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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

FEBRUARY 17, 2023

(FRIDAY SESSION)

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Taken before *Melinda M. Walker*, Certified Shorthand Reporter in and for the State of Texas, reported by machine shorthand method, on the 17th day of February 2023, between the hours of 9:00 a.m. and 3:46 p.m., at the Texas Association of Broadcasters, 502 E. 11th Street, Suite 200, Austin, Texas 78701.

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CHAIRMAN BABCOCK: All right. Everybody, let's get going. Welcome, and we will start as usual with remarks from the Chief Justice.

HONORABLE NATHAN HECHT: Good morning. Thank you, Chip.

We issued our electronic participation rules, Civil Procedure 21d, and also over in the JP section, 500.10, and some other minor changes in the JP rules effective February 1st. They're much like what the committee worked on and debated long and hard. They provide the courts may allow or require a court participant to appear electronically but district and county courts can't require electronic appearance of a participant in a jury trial unless the parties agree or where the oral testimony is being taken, unless there's an agreement or good cause, and the rule sets out what constitutes -- several things that constitute good cause.

Then we also issued an emergency order that was captioned "Final Emergency Order," and when we started the emergency orders on March 13th, 2020, Justice Boyd -- one of my colleagues, Justice Boyd -- suggested that we number them -- number them in the

1 caption "Emergency Order," and I thought that was kind
2 of silly. But after we issued 59 of them, it was
3 probably a good idea, and this is the -- would have been
4 the 60th, but we said "Final" because we anticipate that
5 the electronic participation rule will cover what was
6 left of the emergency orders for the most part.

7 We're still kind of grappling with the need
8 for some judges, especially associate judges, visiting
9 judges, to meet away from the courthouse, and this is
10 especially a problem in the rural areas of the state,
11 but we're working through all of that, and we --
12 there'll likely be legislation in this session to cover
13 some of those issues.

14 So we -- we need the emergency order for
15 the time being, just for the criminal cases, and we're
16 still working to see what those are going to be like
17 going forward.

18 There are two other emergency orders that
19 are out: one on eviction diversion and one on Operation
20 Lone Star, which is the border intercept operation down
21 in Kinney County and along the border. And they need an
22 order so that judges can participate in those
23 proceedings remotely.

24 So there's still a little bit left over,
25 but we think we're back out of the emergency order

1 business for the most part.

2 We also issued the changes that you
3 discussed in TRAP 39.7 effective February 1st that have
4 to do with oral argument at the court of appeals. If
5 you file a brief and you didn't request argument but
6 somebody else did and the court grants it, everybody can
7 participate without having specifically requested it.
8 As I say, we talked about that.

9 We're trying to finalize the forms on rules
10 and cyber bullying in response to legislative
11 directives. Those were -- those forms were published
12 December 1st and we're working on the final versions.
13 The local rules website that you, again, discussed went
14 live January 1st, and the courts are now required to
15 post local rules on OCA's website. If you haven't seen
16 it, you should go take a peek. It's very easy to use,
17 and we're -- it comes at a very good time because,
18 without the emergency orders, there are a lot of courts
19 that are going to specify more than they had -- than
20 they would have in the past how hearings are going to be
21 conducted and whether remotely or not and schedules for
22 doing that. It affects family cases a lot but other
23 cases as well. So those will be posted on the website.
24 And then we gave preliminary approval of
25 TRAP 34.5a which requires the clerk to include the

1 supersedeas bond in the clerk's record without being
2 asked to do so, and comments on that are due April 2nd.

3 And we're missing one of our members today,
4 who is being sworn in on the Dallas Court of Appeals,
5 Judge Emily Miskel. Sorry to miss her, but she's having
6 an exciting day of her own up in the Dallas area.

7 And that's our report.

8 CHAIRMAN BABCOCK: I wrote Judge Miskel and
9 admonished her for her priorities, not being here but
10 instead being sworn in to the court of appeals.

11 Justice Bland, you're up.

12 JUSTICE JANE BLAND: Nothing from me today.

13 CHAIRMAN BABCOCK: Nothing from you today.

14 Well, we have an honored guest from Potter
15 County who will be introduced by Judge Estevez.

16 HONORABLE ANA ESTEVEZ: This is Alexis.
17 This is my daughter. She's nine years old. I think she
18 wants to be a doctor, but you guys are going to convince
19 her to be a lawyer today.

20 UNIDENTIFIED SPEAKER: Or a judge.

21 CHAIRMAN BABCOCK: Alexis, we're really
22 happy to have you here. Are you happy to be here?

23 ALEXIS: (Nods head.)

24 CHAIRMAN BABCOCK: Just wait.

25 HONORABLE ANA ESTEVEZ: She actually had a

1 choice, and she said she wanted to be here. I tried to
2 explain what we did, and she said, "Mom, I'd really like
3 to go."

4 CHAIRMAN BABCOCK: Perfect. Well, you guys
5 dressed alike in matching outfits. It couldn't be
6 better.

7 So, with that, we'll turn to our first
8 agenda item, and Harvey Brown will take us through
9 Rule 7 in lightning speed because this has got to be
10 noncontroversial, right?

11 HONORABLE HARVEY BROWN: Well, hopefully so
12 for the most part. Unfortunately, I'm the only one here
13 from our committee, but I think the first parts will be
14 relatively easy.

15 So back in November of 2020 we were, as a
16 committee, asked to consider whether an independent
17 executor may appear pro se, and this committee generated
18 a memo written by Bob Pemberton and the rest of the
19 committee that recommended the pro se be able to appear
20 pro se and went through all the law, provided briefing
21 from the case that was before the Texas Supreme Court,
22 including the amicus briefs in that case, provided a
23 number of cases in a pretty detailed memo, and the
24 committee voted 18-3 that pro ses -- that independent
25 executors could appear pro se.

1 So we were given the narrow task of writing
2 the rule or putting in the comment. So you'll see in
3 attachment A to the memos from our committee our
4 proposal. It's red-lined so the first change is just to
5 make it gender-neutral, and then the second sentence
6 that we've added is to make it clear the reason we're
7 doing this is that a person who is acting in a
8 representative capacity, such as we often see an
9 individual tries to appear for a corporation -- that's a
10 no-no -- but when they're appearing not in a
11 representative capacity, it is okay. So that's the
12 change we made to the rule.

13 Then addressed the specific issue before
14 us, we wrote, An independent executor can appear pro se,
15 and just to provide additional clarity, we said, The
16 guardians who are representing somebody and acting on
17 somebody's behalf they may not appear pro se. Those are
18 the two largest categories of issues that are still out
19 there that seem to generate some -- some questions.

20 So we took both those on, and those two
21 things thoroughly comply with all that we were asked to
22 do. I think we should discuss them first, hopefully for
23 a short time, but we'll see.

24 And then there was an additional suggestion
25 for something we should consider which we've brought and

1 which we'll talk about next.

2 CHAIRMAN BABCOCK: Okay. Comments about
3 the rules -- let's start with the rule and then talk
4 about the comment. What about the change in the rule?
5 Any comments about that? Any thoughts about it? Yeah,
6 Chief Justice Christopher.

7 HONORABLE TRACY CHRISTOPHER: Well, I'm
8 philosophically opposed to having our court write a rule
9 when the law has been settled, and by rule, settling the
10 law. So there are a lot of judges out there that think
11 this is wrong, and you know, it seems to me it should
12 have gone through the regular process to get a ruling
13 from the Supreme Court that this rule is correct,
14 although I think it is, but I'm opposed to the process.

15 CHAIRMAN BABCOCK: You're not among the
16 allotted judges that think it's wrong?

17 HONORABLE TRACY CHRISTOPHER: No, but the
18 vast majority of probate judges do think this is wrong.

19 HONORABLE HARVEY BROWN: Although I will
20 say that the probate judges in their brief before the
21 Texas Supreme Court said we don't think, Texas Supreme
22 Court, you should handle it here. We think this should
23 be decided either by the Legislature or by the
24 rulemaking process of this committee. So they didn't
25 like being punted, if you will, to this committee.

1 CHAIRMAN BABCOCK: Fair enough.

2 Justice Gray.

3 HONORABLE TOM GRAY: Probably not
4 surprising that I would have an opinion on this.

5 CHAIRMAN BABCOCK: And as you talk, you're
6 dissenting from Justice Christopher or from the rule?

7 HONORABLE TOM GRAY: I never dissent from
8 Justice Christopher.

9 CHAIRMAN BABCOCK: Okay.

10 HONORABLE TRACY CHRISTOPHER: Usually
11 concur.

12 UNIDENTIFIED SPEAKER: In a separate
13 opinion.

14 HONORABLE TOM GRAY: Without a separate
15 opinion.

16 I feel compelled to give just a little bit
17 of my background and why I feel so strongly about this,
18 and that is, that my first three years of practice was
19 spent doing a lot of estate litigation, and in that
20 capacity, it was me representing most often independent
21 executors. But I approached the entire probate practice
22 from the perspective that I was taught by Tom
23 Featherston, a retired attorney, that, as I said in my
24 dissenting opinion that's in the papers, in Texas we
25 have an incredibly flexible probate system. We avoid

1 immense costs of having everything run by a judge in a
2 pseudo-administrative/judicial capacity administration
3 of an estate. That's all done by an independent
4 executor, and it is -- it's the envy, really, of the
5 nation in how we deal with estates.

6 Tremendous resources are spent in other
7 states to avoid the probate process. One of the things
8 they do is what Harvey is going to want to talk about in
9 a little bit is trust. They create an inner bag
10 [Phonetic] of trust, and they do all this stuff of asset
11 transfers, and it's just an immensely complex system to
12 avoid what we have. What we have done in Texas is so
13 efficient that they're trying to get that -- to that
14 point by some other method in other states.

15 The way that Tom Featherston described
16 it -- and I guess it's now inculcated in my DNA -- is an
17 independent executor can do anything that the decedent
18 could do if that person were alive, and it literally --
19 the independent executor, in their capacity as such, can
20 do what the decedent would have done. And that -- that
21 wasn't even part of what some of the cases were that --
22 that apparently the probate judges may have problems
23 with, and that's in actually getting the probate process
24 done, whether or not -- because, at that point, the
25 person is not even an independent executor. They've

1 been named as the independent executor in a will but
2 cannot -- can that person go in and file the paperwork
3 to probate the will? Because if they can't --

4 (Phone ringing.)

5 HONORABLE TOM GRAY: I'm sorry, I thought I
6 had -- there it is. Different button.

7 If they can't represent the decedent in
8 that capacity, they can't even file the application for
9 probate, and so -- because that is a classic pleading
10 that needs to be done by a lawyer if they can't do this
11 pro se.

12 Well, all over Texas -- and I will speak to
13 Navarro County where I was practicing at the time -- it
14 is very routine for an individual to go in, surviving
15 spouse, without a lawyer, you know, designated
16 independent executor, do the paperwork, follow the
17 forms, file it, get it done, and never involve a lawyer.
18 Is it a wise practice? Probably not. Lot of things can
19 go wrong.

20 I probated my grandparents' estates in
21 Harris County in front of one of the probate judges
22 there -- I don't remember which one -- and I saw a
23 number of pro ses successfully navigate the process. I
24 also saw one that got to the point where they offered
25 the will for probate, and the judge said, Denied, and

1 she was somewhat dumbfounded, and she said what -- What
2 did I do wrong? And the judge said, I can't tell you,
3 you know, not my job. You might want to talk to one of
4 these lawyers out here.

5 And I say all that just because it can be
6 done or it should be able to be done, and I am a strong
7 proponent of the ability to do that. I do not think
8 this rule will effectively and efficiently, as proposed,
9 do that, and I would simply suggest that a sentence that
10 says, An independent executor is acting on behalf of
11 the -- or is in effect the decedent and can do anything
12 the decedent would have done.

13 I would basically make the rule the Tom
14 Featherston statement and leave it at that because this
15 nuance that the literature and the rule tries to draw
16 that the individual is somehow representing themselves,
17 we're going to get to the point of, well, wait a minute,
18 he's not representing himself at this point. He's
19 representing one of the heirs that is going to receive
20 that piece of property. Maybe he's trying to clear up
21 an oil and gas lease that's on one of the pieces of
22 estate property.

23 It just -- it -- I think this is going to
24 be confusing. I think it's going to lead to more
25 litigation, and it just needs to be, The independent

1 executor can do anything that the decedent could have
2 done, including representing himself.

3 CHAIRMAN BABCOCK: Has that Featherston --
4 Featherston view found expression in the case law?

5 HONORABLE TOM GRAY: There is at least two
6 opinions from an intermediate court of appeals -- I
7 think it's out of Waco -- that has that expression.

8 Beyond that, I don't know, but it is -- if
9 you go into the -- into the case work and into the
10 individual cases and you -- and you look at this -- and
11 I will add kind of before the advent in the wide use of
12 probate judges because, you know, if we, the
13 intermediate appellate judges, got together and were
14 allowed to write some rules for our courts, we would
15 probably ban pro ses around the state.

16 It's just -- it's not effective or
17 efficient. It can be very time consuming, but that's
18 not the standard that we need to be going for here. And
19 I think everybody knows here, you know, I would rather
20 have a lawyer in front of me at the appellate level do
21 the brief and, hopefully, quality briefing. We've had
22 some very good briefs filed in pro se, but I will tell
23 you, for example, in the case in which I wrote the
24 dissent that's in the works -- the appellate work here,
25 the Steele case, it was a very bad facts made bad law

1 case. I mean, this was a litigant that had -- we had
2 lots of problems with over a long period of time. It
3 was the Steele v. McDonald order and related to a
4 dissenting opinion.

5 And I think there was a certain element of
6 we've got to change our tactic, you know, or we will
7 never be done with this case, and that was one of the
8 ways to do it. And it, unfortunately, was effective
9 and -- but I think the independent executor or the
10 person that's designated as such should be allowed to
11 represent in probate court or any other court and do
12 anything that the executor -- or that the deceased could
13 have done if they were still live.

14 CHAIRMAN BABCOCK: Okay. Roger.

15 MR. HUGHES: I just have a question. The
16 first rule talks about an individual who's acting in a
17 representative capacity, but I know sometimes in probate
18 matters there will be a corporate independent executor.
19 I assume then an independent executor, who is a
20 corporation such as a bank or trust department, would
21 not be able to appear pro se.

22 HONORABLE HARVEY BROWN: That's what the
23 intent was, and that's one of the reasons that we didn't
24 just say an independent executor may appear pro se. We
25 could do that. That would be simple, but there is the

1 issue of a corporate independent executor.

2 MR. HUGHES: Yeah. That's what I thought
3 you'd found. Okay. Thank you.

4 HONORABLE HARVEY BROWN: Just one other
5 point, to give the probate judges a little more credit,
6 while there was some debate about the law, I thought the
7 strongest argument was not a legal argument. It was a
8 practical argument. I think the committee who wrote the
9 report before correctly concluded that the law strongly
10 leans towards this is appropriate, but they did have a
11 pragmatic concern of what we just heard about the
12 hearing where the judge wouldn't admit the will and
13 couldn't tell anybody why because the judge is precluded
14 from giving legal advice.

15 And so I would suggest, if we adopt this
16 rule in whatever format, that we ask the probate section
17 to draft some instructions to pro se independent
18 executors. It seems like, to me, there's probably, you
19 know, half dozens or dozens common problems that come
20 up, and a number of probate judges or practitioners have
21 come up with written instructions, just like we have for
22 divorces now and working out the wills. And while it
23 wouldn't be a form, it seems like we could take care of
24 most of those problems to me.

25 CHAIRMAN BABCOCK: Any other comments?

1 HONORABLE TOM GRAY: I would like to add to
2 that, in the Probate Code, there's very detailed already
3 what's required to be proven to admit a will in probate,
4 and it's -- there's hundreds of forms already out there.
5 Pretty simple. But looking ahead in the day, we could
6 always require the probate judge to explain why they're
7 denying the admission to probate.

8 CHAIRMAN BABCOCK: Well, on that point,
9 Justice Gray, I've always been puzzled by that. I can't
10 tell you -- I mean, sure you don't give legal advice,
11 but you should be given the reasons for denial, if
12 asked, right?

13 HONORABLE TOM GRAY: You -- not to
14 foreshadow what we're going to get to later today, but I
15 think it's called like discretionary review, sort of the
16 same thing, you just deny and move on.

17 CHAIRMAN BABCOCK: Okay.
18 Justice Christopher.

19 HONORABLE TRACY CHRISTOPHER: I have one
20 other question or comment about the comment where it
21 says, "Guardians prosecuting or defending suits on
22 behalf of their wards act in a representative capacity
23 and may not appear pro se." Is that intended to cover a
24 parent as next friend of a child? Because often parents
25 as next friend of children will appear pro se generally

1 in the settlement of a lawsuit, and a friendly suit is
2 filed where the person is pro se on behalf -- that are
3 representing themselves and their children. So I'm
4 worried that that "guardian" word, parent, child, would
5 be a problem.

6 HONORABLE HARVEY BROWN: The short answer
7 to the question is, no, it's not intended to cover that.
8 If you have a suggestion for drafting, you think that
9 would make that clearer, we'd be open to that.

10 CHAIRMAN BABCOCK: Okay. Any other
11 comments? Judge Schaffer, you're looking bemused.
12 Maybe that's your usual --

13 HONORABLE ROBERT SCHAFFER: That's my
14 9:24 a.m. look.

15 I -- Justice Christopher raised it. A lot
16 of the issues that we are faced with a lot in the trial
17 court especially with regard to the parent filing a
18 friendly lawsuit -- and there's -- there's case law
19 that's interpreted to say they cannot do it and yet
20 judges who routinely allow it in the settlement of
21 cases.

22 This comment seems to speak to that
23 because -- I mean, a parent as next friend is not the,
24 quote, guardian, close quote, but acting as the child's
25 guardian in this particular situation. So I think you

1 might be creating some confusion at the trial court
2 level with this comment the way it's -- the way it's
3 written.

4 CHAIRMAN BABCOCK: Okay.

5 HONORABLE ROBERT SCHAFFER: In fact, I
6 promise you that you will be creating some confusion at
7 the trial court level the way this is written.

8 CHAIRMAN BABCOCK: Of course, the proposed
9 change to Rule 7 or the proposed, I guess, change and
10 addition to Rule 7, do you have problems with that
11 language?

12 HONORABLE ROBERT SCHAFFER: Not with the
13 specific language because the comment comes in and is
14 there to supposedly clear it up. I'm wondering myself
15 why we would treat an independent executor differently
16 because, notwithstanding Justice Gray's comment, it
17 seems to me that the independent executor is acting in
18 representative capacity for the benefit of those that
19 are -- that stand to inherit from that particular
20 estate.

21 CHAIRMAN BABCOCK: Okay.

22 Yeah, Lamont.

23 MR. JEFFERSON: I was just going to say the
24 same thing. I mean, I've read the memo and I understand
25 the case law. An independent executive is not

1 representing themselves in any real sense of the word.
2 I mean, they've got duties to everybody else. They're
3 not to -- supposed to not be representing themselves,
4 and so this -- the language in here that they're -- if
5 you're acting in a representative -- not acting in a
6 representative capacity, if that excludes independent
7 executives, I think we're excluding too much from them.
8 I mean, they -- so from an attorney-client perspective,
9 maybe they're not representing, you know, themselves in
10 that situation, but they are representing the interests
11 of others.

12 So I agree that I think it's confusing to
13 say that an independent executor is only representing
14 themselves. That's exactly what they're not doing.

15 CHAIRMAN BABCOCK: Are there any -- yeah,
16 Richard?

17 MR. ORSINGER: I guess I have more of a
18 question. Looked at from a policy perspective, is the
19 purpose behind the rule that a representative of another
20 cannot appear as a lawyer, appear as an advocate, is
21 that to keep people who are not licensed from practicing
22 law from representing people? If that's what we're
23 doing is to keep non-lawyers from acting like lawyers
24 and you put that prism over this situation, it seems to
25 me that an independent executor is not really the kind

1 of wrongful behavior that the rule is designed to stop.

2 The rule is designed to stop a nonlawyer
3 from appearing as an advocate for some friend or client,
4 and I don't -- I mean, if that's the justification
5 behind the rule, I don't see that it really applies well
6 to independent executors.

7 I have a problem, too, with the guardian.
8 You know, you're forcing these guardians to get a
9 lawyer. Clearly, they're representative -- they're in a
10 representative capacity, but it's not the -- the mom
11 that we're attempting to prohibit, which is a nonlawyer
12 acting like they're a lawyer for someone else as an
13 advocate. So I don't know. To me, the situation is not
14 clear.

15 CHAIRMAN BABCOCK: Pete.

16 MR. SCHENKKAN: I have no comment on the
17 merits of the situation --

18 THE REPORTER: I'm sorry, can you speak up,
19 please.

20 MR. SCHENKKAN: I'm sorry. I have no
21 comment on the merits of what ought to count as the
22 unauthorized practice of law in this context, only
23 comment on how it ought to be decided. And it seems to
24 me that it needs to be decided by a rule of the Texas
25 Supreme Court, and that is because the main practical

1 issue that is at -- that means that some decision needs
2 to be made is, unless it is made, it is undisputed that
3 there are thousands of small estates in which legal fees
4 have to be paid that are more than the value of the
5 estate. It is a substantial barrier to access to the
6 judicial system, but the Texas Supreme Court which, if
7 any one single institution ought to be deemed to be in
8 charge of what is deemed unauthorized practicing of law,
9 I think it would be a good candidate for that role.
10 They should call the shot, and as a practical matter,
11 waiting for one of these \$10,000 cases in which
12 somebody's got to spend \$15,000 either to give up and
13 follow the probate court rules that you've got to go get
14 a lawyer or spend the \$15,000 to take the case up and
15 then spend another \$15,000 if you lose, it's not going
16 to happen.

17 So the court needs to call the question.
18 The rulemaking is the way to do it. And I agree very
19 much, Justice Christopher, with the instinct that in
20 many situations there is a tension between having the
21 Supreme Court do so by rule or by case. I think what
22 limits the damage on that tension here is this one is
23 about the unauthorized practice of law. Many of the
24 things that the court is called on to decide either by
25 case or rule are not, and I think that makes this

1 different.

2 This court has the special responsibility
3 when deciding where at the edges are we talking about
4 the unauthorized practice of law, if you take into
5 account practical realities alike, the impact of
6 thousands of people, you know, who have been named as
7 independent executor of a small estate and need to get
8 the thing done.

9 HONORABLE HARVEY BROWN: We didn't spend a
10 lot of time, really, any time talking about the merits
11 since we already voted on that two years ago, but I will
12 point out that the Texas Access to Justice brief states
13 that 11 percent of the estates in Texas are \$10,000 or
14 less and that the average fee in these cases for
15 independent executors was that or more. So that was one
16 of the policy reasons they came out the way they did.

17 CHAIRMAN BABCOCK: Your prefatory comment
18 about we've already voted on this --

19 HONORABLE HARVEY BROWN: I understand.

20 CHAIRMAN BABCOCK: Have we voted on this
21 language?

22 HONORABLE HARVEY BROWN: No. You just
23 voted on the fact that the rule should be changed to
24 make it clear that independent executors may appear pro
25 se. That's all we were asked to do. The guardian

1 sentence, we added on our own. We could cut that out or
2 we could edit that in a number of ways. I think maybe
3 court-appointed guardian might fix Judge Christopher's
4 issue. If not, I'm sure we can come up with some other
5 language between the two of us sitting here at the
6 break.

7 CHAIRMAN BABCOCK: Yeah, Richard.

8 MR. ORSINGER: I wanted to -- I have an
9 afterthought about the guardians. I really don't think
10 it's necessary to address the primary threat which is to
11 allow independent executors to be independent. I
12 would -- I would recommend that we not include the
13 guardian statement and consider that further, and also,
14 as a practical matter, guardians have to have court
15 approval for whatever action they take, and those
16 actions are likely going to be taken in the guardianship
17 court because it has jurisdiction of all
18 guardianship-related matters.

19 So here we have a court-appointed guardian
20 who's making annual reports to the guardianship judge,
21 appearing in the guardianship court, asking for the
22 guardian -- for the court to approve certain actions. I
23 don't know that I see the public policy behind forcing
24 that guardian to hire a lawyer to go in front of the
25 guardianship judge and ask the guardian questions so

1 that they can come in the form of testimony so that the
2 judge can rule.

3 I just -- I would much prefer if we took
4 that sentence out and just dealt with the independent
5 executors.

6 CHAIRMAN BABCOCK: Okay. Justice Gray.

7 HONORABLE TOM GRAY: Just for purposes of
8 putting it on the record, a draft that I would wholly
9 support is something on the order of an independent
10 executor, who's a rightful person, is the party for
11 purposes of this rule when appearing in that capacity in
12 a suit.

13 And that would cover the application. It
14 would cover the -- the need to -- if there's a small
15 claims court, an eviction proceeding of a tenant on the
16 decedent property, you know, wherever it might take you,
17 that would cover it, and it would address Lamont's
18 concern about corporate independent executors, which is
19 a valid issue there.

20 CHAIRMAN BABCOCK: Robert.

21 MR. LEVY: I agree with Justice Gray, and I
22 do think that the language in the rule should be clearer
23 because we, as lawyers, can parse through and understand
24 what is and isn't applicable, but the average pro se
25 person who might be looking at the rules wouldn't

1 understand it, and they wouldn't know to go to the
2 comments. And so we should be very clear about what
3 this means in the circumstances of that we're
4 contemplating.

5 CHAIRMAN BABCOCK: Harvey.

6 HONORABLE HARVEY BROWN: Again, I'm not
7 speaking for the committee since I'm the only one here
8 but I don't have --

9 CHAIRMAN BABCOCK: You've got a wide open
10 road.

11 HONORABLE HARVEY BROWN: I don't have a
12 problem taking out the guardian sentence. I thought
13 Richard's example was definitely something worth
14 thinking about.

15 On the first sentence, I think we could
16 simplify it. Obviously, the way we've written it
17 explains the rationale; that is, that they don't
18 represent themselves. But we could just say in the
19 rule, we could just say, An independent executor in an
20 estate may appear pro se. That's about as simple as you
21 can make it.

22 I think if we go to the comment it was just
23 one special thing, and the problem here is that if pro
24 ses try to represent themselves, the problem that we've
25 seen is when they try to do so, some of the courts don't

1 like that, and this is really more instruction to the
2 judges that they have to allow them to do so.

3 CHAIRMAN BABCOCK: Okay. Any other
4 comments?

5 So do you want to make those amendments in
6 the form of a motion?

7 HONORABLE HARVEY BROWN: Sure.

8 So cut the line where it says represent
9 himself or herself and not others. So only reads, An
10 independent executor of an estate may appear pro se,
11 period. Drop the second sentence of the comment, and
12 leave everything else in the rule and the first comment
13 the same.

14 CHAIRMAN BABCOCK: Okay. How many people
15 are in favor of that amendment to the language? Raise
16 your hand if you're in favor.

17 HONORABLE MARIA SALAS MENDOZA: I have a
18 quick question since Harvey is the only natural person
19 to address.

20 HONORABLE HARVEY BROWN: Well, the rule
21 says an individual. So that's already addressed in the
22 rule that we marked.

23 HONORABLE TOM GRAY: I did not understand
24 what -- you were going to put that entire sentence in a
25 comment and drop the existing comment?

1 HONORABLE HARVEY BROWN: No. I was
2 suggesting that I thought it should stay in the comment,
3 the sentence that says --

4 CHAIRMAN BABCOCK: Let's not vote on
5 whether it's in the comment or not.

6 HONORABLE TOM GRAY: I'm not understanding
7 what we're voting on, what it is, or where it is.

8 CHAIRMAN BABCOCK: Harvey was suggesting an
9 amendment to the comment.

10 HONORABLE HARVEY BROWN: Make it just one
11 short declarative sentence without an explanation.

12 CHAIRMAN BABCOCK: Justice Christopher.

13 HONORABLE TRACY CHRISTOPHER: I think the
14 sense of the room is it would be better to be in the
15 rule.

16 CHAIRMAN BABCOCK: Okay.

17 HONORABLE TRACY CHRISTOPHER: So I think
18 before we vote on changing the comment we should vote on
19 whether the language in the rule should stay as it is or
20 should the rule just say, An individual who is an
21 independent executor may appear pro se?

22 CHAIRMAN BABCOCK: Okay. We can do that.
23 Harvey, is that --

24 HONORABLE TRACY CHRISTOPHER: I think
25 somebody said that the language in the rule itself is

1 confusing, and I agree.

2 CHAIRMAN BABCOCK: Yeah. I agree, too.

3 That okay, Harvey, if we do that?

4 HONORABLE HARVEY BROWN: If the two of you
5 agree, why I would try to --

6 CHAIRMAN BABCOCK: That's a fair point.

7 Okay.

8 HONORABLE HARVEY BROWN: This is the second
9 thing we amended.

10 CHAIRMAN BABCOCK: So everybody's in favor
11 of putting the language, as amended by Harvey, into the
12 rule itself raise your hand.

13 HONORABLE ANA ESTEVEZ: We're dropping the
14 other?

15 CHAIRMAN BABCOCK: Yeah.

16 MR. ORSINGER: It looks unanimous.

17 CHAIRMAN BABCOCK: Okay. Everybody
18 opposed. Well, there are 23 votes in favor, nobody
19 opposed, so that was a good solution.

20 MR. JEFFERSON: Are we deleting the
21 language that was in the rule --

22 HONORABLE HARVEY BROWN: We're deleting the
23 language that says with "an individual."

24 MR. JEFFERSON: Got it.

25 CHAIRMAN BABCOCK: So let's read into the

1 record what the rule is going to say -- the proposed
2 rule is now going to say.

3 HONORABLE HARVEY BROWN: Any party to a
4 suit may appear and prosecute or defend his or her
5 rights therein, either in person or by an attorney of
6 the court. An independent executor of an estate may
7 appear pro se.

8 CHAIRMAN BABCOCK: Everybody good with
9 that? Jim.

10 MR. PERDUE: I was just -- I was in awe of
11 the way you owned the room.

12 CHAIRMAN BABCOCK: Okay. Any other
13 comments on that? Harvey.

14 HONORABLE HARVEY BROWN: I said that our
15 next suggested comment, which I think now is dead on
16 arrival --

17 CHAIRMAN BABCOCK: Let's talk about it
18 anyway.

19 HONORABLE HARVEY BROWN: So Connie Pfeifer
20 has a colleague at her firm who teaches on community
21 property and suggested that we should say not only may
22 an independent executor appear pro se but a trustee
23 should be able to do so, too. Cited a case called Huie
24 v. DeShazo. This was not in the purview of the
25 assignment from the Texas Supreme Court, so we did not

1 really take a position.

2 You'll see I wrote this -- an alternative
3 comment suggested by Andrew Ingram, this professor. He
4 suggested it should cover trustees. We did read the
5 case that he cited. It was also cited by Pemberton in
6 his original memo. We thought the rationale legally was
7 valid, but like I said, it was beyond the purview of our
8 committee. None of us really has great expertise or any
9 expertise in this area, and it doesn't seem to be as
10 much of a problem. It isn't something that we've within
11 the legal community have seen raised before. I think
12 most trustees, not necessarily all trustees, tend to be
13 people who do have either corporations that are the
14 trustee or have lawyers represent them because it's a
15 little more complicated. They're not simplistic like
16 \$10,000 or less.

17 So rationale-wise, as a pragmatic matter,
18 seems like we don't need it. Rational-wise, under the
19 law, seems like the same principal would apply, but like
20 I said, we're not recommending it. We're just throwing
21 it out there in case the court wanted to consider it.

22 CHAIRMAN BABCOCK: Okay. Anybody have any
23 comments on that? Judge Peeples.

24 HONORABLE DAVID PEEPLES: Not on that.

25 CHAIRMAN BABCOCK: Anybody have any

1 comments on anything? Judge Peeples.

2 HONORABLE DAVID PEEPLES: I think the
3 original language goes back to 1941. Are we comfortable
4 with either in person or by an attorney of the court?
5 By attorney or something? As long as we're tweaking
6 language, let's --

7 HONORABLE HARVEY BROWN: I will agree that
8 is strange language and just hadn't focused on it
9 before.

10 CHAIRMAN BABCOCK: It could mean that
11 you're appearing in the court proceeding. So by that
12 language, attorney of the court. That seems redundant.
13 You're either an attorney or you're not.

14 MR. SCHENKKAN: Surely, they mean an
15 attorney admitted to practice before this court which,
16 as a general proposition, in a state court would be any
17 licensed lawyer. I suppose there are some exceptions
18 but not many.

19 CHAIRMAN BABCOCK: Okay. So that's
20 something for the court to consider.

21 MR. SCHENKHAN: Yeah.

22 CHAIRMAN BABCOCK: Back to the thing the
23 court did not ask us to look at but we're going to look
24 at anyway, does anybody have any comments about that?
25 Jeff? Yeah, Lamont.

1 MR. JEFFERSON: I guess my only comment, I
2 voted against the independent executor acting pro se in
3 the first place. For all of the -- I think -- and the
4 only exception to that, I understand, is small -- much
5 smaller estate things.

6 So for the trustee situation that --
7 there's less of a justification to allow trustees to
8 proceed pro se, and this is -- this is complicated
9 stuff. We've had so many cases involving the privately
10 created trusts that, you know, there is no court
11 supervision whatsoever, and you're trying to go back
12 after the fact and recreate both what the testator
13 wanted and, you know, how circumstances may have
14 changed.

15 So, I mean, I don't -- I wouldn't dive into
16 expanding the idea of allowing pro se representation in
17 this area to allow it. It's just so complex, and
18 especially if you take away the financial impediments,
19 which I recognize maybe are more prominent in the
20 independent executor situation but not, you know, with a
21 trust where you've got to specifically create the trust
22 and got to be assets there that make it worthwhile. So
23 I -- I wouldn't -- I wouldn't go down this path.

24 CHAIRMAN BABCOCK: Yeah.

25 Justice Christopher, you had your hand up.

1 HONORABLE TRACY CHRISTOPHER: Well, a trust
2 is not considered a legal entity, so I'm not -- in the
3 probate situation. So I think we need to study this a
4 lot more, along with the guardian issue.

5 CHAIRMAN BABCOCK: Okay. Richard.

6 MR. ORSINGER: So the common estate
7 planning technique that I see now is to name the
8 beneficiary of the trust the trustee of their own trust
9 with an independent as sort of the standard for
10 distribution so they don't run afoul of estate tax law.
11 So here we are saying that a trustee, who is trustee for
12 himself or herself as beneficiary, is in a
13 representative capacity and has to have a lawyer. That
14 doesn't make any sense to me at all.

15 I really -- you know, underlying the common
16 law is the idea that courts don't make decisions until
17 they have a real controversy before them where both
18 sides are advocating the outcome and the court can
19 decide what to do. Here we are giving advisory opinions
20 through comments to the rule in an area where we
21 probably don't even really know where all the issues
22 are, much less do we agree on what the answers to the
23 issues are.

24 So, to me, this is like an advisory
25 opinion. We shouldn't comment about trustees being

1 independent or not. It may be the rule ought to be, if
2 you're a trustee for yourself, you can be pro se, but if
3 you're a trustee for others, you can't, or something.
4 But we're just kind of just throwing this all in
5 together while we're making a change. We're trying to
6 clarify the law in other areas, and I'm not sure we even
7 agree on what the issues are, much less how to clarify
8 them.

9 So I would recommend that we not mention
10 trustees or guardians, and let's just stick with
11 independent executors.

12 CHAIRMAN BABCOCK: Okay. Any other
13 comments?

14 Does anybody want to advocate in favor of
15 this alternative comment? Or is it DOA as some of you
16 predicted?

17 Hearing no advocates, then we'll -- we'll
18 go on to anything else that you want to talk about,
19 Harvey.

20 HONORABLE HARVEY BROWN: Not right now,
21 thank you, but I'll save my time for something else
22 later.

23 CHAIRMAN BABCOCK: You're going to do stuff
24 later. All right.

25 So we're going to go to permissive appeals,

1 and right in your neighborhood to your left is another
2 former member of the court, Bill Boyce, and you're going
3 to lead us on that or not?

4 HONORABLE BILL BOYCE: No. I am going to
5 cheerfully allow Rich Phillips.

6 CHAIRMAN BABCOCK: Well, let's continue
7 down the continuum to Rich Phillips.

8 (Simultaneous speaking.)

9 CHAIRMAN BABCOCK: Good follow-up, I might
10 had.

11 MR. PHILLIPS: Well, it's probably only
12 time in my life anyone has ever described me that way
13 and ever will. Good point.

14 So I drew the short straw.

15 CHAIRMAN BABCOCK: To the commentary, Tim
16 McCumber dies, and all of the sudden you're doing a good
17 job.

18 MR. PHILLIPS: So I drew the short straw on
19 this one, I think, and I'll get to stand up and get shot
20 at a little bit on this one, little bit of background
21 just for the people that are not totally aware of what
22 this statute is and its history because I think that
23 will play a little bit into what we do.

24 In 2001, the Legislature adopted a version
25 of rule -- of section 51.014(d) to allow the parties to

1 agree to an interlocutory appeal of an order that
2 otherwise would not be appealable. It set
3 requirements for -- similar requirements to what the
4 rule is now, the statute is now, but it required the
5 parties agree. And for ten years, that was there, and
6 unsurprisingly, it didn't get used very much. The
7 parties rarely agreed, particularly because you had to
8 agree that the thing you just won, that there was
9 substantial ground for a difference of opinion. So that
10 really didn't go anywhere.

11 So, in 2011, the Legislature amended the
12 statute and removed the requirement that the parties
13 agree to the appeal, and instead, made it the trial
14 court can certify if this issue involves -- meets this
15 test and then send it up, and if the court makes that
16 certification, then the parties can go apply to the
17 court of appeals for permission to appeal. And the
18 statute said the court of appeals may allow an appeal in
19 that circumstance.

20 The statute is very similar to a federal
21 statute. We saw something similar in 1292(b). It has
22 basically two requirements before you can send an issue
23 up. First is if the order of appeal involves a
24 controlling question of law as to which there is a
25 substantial ground for difference of opinion, and the

1 second is an immediate appeal from the order may
2 materially advance termination of the litigation.

3 In response to those amendments in 2011,
4 the court adopted Civil Procedure Rule 168 and Appellate
5 Rule 28.3 to set out the procedures for this. Then
6 people started trying to take these things up, and I
7 looked a little bit at some statistics --

8 THE REPORTER: I'm sorry, can you say that
9 again, please.

10 MR. PHILLIPS: Sorry. I've done some
11 looking at statistics. Did a couple of presentations at
12 the UT CLE -- appellate CLE on this procedure.

13 In 2016, I found -- and it's hard to really
14 be exact about these statistics because of the way that
15 the courts of appeal track these petitions, but we
16 figured it was about 40 percent were getting granted
17 statewide, and that varied a lot from court to court.

18 The court -- Supreme Court in 2019 issued a
19 case called Sabre Travel, where they very much
20 encouraged the courts of appeals to take these if the
21 statutory standards are met. The key phrase is in the
22 memo. Basically, the court said just because the courts
23 of appeals can decline to accept permissive
24 interlocutory appeals doesn't mean they should.

25 I updated my paper last summer, looked at

1 just since Sabre Travel, and actually the grant rate
2 went down. From 2019 to 2022, we found that they were
3 being granted about 26 percent of the time.

4 Right before I gave that presentation, the
5 court issued an opinion in Industrial Specialists which
6 didn't produce actually a majority opinion. There's a
7 plurality of concurrence and a dissent, and as is
8 suggested, there's a lot of sort of division as to how
9 this scheme should be applied. The result of the
10 parties is that what usually happens when these get
11 denied is you get a three-sentence denial that looks a
12 lot like a mandamus denial. It said in Industrial
13 Specialists, the first sentence identified the parties.
14 The second sentence said they asked for permission to
15 appeal. The third sentence said we don't find the
16 statutory requirements are met; therefore, we deny. And
17 that was it.

18 Both parties went to the Supreme Court and
19 argued that the court of appeals was wrong to find that
20 the statutory standard wasn't met and had abused its
21 discretion in not taking up that permissive appeal. The
22 controlling rationale of the court, identified in the --
23 in a footnote, is that the court did not abuse its
24 discretion. And then the question is, why?

25 The plurality has some standards about is

1 it sufficient if it states that the statutory standards
2 are not met. Pointed out that the court could perhaps
3 impose stricter requirements by rule, but it wasn't
4 going to do it in the opinion.

5 The concurrence is a little broader, and
6 that basically said the discretion to take or deny one
7 of these is absolute, and that's the end of the
8 analysis. And the dissent would have required more
9 explanation but would have held that the discretion is
10 not absolute, would require the courts to explain when
11 there are announced statutory requirements, and then --
12 and this gets a little bit tricky -- once the
13 requirements are met, then the statute says the court
14 may accept. So there's discretion there even if the
15 statutory requirements are met.

16 The dissent would -- said the court should
17 explain their reasons for not exercising their
18 discretion in order to start developing some standards
19 about how to exercise that discretion.

20 One of the things that the dissent also
21 pointed out is there's not been a lot of development in
22 the case law about what these statutory standards mean,
23 and there's a fair amount of confusion attached to the
24 materials -- the updated version in my paper about this,
25 where I walk through some of the cases about what do

1 these standards mean.

2 Some of them are easy: Is it a question of
3 law? That's pretty easy. Is it a controlling question
4 of law? There's some dispute among the courts as to
5 what that means.

6 And substantial ground for difference of
7 opinion is one that really nobody knows what it means.
8 There's one court that says, if it's an issue of first
9 impression, then clearly there's substantial ground for
10 difference of opinion. There's another court that says,
11 if it's an issue of first impression, we don't know if
12 there's a ground for difference of opinion, so it's not
13 met. So there's really not been a lot of development
14 about what these mean.

15 And may materially advance the
16 determination. That's a little squishier standard that
17 have been made, but there's not been a lot of comment on
18 that either. So the dissent pointed out that probably
19 another thing needed for parties and lower courts is to
20 know what these statutory standards mean.

21 So, with all of that, then the court asked
22 us to look at whether the rules should be amended to
23 require something more and, if so, where should that
24 rule go and what's the scope. So that is kind of four
25 main things that we looked at as a committee: the

1 whether question; where it goes; what the scope is if we
2 do it; and then a fourth thing, which was not directly
3 in the referral but relates to that first version of the
4 statute -- so back when it was an appeal by agreement --
5 the court adopted Rule 28.2 to govern the procedures for
6 appeal by agreement. And when the statute was amended
7 in 2011, the court adopted 28.3 but kept 28.2 in place
8 for cases to which it still applied. It's now been
9 12 years since that, and it's very unlikely that there's
10 any cases floating around that the agreed version of
11 this might apply.

12 So we also recommend the court consider
13 repealing 28.2. I think there's some possibility it's
14 causing confusion. We had looked at some of the courts
15 of appeals' decisions on this, and they do talk about
16 why they're not granting this procedural problem
17 frequently and sometimes if the people are trying to do
18 it by agreement rather than by order of the trial court,
19 because this rule is still there. So one of our
20 recommendations, the court should consider repealing
21 28.2.

22 So back then to the rule for the existing
23 version of the statute. First question is whether, and
24 we actually had significant discussion about that in the
25 subcommittee about whether the court should amend the

1 rule to do that. There's some concern about trying to
2 dictate to the courts of appeals about how they write
3 opinions, obviously concern about the workload of the
4 courts of appeals. And we detailed some of these
5 considerations in the memo.

6 We don't want to necessarily micromanage,
7 make the trial courts of appeals to write full opinions,
8 particularly when it's on a short application for
9 permission to appeal, and of course, the statute grants
10 discretion whether to grant permission to appeal. The
11 subcommittee did not want to propose an amendment that
12 would interfere with that discretion.

13 And there was also some concern about
14 whether a very detailed opinion might be treated by some
15 of the lower courts as law of the case when maybe it
16 shouldn't be. A lot of discussion of the facts, just to
17 allow the background, someone could argue court of
18 appeals could have found those facts if they were in
19 dispute or even sometimes a comment that something --
20 the law on something is well settled so that there's not
21 substantial ground for difference of opinion, could that
22 be interpreted as law of the case?

23 On the other hand, as noted in -- talked
24 about a little bit -- and the dissent in Industrial
25 Specialists talks about it -- is there lack of authority

1 about what these statutory requirements mean? And
2 there's a fair amount of confusion, I think, among the
3 lower courts and the bar as to how you show that the
4 standard is met. There are some cases that suggest some
5 standards. You can look at some of the federal cases
6 under 1292(b), but we really don't have a good body of
7 case law, and as long as nobody is explaining why the
8 standard is not met, we're not going to get that.

9 Another consideration I think is explain to
10 our clients. If it looks like the standards are met and
11 we have this question of law and it's really important
12 and there's a dispute about it and we get an opinion
13 from the court of appeals that says standard not met,
14 how do you explain that to your client? You can't even
15 tell them why it's not met because the court didn't tell
16 me.

17 And as the unanimous court in Sabre Travel
18 pointed out, permissive appeals can really be an
19 important tool in aiding "early, efficient resolution of
20 determinative legal issues" in proper cases. So, on
21 balance, we decided that we should propose a rule. We
22 recommend the committee propose a rule. We tried to
23 draft it narrowly to address some of these other
24 concerns, to not impinge on the courts of appeals'
25 discretion or to increase their burden to write a full

1 opinion on a short briefing, but we do recommend that
2 there be a rule adopted.

3 The next question then is where does it go.
4 The courts of appeal have said consider 28.3 or Rule 47
5 which is the rule that talks about the kind of opinions
6 the courts need to write when deciding a case. We
7 decided that 28.3, which is the rule on permissive
8 appeals, makes the most sense. Most, for a couple of
9 reasons. First, because that's where people are going
10 to be looking to know what the procedure for a
11 permissive appeal is, and they wouldn't necessarily go
12 to Rule 47. Also, any amendment to Rule 47 would --
13 could get into other kinds of opinion drafting. And,
14 finally, in *Industrial Specialists*, some of the judges
15 pointed out that they weren't even sure Rule 47 would
16 apply to an order on a petition for permission to
17 appeal. So we didn't want to exacerbate any confusion
18 there.

19 We recommend it go into Rule 28.3 which
20 would then make it Rule 28.3(1) which is, like, the
21 worst letter to put in there because it looks like a
22 one, but that's the letter we're on. So it's 28.3(1).

23 And then, finally, the scope of the rule,
24 what we wanted to say. So that is on the first page of
25 our memo is the rule that we propose. If the petition

1 is denied, the court must specifically -- and here, we
2 did have a bit of dispute, and so we're going to leave
3 it to the committee -- identify or explain -- one of
4 those two words -- in its order the reasons, if any, the
5 petition does not satisfy the statutory or procedural
6 requirements for permissive appeal.

7 We thought that that would ask for more
8 than what is currently being done in a lot of courts of
9 appeals where they state the standards aren't met, or
10 sometimes they just say we considered the petition and
11 we deny it. And even the majority or the plurality in
12 *Industrial Specialists* wasn't sure that would be enough
13 to satisfy what the court needs to do.

14 So we think it's narrowly drawn. We did
15 consider a statement that would require the court to
16 explain if it decides to exercise its discretion not to
17 permit an appeal. Even if the statutory standards are
18 met, should the court have to explain why? And we
19 decided not to do that. There's really nothing in the
20 statute that suggests a standard for that discretion,
21 and we decided that was maybe going a little bit too far
22 in getting into the discretion of the courts of appeals
23 and requiring more -- sort of micromanaging the court's
24 work. So we did consider that and reject it, and
25 obviously, if the sense of the committee is we ought to

1 consider it, we'd be happy to do that.

2 So that's it. And then the question then,
3 is it enough to say specifically identify the reasons or
4 do we want to say explain the reasons if we decide to go
5 to it? So that is our proposal, and I'm happy to answer
6 any questions.

7 CHAIRMAN BABCOCK: Okay. Thank you very
8 much.

9 Richard.

10 MR. ORSINGER: You know, Rich, would you
11 mind putting in the record a little bit what procedural
12 requirements -- why are you including procedural? Is it
13 a failure to give proper notice on time or --

14 MR. PHILLIPS: Sort of -- the procedural
15 requirements under Rule 168 and in Rule 28.3, they
16 include things like getting -- there's a whole procedure
17 for getting the trial court's permission. And that's --
18 in the statute, it says the trial court can grant
19 permission, but the rules talk about how you do that.
20 So the way it's supposed to be done, as it's written in
21 the rules, is that after the court issues its order that
22 you want to appeal, you go back and ask the court to
23 amend that order to include in that order permission to
24 appeal. And then the trial court is also supposed to
25 identify the question, state why there's a substantial

1 ground for difference of opinion and why an appeal may
2 be clearly advanced for determination. So those are
3 procedural requirements that have to be in that order
4 that are not in the statute. So those are things from
5 Rule 168 and Rule 28.3.

6 MR. ORSINGER: And so your concern that an
7 appeal might be rejected is because it wasn't
8 procedurally put together, even though the criteria for
9 the statute might be met?

10 MR. PHILLIPS: That happens frequently.

11 MR. ORSINGER: Really?

12 MR. PHILLIPS: Yeah.

13 And a lot of them -- we looked at some of
14 the cases that actually explain the denial. There were
15 lots of them that say, well, you didn't get the trial
16 court's permission or it's not in the order that you're
17 trying to appeal, or a lot of times what happens is the
18 trial judges like to identify the issue and then not
19 decide and just ask the court of appeals to decide.

20 So those are more procedural issues.
21 They're not specifically in the statute, and so we
22 wanted to be sure that, if it's going to be denied for
23 failure to meet procedural or statutory, that those get
24 explained so the parties know what's going on.

25 MR. ORSINGER: Well, I'm just curious. Is

1 it too late to fix the procedural defect once you find
2 out about it?

3 MR. PHILLIPS: Probably not. There's at
4 least one case that has suggested the parties could fix
5 it, and in a minute, we're going to be talking about the
6 mandamus petition. They need to give somebody the
7 opportunity to correct that procedural defect, and maybe
8 the court should get that opportunity. I think it's
9 probably beyond the scope of our referral, but those do
10 come up, and it's something we're trying to kind of
11 educate the bar on when I give these speeches. The main
12 thing I talk about is read the rule and do it exactly
13 right because that's the easiest way to not get that.

14 MR. ORSINGER: It must be hugely important
15 it's curable that the court of appeals tell them it's a
16 procedural problem so they can then clear it and we get
17 to the merits.

18 MR. PHILLIPS: Right.

19 MR. ORSINGER: Thank you.

20 CHAIRMAN BABCOCK: Justice Christopher.

21 HONORABLE TRACY CHRISTOPHER: Well, I spent
22 all day yesterday at the Legislature begging them for
23 more money for the court of appeal. We need more money
24 because we need more lawyers, and the more work we have,
25 the more lawyers we need. This, of course, will

1 increase our workload. I understand that.

2 I'm going to put that aside and focus
3 solely on -- it is a real issue. It is a real issue
4 because if y'all want to increase the length of time it
5 takes us to get anything done, then make us do more
6 work, but the mandamus, with this, that's what you're
7 doing. That's okay. Just understand that it's going to
8 take us longer to get things done.

9 To the merits, I -- unfortunately, I didn't
10 get a chance to read this until after my time at the
11 Legislature yesterday. So, yesterday afternoon, I found
12 two cases through the use of Google Scholar on my iPad
13 that came from my court.

14 CHAIRMAN BABCOCK: They were written by
15 you.

16 HONORABLE TRACY CHRISTOPHER: Well, no.
17 One was per curiam made, but the other one I was just
18 aware of out of our court. Those were sent to you late
19 yesterday afternoon, and I would ask that you open up
20 your email and look at both of those cases, because both
21 of those cases we give explanations for why we're
22 denying the permissive appeal. One of them and -- so I
23 would ask whether with this draft, what we have done, is
24 sufficient. Okay.

25 So, first of all, the first case is Ayala,

1 okay, and panel consisting of Christopher, Busby, and
2 Jewell before Justice Busby went up to the Supreme Court
3 and decided we really needed to explain our reasoning.
4 I digress. Okay. So what he did in this particular
5 ruling -- I think you should look at it -- we set out
6 some facts. We said, okay, this is what the judges
7 ruled, and then we say we have permission -- our
8 jurisdiction is established if we consider that a
9 substantial ground for difference of opinion exists.
10 Okay.

11 Then we say substantial grounds mean when
12 it's novel or difficult, when controlling circuit law is
13 doubtful, when controlling circuit law is in
14 disagreement.

15 Then we conclude. "We conclude no
16 substantial ground for difference of opinion exists on
17 the controlling issues of law stated in the Amended
18 Order."

19 Is that enough? Does anybody understand
20 what we said about that? I read it to mean we think the
21 trial judge was right, so we're not going to grant a
22 permissive appeal. Is that law of the case? Is that
23 sufficient as to what's been drafted? It's an
24 excruciatingly difficult thing to do what you're asking
25 us to do.

1 The second case that I've given to you for
2 your reading enjoyment is Gulf Coast v. Lloyd, and in
3 that case, we granted the permission to appeal. We had
4 full briefing on the merits. I'm not exactly sure how
5 long it took us to get this opinion out, but at the end
6 of the day, we concluded: too many fact issues here
7 precludes us from determining the controlling questions
8 of law. We withdraw permission to appeal and dismiss.

9 Okay. Now, that would clearly be
10 sufficient, I think, under this rule for what we did,
11 but my point is, if it's only after we granted
12 permission, had full briefing, dug into everything were
13 we able to determine really, there's some fact issues
14 here that are preventing us from answering the question.
15 If the facts are X, the law is Y. If the facts are Y,
16 the law is Z. So, I mean, is that the kind of opinion
17 you want us to come out with? We thought no. So we
18 withdrew our permission to appeal, said go away.

19 My third example, very recent -- and I'm
20 not talking about the merits of the case. This case is
21 still pending in front of me -- we get a denial of a
22 motion for summary judgment. Everything seems to agree
23 permissive appeal. Everybody says, yeah, procedurally,
24 it looks good. We look at the motion for summary
25 judgment order denying it, and the trial judge has

1 sustained the plaintiff's objections to some of the
2 defendant's evidence. Okay.

3 So I'm looking. Well, what am I going to
4 do with that in terms of a permissive appeal? So we
5 actually wrote the parties a letter and said do we have
6 to rule on these evidentiary issues before we can answer
7 your controlling question of law? And they kind of
8 hemmed and hawed and said, no. You know, even if the
9 trial judge was right excluding these particular pieces
10 of evidence, we said this, so please take our appeal.
11 So we have.

12 But maybe at the end of the day we'll
13 really disagree with them on this point. And, again,
14 you know, the whole process of deciding to take the
15 appeal took several months, and now we're going to go a
16 full brief on the merits, and they're just going to get
17 in line with all the other cases when you -- despite the
18 fact that you're an interlocutory appeal. Right?
19 Interlocutory appeals go no faster than trials on the
20 merits. They just don't.

21 We have so many filings at the court of
22 appeals it's not possible to prioritize anything with
23 180 days cases. I mean, we're supposed to prioritize
24 criminal cases. We're supposed to prioritize
25 interlocutory appeals, but at the same time, we have to

1 get all our appeals done within two years. So there is
2 the rub of what we do on a daily basis.

3 So I'm not sure what this rule means. I
4 would like you to look at Ayala in particular and tell
5 me whether what we said in that is sufficient, and if
6 so, I'm okay with it because I can write opinions like
7 Ayala, but I don't know for sure what this rule means.

8 CHAIRMAN BABCOCK: Okay. Well, the
9 committee will go into conference, and we'll do --

10 HONORABLE TRACY CHRISTOPHER: I just want
11 to know.

12 CHAIRMAN BABCOCK: -- get an opinion at
13 some point on it, but Justice Kelly.

14 HONORABLE PETER KELLY: Setting aside the
15 --

16 THE REPORTER: I'm sorry, can you please
17 speak up.

18 CHAIRMAN BABCOCK: Speak up.

19 HONORABLE PETER KELLY: Setting aside the
20 workload issues and funding, we need more staff
21 attorneys, and my attorney would kill me for saying
22 this.

23 But also speaking as a relatively recent
24 practitioner, a number of years ago, I had a case in
25 Justice Christopher's court where I got a denial of

1 permissive appeal, and it just said denied. How do
2 I explain that to the client? Maybe there won't be
3 mandamus, I don't know, but as a practical matter,
4 you've gone through the trouble of explaining to the
5 trial judge -- and this was an issue -- it wasn't a
6 summary judgment being issued, didn't have to deal with
7 the ultimate liability in the case, or whether the third
8 party medical funder was going to be able to assert a
9 claim. And that drastically affected the amount of
10 settlement. I can't remember the exact numbers right
11 now. I think it was a \$300,000 claim, a hundred
12 thousand dollar lien. Whether that was enforceable
13 affected the amount of settlement. So, again, it
14 affected the ultimate resolution of the case.

15 So to persuade the trial court judge if
16 this is important, if we answer this question, the whole
17 case will go away, and it will go up to the court of
18 appeals. The court of appeals says, nah, it's not
19 important or we don't know why they denied it. So as a
20 practitioner, it's extremely important to have that
21 knowledge, especially if you persuaded the trial court
22 who, in theory, knows a lot more about the case than the
23 court of appeals does as they're watching all the
24 dynamics going on, trial court's persuaded that it will
25 resolve the case, and now you have to persuade the court

1 of appeals to do that.

2 And that's why it's helpful to get some
3 explanation from the court of appeals as to why it's
4 being denied. Are you agreeing it's not going to
5 resolve the case? Do they disagree with the trial
6 judge? Or perhaps there's some procedural defect.

7 And it's very similar to mandamus, where,
8 you know, we have the authority maybe in the court of
9 appeals just to deny without opinion. Well, as
10 practitioners you get that. That means that you forgot
11 to attach a verification or think they're out of
12 adequate remedy or I'm wrong on the substance.

13 I mean, it's difficult to explain to the
14 client practitioner to figure out what the next step in
15 the strategy is. So the idea is perhaps in permissive
16 appeals, and perhaps even mandamuses as well, some
17 guidance would help resolve the litigation.

18 Now, problem is that, as Justice
19 Christopher pointed out, what is enough guidance?
20 There's no -- I can't think of a way to draft a rule to
21 say you have to write, you know, 500 words on it or, you
22 know, one good reason what is the metric for determining
23 what is an adequate explanation. So sometimes someone
24 drafts a guideline or a comment saying the court of
25 appeals should attempt to or should try to just to

1 encourage the courts of appeals to do that. Again,
2 that's setting aside the workload issues.

3 CHAIRMAN BABCOCK: Lisa.

4 MS. HOBBS: Okay. I'm going to say at the
5 outset that my position on this rule might be different
6 than my position on the mandamus rule, and so I don't
7 think they're inconsistent. I've reconciled it in my
8 mind over the last 24 hours, but on this one, let me go
9 with the easy thing as an appellate lawyer.

10 I agree this should be in Rule 47 and not
11 28.3 or -- I'm sorry, I agree that this should be in
12 28.3 and not 47, and I agree that it's time for the
13 court to just revoke 28.2. I don't think that it's come
14 up. So that is the easy item.

15 CHAIRMAN BABCOCK: So you say.

16 MS. HOBBS: So we say. And I really
17 appreciate that the subcommittee, and I think it's
18 really thoughtful your verb choice on your proposal of
19 identify versus explain, and I would -- even before I
20 heard Justice Christopher's thoughtful comments on A --
21 the A word.

22 HONORABLE TRACY CHRISTOPHER: Ayala?

23 MS. HOBBS: Ayala. Okay. I really think
24 that identification is what we need, and it kind of runs
25 into the mandamus rule. So sometimes somebody can

1 identify why they're denying a permissive appeal in a
2 way that is, in fact, curable, and -- and I agree with
3 what has been said about it. I don't want to delay a
4 decision. I think our courts of appeals are overloaded.
5 I don't think we should require some courts of appeal
6 analysis on every permissive appeal, which is kind of
7 where you're going if you use the word "explain," and
8 probably what Justice Christopher is really worried
9 about is I don't want to do a full analysis on every
10 case.

11 But I think if you identify why the
12 permissive appeal -- and you might even say identify the
13 specific statutory elements. So you might have even
14 gone further than you needed to in that opinion, if you
15 could just say, we don't think there is whatever
16 statutory requirement, period. And that might be a way
17 to answer your question on whether you think this
18 opinion is enough, which I do think it is.

19 The problem is -- and I think Richard --
20 Rich sort of, like, got into this is, first of all, most
21 trial lawyers don't even know the statute exists.
22 Sometimes they're calling me after there's been an order
23 drafted that allows a permissive appeal. Sometimes
24 they're calling me, like, what am I supposed to do, how
25 could they possibly do this.

1 But what I know is that, in my experience,
2 trial judges are very likely to sign an order that says,
3 on this date, this motion was presented to me; I hereby
4 grant or deny it. It's, like, very simple. They're
5 going to sign their name to that. Thank you for
6 being -- you know, drafting that.

7 But with these orders, you need to be way
8 more specific, and in fact, the case law is not clear
9 how much specificity on any of these statutory elements
10 you need to have in the opinion. Rich pointed out one,
11 which is -- I do know you need a ruling. You can't just
12 say, interesting question, I don't know, take it up.
13 The judge needs to rule on it. But the specificity on a
14 lot of the other elements isn't really settled law.

15 So you're drafting an opinion for the trial
16 court to sign, hoping you're not going to get dinged by
17 the court of appeals for something that could be
18 curable. Right? And then you present it to the judge
19 and say, hey, Judge, you want this to go up, we want
20 this to go up, sign this order, and then the judge says,
21 well, maybe I'll take this order. And, I'm like, yeah,
22 but you didn't need to explain, may not have appellate
23 jurisdiction. Right?

24 And so, when you're having these orders
25 that require specific things, you're not necessarily in

1 control of what the judge actually signs. And he or she
2 may have reasons for doing it, but you also have reasons
3 for presenting it.

4 And so that's why I think that if you just
5 required an identification, then, you know, is this
6 something curable or they just -- the court of appeals
7 just disagrees with us if it's controlling or what did
8 they answer, for whatever reason.

9 But the fact is, you don't control that
10 order completely, and it might be curable if the court
11 would just identify why -- identify, not explain --
12 identify the specific statutory elements that were not
13 met as the grounds for denying it.

14 I don't know. I mean, I appreciate the law
15 of the case issue, but if the statutory -- the standard
16 is or isn't met, I don't know why it shouldn't be the
17 law of the case, at least until there's, you know,
18 further appeal on it. If the court of appeals believes
19 that, you know, that this is so certain and so whatever,
20 then I want the trial judge to go with that as law of
21 the case. That doesn't really bother me.

22 It's not saying I won't disagree and I
23 might not take it up on further appeal or try to
24 convince the court of appeals otherwise, but the reality
25 is sometimes it really is a material issue on which

1 people can't disagree, even if the court of appeals is,
2 quote, unquote, wrong, like, because a subsequent court
3 tells you later or you just reconsider. I'm kind of,
4 like, well, just give us the guidance order so that gets
5 us to a resolution so we can go back up on appeal.

6 I'm less worried about the law of the case
7 and what that means, and I'm not sure it's going to
8 create law of the case if you stick to the identify
9 instead of the explain verb. Those are my thoughts.

10 CHAIRMAN BABCOCK: Okay. So you're more or
11 less in favor of the rule?

12 MS. HOBBS: Yeah, yeah. Identify verb --

13 CHAIRMAN BABCOCK: Professor Carlson.

14 PROFESSOR CARLSON: Correct me if I'm wrong
15 on this, Rich, but I recall the subcommittee
16 conversation pertaining to the law of the case. That
17 was one of my reasons we went from opinion to an order.

18 MS. HOBBS: And I would support that, but
19 the reality is that, if you give me a document, whether
20 an order or opinion, and I have been -- I have a trial
21 court and they change my trial court order in a way that
22 I'm, like, I think that gets me by, but I'm not sure,
23 and then the court of appeals tells me I'm just denying
24 this, I'm, like, gosh, I already was frustrated with the
25 trial court that they didn't sign the order that I

1 wanted them to sign because my concerns were correct,
2 and I can just get him or her to change, like, that one
3 little thing and make it compliant with the statute, or
4 is it because you guys just think this is not going
5 to -- I mean, there could be bigger issues.

6 And so it's just so frustrating when you're
7 trying to talk to your client about an order that is
8 especially -- and I'm not saying -- it happens in other
9 times, too, but I've specifically been twice where I
10 proposed the order that I thought would for sure give
11 the court of appeals jurisdiction, and then the trial
12 court changes it, and now, I'm, like, God, is it because
13 they didn't dot their I's and cross their T's or it's
14 curable or it's just because they really don't believe
15 the standard is met, and I won't ever know.

16 PROFESSOR CARLSON: We were talking about
17 the appellate order as opposed to an appellate opinion,
18 no?

19 MS. HOBBS: So I agree with you. If you
20 make it that you have to identify in an order as opposed
21 to explain in an opinion, I think those are. We're
22 talking what you're getting out. So I agree, I would
23 support identify in an order, and I think if we take out
24 the word "opinion," that might -- might cure some of
25 Justice Christopher's concern, too.

1 CHAIRMAN BABCOCK: Rich.

2 MR. PHILLIPS: I think we did say "order"
3 in the draft rule, not opinion, so that's covered. And
4 I think Lisa's captured, not having sat in on our
5 meetings, exactly why we were going back and forth
6 between identify and explain.

7 I want to respond to a couple of Justice
8 Christopher's comments.

9 So Gulf Coast, I want to start with that
10 one. It's slightly standard older of the two. It's an
11 outlier in what courts have done in responding to these,
12 and partly it's because they got to it after a full
13 briefing.

14 It's really -- if you start trying to draft
15 a petition for permission to appeal and you want
16 something you can look at and say this is what it means
17 to have a controlling question of law or a substantial
18 ground for difference of opinion, Gulf Coast is it.
19 That's really the only opinion that's out there that
20 attempts to wrestle with some of those standards, and
21 even then, it's not -- it's a nice outline, but it's not
22 enough. We need more development for the bench and the
23 bar as to what these standards mean.

24 In Ayala, I think Ayala would satisfy this
25 rule. That's just my opinion. I'm not speaking for the

1 subcommittee. But I think the part of it that I
2 appreciate in Ayala is that it doesn't just say we find
3 that there's no substantial ground for difference of
4 opinion. It's got a paragraph afterwards that says --
5 and it doesn't explain -- doesn't cite cases to explain,
6 here's cases that say this question is resolved. All
7 right.

8 And I think that gives the parties the
9 answer to the question, and it does what the rule says,
10 which is identify. It doesn't have to explain exactly
11 why, but it identifies it in a way that at least I can
12 go back to my client and say this is why the court of
13 appeals said we couldn't do this or a trial judge can
14 look at that and say that order didn't get there. Now
15 for my analogizing, it's going to help me develop
16 standards as to how this could be applied. So I do
17 think that Ayala gets there on identify.

18 I probably come down on the identify side
19 of the line just between identify and explain, but we
20 wanted to put that out there for everybody. I think
21 it's important we understand, though, that Ayala and
22 Gulf Coast are outliers. The vast, vast, vast majority
23 of these denials are the three sentence. Ex parte to
24 that they simply can appeal. 51.014(d) says you can
25 appeal if and recites some standards. We don't find

1 these standards are met, denied. That's it. And that
2 makes it hard to go back to the client, and it makes it
3 hard when you're in Lisa's position and a judge will
4 want to tweak your order. You don't have a case that
5 says, well, that's not going to get us there.

6 I did want to be clear, too, on what's --
7 so Rule 168 identifies what the trial court has to do.
8 The order must identify the controlling question and
9 must state why an immediate appeal might be cured in
10 advance, but it doesn't have to say why it's -- it
11 doesn't have to identify why that question is a
12 controlling question of law as to which there might be a
13 substantial ground for difference of opinion. It just
14 has to say this is the question, and then it has to
15 explain why it might be curable in advance. So that's
16 what's in Rule 168.

17 I do think -- and I'm a little bit -- I
18 think I agree with Pam, and she'll appreciate reading
19 this in the transcript later -- that we want to be
20 careful in trying to pack too much stuff into comments.
21 But it might be an ideal way, if we go with identify, we
22 can put a comment in that says identify means give
23 enough of an answer that parties can understand -- we
24 have to massage the language, but kind of explain what
25 we want sort of along the lines of what Ayala does.

1 I did also neglect to mention that there is
2 -- and this is in the materials. There is a House Bill
3 that's been proposed that deals -- attempts to deal with
4 this. We looked at the language, and it's on page --
5 I'll just scroll down to the PDF. It's page 1561 of the
6 PDF. We don't think this really gets there. It's House
7 Bill 15 -- it's the House Bill 1561. It's on page 206
8 of the materials. Yes. And it just says can --

9 MS. HOBBS: It's 157 on mine.

10 MR. PHILLIPS: What?

11 MS. HOBBS: It's 157 on mine, but there
12 were two PDFs that went --

13 MR. PHILLIPS: Okay. So, anyway, it's in
14 there. But basically, you have two parts. It says, If
15 a court of appeals does not accept an appeal under
16 Subsection (f), the court shall state in its decision
17 the specific reasons for finding the appeal is not
18 warranted worked.

19 Our view is that some of these three
20 sentence denials that arguably meet that test.

21 And then the second one states, The Supreme
22 Court can review a decision by a court of appeals not to
23 accept.

24 We also think after Sabre Travel and
25 Industrial Specialists the court has kind of said they

1 do have jurisdiction. So we wanted to make sure the
2 committee was aware that that is out there, and it might
3 recommend adopting a rule so that we don't have to do
4 whatever the Legislature requires instead, but I'll
5 leave that out there.

6 Let's see if there are any other comments.
7 I think that responds so far to the comments that are
8 out there.

9 CHAIRMAN BABCOCK: Richard, and then Bill.

10 MR. ORSINGER: So I'm a little concerned
11 about trying to force too much of the merits to be
12 stated as a dismissal order. I would think all the
13 merits should be stated if the appeal is granted and
14 there's an opinion written, absolutely, it needs to be
15 fully explained.

16 But if you're denying it, and the judge has
17 ruled in a certain way, then you're saying, well,
18 there's no substantial ground for difference of opinion
19 about what the judge ruled, and yet we don't have the
20 kind of a robust briefing we would expect in a normal
21 appeal, and we don't have any of the facts really,
22 unless they're stipulated in the trial court's order.

23 And so I -- I'm really concerned about
24 anything that would elevate a denial to any kind of
25 preclusive effect for the rest of the trial or for the

1 subsequent appeal.

2 CHAIRMAN BABCOCK: Bill.

3 HONORABLE BILL BOYCE: So I would endorse
4 the order and the identify language, and I think respond
5 in part to Richard's concerns.

6 You know, my take on reading the briefing
7 from Industrial Specialists is that part of the concern
8 was that the interlocutory appeal permissive appeal
9 procedure was being applied in inconsistent ways across
10 multiple courts of appeals, and in some courts of
11 appeals you could not obtain permission if your life
12 depended on it. So it was a big no for everyone with a
13 form order that tells you nothing about it.

14 And so I think to go behind the identify
15 language and the order language in this whole rule is to
16 have a little bit more to work with so that, for
17 example, if you want to take a swing at going to the
18 Texas Supreme Court and saying, even though the court of
19 appeals denied this, this really is an important issue,
20 I'll say, you have a little bit more to work with than
21 just a no order.

22 And you know, certainly sensitive to the
23 workload issues and to the fact that everything is
24 interlocutory and accelerated. Nothing is accelerated.
25 But I think -- I would hope that doing this in the form

1 of an order with identifying reasons will ameliorate
2 that to some degree so it's not looking for a formal
3 opinion that exacerbates the problems that Chief Justice
4 Christopher identified.

5 One other observation which is, you know, I
6 have heartburn about the effect of an order in this
7 context on what happens later in the case, but
8 basically, that's a calculus that you've got to make
9 every time you're going to pursue an interlocutory
10 appeal or a mandamus. You can get incidental comments
11 in the course of those procedures that have a subsequent
12 effect, for better or for worse, on the merits of your
13 case, and that's just part of the calculus. Just as
14 you've got an interlocutory appeal doesn't mean you
15 should take it.

16 But if you make the calculus and you're
17 going to do it, I think that having it framed as an
18 order with identification for some explanation but short
19 of a full-on opinion is probably an acceptable middle
20 ground to balance all of these considerations and not
21 put yourself in some sort of --

22 (Phone ringing.)

23 CHAIRMAN BABCOCK: Speak of the devil,
24 Justice Gray, did you have your hand up? You're next.

25 HONORABLE TOM GRAY: Was Bill finished?

1 HONORABLE BILL BOYCE: Yes. Bill was
2 finished.

3 CHAIRMAN BABCOCK: I've got this alarm.

4 HONORABLE TOM GRAY: Bear with me for a
5 moment.

6 But after the Supreme Court, needless to
7 say, where its encouraged us to write more, maybe the
8 grant rate went down because the more frivolous ones
9 stopped. And so it not only would encourage us to write
10 more but encourage more to be filed and, ergo, the rate
11 goes down.

12 I would say that we may be one of those
13 courts where the three-sentences opinion is too long.
14 It's one sentence, and it is the permission requested on
15 such-and-such is denied. And it's left at that, and
16 there's a reason for that, and I'll get to that in a
17 minute.

18 We all want more information about our
19 case, the law, to guide our client through this maze,
20 and this is an opportunity to get an advisory ruling
21 that is permitted in this unusual circumstance. And it
22 is very dangerous, in my opinion, because of the law of
23 the case being decided on undeveloped facts where the
24 case is either not fully discovered yet or it's -- the
25 parties just haven't seen how it's going to play out or

1 they have, and they have a premonition of where it's
2 going, you know, whatever the reason.

3 But we see this all the time, and we don't
4 get the explanation or identification of the issue that
5 the rule is seeking to impose. I think about how much
6 easier it would be to rule on a motion for summary
7 judgment that has been granted if I knew why the trial
8 court had granted it.

9 So, you know, I think it would really be
10 nice to know -- and I'm going to recognize the reverse
11 here -- why a motion for new trial was granted when it
12 is now required to be explained and can be reviewed.
13 And I'm sure there's a lot of litigants that would like
14 to know why a petition for review was denied summarily
15 when it's denied, and it would provide them information
16 maybe not on that case but on others.

17 So my point is, we all would like to have
18 more information at some point in time about what may
19 affect our case.

20 I can't let the workload go because I sat
21 through the same hearings that Tracy did yesterday, and
22 based on the statistics that Rich presented of 129 of
23 these petitions over the period of time that he was
24 looking at, that is one judge's workload for a year what
25 we're looking at. So it's not an inconsequential burden

1 on us to do this.

2 I even share Richard's concern that or kind
3 of reference that maybe we need to go back to the rule
4 and do a better job of filling in what is required in
5 the trial court before you get to the order that then
6 gets to the request for the permission to do this
7 interlocutory appeal, this permissive appeal, and maybe
8 that's the better place to do the cleanup than here.

9 I would also say that if we have a summary
10 denial and the parties feel that strongly about it that
11 they want to seek review by petition to the Supreme
12 Court and the Supreme Court needs more information about
13 why we didn't grant it, you may want to think about,
14 literally, a remand procedure from the Supreme Court
15 that says, okay, on this one, give us a full write-up,
16 and that way it limits the number in which we have to do
17 that.

18 You've got an undeveloped record, this
19 whole question -- oh, the statutory requirements. What
20 if at the appellate court we can't even agree, which
21 occasionally happens, as to whether or not this is ripe
22 for a permissive appeal? Then we're going to start
23 writing majority and concurring opinions -- and I'll get
24 to the opinion versus order in a minute -- but on -- on
25 why this issue is or isn't, and then suddenly we've

1 created more of a problem for the litigants because
2 we've given them a snapshot of what might be down the
3 road on their case on an interlocutory appeal that may
4 or may not be dispositive of the case.

5 I notice in the rule that they use the jury
6 charge favorite phrase of "if any." I thought that was
7 great because, as long as that is in there, I might
8 still be able to do a one-sentence denial. Somebody
9 might infer from that that there are no reasons; we just
10 deny it.

11 So I am very concerned about the law of the
12 case because what happens if, based on the facts as then
13 developed, we go one direction, and then when the case
14 is over, because it didn't resolve because of this
15 issue, what if, if, turns out those weren't the facts
16 that the jury found; and therefore, maybe the rule
17 becomes different?

18 We get to this question of the order versus
19 opinion. It's really outside the scope of what we're
20 about today on this, but right about the time I joined
21 the court 25 years ago, the chiefs, for statistical
22 reasons, they have to dispose of proceedings by
23 opinions. It's the only way you count at the court of
24 appeals. You may have a judgment or you should have a
25 judgment in addition to the opinion, but it is the

1 opinion that controls the statistics, and the problem
2 with that is you may label it an order in a rule, but
3 it's going to get disposed of by an opinion.

4 And I'm sure there was something else I was
5 going to say, but I will close there.

6 CHAIRMAN BABCOCK: All right. Thanks.

7 HONORABLE TOM GRAY: In case it wasn't
8 clear, I don't think you need the rule. I don't think
9 this is the place or the way to do it.

10 CHAIRMAN BABCOCK: Lisa had her hand up a
11 minute ago, but she's since left the room. It will be
12 up -- Tom Riney.

13 MR. RINEY: I just have a concern about
14 Representative Smithee's bill pending on the same
15 subject. I mean, this is -- an interlocutory appeal is
16 a statutory creature, and if one legislator is
17 interested in amending that statute, I just think it can
18 cause issues if we try to pass a rule on the same topic,
19 regardless of whether our rule is better than what they
20 might do.

21 CHAIRMAN BABCOCK: Well, I say in response
22 to that that we're not going to pass anything. We're
23 just going to tell the court about what we think, and
24 it's up to the court to -- to pass it or not. And by
25 the time the court gets to it, the Legislature may or

1 may not have spoken. So I'm not too worried about that
2 myself, but -- so, Lisa, do you still want to say
3 something?

4 MS. HOBBS: Yeah. Somebody -- there should
5 be -- Chief Justice Gray said that -- I just want to
6 kind of have a dialogue with him.

7 CHAIRMAN BABCOCK: Take it outside.

8 MS. HOBBS: No, but I think it's for the
9 benefit of our discussion.

10 With regard to the word "order" in the
11 proposed draft, as I understood, you basically are
12 saying there's opinions and there's judgments. There's
13 not really orders because of your reporting
14 requirements?

15 HONORABLE TOM GRAY: Not final disposition
16 orders.

17 MS. HOBBS: Well, and I guess to pushback
18 just a little bit, mostly out of curiosity, and not
19 because I necessarily disagree with the comments,
20 because that's my experience with most cases at the
21 court of appeals, but even on preliminary motions -- so
22 like you have an order of abatement, or an order, so we
23 know there are some preliminary orders.

24 HONORABLE TOM GRAY: The -- even now when
25 we do a -- like for bankruptcy, an abatement --

1 permanent abatement for bankruptcy, it will be classed
2 as an opinion, and there will be a separate order that
3 does it, and remember that the denial of one of these
4 requests is a final disposition and --

5 MS. HOBBS: So that takes it off your
6 docket; that's what you're saying?

7 HONORABLE TOM GRAY: Yes, it's gone.

8 MS. HOBBS: Similar to a motion to dismiss,
9 that's going to be an opinion and -- an opinion and a
10 judgment, not an order. So you think anything that
11 removes it from your docket, it's not an order
12 necessarily. Okay. I understand now. I was trying to
13 clarify.

14 And then -- so my experience is -- on both
15 sides of this is that the trial courts are not quite as
16 reluctant as the courts of appeals to take this -- take
17 these up, but there's a lot of investing at the trial
18 court level. So I think you reiterated Rich's -- I take
19 Rich's 129 permissive appeals in the last reporting
20 cycle --

21 MR. PHILLIPS: That was 2016 to 2019. So
22 over three years.

23 MS. HOBBS: Okay. So it's not a judge --
24 it's not a court of appeals' judge's docket in a single
25 year. That was a three-year --

1 MR. PHILLIPS: That's statewide, 2019 to
2 2022, three years statewide, Lisa, three years.

3 MS. HOBBS: So it's not a one year --
4 because you -- when you said that, I was, like, oh, I
5 don't think of things in the aggregate, right, because
6 my actual experience is -- and one of the reasons why I
7 really am advocating for this -- and I'm going to take a
8 different position on the mandamus -- is this is
9 screened very heavily with the trial courts. Trial
10 courts generally don't like their papers graded, and to
11 get permission to have their paper graded, I have found
12 when I'm trying to get it is a labor in lore, and when
13 I'm trying to convince them to resist it, it's not at
14 all hard to get the trial court to resist it.

15 And so I don't -- I feel like this is a
16 small part of your docket, but I also don't want to
17 discount -- like, I agree with everything every justice
18 -- court of appeals justice has said today. The more
19 you allow permissive appeals and other interlocutory
20 review, the harder y'all's job is and especially in the
21 courts of appeals where they have criminal jurisdiction,
22 too.

23 So I really respect it, but I find these --
24 I'm probably doing one or two a year max, and Rich is
25 probably maybe doing a little more because he writes all

1 the papers about it. So they call Rich before they call
2 me, but if Rich has a conflict, sometimes he calls me.
3 No, I'm just kidding.

4 But I just find it -- the trial courts
5 don't really like this. I feel like the trial courts
6 are sincerely thinking that -- that's a tough issue, and
7 I don't know -- and I have years of litigation on this,
8 and if I'm wrong, I need a court of appeal to tell me
9 how that I'm wrong, because otherwise we're wasting
10 everybody's time. And I just feel that trial courts are
11 not granting these willy-nilly. And that's a gatekeeper
12 role that is so important, and it's a burden and a
13 hurdle in and of itself to get a trial court to say,
14 yeah, you're right, this will stop three or four years
15 of litigation if you'll just go to the court of appeals,
16 ask the court of appeals to tell me if I'm right or
17 wrong.

18 CHAIRMAN BABCOCK: Okay. After our morning
19 break, Justice Christopher will be first up and then
20 Judge Evans, but Melinda's new, and we're just beating
21 her into the ground in an hour and 45 minutes of
22 continuous comments. So I can see her sweating over
23 here. So we're going to take our morning break and be
24 back at 11:05. Thank you.

25 (Recess from 10:46 a.m. to 11:05 a.m.)

1 CHAIRMAN BABCOCK: All right. Let's get
2 back at it.

3 When we broke, we were on the verge of
4 getting to listen to Justice Christopher, but she is out
5 of the room.

6 HONORABLE TRACY CHRISTOPHER: No, no, I'm
7 here. I'm here.

8 CHAIRMAN BABCOCK: There she is. So the
9 wisdom is delayed for just a minute, but now we're on
10 point and would love to hear.

11 HONORABLE TRACY CHRISTOPHER: I'm not
12 really sure that there is a difference between an order
13 and an opinion with respect to law of the case. That's
14 number one. If someone thinks there is, I'd be
15 interested in seeing that.

16 And then number two, as a practical matter,
17 if you want to be able to look at my orders, I have to
18 call it an opinion for Westlaw to put it in the books,
19 okay, because if I just call it an order, even if I put
20 "Publish," "Publish," "Publish" at the top of it, they
21 may or may not decide to publish it.

22 And we have found that to be the case in
23 connection with the motions to review the supersedeas
24 bond. And there is substantive information that we put
25 in our orders on the motion about the supersedeas bond

1 that we, even as a court, lose track of because it's in
2 Westlaw. I'm, like, I know we did one of these. You
3 know, we have to dig around and dig around and dig
4 around until you find it. So I'm not a hundred percent
5 we should say "ordered" if the idea is that we want
6 something that's going to give guidance, not only in
7 this case but in other cases.

8 CHAIRMAN BABCOCK: Okay. Judge Evans, you
9 had your hand up before the break.

10 HONORABLE DAVID EVANS: Well, I'm an early
11 proponent of a trial judge of sending cases up, and I
12 sent them up on permissive appeal and then gradually
13 changed my mind because the workload at the court of
14 appeals --

15 (Phone ringing.)

16 HONORABLE DAVID EVANS: Oh, I'm sorry.

17 CHAIRMAN BABCOCK: That's okay. It
18 happened to mine, too.

19 HONORABLE DAVID EVANS: It's to remind me
20 not to speak.

21 CHAIRMAN BABCOCK: Your time is up.

22 HONORABLE DAVID EVANS: Then because of the
23 workload that's before the court of appeals, it doesn't
24 expedite the case, and then I started using it only in
25 cases where it might -- where a jury trial might be a

1 two-week trial or have extended time and that a
2 particular decision on the law would impact the charge
3 and how the case was tried. These were usually discrete
4 questions, not totally dispositive of the case, or you'd
5 send the case up on an order granting summary judgment.

6 And then I can appreciate and do appreciate
7 why the appellants -- the appellants want a decision
8 that sets out the factors, and they need that if they're
9 going to pursue further review. But I was never
10 confused as a trial judge when one was denied because I
11 wasn't reversed, you know, and I figured if it was bad
12 enough to get a comment that the Second Court of Appeals
13 would send me notes of don't do that, you know.

14 So, as a trial judge, an outright denial
15 isn't possible. I just proceed. That's all I have.

16 CHAIRMAN BABCOCK: Okay. There are some
17 other hands up, and that would be Pete Schenkkan. Pete.

18 MR. SCHENKKAN: I wanted to try and make
19 sure I understood what the wording on this rule is
20 intended to do, and if it is, I think it may be that
21 that clarification of what we're trying to do will help
22 us get the words right and not solve these problems in
23 terms of the workload but help ameliorate them.

24 It seems to me that there are three
25 categories of reasons for denying a permissive appeal.

1 Category one is the person asking for it did not dot
2 their Is, cross their Ts, hop on their left foot three
3 times, and say, Mother, may I, please, three times.
4 They screwed up procedurally. They need to know about
5 that. Some of the time it's curable. If it's curable,
6 they need to decide am I going to make an effort to cure
7 it. And other times, it's not curable, and they need to
8 know that so they can go on down the road and live their
9 life with the consequences of having made an incurable
10 remedy.

11 The second thing is the statutory
12 requirements, a controlling question of law, as to which
13 goes to material grounds for a difference of opinion. I
14 think they're entitled to know you thought and you
15 persuaded the trial judge that X was a controlling
16 question of law estimation, a material ground, and we
17 don't think so. That's why we're not going to take
18 this. That's useful information and shouldn't be that
19 hard to write.

20 The final one, though, is all you have to
21 do to get your ticket punched on this to get up there in
22 front of the court of appeals is that the trial court
23 agrees with you that it may materially advance the
24 litigation to answer this controlling question of state
25 law as to which there are material grounds for a

1 difference of opinion, but the court of appeals may say,
2 yeah, it might, but it's not very likely to. It is a
3 lot more likely that this is going to waste a year of
4 our time and another year or two in the Texas Supreme
5 Court, and so we don't think this is a good idea to do
6 this now. And that's why they still may not going to do
7 it. And I think just saying this may not -- we don't
8 think it's going to advance it enough to do it this way
9 ought to be good enough.

10 CHAIRMAN BABCOCK: Justice Kelly.

11 HONORABLE PETER KELLY: I just wanted to
12 clarify this concern about application of the law of the
13 case that the Supreme Court has repeatedly stated the
14 law of the case doctrine only applies in cases brought
15 up to the court of last resort which would be the
16 Supreme Court. So, technically speaking, a court of
17 appeal opinion denying this doctrine of appeal or
18 granting it does not become law of the case. It may
19 have some other preclusive or prejudicial effect on the
20 determination of the rest of the litigation, but it's
21 not technically law of the case.

22 CHAIRMAN BABCOCK: What if it goes to the
23 Supreme Court on a, you know, discretionary writ or a
24 petition and the petition's denied or the writ's denied?

25 HONORABLE PETER KELLY: That has not been

1 answered yet.

2 CHAIRMAN BABCOCK: Rich.

3 MR. PHILLIPS: Just on Pete's comment,
4 because I think it is important we think about it that
5 way. I like the buckets. I think I might think about
6 them slightly differently.

7 The materially advance determination
8 standard is part of the statutory standard. So I think
9 there's also another bucket beyond that which is -- and
10 the court wrestled with this a little bit in Industrial
11 Specialists. We talked about it in the subcommittee.
12 We decided not to say anything about it in here.

13 The statute says, if those standards are
14 met, including materially granted, then the court may
15 grant permission to appeal. So, if you meet the
16 standards, the court can still deny you in its
17 discretion, and we discussed whether or not we should
18 ask the court to explain why they're not exercising
19 their discretion to grant permission, even if the
20 statutory standards are met. We decided not to include
21 that requirement.

22 So I think there's -- if it's three
23 buckets, I would think about them as all the procedural
24 requirements: get permission, make sure that the trial
25 court actually decides it, all that stuff.

1 Then the statutory requirements: is this a
2 question of law, is it controlling, is it -- is there a
3 substantial difference of opinion, might it materially
4 advance.

5 And then the third bucket: Is the court of
6 appeals going to exercise its discretion to permit this
7 appeal that satisfies the statutory standard.

8 MR. SCHENKKAN: Could I follow up?

9 CHAIRMAN BABCOCK: Yeah. Sure.

10 MR. SCHENKKAN: I agree with you that the
11 "may" is, itself, a statutory requirement, and I guess
12 what I'm suggesting is that I'm having -- I'm imagining
13 that if you -- if one were able to -- if you go and
14 actually test your eyeballs over some briefing all 169
15 cases over a three-year period, that an awful lot of the
16 ones in which the court of appeals did not take the
17 permissive appeal, even though they did not identify a
18 procedural failure or a failure on step one and two, and
19 they did not say there is no controlling question of law
20 here -- they did not say there is a controlling
21 question, but there is no ground of -- material ground
22 upon -- I'm guessing that the vast majority, if not all,
23 of the ones that they still didn't take after not
24 identifying the failure to meet an earlier criterion,
25 was simply they didn't think it was likely enough to

1 materially advance the case to do it that way.

2 And that's why I think that first external
3 requirement is the discretionary one, as opposed to the
4 first two are it's either true or false, and we all know
5 as lawyers that's an oversimplification. Some things
6 are closer to truth than others. But the "may" really
7 is much more intrinsically discretionary.

8 MR. PHILLIPS: I agree, but there's two
9 "mays," and you and I are talking about two different
10 "mays." The "may" materially advance for sure is may,
11 and it may be, although we don't know, but a lot of
12 times that it's being denied is they don't think it will
13 materially advance. There's a different "may."

14 So the other "may" is if those two
15 things --

16 THE REPORTER: I'm sorry, can you slow that
17 down, please.

18 MR. PHILLIPS: Sorry. The controlling
19 question of -- the court found a controlling question of
20 law, if there is one of those, and if it may materially
21 advance, then the court of appeals may grant permission.
22 So it's a completely separate "may." They -- even if
23 they think it may materially advance and they think it's
24 a controlling question of law, the court of appeals
25 under the statute and the way the Supreme Court's read

1 it in Industrial Specialists, they can still say --
2 they're talking about discretion not to take this thing,
3 and we did not want to put in there something that
4 requires them to explain that "may."

5 And I think it may be useful -- I keep
6 saying "may." It may be useful, but they need to, if
7 they think it won't materially advance, to at least say
8 we don't think it will and, again, identify so they
9 don't have to say why they don't think it will, but --
10 and I think that even will give parties additional
11 information.

12 One other thing I want to comment on -- I
13 know Lisa wants to jump in, but I want to say this while
14 I'm thinking about it. Chief Justice Christopher talked
15 about opinion, order, and what Westlaw picks up, and
16 Chief Justice Gray and I were talking in the break.
17 These statistics are very, very, very rough and limited,
18 and they're limited by the fact that I can't find them.
19 Right?

20 If Westlaw hasn't picked it up -- and so we
21 did Westlaw searches. We called clerks. Some of the
22 clerks code this in the system as petition for
23 permission to appeal, but I couldn't find them, but
24 only, like, one of them does that. So finding it was
25 hard even for the clerks.

1 I was talking to Chief Justice Gray. I
2 said we called the clerks and asked how many of these
3 they've had and if they could tell us which one. And he
4 said even they probably can't find it. So he knows I
5 found one in Waco in three years. He's pretty sure it's
6 two or three. The reason I didn't find it is because it
7 was a one-sentence order that Westlaw didn't pick up and
8 it didn't cite a statute or rule. Just said you've
9 asked for permission to appeal; we deny. I'm never
10 going to find that.

11 So I hadn't even thought about the idea of
12 an order or opinion extension for whether Westlaw picks
13 it up, but if we're trying to give guidance, we may need
14 to think about how parties are going to find these
15 things when they're issued.

16 I still think the rule ought to be in 28.3,
17 not 47, even if it is technically an opinion so that
18 Westlaw will pick it up, but I wanted -- I appreciate
19 that insight, and also, I want to make sure as we talk
20 about these statistics that we all understand the
21 limitation of trying to figure out what's going on
22 because it's just a little opaque statistic.

23 CHAIRMAN BABCOCK: Okay. Lisa, did you
24 have your hand up?

25 MS. HOBBS: Rich covered most of where we

1 were confused to those two "mays" in there.

2 But I do want the record to reflect that
3 the idea may advance the litigation really has to do
4 with the outcome of that appeal. Right? So, if I win,
5 I'm getting a judgment, you know, and the case is over.
6 If I lose, we're still going to trial, right? So that
7 first "may" is not, like, I disagree -- I don't even
8 need to speak for the court of appeals, but the way I
9 read that first "may," this has a chance that we're
10 never going to jury trial. This gets resolved right now
11 by the trial court, and the court of appeal says, no.

12 It's the second "may" where I totally agree
13 with everything Rich said, which is I think it's -- I
14 think the court of appeals can just say it meets the
15 standard and I'm still not going to agree with that, for
16 whatever reason. It's the second "may" that gives them
17 discretion.

18 I don't want this record to imply that --
19 the may materially advance the litigation, it seems like
20 that standard should be the same as the trial court and
21 the court of appeals meaning, depending on how this
22 comes out, it may materially advance this thing. It
23 could make it go away or it could make it go forward,
24 and we're going to be in the same place we are, which is
25 going to a jury trial, whatever. I just, I don't know.

1 I get very sensitive about these standards, and I just
2 don't want the record to be confused that there are two
3 "mays." Rich is right. And I mean -- and you're right
4 as the court of appeals has a lot of discretion here,
5 but it's in the second "may" that gets the discretion.

6 CHAIRMAN BABCOCK: Jim, then Harvey.

7 MR. PERDUE: The language of -- at least
8 the substantive side of the rule is straight out of the
9 federal cite. I mean, it's identical. So what Lisa is
10 just clarifying is the proposed rule change essentially
11 is a ticket to mandamus. That's what you're writing in
12 there. It's under the discretion of the trial court --
13 I mean, discretion of the appellate court to deny it, is
14 now subject to mandamus because they haven't satisfied
15 this new standard.

16 MS. HOBBS: Well, the Supreme Court has
17 already said they will review it. So, with that,
18 mandamus is actually going to be review of the denial to
19 permit the appeal.

20 MR. PERDUE: With now vague language about
21 you have to clarify what your rationale was.

22 MS. HOBBS: Yeah, because it might be
23 curable or it might not be.

24 MR. PERDUE: Or it may be in their
25 discretion as Judge Gray said -- Justice Gray said.

1 It's in their discretion and they made up their mind.

2 MR. PHILLIPS: And that may be something
3 for the Supreme Court to take up. There's a discussion
4 about the question about discretion is discretion and
5 it's absolute. And that's -- the concurrence said
6 that's it and we're done.

7 The same words were -- we're not sure that
8 that is the kind of discretion, but that's something
9 that maybe needs to be fleshed out but can't be right
10 now. The courts of appeals are not explaining -- or at
11 least identifying the reasons for denial.

12 CHAIRMAN BABCOCK: Harvey.

13 HONORABLE HARVEY BROWN: It seems like to
14 me most of our discussion has been about the policy and
15 whether this is a good idea, and I think at least the
16 Supreme Court has spoken on the statutory issue, as well
17 as the statute meaning, and what it says is the statute
18 means that the three-sentence order is sufficient. I
19 mean, that's one of the points that was brought forward
20 in *Industrial Specialists*. The majority opinion said
21 they have unfettered discretion to deny it.

22 MS. HOBBS: Plurality.

23 HONORABLE HARVEY BROWN: Excuse me, yeah,
24 plurality, and then the concurring opinion, five total
25 said there was absolute discretion. So, if there's

1 unfettered, absolute discretion and a three-sentence
2 order was sufficient there, it seems like, to me,
3 we're -- at least it would propose a rule certainly be
4 intentioned with that opinion, and we don't normally do
5 that, I don't think.

6 I'm also concerned that even about an
7 opinion as the Ayala opinion. Even if it doesn't
8 technically have law in the case repercussions, it is a
9 practical matter. Let's say it goes back down with her
10 order, which cites two cases, said, you know, there was
11 no material difference of opinion, there's no
12 substantial ground for difference of opinion. She cites
13 two. I haven't read any of it, but my guess is that the
14 other side either, A, said those aren't mine, they're
15 distinguishable for the following reasons; or said,
16 yeah, but there's these three other cases. This is very
17 short. It doesn't address those arguments.

18 It goes back down. The trial judge says,
19 well, great, you know, this basically says I was right.
20 New judge comes into office. New judge comes in office
21 and looks at this and says, well, I'm not changing
22 anything; the court of appeals blessed that. So, well
23 it may, technically, not be law of the case. It's going
24 to have the practical effect of law of the case without
25 full briefing, and to me, that's dangerous.

1 I'm also concerned this will encourage more
2 of these, yes, there's no explanation. There's reasons
3 for why there's no explanations. Justice Gray said they
4 wanted it in summary judgment rulings and lots of other
5 rulings, where we have to advise clients as to why we
6 think the court did what it did without knowing. But I
7 think this will encourage it and create some -- some
8 problems, and there's at least tension with the
9 statutory language. And I know that Justice Gray said
10 perhaps a rule change would make this easier, but
11 perhaps, to me, does not say, yes, it would. And so I
12 just have some concerns about it.

13 CHAIRMAN BABCOCK: Rich, and then Pete.

14 MR. PHILLIPS: Yeah. I want to be sure
15 we're clear about what the holding from Industrial
16 Specialists is, the one that got the vote --

17 CHAIRMAN BABCOCK: The plurality opinion?

18 MR. PHILLIPS: Well -- so in prove up 16,
19 which is in the plurality, this is holding -- we hold
20 that 51.014(f) permits the Texas courts of appeal to
21 accept permissive interlocutory appeal when the two
22 requirements of section 51.014(d) are met, but it grants
23 the courts discretion to reject the appeal even when
24 requirements are met. That's the thing that got five
25 votes.

1 The other stuff about absolute discretion,
2 that only got a couple of votes. So I think the rule as
3 we're trying to posit it -- and we did try to take that
4 into account -- I don't think is intentioned with the
5 holding in Industrial Spec. I think the holding is
6 about the fact that the discretion exists and what the
7 court of appeals say about the exercising of their
8 discretion.

9 The other thing I just want to comment on
10 the law of the case to highlight the issue. I think
11 there's always a risk. If you're going to take
12 something up in an interlocutory appeal, you may get a
13 comment in there that maybe comes back down, and you get
14 a new judge, and you're not going to be able to convince
15 the new judge to do something different. That's
16 something the parties have to take into account in their
17 calculus. I'm not sure that's a reason not to ask the
18 courts of appeals to help the parties understand what's
19 going on with these statutory standards.

20 And I think where we came down, at least
21 for me and I think the subcommittee would agree, the
22 reason we ultimately decided this narrow rule was
23 probably a good idea is we just need some guidance. The
24 trial courts and the parties need some understanding as
25 to what these standards mean and how they're being

1 applied so that we can advise our clients whether it
2 makes sense to seek this or, if it gets denied, we can
3 at least understand what's going on.

4 And anyway, I'll leave it at that.

5 CHAIRMAN BABCOCK: Pete, then Harvey.

6 MR. SCHENKKAN: So it seems reasonably
7 clear from Justice Boyd's plurality opinion, which
8 combined concurrence produces the five votes that
9 says --

10 CHAIRMAN BABCOCK: You've got to speak up,
11 Pete.

12 MR. SCHENKKAN: Justice Busby's -- Justice
13 Boyd's plurality opinion was key to the five votes for
14 saying there's discretion just to say no at the end, but
15 Boyd says specifically, perhaps we can do this by rule.
16 And I don't think there's any question but what the
17 court -- the Supreme Court of Texas in its job as
18 managing the discretion, the standards for discretion of
19 the intermediate courts of appeal which determine which
20 cases reach the Texas Supreme Court and under what
21 circumstances can exercise its rulemaking discretion to
22 say we need to shift this balance. So they can do it,
23 and they're here asking us for some input on whether to
24 do it and how.

25 Now, yes, there are two different "mays."

1 One "may" is the trial court says this may advance the
2 litigation, and the court of appeals can say no, it
3 might -- there's no way this can advance the litigation.
4 That's a possible answer.

5 I'm suggesting it's possible to say, yeah,
6 it may, but it's not likely enough, and that's why we're
7 not going to do it.

8 And what I'm trying to understand is, are
9 there any other grounds on which a court of appeals
10 could say no on its may, on which it could say, yeah,
11 you're right, this could materially advance the
12 litigation. It's actually quite likely to do so, and
13 yet nevertheless we say no. I'm kind of thinking that's
14 likely to be error.

15 MR. PHILLIPS: The statute specifically
16 says they can say no, even if --

17 MR. SCHENKKAN: But I'm saying if their
18 "no" is because it may but it is not likely enough,
19 that's what I think they mean by their "may."

20 So I'm trying to understand, is there any
21 other subset of cases in which it is generally possible.
22 It's just very damn unlikely.

23 CHAIRMAN BABCOCK: So you're saying this
24 second "may" isn't additive of anything? So, if they
25 said no, but your two requirements are met, but I've got

1 another two things --

2 MR. SCHENKKAN: I'm saying it's focusing
3 our attention as input to the Chief and the Chief's
4 colleagues, for whatever it's worth, from the rest of us
5 that the question is, do you really want to tell the
6 courts of appeals to say anything other -- after having
7 said you got all the procedure right and, yes, there's a
8 controlling question of law, and, yes, there's a
9 material ground of difference, all that's true, and we
10 still don't want to take it, is there any scenario under
11 which there -- that is anything other than a difference
12 of professional judgment by the three members of the
13 intermediate appellate panel with the trial judge on how
14 likely this is to, in the long run, advance the
15 efficiency of the process?

16 CHAIRMAN BABCOCK: Can you ask that
17 question a different way? Could you say under what
18 circumstances would there be abuse of the -- of
19 discretion with the second "may?"

20 MR. SCHENKKAN: Yeah, that -- that's my
21 question and I don't understand --

22 CHAIRMAN BABCOCK: Well, what's the
23 answer --

24 MR. SCHENKKAN: -- that seems to be all
25 there is.

1 CHAIRMAN BABCOCK: Okay. Now, Harvey.

2 HONORABLE HARVEY BROWN: Well, I mean the
3 three-person plurality opinion says it's unfettered
4 discretion. The concurring opinion of two justices says
5 absolute. That sounds like there is no way to undo
6 that.

7 But it seems to me that if you can't get
8 three justices -- any one of them -- to write on this,
9 that means it was not interesting to them. They don't
10 think there is either, A, they don't think there's an
11 error or, B, they think the error is pretty small and
12 not likely to be very important, and none of them want
13 to write on it. Then we are going to put judicial
14 resources forward for basically just one purpose, and
15 that is to educate the lawyers who can educate the
16 clients because you're not advancing the case at all
17 because all the judges have agreed this isn't important.

18 It just seems like to me that's a high cost
19 to advise clients. I agree that it's helpful. I mean,
20 I'd like it in a summary judgment context like I said.
21 I'd like it in an expert context. I'd like it from the
22 Supreme Court. But we don't do that because of extra
23 workload, and it seems like, to me, that benefit does
24 not offset the burden on the courts when no one's
25 interested in it.

1 I mean, I remember the first time this came
2 to me when we were debating it, and there was a little
3 bit of debate between us that, in the end, all three of
4 us agree, but to then take that and have to write it
5 would have taken a fair amount of resources.

6 CHAIRMAN BABCOCK: Okay. Lisa and then
7 Richard.

8 MS. HOBBS: I don't mean to bring up any
9 motion for new trial controversy, but there was -- y'all
10 remember the way that came about. It was, you trial
11 courts need to state the reasons they're going to grant
12 a motion for new trial, and the court said, yes, you
13 need to state the reason, and we went into the
14 specificity of that. And then the next question is, Are
15 we going to review the ground stated? And there are a
16 lot of people who are like, well, didn't you already
17 answer the question, do you want to state your reasons,
18 and so, of course, we're going to review them.

19 And I actually took the position, no, there
20 are reasons you would require a judge to state the basis
21 of your reasoning because it's individual
22 accountability, right? So, if an appellate court needs
23 to say this is why we're not going to take this, even
24 though they have very broad discretion on whether to do
25 it, it's making you get into your head and not just

1 because, well, I'm too busy.

2 There is value in stating the basis for
3 your ruling. I might advocate it in a summary judgment.
4 I'm glad we're not there yet, but I do think that if you
5 could tell the parties you did not -- just identify the
6 specific statutory element that was not met, it really
7 gets judges -- appellate court judges to focus on why do
8 I think this permissive appeal that a trial court
9 allowed to go up and at least one party agrees, then
10 why -- why am I doing -- just identify the specific
11 element.

12 Going to the three buckets -- and I know
13 there's some disagreement about the three buckets. I
14 don't know that I would say, if you get to that second
15 "may," you need to say, I just don't like these parties
16 or my docket's too busy, I've got too many damn cases,
17 which might be that the concurrence is a valid reason to
18 deny it. But there is a reason to require courts to
19 identify for the parties, but not just for the parties,
20 but for personal accountability.

21 The statute says you -- you know, this is
22 the standard for a permissive appeal. If you are not
23 going to take it, then at least go through a pro forma
24 order or opinion or whatever to say why you don't think
25 it meets the standard.

1 CHAIRMAN BABCOCK: Okay. Richard and then
2 Roger.

3 MR. ORSINGER: Well, I continue to have a
4 concern that putting too much weight on the denial order
5 might have effect -- unintended effect. It
6 clearly would be helpful if the Supreme Court had said
7 that the courts of appeals need to do more than just
8 deny it. They need to do something to explain the
9 reason or identify the reason. But the denial is not
10 the same as the granting of an appeal and writing an
11 opinion that then the Supreme Court then reviews.

12 So I would feel better if we had a comment
13 that said that an order denying, no matter what it says,
14 no matter how specific it is, is not -- is not law of
15 the case. I would feel better about that because I
16 don't think it should be law of the case, and I don't
17 think it should be considered truly really on the merits
18 for anything other than the purpose of the trial court
19 disposing of the rest of that case.

20 CHAIRMAN BABCOCK: Roger, then Justice
21 Christopher.

22 MR. HUGHES: Two points. First, the
23 comparisons of the motion for new trial, it is
24 imperfect, and it was done to protect jury verdicts.
25 And remember, when we -- the way that law developed,

1 it's like if the judge is going to deny the motion for
2 new trial, they don't have to say anything other than
3 deny. It's when they want to upset the jury system and
4 grant the motion, then they've got to explain themselves
5 and have a valid reason.

6 And so, if we were going to apply the
7 analogy, if we're going to upset the apple cart and
8 grant the motion, yeah, they maybe ought to explain
9 themselves. But if they're going to deny it, the
10 analogy says they don't have to explain themselves.

11 But I think it comes down to this: the
12 discretion to grant or deny has been given by the
13 Legislature. That's the ones that decided that they
14 have discretion. And if the Legislature, when they
15 enacted the statute the way they wrote it, intended the
16 court of appeals to have unfettered or, as we say in the
17 Valley, bulletproof discretion, then this whole exercise
18 is just about how many angels could dance on the head of
19 a pin.

20 If the bottom line is, when we get past the
21 procedural and statutory requirements being all
22 satisfied, I can still say no and there's nothing you
23 can do about it, then -- we have a place for that in the
24 Valley. I don't live there anymore, but we did. It's
25 called snake bit. You're not going to win. You're just

1 snake bit, and that's the thing.

2 If we're going to say that they can say,
3 yeah, you satisfied all the requirements, all the Ts are
4 crossed, all the Is are dotted, but we don't have to
5 take it, and there's not a thing that -- and we can't be
6 reversed for doing it, then why are we putting the court
7 of appeal through this drill?

8 And I'm sorry, the decision as to whether
9 the discretion is bulletproof or not, it's not going to
10 be decided by a rule. It's going to be decided by the
11 statutory construction.

12 CHAIRMAN BABCOCK: Justice Christopher.

13 HONORABLE TRACY CHRISTOPHER: I have a
14 couple of questions.

15 First of all, did you figure out how many
16 permissive appeals were filed in the Supreme Court after
17 Sabre Travel and how many they accepted?

18 MR. PHILLIPS: Didn't look at that.

19 HONORABLE TRACY CHRISTOPHER: Okay. Well,
20 see, if the Supreme Court said in Sabre Travel, it
21 doesn't matter that the court of appeals didn't rule on
22 it, you just asked us to rule. So won't the Supreme
23 Court have to explain why they're not taking it if we
24 change this rule? Something for the Supreme Court to
25 think about because, you know, I mean, why not?

1 CHAIRMAN BABCOCK: It's on --

2 HONORABLE TRACY CHRISTOPHER: That's all
3 I'm saying.

4 MR. HARDIN: There's seven not represented.

5 CHAIRMAN BABCOCK: That's right. Justice
6 Gray.

7 HONORABLE TOM GRAY: The way you can get me
8 on board to agree to this would be if we added this
9 workload, along with sovereign immunity and business
10 court appeals, to the workload of the statewide
11 intermediate appellate court.

12 CHAIRMAN BABCOCK: Okay. Here we go.
13 Robert.

14 MR. LEVY: I was just thinking about the
15 issue that Lisa mentioned the different categories that
16 might be the basis for denial. Could it be as simple as
17 just having a form that the court of appeals fills in
18 when they're denying the motion, just it doesn't meet
19 this, we find it's not -- similar to what your court
20 did, just very simple check box that says this is the
21 basis for the denial?

22 Speaking as a lawyer and as a client, when
23 your appellate lawyer comes and says we think this is a
24 situation for a permissive appeal, you invest the money.
25 It's not a small amount of money, and then you get a

1 denial back. You're kind of left wanting, and the cost
2 of that, because you felt that it was worthwhile, but
3 then you're just faced with not knowing.

4 And so would it be a compromise to do this
5 in a way that simply is checking the box, but at least
6 it gives some information to appellate clients?

7 CHAIRMAN BABCOCK: Richard, the family law
8 bar is going to be opposed to the form, right?

9 MR. ORSINGER: You may be past that.

10 CHAIRMAN BABCOCK: We're rather past that?
11 Well, I think our food is beckoning us, so we need to
12 vote on this.

13 So we have the language in front of us as
14 mentioned by the subcommittee, and we're going to vote.
15 Those in favor of adding subsection L to Rule 28.3 when
16 petition denied -- if the petition is denied, the court
17 must specifically identify in its order the reasons, if
18 any, that petition did not satisfy the statutory or
19 procedural requirements for a permissive appeal,
20 everybody in favor raise your hand.

21 MS. HOBBS: You're leaving out identify?

22 CHAIRMAN BABCOCK: Yeah. Is there somebody
23 behind you, Lisa?

24 UNIDENTIFIED SPEAKER: Yeah, there is.

25 MS. HOBBS: Yes, not my vote.

1 CHAIRMAN BABCOCK: Everybody opposed raise
2 your hand.

3 Well, the vote is close, but it is the --
4 vote in favor has 14 and the vote against has 12. So
5 the court will consider that we are almost evenly split
6 but not so split that I would have to vote. The Chair
7 has not.

8 Judge Wallace.

9 JUDGE WALLACE: I agree with Justice Gray's
10 comment. I think we need to take out "if any" because
11 you're saying there's got to be a reason in the phrase
12 "if any."

13 CHAIRMAN BABCOCK: Now, it is to be noted
14 that the Chief is not leaving in anger.

15 MS. HOBBS: He heard me say that I threw a
16 flag at him.

17 CHAIRMAN BABCOCK: There is wedding news
18 afoot. The Chief is going to preside over a marriage --
19 over the lunch hour, and speaking of marriage, Richard
20 Orsinger on Valentine's Day, very romantic, got married
21 to his fiance for I think two or three decades, Joan
22 Jenkins, and so we believe he is in for a round of
23 applause.

24 (Applause.)

25 CHAIRMAN BABCOCK: Yeah, Rich.

1 MR. PHILLIPS: Can we just -- I think I
2 know this, but 28.2, our recommendation the court ought
3 to consider repealing 28.2.

4 CHAIRMAN BABCOCK: Everybody in favor of
5 repealing 28.2 raise your hand.

6 MR. PHILLIPS: That is the one that agreed
7 interlocutory appeals, only for cases filed before
8 September 1st, 2011, which there probably shouldn't be
9 any problem.

10 CHAIRMAN BABCOCK: Anybody opposed to 28.2?

11 PROFESSOR CARLSON: Are we done?

12 CHAIRMAN BABCOCK: Do you want to vote
13 against 28.2? So there were 14 votes to repeal 28.2,
14 and there were no votes in favor of retaining it. So
15 that's that.

16 Lisa.

17 MS. HOBBS: I just wanted to add --

18 CHAIRMAN BABCOCK: But you're winning,
19 Lisa.

20 MS. HOBBS: -- I had a conversation but on
21 the backup conversation, if the court was so inclined,
22 they could say, specifically identify the statutory
23 grounds in the first part of the section, and that would
24 not require a court of appeal to talk about that third
25 bucket that we may have disagreement with what that

1 third bucket is, but it wouldn't tie it to the statutory
2 language, and I'd just like that for the benefit of the
3 staff who go back and look at the transcript of a way to
4 know that even --

5 CHAIRMAN BABCOCK: Richard, is this --

6 MR. ORSINGER: I want to respond to Justice
7 Wallace's comment about "if any" which troubled me, too.
8 But if you take it out, it kind of creates an inference,
9 the only grounds to deny is a failure to meet the
10 statutory requirement. It's possible to meet all the
11 statutory requirements that the court would still not do
12 it, and that's why I think "if any" should stay in.

13 CHAIRMAN BABCOCK: Okay. So anymore
14 comments, if any?

15 So let's go to Rule 52, and Rich, I see
16 your handiwork in this, too.

17 MR. PHILLIPS: Well, I'm on the
18 subcommittee, but I'm not going to take -- I think Pam
19 took the lead on it.

20 HONORABLE BILL BOYCE: I'll present.

21 CHAIRMAN BABCOCK: Bill, okay. Where's
22 Pam?

23 (Simultaneous speaking.)

24 CHAIRMAN BABCOCK: You went over to the
25 other side.

1 HONORABLE BILL BOYCE: I'm working for a
2 living.

3 CHAIRMAN BABCOCK: Okay. Bill.

4 HONORABLE BILL BOYCE: All right. So we
5 actually touched on this a little bit in our prior
6 discussion. There are two thoughts behind this rule
7 proposal. Number one is to sync up the handling of
8 mandamus petitions with the rules that govern other
9 appellate procedures, such as an appeal on the merits
10 and so forth, and that is to state affirmatively that a
11 denial of petition for writ of mandamus that is based on
12 a curable technical issue, provide the verification, you
13 didn't put the right stuff in the appendix, things of
14 that nature, there should be notice and an opportunity
15 to cure that. So that's part one.

16 Part two is to be a little more precise
17 about the disposition of the petition through mandamus.
18 The current rules speak in terms of grants and denial.
19 The proposed rule amendment would expressly authorize
20 dismissal, which may be the appropriate disposition, for
21 example, if somebody tries to mandamus a person or an
22 entity who is not among the list of mandamusable people
23 in the statute for that particular court.

24 So that's the short version. I think Chief
25 Justice Christopher has already expressed a view about

1 at least the first part of the proposal.

2 CHAIRMAN BABCOCK: She accused you of going
3 over to the dark side.

4 All right, Lisa. You're perky today.

5 MS. HOBBS: Well, you're talking about
6 appellate rules, what I do for a living, and Chief
7 Justice Christopher will be pleased I'm not on the dark
8 side on this.

9 I agree that mandamuses should be denied
10 without the court of appeals telling us specifically
11 why, and as I was wrestling with why I have such a
12 strong opinion on the court should grant or state the
13 reasons for denying a permissive appeal and equally
14 strong views that they should not have to explain or
15 even give notice and opportunity to cure on the defect
16 on the mandamus petition, my first thought is, like, get
17 consistent. If you're going to advocate for one,
18 advocate for the other. Right?

19 But I've come around to this. My gut has
20 reasons for taking two different reasons, and one of
21 them is the nature of a mandamus proceeding. This is a
22 rare writ. It is an equitable remedy. So this is not
23 an appeal. It's actually an original proceeding whose
24 basis is inequity and is fair for the court of appeals
25 to say dot your Is or cross your Ts or go away because

1 it's equitable. Right?

2 So that was a shallow reason why I could
3 take different positions on this, but really, when it
4 really came down to it, it was, when you have a
5 permissive appeal, you have fought hard as a trial court
6 to get that order granting a permissive appeal. There
7 is a gatekeeper at the trial court to say, sure, you can
8 go up. That's going to, like, delay the trial court
9 proceeding. Yes, it's going to cost people money to go
10 up, but I believe there's -- there is a judicial,
11 nonparty gatekeeper in allowing that to go up.

12 And mandamus, anybody can go up for any
13 reason and quickly and cause the same delay that a
14 permissive appeal will cause, but with no gatekeeper.
15 And if they want that extraordinary relief, they need to
16 dot their Is and cross their Ts, and I don't think that
17 the court of appeals should have to tell them when they
18 haven't because of the equitable nature and because
19 there isn't anybody being a gatekeeper.

20 It can really -- you can get a trial halted
21 in a moment just for a mandamus proceeding that doesn't
22 actually comply with the mandamus threshold. It's
23 very frustrating. So, in addition to all the things
24 that have been said about workload and we shouldn't have
25 to do this, I hundred percent agree with that. Makes me

1 inconsistent with that position, but I agree with all
2 that.

3 But I just wanted that as to explain why I
4 was in favor of the permissive appeal rule that we just
5 voted on, but I am against giving further work to the
6 court of appeals on mandamus.

7 CHAIRMAN BABCOCK: Okay. Well, we'll go to
8 Levi and then Bill and then Robert and then Rich.

9 HONORABLE LEVI BENTON: In all the years
10 I've been licensed to practice law, over the years --

11 THE REPORTER: I'm sorry, can you speak up,
12 please?

13 HONORABLE LEVI BENTON: Yes, ma'am. No
14 one's ever said that.

15 CHAIRMAN BABCOCK: There's always a first
16 time.

17 HONORABLE LEVI BENTON: There is nothing
18 intensive jurisprudence that offends me more than an
19 intermediate court denying a petition for mandamus and
20 not explaining why and then having the high court take
21 it and say we really wish the intermediate court had
22 done its job. There's nothing more offensive.

23 And I know I might be having gone to the
24 dark side, but it is -- to the taxpayers of this state,
25 it's like -- I'm sorry, I'm on the record --

1 (Simultaneous speaking.)

2 THE REPORTER: You're all talking at once.
3 I can only take one person down.

4 HONORABLE LEVI BENTON: With all due
5 respect to my dear friend Lisa, there is a gatekeeper on
6 these issues. There is a trial court who has said no,
7 Mr. Hardin, you cannot have that discovery because I
8 didn't really like Mr. Perdue's lawyer. So we've got to
9 fix this mess.

10 I could go on but I yield back.

11 CHAIRMAN BABCOCK: Okay. Chief Justice
12 Christopher had her hand up and I missed it, and then
13 Bill and then down the line.

14 HONORABLE TRACY CHRISTOPHER: So I'm not
15 going to talk about workload, but I'm going to talk
16 about the way this rule is written. And the reason why
17 I'm going to talk about it is there are a few judges on
18 our court that routinely impose this rule in all
19 mandamuses, and if the two of them are on a panel
20 together, then we have to do this rule. If they're
21 split up, then no, and one of them often dissents. So
22 it's quite an ongoing little brouhaha in my particular
23 court.

24 It has not gained traction in any other
25 court of appeals, and actually, I was looking for this

1 particular justice's name involved in this, but I didn't
2 see it. So he's probably gotten somebody else to do his
3 dirty work on it.

4 Okay. Here's my problem with the way it's
5 written. So sometimes you'll get a mandamus and you'll
6 look at it and you'll say adequate remedy by appeal, but
7 it's also defective, right? And if I'm on a panel with
8 these two particular judges, they make the lawyer fix
9 the mandamus before they say denied, which to me is a
10 total waste of time and effort and money. And his
11 thought process is, well, I can't examine the merits of
12 the case until the procedural problems are fixed because
13 maybe that will change my mind when they fix the
14 procedural problem.

15 So the way this is written does not help me
16 with my dispute with my colleagues. I could say I'm
17 denying this mandamus because adequate remedy by appeal,
18 all right, without mentioning the defect. So the
19 question is, if there are defects, do I always have to
20 do this, or -- because the way it's written, to me, it's
21 confusing.

22 You know, if we have to do it, we have to
23 do it. We are now doing a checklist on our website for
24 mandamuses -- it's probably up there now -- on what
25 needs to be in a mandamus because of this ongoing

1 dispute with the court -- within the court on the formal
2 requirements for mandamus which are lengthy and often
3 fail.

4 My thoughts.

5 CHAIRMAN BABCOCK: Bill.

6 HONORABLE BILL BOYCE: So I want to address
7 Chief Justice Christopher's comments in a moment.

8 I just want to observe what I think is
9 maybe the discussion conflating two different things
10 because I do not perceive this rule to be addressing
11 whether or not courts of appeals have to explain why
12 they are denying a petition for writ of mandamus. I see
13 this as a separate procedural rule, safeguard, whatever
14 you want to call it, providing for notice when there is
15 a procedural defect that will otherwise prevent the
16 mandamus from getting reached perhaps.

17 So I don't think we're talking about should
18 the courts of appeals explain why they're denying
19 mandamuses. And perhaps the rule can be written more
20 clearly to reflect that.

21 To Chief Justice Christopher's point, my
22 initial reaction is that if the petition does not -- if
23 the petition brings up an issue for which there is an
24 adequate remedy by appeal, then it is not being denied
25 for formal defects or irregularities, but there's

1 probably some wordsmithing that can be done to try to --

2 HONORABLE TRACY CHRISTOPHER: You got me.

3 HONORABLE BILL BOYCE: I'm here to help --

4 to try to address the circumstance where it's both

5 substantively not going to get granted and procedurally

6 defective, and you know, that may be an outlying

7 discussion we have.

8 But I do want to just make a point that I

9 really see this as -- as I put before, syncing up the

10 way that procedural defects are handled in a mandamus

11 proceeding with the way they're handled in other

12 appellate proceedings. And, yeah, mandamuses are

13 different and they're supposed to be special and

14 extraordinary, but you know, the policy of the courts as

15 expressed in rule and expressed in court opinions is,

16 you know, we don't throw out your appeal because there

17 is a tiny glitch in the notice of appeal if we can

18 figure out that you intended to appeal, and that same

19 policy and logic, it seems to me, would be applicable to

20 all forms of appellate mechanisms that are being

21 invoked.

22 And if we want to be stricter about when

23 you can get mandamus, then we can be stricter about it

24 in terms of the standards that are applied about whether

25 or not it's going to be granted.

1 But the overall policy of allowing things
2 to be decided more on the merits and less on procedural
3 defaults seems to me to be pretty equally applicable.

4 CHAIRMAN BABCOCK: Robert.

5 MR. LEVY: I agree with Justice Boyce's
6 comments, and in response to Lisa, I do think that our
7 courts are providing a customer service, and we need to
8 make sure we take care of our customers. In the rush of
9 time to -- and mandamuses are typically under very
10 stressful situations and submitting a mandamus, and it
11 turns out that the notary public jurat is expired and I
12 don't notice that, but the court of appeals does and
13 says it's not a valid notarization on the verification;
14 therefore, it's denied -- it just seems like that's a
15 gotcha. And there's no reason why we can't address that
16 rather than, you know, just denying the relief that
17 otherwise might have been very well stated, and you
18 would never know. And I think that Justice Boyce is
19 saying we need to get away from those gotchas and try to
20 focus on providing the service.

21 CHAIRMAN BABCOCK: Okay. Rich, I think
22 you're next.

23 MR. PHILLIPS: Yeah. Bill covered what I
24 was going to say. This is supposed to be limited to the
25 technical, curable defects, not suggesting the court has

1 to explain why you're not getting mandamus relief. But
2 if you're going to kick it for something that could be
3 fixed, then let's get with the rest of the rules and
4 give them a chance to fix it before you kick it.

5 CHAIRMAN BABCOCK: Harvey.

6 HONORABLE HARVEY BROWN: One problem is
7 that many times that those are technical defects, it's
8 not one gotcha. It's there's three, four, five defects,
9 and then overall the briefing is just poor and makes the
10 appellate justices' job much more difficult. Poor
11 briefing just makes the job harder to figure out what to
12 do and what the cases say and how you want to write an
13 opinion.

14 So I often saw that blend. There was
15 multiple defects. There was other problems as well. It
16 seems to me that if we had a petition back in the old
17 days and we thought it was good on the merits but it had
18 a technical mistake on the notary, I just feel confident
19 that one of us would have said, you know, this has
20 merit, they got a mistake here, we should advise them.
21 But to say the court has to in every situation when
22 there may be multiple ones just seems like, to me, kind
23 of ties the court's hand more than it needs to.

24 The court will recognize when it's a really
25 gotcha situation and tell the court -- tell the parties

1 just that, and let them fix it if there's merit to the
2 case.

3 CHAIRMAN BABCOCK: Roger.

4 MR. HUGHES: Well, I'm sympathetic to
5 allowing people to cure technical defects and that that
6 doesn't become the reason for dismissal. What I'm
7 concerned about is the absolute screaming emergency
8 cases where I need to know, where the court's got to
9 decide today, and the usual practice that I've seen
10 almost everywhere is if you come in with a motion for
11 emergency relief with a petition, either you get an
12 order granting the emergency relief at the end of the
13 day or you'll just get a summary order it's being
14 dismissed.

15 I'm wondering how we build in a protection
16 that the parties -- that the party doesn't end up with a
17 gotcha but on a technicality that they can't get time to
18 fix; that is, maybe the court would like to give them
19 time to fix, but they need to move on to the Supreme
20 Court or have it resolved right away.

21 So I'm wondering, is that somehow built
22 into the rule or do we just have to hope that the court
23 will entertain the petition and not deny it? What I'm
24 thinking is that perhaps add some sentence that the
25 court would be allowed to put in the order that any

1 defects are being overlooked or forgiven in the interest
2 of being expeditious to deal with the emergency relief
3 issue.

4 I leave that where I said it.

5 CHAIRMAN BABCOCK: Judge Peeples.

6 HONORABLE DAVID PEEPLES: Speaking for the
7 appellate judges, it would seem to me that if you see a
8 petition for mandamus and you look at it and think I'd
9 like to consider this or it seems to have merit but they
10 didn't touch all the bases, how often -- attorneys do
11 this and how often does it happen, that you'll say deny
12 because of not sworn or -- or whatever it is. In other
13 words, basically, we have precedent and we'd like them
14 to re-file, kind of like Harvey Brown was stating a
15 minute ago. You think you kind of like it and you want
16 to tell them there's a defect, but you're not imposing
17 rules on the appellate courts in every case.

18 I get that.

19 CHAIRMAN BABCOCK: All right. Justice
20 Christopher, then Justice Kelly.

21 HONORABLE TRACY CHRISTOPHER: I think that
22 that is a judgment call that courts will handle
23 differently. So if -- and really, the question at heart
24 is are all the requirements in the rules about mandamus
25 somehow jurisdictional or not, right? Which there's no

1 case law on that.

2 So if you have -- you've got a mandamus.
3 You have failed to give me the reporter's record or a
4 statement that there was no reporter's record, right --
5 that's one of the gotchas that gets people all the
6 time -- but I think your case has merit, I will say,
7 Request a response from the other side, and, oh, by the
8 way you need to tell us whether or not there was a
9 reporter's record.

10 Some people who think it's jurisdictional
11 will not grant the relief, will not ask for corrections.
12 They'll just deny it.

13 So, as far as I know, there's no case law
14 on it. Mandamus is a discretionary writ. It has a
15 denial. There's never law of the case. If we start
16 writing on it, it does become law of the case, but a
17 denial is not, and you can absolutely re-file if you
18 screwed up. If we tell you what you screwed up on and
19 you can re-file it, it's just another filing fee.

20 CHAIRMAN BABCOCK: Justice Kelly.

21 HONORABLE PETER KELLY: I try to -- try to
22 get my colleagues to do it as well is seems a lot of
23 times depends on the posture of mandamus coming up. One
24 issue would be -- Rogers talked about you have a
25 screaming emergency. It's going up no matter what we

1 do. We know it's going to go up to the Supreme Court.
2 That might lead to let's just deny that opinion, get it
3 out the door in ten minutes, and let someone else get
4 that.

5 But there's kind of a more leisurely
6 approach to it. You can order the petition be withdrawn
7 to correct for the lack of, say, reporter's record or
8 request a response, as Justice Christopher was saying,
9 and by the way, petition is defective because it didn't
10 include a particular statement or jurat has expired or
11 something like that.

12 I think it's incumbent on us as justices to
13 try to reach the merits of the issues and give parties a
14 chance to get the merits of the issues in front of us.
15 So I try to -- and encourage my other panel
16 members doing this -- I'll sign-off on this as long as
17 you tell them why you're doing it and try to limit it
18 sometimes just to even a clause in a sentence to say use
19 the adequate remedy or whatever it was.

20 CHAIRMAN BABCOCK: Thank you. Thanks,
21 Judge.

22 What other comments? Any other comments?
23 Yeah, Roger.

24 MR. HUGHES: Let me clarify. All I'm
25 saying is if we adopt this rule and you get in a

1 screaming mandamus with emergency relief, section C --
2 pardon me -- E effectively requires the court to go, so
3 we're not going to rule on your petition until you cure
4 defect A, and we'll give you until Monday to do that.
5 Well, Monday's too late or maybe -- I'm just thinking
6 maybe there will be only some waiver provision where the
7 court can say we're going to deny the petition without
8 referencing any formal defects and just, you know, we're
9 not -- the usual pro forma, you know, failed to
10 establish -- lack of adequate remedy of law and abuse of
11 discretion -- to deal with that rather than saying,
12 well, we can't deny it until we give them a chance to
13 amend.

14 I think it would be better if they --
15 saying formal defects, we don't care about them. Even
16 if you cure them, you're not getting anything. They
17 should just be able to rule that and not, so to speak,
18 tie up the workload of the court of appeals trying to
19 fix a mandamus that's never going to fit. That's all.

20 CHAIRMAN BABCOCK: Yeah, Lisa.

21 MS. HOBBS: I have a comment on subsection
22 D instead of E, which is what most of the comments have
23 been on so far.

24 CHAIRMAN BABCOCK: Okay.

25 MS. HOBBS: The first is just a comment

1 on -- I mean, the experience I had, I went up to Fort
2 Worth. I tend to be at the Fort Worth appellate bar,
3 and one of the judges from the Fort Worth court and --
4 yeah, my topic was mandamus, and I was do you have any
5 idea why the Houston court say it's missing things
6 instead of denying things, like, I can't make heads or
7 tails of it. He was, like, oh, that's weird, I have no
8 idea because I'd been granted access. So you remember
9 that, you know, one or the other, right? So it was an
10 entry -- and I was talking with the staff attorney, too,
11 and he was, like, I can't make heads or tails of why
12 this was dismissed or denied. So that was just an
13 interesting conversation.

14 This goes into my question about D, which
15 is the court may dismiss the petition based on lack of
16 jurisdiction. I understand why that's a dismissal. For
17 want of prosecution, I understand why that's a
18 dismissal. But what does order as required by statute
19 mean that would not be -- you mandamused the wrong
20 person --

21 HONORABLE BILL BOYCE: And the example
22 would be a vexatious litigant.

23 MS. HOBBS: Can they review -- can they get
24 mandamus reviewed if they want to re-file a lawsuit in
25 the first place? I think that I can get that by

1 mandamus, so -- so there's a part of a vexatious
2 litigant -- they were never -- if they're a vexatious
3 litigant, presumably they weren't ever allowed to file
4 anything in the trial court. I don't know what the
5 statute says about vexatious litigants. Either they
6 don't have review of that or the -- I can't think of the
7 statute that gives them mandamus review of that, but
8 maybe I'm wrong.

9 CHAIRMAN BABCOCK: Judge Evans.

10 HONORABLE DAVID EVANS: As a response,
11 every judge has responsibility for allowing the filing.
12 A judge exercises its -- and so it's -- it is up to
13 local administrative judge subject to mandamus.

14 MS. HOBBS: And if -- when it would be
15 dismissed as required by the statute? Wouldn't the
16 court of appeals --

17 HONORABLE DAVID EVANS: Not my opinion.

18 MS. HOBBS: I'm just trying to understand
19 the language. I can't think of a situation.

20 CHAIRMAN BABCOCK: Levi.

21 HONORABLE LEVI BENTON: Just to help Lisa
22 understand, the declaration of mandamus -- that if from
23 if appealing, okay. But then I come back the next day
24 and I -- against Sullivan, well, I'm not -- I'm not
25 permitted to fight that suit, and that's where -- so it

1 shouldn't be a mandamus on the AJ's order saying I can't
2 file that suit.

3 HONORABLE DAVID EVANS: Well, I think the
4 LAJ has to have -- has to be standards to follow on
5 whether or not to allow the --

6 HONORABLE LEVI BENTON: Yesterday, you
7 declared me that --

8 HONORABLE DAVID EVANS: It's -- vexatious
9 litigant orders are always based on a particular suit,
10 the case of a different party. That may not fall under
11 the prior order.

12 MS. HOBBS: But either way, I don't
13 understand where there's a statute that would require
14 dismissal of that mandamus procedure, assuming that
15 there's a finding there.

16 HONORABLE PETER KELLY: There is one
17 vexatious litigant in the Houston area and files all
18 these suits pro se, filing orders as a vexatious
19 litigant, remember it's simply saying he can't file
20 unless an attorney has signed off on it. Hire an
21 attorney to sign off on the petition and then you file
22 the pro se mandamus and it has not been signed off on.
23 So, under the terms of the statute and order, he's now
24 violated the order. He started off fine, because he
25 paid the lawyer to sign-off on the petition, but now

1 they're coming to our court pro se, he's violated it and
2 gets dismissed under the terms.

3 MS. HOBBS: Why is it dismissed under the
4 terms of the order instead of just denied? Because
5 it's --

6 HONORABLE PETER KELLY: I don't recall
7 exactly.

8 MS. HOBBS: Okay. It's the dismissal
9 versus deny that is -- it just struck me as I don't know
10 what you mean, and I've been doing this a long time.
11 I'm definitely open to areas that I don't know,
12 especially these are --

13 HONORABLE PETER KELLY: Chief Justice
14 Christopher's court is more interesting than mine.
15 Sometimes there is some debate about re-file versus
16 dismissal, and I think we sort of looked at it as
17 ultimately a distinction without a difference for the
18 ultimate resolution of the dispute. With regard to one
19 particular issue of vexatious litigant, I think that's
20 what we're talking about.

21 CHAIRMAN BABCOCK: Rich.

22 MR. PHILLIPS: I think it's not appealing
23 the vexatious litigant determination. It's just talking
24 about somebody who has been declared one is not allowed
25 to file something without an order, or whatever the

1 terms of that order are. So they file that mandamus
2 petition, and that's in violation of being a vexatious
3 litigant. You don't get to the merits. You don't deny
4 it. You just -- it's dismissed because they violated
5 the statute on filing.

6 CHAIRMAN BABCOCK: Roger, and then Justice
7 Gray.

8 MR. HUGHES: One thing I want to speak in
9 favor of section D. I think it is helpful if there is a
10 problem with jurisdiction, et cetera, that the court
11 should -- the rule states may dismiss for that. I've
12 had cases where people call me about why did my mandamus
13 petition get dismissed. Well, what does the order say?
14 Well, one court was actually nice enough to tell
15 somebody lack of jurisdiction. Oh, you should have
16 filed in the Fourth Court instead of the 13th Court.
17 And of course, that's very helpful to have that
18 information. I don't think that there's a real
19 jurisdictional issue. Being able to just say that could
20 be very helpful to the litigant and the counsel.

21 CHAIRMAN BABCOCK: Justice Gray.

22 HONORABLE TOM GRAY: Well, first, I
23 apologize for Pam -- to Pam because I had promised her
24 that I was not going to speak on the subject. So, if
25 she reads this in the record, she will know that I

1 apologized in advance.

2 CHAIRMAN BABCOCK: Will she forgive you?

3 HONORABLE TOM GRAY: She may not forgive me
4 but, you know, it's --

5 MR. WOOTEN: I'm pretty sure she wouldn't
6 hold you to that. Now, Judge Christopher --

7 HONORABLE TRACY CHRISTOPHER: Not
8 reasonably reliant.

9 HONORABLE TOM GRAY: But what I rise to
10 speak about is vexatious and pre-filing orders are
11 different. So a pre-filing order can be rendered
12 because of it being vexatious, but they are not mutually
13 exclusive. So that's kind of a gnat in this general
14 conversation.

15 But the specific that I had mentioned to
16 Pam about why this extension needed to be there is
17 because we see litigants that have pre-filing order
18 requirements slip by the clerk and get something filed,
19 and then the statute requires that the clerk dismiss
20 it -- dismisses it when it is brought to their
21 attention. That is the specific example that caused
22 that phrase to be included, and as I said to Pam, I am
23 sure there are others. I just can't think of them right
24 off the cuff as we speak.

25 Since I've already violated my promise --

1 CHAIRMAN BABCOCK: Keep going.

2 HONORABLE TOM GRAY: Thank you. I wanted
3 to address Roger's comment about this problem of the
4 need for emergency. We routinely, and I do mean
5 routinely, use Rule 2 to lift all or suspend -- in the
6 language of the rule -- to suspend the procedural
7 requirements of the mandamus filing so that we can get
8 to the merits thereof and summarily deny it or, on the
9 occasion where we think there may be something there
10 that needs to be addressed, we will use it to lift the
11 procedural requirement and request a response. And we
12 put that Rule 2 language usually in a footnote right on
13 the front of the opinion or front of the order, so...

14 CHAIRMAN BABCOCK: Cutting edge stuff.

15 HONORABLE TOM GRAY: Hey, look.

16 CHAIRMAN BABCOCK: All right. Are there
17 anymore comments on the proposed rule? I smell lunch
18 and so I know everybody's itching to vote.

19 So everybody that's in favor of adding
20 subsection D and E to Rule 52.8 raise your hand. All
21 right. Everybody opposed raise your hand.

22 All right. By a vote of 16 to 9, the
23 people in favor prevail over the people opposed, and
24 that means we can have lunch.

25 We'll be back at 1:25 p.m.

1 (Recess from 12:21 p.m. to 1:25 p.m.)

2 CHAIRMAN BABCOCK: All right, guys. Let's
3 get going.

4 Just before lunch, the Chief got a letter
5 that is very sad news for all of us, and I'll let him
6 inform us what happened.

7 HONORABLE NATHAN HECHT: So I said earlier
8 we're missing Justice Miskel now today, but I had
9 noticed we were missing another. And it's my sad duty
10 to tell you that our good friend and colleague for many
11 years Richard Munzinger passed from this life on Sunday.
12 I should have noticed his absence right way because how
13 could you not miss Richard, and he would have loved to
14 debate this morning and had several things to say and
15 would have said them as fervently as he could, as he
16 always did. He was a great lawyer. He was faithful in
17 attending many of the meetings. He did tell me a couple
18 of times that it was hard to get here from El Paso. It
19 really added an extra day on to his meeting time, but he
20 was always here, always prepared, always insightful, and
21 well respected in El Paso at the time. So we will miss
22 Richard.

23 CHAIRMAN BABCOCK: That is for sure. He
24 was certainly one of my favorite people on this
25 committee, and he used to sit right over there next to

1 where Elaine is.

2 HONORABLE ROBERT SCHAFFER: I was just told
3 I'm sitting in his chair.

4 CHAIRMAN BABCOCK: That's it, may be his
5 chair, but he had way of expressing himself, and it was
6 with such passion and -- and he evoked our Constitution,
7 both state and federal, in such eloquent ways and I
8 think made us all think about lots of things but -- and
9 I'll miss him, and so let's have a moment of silence.

10 (Moment of silence.)

11 CHAIRMAN BABCOCK: Okay. Thanks. So now
12 we will get back to important, but more mundane, things
13 in light of that news, Rule 226a. Tom Riney is going to
14 lead us through that.

15 MR. RINEY: Thank you, Chip. We were asked
16 to address an issue regarding an instruction on implicit
17 bias in Rule 226a, and I'd like to give you a little
18 background of where we've been up until this point, and
19 then tell you we're going to punt. We would like to ask
20 a little guidance on what you think our future direction
21 should be.

22 The court Rules Committee, that is, the
23 State Bar Court Rules Committee, sometimes referred to
24 in here as the CRC, sent a proposal for an implicit bias
25 instruction to this committee, and we debated that at

1 our meeting on September 3rd of 2021.

2 Now, our subcommittee had reviewed it in
3 advance, and we recommended adoption of the language as
4 proposed by the court Rules Committee at that time.
5 There was a lot of discussion -- I want to hit some
6 highlights of that in just a moment -- but we did not
7 take a vote as a committee. However, the court Rules
8 Committee apparently looked at the transcript of our
9 discussion on the subject and sent a revised proposal
10 back, presumably to address some of the issues that were
11 raised.

12 However, that did not get to our
13 subcommittee until last week. We did go ahead and
14 schedule a call yesterday morning, and after about a
15 45-minute discussion of some of the specifics of the
16 proposed changes that they had sent to us, we decided
17 as a subcommittee that we were going to say that we
18 weren't ready to make any recommendations going forward
19 and thought that the issue merited some more study.

20 Let me go back to some of the issues that
21 were raised in September of 2021. Several people raised
22 the question about whether or not the instruction was
23 actually helpful, did it really do much good, that there
24 was certainly a worthy purpose behind it, but they
25 questioned whether it really did much good.

1 There was also a question about when the
2 instruction should be given. In the 2021 version, the
3 instruction or a version of it were to be given twice,
4 and that is, once the jury was in the box or -- I think
5 it's actually part two if you look at the rule -- and
6 also in the court's Charge. The revised proposal -- and
7 by the way, you do not have the 2021 language, I don't
8 think, in the materials that were presented to you, and
9 the reason that I mention that is that I think at least
10 some of us on the committee actually kind of liked the
11 previous language better than the current language, at
12 least in some respects, which I'll address here in just
13 a moment.

14 But -- and before I go any further on that,
15 the majority of the subcommittee yesterday decided that
16 there should not be an instruction prior to voir dire of
17 the jury, and the idea was that that may infringe, to
18 some degree, upon the lawyer's ability to make a
19 determination about bias or prejudice and that that was
20 simply not an appropriate time to do so.

21 Now, let me get to some of the other parts
22 of the instruction. In your proposal -- and candidly,
23 had we had a little bit more time -- and again, I'm not
24 blaming anybody -- but had we had a little bit more
25 time, I probably would have put together a document that

1 showed the current rule, the 2021 language, and the 2023
2 language just for comparison purposes, but if you'll
3 turn to -- and the pages are not marked -- but if you'll
4 turn to instruction in part two of the proposed amended
5 rule there is a paragraph 5 in red-line, and I just want
6 to point out a couple of issues that came up during our
7 discussion yesterday.

8 It says, Our system of justice depends on
9 judges like me and people like you making careful, fair,
10 and unbiased decisions. And then you'll see a couple of
11 sentences down it talks about, we categorize people, and
12 sometimes these categorizations involve negative or
13 positive biases or prejudices, which may be conscious or
14 unconscious. Such preferences or biases, whether or not
15 they are conscious or unconscious, should be discussed
16 now.

17 So, first of all, you're talking about
18 biases and prejudices in one sentence, and the next
19 sentence you talk about preferences or biases. So
20 that's one of the reasons we kind of like the previous
21 language. This was actually the voir dire instruction.
22 It said should be discussed now and weren't sure that
23 was particularly helpful language, not sure what it
24 meant.

25 So let's go over on to a couple of pages to

1 the -- you'll see a paragraph eight in red-line. These
2 would have been the instructions when the jury was in
3 the box. First of all, you see the switch from biases
4 or prejudices in one sentence to preference in the next.
5 Then you'll see a paragraph that says techniques that
6 you can use as jurors.

7 Now, I want to break that down because we
8 didn't really like this paragraph that says our system
9 of justice as well as we liked the previous version. We
10 thought this had the problems that I mentioned, plus it
11 was just a little bit too wordy. However, there's the
12 general consensus on the subcommittee that this
13 paragraph about techniques that you can use to check
14 whether there are unconscious biases, we thought that
15 was pretty good. Although there was some discussion
16 about eliminating the final sentence of which dealt
17 about parties, witnesses, or attorneys that had
18 different personal characteristics, we weren't quite
19 sure exactly what that meant.

20 By the way, I will mention that Buddy Lowe
21 mentioned in our discussion in 2021 that we had to be
22 careful about criticizing all prejudices and biases
23 because he said, what about if someone has a prejudice
24 against witnesses that had shifty eyes or witnesses that
25 looked down at their shoes when they're answering a

1 question, that's a prejudice, but it may not be
2 something that's inappropriate. So, again, those are
3 just some of the comments that we thought about.

4 Finally, the instruction in the jury charge
5 had some of the same language, and it's -- that's
6 actually over -- yeah, it's in paragraph 2, and it
7 follows the traditional instruction of do not let bias,
8 prejudice, or sympathy play any part in your decision.
9 Again, some of the language we liked, some we didn't,
10 and when we got to that, that's about the point we said,
11 you know, this is pretty complicated. We still had
12 questions about whether this language is really going to
13 serve a purpose or if it is effective in serving the
14 purpose that we hope.

15 Since we finished that call yesterday
16 morning, I've got a half a dozen emails from members of
17 the subcommittee, including during the meeting today,
18 talking about different resources that we could probably
19 look at -- John Kim also had some helpful suggestions --
20 to learn a little bit more about implicit bias. And one
21 of the questions is, if you're not conscious that you
22 have a bias, how can we instruct you how to deal with
23 something you don't recognize. That's what these
24 attempt to do.

25 So, with all of that, Chip, we would like

1 to at least go back and be able to compare the different
2 versions of the language, and then -- I mean, you tell
3 us how far you want us to go. I mean, we have no
4 sociologist on the subcommittee, and so we recognize our
5 limitations. But there is -- if you would like for us
6 to do so, we can look at some of these other issues.

7 CHAIRMAN BABCOCK: That's good. I think I
8 better open it up for comments, but I've got to tell one
9 quick story. One of the best answers I've heard in a
10 deposition, the lawyer on the other side had been trying
11 to get the witness to say that they had said something
12 in his conversation. The witness said, I don't remember
13 that. I don't think I said that and about the fifth or
14 sixth time, and finally, the lawyer said, well, are you
15 in denial about saying this, and the witness said, well,
16 if I was in denial, how would I know?

17 Same problem. Clever answer, I thought.
18 So we will take comments about this whole thing.

19 Judge Peeples.

20 HONORABLE DAVID PEEPLES: As a member of
21 the subcommittee, I'd like to just give some
22 overview and background, sort of a bird's-eye view of
23 this.

24 And the first thing is, these are four
25 different things that judges tell jurors during a jury

1 trial. Roman I is what we tell the panel or the venire
2 when they come in the first time. And the second thing
3 is what you tell the 12 when they've been chosen and
4 have been sworn in and they sit in the jury box. And
5 Roman III is what we tell them in the Charge of the
6 court. Number IV is what we tell them when we say
7 good-bye, thank you for your service. So, if you think
8 of it in those four categories, it helps sort things
9 out.

10 Now, as we sit here today, the only
11 reference to bias, prejudice, or sympathy is in the
12 third group, the Charge -- the instructions in the
13 Charge. And the first numbered instruction says, Do not
14 let bias, prejudice, or sympathy play any part in your
15 decision. It used to say in your deliberations. But
16 that's what is said now.

17 And the proposal from the sub bar committee
18 is to have more -- to say more about that and to say it
19 in three different places: to say it in the first part
20 to the jury panel, the venire; to say it again to the
21 jury that's been chosen, the 12; and then say it a third
22 time in the Charge of the court. And then what they
23 propose is not the same identical language every time.
24 It's sort of different.

25 And so what we need some guidance on as a

1 subcommittee is where to go on this, and I've divided it
2 into two things: placement and content. Now, the
3 placement question is, do we keep it in where it is now,
4 the bias, prejudice, and sympathy instruction, which is
5 in the Charge to the jury and elaborate on it? Do we
6 keep it there alone or do we also say something in Roman
7 I and Roman II, which is the venire, you know, the 30,
8 40, 50 people, whatever the number is, 60, and then
9 again to the 12 and then again in the Charge? Do we say
10 it in all three of those times or maybe two of them or
11 only one?

12 And then the second question, aside from
13 placement, is the content, and some of these things are
14 very, very different. They talk about -- they go
15 all the way to gender identity and sometimes these
16 proposals, things like that, and sometimes it doesn't.
17 And so the wording and the content is something we need
18 guidance on, too.

19 So it seems to me placement and content,
20 defined that way, that makes sense to me, Tom.

21 MR. RINEY: I agree.

22 HONORABLE DAVID PEEPLES: Okay. That's
23 just a bird's-eye view.

24 CHAIRMAN BABCOCK: Bird's-eye view. You've
25 been a judge for a long, long time. Do you think that

1 jurors sometimes ignore those -- that instruction: do
2 not let bias, prejudice, or sympathy play any part or
3 all of the time or mostly or --

4 HONORABLE DAVID PEEPLES: I'm sure some who
5 do some of the time. I think it makes a difference to
6 have that language in the Charge, and it's going to be
7 in the Charge, and so I heard -- and I know the lawyers
8 and judges have, too -- lawyers when they're voir diring
9 the jury and when they're talking to the 12 will
10 frequently and sometimes -- almost all the time will
11 say, now, the judge is going to instruct you, do not let
12 bias, prejudice, or sympathy play any part in your
13 deliberations. So we'll talk about it during the case,
14 and I think that does some good with jurors. Totally
15 good with everybody, obviously not.

16 CHAIRMAN BABCOCK: All right. So do you
17 think that, if you said it more often from the bench,
18 that would be a good thing or a bad thing?

19 HONORABLE DAVID PEEPLES: Chip, I come down
20 on the side of saying it where we say it right now in
21 the Charge and trusting the lawyers to mention it as
22 they see fit for the case during voir dire, when they
23 make opening statements to the 12, and then when they
24 sum up after the evidence is finished. To me, I come
25 down on saying it and saying it well and not too much

1 detail in the same place where we say it right now and
2 then letting the lawyers decide how to try the case.

3 CHAIRMAN BABCOCK: How do you feel about
4 unconscious bias? Do you think that if it's good to
5 alert jurors that there may be biases they have that
6 they don't recognize but they should?

7 HONORABLE DAVID PEEPLES: I don't know the
8 answer to that, but I can tell you that the Texas Senate
9 and Judiciary puts on a conference for new judges in
10 December of every year. And I've been there four or
11 five or six times, and I've heard the same one-hour
12 lecture four, five, six times by a professor from
13 Connecticut on implicit bias. And they're trying to
14 tell judges what it means, and I'm still working on it.

15 CHAIRMAN BABCOCK: Richard.

16 MR. ORSINGER: So, Chip, I've been thinking
17 a lot about that, this whole topic, and even more
18 dangerous than that I've been doing some research on it,
19 and I think I might have found your professor from
20 Connecticut, James Colquitt [Phonetic] who was --

21 HONORABLE DAVID PEEPLES: No, Wetsinkski
22 [Phonetic] or something like that.

23 MR. ORSINGER: Oh. Well -- and I've also
24 been talking to some of the juror selection experts,
25 those who do focus groups in jury selection, and so I

1 want to start by borrowing from the medical profession
2 the beginning of the Hippocratic Oath: First, do no
3 harm. Okay?

4 Now, that's their first principle, and it
5 should be our first principle when we're deciding we're
6 going to change things up, and I'll quote from an
7 article here that was from the National Center for State
8 Courts, 2014, written by a Jennifer Elek and Paula
9 Hannaford-Agor, and I will quote them: "To prevent
10 distribution and implementation of jury instructions
11 that may do more harm than good, any instruction of this
12 kind must be carefully evaluated."

13 Now, one of the things to consider about
14 instructing the jury is what the social scientists
15 called the backfire effect, which is that you may
16 actually make a situation worse with some people, even
17 if you make it better with others.

18 Another thing to consider is the social
19 desirability effect, meaning that once someone in
20 authority lays down a standard by which the people are
21 expected to respond, they're going to want to respond in
22 a way that makes it look like they're cooperative, that
23 they're socially resound and they're fitting in.

24 So, if you lead too early and too strongly
25 about not being biased, first of all, you may have a

1 backfire effect by some people that I'm inclined to my
2 views, but secondly, more prevalent, is that you may
3 actually motivate people to be afraid to say that they
4 have a bias.

5 And so my question is, is it the fix for
6 implicit bias, which is a bias that jurors or
7 venirepeople are not even aware they have, is the fix
8 for that to say search within yourself to find your
9 biases and don't let them affect what you're doing? Or
10 is the better approach is to structure the voir dire
11 process in such a way that the lawyers and the judges
12 can actually detect the implicit biases in venireperson
13 responses.

14 The juror selection people that I've talked
15 to are very much against any instruction that would
16 cause any jurors to be less revealing in their voir
17 dire. So that, if before the voir dire, you tell them
18 we all have biases but you're not supposed to allow the
19 biases to be expressed here in this case, you're never
20 going to have anybody or -- you'll have fewer people who
21 will raise their hands and say, yeah, I'm biased because
22 of this and that and the other.

23 So we have to worry about, in my opinion,
24 especially with the social desirability effect of
25 dampening the willingness of jurors to admit they have a

1 bias.

2 Now, the structured voir dire could make a
3 big difference. According to the research, many states,
4 as well as the federal courts, don't have much lawyer
5 participation in the voir dire. Texas doesn't have that
6 problem because our judges allow the lawyers to
7 participate in the voir dire, but from reading the
8 literature, it appears as if the lawyers and the judges
9 are all interactive in encouraging jurors to express
10 their feelings without telling them in advance certain
11 feelings are bad, then you're more likely to find out
12 who has an implicit bias, and the judge can have a
13 better foundation for challenge for cause. And in the
14 literature, by the way, they don't like leading
15 questions because you're suggesting to the venireperson
16 what the correct answer is, and they'll likely go along
17 with you.

18 So when the judges -- and in my experience
19 a lot of them in voir dire -- some of them will be up
20 there in front of the bench on a challenge for cause
21 saying they have a bias or a prejudice, and the judge
22 will say, If I instruct you on the law, you'll agree to
23 be governed by my instruction of the law, won't you, and
24 you'll decide based on the evidence. Well, now all of
25 the sudden, the judge who's the central authority is

1 telling them the right answer is for you to say, yes,
2 even though I have this bias, I will -- I will follow
3 your instruction on the law and I will make a decision
4 based on the evidence. Now, is that true or are they
5 just buckling under pressure from the judge?

6 So we need to be very sensitive that the
7 judges are not grinding the biases in the ground before
8 the lawyers find out. And my view is, the best cure to
9 implicit bias, which admittedly these people don't even
10 know they have, is not to tell them don't have what you
11 don't know you have. That's ineffective. What is
12 effective is to say be open about the way you feel about
13 things.

14 Now, a lot of the research that I saw --
15 and all of this data is pre-COVID -- was based on racial
16 bias, and that was perhaps one of the most pernicious
17 problems with the justice system for many back then, but
18 it's also very -- too valued. It's very black and
19 white, not to make a joke of it, and so it's easier to
20 test. It's easier to see what the choices are that
21 you're presenting.

22 But in civil litigation, it's not so much
23 race related, and in one of the papers I have here,
24 which I won't put in the record but I can share with you
25 later, they found out that the predominantly White

1 panels they were testing were more sympathetic to an
2 African American defense than they were a White person's
3 defense. They were more sympathetic to the Black
4 defendant, which is contrary to what you would think,
5 but that's what that study showed. But the point is, is
6 that racial bias is not really a big deal in my world on
7 the civil side.

8 What we have and what the literature shows
9 is that there's bias against tobacco companies. There's
10 bias against asbestos manufacturers. There's even bias
11 against HMOs. There's bias against corporate
12 management. There's bias against corporations.
13 Generally, there's bias against complaints of soft
14 tissue injuries in the neck. There are a lot of biases
15 that don't relate to what this rule talks about: race,
16 color, natural origination, ancestry, religion, creed,
17 age, disability, sex, gender. Those are all personal
18 qualities that don't apply to a corporation or to the
19 government or to a group of people that might be of
20 mixed whatever.

21 So I think that I'm questioning the
22 validity of the whole idea that, by telling these people
23 that they have biases that they don't realize, then they
24 should not allow them to influence their thinking when
25 they don't even really know what their biases are. And

1 people may say, oh, well, I don't have a bias based on
2 race, color, national origin, or ancestry. That's not
3 the bias we're really struggling with in civil
4 litigation in my estimation.

5 So a better cure I think, as I said
6 dangerously having thought about it, is that, number
7 one, we need to be sure we have good lawyer
8 participation and that we give the lawyers the
9 opportunity to detect the implicit bias by the
10 unconscious answers that the venirepeople are giving you
11 about what they truly think, and let the lawyers decide
12 if that's going to be pursued to a challenge for cause
13 or whether that's going to be the basis for a peremptory
14 strike.

15 So anything we can do to encourage open
16 answers will help the lawyers be the ones that decide
17 where the implicit bias is and what to do with it rather
18 than just telling people, Don't have an implicit bias.

19 The next question is: Well, what about
20 juror privacy? Now, you know, there is a privacy
21 question of, well, I've been brought here against my
22 will and now you want to find out if anybody in my
23 family has been a victim of a violent crime. Well,
24 that's private information. That's not for you to know.
25 There's reasons why we do want to know. The privacy

1 consideration is more than just a sense of invasion is
2 people are less likely to be revealing about their own
3 deep feelings in a group.

4 And so there's some writers that advocate
5 juror questionnaires as a way to determine whether
6 venirepeople have implicit biases, and of course, we
7 don't ask them, please list your implicit biases. We
8 don't do that. You ask them kind of general questions
9 and then you get their answers and you can infer that
10 they have an implicit bias.

11 And so some of the questions were, well,
12 should we send a questionnaire out before you even bring
13 them down to the jury room and exclude the ones
14 electronically that, you know, express a bias that
15 wouldn't be fair for the kind of case we've got.

16 Then you've got when they show up and they
17 fill out a questionnaire, like in Bexar County, for
18 example, just have a little small information card that
19 tells you what religion you claim, your marital status,
20 whether you've been a plaintiff or a defendant, whether
21 you've been on a jury before. That's a questionnaire of
22 sorts. It's not much, but it is -- but then there are
23 more elaborate questionnaires.

24 But that's not very practical in my
25 community because we have random assignment of the judge

1 for the trial on the Friday before the trial, and Austin
2 does, too. Travis County does, too. So we're not going
3 to be able to get questionnaires, you know, by the
4 judge -- I mean, the judges are not -- I've never tried
5 to get a questionnaire from a Bexar County judge, but
6 they're trying to get the jury impanelled and get the
7 case tried in a week, and the idea to then show up and
8 try to convince them about questionnaires, you're in
9 trouble. But if the lawyers can get together or, again,
10 if there was even some kind of jury charge that came out
11 with questionnaires that were well targeted against the
12 kind of implicit biases that we face in civil
13 litigation, that might be a useful tool.

14 And then another thing from the literature
15 is to ask prior open-ended questions, not leading
16 questions, because you don't want to lead the
17 venireperson into what the right answer is. You want to
18 find out what they really think.

19 So, having said all that, the social
20 desirability effect, to me, is the biggest risk of
21 instructing the jury about implicit bias before the voir
22 dire, and of course, you want them to be truthful in the
23 voir dire, but you also want them to be open in the voir
24 dire. So, if you're going to have an instruction on
25 implicit bias, which I question whether there's any

1 science at all that says it helps, it shouldn't be
2 before voir dire.

3 The instruction before voir dire ought to
4 be along the lines of the jurors -- I mean, the lawyers
5 are going to ask you questions -- they're personal --
6 about your feelings about things, but understand we need
7 to do this in order to pick a jury for a fair trial, and
8 urge them to be open about the way they feel so when the
9 lawyers ask their questions, if they ask about the
10 defendant, that's ask one set of questions, and if they
11 are an HMO, that's another set of questions. If they
12 represent a godless corporation, that's another set of
13 questions. Or a plaintiff that has a neck injury,
14 that's another set of questions.

15 We need to let the lawyers decide what the
16 set of questions is, what the implicit biases are that
17 they're after. And so I think I understand that this is
18 a worthy goal to try to ensure that people are made
19 aware of their implicit biases. Some people are in
20 therapy for decades in order to work through that kind
21 of thing, and I don't think we're going to cure it with
22 one or two or three instructions that say don't be
23 implicitly biased.

24 While I don't see much harm from doing this
25 later in the process, I can see a lot of harm in doing

1 it so early in the process that the lawyers and the
2 judges can't effectively detect implicit bias.

3 Well, I told you it was a danger but I just
4 got real interested, and so I read the literature.

5 CHAIRMAN BABCOCK: Read a lot. I'm just
6 worried about your therapy, but Tom.

7 MR. RINEY: Richard, to your list of groups
8 of may suffer from prejudice, I think you can safely add
9 nursing homes and lawyers. So certainly that is a
10 point.

11 But I really wanted to mention something
12 that Hayes Fuller mentioned at dinner last night. When
13 we were talking about this, he pointed out that since
14 the last time we discussed this we had Dr. Phil here,
15 and he said based on what Dr. Phil said, some people
16 could perceive these instructions as basically an
17 offensive-type accusation against them and they would
18 dig their heels in even deeper. That's why I have some
19 trepidation about our committee being able to
20 successfully determine what's appropriate, but we're
21 happy to try.

22 MR. ORSINGER: I could say Justice Grayson
23 did back in 2006, when he was here, Justice Grayson did
24 a survey at the request of the State Bar about the
25 effectiveness of our pattern jury charges, and I have a

1 copy of it right here. And he had even some stuff about
2 bias and prejudice in that, how meaningful that was. I
3 don't know if he was paid for this. He may have been, I
4 assume, but it was a State Bar of Texas commission to
5 field test these jury charges.

6 Maybe what we ought to do if and when we
7 decide we want to make an instruction on implicit bias,
8 maybe we ought to contact Jason or someone like him, and
9 say that these are our choices, would you field test and
10 see whether this is hurting or helping or not making any
11 difference.

12 CHAIRMAN BABCOCK: Good idea. Justice
13 Christopher, and then we'll go around.

14 HONORABLE TRACY CHRISTOPHER: Well, I
15 actually think we should talk about bias or prejudice in
16 number I, before voir dire, and we actually do talk
17 about it because we say, being thorough and trying to
18 choose fair jurors who do not have any bias and
19 prejudice in this particular case, and that's the spot
20 of number IV and number I.

21 That's the spot where a lot of judges will
22 give examples, all right. So they will say, you know,
23 this is a nursing home case, you know, and you might
24 have jurors that had a bad experience in a nursing home
25 and maybe that makes you biased against nursing homes.

1 And you talk about it in connection with the case. So I
2 do actually think it's good to have it there. I'm not
3 sure I like the particular wording that is in the
4 proposed rule. But I do understand what Richard is
5 saying about being careful how you say it. Right?

6 I think, though, what we're trying to get
7 at with implicit bias is not a bias against nursing
8 homes. It's a bias against race, sex, gender. Right?
9 So it's socially acceptable for a juror to say, you
10 know, I don't really like nursing homes, okay, and
11 people can explore that issue in voir dire. It's not
12 socially acceptable for someone to say I don't like
13 Black people. All right? So that is where you are
14 going to have the unconscious bias/bias problem. Right?

15 When I was a trial judge and the plaintiff
16 was African American, you know, the words I would always
17 say, okay, anybody got a prejudice against my client
18 because he's African American. Well, of course, no one
19 was going to answer yes to that question because it's
20 not socially acceptable to say that, even if you feel
21 it. Even if it's conscious or unconscious, you're not
22 going to say that.

23 The best question I ever heard in that kind
24 of a case was: Has anyone here been accused by anyone
25 else of being biased against Black people? And then

1 you'll find all sorts of interesting situations where,
2 you know, somebody else who works with them has said,
3 oh, you're just prejudice, or maybe somebody's actually
4 filed a complaint against somebody. And they'll get to
5 say about how I'm not prejudiced but you know this
6 person over here thought I was. And that gives you
7 useful information to make your strike on that
8 particular person.

9 So I think we have to -- and also as a
10 judge, you would rehabilitate someone who said I don't
11 like corporations. Right? You would try to
12 rehabilitate that person. But you would not try to
13 rehabilitate someone who said, I don't like Black
14 people. You know, I mean, like -- you know, people have
15 said, I don't believe anything that he said. Right? So
16 you don't try to rehabilitate that person, but you might
17 with respect to corporations.

18 So I think we have to really figure out
19 what -- what we're talking about here, and my
20 understanding of these instructions is race, religion,
21 sex, sexual orientation, that people feel like they
22 can't say.

23 CHAIRMAN BABCOCK: Yes, Judge.

24 HONORABLE MARIA SALAS MENDOZA: So I
25 support the idea that we need more work. We need to get

1 some experts maybe and get some more information, but I
2 think the information should be in all the places. Like
3 Justice Christopher said, we say up front that the
4 lawyers are trying to find jurors who are going to be
5 fair and unbiased. We say that up front, and that's
6 where I use the time to give an example.

7 I've been talking about implicit bias for a
8 while now. I spoke last year at the State Bar with
9 Judge Sandill and Judge Evans, both from Houston, on
10 implicit bias in jury selection and -- and gave various
11 examples, and Judge Sandill talked about how he won't --
12 he shouldn't be saying you guys because that would cut
13 out 50 percent of the audience. I disagree. I've
14 talked to people in El Paso about that, but it's one
15 example of how we can get jurors to think about things
16 that they're not thinking about.

17 Implicit bias is a very difficult concept.
18 I agree with you that it's hard to do this in the right
19 way, and I think that the reason that it's hard is
20 because the assumption is, it is just about race,
21 gender, and all the things that are hard. When I talk
22 about implicit bias, I tell them we're generally not
23 talking about illegals for discrimination, but if that's
24 an issue in this case, the lawyers will talk to you
25 about it because I think the important job for the judge

1 is to open the door so that the lawyers can talk about
2 it in a meaningful way. But race discrimination, when
3 you have a Black defendant, is as important in that case
4 as bias against a nursing home in a case that involves a
5 nursing home.

6 I mean, the issues are equally important,
7 but I think that the implicit bias opens the door for
8 jurors to consider their bias, and I tell jurors when
9 I'm done, so everyone has bias, a leading question, and
10 they all agree because I say I have bias, they all have
11 bias, and then it lets them talk to the lawyers when
12 they're asking them the questions about how they might
13 be having a unique approach.

14 What I see more in my community, because
15 it's not very diverse, is bias about socioeconomic
16 status, about education. There's all kinds of things
17 that lawyers want to learn about. I think it's very
18 important that we talk about implicit bias, and I think
19 the more we talk about it, the more it's understood.
20 They'll come back and say, oh, I didn't realize I have
21 implicit bias. I'm going to say it now, but it's not a
22 cure. We don't cure implicit bias.

23 The only thing that when the judge says it
24 and when we do it often and when the language is
25 better -- I don't like the language -- but it does give

1 people an opportunity to recognize it and to talk about
2 all the other things which we are not -- I think we'd be
3 wrong to think that implicit bias is just about those
4 areas that are about illegal discrimination. It's not
5 just that. It's all the ways and all of the experiences
6 that jurors bring to their service, and I tell them it's
7 an important experience. We're not asking you to leave
8 that outside the door. We just want to know about it,
9 you know, to tell the lawyers about it.

10 I know we also tell them if they stay quiet
11 they're going to get one of the good seats in the jury
12 box. I know we -- and that language could be better,
13 but I'm having it -- in favor of having it in all the
14 areas but working on the language.

15 CHAIRMAN BABCOCK: Great. Thanks, judge.
16 A1.

17 MR. YORK: I'm Alan York. I'm not a voting
18 member, but I'm the CRC liaison today. I agree with
19 everything that you just said, and that was part of the
20 CRC's discussion, which we've had in-depth discussions
21 on this.

22 Richard, to your point, there was a
23 considered decision for us not in the instructions to
24 the venire to call up prejudices or biases as being bad
25 but instead to mention them and encourage discussion of

1 them at that time. All right? So, while the language
2 might need to be refined, that really was our studied
3 goal there was to open the door to the conversation so
4 that those then could at least be discussed at that
5 point.

6 With regards to law -- and you'll notice as
7 we go through, we went short, long, short. We did three
8 places. We agreed, again, it was worthy of comment in
9 all these three places and not as an attempt to cure
10 implicit bias because it's not, but because more -- the
11 more implicit bias becomes conscious, the easier it is
12 for jurors to deal with it.

13 The listing in this -- in the longer
14 version, which is the instructions to the seated panel,
15 does go into very specific comments about specific types
16 of implicit bias including gender, sexual orientation,
17 gender identity, and things like that.

18 We believe that it was important to say
19 those things, and any further discussion that is had of
20 this -- again, I think it's a great thing to have these
21 discussions and to try to come up with better language,
22 but I would encourage everyone who is talking about this
23 to think about it not only from a traditional standpoint
24 but also from the viewpoint of people who often have
25 felt left out of the justice system, who have been

1 shortchanged by the justice system, who are many of the
2 categories that are named in that specific longer
3 instruction.

4 It's important when we have people come
5 into our justice system that they see themselves
6 represented, that they hear their concerns being voiced,
7 and that's one of the purposes of having that named in
8 that longer instruction.

9 And so, as this subcommittee continues the
10 discussion, I would encourage you to use as a resource
11 -- I know there are others -- Judge Tonya Parker who had
12 a significant involvement in crafting this language.
13 She's passionate about this project, and the CRC, like I
14 say, I just want to make sure you understand many of the
15 conversations that are happening today have already
16 happened at the CRC level and are reflected in the
17 language we requested.

18 CHAIRMAN BABCOCK: Judge Wallace, I'm
19 sorry.

20 HONORABLE R.H. WALLACE: Yeah, I agree,
21 implicit bias doesn't allow lawyers and corporations, --
22 people normally don't like lawyers and corporations.
23 The thing that's so difficult here is, how do you get
24 somebody to open up about something that they don't know
25 they have. I understand that one thing. I don't know

1 the answer to that. I look forward to that.

2 I don't think you can get into that in voir
3 dire -- just, you may not have a big instruction on --
4 in your voir dire instructions, but what's going to keep
5 one of the lawyers from getting up and saying, I
6 anticipate the judge is going to instruct you, if you're
7 selected as a juror in this case, that you can't
8 consider religion, creed, age, disability, sex, gender,
9 including gender identification, all those things you
10 cannot consider that in your deliberations. Is there
11 anyone who cannot follow those instructions?

12 That's when you maybe -- and you get some
13 hands then, but it will come up in voir dire, and that's
14 where it should come up. I mean, if they -- if they get
15 on the jury and then they hear that and go, whoa, then
16 you've got a problem.

17 CHAIRMAN BABCOCK: Professor Carlson and
18 then Kent.

19 PROFESSOR CARLSON: Kent, are you going to
20 be speaking?

21 MR. SULLIVAN: After you apparently.

22 PROFESSOR CARLSON: Okay. Probably what I
23 was going to say is, but you may be saying....

24 Richard, I went to the National Center For
25 State Courts yesterday to kind of see what's new on the

1 subject and rushed an hour and a half presentation on
2 jury instructions and implicit bias with a three-person
3 panel, a judge, a professor, and a sociologist, and what
4 struck me was the lack of data or testing on what is
5 effective, and there's a shared fear that was expressed
6 earlier that people will dig in who disagree with the
7 instruction, affirmation, bias. So saying don't be
8 biased is probably ineffective.

9 But then the question becomes what is
10 effective to call out an unfair bias against litigants,
11 and I was just kind of surprised how little there really
12 is in the studies. And I can see where juror
13 questionnaires would be much more revealing, not asking
14 are you biased, but I think they might reveal a bias,
15 than the voir dire instructions or the jury
16 instructions.

17 I notice that I rushed a couple -- made a
18 couple of other things. Some states use videos with
19 orientation -- I didn't watch those yet -- instead of
20 including it in their jury instruction. That's like a
21 prerequisite when you're called on to do jury duty.
22 Some judges are already giving instructions on bias in
23 Texas in Harris County and more extended than our 226a.
24 So you might be able to get a feel from those judges if
25 they feel that that's an effective way of doing things.

1 My concern in this assignment, as well as
2 my concern as a faculty member, because we just went --
3 I was telling our group yesterday, I was in a five-hour
4 orientation on new ABA standards for law professors
5 where we are required to teach cultural competency, and
6 we brought in an expert. And, you know, we take that
7 seriously. We're supposed to be following the ADA
8 guidelines. They're the ones who accredit us. So
9 everyone was there dutifully.

10 And I asked the speaker to kind of explain
11 what is -- what is it we're supposed to be doing, and I
12 never really did get a clear answer, and this is very --
13 it's hard to get your arms around. It's easy to say
14 bias and don't do that. It's hard to really call out
15 what that is and when it should be decided on.

16 And I would say I think there is -- almost
17 positive -- 7th Circuit case where a juror was struck
18 based on sexual preference, and it was hard to violate
19 that and the other side of the case. It was a case I
20 think that dealt with HIV medication, and so the jurors
21 were asked if they were familiar with it, I think. And
22 I just throw that out to try to confuse things.

23 Probably the most cited person that I heard
24 yesterday -- and I don't know if this is true or not --
25 is Mark Bennett out of Iowa, who Judge Bennett gives

1 instructions and also questionnaires to prospective
2 jurors in his courtroom.

3 So we need help if they're going to be
4 effective. I mean, we can roll it out with what we've
5 been given, but I think our committee doesn't feel
6 totally confident that it would be effective, and we're
7 just trying to figure out how to get there.

8 CHAIRMAN BABCOCK: Kent.

9 MR. SULLIVAN: I would ask Richard, if I
10 could, what was the date of the research done by Jason
11 Bloom?

12 MR. ORSINGER: 2006, and it was just the
13 standard TJs that included the bias and prejudice.

14 MR. SULLIVAN: I was involved in it, and
15 Judge Christopher was involved in it, too, I remember,
16 and I believe the Chair was involved.

17 CHAIRMAN BABCOCK: Well, the Chair's wife
18 was involved.

19 MR. SULLIVAN: There you go.

20 CHAIRMAN BABCOCK: Close enough.

21 MR. SULLIVAN: And let me say that -- so I
22 thought it was very useful research and produced some --
23 I mean, produced useful and counterintuitive, unexpected
24 information, and it is unfortunate that we don't do it
25 more systematically and routine in terms of trying to be

1 more scientific and data-driven and objective about how
2 we should manage the -- our system of jury trials.

3 So I will say, I agree with many of the
4 points that Richard made, several by our speakers, Judge
5 Peeples, Professor Carlson. There are a number of
6 nuanced points that have to be considered.

7 I just want to add one which is I do think
8 we tend to be somewhat piecemeal how we approach issues,
9 and I think we run some risk of doing that again here
10 today. I think the overall management of juries and the
11 jury trial process generally should be viewed in a more
12 holistic and more integrated approach with respect to
13 issues like the communication with and instruction of
14 juries. We ought to look at the work product that is in
15 question and, more generally, try and test, not simply
16 rely on opinions or war stories, but test to determine
17 whether those communications are useful for the end
18 user -- jurors -- and whether they're effective in terms
19 of trying to produce outcomes that are within a range of
20 the sort of outcomes that we want.

21 I also think it would be useful for us to
22 think about the jurors more as important users of the
23 system. People have mentioned privacy rights of jurors,
24 and I do think that's an interesting topic to take up
25 and is one that is sorely neglected in terms of what are

1 the appropriate boundaries of a process like voir dire.

2 Also, I don't think it's unreasonable to
3 take up the question of time management and time
4 commitment of jurors because it is currently largely
5 unboundary [Phonetic], and jurors -- I think we all
6 ought to acknowledge -- are effectively hostages in the
7 trial process, people that have other things to do,
8 often very important things to do, and they're not
9 considered very often.

10 So I think we ought to consider this issue
11 of user friendliness, this issue of being more
12 objective, using things like best practice analysis to
13 determine what the best alternative is, and you know, I
14 have -- I would say that -- I like Richard's starting
15 point which was actually something I had written down,
16 and that was this point of the Hippocratic Oath that
17 goes to first do no harm.

18 And so I think that ought to be a starting
19 point, and I think the likelihood of harm is increased
20 significantly. I think we move forward in important
21 areas like this one and do so only on the basis of
22 opinions or war stories and all that.

23 I'd love to see more time and
24 thoughtfulness devoted to this. I'd also like to think
25 that we could consider partnering with people, perhaps

1 even on a national basis, people -- and there may be
2 sources of support and resources to do more meaningful
3 testing.

4 I was very disappointed that we didn't
5 follow-up the 2006, I guess it was, testing because I
6 thought it produced useful results. If I recall it
7 correctly, I believe we actually changed 226a. There
8 were modest language changes resulting from some of that
9 research. We could have done a lot more. We can do a
10 lot more now.

11 CHAIRMAN BABCOCK: Thanks, Kent. There was
12 one other hand. Roger and then Judge Estevez.

13 MR. HUGHES: Two things that I want to
14 echo. I do think word testing these instructions might
15 be of extreme value, but I think if there's a jumping
16 off point for where the instructions need to go, the
17 first line talks about the justice system depends on
18 judges like me and jurors like you making careful,
19 unbiased, and fair decisions.

20 There was a federal judge in the Valley,
21 who will remain nameless, but that judge started voir
22 dire by telling jurors how important it personally was
23 to the judge to be fair and to make even-handed
24 decisions and how hard that was and now you're a public
25 official just like me and so it's real important that

1 you be able to do what I try to do.

2 And I think it's important that that
3 jumping off point is important for two reasons. First,
4 from what I got from our last talk about what jurors
5 think today when they come to the courtroom, it's not
6 just the confirmation of bias. It's an outright
7 hostility to the judicial system, and they don't see a
8 judge as a human being that's trying to do the right
9 thing. It's not going to be easy for them to want to do
10 it either. And so that's why I think that instruction
11 gets off on the right foot.

12 The second thing is this, why we're asking
13 these questions: You're about to be a temporary public
14 official and you're going to be a team with that judge
15 to make a decision about this company or that person's
16 livelihood, whatever. And that tells them why we're
17 asking all these questions, and that's why fairness is
18 important.

19 Getting on to the next point, I guess the
20 word "privacy" comes to mind. The instruction about all
21 the kinds of people that determine for fairness about
22 race, gender, sexual orientation, all that. That might
23 be a bridge too far for a couple of reasons. If your
24 case doesn't involve any of those issues, you know, do
25 you really want to get people all stirred up about them

1 before they even sit down to decide your case?

2 The second thing is, do you want them
3 trying -- if you don't have witnesses who are lesbian or
4 homosexual or transgender or whatever, do you really
5 want the jury trying to figure out if they are just
6 because they said they won't be biased against them or
7 not. That's never going to be in evidence. Then you're
8 almost forcing them to rely on stereotypes to determine
9 who is the person they shouldn't be biased against.

10 And the privacy of the parties and
11 witnesses, if that's not going to be an issue, why are
12 we trying to launch the jury off in that direction?

13 So what I'm thinking is this may need to be
14 at least tailored to the needs and wants of the case as
15 opposed to just a general statement. I leave that out
16 there for further discussion. Thank you.

17 CHAIRMAN BABCOCK: Hayes.

18 MR. FULLER: Just several thoughts. I
19 really was wanting to see what Rusty had to say about
20 this.

21 But first of all, less is more in my
22 opinion in this area. I think any instructions we're
23 drafting and using, we need to be careful that it is an
24 instruction and not an accusation or not perceived as
25 such.

1 Specifically looking at this lengthy
2 instruction after the panel is seated, couple of
3 thoughts. I think that strays into the area of putting
4 people on their heels and basically saying, you know,
5 don't want to admit you're implicitly biased, let's
6 talk about that. But more importantly, if you're going
7 to deal with the issue of implicit bias, which I think
8 can produce and often does produce an unfair result, I
9 feel the jury will say that's too late. You can't do
10 anything about it. You're not going to cure someone of
11 that bias after that time, but implicit bias, you need
12 to deal with that up front.

13 And, you know, Richard's right in the sense
14 that I think the questionnaire is the best way to kind
15 of give you the background to tell you whether that's a
16 problem because people with implicit bias, they're
17 really trying to get the information that really reveals
18 why they should be stricken, either for cause or just
19 outright struck. You're not going to rehabilitate that
20 initially. And the questionnaire is good, but more
21 often than not, a lot of judges don't want to take the
22 time of a questionnaire. At least, that has been my
23 experience. That's a discretionary thing, and if they
24 don't want to do it, we're just kind of stuck, and it
25 would be even worse in federal court, where the judge

1 gives you ten minutes and says can you be fair and
2 impartial, good, okay, we're done, you know.

3 We need those opportunities to visit with
4 the panel members to uncover that implicit bias. I
5 mean, we in trial are not going to basically have
6 someone self-diagnose themselves as being implicitly
7 biased and be able to do anything about it to the
8 extent that any of us would have confidence in a fair
9 and impartial verdict.

10 I believe when we're talking about
11 corporations or things like that, yeah, you can
12 rehabilitate that in those situations, whether we say it
13 one time or three times. All you're really doing is
14 providing anchors for skillful advocates and the court
15 to come back to in regards the particulars of their
16 case, you know, have you thought about this, have you
17 thought about that, remember what the judge said in the
18 instructions, I know you may not like this, but however
19 you want to deal with that.

20 And I just think those are some things we
21 need to be thinking about going forward. Kent, you had
22 a great thought in terms of doing this as a holistic
23 major project that may be beyond the scope of our
24 committee. I'm not sure we'd ever finish it.

25 But you know, if we're going to focus

1 strictly on these -- these instructions, I think less is
2 more. I think let's stick with what we've got before we
3 do anything else. Let's carefully study it and what the
4 actual effect of that is.

5 And another thing we ought to look at and
6 encourage is a way for the judges to, more often than
7 not, use a questionnaire if it's appropriate and the
8 parties may not ask that or may not care, but if they do
9 care, what's the harm?

10 CHAIRMAN BABCOCK: Judge Estevez.

11 HONORABLE ANA ESTEVEZ: I know this is
12 going to surprise all of you, but my jurors are
13 completely different from your jurors. We are all --
14 you know, what will offend my jurors is different than
15 what will offend your jurors, and I will tell you that
16 in the Panhandle, I'm not sure -- there may be some
17 implicit bias, but you know, most of them know what
18 their biases are. And I do believe that the best way to
19 handle this is probably for a judge to make a broad
20 statement on bias and that the lawyers, when they know
21 that there's an issue, they need to take care of it
22 during voir dire, and we can have something in the
23 Charge.

24 And I think that the language that you
25 indicated here is too strong for us, I mean, for the

1 Panhandle. It's judge-y and it's pushback, and they
2 will push back. I mean, if they had these type of
3 instructions, I have the jurors that would say why they
4 have what would be considered implicit bias in Austin
5 but it would be downright acceptable biases in the
6 Panhandle. And they'll express them and they'll express
7 them proudly.

8 So I think that when we're doing the study
9 we need to make it a geographical study to see how
10 different areas react to these type of instructions. I
11 don't think you're going to get the same thing. I think
12 what Dr. Phil said about it having a pushback is going
13 to be true, and in terms of legal, I think it's a
14 problem anywhere else except in the Charge for a
15 specific instruction from the judge.

16 I think that, you know, the best place for
17 those types of cases are for the lawyers to deal with
18 it, and they need to make them feel open to talk about
19 it because I think at least our jurors, they're really
20 willing to talk about things unless you come down and
21 tell them that what they feel is wrong. And then
22 they'll either shut down or they'll push back, but you
23 won't get the truth, and you won't get your jurors.

24 So I just wanted to share that my
25 preference would be or I would say for the ones that I

1 have experience with, a section 3 instruction would be
2 the most effective with a broad opening from the judge
3 to allow them to then follow up in the voir dire however
4 they feel their case fits into whatever category someone
5 may have bias.

6 CHAIRMAN BABCOCK: Judge Salas Mendoza.

7 HONORABLE MARIA SALAS MENDOZA: So I want
8 you all to come to El Paso and get a peek at our
9 questionnaire. Every single panel, you get a
10 questionnaire from every juror, and I will tell you it's
11 not your implicit bias but your actual bias that you're
12 using when you go through this questionnaire and, great,
13 now find jurors who are against you because they're just
14 facts. Right? It doesn't mean I'm against the person,
15 and when a guy based on religion or whatever, that
16 person, against or for you, you made a decision based on
17 your bias. And so, if these things are not fixed --
18 implicit or actual bias, it's not about fixing it. It's
19 about addressing it and feeling like you did everything
20 you can to address it and have it in the instructions
21 and the judge do it. It opens the door for a more open
22 conversation.

23 But I like what Joseph said. We judges, we
24 might recommend a more simple instruction. We talk to
25 judges and maybe judges view about -- we know what works

1 in our community. There's some things that I can say to
2 my panels that y'all can't say in Harris County. I
3 mean, it's just a fact, and so that may be something
4 that is really worth considering.

5 And then the last thing -- I've said it
6 before but I don't want it to be lost -- this idea that
7 you have to have results. I don't know what that looks
8 like. What we're looking for is a process that appears
9 fair, that is open to everyone, and when we do this,
10 we're saying we want everyone to feel like this is our
11 courtroom. It's not about what verdict you get or
12 what you hope you get. It's the process and how we
13 treat people in our courtrooms. That's what this is
14 about. It's not about getting can we get a correct
15 verdict or get more opinions for this. I don't know
16 what measure we think we're looking for, but when you
17 talk about this idea, it's about the procedural fairness
18 of our processes that we are -- that we're seeking.

19 CHAIRMAN BABCOCK: Yeah, and Judge Estevez,
20 don't forget, it's not only the impact on the jurors but
21 it's the impact on the parties, too. I've told you this
22 story before, but you know, I represented a very famous
23 Black woman in your county.

24 MR. ORSINGER: Over food?

25 (Simultaneous speaking.)

1 CHAIRMAN BABCOCK: And when the panel came
2 in, it was full of people, all White, and she leaned
3 over and said, Is that a jury of my peers? And I said,
4 I don't think there's a billionaire around. That's a
5 war story.

6 And Rusty Hardin, I heard, has tried five
7 jury cases in his illustrious career. So maybe you have
8 some war stories about rooting out implicit bias or, I
9 note, leave yourself out of it because I think you have
10 strong views about it --

11 MR. HARDIN: I do have strong views about
12 it, but I think, in my view, given this area, is in
13 order to elicit information, is not to lecture and
14 change people's views. That is not what the trial is
15 supposed to be about. The trial is supposed to be
16 making sure, in my view, that each of those two parties
17 get a fair hearing and get a fair trial, and as you all
18 know, I'm not trying to lecture but I really want -- as
19 I listen to this, let me go back for a second.

20 The subcommittee had different views about
21 language, but that led to a pretty unanimous view that
22 we didn't feel like we were qualified to pick these
23 words right now and that we needed more research, not on
24 the issue of whether or not bias should be addressed,
25 but whatever, in order to not do harm, we do agree on or

1 certainly the court hopefully does it and follows the
2 recommendation, that it is language that hasn't done
3 more harm than good.

4 And we didn't feel like -- everybody had
5 different views on it but pretty much expressed what you
6 heard, four or five members of the subcommittee so far,
7 and that was it's that worthwhile looking at the
8 language, it's worthwhile doing some research and trying
9 to figure out, but just like elections, what are some of
10 the consequences.

11 And the fear was is that we weren't
12 qualified even if we had a month. It had more to do
13 with all the relating background to be able to figure
14 out what those words are. In my view, those words
15 should be designed and be two times in a trial, not four
16 times. Whatever words are going to be decided, it's
17 worth doing and decided to do it, it should be at the
18 jury selection stage and at the jury charge stage. I
19 don't see the reason to be talking about it when they're
20 impanelled and put into a box or something.

21 But the words can be hugely helpful to the
22 trial lawyer because it gives the imprimatur of the
23 court on a subject that then the trial lawyer has to
24 express, and whenever I -- a number of years, more than
25 I like to remember, of jury selection, 30 years I've

1 been trying to say, lawyers, quit asking negative
2 questions that we have acknowledged here. You want to
3 find out information. You only do that by asking their
4 views. So these words are the imprimatur of the court,
5 enable us to say what do you think, what's your
6 reaction, not, well, you promised me not to be biased.
7 We all know what the answer is going to be. But it
8 gives us a way to sort of elicit and talk to them and
9 surface their views. It takes a judge who's tolerant
10 enough to give us more than 20 minutes, but if you've
11 got 45 minutes or an hour to pick a jury in a major
12 civil case, because many of y'all know I and my firm do
13 malpractice and a bunch of others. We don't do just
14 criminal. We also do civil, do probates, and others.
15 They're all the same, 40-something people out there to
16 hear these cases, and we want to know what they think.

17 And so this wording is to say the judge
18 believes and is telling you he's going to -- you cannot
19 let bias, prejudice in, but tell me what your views are.
20 I'm not going to change your views because one of the
21 things that I think we've got to remember here is this
22 is not designed to change societal views. That's not
23 what a trial is. It'd be unsuccessful if it was.

24 It is to make sure that people have -- feel
25 an obligation to tell us if they have those kind of

1 views. As a trial lawyer, I could -- but I do care. I
2 care in a societal way, but as far as the trial is
3 concerned, I just want to know what they think, and I
4 want them to know I want to know what they think because
5 y'all have to talk to me. You know, you took an oath to
6 tell me the truth. So I don't want to put you over here
7 in the jury box and have you violate your oath and be
8 acting on something that bothers you that is inherent
9 bias or prejudice. Just tell us what it is and we'll do
10 what we're supposed to do.

11 And so I want to urge that we look at this
12 in terms of more research. We all agree it's a good
13 thing to fill out more than just the one sentence, not
14 bias or prejudice. The advantage of it, knowing that
15 the Supreme Court has asked us to do anything on this,
16 it lets the trial lawyers have a better shot at truly
17 getting people's opinions if the wording is right. We
18 know you got to tell us what you think, and that is --
19 our job is to find it out, and so if it -- some wording
20 should be different, jury selection would be pitched to
21 one thing, and then the jury charge, the language that
22 you've now said, I told you at the beginning now, and
23 now you've heard it, and when you make these decisions,
24 these are things you can't do, these are things you can
25 act on, so if you slip through as we hoped you didn't --

1 but, anyway, I just want to make clear there are two
2 different worlds here. One is trying to change the
3 public's attitude, and the other is finding out where
4 they are right now in this trial. Changing the public's
5 attitude is in another forum. Tell us what you think in
6 this forum so both sides can do the same thing.

7 CHAIRMAN BABCOCK: Thank you, sir. Skip.

8 MR. WATSON: Well, what Rusty was saying
9 has sort of crystallized my thinking. It seems to me
10 that we're talking about kind of two separate things,
11 and that, to me, says that there are probably two
12 different goals.

13 At the first of finding out what people
14 think what their biases are, that is what we all do. We
15 all can understand that. We want to be able to get an
16 accurate reading of what people think, and if that means
17 what their bias, prejudices, or preferences are, yes, we
18 want to know that.

19 To me, it shifts and I'm not sure what
20 we're trying to accomplish. After we get to the point
21 that they're seated, at that point, they exist to
22 determine really the credibility of the evidence as it's
23 coming in on disputed facts. They are deciding which do
24 we want to believe.

25 And the next step at the Charge, they're

1 weighing that credible evidence. They're weighing the
2 evidence they found credible to say which way am I going
3 to step on answering this disputed fact.

4 Now, I really get at the voir dire stage a
5 ferreting out, but I'm left wondering -- and I'm not
6 saying what the answer is because I don't know -- but
7 I'm wondering why we are putting this -- the implicit
8 bias language in there unless what we're trying to say
9 in the second two aspects, we not only don't want you to
10 be biased in hearing this testimony, but we want you to
11 examine why you came to believe or disbelieve every
12 witness. And if that doesn't come down to a true
13 indicator of their veracity -- rather, it's just a kind
14 of subliminal reaction of I don't like insurance
15 salesmen or whatever it is, you know -- or the worst
16 that Tom Gray and I were talking about is, you know, is
17 there a possibility of just assuming that because
18 somebody is, you know, an 80-year-old White professor
19 that gives evidence on what happened at an intersection
20 might have more weight than a 16-year-old girl. You
21 know, that -- you know, that could be there.

22 But do we want to ferret that out and get
23 them to say I'm examining why I choose to believe this
24 witness? That, to me, is the reason I'm hearing for
25 getting into implicit bias is to get the person to

1 recognize, well, I've thought about it now and I do know
2 why I'm leaning, and maybe that's not a good reason.

3 It's the same thing that holds true when
4 you get to weighing the evidence that you found
5 credible, of why are you giving more weight to some
6 testimony, but I'm not sure that asking the jury to
7 examine why you're making credibility determinations and
8 why they're weighing -- giving more or less weight to
9 what they've judged credible evidence, I'm just not sure
10 if that really would be effective. And I'm not sure
11 that it's going to really help anything, and I'm not
12 sure that it's going to actually move the needle toward
13 a fairer shake, a fairer trial.

14 I'm willing to hear, but I think that's
15 what we're trying to say we're doing is examine why you
16 choose to believe this person over that one and make
17 sure it's not some inherent matter that shouldn't be
18 there. And it may be you're going to say that but if we
19 do say it, I think we should say it very directly rather
20 than just talking in general, feel-good terms.

21 CHAIRMAN BABCOCK: Rusty.

22 MR. HARDIN: Yeah, and I don't have quite
23 the answer to what you're saying by any means, but I
24 think there's a second element of that. If the first
25 part of the jury instructions -- not the jury

1 instructions -- if the judge is telling the jury that in
2 the jury selection, we don't approve of bias, prejudice,
3 say all those different things, then we get to the jury
4 charge stage, and the court, with all of the sanctity
5 that's the -- to consider the judge said, this is
6 another time to remind you, our system -- this is part
7 of what the judge is talking about -- disapproves
8 strongly of you using a bias or prejudice to reach your
9 conclusion. So you have to look within yourself --
10 whatever the language is obviously. I won't get into
11 the way it's drafted -- but you've got to look within
12 yourself as you reach this, but I want to tell you, the
13 sanctity of this system that you participate in depends
14 on you not letting bias or prejudice affect how you view
15 things, and you've got to be willing to look carefully
16 as to whether you're going to -- are you letting anyone
17 of that compact that you have really thought to think
18 about, are you letting that affect how you look at the
19 evidence, and that's what you --

20 MR. WATSON: I like that.

21 MR. HARDIN: You know, my experience with
22 most jurors is they feel noble about the process when
23 it's over, and that's what we want them all to feel. We
24 want them all to feel better having made that
25 contribution to society, and so, if the end return on

1 this system that we hold sanctity, it reminds you that
2 you cannot make these decisions as to credibility of
3 witnesses of feelings because of some out-of-trial
4 violation or prejudice or attitude you have, I think
5 maybe --

6 MR. WATSON: That goes right at -- that
7 gets at what I'm trying to say is that's the legitimate
8 purpose of doing it, but it needs to be sharper --

9 MR. HARDIN: That's why we didn't feel
10 qualified to do it --

11 (Simultaneous speaking.)

12 CHAIRMAN BABCOCK: I feel like I'm on a
13 talk show or something.

14 I've been following Perdue's Facebook page,
15 and he claims he's tried many more cases than you. So,
16 Jim, what's your take on all this?

17 MR. PERDUE: Just not a fair transition.

18 Rusty's tried hundreds and hundreds of
19 cases, and criminal case is a fascinating journey into
20 bias. Right? But everything that I've heard about
21 decision science tells me that if you think that you're
22 going to tell them in the jury charge don't let bias
23 affect your deliberations, you're fooling yourself.
24 That's just not the way decision-making works.

25 CHAIRMAN BABCOCK: So how do we handle it?

1 MR. PERDUE: Well, I mean, the lawyers --
2 the lawyers have a role in the advocacy process. I
3 mean, what Rusty just did was talking about the way
4 they're to judge the evidence and their role as jurors
5 that have a higher responsibility to the process. But I
6 mean, the idea you put it in the Charge, don't let
7 something that you don't know you have and haven't had a
8 conscious recognition that you have it affect your
9 conscious conversations about the deliberations of the
10 evidence is comical. It's just not the way the brain
11 works.

12 Most people don't know why they make a
13 decision. Most people then rationalize with the frontal
14 cortex the facts to explain the decision they've
15 reached. So what you're talking about here is -- I
16 mean, there's -- I think there's a conflation because I
17 really don't know where this term "implicit bias" is
18 supposed to capture because if it's a synonym for
19 "unconscious feelings" about things, if that's what it's
20 intended to be is a synonym for "unconscious feelings"
21 or thoughts about things, the trial lawyer's
22 responsibility is to find it during jury selection to
23 test it out through life experiences what you think may
24 affect that which they cannot verbalize in their ability
25 to be a good juror for your case. That's the whole --

1 that's the whole job of jury selection, right, Rusty?

2 MR. HARDIN: Right.

3 MR. PERDUE: And if you fail to do that and
4 you've got 12 people in the box who are dog lovers and
5 Michael Vick is on trial for killing dogs, you're going
6 to have a good shot. Just -- that's just true. So --
7 and you're not going to fix that with an instruction in
8 the jury charge saying don't allow things that you don't
9 know that you feel affect the way you feel about this
10 case.

11 HONORABLE ANA ESTEVEZ: And I guess
12 unconscious assumptions is how I look at it. It's
13 unconscious assumptions, so you're assuming something
14 that will happen.

15 MR. PERDUE: Well, I think the conversation
16 about implicit bias I've heard mostly has been in kind
17 of conversations to get a little more honest
18 conversation going about people's reaction about race,
19 about gender, about some of those really hot topic
20 issues that are hard to test, and that's fair.

21 But you know, if you had a case where -- I
22 mean, Rusty, you tell me. If you had a case where you
23 were really worried about race playing a role in it, the
24 trial lawyer has a responsibility to be really brutally
25 honest and test that during jury selection because an

1 instruction is not going to fix that problem.

2 MR. HARDIN: I agree, but I think the trial
3 ought to be -- what she's treating it as a social
4 discussion and societal activities ought to be what
5 you're talking about because from what she's talking
6 about, the lawyer can turn around and use the reason I
7 like it at the end of the trial is not to convert them.
8 It's to put the imprimatur on the court of what the
9 lawyers were talking about in jury selection, what the
10 judge has got in the Charge; that is, you can't let
11 those views affect it. It gives me a bigger wedge if
12 I've got the judge's language to talk about what the
13 bias is -- you may end up in argument. In other words,
14 it gives the trial lawyer a tool to elaborate on
15 whatever happened in the trial that some bias or
16 prejudice might affect if you got it, and you're
17 reminded you can't do that.

18 MR. PERDUE: I completely agree, but I
19 mean, we have an instruction that says do not let bias,
20 prejudice, or sympathy play a role in your
21 deliberations, and Tom Riney, if he's got a brain
22 damaged baby case that he's defending is going to grab
23 that instruction early in closing argument and say the
24 court has instructed you, the law of the State prohibits
25 you, it is almost impossible for you not to feel

1 sympathy for this child, but you cannot allow that to
2 play a role in your deliberations.

3 So that's the imprimatur you're talking
4 about. It's this additional stuff about don't let the
5 things that you don't know affect you not affect you is
6 just -- it's kind of gobbledygook with that. That's a
7 legal term.

8 CHAIRMAN BABCOCK: Judge Wallace, most of
9 you know -- I mean, you know Judge Wallace, but you
10 maybe didn't know that he, as an American trial lawyer
11 before he went on the bench, tried four cases more than
12 Rusty and Jim combined. So you're speaking from an
13 authority here.

14 HONORABLE R.H. WALLACE: And I tried a lot
15 of legal malpractice case work, and I know biases
16 against lawyers. I think between Jim and Rusty, they
17 pretty well hashed out what I was thinking, and that is
18 a lot of what -- Rusty wasn't giving a jury instruction.
19 He was giving a closing argument, and that's where, you
20 know, Rusty is.

21 If a plaintiff or not plaintiff -- any
22 party say their client is a homosexual and they know
23 that evidence is going to come out, for whatever reason,
24 in trial, they may or may not want to voir dire on that,
25 and you know, let them form the question to try to draw

1 out the information that they want, not by telling
2 somebody you can't take that into consideration, but
3 finding out whether there's -- what their thoughts are.
4 So I think whatever we do probably less is going to be
5 better.

6 MR. PERDUE: I do have a solution,
7 chairman.

8 CHAIRMAN BABCOCK: I know that. I was
9 trying to tease that out of you.

10 MR. PERDUE: I think the family bar section
11 needs to develop a form questionnaire.

12 CHAIRMAN BABCOCK: We have a lot of time to
13 get a form out of the family bar. Why don't we do that.

14 (Simultaneous speaking.)

15 CHAIRMAN BABCOCK: There's a famous Florida
16 governor a long time ago who said that, you know, I'm
17 trying to overcome my biases. You're apparently
18 satisfied with yours. And the guys who's biased, I
19 mean, is probably not going to change, and if we can
20 find that out during voir dire, then we're going to boot
21 him if we can. But the person that's trying to overcome
22 bias, that's where the implicit bias comes in. So they
23 know it's wrong, but they just go on thinking they'll
24 overcome it. And so, if they see a witness who is --
25 has a particular -- maybe it's an insurance salesman,

1 maybe it's a Black person, maybe it's a woman -- they
2 will be active in imputability that there are other
3 witnesses, and that's what you're kind of doing.

4 HONORABLE R.H. WALLACE: Can I say
5 something right quick. I think an example of the jurors
6 that try the case and one of the parties was a
7 Vietnamese guy, and at the end of the voir dire, one of
8 the panel members raised his hand up, asked to come up
9 to the bench, and basically he said, Judge, I served in
10 Vietnam back in sixty-something, and I thought I had
11 overcome my prejudices but I realize here that I
12 haven't.

13 HONORABLE ANA ESTEVEZ: I've had that
14 happen, too.

15 HONORABLE R.H. WALLACE: If you ask them
16 ahead of time are you biased or prejudiced against
17 people who are Vietnamese, he may have said no, but
18 anyway, I'll understand --

19 CHAIRMAN BABCOCK: See, war stories do have
20 their places. We have Judge Salas Mendoza.

21 HONORABLE MARIA SALAS MENDOZA: I'm going
22 to say that's the last question, right, if there was
23 something I hadn't asked you, would you -- that that
24 brings that out, but I do want to address something we
25 haven't addressed: juror privacy. And I don't know if

1 it goes along with this effort here, but I do tell
2 jurors that I don't want to try to embarrass them and if
3 they want to approach the bench. I also tell them that
4 there's a very good chance that there's someone else on
5 the panel who's going to have that experience or be able
6 to talk about their own experience. It's not -- it's
7 something I add in. So we might think about an
8 instruction regarding privacy and how that's not our
9 goal to embarrass people.

10 CHAIRMAN BABCOCK: Yeah. Kent raised that
11 question, and you know, I think it's a serious one I
12 don't think that's talked about much, but Hayes, you had
13 your hand up a minute ago.

14 MR. FULLER: I was just following everybody
15 else. Again, implicit bias is also challenging. That's
16 the whole purpose of the voir dire. We're trying to
17 uncover what those implicit biases are, and you know, a
18 lot of times we can fish it out and get some clues as to
19 where to go from a questionnaire, something like that,
20 but I see implicit biases frequently because both sides
21 are trying to figure out what they are, and the implicit
22 bias is only bad if it adversely affects one side or the
23 other. I mean, I'm striking yours and you're striking
24 mine, right? Sometimes we don't know and we'll strike
25 each others.

1 I love jurors that go through where
2 everybody thought they were okay, but at the end of the
3 day, I guess there are some implicit biases and why it's
4 so important we find them in relation to the case is
5 some of them may not make any difference on the case.
6 You know, in which case, we both let them through, but I
7 think, you know, if anything we do in the area of
8 implicit bias, it needs to be a tool for the advocates
9 to use in uncovering that implicit bias so intelligent
10 decisions can be made prior to the selection of a jury,
11 and that's probably a good place to stop.

12 CHAIRMAN BABCOCK: Okay. Family bar raised
13 their hand to second the solution here?

14 MR. ORSINGER: We've been dealing with
15 Family Code so you can't consider gender as a factor in
16 making decisions in parent-child. We can tell them that
17 all the time until the cows come home, but everybody on
18 the jury panel -- if the evidence was that the mother
19 and father were equally good parents, who would you give
20 custody to. The mother? Eight out of ten raise their
21 hand. So just live with it.

22 So my perspective on it, or I guess my
23 experience in this conversation is we ought to consider
24 this to be a partnership, not are we going to cure it
25 all through an instruction, but can we use the

1 instruction to help the lawyers figure out what the
2 implicit biases are, and then address them with
3 challenges for cause or peremptory challenges.

4 And I think that this instruction is an
5 effort to try to solve the whole problem in the
6 instruction, and maybe what we ought to be doing is
7 focusing on what we do to help these people out so
8 that -- I mean, sure, more during the voir dire, so that
9 the court can make a more intelligent decision on a
10 challenge for cause or a peremptory strike. The lawyers
11 can exercise their peremptory strikes.

12 And in conjunction with that, you know, the
13 idea that someone will be more honest about the way they
14 feel if it's private, you can maybe exploit that with a
15 questionnaire with an understanding that this will not
16 be shown to either one of the lawyers and the court in
17 the case, maybe they'll be more forthcoming. If it's a
18 sensitive area, you take them up to the bench and
19 question them alone in front of the judge.

20 To me, there's a combination of things we
21 could do to make our voir dire process better at
22 detecting bias, but I think it has to be the courts and
23 the lawyers who actually carry it out and act on it.

24 CHAIRMAN BABCOCK: Good point. Hey, Bobby,
25 just give me one second. Bobby, we haven't talked to

1 you and you're a trial lawyer.

2 MR. MEADOWS: Used to be.

3 The court: Yeah. You have more experience
4 in California than in Texas in recent years.

5 MR. MEADOWS: Well, I agree with a lot of
6 what's already been said, and I think we all agree that
7 an instruction of this type is not going to make the
8 jurors better people.

9 And so it's a tool. It's a tool for the
10 trial lawyers to explore a particular concern in a
11 particular case, whether it's about the race or gender
12 or age of a witness or expert, whether it's a concern
13 about the lawyer themselves.

14 And so the idea is that some instruction --
15 I agree we haven't settled on it -- but some instruction
16 of this type would be helpful in the sense that it would
17 create a dimension beyond what we already have to talk
18 about a way to discover and to have particular jurors or
19 potential jurors confront, and that's what the lawyers
20 want to do on both sides.

21 CHAIRMAN BABCOCK: Kennon, you tried a case
22 or two, I remember you said.

23 MR. WOOTEN: Well, one thing is that the
24 questionnaire, while a good idea, is not practical in a
25 case. You just don't have the benefit of getting a

1 specific questionnaire in many of the cases you try. So
2 I agree that people are probably more likely to share in
3 that space where they're just writing something down or
4 clicking a button than in front of a lot of other
5 people. I just don't think in this big and diverse
6 world and the courts doing that it's going to be a
7 solution across the board.

8 In regard to what we say, we all
9 acknowledge in this room that we've had the instructions
10 for many, many years, the statement about not being
11 biased or prejudiced. And I believe that there are many
12 people who think they are not biased or prejudiced but,
13 in fact, have biases and prejudices, not because they're
14 bad people, but it's because that's a common thing for
15 human beings.

16 So I think it would be helpful to explain,
17 without doing harm, a little bit more what you mean when
18 you're saying that because I have a feeling that's going
19 right over the head of a lot of people who don't have
20 the self-awareness to recognize I might have some biases
21 and prejudices and how assessing the evidence, the
22 people, et cetera, and while it is our goal to assess
23 credibility, I think the goal is to do so without bias
24 and prejudice, to the extent possible. And the idea
25 that people aren't going to be better versions of

1 themselves when they're jurors I think might not be
2 giving every juror enough credit.

3 I think probably all of us in this room
4 have been on boards, spaces, and places where we have to
5 set aside some viewpoints, maybe make decisions that are
6 in the best interest of the whole for our business, for
7 example, even if personally it's not easy. So I think
8 we can be better versions of ourselves and rise above
9 our normal state of being in the ways that affect
10 liberty, life, property, et cetera.

11 Maybe I'm giving people too much credit,
12 but I don't want to assume they can't be better versions
13 of themselves when they're in that space with such an
14 important responsibility.

15 I hope we don't get too hung up on the text
16 that's in front of us because what I'm learning in just
17 a little bit of time is that different text has been
18 used for years in Texas in various places. So, in terms
19 of the data, I'd like to see what text has been used for
20 years, for example, in Dallas, in Harris County, and
21 talk to the judges who have used that text for years to
22 get their viewpoints on whether it's been helpful. I
23 bet some of them have talked with jurors after the fact
24 to see whether it has been helpful.

25 I think the text that has been presented to

1 us, from what I can tell, is perhaps borrowing from some
2 of the other places but might be a hybrid as opposed to
3 something that's been used in any particular court in
4 any particular county. So I would like to get more
5 information based on the actual text that's been used
6 before we have a conversation about the content that's
7 on the page before us and the proposal but perhaps has
8 never been tested.

9 CHAIRMAN BABCOCK: Okay. Very good. Yeah,
10 Judge Evans.

11 HONORABLE DAVID EVANS: Well, you know, I
12 have worked on a case that there's express bias in most
13 voir dices, and I think most of the people today
14 discussed expressed bias.

15 My best example of implicit bias is a
16 person has a stated value and yet acts on information
17 contrary to the stated value. One of the most often
18 seen, most constructive to me is that you have a stated
19 egalitarian view that women can do the same job as men.
20 Yet, as an employer, you rely on the advice of male
21 co-workers or give greater credibility than you do
22 women. That's a really hard problem, and that's true
23 implicit bias right there, or if you have a stated value
24 that -- with regard to race and yet you value the
25 opinion of a White male lawyer over a Black female

1 lawyer.

2 We don't really address implicit bias in
3 voir dire as trial judges, and we don't have enough good
4 examples that are psychologically vetted for their
5 unintended consequences to do that at this time.

6 But the good cases I've tried that have not
7 only worked on express bias but they've given
8 consideration to the character and the models of the
9 witnesses coming forward and addressed it, not the car
10 wrecks, but have addressed it as they go forward with
11 who they've got in the box, and they put more emphasis
12 on one witness or another.

13 If you got -- I watched one case where I
14 knew one of the experts that was put in was designed to
15 go for the eight females that were in the box, that they
16 would give that witness more credibility than the other
17 witness that was available. Now, he just had that
18 ability and there was a lot of money involved, but the
19 court does have to take a strong position on express
20 bias and implicit bias without interfering with the
21 trial process and producing unintended consequences.

22 CHAIRMAN BABCOCK: Okay. Thanks.

23 HONORABLE DAVID EVANS: Most trial lawyers
24 in here or trial judges, I've tried cases with same-sex
25 couples. I've seen it addressed. I've had cases with a

1 number of people who couldn't speak English, and I've
2 seen good results from a jury that I was confident that
3 race and alien status did not influence it. And in
4 fact, in one I think that the value system of the
5 immigrant so overwhelmed a northwest Tarrant County jury
6 that they probably awarded more money than they would
7 have awarded otherwise.

8 You know, I've seen it work a lot of ways
9 once they get into that, but I'm not sure I agree with
10 this language here. But I do agree with Rusty and
11 others that the court has to take a position on bias and
12 not just group it in one word. Don't let bias,
13 prejudice, sympathy get a highlight. That would be my
14 thought on that.

15 CHAIRMAN BABCOCK: Thanks. Tom and
16 Professor Carlson, I'm going to give a courtesy, see if
17 we can get you some additional resources, but if we
18 don't -- but I think we will -- but if we don't, you'll
19 have to slog through it as best you can and then bring
20 this back to the next meeting and it'll be an agenda
21 item, and you'll either sink or swim then. And we'll
22 see where we are, but for the moment we're going to take
23 our afternoon break and be back at 3:20.

24 (Recess from 3:03 p.m. to 3:19 p.m.)

25 CHAIRMAN BABCOCK: We're now on the record

1 on suits affecting parent-child relationship and
2 out-of-time appeals in parental rights termination
3 cases, and we have been working through this at a good
4 pace, and Bill Boyce is going to take us for the next
5 hour or so. Ready, Eduardo?

6 MR. RODRIGUEZ: Yes, sir.

7 CHAIRMAN BABCOCK: Okay.

8 HONORABLE BILL BOYCE: Hopefully, less than
9 an hour.

10 This is an old discussion we had in October
11 relating to votes that we took on the form of a draft
12 rule that we discussed at that meeting, and so if you
13 look at the memo, you will see that there was a draft
14 Texas Rule 28.4 that was circulated for discussion in
15 October relating to the handling of appeals that are
16 deemed frivolous in this particular context, the context
17 being a suit for termination of the parent-child
18 relationship or suit affecting the parent-child
19 relationship filed by a government entity for managing
20 conservatorship.

21 And so we worked through issues last time,
22 and there were a couple of votes on tweaks to the
23 proposed rule that the subcommittee is now bringing back
24 to the full committee for your consideration.

25 So, if you look on page 2 of the

1 February 13th memo, you will see two subsections. One
2 is called Pro Se Response to Certification of Appeal
3 Deemed Frivolous, and then there is a new subsection
4 under that, Abatement for Additional Briefing.

5 You may recall that the original draft of
6 this proposed rule had the sentence that now appears at
7 the bottom of the page. That was actually as
8 continuation of the prior section called Pro Se
9 Response. The sentiment of the committee as a whole was
10 to break that out as a separate sub part, which is what
11 this does. It gives it a new subheading, Abatement for
12 Additional Briefing, and this reflects the discussion we
13 had about whether abatement for additional briefing at
14 the court of appeals or the appellate court sees an
15 issue that appointed counsel has not -- appointed
16 counsel has come in and said there is no issue to brief
17 here. If the court of Appeals nonetheless sees one, it
18 can send it back.

19 There was some discussion last time around
20 on the notion of whether it should go back, whether an
21 appellate court would have discretion to either send it
22 back to the same lawyer and say we looked at this issue
23 or appoint a new lawyer to do that. This draft reflects
24 the vote that was taken to have that be an option for
25 the court and not to automatically mandate appointment

1 of a new lawyer.

2 And so it says an appellate court may abate
3 the appeal for either existing counsel or newly
4 appointed counsel to provide additional briefing to
5 evaluate a nonfrivolous ground for appeal that has not
6 been adequately addressed by counsel.

7 The other refinement to the rule that we
8 talked about in October appears on page 3 of the memo,
9 and it is an addition of a comment that is based on the
10 In re P.M. case that references the reviewing court's
11 independent obligation to evaluate the record and make
12 its own determination about whether there are
13 nonfrivolous or potentially nonfrivolous grounds for
14 appeal.

15 There was some discussion about putting
16 that in the rule or a comment. The vote came down in
17 favor of putting it in a comment. So that's what this
18 does, and we've had some discussion over the course of
19 multiple meetings about whether or not it's really
20 accurate to call this an Anders procedure or is it a
21 different procedure that's related to but somewhat
22 distinct from Anders, but this comment refers to the
23 Anders case because that's what In re P.M. said and did.

24 And so, to sync it up with the case law
25 that we're relying on, that's what the comment says. So

1 those are the two what I hope are relatively small
2 refinements to the rule that was previously presented to
3 the committee as a whole.

4 CHAIRMAN BABCOCK: Okay. Thanks, Bill.
5 Yeah, Richard.

6 MR. ORSINGER: Okay, Bill, so a couple of
7 specific suggestions. And we got the list of the things
8 that the appellate lawyer has to put in the brief, and
9 under subdivision three, it says one is the
10 certification, two is the brief, and three is the notice
11 of the claim. "Notify the client in writing of the
12 right to access the appellate record and provide the
13 client with a form motion for pro se access to the
14 appellate record."

15 It seems to me we should also require to
16 inform the client of the right to file an appellate
17 brief or a pro se response to his -- the court's Anders
18 brief because it's not just looking at the record. We
19 need to also be sure that they understand that they can
20 represent themselves at that point.

21 The next one I wanted to say is under the
22 pro se, in the next rule, it's an appropriate response
23 to a certification of frivolous, and it entitles the
24 client or the individual to file a pro se response. And
25 I'm wondering if a pro se response is a brief or is it,

1 like, just a handwritten statement of facts that's
2 unsworn? I mean, we need to be more technical about
3 what they file other than to say pro se response because
4 I'm afraid that's not much direction, and I don't know
5 if we want a brief or whether we just want 15 pages of
6 handwritten, unsworn testimony. I mean, the word
7 "response" should be evaluated as to whether that's a
8 word we really want.

9 The next paragraph is Abatement for
10 Additional Briefing. The appellate court can abate to
11 have existing counsel or newly appointed counsel
12 evaluate a nonfrivolous ground, but it also occurs to me
13 that they may have violated the standards up above on
14 the contemporaneously filing of a brief, and it seemed
15 just as likely to me that the court of Appeals may want
16 to abate to direct the appellate lawyer to file a brief
17 in conformity with the rule in case they didn't do an
18 adequate job on the statement of facts or whatever.

19 So my thought would be to say an appellate
20 court may abate the appeal for either existing counsel
21 or newly appointed counsel to provide additional
22 briefing, and add in, if the requirements of Rule 28.4
23 above are not met -- and we don't have a number so it
24 may be 28.4(1) or not, but it's not just to evaluate the
25 grounds or the nonfrivolous ground. It's to comply with

1 the requirements of the brief and the rule itself. It's
2 my understanding, from talking to the court of Appeals
3 judges frequently, if the quality of the brief initially
4 filed by the lawyer is not up to snuff -- and they've
5 spoke of instances in which they remanded to that lawyer
6 to draft a brief in compliance.

7 The next comment is on the next paragraph,
8 and it talks about what the court of Appeals is
9 empowered to do. And it says a court of appeals should
10 affirm the final orders subject to the requirements that
11 the attorneys still must, one, A, B, C; and two -- well,
12 that's -- that's a limitation on the court of appeals'
13 power, and it ought to be a duty on the appellate level.

14 It seems to me we ought to take that
15 laundry list of things that the lawyer must do, and
16 instead of saying that courts affirm it subject to the
17 lawyer doing these things, we ought to have a separate
18 section that says the lawyer must, within five days
19 after the opinion is issued, send a copy to the client,
20 et cetera, et cetera.

21 So, to me, a clear duty on the appellate
22 lawyer, rather than a limitation on the court of
23 appeals' ability to affirm.

24 And then the other laundry list I think we
25 should have, file a motion for rehearing under Rule 49

1 because if, in fact, this person is going to go on to
2 the Supreme Court, an obvious first step is to file a
3 motion for rehearing in the court of appeals, and we're
4 not telling them that's no longer required but it's an
5 option. And as long as we're telling these pro ses what
6 their options are after the court of appeals has ruled
7 against them, I think we ought to include a motion for
8 rehearing in there.

9 That's it. I'd like the record to
10 reflect --

11 CHAIRMAN BABCOCK: Yeah, I like the
12 comment.

13 MR. ORSINGER: Yes, I liked the comment.

14 CHAIRMAN BABCOCK: Do you have a comment on
15 the comment?

16 MR. ORSINGER: I do have a comment on the
17 comment.

18 We talked a lot and tried to work through
19 that and make Anders work in this context and the
20 decisions that we had and whatnot, and I think it's good
21 to make it clear that we think this meets the
22 constitutional requirements of Anders. And I also think
23 it's good to tell the appellate court to conduct an
24 independent evaluation.

25 My interaction with the court of appeals

1 justices is they already believe that and do that, and
2 we're complaining about how biblical it is for their
3 staff attorneys to plow through the record without an
4 appellate brief to tell them look at this page and look
5 at this line, but I certainly think it's good to put it
6 in here so everyone can see that there is going to be an
7 independent evaluation. Whether the appellate brief is
8 good or not, the court is going to take upon itself to
9 be sure that we don't have an improper permanent
10 termination of a parent-child relationship. So I like
11 the comment.

12 CHAIRMAN BABCOCK: Okay. Any other
13 thoughts about it.

14 MR. JACKSON: I just have a question, Chip.

15 CHAIRMAN BABCOCK: Yes, David.

16 MR. JACKSON: Are these appeals filed under
17 the expedited appeals, like the original cases of these
18 child cases that we've been talking about in the past?
19 In the other words, does the court reporter have 15 days
20 or 10 days?

21 CHAIRMAN BABCOCK: Well, it says
22 accelerated appeal.

23 MR. JACKSON: Accelerated.

24 MR. ORSINGER: We had a lot of work on here
25 at this committee level because the Legislature had

1 instructed us to make recommendations to speed the
2 appellate process along, and the public policy behind
3 that, just to remind you, is that the child status is in
4 limbo. They can terminate it, but there's a process of
5 due law and sufficiency of the evidence, and if that
6 goes on for six months or nine months, then the process
7 can't move forward. So I think the Legislature said
8 speed it up, speed it up, and we did. We made a lot of
9 changes in the appellate rules here.

10 MR. JACKSON: Right. But in the frivolous
11 appeal-type things which -- yeah.

12 MR. ORSINGER: I can't remember what we did
13 in the last meeting, but the task -- 7 Task Force, we
14 wanted to create a separate timetable with it's own
15 motion for a new trial deadline because it's impossible
16 to raise ineffective assistance of counsel when the
17 lawyer that you're asking to file that argument is the
18 lawyer who was incompetent.

19 And so the question -- and some
20 incompetency is not on the face of the record. Some of
21 it's embedded in the inability to call witnesses. And
22 so the thought was the only way for us to think this in
23 was to create a new timetable for motions for new trial
24 on ineffective assistance of counsel, and give the new
25 lawyer time to come in, acquaint themselves with the

1 case. I can't remember what we ever did with that. I'm
2 not sure we resolved that issue or really took a vote on
3 it. I don't know.

4 CHAIRMAN BABCOCK: Okay. Any other
5 comments? Yeah, Justice Gray.

6 HONORABLE TOM GRAY: There is a potential
7 discrepancy between use of the words "response" versus a
8 "brief." The pro se litigant, at that point, the actual
9 party, does get to file a response.

10 In the criminal context, we have expressly
11 and forcefully said this is not a brief. No file a
12 briefing requirements. This is a response to inform the
13 court of what issues you think we should look more
14 closely at while we are doing our independent review.

15 So I think the use of the term "response"
16 in the unlabeled section under four is correct.

17 But that -- your comment made me think more
18 about the heading for the next one, Abatement For
19 Additional Briefing. "Abatement," again, a term of art
20 that actually when we, or at least for our court -- may
21 not be a way for the First and 14th or the other courts
22 of appeal -- abatement is a formal process of putting a
23 trial court back in jurisdiction to do something. That
24 is not what is happening at that point.

25 I could do without the word "abatement,"

1 and it's actually more in the nature of a study or
2 schedule suspended, just an order requiring additional
3 briefings. It's not really a true abatement, but I'm
4 not terribly offended by it, not nearly as much as I am
5 other portions of the rule which I won't go back into
6 because I've already lost --

7 MR. ORSINGER: Can I ask you a question.
8 What is the impact of the timetable that's running
9 against the court of appeals?

10 HONORABLE TOM GRAY: None.

11 MR. ORSINGER: Doesn't matter whether you
12 call it abatement or stay?

13 HONORABLE TOM GRAY: No.

14 MR. ORSINGER: Can you stop the clock or is
15 it running, no matter what?

16 HONORABLE TOM GRAY: Right now, as it
17 exists -- and I'd have to go back and see if there was
18 some -- I know it was discussed in the context of this,
19 whether or not we could stop the clock for any reason,
20 but I haven't -- didn't get a chance to look at this to
21 see if it now does that. But right now, the way
22 everything has worked is of the day that the notice of
23 appeal is filed in the trial court -- one of our
24 problems has been we may not even know that for
25 30 days -- our 180 days is running. And it never -- it

1 doesn't stop for any of this, not for delays in the
2 record, not for anything.

3 MR. ORSINGER: Even for a remand for a new
4 brief, which starts the whole new briefing cycle?

5 HONORABLE TOM GRAY: Correct.

6 MR. ORSINGER: But that's something the
7 House Bill Task Force thought about, how does the court
8 of appeals reconcile having a second briefing cycle with
9 a new lawyer and still be under that six-month clock.

10 HONORABLE TOM GRAY: We've made it. We've
11 done it. We've been able to do it, but it is -- you've
12 got to have somebody assigned to process these appeals
13 from the date you first get the notice of appeal, and
14 they ride herd on them or you don't make the 180 days.

15 Do you agree with that, Tracy?

16 HONORABLE TRACY CHRISTOPHER: Yes, and
17 sometimes we bust those 180 days because of that.

18 HONORABLE BILL BOYCE: And just by way of
19 background, there's a series of votes that are reflected
20 on the first page of this memo that, the short version,
21 we count some of this ground that's been plowed at prior
22 meetings. The notion of tolling it for an abatement was
23 voted down.

24 MR. ORSINGER: Oh, okay.

25 HONORABLE TOM GRAY: And in closing on my

1 part, my comments, the suggestion that Richard made on
2 the last part of the rule to split the discussion
3 between the court duties versus the lawyer duties when
4 they give their -- when they get to the order that
5 affirms the trial, I think that's a good division. I
6 think that we add one more section to the rule, but if
7 the lawyer duties that kick in at the point that we
8 affirm the order of termination was set out in its own
9 rule or own portion of the rule with a subheading would
10 be an improvement. I wouldn't vote against it because
11 of that, but I do like the idea that Richard suggested
12 to break it out separately.

13 CHAIRMAN BABCOCK: Bill, how do you feel
14 about the word "abate" versus "stay" or some other word?

15 HONORABLE BILL BOYCE: I guess I have a
16 broader conception of abatement, does not necessarily be
17 limited to sending the matter back from the appellate
18 court to the trial court because I think of it, for
19 example, in the bankruptcy context. The appeal is just
20 stopped or paused while bankruptcy -- the stay is in
21 place. So I guess I don't have a super strong feeling
22 about using the term "abatement" versus "stay." Stay
23 may be more plain -- plain English.

24 CHAIRMAN BABCOCK: Justice Christopher.

25 HONORABLE TRACY CHRISTOPHER: Well, you do

1 abate if you're going to send it back for newly
2 appointed counsel. So I think it is all right to leave
3 it at abatement.

4 I like what Richard said. Sometimes the --
5 like the most common problem we see within Anders is
6 they won't address the grounds D and E, and so D and E
7 might be a frivolous issue ultimately, but they still
8 have to specifically address it. So -- so I wouldn't
9 call -- like, if they didn't put D and E in their first
10 brief, I wouldn't remand to say it's a nonfrivolous
11 ground. I'd just say you have to address D and E and
12 give us your opinion separately if it's D and E are
13 frivolous.

14 HONORABLE BILL BOYCE: So should it say
15 potentially nonfrivolous then?

16 HONORABLE TRACY CHRISTOPHER: Yeah. That'd
17 be all right.

18 CHAIRMAN BABCOCK: Justice Gray.

19 HONORABLE TOM GRAY: While the attorney has
20 drawn the conclusion that the appeal is frivolous, the
21 grounds are D, E, and O, we are going to do an
22 independent review to see if we agree, and we are going
23 to include in our review a D or E evaluation, why would
24 we have to have counsel's briefing on D and E as an
25 independent frivolous issue?

1 In other words, we don't -- I'll tell you
2 this. We don't require that now. If they say it's
3 frivolous, we assume that they have complied with -- is
4 it P.M. They have complied with P.M., and when we do --
5 then we do our independent review and we comply with
6 P.M. by reviewing internally D or E and agree that those
7 would be frivolous grounds to argue that they were
8 meritorious.

9 And so we don't -- we still affirm and we
10 will mention which one we looked at, but we're not going
11 to require counsel to independently brief two grounds
12 that they've determined are frivolous.

13 CHAIRMAN BABCOCK: Justice Christopher.

14 HONORABLE TRACY CHRISTOPHER: So we do.

15 HONORABLE TOM GRAY: I know.

16 HONORABLE TRACY CHRISTOPHER: So our Anders
17 checklist, which is on our website, requires sufficiency
18 of the evidence with respect to D and E specifically.
19 We require them to specifically mention that. So...

20 MR. ORSINGER: For the context, I
21 believe -- correct me if I'm wrong -- the reason that D
22 and E is so important is that that has to do with abuse
23 and neglect of this child, but it can also be the
24 grounds for abuse and neglect, the termination of a
25 different child. So it could have res judicata effect,

1 and that's why you've got to get it right in this case
2 because they don't get another chance, I guess, with the
3 next child. That's why the importance of D and E for
4 you?

5 HONORABLE TRACY CHRISTOPHER: Yes. So we
6 specifically put it in our Anders guideline. So, if
7 they didn't address it, we'd send it back and say do
8 that.

9 CHAIRMAN BABCOCK: So are we ready to vote
10 on these two proposed changes or do we need more
11 discussion or do we need more amendments?

12 HONORABLE BILL BOYCE: I think we're ready
13 to vote, and I think we're done with this rule, and it's
14 incorporated and submitted to the court. I think that's
15 where we are.

16 CHAIRMAN BABCOCK: Yeah. All right. Let's
17 vote on the Abatement for Additional Briefing language.
18 First, everybody in favor raise you're your hand.

19 HONORABLE BILL BOYCE: Keeping the
20 abatement language?

21 CHAIRMAN BABCOCK: Anybody opposed?
22 Twenty-one to nothing in favor.

23 And then the comment. Everybody in favor
24 of the comment as drafted, raise your hand. All right.
25 Twenty-two to nothing. We picked up a vote. Chair not

1 voting. And so that will take care of that.

2 MR. ORSINGER: Hold on, Chip. There's
3 another important one. It's the last one there about
4 whether to break out: The court of appeals should
5 affirm the final orders, subject to the requirements
6 that the attorney do so himself.

7 CHAIRMAN BABCOCK: Tell me what page you're
8 reading from.

9 MR. ORSINGER: The last page, very last
10 paragraph of the rule. A suggestion was made and other
11 people suggested as well that we turn that into a
12 separate paragraph setting out the duty of the appellate
13 lawyer after the opinion comes down affirming, and
14 that's really important because right now this
15 doesn't --

16 CHAIRMAN BABCOCK: The pages are numbered.

17 HONORABLE TOM GRAY: Right above the
18 comment.

19 CHAIRMAN BABCOCK: Page 3, that's supposed
20 to be -- Bill, what's your position on that?

21 HONORABLE BILL BOYCE: I'm fine with that.
22 I think that will be potential clarity.

23 CHAIRMAN BABCOCK: I'm sorry, say again?

24 HONORABLE BILL BOYCE: I'm fine with it.

25 CHAIRMAN BABCOCK: You're fine? Anyone

1 opposed? I didn't hear anybody opposed. You made it.

2 MR. ORSINGER: Okay.

3 CHAIRMAN BABCOCK: You're going to have
4 your fingerprints on the recommendation.

5 All right. Do we have any other business
6 before us today, other than to compliment Alexis for
7 being a terrific member, ex officio? That is one
8 focused child.

9 Your thanks for everything, and we will
10 next meet April 21st, right back here. April 21, back
11 here, and thank you all for your hard work today, and
12 thanks, everyone. We're in recess.

13 (Proceedings concluded.)

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2 **REPORTER'S CERTIFICATION**

3 MEETING OF THE

4 SUPREME COURT ADVISORY COMMITTEE

5 * * * * *

6

7 I, MELINDA M. WALKER, Certified Shorthand
8 Reporter, State of Texas, hereby certify that I reported
9 the above meeting of the Supreme Court Advisory
10 Committee on the 17th day of February 2023, and the same
11 was thereafter reduced to computer transcription by me.

12 I further certify that the costs for my
13 services in the matter are \$1,917.00.

14 Charged to: The State Bar of Texas.

15 Given under my hand and seal of office on this
16 the 22nd day of March 2023.

17

18 /s/Melinda M. Walker
19 Melinda M. Walker, Texas CSR #4313
20 Certificate Expires 05/31/24
21 703 W. Pecan Street
22 San Saba, Texas 76877
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