* *

MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

JUNE 16, 2023

(FRIDAY SESSION)

* *

Taken before *D'Lois L. Jones*, Certified Shorthand Reporter in and for the State of Texas, reported by machine shorthand method, on the 16th day of June, 2023, between the hours of 9:00 a.m. and 3:06 p.m., at the State Bar of Texas, 1414 Colorado, Austin, Texas 78701.

INDEX OF VOTES

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

--*-*-*

MS. WOOTEN: Good morning, everybody. It's 9:00 o'clock, so we're going to get started with the meeting. You're probably wondering why I'm sitting here instead of our wonderful witty chair. It's because he's been sick with COVID. He's on the mend fortunately, so all is well, but he's keeping his distance to avoid getting anybody else sick. So I'll be here today and tomorrow. And with that I'm going to turn it over to Chief Justice Hecht for the status report from the Court.

HONORABLE NATHAN HECHT: Thank you, Kennon. This is only the second time Chip has missed a meeting since he's been chair, so we'll give him an excuse this time, particularly since we don't want to get what he's got, so we wish him well, and we thank Kennon for stepping in this week and are grateful to her.

The Supreme Court will put out some orders here in a few minutes, and we're two weeks away from the end of our scheduled term, and I believe we will be -- we will have issued opinions in all of the argued cases by the end of June as we have for several years.

You may have noticed in the paper this morning more evidence that the 88th Legislature was rather difficult, and now there are all sorts of things are being talked about going forward, including vetoes of bills. On

our side, except for pay issues, which are serious, the -- the judiciary did pretty well. The Judicial Council's recommendations were well-received, and as usual, since 2003, in the last 20 years we have gotten a lot of directives, instructions, suggestions from the Legislature about changes in procedure and rules of administration of the judiciary generally, including the legal profession.

So just a word of history about that. Back in the '90s, the Legislature and the rules committee did not work together very well, not for any particular reason, just because we never had, and it was kind of a new thing, and in 2003 that changed, and the Legislature gave us 11 different areas in which rules should be -- rule changes should be considered. They were, at the time, and I think since, thoroughly pleased with that result, because as you know, we can talk about the details of things and make sure they work for the people who have to use rules and procedures; whereas in a legislative session, that's very difficult to do with all of the politics going on. So they've got bigger issues that they worry about, and the details of how to effectuate this or that procedure are best left to this committee and to the Court.

So we have got almost 30 -- I said 11 in 2003. We have almost 30 bills that fall into that

category this time, and the ones that are on the agenda are ones that Justice Bland and Jackie and I thought going through them best needed your attention over the course of time. So our hope in this meeting is to make sure we have a good plan for all of these going forward to get recommendations on some by the August meeting so that if we can, we can reissue an order before September 1st when some of the changes become effective, and for others to continue to look at them at the October meeting and maybe the December meeting trying to work all of those out on a -- on a later timetable.

The business courts, as you probably know, and the Fifteenth Court of Appeals do not actually -- well, the bill becomes effective September 1st. The courts themselves do not become effective until September 1st of next year. So we have a little time to work on those, but we also -- they may be quite a bit more complicated.

Here's some things that we sent to other people, because some of the instructions that we got on the rules changes we didn't think needed your review, so there's a new standing requirement for grievances filed against an attorney. You may have heard of that in the press. And you may not have heard that there's now a statute that authorizes a public sanction against an

attorney who knowingly makes a false declaration on an application for a place on the ballot for judicial office. So we have sent those over to the -- to the grievance rules people to let -- at the bar to look at and to make recommendations on. And then to the Board of Legal Specialization, there's a statute that creates a specialization in judicial administration, so that may interest some of you, and the thought behind it was to continue to try to provide ways to increase the experience and qualifications of judges and judicial candidates, and then in this case others who work with the judiciary.

We're going to work with the Court of Criminal Appeals on some updates to judicial education rules. We're going to try to do in-house at the Court changes in the protective order kit. One thing of note is that a Court no longer needs to find that family violence, quote, "is likely to occur in the future," end quote, to issue a protective order. So that's a change, and we'll be changing the protective order kit accordingly.

Some changes in the will forms. One statute allows felons to be independent executors, so we'll make a change in the will forms to that effect. We need some changes in the electronic proceedings rules for IV-D cases. The attorney general made a push, and I think he was right to do so, to make it easier for lawyers in the

attorney general's office to participate in IV-D cases instead of them having to travel around the state, so make some changes there.

There's some -- the changes in the omnibus courts bill to allow clerks to summon jurors directly, and I don't know why we haven't done this before, but it's been brought up several times to put orders on the re:SearchTX on the Tyler Technologies e-filing system, so some courts have done that a little bit already, but now there's a statute that requires us to do that, and that will be a good change.

So we issued some rules for injunctions against cyberbullying in March. We updated the Rule of Judicial Administration 7 regarding electronic proceedings, just to keep it consistent with everything else. The Rule of Judicial Administration 10, we clarified that local courts cannot require use of a particular form. We discussed that here, of course, and in TRAP 34.5 we changed the rules to require the automatic inclusion of supersedeas bonds and deposits in the clerk's record.

There's been some changes in juvenile proceedings, which we'll have to incorporate in the TRAPs and the Rules of Judicial Administrations. One rule that, again, I wonder why we have not thought about this before,

but we changed TRAP 6.4 to apply withdrawal procedures only to the lead counsel and not to all of the associates. Maybe that's a nod to the current business model of law firms these days, but with people moving around associates should notify courts and clerks, but the formal withdrawal procedures apply just to lead counsel.

You may have heard in the news this week that Governor Abbott does not intend to extend the disaster order that he issued on March 13, 2020, for COVID, so the Court's authority to issue emergency orders will stop at the same time, although we have quit issuing emergency orders as of several months ago. We will look at changes that we made in eviction diversion programs, such as allowing legal aid providers to be in or near the courtrooms during eviction procedures, and we'll think about whether that should be continued. We've already gotten a request from Justice Chu, who has been kind of our liaison with the JPs, to think about that, so we'll take a look at that.

So there's a lot going on. With regards to Operation Lone Star, there's a separate Governor's emergency order that applies down there, so that won't affect the orders that we've put out to facilitate arraignments and proceedings and assignment of indigent counsel in those cases.

It's really critical that we respond timely and substantively to the Legislature's directions and requests. The -- as Von Grotius said, the request of a tyrant is hardly discernible from a command, so we've got our marching orders and we can get with it, but most of all, we want to maintain a really good relationship with the Legislature on these kinds of things and the process -- the rules and procedure process that we have used now for coming up on 85 years. And we need to continue to look for ways to assist them when we think they need to consider changes in the substantive law or statutes to pass that along to them, which we find from time to time in our discussions here.

So, Madam Chair, that's my report.

MS. WOOTON: Thank you, very much, Chief Justice Hecht. Justice Bland.

HONORABLE JANE BLAND: Good morning, I'm so glad that y'all are here and we're all together. On the division of labor for these many projects that the Legislature has assigned to us, Chip Babcock at the beginning of every one of our reconstituted committees makes subcommittee assignments and chair assignments, but sometimes those are not going to map perfectly onto the numerous legislative assignments that we've received, and I think as a result of that he created a business courts

task force, but also, you know, played around a little bit with what got assigned where. If you have a particular interest or if you noticed that someone of your particular background and experience might not be reflected in those committees, let Chip know, because we want all hands on deck. Anyone who is interested in helping with any particular project is welcome, and just let Chip know.

MS. WOOTEN: Thank you, Justice Bland. All right. So we shift into item four on the agenda on discovery in family law cases. I do not see Bobby Meadows here. Chief Justice Christopher, are you taking lead with the report?

HONORABLE TRACY CHRISTOPHER: Yes.

MS. WOOTEN: And the memo for everybody's reference is Tab B of the materials, starting on page 16 of 357.

HONORABLE TRACY CHRISTOPHER: All right. So HB 2850 changes Rules 194 and 195 with respect to family matters. The bill analysis says it was only designed to affect those two rules, but the bill itself is a little bit broader than that, in our opinion. So there are a number of things that we flagged as issues and potential changes. We got Richard Orsinger involved on our subcommittee. He's done a little digging. We're not exactly -- well, we know that the authors of the bills

practiced in family law and did not like the initial disclosures. So, you know, that was the impetus of the bill, not really sure of the impetus of the change in the expert disclosure rule.

So we looked at the bill. We looked at our current rules, and there are a number of things that I think that the Supreme Court Advisory Committee should vote on. Okay. So the number one question -- and I don't know if we want to get to this one first or not -- is section 301.002 of the bill, which says "This provision provides that this chapter may not be modified or repealed by the Supreme Court." So the question is do any of our discovery rules modify or repeal this statute, and as I said, clearly 194, 195, have been changed, but as we went through the discovery rules, there are a lot of things that would need to be tweaked in connection with it. So that's number one.

Number two, there's a provision protecting draft expert reports and disclosures. We thought that that was currently in the rules of discovery and that there was no need to make a change to the discovery rules on that part. It's just going to be part of the Family Code. We think it's current law, no problem.

The next major sections of the bill, again, deal with going back to requests for disclosures instead

of having initial disclosures, and then secondly, discovery regarding testifying expert witnesses. So the first sort of biggest issue is do we incorporate these provisions into our rules, or do we just say for family -- for cases governed by the Family Code, see section 301.051? So our committee kind of went back and forth on it, back and forth on it, and decided that we thought it would be easier for most people if the actual change was in the rule as opposed to just a reference to the Family Code section.

So that is what we have drafted here, where we have created a 194a and created a 195a, and both of those incorporate verbatim the statutory language. Richard has gotten some feedback from some people indicating that maybe they prefer not to have it incorporated in the rules, and so that, you know, is kind of -- that is the biggest issue. Our first thought as a committee member was just refer -- refer to the new Family Code. But then, you know, when you talk to people, well, are we going to have these weird new rules involving request for disclosures and different rules involving experts in something where, you know, a judge, a lawyer, has to have the rule book and the Family Code provision out at the same time to make sure that they covered it.

So we have drafted it so that you could see

what it looks like, by adding 194a and 195a. However, if the committee or the Supreme Court or after further, you know, sort of back channel research, you know, the indication is it would be better if it was just a reference in the rules, you know, we're perfectly fine with that. But that's kind of like the first big discussion point, and, you know, I'm almost thinking it's premature, just because we're still running the traps on this, but I don't think it would hurt to have discussion by this committee on what people think about that. So that would be -- that would be the first issue to discuss, should we include a 194a and a 195a or should we just reference under current 194, doesn't apply in family cases, please go see the Family Code; under current 195, doesn't apply in family cases, please go see the Family Code. So that's the first question for discussion in my opinion.

MS. WOOTEN: Mr. Orsinger.

MR. ORSINGER: So at the subcommittee discussion I was of the opinion that it would be better to have the rule change required by the statute reflected in the rules so that the users could look just to one place to figure out what rules applied. Since Chief Justice Christopher circulated her proposed language, I circulated it among the family law counsel leadership, the officers,

and there were three lawyers in particular that assisted Representative Smith in the drafting of this bill and in navigating this bill through the Legislature, and the Judicial Council made some changes and there was some -- there was a floor amendment, and so the bill had an unusual path to -- but of the three lawyers that I've communicated with that were involved, all three of them think that it is better not to change the Rules of Procedure to reflect the effect of the statute, except perhaps peripheral changes that are cross-referenced that are no longer meaningful. And then here at 9:10 this morning, I just received an e-mail from the chair of the family law section, who has been involved in this e-mail exchange here in the last 48 hours, who said on reflection, he thinks it is wiser not to include the Family Code provisions for the simple reason that if the Legislature amends Title 6 in the future, the rules and procedure in the Family Code will conflict until new rules are issued.

So we do have a Legislature that has a number of lawyers, and some of them are family lawyers, and they're empowered as legislators to make changes through statutory amendments, which we have experienced before in the family law arena, so it is entirely possible that they're making future changes, and that's a factor to

consider is if every legislative session are we going to be having to tinker with the rules or are we better off just referring to the Family Code. On the larger issue, the motivating factor for the bill was merely to undo the required initial disclosures. It was not really broader than that, and there was a concern that perhaps in making the amendment that they might lose the recent changes that discovery does not include the rough drafts and the communications between the lawyers and the expert witnesses, so that was added in there to be sure that it didn't go away. So I think the perspective of Representative Smith and the lawyers that were working with him was to merely restore the practice to what it was before the mandatory initial disclosures occurred.

And given that that's the case, that -- the presenting question of whether we change the rules or not, there's still discussion going on because this only hit them, the family law people, very recently. The bill amendment to the Family Code did not originate with the family law bar. It originated with a particular representative, who then enlisted the aid of some of the family law bar, so the bar itself, family law bar itself, doesn't really have a position yet. They're still formulating it, and I'm still seeing the e-mails passing back and forth, but they're all volunteering to help if

their input would be considered useful.

And one of the things to refer back to what Chief Justice Hecht said about the cooperative relationship we've had with the Legislature has not always been cooperative, and sometimes it's even been antagonistic, and I think that it's -- it's a good practice when a bill makes it through the Legislature and gets signed by the Governor, which is a difficult process for us to be cooperative in the efforts to figure out how to implement that, and so rather than make a final decision today, which would not be characteristic anyway, I think it would be a good idea to vet our views and then not to make any kind of binding decision today, but just continue to get input and see what the organized family law bar thinks, see what Representative Smith would be offended at or not offended at, and take all of that into account. So anyway, it's a going process, and e-mails are coming in.

MS. WOOTEN: In that regard for Representative Smith, am I correct in understanding we don't know the viewpoints of Representative Smith as to whether this should be addressed in details in the rules or --

MR. ORSINGER: This is correct, but we can probably get that pretty easily, and to me it seems like

the smart thing to do.

MS. WOOTEN: Robert Levy.

MR. LEVY: I just had a question. How will this split work when you've got cases that have Family Code issues, but also involve traditional tort claims or other claims?

HONORABLE TRACY CHRISTOPHER: Well, the requests for disclosure seems to indicate that there would be other tort claims involved. They don't -- because they talk about discovery, about personal injury type, you know, medical bills and things like that, so -- so it would seem that they are discussing the same kind of, you know, kind of ancillary issues that you sometimes get in the Family Code. It would not discuss any sort of, you know, business problem that sometimes arises in the Family Code that I could tell just by looking at it. The -- you know, it says this chapter applies only to a civil action brought under this code. So that's all I've got in terms of would we have different rules for the family law matters versus ancillary nonfamily law matters.

MR. LEVY: I'm wondering whether we want to consider providing guidance on how to navigate that issue for the courts, apply the Family Code provisions for the parts of the case that are out of the Family Code.

HONORABLE TRACY CHRISTOPHER: Well, we

hadn't really thought about that on our committee truthfully, so I'm not really sure where I feel -- where I would feel about that, but I mean, it's a good point.

MS. WOOTEN: Richard Orsinger.

MR. ORSINGER: So it is -- it is pretty -- I mean, not very apparent what the extent of the chapter applies only to a civil action brought under this code. Clearly a divorce case is brought under this code, but traditionally some torts were also brought in connection with family law cases, although that's not as popular as it once was, and now I'm seeing quite frequently the joinder of entities and trusts in litigation to either invalidate transfers to entities or trusts or to completely unwind trusts altogether, and you have all of these fiduciary -- breach of fiduciary claims, and it can become quite complicated and doesn't look very much like a divorce anymore.

It does seem to me that this is another unintended consequence of a simple effort to do one thing, and then all of the sudden the ramifications become more complicated. It does seem troubling to me if we have two different disclosure schemes in the same lawsuit, and picking and choosing between whether a claim for fraud on the community is governed by the family law rules or governed by the civil rules relating to fraud, it becomes

very subjective and is going to lead to a lot of disputes and perhaps court hearings and maybe even mandamuses. So I would initially myself, in reaction to your issue, which I never thought of until you raised it, Robert, is that it would be better if it's raised in a divorce case, then it's governed by the divorce statute, but this is a perfect example of the kind of thing that we could discuss with others and find out if there's a broad consensus or whether there's a sharp disagreement.

MS. WOOTEN: Anyone else have any thoughts they want to share? Yes, Tom Riney.

MR. RINEY: I'm inclined not to include it in the rules, just have a reference to the Family Code. This may not be a good reason, but I am amazed how many people still don't follow the initial disclosures. I mean --

MR. ORSINGER: It's true.

MR. RINEY: Even after I serve my initial disclosures, it doesn't prompt anything. So if we put in there required initial disclosures and then have a separate rule that says but in family cases you have a request for disclosure, I think that just potentially leads to additional confusion, but of course, you could also say that. On the other hand, if they don't read the rule now, they're not going to read the amended rule,

so -- but I think simplicity, it's always a good idea.

MS. WOOTEN: Chief Justice Gray.

HONORABLE TOM GRAY: When Tracy was laying this out it occurred to me that the scope of the rules, our current what it is we do at this committee for the Supreme Court, we really need to think about what is the philosophy of the rule book and why it's there, and I went back to this Rule 2, scope of the rules, and it just seems to me that this needs to be incorporated into the rule book, because it's like these are our rules. I mean, some of them are statutory, but this -- you think of this as going to the courthouse with, okay, if it relates to procedure, it's in this book.

Yes, some of the publishers take the Family Code and they incorporate part of the rules in that. We see it over in the criminal law as well, and the Code of Criminal Procedure, the West pamphlet will have the applicable TRAPs and other rules in it, but I just -- I see it as a real problem and a source of potential confusion for a trial court judge or the parties sitting there looking through their rule book for guidance on what we're supposed to do in this particular situation and a family law matter that may be this carryover into this fraud on the community in connection with a divorce proceeding, and that was the very first claim that I

thought of as what's going to happen when they try to do discovery in that case, because we've seen those at the appellate level when they get mandamus or even on ultimate appeal where they get carved out as a kind of a separate proceeding.

It's not a separate case, but it is carved out for a separate trial, and it's -- you know, when it was popular, that was fairly common to see that carve out, but I just -- I think it ought to all be in one place. I mean, it just seems to me that it would be much, much simpler for the litigants; and, you know, I think about, yes, the half a dozen or so people that are responsible for this new bill that guided the new bill through the process, they sound like seasoned veteran family law practitioners. That is not the most common attorney that is litigating some type -- some case that is brought under the Family Code, because this is going to apply to termination cases, it's going to apply to adoption. It's going to apply to a lot of things that as we sit here today, yes, the caption, as Tracy said, that it applies to anything brought under the Family Code, but that's a lot. I mean, there is a lot of stuff that gets swept in, and the average practitioner in small town Texas is not the one that passed this bill.

MS. WOOTEN: And it seems like with the

amount of self-represented litigants in family law cases we ought to consider people who are not lawyers as well when making this decision. Chief Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, that was ultimately, you know, kind of a guiding factor for us, because, sure, the associated family law practitioners have no problem going to the Family Code, but the self-represented might not. Plus, I'd like to remind this committee that in many parts of the state you have trial judges who hear all kinds of cases, right, who maybe get, you know, one divorce case and five criminal cases and two civil cases on their docket; and to the extent they're doing discovery disputes, you know, on a Monday morning docket, you know, this is what -- the rule book is what they're going to have up there on their desk. So, yes, I do understand that if the Legislature makes changes, you know, we'll have to change it again. I mean, I do understand that point of view, but we incorporate a lot of -- as Chief Justice Gray said, we incorporate a lot of statutory changes in our rules, and that -- that was the tipping point for me.

MS. WOOTEN: Justice Miskel.

HONORABLE EMILY MISKEL: I just checked in with Representative Smith on the discussion that we're having, and he said I could share this. He thinks it's

probably a good idea to incorporate it into the rules so it's all in one place, he would not be offended if we did that. As long as we don't change it, because he's very passionate about this one, and if it gets changed he'll come back and address it. I said we understand, we understand where you're coming from, we want to just either have it all in one place or not and wondered if you had an opinion on that. So he would be fine with incorporating it into that and not offended.

MS. WOOTEN: That's very helpful. Anybody else want to comment on this question?

HONORABLE ANA ESTEVEZ: It's not a comment on this question, but at some point if this continues I think we need a separate rule book for the family, just family procedure. I mean, there's judges that only do family law. They can have their one family law book. I have a civil book, I have a criminal book, and there should probably be a family book at some point. Just put everything together in one.

MS. WOOTEN: Chief Justice Christopher.

HONORABLE TRACY CHRISTOPHER: If we were going to address Robert's issue, you know, my -- I would think that we would only have one set of discovery in a divorce case, even if it included ancillary matters. Now, you know, I don't know if that's really within the scope

of our committee's concerns at this point. I mean, we're using the statutory language in making these changes, but, you know, that's where I would go. I mean, there's not -- I understand that they didn't like the initial disclosures, and there's not really a lot of harm between doing a request for a disclosure versus an initial disclosure in connection with these ancillary issues. In my opinion. I mean, they -- it's like the older request for disclosure, you know, before we made our changes, and it incorporates all of the things that the old request for disclosure used to ask for. So to the extent that if you're in a family law case and the request for disclosure doesn't cover anything, well, you know, then you send out interrogatories or request for production and then you cover what you need to on those ancillary matters. I would not -- I would hope that we would not have two different systems going within one lawsuit. That's just my -- you know, as I reflected further on it.

MS. WOOTEN: Richard Orsinger.

MR. ORSINGER: I would like to follow up on what Chief Justice Christopher said, we, I think, at this committee level should make a recommendation to the Supreme Court so that they can make a rule decision about what to do when you have a pending lawsuit part of which is under the Family Code, part of which is under tort law

or fiduciary law, because if we don't do this at the rules stage, at least with the comment, then it's going to be litigated. It's going to be -- there are going to be mandamuses, and it's going to cost people a lot of money to get the answer to this question, and I know that the Supreme Court will ultimately give us the question, either way, but it's going to be easier on so many people if they do it at the rules stage, perhaps only through a comment, than if we have to have mandamuses filtering up through all of the courts of appeals to finally get to the Supreme Court to figure it out.

HONORABLE TRACY CHRISTOPHER: So we'll be glad to work on that language, if the committee thinks we should.

MS. WOOTEN: Anybody else see value in that language being addressed in a comment?

HONORABLE ANA ESTEVEZ: I do. I have family law, so they happen a lot.

MS. WOOTEN: Chief Justice Christopher, do you want to address some of the other questions?

HONORABLE TRACY CHRISTOPHER: Oh, yeah, we have lots of other questions to go through, lots and lots.

MS. WOOTEN: So much to talk about.

HONORABLE TRACY CHRISTOPHER: So the -- basically I went -- I tried to go through all of the

discovery rules and flag and change where I thought changes would have to be done as a result of this. So the next sort of big issue is the fact that the Rules of Civil Procedure in several instances say the trial court by order and the parties by agreement can modify these rules. All right. And so, again, going back to the bill language, the bill language says, "This chapter may not be modified or repealed by the Supreme Court." So is -- is a rule of procedure that allows modification of a rule by court order or agreement of the parties contrary to that language?

So that -- that is sort of the overarching question, and we discussed it a lot in the committee. We didn't come to a resolution, so -- so for example, we had some ideas. Could a trial judge say, "Well, we're going back to request for disclosures"? No, we don't think -- I mean, "We're going back to initial disclosures." Okay, we think, no, a trial judge couldn't do that, even by court order. So -- but could parties by agreement say, "We're going back to initial disclosures"? Or could the parties by agreement say, "Well, I like what's in the new rules with respect to experts, and the discovery of experts, versus what's in the statute." Can we by court order ask for that, or can we by agreement agree to that, and, you know, have the agreement blessed by the court?

Obviously parties can agree to things without it being blessed by the court, and so, you know, the imprimatur of the Court would not be changing the rules, right, WOULD not be modifying or changing the rules. So we -- we didn't really know where to go with this one. I mean, it just kind of bottom line, we didn't know where to go on it, which we are still hoping to get more input from people involved on it. I mean, right now our rules, for example, say, you know, a judge by local rule cannot contradict the rules of procedure, okay, which is maybe another reason to put these noodles into the rule of procedure, okay, because so, you know, a trial court could not say, well, you know, have a standing order that says we want initial disclosures, because that would seem to violate the new statute. So there's quite a few provisions in these discovery sections where modification is mentioned, and we're not exactly sure what to do with it.

MS. WOOTEN: And a lot of those sections were in place when we had request for disclosure.

HONORABLE TRACY CHRISTOPHER: They were. They were. Yes.

MS. WOOTEN: Yes, Jim Perdue.

MR. PERDUE: As I'm reading this bill and I'm just wondering did the subcommittee take the old rule

before the change and just set it next to the bill?

HONORABLE TRACY CHRISTOPHER: Yes.

MR. PERDUE: And is it just -- is it literally that?

HONORABLE TRACY CHRISTOPHER: It's got some minor --

MR. PERDUE: Other than the --

HONORABLE TRACY CHRISTOPHER: It has some minor changes on the expert. The request for disclosures appear to be identical to the old request for disclosure.

MR. PERDUE: See, the problem is, is that when you do that as a bill author and then you send it to lege counsel, lege counsel won't do that. So you take the old rule and then lege counsel scrubs -- scrubs your bill, and then what you think you've done, which is just take the old rule and put it in a statute, doesn't track the -- it doesn't track the old rule because lege counsel has scrubbed the bill for its grammar and all of that stuff.

HONORABLE TRACY CHRISTOPHER: Well, and I did see one that was, like, biography versus bibliography, I mean, there were, you know, a few little funny things that popped up. The -- but the scope of expert discovery is probably the biggest difference, which is something that we'll get to as we go through the individual changes. So, for example, if you look at my draft rule where we

start talking about it, just -- let's see, 190.2(b), "Discovery is subject to the limitations provided elsewhere in these rules and to the following additional limitations." So that, you know, would be changed depending upon whether we put the new rules in or not, you know, as -- so that would be someplace that would need a comment in some way, shape, or form.

Then the next thing that we looked at was the discovery period, so because we no longer have initial disclosures, we had to change the discovery period, and so we drafted that for those cases governed by the Family Code, "All discovery must be conducted during the discovery period, which begins when the suit is filed and continues until 180 days," blah, blah, blah. That is the language from the 2020 rule book. Okay. So we just pulled that out as -- since we now have request for disclosures, we now have request for disclosures that can be served with a petition, because they went back to that, we had to change the discovery period, and our recommendation was to go back to what was in the 2020 rule book. And the subcommittee was pleased that I still had my 2020 rule book. But so that's what we've done there in 190.2.

190.3, we have the same issue. In 190.3, we changed the discovery period for the Family Code until the

30 days before the date set for trial, which is another statutory provision that had been previously in the rules. So -- I don't know -- I don't think we need to vote on these, I'm just going to go through them. People -- I've seen typos already, so, you know, we don't have to worry about that. So then again in 190.4, by order level three. Richard says a lot of divorces are level three cases. Of course, those are the ones he deals with, and again, the current rule says the judge may change any limitation on the time for or amount of discovery set in these rules. So, again, we have the modification question, which we'll get to, but I'm going to just kind of go through where -- where it all came about.

Rule 191, specifically talks about modifications of procedures. Again, do we need to have some sort of, you know, an overarching comment or a comment in every single section where modification is spoken of. So then we went to 192.1, and we did required disclosures, except in cases governed by the Family Code, request for disclosure in cases governed by the Family Code as the forms of discovery. So whether this is in the book or not, these changes need to be made. The discovery period needs to be changed. This needs to be changed in terms of a form of discovery. 192.2, timing, again, the statute says request for disclosures can be served with

the original petition, so we put that back into the rule.

Okay, so then our next one that's a little trickier, next point, is -- and I know y'all don't want to spend all day talking about this one because we've got lots to get to, but 192.3, the scope of discovery. All right. So when we made our big changes, we tweaked scope of discovery for experts, and we pulled in some language from the federal rules and, you know, came up with what we have here. The scope of discovery with respect to experts is not specifically addressed in the statute, but to me by implication it does. It does affect the scope of discovery, so -- and the -- the thing about the statutory provision is, you know -- let's see, where's my language.

"A party may request another party to designate and disclose information concerning testifying expert witnesses only through," all right, so that is a very strong indication that here, you know, they meant to override what we were doing. And 301.104, "In addition to a disclosure request, a party may obtain discovery by an oral deposition and get a report prepared concerning" and then they go through the specific items, right, which is different than our current subsection (e). The description of number (3) and number (4) and number (5) are different in the current rules than they are in the statutory provision. So, therefore, we added what scope

of discovery would be in cases governed by the Family Code as subsection (f), and, you know, we thought that was fair, given the language of the statute, that this is, you know, the only way for you to get discovery of a testifying expert.

But, unfortunately, they did not discuss at all the consulting expert whose mental impressions or opinions have been reviewed by the testifying expert in the new statute. It's not discussed at all. So the question is whether we still have the same (1) through (7) for a consulting expert in a family law case or whether we change consulting expert discovery to (a) through (d), which is in the statute. I mean, I didn't renumber them all appropriately. My computer kept messing up on me as I was trying to import new stuff in. They were like no, this should not be an (a), this should be a what, I don't know.

So that, we're not sure what to do with that one. I mean, that's -- that's the best we can say. We do not know what to do with this issue, and I'm not really sure that -- well, I'm positive that no one thought about it when they were drafting this bill, because otherwise, you know, I think they would have addressed it, and, now, you know, what do we do at this point? I don't know. It would be simpler if we added consulting expert testimony

down into (f), so that we would have (e) would be clearly nonfamily law cases and (f) would be clearly family law cases involving both experts and consulting experts, which is the way -- but I don't know. I don't know which way to go on that.

And again, the statute here did use biography, not bibliography, that's why I put that in there. Again, 193.1, responding to discovery within the time provided by court order. We get back into the modification problem, you know. And I -- one of the family law lawyers mentioned 193.6, which I did not catch, and 193.6 talks about required disclosures, and so the question is, is that -- is a required disclosure, does that cover both an initial disclosure and a request for disclosure, or should we make it clearer in terms of changing that particular rule? And I know Jackie is listening because she's going to have to do all of this work, because it has to go by September 1, so we tried to flag as much as we could what we thought the issues were.

So then the changes to 194 are basically taking out all of the stuff about the Family Code in current 194, and I think we got it all, and creating 194a, request for disclosure in cases governed by the Family Code, as we talked about. And then 195, all you have to do is change the heading and then 195a, discovery

regarding testifying expert witnesses for cases governed by the Family Code, we then imported the statute there.

So we think we've gotten all of the potential changes in this memo, except for 193.6 where it says required disclosure, but, you know, we're still looking to see if we missed something, you know, as we went through the rules. So that's -- that's kind of the changes that need to be made, assuming everyone is okay with going back to the old discovery period as a result of the change and then the overarching question about how to address modification.

MS. WOOTEN: One question that I have is whether there are any statutory provisions that address the meaning of consulting expert. I'm not aware of any, but I wonder whether there is any statute now that addresses consulting experts.

HONORABLE TRACY CHRISTOPHER: Oh, a statute?

MS. WOOTEN: Uh-huh.

HONORABLE TRACY CHRISTOPHER: No, not that I'm aware of. I know it's in the rules, but -- because like when you go to 195, you know, discovery regarding experts, it specifically says in the comment from 1999, "This rule does not limit the permissible methods of discovery concerning consulting experts whose mental impressions or opinions have been reviewed by a testifying

expert." So, I mean, you know, that's always been in there, and it doesn't refer to any statute. I am not aware of one. So I don't know if we want to have discussion about the modification issue or, I mean, because that would be the next thing in terms of a big issue.

MS. WOOTEN: Richard Orsinger.

MR. ORSINGER: So on that issue, just thinking through the practicalities of it, I doubt that there would be a motion to require initial disclosures, because you can get the information you want by sending a request, which is easier than filing a motion and having a hearing, right? So to me it's more likely that a modification would occur not as a result of a motion by one side, objected to by the other, but courts that adopt standing orders that reinstate the rules for the statute, and it is the practice around the state for family law courts to have standing orders that apply just to family law matters, and they have all of these rules that relate to the husband and wife relationship and these rules relating to the property of the parties and rules relating to the children, and they just don't want to be bothered with temporary restraining orders. You have a set, don't you? I mean, it's all over the state.

So the thing that I could envision might be

a problem that we should address at this level of the Supreme Court's recommendation is a trial judge that decides to have a standing order that basically nullifies the statute and puts the initial disclosure rule back in effect. Now, it may be no trial judge would try to do that, but if they did, I think it would kind of break the spirit of the statute. It wouldn't be the Supreme Court doing it, so it's not expressly prohibited if the trial judge does it and the Supreme Court doesn't do it, but we could have some statement from the Court somewhere that the trial judges should not adopt local rules or standing orders that contravene the Family Code statute in this regard. That's just a thought.

HONORABLE TRACY CHRISTOPHER: Well, what if, you know, we worked on this whole content in certain suits under the Family Code that's currently in the rule, subsection (e) -- or no, (c), and, you know, what if the trial judge put that back in as a requirement of a request for disclosure, as part of a request for disclosure? You know, there's just a whole lot of unanswered questions by the language in the -- and what's really interesting, too, while the language about expert witnesses say you can only discover about expert witnesses only through this section, the actual section about requests for disclosure does not explicitly say no initial disclosures, but we think that

that was the intent of it, but there is not, you know -- not later than the 30th day for, blah, blah, blah, a party may obtain disclosure by sending the request for disclosure.

So in the expert language it was like only through, but in this disclosure language it's "may," may obtain disclosure this way. So that's kind of another wrinkle in the language of the bill. But we did think the intent was to get rid of initial disclosures, and that's what the House bill analysis says, and that's the way we've drafted it, as if it did get rid of the initial disclosures.

MS. WOOTEN: To the discussion point about whether a judge could through a standing order try to do something conflicting with the Family Code, that might be another reason to incorporate all of this text into the rules because we do, of course, have statewide rules saying you can't have a standing order that conflicts with the statewide rules.

HONORABLE TRACY CHRISTOPHER: Right. Right.

HONORABLE EMILY MISKEL: That same rule also says that standing orders can't conflict with state law, so --

MS. WOOTEN: Oh, covered.

HONORABLE TRACY CHRISTOPHER: So that, you

know, I am sure the unintended consequence was not to prohibit agreement by the parties to, you know, change anything, but, you know, modification by court order is where we run into potential problems. And it could just be dealt with by a comment in every -- every time we talk about modification, which I tried to flag as we were going through it, or maybe just sort of an overarching comment at the beginning of the discovery rules. I'm not sure which would be best.

MS. WOOTEN: So for purposes of today, do you want to take any votes? I know you mentioned a need for votes at some point, but what's your preference today?

HONORABLE TRACY CHRISTOPHER: Well, you know, and maybe the Court doesn't need the vote. I mean, really the biggest vote is do we incorporate -- do we have a 194a and a 195a. Most of those other changes are I think noncontroversial changes that just have to be done to comply with the statute. So I think Richard thinks it might be a little premature, although if the author of the bill says it's fine with him and he thinks it might be good to be in there, you know, that weighs heavily in my mind, and that has been my opinion, so I don't know whether the Court wants a vote on that point or not.

HONORABLE NATHAN HECHT: Sure.

MS. WOOTEN: Let's get a show of hands. So

all of those in favor of incorporating the bill language into the rules through the new 194a and 195 --

HONORABLE TRACY CHRISTOPHER: A.

MS. WOOTEN: Sorry, 194a and 190 -- is it 195a? Okay. So all of those in favor of incorporating the bill language into new Rules 194a and 195a, raise your hands.

Okay. And hands down. All of those opposed? All right. There we go. We have an overwhelming majority.

MR. ORSINGER: You need to read it so it's in the record what the vote was, if you don't mind.

MS. WOOTEN: Okay.

MR. ORSINGER: Because someone will be reading the transcript, and they won't know.

MS. WOOTEN: You want a count? Okay. So all of those in favor of incorporating the bill language into new Rules 194a and 195a.

HONORABLE ANA ESTEVEZ: I'm just changing my vote because I was the other way because of the phone call with the Justice -- Smith.

MS. WOOTEN: I have 18 in favor of incorporating the bill language into those new rules. All of those in favor of not incorporating the bill language into the new rules, please raise your hands.

MR. PERDUE: Right.

MS. WOOTEN: Three total not in favor of incorporating bill language into the rules. I'm sorry. Nina Cortell.

MS. CORTELL: I just wanted to endorse the idea that ultimately not for the current timetable, that the suggestion earlier made about a separate set of rules for family court practice makes abundant sense, that they be in one place for both the bar and the judiciary, a place you can look to for the rules would be much simpler than what we're currently constructing. I understand the timetable we've got right now does not permit that, but I just wanted to flag that for potential further study.

MS. WOOTEN: Thank you, Nina.

HONORABLE TRACY CHRISTOPHER: Just the last question, do you want us to try and draft language with respect to family cases that include other causes of action?

HONORABLE ANA ESTEVEZ: I think you should.

MS. WOOTEN: I'm getting a nod of the head.

HONORABLE TRACY CHRISTOPHER: Or can Jackie handle that?

MS. WOOTEN: All right, not at this time, but thank you for the offer. All right. Kent Sullivan.

HONORABLE KENT SULLIVAN: Just a brief me,

too. With respect to Nina's suggestion, I think it makes abundant sense. I'm always chagrinned by the fact that we have divided the judicial process -- maybe vulcanized would be a better word -- the judicial process by geography, particularly now by subject matter; and to the extent that that's what we're going to do, we will leave maybe a discussion of the advisability of that to a different day, but if that's where this is going, then we need to make it as easy as possible and as coherent as possible. Nina's suggestion was exactly that.

MS. WOOTEN: Thank you very much. So we have three total having expressed support for that approach. Anybody else want to weigh in on that?

HONORABLE ROBERT SCHAFFER: I agree.

MS. WOOTEN: Judge Schaffer and Marcy Greer agree. Anybody else want to weigh in? Okay. Any further discussion? No further discussion on this item. Ten of seven, so we will move onto item five, suspension of money judgment pending appeal. I'm not sure who is reporting, Connie Pfeiffer?

MS. PFEIFFER: Yes, our chairs are not here, and I humbly agreed to present on behalf of our subcommittee for the appellate rules.

MS. WOOTEN: Thank you very much, Connie.

MS. PFEIFFER: House Bill 4381, which adds

to Civil Practice and Remedies Code, Chapter 52, that's the chapter that addresses supersedeas or superseding judgments, so the Legislature has added section 52.007, which requires a court to allow a judgment debtor worth less than $10 million to post alternative security with a value sufficient to secure the judgment if the debtor shows that the amount required by Chapter 52 or the relevant Texas Rule of Appellate Procedure would require the judgment debtor to substantially liquidate the judgment debtor's interest in real or personal property necessary to normal course of the judgment debtor's business.

We have been asked as a subcommittee to consider whether we should be amending Texas Rule of Appellate Procedure 24.2, which is the parallel rule that goes along with the supersedeas statute or to just add a comment to reference or restate the statute. So I think in some ways this discussion is similar to what we've just been through, but I think I can keep it much more succinct, but I was reminded of these same issues as we were talking, and the first issue is do we amend the rule and do we amend the rule by simply referencing this new statute or do we just incorporate the statute wholesale, and I will tell you my personal leaning on something like this is to not incorporate a statute wholesale

particularly when it's a very intricate statute with a lot of -- this has four subsections and it's lengthy and it's rather intricate, but that said, if Bill Boyce were here he would point out, and I have to agree with him, that Rule 24 is already intricate and lengthy and people go to that rule and see all sorts of minutia about how to supersede judgments. And the concern of the committee is that if we don't incorporate the statute wholesale people won't see it and they won't know where to go, and so there is a real debate of should we just be referencing the statute in some way that points people to the statute if they've got a judgment debtor with a net worth of less than $10 million or should we spell it all out and give them every detail.

So that's going to be issue one. We have gone ahead and offered a proposal to the committee that does verbatim incorporate the statute into the rule, and we are very sensitive to the fact that TRAP 24 is cited by courts a lot because there is lots of litigation over supersedeas, and we didn't want to add a new section in a way that causes old case law to now be confusing because it's referencing different subsections. So our cure or proposal for that was to add subsection (e), which would be a brand new subsection at the end that doesn't cause any renumbering of what's already there, and it would

require a couple of minor tweaks in subsection (4) and subsection (c), with regards to determination of net worth.

Those are easy. The harder questions really are going to be do we want a whole new subsection that imports the statute wholesale, and as we started talking through this we started seeing all sorts of things that we could, you know, have questions about or need to litigate in the future, and I'll just flag those for you so you can see where there's potential ambiguities in the statute. You know, just debtor's business, what constitutes a debtor's business. Or when it says "a trial court shall allow" is this a situation where "shall" means "must" or does "shall" mean "may"; and if a trial court is allowing something, does it have to do it by court order? When it refers to the value sufficient to secure the judgment, what does that mean? How is that going to be determined? When it references personal property, would that include financial instruments or investments, and then -- and it talks about a redetermination of the amount. Who would make the redetermination, because that would generally be while you're on appeal?

So we have a lot of issues we can spot and we think are interesting to talk about. We don't have answers. This was referred to us very recently, and we

are really just looking for some guidance. This may be a very simple task, depending on how the broader committee is leaning, or it could be a lot more work for us. So with that, I will put it to the group to say I think that the two big issues on the table are what are people's thinking about importing the statute wholesale into the rule and should our subcommittee be trying to add and supplement to the Legislature's language by adding some clarity to these questions that we can see now, or should we not and leave that for litigation in the courts to develop? So I'll put that to the group.

MS. WOOTEN: All right. Let's start with the first issue, discussion on incorporating language from the bill into the rule wholesale. Anybody have views on that? Yes.

MR. STOLLEY: We've already done that in the rule, so I don't know why we wouldn't do the same for this new bill.

MS. WOOTEN: So one vote in favor of incorporating the bill language. Anybody else want to speak in favor of incorporating the bill language? Chief Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, this is complicated, Rule 24 is complicated, and, you know, to the extent we have a whole new statutory section, it would

help if it was in the rules.

MS. WOOTEN: Chief Justice Gray, I think I know what you're going to say. Do you have a view on this?

HONORABLE TOM GRAY: I think I laid it out with regard to the last conversation, so bring it in wholesale and litigate the issues as they go along so that you don't have to come back to me on the second questions.

MS. WOOTEN: Noted. Any other discussion on the first question in terms of incorporating the bill language into the rules?

Shifting to the second question about whether the rules should clarify the meaning of terms in the statute, does anybody have any views on that? Aside from Chief Justice Gray. Richard Orsinger.

MR. ORSINGER: Just as a general philosophical point, if there's going to be difficulty interpreting the statute, the most efficient thing for -- is for us to -- is to do that committee process on it, refer it to the Court, and let the Court do it in the rule-making, because I'm afraid it's going to invite disagreement in the trial court, and the case is going to be on appeal, so there's going to be motions filed in the court of appeals, and it seems to me that it's a better way to get to the solution at the committee process

through the Court rule-making than it is to do it through appellate -- motions filed in appellate courts and trial courts. So I would be in favor of -- if we know that there's going to be a problem, I would be in favor of resolving it through the rule process.

MS. WOOTEN: Chief Justice Gray.

HONORABLE TOM GRAY: Unless you agree with that whole concept of letting the issues percolate up through the various courts of appeals and be resolved different ways potentially and let the legal issues be better developed at a broader -- based on actual facts in litigation.

MR. ORSINGER: I certainly see that principle throughout our country and the old federalism and idea of different states, so there is -- there is a lot to say for that, which is that, I mean, in my personal opinion, the collective wisdom of the common law is individual decisions made over a long period of time and a lot of different circumstances is a good way to get at a result, but it's also the most costly way to do it. And so I think you're kind of trading off here, are we going to get a better solution, less -- with less cost through a committee analysis and a decision made in the rule context or all of this litigation that ultimately after 15 or 20 years will finally be ruled on by the Supreme Court?

MS. WOOTEN: Okay. We have several hands. I'll start with you, Scott.

MR. STOLLEY: So one thing this bill does poorly is uses the word "shall," which can be ambiguous. Like there's one point in here on line 15 that it says, "The court shall allow me," to me that means "must allow." But then on line 17 it says, "The judgment debtor shall continue to manage." To me, that seems to mean may continue to manage. I think it would be good for the Court to be clear about what the Court thinks these things mean. So I'm not agreeing with Richard, that it's better for the Court at this point to make it clear procedurally how this thing works. I agree also with the comment about letting things percolate. To me that would apply to substantive problems or questions about the bill's meaning, but if it's a question about procedure, I think it would be preferable for the Court to clearly lay out the procedure. Many of you have probably had the experience of representing a judgment debtor, and it is terrifying to try to wind your way through the process of getting the supersedeas or some alternative approved, and the clearer the Court can be about this, the better, I think.

MS. WOOTEN: Thank you. I think I saw Rich Phillips' hand up.

MR. PHILLIPS: I come at this from having lived through the last time we amended TRAP 24 and adopted all of the stuff about net worth. I had a case that came up very quickly after that, and we had no idea what we were supposed to do, especially because net worth doesn't really mean anything. It means whatever anybody wants it to mean, and so it was -- it was painful. It was a lot of litigation, and a lot of people in this room probably lived through that trying to sort out how do you figure out what somebody's' net worth is, what counts, what doesn't count, all of that.

But my concern on some of those substantive things is despite the wealth of experience of the people sitting in this room, we just can't figure out what's going to come up, and I think sometimes when we try to anticipate all of those things procedurally we end up with unintended consequences and create problems we didn't mean to create because we haven't anticipated a situation that might come up. So I think there may be some value in thinking about the shalls versus musts, and one of the other ones that's in there is this question of if it says the court must or shall allow, does that mean you can't post alternative security until you get an order from the court or -- which is more the federal model for supersedeas, you've got to get it approved, or you could

stay with sort of what we've done, which is it's good until somebody challenges it as long as you follow the rule.

So I think there may be some wisdom in figuring some of those procedural things out, but the substantive things -- and there's a lot of them, right? What does it mean to post it, for example, like how do you post personal property? You go file a UCC on it somewhere or some -- nobody knows. That stuff I think we need to leave to get sorted out as the case is percolating up.

MS. WOOTEN: Chief Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Looking at what the subcommittee has identified as potential problems, I tend to agree we should let those problems percolate, other than the shalls and the mays. Just because I'm looking at what they have defined as potential problems, and I don't see how we're going to come up via rule-making with the answer to that frankly. But -- and I will say here's another sort of complicating factor. I mean, Tom thinks, oh, it's going to percolate up in decisions. Well, unfortunately it comes up to us as a motion, and we write it -- you know, we do an order on the motion, and sometimes West doesn't even pick it up and doesn't put it in the case law.

So, I mean, and so we have, you know,

started calling it an opinion on motion to try to make West pick it up for -- because, I mean, we had a case that -- that we really worked hard on and it was probably a 20-, 30-page opinion, you know, addressing all sorts of things, and we listed it as an order, and it was just gone. And so I'm searching for it on Westlaw, I'm searching for it, I'm searching for it, and then I finally talked to, you know, the staff attorneys, and I'm like I know we wrote something on this, you know, where is the darn thing? And we finally found it, but it was even hard to find within our own software to find it, so that's a good tweak that we need to make in these rules frankly. I mean, if we want case law that percolates up, it needs to be a little bit more than an order on a motion.

MS. WOOTEN: Nina, I think I saw your hand up a while back. Do you still have a comment you want to make?

MS. CORTELL: The comments have been captured. Thank you.

MS. WOOTEN: Next hand, Robert Levy.

MR. LEVY: I also agree with the prior discussion that we probably need to be a little hesitant about defining substantive provisions that aren't spelled out in the statute. One of the areas that you would go to if you were a litigant is the legislative history, which

would include the bill analysis, any debate that took place for how it was laid out in committee and on the Legislature -- the floor of both houses, and so I think that we need to leave that for the case law to develop procedural issues, I think we can try to anticipate those. It does seem like this provision is not self-effectuating, that the court does need to approve it the way that it seems to be presented in the analysis.

MS. WOOTEN: Thank you, Robert. Connie Pfeiffer.

MS. PFEIFFER: Just as a member of the committee I did want to lodge my very strong preference that we not try to address things that you'd call more substantive like defining a debtor's business or defining value sufficient to secure the judgment. I think that's got to be something that the trial court determines and that I think Justice Christopher made a very interesting and good point, this isn't really something that we see percolate in the classic sense of being able to go to Westlaw and look up precedent for it, but I think we should let those things work out with real facts and records and not a rule committee trying to add too much specificity to those kinds of issues, and I think we could figure out maybe if there's a couple of tweaks to make on the "shall" issue or by court order or something to make

it clearer. We could discuss that as a committee, those types of issues, for the full committee.

MS. WOOTEN: Thank you, Connie. Chief Justice Gray.

HONORABLE TOM GRAY: I'm just hoping that someone will pull me aside at the break and explain to me how you can ever qualify under this anyway, because it seems to me like there is a built in failure to meet the test. If you have alternate security that you can post without selling your real estate, how would you be required to sell your real estate to be able to have the bond, but that's probably an offline conversation.

MR. LEVY: The bill analysis talks about that this is a situation where a debtor has income-producing property that would normally be available to address the judgment, but by securing it in a bond, I guess a bonding agency would want all of the income from that property to go to them during the pendency of the bond, but the company needs it to pay payroll. So presumably if they had other security that is not income-producing, it wouldn't fall under at least the intent of this, but -- or if there's some other way that they can secure it without affecting the income.

MS. WOOTEN: I thought I saw a hand on the other side of the room, but I see no hand now. Does

anybody else have anything they want to say at this point? Richard Orsinger.

MR. ORSINGER: Yeah. I'm kind of out of my lane here, but it does seem to me that the logical use of this statute is to say I have this piece of real estate, let me give you a lien in it so that you have a secured position and you can foreclose if the judgment is affirmed, but in the meantime I can keep it and keep the income off of it. To me that's the suggestion here. I don't know if that's practical from the perspective of appellate lawyers who represent these kind of judgment debtors, who I don't.

MS. WOOTEN: Well, it sounds like there may be some benefit to the subcommittee's addressing potential changes for the procedural question "shall" versus "must" and "may," et cetera, but not trying to define substantively the terms that the Legislature didn't define for us. Is that fair? Okay. So I think unless there's a request for a vote, there will be subcommittee attention to the language and then bring it back the next meeting for a vote?

MS. PFEIFFER: Yes. I mean, all the comments I've heard are very positive on incorporating statute into the rule, so I think -- I don't know that we need to vote on that, so that will be the plan unless

anybody would like a vote on that, and then we'll come back with a few tweaks proposed.

MS. WOOTEN: Does anybody want to speak against incorporating the statutory language into the rule? Okay. I think you do have a clear consensus there.

It's 10:27. I think it's a good time to take a 10-minute break so that we can give Dee Dee a break as well, so we'll come back -- let's just say a 12-minute break, 10:40.

(Recess from 10:27 a.m. to 10:40 a.m.)

MS. WOOTEN: All right. We're going to move on now to item six in the agenda. This pertains to permissive appeals. Rich, I'm guessing you're leading this discussion?

MR. PHILLIPS: Yes.

MS. WOOTEN: So --

MR. PHILLIPS: As you may recall in February, this committee voted overwhelming 14 to 12 to recommend the adoption of Rule 28.3(l). Subsequently the Legislature passed Senate Bill 1603, which is in your materials at Tab G, with two new subsections for Civil Practice and Remedies Code 51.014. The first one is (g), and it says that "If the court of appeals does not accept an appeal under subsection (f), the court shall state in its decision the specific reason for finding the appeal is

not warranted under subsection (d)." And then subsection (h) clarifies the Supreme Court can review the decision not to accept an appeal.

One change there is it says that review would be de novo, rather than for abuse of discretion, and then it says that the court can direct the court of appeals to accept the appeal if the Supreme Court finds that the requirements are satisfied. So based on that language at Tab H of your materials you've got a revised proposed Rule 28.3(l). The first sentence basically just tracks the Legislature's language about what the court should do in denying. So "If the court denies the petition, the court must state in its decision the specific reasons for finding that an appeal was not warranted." Then the second sentence covers the Supreme Court review. Because the Court held -- has held that it has jurisdiction on petition for review to review the denial of a petition for permission to appeal, we said on petition for review the court can review that de novo, and then again, it sort of basically tracks the statute language.

So this language is a little different than what the committee approved in February. I think if it were me, I would probably go more with what we approved in February. I think that's a little more specific as to

asking the courts of appeals to explain themselves, but given that the Legislature put this in, we figure it's best to track the language of the statute. So we would propose that the Court adopt or recommend to the Court that they adopt 28.3(l) as revised in our memo, and that's page 50 of your materials if you want to look at it.

So I've got one other issue on Rule 28.2. We'll come back to that. Let's start here, I guess, and see if there's any discussion about the language of that rule and whether to include it. I think we agreed that it made sense to do so before. I think our subcommittee would recommend we stick with that recommendation, particularly now that the Legislature has enacted this statute. So any discussion on those points?

MS. WOOTEN: Chief Justice Gray.

MR. PHILLIPS: Shocking.

HONORABLE TOM GRAY: Noted.

MR. PHILLIPS: I knew it was either going to be you or Chief Justice Christopher.

HONORABLE TOM GRAY: Notwithstanding my two earlier forays into repeating the statute, I want to extend that to yet a third one so that we say at the end of the first sentence we continue to quote from the statute and say under subsection (d), so that you probably by this successfully eliminate the reason I was in the 12

on the last vote that because of the explanation being because we don't want to take your appeal. You're limited to the reasons given in subsection (d).

I also think that the second sentence should end with the clause where it says, "The Supreme Court may direct the court of appeals to grant permission to appeal and state in its decision the specific reasons for a finding that an appeal was warranted under subsection (d)." So, you know, if we have to give our reasons, I think the Supreme Court should have to give their reasons, so, you know, because the whole thing is you want to set a guide for the other courts in the future, and this is what we need to know.

HONORABLE NATHAN HECHT: But you're not in the Legislature, so --

HONORABLE TOM GRAY: Not yet. Not yet.

MS. WOOTEN: Chief Justice Christopher.

HONORABLE TRACY CHRISTOPHER: You know, I agree the statute says "not warrant under subsection (d)," so I think we need to include that "state in its decision that an appeal is not warranted under" -- you know, the statutory (d) language.

MS. WOOTEN: Rich Phillips.

HONORABLE TRACY CHRISTOPHER: I think it needs to be in.

MR. PHILLIPS: So we didn't talk about this as much at the subcommittee level. I thought about putting that in there for a couple of reasons that I didn't, although I could be persuaded to include it. The first is if we're going to say that, we can't just say subsection (d) because it's not 28.3 subsection (d), we have to refer specifically to the whole statute, and the other reason there is because I -- while there is wisdom in including these things in the rules, I know we're a little bit hesitant sometimes to refer to specific statutory sections in the rules because if the statute changes then we've got to go back and change the rule. So I could go either way on that, but that's the reasoning for not including that last little sub clause of "under subsection (d)" is that I figured that might be understood as to those of the provisions that we have to look at to decide whether it's warranted or not. But again, I could be convinced to go ahead and put that in there. Just normally we try not to put that specific reference in a rule.

MS. WOOTEN: And would you have the same feeling about putting specific reference in a comment to the amended rule?

MR. PHILLIPS: I'm totally fine with putting it in a comment. I think that would make some sense.

MS. WOOTEN: Chief Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, as it is written, it broadens what we have to do, so I'm opposed to it. And so I don't think it belongs in a comment. I think it belongs in the rule.

MS. WOOTEN: Any other discussion about the proposed language?

MR. PHILLIPS: So I'm not sure if we need to take a vote on this. I guess we could take a vote on this language or this language with a specific reference to subsection (d).

MS. WOOTEN: Let's take a vote.

MR. PHILLIPS: Okay.

MS. WOOTEN: So by show of hands, all of those in favor of the subcommittee recommendation as stated on page 50 of the meeting materials, please raise your hand. Four total.

By a show of hands, all of those in favor of amending the subcommittee proposal by including a reference to subsection (d) of the statutory provision, section 51.014, Civil Practice and Remedies Code, by a show of hands.

I count 15 hands in favor, so that vote prevails. Any further votes that you think would be helpful?

MR. PHILLIPS: On this part of our memo, I think that's probably all we need unless the Court needs -- okay.

MS. WOOTEN: I think we are good to move onto the next issue.

MR. PHILLIPS: The next issue actually does relate to 28.3(l), and that is to what cases does it apply? When we had considered adopting this in our meeting in February, it was just going to be a rule, so it would just go into effect, I guess, whenever the rule was adopted. The statute specifically says that the statutory change applies to cases filed after September 1st, 2023, so I think there's a question, is do we want to make the rule effective that way and so add the proposed comment, which is on page 52 of the materials, just saying that it applies to cases after September 1, 2023, or if we want to have it apply in a different way, with I think the committee's recommendation -- well, we didn't take a specific vote of the subcommittee. I think, again, being consistent with the statute, my recommendation would just make it effective for cases after September 1st, 2023, but leave it to the group to vote on that.

MS. WOOTEN: Chief Justice Gray.

HONORABLE TOM GRAY: The reference to cases is very confusing in this context. The statute has a

better implementation. It says it applies to an application for interlocutory appeal filed, so it's the application at the appellate level to which they filed. I think if you're going to do this, as we must, because of the statute now, I think you just make it as soon as it's passed it applies to everything that's in the pipeline. I mean, you're making the change. We've already got the cases. It's really not much of a movement from where we are now under existing case authority, and it just needs to be effective immediately.

MR. PHILLIPS: And I would be totally fine with changing that comment to petitions for permission to appeal filed after September 1st. I think that would make sense if the Court doesn't want to just make it effective immediately.

MS. WOOTEN: Any further discussion? Okay. All right. Anything else about -- oh, Chief Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, I know this is not in the subcommittee's purview at this point in time, but I would like to suggest that given the change in the law that we look at the requirements of what has to be in the petition. All right, so right now the petition only requires a copy of the order, and it's a 15-page petition or 4500-word petition that is often agreed. So

unlike a petition at the Supreme Court where you have opposing views on whether something should proceed forward, we will only get one side here. At a minimum I think the -- although I looked back at the, you know, 10 or so that we've had filed in the last couple of years, and they do include a lot more in their appendix than just the order, but I think we ought to have a list of what needs to be included in the appendix. I mean, if we're going to be making a substantive review, we need to know exactly what we're basing it on.

Another question that I think the subcommittee should consider or the Court should consider is what is the effect of our denial if in our denial we say we think the trial court made the correct decision, therefore, no need to take this appeal. Is that law of the case? What is the effect of that? Since it's subject to review now, de novo review by the Supreme Court, is the Supreme Court going to be reviewing our decision that the trial court got it right and, therefore, you know, no appeal is warranted, or are they just going to be looking at it from a point of view of, well, we want you to write on it anyway?

To me, you know, there has to be a difference between normal, ordinary, interlocutory appeals and this permissive appeal mechanism. Otherwise, why do

we have it? So I think there's a lot that needs to be considered and that the appellate courts, you know, will need to know. Like, for example, we're not actually allowed to call for briefing before we decide whether or not to take the appeal. If we call for briefing, we've taken the appeal. Now -- and I previously had presented this to you-all, an opinion from our court where we called for briefing, and after we briefed it we wrote an opinion that said this was a mistake, we should not have taken this appeal.

Now, you know, and so we withdrew -- we withdrew our original order granting permission to appeal. So, I mean, I just think -- I think there's a lot to be considered here that would be useful for the appellate courts, because I really want to know whether it's okay for me to say trial court got it right, no need for this appeal.

MS. WOOTEN: Connie Pfeiffer.

MS. PFEIFFER: I would like to make a comment in response. It was actually my case that you're referring to that went all the way through the briefing process, the court granted jurisdiction, accepted the appeal, went through oral argument, sat on it for many, many months writing an opinion, and then we found out they lacked jurisdiction, so that was sort of the extreme

example, I think, but I would suggest that in most of these cases when the court's first looking at the application, and the record -- or the order from the trial court, that there's some freedom in the limited record, and that's actually liberating in the sense that you don't have to do a full on merits review or pass on the merits of the case and that it can be very much about the procedural and statutory language and whether that's satisfied, and so I think maybe embrace the very narrow posture that it's in.

HONORABLE TRACY CHRISTOPHER: Well, to me, okay, the order to be appealed from involves a controlling question of law as to which there is a substantial ground for difference of opinion. All right, so what we get in our petition is, well, we thought the law was this, and they thought the law was that, so, therefore, -- therefore we, you know, have a controlling question of law as to which there is substantial ground for difference. When, in fact, you know, the appellee's position is correct, period. There's not a controlling question of law. You know, the trial judge got confused. The trial judge was thrown a bone to the loser by agreeing to this permissive appeal. You know, to me, if all I have is a 15-page petition that says this is controlling and, you know, we have a substantial disagreement. Well, I need to

know a little more than that. Otherwise I'm going to have to take them all, which is not the intent of this statute, in my opinion.

MS. WOOTEN: Rich Phillips.

MR. PHILLIPS: Just one quick comment I want to put back on a little bit. I'm a little disturbed, I guess, on the idea that on a 15-page petition that may be in response the court's going to say we're not taking this because the trial court got it right. I mean, that's an appeal, right. Now I've lost on the merits when all I was trying to do is get the court to take it without full briefing on the merits, and so I hope we don't write any rules that encourage the courts of appeals to say, "We're not taking this because the trial court got it right," because I think that ends up -- if it does become law of the case, it's going to end up depriving the parties of the right to a full appeal with full briefing on a full record.

I think -- I would hope that if there's -- if you do think the trial court has got it right and there's no question about it, then there's no substantial ground for difference of opinion, and leave it at that without commenting on the merits. I think just saying that "We find there's no substantial ground for difference of opinion" would be -- would satisfy the statute, the

rule, and we would be done without creating all of the case problems.

HONORABLE TRACY CHRISTOPHER: Well, but if I'm supposed to state my reasons, okay, I'm not doing anything other than what we're currently doing that you object to. Okay. What we are currently doing is we find that there is no controlling issue of question of law as to which there is substantial ground for difference of opinion. That is what is in our standard boilerplate order that you opposed. And, you know, nine times out of ten the reason we say that is because we agree the trial judge got it right. That is why we're saying that.

MS. WOOTEN: And, Chief Justice Christopher, you mentioned a standard order that you-all have in your court. Is that something that exists in the other courts Of appeals, or is it just in your court, to your knowledge?

HONORABLE TRACY CHRISTOPHER: Well, it's the one that was included in the Supreme Court opinion that they talked about, that, you know, it's basically a two-sentence order that quotes the grounds of the statute and says no. So, I mean, I don't think we're the only ones. I know the First Court has a very similar order. You know, so we cannot just say, you know, we reviewed it and there's not a controlling question of law as to which

there is a substantial ground for difference of opinion, because you have told me at our last meeting that that's insufficient.

MS. WOOTEN: Justice Kelly.

HONORABLE PETER KELLY: The process needs to be rethought, and, you know, at the very core of what you're doing is turning a court of appeals, where we have to take everything, into a discretionary court every once in a while, and a more thought through process that would allow us to make a more substantive decision early on would certainly be beneficial so we're not making a decision that there isn't -- without an adequately developed record in front of us.

I mean, as a baby step, as a first step, I wholeheartedly agree with Justice Christopher's recommendation, that we mandate more items be included in the appendix going up, because if it is just the order and then a one-page statement that the parties agree, you don't know if there's been waiver. I mean, if our analysis is supposed to be on the decision that the trial court made and what was before the trial court at the time, then we don't know that the court -- the parties don't have to tell us at the time, but that would be very fundamental to our decision of whether or not we're going to take it at all. But the whole process needs to be

rethought to give us more authority, more akin to what the Supreme Court's authority is, in deciding whether or not to take a case. We just need more materials, and if we're going to write an opinion, we need to have more to base our opinion on.

MS. WOOTEN: Rich Phillips.

MR. PHILLIPS: So I do want to push back on one thing, which I think the form that we're seeing and the one that was addressed in Industrial Specialists didn't actually talk about any specific element in the statute or the rule. Instead what it says is here's the basis and we conclude it fails to establish each requirement of Rule 28.3, 3 and 4, and we deny the petition to appeal. It didn't specify which of the things wasn't satisfied which is one of the things that brought it to the Court's attention in Industrial Specialists. I think this would require something more than just saying that we don't find the statutory requirements are met. I think there's an argument that identifying specifically which one is not met would satisfy what the proposed rule requires and the statute, that would give the parties something more than they're already getting.

I like the idea of a broader appendix. I think that may be worth discussing. And then, again, as I said at the beginning, if it were me, I would probably

prefer the language we had proposed and was approved at the last meeting because I think it does require a little bit more than what the statute does, but we have the statute, and I think that putting the rule something more than the statute is going to cause all kinds of mischief and they would be mad at us probably, so that's why we're at the language we are recommending. That's what the Legislature passed. I understand the concerns about limited records and other things, but I think it is possible to give the parties some guidance beyond just we don't think you met the statute, so they can understand what's going on.

And again, some of the other concerns that the bar has expressed may be addressed, depending on what the Supreme Court does with its de novo review authority that's been granted by the -- I have some idea how much they might or might not use that, but it does give it some help, so --

MS. WOOTEN: All right. Any further discussion on this? Yes, Scott Stolley.

MR. STOLLEY: I think a bigger appendix makes sense, but to the justices in the room, are you thinking of something along the lines of what we do in mandamus where you have to create a sufficient record to demonstrate --

HONORABLE TRACY CHRISTOPHER: Yes.

MR. STOLLEY: -- that relief is available?

HONORABLE TRACY CHRISTOPHER: Yes.

HONORABLE PETER KELLY: You don't have to create it the way you do in a mandamus. I suppose you have the court files. You have to designate sufficient items in the record, but, yeah, the burden would be on the parties to make that designation.

HONORABLE TRACY CHRISTOPHER: Well, we don't even have the clerk's record, so, yes, I think it needs to be in the appendix.

MR. PHILLIPS: It would have to be similar to mandamus because you just file a petition with appendix attached.

HONORABLE PETER KELLY: Right, it would be.

MS. WOOTEN: Anything else?

MR. PHILLIPS: One last small thing on ours before we --

MS. WOOTEN: Okay.

MR. PHILLIPS: -- before I'm done, but if we're done with the 28.3(l) discussion, the TRAP 28.2 we had recommended, this is the rule that was continued in existence after the repeal of the prior version of section 51.014(d), which was appeal by agreement of the parties, and that applies only to -- it does apply only to cases

filed before September the 1st of 2011. At our last meeting the subcommittee recommended we probably repeal 28.2 at this point because it's been 12 years.

Somebody saw the -- I got a phone call from a lawyer who was begging me to tell the Court not to do that, because apparently there's still some cases floating around that were filed before September 1st of 2011 to which this rule may apply. So we're revising the recommendation that 28.2 be revised -- or be repealed, but as I noted in our last meeting, that rule is causing confusion. There's a number of court of appeals' decisions denying permission to appeal where they say the parties have come to us with an agreement but no order from the trial court, because 28.2 doesn't say anything about an order because that wasn't required.

So I think the parties are reading the rule. They're not reading the comment that says it applies only to cases filed way back when, and they're trying to use it. So because nobody is reading the comment, just a small proposal would be to amend actually the heading to the rule, so it's 28.2 and then in parentheses after that, after the description, "Applicable only to cases filed before September 1st, 2011." I've got the exact language in the memo.

MS. WOOTEN: Page 52.

MR. PHILLIPS: Thank you. So that we can maybe try to make it clear to the parties they can't use this unless their case is that old, and then, I don't know, five years from now or something we ought to review this and really get rid of 28.2, but in the meantime since people can't get rid of their cases, we need to keep it. So that's our other small tweak of a recommendation.

MS. WOOTEN: Anybody opposed to adding that parenthetical to 28.2? Chief Justice Gray.

HONORABLE TOM GRAY: Could I ask him a question? Rich, we frequently see it in criminal cases, I don't know that I've seen it in our rules, but where the Legislature amends a statute and says, "The language of the previous statute is continued in force for cases already filed." Why couldn't we just do that with the repeal and just put that statement in place of the rule, the existing rule, and say, "This rule is repealed, but it's continued in effect for cases that were filed before September 1, 2011," and then that way the whole rule is gone. If you have one of those exceptional cases --

MR. PHILLIPS: It's still there.

HONORABLE TOM GRAY: -- it's still applicable. You know it. It applies to your case, and maybe, if you're lucky, you have Tracy C. Christopher on tap with an old rule book, you know, so --

MR. PHILLIPS: I think that makes some sense. We would have to make sure that the parties can find it if they need it, and maybe the parties that need to know about it already do, but that's certainly an alternative to the proposed language.

HONORABLE TOM GRAY: And then that way we don't have to come back to it in five years. It's gone.

MR. PHILLIPS: Yeah.

MS. WOOTEN: Chief Justice Christopher.

HONORABLE TRACY CHRISTOPHER: I agree with Chief Justice Gray.

MS. WOOTEN: All right.

HONORABLE TRACY CHRISTOPHER: We have many a meeting when we don't, but it should just be gone now with a reference. Westlaw has gotten a lot better to allow you to find prior versions of things, and, you know, if we're talking about 2011, you know, there are so few cases that it could possibly still be applying to.

MS. WOOTEN: Any further discussion on the note about repeal versus the parenthetical? I guess we can just leave that for the Court to decide the path that's best.

MR. PHILLIPS: Makes sense.

MS. WOOTEN: Any other points?

MR. PHILLIPS: That's all we've got on

permissive appeals today.

MS. WOOTEN: All right. Moving on to item seven in the agenda, conduct of judicial candidates, memo starting on page 113 of the materials. Nina Cortell.

MS. CORTELL: Thank you, Kennon, and thank you to Bill Boyce, who couldn't be here today for a good reason, well-deserved long-planned trip, for preparing the memo you have in front of you. Basically we're dealing with HB 367, which essentially makes --

HONORABLE TOM GRAY: Nina, we're having a little bit of trouble with the court reporter being able to hear and other old people at this end of the room.

MS. CORTELL: Oh, my goodness, okay.

HONORABLE TOM GRAY: That would be me. I didn't mean to imply that you were old, Dee Dee.

MS. CORTELL: All right. Is that better? Am I -- maybe I should stand, Your Honor, and --

HONORABLE TOM GRAY: No.

MS. CORTELL: And --

HONORABLE TOM GRAY: I'm just trying to help out the court reporter.

MS. WOOTEN: All for the court reporter.

MS. CORTELL: I understand. I think part of this is having now gotten past the age of 70, my volume is going down, so I'll work on it. HB 367, what it basically

does is it brings judicial candidates within the purview of the State Commission on Judicial Conduct. So sort of a jurisdictional move here by the Legislature, and so now the commission can accept complaints, conduct investigations, and take disciplinary action against judicial candidates. That was not previously the case, and so now we've been asked to look at the Code of Judicial Conduct and the procedural rules for the removal or retirement of judges to make sure they align with this expansion of jurisdiction by the commission.

So what you have in your materials at Tab J are -- is the legislation, 367. We've given you the Code of Judicial Conduct at Tab 11, and the rules for removal at Tab M. In this instance and in the next item that we will cover, the subcommittee basically focused on the changes that we think will be needed for the code and that we are deferring for next time pretty much looking at the rules for removal, which will have to be pretty substantially changed, particularly to make sure they reflect that they are also rules for judicial candidates because those rules currently are only for judges. Okay. So what we've done, and I don't have the PDF number, but it's -- our memo is at Tab K, and we've given you a revised Canon G, and there's a few issues there.

There's also a bit of a typo, which I

noticed reading it, but basically I want to flag one issue that I really invite your good thoughts on, but look at subsection (1), mainly because it talks about persons seeking judicial office, in 6A(1) which does not pick up all judicial candidates, so the way 6A works is (a), (b), (c), (d), lists various different levels of the judiciary, and this will come into play because when we go then to subsection (2), we're saying any judge or judicial candidate. So one question, not really asked of us in this instance, but I just want to flag is whether one needs to be expanded not to be limited to 6A(1), so that's -- for example, constitutional county courts, justice of the peace, and various other courts are not included in 6A(1), but the focus really for today is subsection (2) where we want to make clear that judicial candidates are subject to review, if you will, their conduct, by the State Commission on Judicial Conduct, and what you have is some different language options.

(1) is subject to sanctions by the State Commission on Judicial Conduct, which is the prior language, and the only change would be you add judicial candidate. Alternatively, subject to investigation and disciplinary action by the commission, alternatively, subject to disciplinary action. So I don't know if you want to -- focusing on subsection (2), if there is a

feeling, a sense by the committee, which language is preferable to suggest to the Texas Supreme Court.

MS. WOOTEN: All right, so any discussion on which of the three alternatives is preferable on page 114 of the materials in subpart G(2). I feel like you want to raise your hand, Chief Justice Gray.

HONORABLE TOM GRAY: Well, I was on the subcommittee, and I didn't know if I should speak now or wait until others spoke, so I'll do whatever the committee's preference is.

MS. WOOTEN: Anybody other than Chief Justice Gray want to comment at this time? Judge Schaffer.

HONORABLE ROBERT SCHAFFER: Why are we making a distinction in (1) and (2) between the different types of members of the judiciary?

MS. CORTELL: I had that question as well, actually.

HONORABLE ROBERT SCHAFFER: Because I looked at the statute, and the statute doesn't distinguish between one or the other. It says "judicial candidates."

MS. CORTELL: I agree. This didn't come up in the subcommittee discussion. This came up as I was reviewing the memo and looking at the canon preparing for today. I think we should probably suggest additional

changes than those reflected here, but happy to entertain other thoughts.

MS. WOOTEN: Justice Kelly.

HONORABLE PETER KELLY: Is judicial candidate defined anywhere? Is it someone who is designated a treasurer, is it someone who's just expressed an interest, or how is judicial candidate defined?

MS. CORTELL: Let's look. It's in Canon 6.

HONORABLE PETER KELLY: I probably should look it up myself.

HONORABLE ROBERT SCHAFFER: The canons are tabbed M? No.

MS. CORTELL: So 6, 6G says, "Any person seeking elected judicial office listed in 6A(1)." So again, it goes back to those specified courts in 6A(1), so that's -- honestly, Judge, that's a question I have. I don't know why it's been limited to those courts. Is there -- does anyone know, are those other courts -- are there no elections for those other courts?

HONORABLE TRACY CHRISTOPHER: JPs are elected.

MS. CORTELL: So I guess a question should be whether we open this up to all -- all persons seeking elective judicial office and not limit it to listed in 6A(1). If you look at 6A(1), that's the Supreme Court,

the Court of Criminal Appeals, courts of appeals, district courts, criminal district courts, and statutory county courts.

HONORABLE PETER KELLY: I'm concerned about where in the process, like is it designating a treasurer, are you collecting funds, are you collecting petitions, have you actually filed your petitions in December, or maybe it should also apply to someone who has filed an application to the Governor's office for appointment for a vacancy. Where in this process does it really apply, not necessarily which office are you going to?

MS. CORTELL: I think your point's well-taken. Do you want to offer a thought on how we should define it?

HONORABLE PETER KELLY: I just did. I will look at that and try to figure out where --

MS. CORTELL: Okay. All right.

MS. WOOTEN: I saw Robert Levy's hand up first and then --

MR. LEVY: Well, this discussion made me think about something we're going to talk about later on business courts. If we're going to amend the canons, we might want to add a reference to the business court in 6A and then elsewhere where it might be applicable.

MS. WOOTEN: John Warren.

MR. WARREN: Where in the canons does it discuss justice of the peace courts?

MS. CORTELL: It's also in Canon 6. The way Canon 6 is currently written is 6A(1) specifies the courts I've just mentioned. B is county judges, C is justices of the peace. So the way Canon 6 is structured right now is it breaks out by court, and to reference Kent's point about balkanization, we've got this sort of separation, and as noted, the legislation is not making a distinction between what court we're talking about.

MR. WARREN: So but wouldn't there -- I know it says any person, and I guess, oddly enough, you have to define person, because you could be a lawyer or you can be a nonlawyer as a justice of the peace; and if a person seeking office is only referring to an attorney, then that lets a nonattorney person off the hook, but they should be included. So how do you define that or how do you prevent that argument that says this doesn't apply to me because I'm not a lawyer?

MS. CORTELL: There's actually a distinction in the current 6G, which you'll see the way it's broken out, and again, I think we should be simplifying it, and I think the intent of the legislation is to group all candidates for judicial office, however Justice Kelly is going to define that to be. But when you say any person

-- G(1), "Any person seeking elected judicial office" and again it's limited to 6A(1). (2) is "any judge or judicial candidate," and then (3) is "any lawyer," and then (4) is "the conduct of any other candidate," which I think was intended to pick up nonlawyers. But I agree that seems to me the simplest thing is that all candidates are -- will be subject to -- however you-all want to say it, disciplinary action by the State Commission on Judicial Conduct, and we shouldn't be breaking out all of these categories.

That said, the subcommittee had one other main point, and that was we saw the legislation as not substituting the Commission on Judicial Conduct for these other bodies, the State Bar of Texas in item (3), the Secretary of State, attorney general, or district attorney in (4). So we did not see it as displacing it, but adding to it, so if we were to have one sort of overarching rule, I think it would be -- and I welcome subcommittee, with several members here, to participate and to rein me in on this, but one idea would be any judge or judicial candidate, lawyer, nonlawyer, would be subject to investigation, disciplinary action by the commission, right, but then -- at least in certain instances, maybe this Canon 5, the State Bar of Texas and these other -- other reviewers, if you will, Secretary of State, attorney

general.

MS. WOOTEN: Justice Miskel.

HONORABLE EMILY MISKEL: I was going to say, so looking at G, and then G currently says, "Any person seeking elected judicial office listed in Canon 6A(1)," and those are all the people we typically think of as judges, district court, county court of law. 6B is county judges, and 6C is JPs and municipal court judges.

MS. WOOTEN: Uh-huh.

HONORABLE EMILY MISKEL: So I don't know that we do want these requirements to apply identically to county judges, and I would say that county judges probably don't want that, but we might want them to apply to JP candidates. So at some point we may have to continue to break out 6B. I just thought I would raise that.

MS. WOOTEN: Chief Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, I actually don't agree that these are intended to be cumulative sanctions. You know, I think we should -- I think it should be clear that if we're talking about a judicial candidate, they need to be subject to the Judicial Conduct Commission, not to the State Bar. I mean, you know, if a person right now files a complaint against a judge with the State Bar, they say, "Hey, we don't have jurisdiction here, go to the Code of Judicial

Conduct." So I -- I don't think that the State Bar thinks, you know, that they could reach down, well, you were a lawyer who sought elected office, so therefore, we're going to discipline you. I don't think the State Bar looks at it that way.

MS. WOOTEN: Judge Schaffer.

HONORABLE ROBERT SCHAFFER: No more.

MS. WOOTEN: No more? John Warren.

MR. WARREN: I was just going to say on G(4), it says, "The conduct of any candidate for elected judicial office," so I think that covers the person who is not an attorney.

MS. CORTELL: That's correct.

MS. WOOTEN: It's now Chief Justice Gray's turn.

HONORABLE TOM GRAY: Well, first I want to offer a comment by Robert that Robert's not raising his hand to make the comment, and that is what happens if you withdraw your application for a place on the ballot? You're no longer a candidate, and that really is the -- kind of leads me to the counteroffensive that I typically am not the one that advocates getting out of the weeds, but this one is one where I think we do need to get out of the weeds.

The title of G where the subcommittee has

recommended that we tinker with this is "Candidates for Judicial Offices," but yet it talks about a host of enforcing entities. And this is an enforcement, almost jurisdictional as Tracy was trying to take us toward, why are we talking about who is going to enforce what?

If you go back to the statute, the reason we're here and we're even talking about this issue today, it gives the commission the authority to accept complaints, et cetera, et cetera, with regard to very specific persons. It is not about the conduct of those persons. The Code of Judicial Conduct is just that. It is about the conduct of persons either that are judges, or as in the original subsection G in the code before we started tacking a lot of other provisions into it, was subsection (1), any person seeking this very narrow category of offices shall be subject to -- and it is basically informing a person that is running for office, one of those offices, that they are subject to certain provisions of this code.

It doesn't say anything about who's enforcing it. If I was going to take this statute and implement it in rules that are subject to the Supreme Court's rule-making authority, I would go and find the provision where the commission is currently authorized by those rules to enforce the code and add the provision to

that place, not within the code, which is the rules that control or guide or -- the conduct of the persons that are named, the judges and the candidates. In fact, with that argument, I would say the only provision that needs to be in subsection G is (1), which is -- which defines the conduct that is -- that a judicial candidate is responsible for complying with.

And so that's my first overarching kind of objection, if you will, to putting it even in the Code of Judicial Conduct at all. I think at best it's over in the next provision that we're going to talk about regarding the removal, retirement, or I would argue also sanction of judges. That's where it goes, but if I may continue, if we're going to put it here, there's the problem that's previously been talked about at length, and so I won't revisit, but the seeking elective judicial office is very different than a judicial candidate, because it could be as Peter -- it could be an applicant for a place on the ballot. It could be an applicant for a business trial court. It could be an applicant for, you know, just a municipal court that doesn't have elections. It's just -- it's broader than the application for a place to be on the ballot, which would seem to be the tripping point for who is a candidate and who is not.

Then you get to Robert's question of, okay,

now, you've withdrawn your application, can the commission still come after you? And the whole point of all of that is I don't want to make a candidate responsible for compliance with anything greater than what they are already responsible for complying with, because we suddenly give the Judicial Conduct Commission broader authorities to enforce. So because then it's going to be a question of, well, this is applicable to a judge, is it also applicable to a candidate. And the code doesn't say it, but does this give them the authority to make it so?

Okay. With all of that, then I get to the specifics. In subsection (2) of the proposal, it says, "Any judge or judicial candidate who violates this code." Well, when we wrote subsection (3) we were much more careful about not limiting it to just who violates this code. Who violates Canon 5 or other relevant provision of this code. That language draws it back, not for the whole code, just the ones that are relevant to candidates seeking judicial office, which seems to be nonparallel with (1), seeking elective judicial office; and I think you're starting to see the problems of this; and then to finish where Tracy led us, is that I would have never thought that by becoming a candidate or a judge I was in some way preventing the Secretary of State, the attorney general, or a local district attorney, from taking

appropriate action against me for violation -- for conduct that may have been a violation of the code and some other penal provision or civil provision.

It just -- I would have never thought that this was a statute or a place or a authority to limit some other enforcement arm. And that's why I think this whole concept of enforcement either needs to be taken out of this or a new section created for that -- who can enforce this code needs to be moved to its own section. And with that, I will be quiet now.

MS. WOOTEN: Judge Stryker.

HONORABLE CATHLEEN STRYKER: Just kind of following up on that, I was confused by B(3) because obviously that appears to apply to nonelected positions, and we have associate judges in our district courts that would just make an application to the local district judges. Would this apply to them? Because they're not part of 6A(1), and so I do think there needs to be clarity as to who's a candidate and when. Otherwise, the minute they turn in that piece of paper to their presiding district judge are they a candidate?

HONORABLE ANA ESTEVEZ: I don't think there's a lot of harm, though. I mean, it's only the presiding judge that's making that determination, so what's the harm with them running around saying how they

would vote in a certain -- as opposed to the population. That's what they use it for, right, to say I'm going to vote this way in this type of case.

MS. WOOTEN: Uh-huh. Robert Levy.

MR. LEVY: Thank you for speaking my opinion, but on a related note, maybe I'm misunderstanding this that House Bill 367 talks about a candidate for judicial office who is subject to subchapter (f), Chapter 253 of the Election Code; and in that chapter it says it's applicable to Chief Justice or justice, Supreme Court; presiding judge or judge, Court of Criminal Appeals; same for court of appeals, district judge, judge, statutory county court or judge, statutory probate court. So it doesn't seem to reference justices of the peace, so I'm not sure if we can add them in under the commission's authority based upon this statute.

It does, though, cover write-in candidates, so you are potentially subject to this provision if you are written in, even if you knowingly are going to be written in. It's unclear if somebody decides to write you in without consulting the judge -- or the candidate.

MS. CORTELL: That pretty well parallels 6A(1). There may be a little bit of difference there. So I guess I have some questions I would tee up. So one is to Robert's point and really the way this was originally

written. Is there -- does the committee believe that we should stay faithful to the more limited reading of the House bill and only make the jurisdiction of the commission to those that Robert's just gone over, which is pretty similar to 6A(1), but we could put that down.

So just, in other words, stay faithful to the bill and not expand the jurisdiction of the commission beyond those judges or those judicial candidates. Is that -- does that sound right?

Okay. I see one nodding. I don't know if we want to vote on that or not. But another big issue that Chief Justice Christopher referred to is when we see the legislation is cumulative or, now, to the extent the commission has jurisdiction as to those judicial candidates, it does not have jurisdiction -- if we should limit the jurisdiction of these other bodies, the State Bar of Texas, Secretary of State, attorney general, district attorney, to those not encompassed by the new bill. I don't know if I said that very clearly. Should I restate that?

MS. WOOTEN: I think I understand.

MS. CORTELL: Okay.

MS. WOOTEN: You're addressing the point about whether the State Bar remains as an enforcer?

MS. CORTELL: Right, whether all of these

other -- the State Bar of Texas, which is now in (3) and the other enforcers in (4), do we take them out of the adjudicatory business in this area as to those candidates encompassed by subchapter (f), Chapter 253 of the Election Code, again, which is more or less like 6A(1).

MS. WOOTEN: I'll start with -- well, actually, before I do anything, Judge, go ahead. Judge Evans.

HONORABLE DAVID EVANS: One of the things that has worried me about this bill as I've watched it is that placing a lawyer under the commission as a candidate is in what powers does the commission have that would be significant to a lawyer? They can't suspend them from practice because of the way the Code of Judicial Conduct procedure works. You suspend them from the bench and you reprimand them, and a private reprimand under the State Bar Act has a different meaning than a reprimand with the Judicial Conduct Commission.

Also, 802 of the Rules of Disciplinary Procedure that govern lawyers make candidates, lawyers who are judicial candidates, subject to the rules governing the judges under the Code of Judicial Conduct. So you violate something as a lawyer, as a candidate, you violate the judicial conduct code, you can be prosecuted, and we did prosecute when I was chair of the commission and the

bar can suspend people for that. So you've got to rewrite 802 if you're going to deprive the commission for lawyer discipline the jurisdiction over lawyer candidates. And you don't have enough power in the commission to have effective sanctions.

I would suggest that Seana Willing, who served both as chair -- I'm sorry, administrative director of the commission and is now chief disciplinary counsel, might be a resource. She's been with the bar for -- since the Nineties. So I -- the interplay here has got a lot of problems.

MS. WOOTEN: Judge Estevez. Judge Evans, were you done?

HONORABLE ANA ESTEVEZ: Yeah, I have a question for you. Could they not fine as well? I know they fine us for being late on anything.

HONORABLE DAVID EVANS: It was not unusual during an election when I was serving on the commission to have complaints filed against lawyers for violating the Code of Judicial Conduct, and then that triggers a whole evidentiary -- the whole process of the Rules of Disciplinary Procedure, since 802 makes a candidate subject to the judicial conduct code.

HONORABLE ANA ESTEVEZ: But couldn't you fine them as well? Could you not give them a fine?

HONORABLE DAVID EVANS: The Ethics Commission does fines. It's very rare that you'll see the commission do a fine. It's restitution. You get restitution but not fines under the Code of Disciplinary Procedure, but the limitations on the judicial commission right now, and I just did a brief scan of the rule, talk in terms of suspending a judge, mentoring a judge, and different levels of -- and, you know, we had this problem of, quite frankly -- well, that goes in other areas, but they have different levels of punishment that -- you can punish a judge in a way or censure a judge in a way -- you can censure a judge, and they can still be a visiting judge, but that's getting in the weeds pretty far.

MS. CORTELL: Let me say that the scope of our assignment is to look at the rules themselves that govern the commission. We have not taken a stab at that yet. That's yet to come back to you with that, but you're exactly right. The current rules anticipate only jurisdiction over judges, so this is a profound change and will require profound revisions, if you will, to the rules.

HONORABLE DAVID EVANS: Well, there's -- there is -- I have to go back and find it, but there is an interplay between the two agencies, the commission and the commission -- judicial commission and the commission for

lawyer discipline, because if you -- if you get a complaint filed against you as a judge, with the bar, the bar will dismiss and refer to the judicial conduct commission, and they have -- and they cite a rule for that proposition, so I think Seana would be a really good resource on the issue.

MS. CORTELL: So this also goes back to the question raised about whether -- as to the candidates that are the subject of the new bill, 367, whether we keep in the picture not only the commission, but also the State Bar of Texas. I think that goes to that, and that's the basic question of whether the new legislation displaces other groups that look at discipline, such as those listed in the current 6G, or whether it's cumulative. I think that's a pretty basic question that the subcommittee looked at. The subcommittee -- and we certainly want to be informed by the larger committee, but our initial take was it's cumulative, so it would keep the State Bar in the picture.

HONORABLE DAVID EVANS: I don't -- I'm sorry, the commission makes a finding. They're going to have to get it to the bar in order to get an effective punishment, or you're going to have to engraft the bar's punishment chart for a lawyer under the commission. At which point you lose certain procedural rights as a lawyer

for review and appeal that exist under the Rules of Disciplinary Procedure.

MS. WOOTEN: Chief Justice Christopher, I think you said your reading is that it's not cumulative. Is that accurate?

HONORABLE TRACY CHRISTOPHER: Well, that's only because I know that, you know, I got a copy of a complaint against me that was filed at the State Bar, and the State Bar sends me a letter saying -- and the applicant saying, "We don't discipline judges, go -- you know, go to the judicial conduct commission." But now you're telling me they do, so --

HONORABLE DAVID EVANS: On mine, they -- on mine it was filed and then referred -- and now Seana refers them over, and she cited a rule on mine. She said, "Go to the judicial" --

HONORABLE TRACY CHRISTOPHER: Right.

HONORABLE DAVID EVANS: "We're sending it to the judicial conduct commission," which then processes and then has a complaint filed with them, and this --

HONORABLE TRACY CHRISTOPHER: So I thought they didn't, but --

MS. WOOTEN: And in your examples --

HONORABLE TRACY CHRISTOPHER: -- what you're saying is an instance where they did.

HONORABLE DAVID EVANS: I'm just saying that she probably has -- Willing probably has more knowledge of the two systems as a resource than anybody I know.

MS. WOOTEN: And for clarity, in the examples that you're referencing, are you referring to judges who are the subject of a complaint or judicial candidates?

HONORABLE TRACY CHRISTOPHER: Well, I mean, the complaint was against me as a judge.

MS. WOOTEN: Right.

HONORABLE TRACY CHRISTOPHER: But, you know, -- you know, but, you know, it doesn't matter whether it's a judge or a judicial candidate. I mean, now, under this new rule, right, judicial candidate goes to the judicial conduct commission. I don't know.

HONORABLE DAVID EVANS: Well, with that amendment it could go to both. They both have jurisdiction.

MS. CORTELL: Let me make a suggestion. So the original G(2) was only judges, right, and that went, as is being confirmed here by those who have experienced unfortunately this system, is it goes to the commission, which would still make sense. Maybe we break it out and judicial candidates would still be subject to the full -- the fullness of all these other bodies, so that the

commission as well as the State Bar as well as those persons named in (4). Does the committee --

HONORABLE PETER KELLY: Except judges can also be judicial candidates.

HONORABLE DAVID EVANS: Right.

HONORABLE PETER KELLY: Judges can also be judges running for re-election are also judicial candidates.

MS. CORTELL: So how would you want to approach that?

HONORABLE PETER KELLY: The thought just crossed my mind. I haven't thought about it.

HONORABLE TRACY CHRISTOPHER: Well, I mean, isn't the real question whether it's the -- as a result of their conduct as a candidate?

HONORABLE ANA ESTEVEZ: Right.

MS. WOOTEN: Right.

HONORABLE TRACY CHRISTOPHER: And if it's as a result of their conduct as a candidate, then where should that go, just to the judicial conduct commission or to the State Bar, too?

HONORABLE PETER KELLY: Depends if they win or not.

HONORABLE TRACY CHRISTOPHER: Well, I mean the whole idea of this is even if they lose they could

still be disciplined.

HONORABLE PETER KELLY: Right.

HONORABLE TRACY CHRISTOPHER: So they could still get a reprimand. They can't obviously remove them from office, but they could still get a reprimand.

HONORABLE PETER KELLY: So then this would apply to people who are not sitting judges who become judicial candidates, however you define that, but then who are not elected, who don't actually become judges.

HONORABLE TRACY CHRISTOPHER: Well, I mean, just by nature of their type of discipline, it -- you know, there's going to be two distinctions. If you get elected, it's one possible; if you don't get elected, it's another possible. It's a reprimand. That's it.

MS. WOOTEN: John Warren.

MR. WARREN: From a nonlawyer perspective, if you have a judicial candidate who is not already a presiding judge, you're an attorney running for office, but your violation has nothing to do with the oath that you took as an attorney, it has to do with an action you took as a candidate, why not just roll that under (4), G(4) and it's the -- or your local district attorney or an attorney general who would actually address that issue.

HONORABLE TRACY CHRISTOPHER: Well, let's look at an example.

HONORABLE DAVID EVANS: I just say this in response to you. A lawyer who runs for -- who is a candidate for judicial office is obligated -- "shall comply with the applicable provisions of the Texas Code of Judicial Conduct." That's 802(b), and so a violation of the Code of Judicial Conduct, which is what I assumed was required for a candidate under this new rule to do it, is actionable by the bar, and the bar currently has jurisdiction under the State Bar Act for the lawyer to give the range of sanctions allowed against lawyers. And that may be a dual system, but this new, of course, granting the jurisdiction to the judicial conduct commission requires another range of punishments against lawyers and how you -- what punishment ranges you would adopt.

Because a private reprimand under the State Bar act has a different impact than a reprimand under the judicial conduct commission. For instance, a private reprimand against a lawyer has little impact on future ability to sit, but a reprimand, a public reprimand, but to practice, but a public reprimand against a judge means you can't be a visiting judge. So the whole web of sanctions will have to be thought out as to what -- if we're going to engraft them or do that, I would think.

MS. WOOTEN: Chief Justice Christopher.

HONORABLE DAVID EVANS: And I don't know how many of these they're going to take.

MS. WOOTEN: Chief Justice Christopher.

HONORABLE TRACY CHRISTOPHER: It's confusing. You know, I was only talking about my personal experience, you know, but which so apparently sometimes they take them and sometimes they decline them.

HONORABLE DAVID EVANS: Well, you know, you get in a --

HONORABLE TOM GRAY: Maybe it depends on how well you know Seana.

MS. WOOTEN: Let the record reflect there was laughter.

HONORABLE DAVID EVANS: That's the last thing I would say to Seana because we would be prosecuted tomorrow.

HONORABLE TRACY CHRISTOPHER: No kidding.

HONORABLE DAVID EVANS: She's about as straight as they ever came.

MS. WOOTEN: Kent Sullivan.

HONORABLE KENT SULLIVAN: I just wanted to ask a practical question. I always like to think in terms of how does someone access this information and/or how does someone use this information. If there is a public reprimand against a lawyer, you can find it on the State

Bar website. You don't have to, you know, dive through some labyrinth of individual decisions and the like. At least you can find that, and I'm told by Trey Apffel that they're actually trying to update the website so you can get more details. Right now, depending on where they are in that process, if something has happened in the last few years, you only see a public reprimand, and you do have to go to added effort to find out the details of it. But they're working on it.

I have to confess that I don't know how one locates a public reprimand against a judge, and I would also want to know how someone would find a public reprimand against a judicial candidate that was unsuccessful and never became a judge.

HONORABLE DAVID EVANS: Well, if it was -- if it was in the bar, if it was a public reprimand issued by the bar, it would be under the State Bar listing, which shows public reprimands, and although it doesn't show the detail of the complaint filed or the finding, it will show a public reprimand.

HONORABLE KENT SULLIVAN: That's what I was trying to detail before, if that wasn't clear. I'm curious about the judicial conduct commission.

HONORABLE DAVID EVANS: On judicial conduct commission, I would have to go check again. You can get a

synopsis of the various opinions that have been made, but I don't believe they list them by individual at this point.

HONORABLE KENT SULLIVAN: So my point would be --

HONORABLE DAVID EVANS: But I don't know that. I want to be clear.

HONORABLE KENT SULLIVAN: And I appreciate Judge Evans' clarification, but I was trying to find out -- and I think he's implicitly answered it -- to what extent a member of the public or some interested party easily could locate this information, and I guess what I'm hearing is with respect to the practices of the judicial conduct commission, it may not be so easy.

HONORABLE DAVID EVANS: I don't think they have the same standard right now, but I think it's coming along. Is it now listed by name?

HONORABLE EMILY MISKEL: Because I read them. If you go to the State Commission on Judicial Conduct, there's a tab for disciplinary actions, and it includes public sanctions, private sanctions, resignations, and suspensions, and it has the judge's name if it's not private.

HONORABLE KENT SULLIVAN: You can search by name?

HONORABLE EMILY MISKEL: And it has a search.

HONORABLE KENT SULLIVAN: I was just curious about that. I was also curious about to what extent, you know, we could at least suggest or somehow facilitate a one-stop place to shop. Most judges, with the exception, I guess, of JPs are lawyers, and I don't know why that wouldn't appear on the State Bar's website as well, in terms of a consolidated list of relevant disciplinary information. It seems to me that might be in order.

MS. WOOTEN: Nina Cortell, anything else you wanted to add?

MS. CORTELL: I heard at least one vote from Chief Justice Gray that perhaps we shouldn't even put in the code as sort of this jurisdictional mechanism reference, which is to say it only -- only say that you're to comply with Canon 5 and other relevant provisions. That could be one way to go. Or should we be explicit as to what bodies have jurisdiction?

Historically, of course, if you see what's not in red here, we have done that. I mean, we've been explicit as to who may investigate and provide sanctions or other disciplinary action. Is there any appetite by this committee to change that approach?

MS. WOOTEN: Chief Justice Gray.

HONORABLE TOM GRAY: I just answered her question. Yeah, there's an appetite for it. Because I just -- given the caption of the section that we're talking about versus -- I mean, it's -- I think I heard somebody -- I think it may have been Peter or David, Judge Evans, that said that this is a mess. That is an understatement in the way this is written right now. The code applies. Certain provisions of the code apply to judicial candidates. All the statute that we're dealing with does is makes the commission where it can investigate certain violations of the code that are done by candidates, and it ought to be -- whatever we do, that's all we ought to do.

While there's some great improvements that could be made to subsection G as it currently exists, it doesn't need to be touched. But that's -- and by the way, to answer your question, if you search by a name and a sanction, you will get the judicial conduct commission's website and the actual sanction. My public admonition that I got from the judicial conduct commission, you search Tom Gray, public admonition, the judicial conduct commission's website comes up.

HONORABLE ANA ESTEVEZ: I'm doing it right now. And it did.

MR. ORSINGER: Can you e-mail it?

HONORABLE ANA ESTEVEZ: It's there if you want me to send it to the group.

MS. WOOTEN: Kent Sullivan.

HONORABLE KENT SULLIVAN: If I could ask a quick question to clarify. If I search only by name, are you implying that I wouldn't be able to find that?

HONORABLE TOM GRAY: Don't know the answer to that. I'm sure it probably comes up in a Google search because the name is there.

HONORABLE ANA ESTEVEZ: I put "Tom Gray public admonition," and it was the first thing up.

HONORABLE TOM GRAY: Well, Tom Gray is probably going to be a broader name. You're going to wind up with a bunch of trash on Google, but --

HONORABLE KENT SULLIVAN: Are we talking about a Google search or a judicial conduct commission database?

HONORABLE TOM GRAY: I got Robert to do it on an open search, just a regular Google search, four words, and that's what you got. I mean, it took, first hit, first in line. So it comes up. It's out there.

HONORABLE KENT SULLIVAN: And to state the obvious, it seems to me, I think we ought to at least in the general discussion consider user-friendliness, and to rely on Google for that kind of information it seems to me

is problematic. We would -- I think it would be great to encourage the updating and coordination of, you know, the availability on the state-based -- you know, the State Bar -- if only we knew the chair of the board of the State Bar.

MS. WOOTEN: If only. Where is the chair when you need her? I don't know.

HONORABLE KENT SULLIVAN: To the extent that we could facilitate some coordination, I think it serves the public well.

MS. WOOTEN: Justice Miskel, and then Robert Levy.

HONORABLE EMILY MISKEL: Yeah, I just wanted to quickly clarify, they were referring to if you just search on Google the conduct commission stuff comes up, and also all you have to do is search by name on the conduct commission website. You don't have to have special search terms. That's right.

MS. WOOTEN: Robert Levy was going to make the same point, so that's covered. Nina Cortell.

MS. CORTELL: I think I have a sense of the committee. The only question I have, Madam Chair, is whether we need a vote on this notion that this is cumulative versus not. You know, in other words, should we keep in provisions that maintain the jurisdiction of

the State Bar of Texas and these other persons inching forward. I think the sense of the committee is we do, but --

MS. WOOTEN: Let's take a vote.

MS. CORTELL: I think we need a vote.

HONORABLE TOM GRAY: Can we affect in a rule the jurisdiction of those other bodies?

MS. WOOTEN: I don't think we can do that in a rule, but I think what we're doing now is getting a read of the room on how people are construing the effect of this bill.

HONORABLE TOM GRAY: Okay.

MS. WOOTEN: Okay. So by a show of hands, all of those in favor of retaining provisions in Canon 6G referring to disciplinary entities other than the commission on judicial conduct, raise your hand.

HONORABLE ANA ESTEVEZ: I don't get it.

HONORABLE DAVID EVANS: I may have to have it explained to me later by Peter.

MS. WOOTEN: So it sounds like we need to be clearer before we take a vote. My apologies. So the current question is whether the effect of the bill, House Bill 367, is effectively to say for all of those candidates covered, only the conduct commission, judicial conduct commission, has the authority to discipline. And

if you think that only the commission has the authority to discipline as a result of this bill, then you would remove from existing Canon 6G entities other than the commission for the covered candidates. Justice Kelly.

HONORABLE PETER KELLY: I would just suggest that this might be premature until we answer some of these other questions we've identified in the past hour because we don't know the relationship between -- you know, who's a candidate, who's not a candidate, are they subject to the bar or the commission, but not have a vote on this moment.

MS. WOOTEN: Nina, is there more opposition to getting more clarity presented to the committee about who is and who isn't covered before we take a vote?

MS. CORTELL: I'm happy to defer, and Bill will be the one presenting in August. He will have the answer, so I think I understand basically the sense of the committee. So I'm good to refashion this.

MS. WOOTEN: Okay.

HONORABLE PETER KELLY: We need to table the motion.

MS. WOOTEN: We should table the motion.

HONORABLE PETER KELLY: Move to table the motion.

MS. WOOTEN: All right. Is there a second

to table the motion? Judge Schaffer seconds the motion, so the motion is to currently table the motion made about cumulative or not authority. All of those in favor raise your hand?

All right. All those opposed raise your hand? Okay. So we're going to table it. It's 11:57. Do you want to break for lunch?

HONORABLE NATHAN HECHT: Sure.

MS. WOOTEN: We'll break for lunch for 45 minutes and then come back and resume conversation.

(Recess from 11:57 a.m. to 12:49 p.m.)

MS. WOOTEN: All right, everybody, we're going to go ahead and get started again. You're all on the record now.

MR. FULLER: Tape is rolling.

MS. WOOTEN: Tape is rolling. Okay. We're moving on in the agenda. Before we move on to item seven, I'll note that we have assessed the possibility that we might finish today and not have to come back tomorrow. So I just wanted to share that possibility with you as we move through.

HONORABLE TOM GRAY: Are you trying to bring peer pressure on me to be quiet?

MS. WOOTEN: I would never do such a thing. I just wanted to acknowledge the possibility that we might

finish today. So with that, we'll move on to item seven.

MR. LEVY: Well, now we're not.

MR. ORSINGER: Hello, we're moving on.

MS. WOOTEN: Item seven in the agenda, and this is conduct of judicial candidates, Nina Cortell leading the discussion, and the memo that pertains to this part of the discussion is on page 141 of the materials.

MS. CORTELL: Thank you, and thank you, Madam Chair, for having taken a lead role on preparing the memorandum that will be considered by the entire committee. This refers to a house bill that regards judicial disclosures, additional disclosure obligations and additional judicial educational requirements. If you've looked at the statutes, they are pretty fulsome in a number of things they're asking the Court to do. Many of them are not within the confines of our assignment, so if you look at footnote 1 of the memorandum that gives you kind of a listing of a number of item that is are not before you today that will be considered by different bodies at different times, so ours is a more limited assignment.

We looked specifically at 33.032, which is to -- as to the section of the Government Code requiring that we make public any sanction the State Commission on Judicial Conduct issues against a judicial candidate for

making false ballot application disclosures, along with related records, so to make those public. In section (3) it adds another Government Code provision, providing for the suspension and removal of judges who do not comply with the education requirements that are provided by these statutes.

We were asked to consider the implications for the Code of Judicial Conduct and the procedural rules. Again, we focused on the code this go around. We understand that we need to then turn to the procedural rules, but our effort in doing that will be informed by the discussion today.

So specifically what we have recommended is adding to Canon 5 of the judicial conduct -- it's on your memorandum, page two, and basically saying that "A judicial candidate, including a judge seeking elective judicial office, shall not knowingly make a false declaration on a statutorily required application for a place on the ballot for any of the following offices," and that's the listing of judges that we talked about in our earlier discussion, those that are listed out in 6A(1) of the canons and also a comment explaining that we are adding this to reflect new statutory requirements relating to applications for judicial office. So I open it up to discussion for the recommended amendment to Canon 5.

MS. WOOTEN: Judge Schaffer.

HONORABLE ROBERT SCHAFFER: This by itself doesn't trouble me. What troubles me or what I'm concerned about is the additional things that we have to disclose. And so without knowing what those are, this is, I don't know, pretty innocuous.

MS. CORTELL: I don't think that the actual what is required to be disclosed, that's covered in footnote 1 as to how that's going to be handled, so that wasn't put to us. I don't know --

HONORABLE ROBERT SCHAFFER: Okay.

MS. CORTELL: -- if we're able to separate it out or not, but --

MS. WOOTEN: I will add that, as reflected in footnote 1, the Secretary of State is working on a form application to specify the additional disclosures, so as Nina indicated, it will be addressed and explained in the form that's in the works.

MR. PERDUE: And I think it's really sanctions, as --

HONORABLE ROBERT SCHAFFER: I know it's that, but I think it may have other requirements as well, like your experience level and things of that sort.

MS. WOOTEN: You're correct, it requires disclosure of experience in the preceding five years of

making the declaration.

MS. CORTELL: I think the only guidance we have today is what's actually in the statute. Yeah.

HONORABLE TOM GRAY: And the actual language of the statute starts on page 145 of what is required that the Secretary of State will be adding to the application. Starts on line 18 of page 145.

HONORABLE ROBERT SCHAFFER: Uh-huh.

MS. WOOTEN: And there are specific requirements for disclosure for individuals seeking appellate courts who are not already sitting appellate court justices. Any further discussion about the recommendation laid out in the memo on page 142 of the materials?

MS. CORTELL: The suggestion, Madam Chair, that we might finish today is informing the discussion level.

MS. WOOTEN: That's quite possible, but I hope it's not stifling anybody's feedback. So if anybody wants to speak against what's on page 142, this is the time.

Okay. You want to move onto the next recommendation?

MS. CORTELL: As has already been indicated, there are very extensive additional judicial education

requirements. We didn't go into those here for the reasons previously stated, but we did think that we should add a reference to that in Canon 3, so we provided you a redline there under Canon 3, adjudicative responsibilities, and we've added in addition to "A judge should be faithful to the law and shall maintain professional competence in it," and then the added language, "including by meeting all judicial education requirements set forth in governing statutes or rules." So that new language that's in redline is what we are proposing.

MS. WOOTEN: Any discussion on the recommendation? Yes, Robert Levy.

MR. LEVY: Why -- well, I guess the question is, is that really an adjudicative responsibility or should that maybe go under 3(a), judicial duties in general? Because the education doesn't pertain to the adjudication of cases.

MS. WOOTEN: I'll speak to the thought process of putting it there, and that is the existing Canon 3B(2) refers to maintaining professional competence in the law, and the thinking was that completing your required judicial education would be a component of maintaining judicial competency in the law.

HONORABLE TOM GRAY: And if you are

wondering why she is so well-informed on that is she wrote this part of the memo.

MS. WOOTEN: Chief Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, they already will discipline a judge for not doing their training, so what are they -- what is that under now?

MS. WOOTEN: If there's another place that references it, it's not explicit. Maybe it's not in the canon. I'm just not sure.

HONORABLE TRACY CHRISTOPHER: I don't know. You see it all the time, so-and-so hasn't completed their 15 hours or 16 hours of judicial education and --

MS. WOOTEN: It might be under the existing language that I just read about maintaining professional competence in the law. It's probably a good question for the commission. We could certainly ask.

Any further discussion? Anybody have anything they want to state in opposition to the recommendation on page 143 of the materials? Okay. I think we're done with item seven.

MS. CORTELL: Thank you.

MS. WOOTEN: All right. Actually, item eight. We are now moving on to item nine, court confidentiality. Jim Perdue.

MR. PERDUE: I will say on behalf of your

legislative mandate subcommittee, we thank you for only referring one of the 11 legislative mandates that are on the agenda to our committee. Everybody else got their own legislative mandate. This one came to us and we were blessed to have the fantastic Robert Levy do the work on this particular bill, and so I give it to Robert.

MS. WOOTEN: Robert.

MR. LEVY: Thanks. The language in Senate Bill 372 is prompted by the United States Supreme Court leak situation that happened with the Dobbs opinion, and the Legislature wanted to make it clear that judicial work products not be disclosed, and it also adds as a criminal offense the disclosure of judicial work product, particularly by staff. So the question then becomes how to effect the implementation of the bill and where should it be, in effect, codified in the rules. And it's not easy to find the right place for it, but the place that seemed to be the most pertinent or applicable place is in the Texas Rules of Judicial Administration. It's not a perfect fit, though, so we might decide that it should go somewhere else or not even in a specific rule.

The Texas Rules of Judicial Administration apply to the courts generally in terms of broad administrative issues. Texas Rule of Judicial Administration 12 deals with public access to judicial

administration, and as Justice Evans will provide some more background on how it works, but this basically is -- functions as the Freedom Of Information Act provision allowing individuals to request information regarding court activities.

And Rule 12.5, or, I'm sorry, Rule 12.4 is a provision that specifies that the public shall have access to judicial information, and so the premise is that all the information should be accessible, and then Rule 12.5 talks about exceptions to disclosure, and the current rule actually already incorporates language, and you can see on page three of the memo in the redline, the current rule already covers judicial work product and drafts as an exemption to items to be disclosed. And one of the issues we think should be changed is that it should be not an exemption that is a permissive exemption, but it's actually a mandatory exemption, and I'll get to that in a moment. That would be an additional change from what's in the draft memo.

But the -- putting it in 12.5 is designed to kind of fit with the existing structure, and it might be, though, that it doesn't really fit because this is, again, with the premise of open information than what's accepted, so that, I think should be a question that we -- we talk about, but you see the changes would clarify that pursuant

to Texas law, which is the statute SB 372, it is prohibited to disclose the following list of records, which would be nonpublic judicial work product, which I've changed the definition to track the statute rather than what was previously in the Rules of Judicial Administration.

Not a lot of significant difference in how it's worded, but obviously the statutory guidance has its definition, so that's why I tracked that, and that, of course, includes the drafts of opinions and memoranda of law, and it further defines nonjudicial work product as any other work product other than the materials filed with the clerk as well as oral statements. So this would apply to disclosure of conference and what judges are talking to each other about or could even include the discussions with court clerks or law clerks, and it makes clear that that not the judge or justice of the court may not disclose it unless it's authorized by court. That's in a proposed Rule 12.5.1, and that's an issue that actually might need further discussion as well.

The issue about the authorization of the court is at some point in time a court will decide to issue an opinion, and at that point in time the opinion can be released, and the vehicle for that might need fleshing out. Like does this mean that a judge can issue

a dissenting opinion, does it -- do you need the court's approval to issue an opinion, but at some point in time, is there a point where this information can be disclosed and that the statute seems to contemplate that. And then the proposed addition of 12.5.2 is that anyone else who's involved in the process, which would be clerks or attorneys or anyone else that works in connection with the court, must maintain the information, and that person can be subject to a criminal sanction, and the statute points out that it is a person other than the judge or justice who is subject to the criminal sanction.

So that language is limited to nonjudges. Of course, a judge would be subject to potential disciplinary sanction. We did not contemplate including language in the Code of Judicial Conduct. I'm not sure we need that because I think the code would cover it generally. So that's -- that's the outline.

The other addition that Judge Evans pointed out is that in 12.8 of the Rules of Judicial Administration there's a reference to permissive disclosure of information, so we think that that should be amended to make clear that the court must not disclose this information that is prohibited by law so that there's no confusion that there might be a permissive but not prohibited disclosure. Yes, sir.

HONORABLE DAVID EVANS: If I can maybe tag on, and I think the hardest rule I learned after becoming presiding judge for a region was Rule 12, and if it hadn't been for David Peeples I probably would have given up the ghost and left. It is an access to a judicial record, and a judicial record is defined as a record kept in the regular course of business but not pertaining to adjudicative functions. So an opinion, an order, is not within the context. I do think there need to be amendments to Rule 12 to reflect what the Legislature has done. What Robert and I may disagree upon is on the extent, especially as it pertains to the staff, that there may be another place and a need for another rule that governs staff conduct more than disciplinary or prohibitory fashion than this.

This rule is an access to judicial records, but not case files. And so the way this works is you get a request in writing. You have 14 days to respond. If you're the records custodian, a defined term, and then you have to respond within 14 days, and you can charge costs in accordance with the guidelines from the Office of Attorney General. And if the requester disagrees with you, they have a right of appeal. They appeal to the Office of Court Administration, and a panel of regional presiding judges is appointed, and here's the petition,

and there's a whole body of opinions out there defining what is an adjudicative function, what is not, so on and so forth.

The rule prohibits -- has a category that it prohibits -- and, Robert, I gave you that note and now I can't find it, but it prohibits the -- you cannot disclose what's prohibited by law, but if it's exempt, a different category, you can -- you have the discretion to disclose it. Well, if you look at the extent of categories in the rule, it includes health records and employment records, those are prohibited or exempt at this point. So the rule has problems to start with, but what I'm trying to say is here this category needs to be strictly prohibited as opposed to being a discretionary area. That's a change that needs to be in the rule.

MR. LEVY: 12.8.

HONORABLE DAVID EVANS: You just flat cannot turn over work product. Although, I would argue with you that under the Rule 12 decisions, it may not even be a judicial record right now. I see the rules attorney is nodding up and down, because work product pertains to an adjudicative function.

MR. LEVY: Right. Well, the --

HONORABLE DAVID EVANS: He taught me well. He made me learn that riddle.

MR. LEVY: Maybe I can pose this question. Judge Evans points out that 12.2 defines judicial record, which does not really include this, but 12.5 talks about exemptions, which includes judicial work product. So the rule itself has some inconsistencies, so maybe posing the question, is this the right place to address this legislative mandate, and does anyone have thoughts about that? Should it be a separate rule? Is this a good place to address it?

MS. WOOTEN: Justice Miskel.

HONORABLE DAVID EVANS: Well, can you address conduct of staff in the Code of Judicial Conduct?

HONORABLE TRACY CHRISTOPHER: Yes.

HONORABLE EMILY MISKEL: Well, these are the Rules of Judicial Administration.

HONORABLE DAVID EVANS: I think only Rules of Judicial Administration. So it would have to be a separate rule for staff conduct, wouldn't it?

HONORABLE EMILY MISKEL: That was going to be my question, which is if the Rules of Judicial Administration govern judges, our purpose is not to punish judges for releasing information that judges want to be released, and so I don't know that additional things in the Rules of Judicial Administration are the proper place to locate this, because I don't know if it covers the

people that we're concerned about releasing things without the approval of the judge.

HONORABLE DAVID EVANS: And maybe what I was trying to say was should there be a separate rule besides Rule 12, another rule that just governs staff conduct? Is that the place to govern staff conduct, because this really goes to staff conduct, is what it's designed to prohibit.

HONORABLE EMILY MISKEL: I'm looking at the rules right now to see are there other Rules of Judicial Administration that cover nonjudges, and I just don't know off the top of my head.

HONORABLE DAVID EVANS: I don't believe there are.

MS. WOOTEN: Chief Justice Christopher.

HONORABLE TRACY CHRISTOPHER: I don't know why we're not putting it in the Code of Judicial Conduct because we are supposed to make sure that our staff complies with certain provisions in the Code of Judicial Conduct. So --

MR. LEVY: That is --

HONORABLE TRACY CHRISTOPHER: -- it seems to me that that's where it should go.

MR. LEVY: And that is obviously in the Code of Judicial Conduct, but that obligates the judge to make

sure the staff acts accordingly, but it doesn't explicitly apply to the staff and govern their conduct.

HONORABLE TRACY CHRISTOPHER: I'm not sure RJA does.

MR. LEVY: And in this situation the rule is in effect pointing out that there's a statutory penalty, but we don't need a rule to effect the statutory penalty.

HONORABLE TRACY CHRISTOPHER: Right.

MS. WOOTEN: Rich Phillips.

MR. PHILLIPS: So, I mean, the first question I have is it does seem like it's a weird place. If we have to change exempt to prohibited, we're kind of really doing something -- some violence to 12.5, but the other question is, do we need a rule? I mean, i know the Legislature says do it if you need to, but it's a criminal penalty. If we're trying to find a place to put it that binds staff, because we're not sure that this binds staff or that judicial conduct binds the staff, what -- I know you guys put a lot of work into coming up with the rule, but the first question is, do we need a rule?

MR. LEVY: No, no, it's a very good question.

MR. PHILLIPS: Is it enough that it's a criminal penalty for it, and, you know, maybe the judges -- I don't know, I'm just wondering if we even need

a rule on this.

MR. LEVY: Just to respond quickly, I think that's a very valid question. I do think that we would need to clarify 12.5 to make it clear that it's -- it's not -- you know, there's no permissive nature to it. So we should still update 12.5 and 12.8 just to clarify the prohibition, but you're right, we don't necessarily need to address the staff issue or all the other detail that's in the proposal.

MS. WOOTEN: Chief Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, right now all of our staff and our interns take an oath to uphold the confidences of the court, and we give them, you know, the law to look at on that. So I don't know if we need anything other than to make that sort of a, you know, standard practice.

MR. LEVY: Where is that oath?

HONORABLE TRACY CHRISTOPHER: We just made one.

MR. LEVY: Okay.

MS. WOOTEN: It's internal.

MR. LEVY: There's not a -- should there be? Should there be an oath for all of the courts?

HONORABLE TRACY CHRISTOPHER: I've never looked at the history of our oath. I think the Supreme

Court does it, too. Don't they?

MS. DAUMERIE: Yes.

HONORABLE JANE BLAND: We just recently did it, but the First had it.

HONORABLE TRACY CHRISTOPHER: Yeah. The First and the Fourteenth have had it as long as I have been there. I do not know the history. I will be glad to find it and share it, but I actually think that's the best way to handle it.

MS. WOOTEN: John Warren.

MR. WARREN: At the trial court level, the judiciary does not administer -- does not administer an oath to their staff, the court reporter and court coordinators. I've been trying to figure out what problem this is trying to solve, but then again, you do have instances where you will have employees -- if you have a court coordinator who is terminated by a judge. That court coordinator is now a disgruntled employee and wants to displace some -- some misbehaviors or something that the judge may have said about colleagues and colleagues ruling on their behalf or even an attorney who is a bad actor or something. So as it relates to judicial administration, the guidance of staff should be there, because they are actually assisting the judge in covering that administrative responsibility of the court. So how

do you phrase it? I have -- I don't know, but that should be -- but that should be considered.

MS. WOOTEN: Justice Miskel, and then Chief Justice Gray.

HONORABLE EMILY MISKEL: I just had one other comment about changing -- inside the Rules of Judicial Administration, changing something in 12.5 from permissive to prohibited, and again, I just keep circling back. The Rules of Judicial Administration, their purpose is to govern judges' behavior and get judges in trouble, but the purpose here is not to get judges in trouble for releasing whatever work product of the judge that the judge wants to, right? So it's always going to be permissive because the judge can always decide this needs to be public or whatever, so putting it in the Rules of Judicial Administration to prohibit a judge from releasing the judge's own work product and get a judge in trouble for doing that either accidentally or on purpose, I just don't know that that's the purpose of the statute. The purpose of the statute is to punish people from doing it against the judge's wishes, right, but to put it into something that governs judge behavior and get judges in trouble for doing it on purpose or accidentally is not what the statute governs.

MR. LEVY: Can I respond just briefly?

MS. WOOTEN: Yes, Robert Levy.

MR. LEVY: I do think that the statute contemplates judges' conduct because it says "The justice or judge of a court shall comply with Supreme Court rules governing the confidentiality of nonpublic judicial work product," and that's in 372. So under that, like if I'm a dissenting judge to Judge Gray and I decide to disclose all of our discussion about that decision, that would violate 372, I believe. So while it doesn't put the judges at criminal risk, it does apply to judicial conduct.

HONORABLE EMILY MISKEL: So I guess I'm having trouble imagining -- and I'm losing my place going back and forth between the statute and your memo, but something said without the permission of the court, which is easy in a one judge court because the judge is the court and the judge gives herself permission, and you're right, in a three-judge panel or a 13-judge court of appeals, who is the court that can give permission? I don't know the answer to that.

HONORABLE DAVID EVANS: Under the rule, for access to information, the chief is the records custodian. Under this rule.

HONORABLE EMILY MISKEL: And is he the court that can give permission?

HONORABLE DAVID EVANS: Chief of the Court, when you dig into it deep enough, the chief would be the records custodian for -- for information subject to Rule 12, written requests, information, so on and so forth. But the one thing, Emily, that bothers me, or, Judge, bothers me is we -- we -- I think you can actually disclose things under Rule 12 that are prohibited from law from being disclosed, certain employment and private information, and that's little bit -- it's related to what Robert's bringing up, is that the rule talks about voluntary disclosure and then talks about the response, and there needs to be something real clear in the rule that in no circumstance can you disclose something that's prohibited by law as a judicial record, which is -- is not -- is not -- it's not opinions, though. So I don't think it is the place for staff conduct. I'll just say it that way. I don't think it's a place for staff conduct or penalties.

MS. WOOTEN: Chief Justice Gray.

HONORABLE DAVID EVANS: We wrestle with this rule. Judges are being bombarded by people with Rule 12 requests. It's very difficult if you don't have a staff to -- for an individual judge to keep up with these requests and catalog the dates, gather them, make the cost assessments, and so on and so forth.

MS. WOOTEN: Thank you, Judge Evans. Chief Justice Gray.

HONORABLE TOM GRAY: Having been the chief in Waco for 20 years, the -- I've dealt with a lot of these over the time period with other judges on the court participating as the Rule 12 requires, and respectfully, I don't think this fits well in Rule 12. The whole concept of Rule 12 is what do we make available to the public. We have something that we make every employee that comes to work for us sign that has to do with a host of things of -- and I think confidentiality is one of those things. OCA makes me sign a statement every time I get a piece of equipment from OCA, in that if I lose it or destroy it I'm responsible for it.

I would think that if I just walked up to this and read the statute, one, we don't need a rule for it. But, two, if you're going to do a rule, let's focus on the conduct of the judge that will help implement the Penal Code provision that was designed, to answer John's question, to address the public disclosure of a draft opinion. That was what it was all about. It was all about the Dobbs opinion and its public dissemination, and so what -- and there are two provisions that I think are relevant already in the Code of Judicial Conduct, Canon 3, subsection (11) says, "A judge shall not disclose or use

for purpose unrelated to judicial duties nonpublic information required in a" -- "acquired in a judicial capacity."

So there's your link to the judge. Then in subsection C(2), it says, "A judge shall require of staff, court officials, and others subject to," and then it talks about the conduct. It would seem to me that the perfect link, tie, would be in C(2) to a form oath promulgated by the Supreme Court that prohibits the same conduct as -- that referred to in the statute, and I think this subcommittee should be charged with drafting and coming back at the next meeting with that form oath, of what -- what oath should the judge require their staff to sign that would implement this penal provision, and that's where it would then be tied into the existing rules and Code of Judicial Conduct.

MS. WOOTEN: Perhaps using as a base existing forms --

MR. LEVY: Right.

MS. WOOTEN: -- that are available. Rich Phillips.

MR. PHILLIPS: Just one comment on who is this supposed to control as far as an offense under the statute, and it's not entirely clear, but sub (c) says the judge or justice will comply with the rules, (d) says the

person other than the judge or justice has to keep things confidential, but the only place it talks about committing an offense in the statute is (e), and that expressly excludes justice or judge. So a justice or judge can't commit an offense under this statute, as I read it. I think the only offense is someone other than a justice or judge who has access to disclose. So I think, again, the idea of who this is aimed at is clearly court staff and not justice or judges, which, again, gets us back to where we put this if we're going to have a rule at all.

MS. WOOTEN: Right. Any further discussion at this time? Yes, Judge Schaffer.

HONORABLE ROBERT SCHAFFER: I kind of agree with what Rich just said, that we really -- this -- the conduct we're aiming at here is the person other than the judge or justice. I don't think we're intending to make a misdemeanor a judge or justice not complying with Supreme Court rules. So I don't think it goes in the Rules of Judicial Administration. I don't think it necessarily goes in the Code of Judicial Conduct. I think it's a statute just like any other misdemeanor statute on our books. We don't make a list of them and hand them to people before they take certain jobs, but if you feel so inclined to remind a -- remind your clerks or interns about this, that's fine, but I think what the Legislature

is asking here is just keep those opinions confidential and not disclose them.

MR. WARREN: I would just say based on what Rich and Judge Schaffer just said, the oath would satisfy that.

MS. WOOTEN: And you're referring to the oath that's currently administered by some appellate courts at least --

MR. WARREN: That's correct.

MS. WOOTEN: -- at the intermediate level and the Supreme Court? Robert Levy.

MR. LEVY: I do think that there is value in taking practice and putting it into procedure, like with an oath. This issue obviously applies to controversial topics, but it could easily apply to, you know, the judge that you're working for is about to issue a decision that might impact the stock market for the party in that case or might have other significant ramifications, and the statute now addresses that issue with staff and adding to the visibility in a process would -- would be a value, I think.

MR. PERDUE: I'd just like to say if there's going to be an oath written, it seems like that should go to the appellate practice subcommittee, not the legislative.

MS. WOOTEN: I see what you did there.

HONORABLE DAVID EVANS: That's my chair. That's my chair.

MS. WOOTEN: That was subtle, but I see what you did there. Any further discussion today on the proposal that we've been analyzing? So I think maybe at this time we wait for further input from the Court on where to go from here, but we will move on in the agenda to item 10, SVP magistrate referrals.

HONORABLE ANA ESTEVEZ: I'm going to do that because I'm the only one here.

MS. WOOTEN: All right. Take it away.

HONORABLE ANA ESTEVEZ: Sometimes that's --

MS. WOOTEN: And this starts -- I think your memo starts on page 242 of the materials.

HONORABLE ANA ESTEVEZ: Probably.

MS. WOOTEN: Is that right?

HONORABLE ANA ESTEVEZ: Yes. All right. So two bills passed, 1179 and 1180. Both of them contained what is now going to be or actually already is, so I'm going to just point that out, first of all, but what is now Chapter 14A of the Texas Civil Practice & Remedies Code. Senate Bill 1179 takes effect on September 1. Senate Bill 1180 already took effect on May 24th, so it is already in effect immediately. They were identical parts.

One of them was a stand-alone bill. The other one has some other additional provisions that will take an effect and have nothing to do with our assignment.

So I'm just going to start with -- deal with everything with 1180 because it's exactly the same as 1179. So just a little bit of background just because I don't know that everybody knows that there is such a thing as a sexually violent predator law, but there is. So what that allows people to do is in the Health & Safety Code, Chapter 841, if there's someone that has been convicted of a sexually violent crime, as defined by the Legislature, more than once, and we're not going to wait for them to commit another crime, we can actually civilly commit them into a facility. And Senator Perry has one of those in his district out in Lamb County, which is in mine as well, and they stay there until there is -- well, they get there if they can prove that they are repeat sex offenders that have a behavioral abnormality that would allow them to commit another crime of a sexual nature. And so they can get jury trials, and they can get out.

They're reviewed every two years. They have to be reviewed to determine whether or not they should be released, but they can get something sooner, since they're all getting treatment. So just for constitutional reasons, I'm telling you that they have not committed

another crime at this point, but they are civilly committed.

Now, this is an identical bill except for the statute references to Chapter 14. Chapter 14 has to do with inmate litigation where we have people that are prisoners, and they get angry at the people that are in the prison with them, and they file a civil lawsuit against them. They go through a grievance process, and then at some point if they've exhausted all of those things they can go to a district court, file a lawsuit, so that they can get some relief. Senator Perry's office did state after a phone call that this was intended to be exactly like Chapter 14. So it is. If you look at Chapter 14 and you put it next to 14A, other than the references to the internal statutes, it is exactly the same, and that's probably why they have this little referral that says -- that I never knew about, because I would have been using my little genie to do these cases since I have a prison in my jurisdiction, but it allows a district judge to refer it to a magistrate for a magistrate to determine whether or not a lawsuit should continue, whether you should dismiss it as frivolous, and never have anyone served at all, whether -- if it is frivolous, whether those costs that would have been imposed can be charged against them, and then it can come

out of their inmate account.

All of that to say, once I realized that it was identical, Jaclyn over there was my little genie, and I said this was enacted in 1995, surely someone did something with it, because it has the identical provision to allow for the little genie to do your work for you, and so I called -- or e-mailed her, and if you will look at Tab T, and I think this is a wonderful exhibit, because I want to name the people that signed off on this wonderful miscellaneous docket order 96-9273 because the distinguished people, some of them are amongst us still today, and all of them have gone and done some wonderful things. So we have Thomas Phillips, Raul Gonzalez, Nathan Hecht, John Cornyn, Craig Enoch, Rose Spector, Priscilla Owen, James Baker, and our Governor, Greg Abbott.

And what they did -- I guess this is technically cheating, I don't know, but I just didn't -- I thought that somebody here worked on this a long time ago, and they worked really hard, but they did the rule for magistrates in inmate litigation, and therefore, after years of work I have turned that into -- or our subcommittee turned that into rules for magistrates in civil commitment litigation. And I will say that I do not think that the senators that have passed these laws really care about that magistrate referral part on 14A. They

really were just mirroring the Chapter 14, so it's not that there's a great need. I know Lamb County, we have one district judge there that has 12,000 people in his whole district and then, you know, this issue. So I don't know if you need a magistrate or not to do that work.

So we can go through all of this that they did, or they can review that and tell us if there's some things that we want to change, but I'm telling you that they spent so much time on it in the Legislature I don't think they're waiting on us on this. I really don't know if anyone has ever used this. I mean, I didn't know it existed, and I've been on the bench for 17 years. So if somebody else has used this or if you've had a magistrate referral, a magistrate appeal, I mean, they could just -- they had an appeal straight to the district court. It allowed for video conferencing for hearings. It allowed for a court reporter or no reporter. I mean, it is very thorough, and I think if we put it out there everybody is going to find it, and we're going to all ask for our magistrates, because it's time-consuming and we do do a lot of these cases when you have a prison in your jurisdiction.

MS. WOOTEN: All right.

HONORABLE ANA ESTEVEZ: But I can go through each section. I don't know, I mean, this will take -- if

we actually really debated all this we'll be here tomorrow. I mean, there's a lot of substance in it, and it was well-written.

MS. WOOTEN: I wouldn't call it cheating. I would call it being resourceful.

HONORABLE ANA ESTEVEZ: Well, you know, I mean, how could I beat the work from these people?

MS. WOOTEN: Any discussion about the recommendation to essentially carry over the prior order content for the sexually violent predator context? Yes, Professor Hoffman.

PROFESSOR HOFFMAN: Who is paying for this?

HONORABLE TOM GRAY: You are.

HONORABLE ANA ESTEVEZ: It's in 4.01 of tab -- well, Tab B on the other one. So are you saying who's paying for the --

PROFESSOR HOFFMAN: Magistrates.

HONORABLE ANA ESTEVEZ: For the magistrates? If they give us funds, then they pay for it. If not there's a provision that allows it to come out of the county funds, 26.05 of the Code of Criminal Procedure, and, you know, that kind of bothered me, but then I realized that the Legislature -- not the -- the inmate litigation, I mean, these were people that were tied to the criminal world, you know, and had served sentences

before, and the only reason they're in commitment is because they were in the criminal system. So I think it's fair to take it out of that same fund if the county is going to pay for it, but the county commissioners decide whether they're going to even allow it. So either the county or the state.

MS. WOOTEN: Yes, Chief Justice Gray.

HONORABLE TOM GRAY: In your research on this, was there a reason given for why 14A was being implemented?

HONORABLE ANA ESTEVEZ: Because they started filing lawsuits.

HONORABLE TOM GRAY: Why does Chapter 14 doesn't -- not apply?

HONORABLE ANA ESTEVEZ: Oh, they're not in prison. It's a civil commitment, so it's not the prison. So they just mirrored it because it's a civil commitment, not a criminal, criminal justice.

HONORABLE TOM GRAY: I've been dealing --

HONORABLE ANA ESTEVEZ: That's the only reason.

HONORABLE TOM GRAY: Okay. Because I have been dealing with Chapter 14 for 25 years, and I don't know that I've ever seen the magistrate order used.

HONORABLE ANA ESTEVEZ: I never knew it was

there.

HONORABLE TOM GRAY: And I can tell you with some degree of certainty when I first saw it, and it was about 20 hours ago.

HONORABLE ANA ESTEVEZ: I saw it on June 3rd or June 4th, whenever we started the project, and so this was a lifesaver to me.

HONORABLE TOM GRAY: So in answer to Lonny's question, it's like who has to pay for the attorneys in, you know, cases where they're appointed, it's going to be some level of government that pays for it.

PROFESSOR HOFFMAN: Who are the defendants in these civil commitment cases? Who is on the other side? Is it the county?

HONORABLE ANA ESTEVEZ: It is the people that run the civil commitment -- usually it's the civil commitment people, but it doesn't -- so it specifically says it does not apply to family law. So in other words, if you try to divorce someone, you don't go through this process or if there's some sort of adoption or termination going on.

PROFESSOR HOFFMAN: So what I'm after -- and maybe I'm off base here, but if --

HONORABLE ANA ESTEVEZ: It's usually the system.

PROFESSOR HOFFMAN: If the -- if the suit by the civilly committed inmate is brought against the county, and the county also is in charge of deciding whether to allocate money to a magistrate to hear the proceedings, that seems like a potential place of conflict where, for example, the county -- the commissioners might very well decide that this case will languish if it stays with the district judge versus if it goes to this magistrate who has some -- the county is concerned about that, then they don't allocate the money.

HONORABLE ANA ESTEVEZ: Well, you only get the money if -- you would have to have the money before you give it to them. And sometimes it's against another inmate. They can do a civil lawsuit against another inmate, too, just anyone that they would be in contact with while they're committed.

MS. WOOTEN: Chief Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, I think it's an elegant solution because, you know, it's hard to figure out where to put this, but the fact that people that have been in the judicial administration business for a long time are unaware of this is a negative in my mind, and so I don't know where would be a specific or a better way to put it or to make it widely available. I mean, I won't say which appellate court this is, but when -- when

the Legislature passed a rule saying we have to do our juvenile certification hearings super quick, the Supreme Court passed a little order that said, hey, do it in 180 days, and a lot of -- several appellate courts didn't pay any attention to it until they actually amended Rule 6.2.

So I'm just saying that sometimes an order, a miscellaneous order from the Supreme Court, can get lost, and I don't know where I would put it, but it's a useful rule that people will want to use. Both of them are. So we just -- you know, I don't know what the Court can do to make that a little more physical.

MS. WOOTEN: Justice Miskel.

HONORABLE EMILY MISKEL: I mean, since Rules of Judicial Administration are on my mind because of the last agenda item, I don't know if they're already in the Rules of Judicial Administration or anything governing magistrates, but I know more and more counties seem to be like creating magistrates, and so I wonder if we have something already in the Rules of Judicial Administration that talks about magistrates, we could put references to these procedures in there. Because that was Rich's question. It's like, okay, it says "rule" at the top of the page, but where does this rule live, like where is it?

MS. DAUMERIE: It -- yeah, it's just on our admin order page, but I was thinking maybe we could move

that at least onto our rules page, if we don't end up putting it in a rule like the Rules of Judicial Administration.

HONORABLE EMILY MISKEL: Do you know, are there like -- is there a place where there are rules that apply to magistrates or juvenile referees or these other types of officials?

MS. DAUMERIE: Not off the top of my head.

HONORABLE TOM GRAY: It may sound a little bizarre, but then coming from me that's nothing new. Looking for a place to append this to our rule book, Chapter 14 is in large part there because of the indigent nature of the plaintiff in the civil lawsuit that's being filed. Rule 125, or any of the Section 6 rules that deal with cost may be a place you could hang a comment that -- to Chapter 14, 14A, because that's the first thing you're going to get with one of these petitions, is the affidavit of indigency. And I think there's another rule about that, and I'm sorry, I'm flipping through the rule book here, but I didn't think about the question that came up today of where do you put this that you actually find it, because Tracy's right, I've never seen this magistrate part, which is what we're working on. So --

MS. WOOTEN: And what's your reaction to the idea of putting it on the rules page of the Supreme Court

of Texas? Do you think that might help?

HONORABLE TRACY CHRISTOPHER: Well, it would certainly help as opposed to just being down in the advisories, you know. I don't know. I think Justice Miskel is correct that we have so many different provisions regarding the use of magistrates, and we don't really address them anywhere in our rules. I think as a long-term project it would be good to, you know, kind of pull all of those things together in a separate section, and then we would have a great place to put this rule.

HONORABLE TOM GRAY: So you're advocating a fourth rule book to have on the judge's desk for all of the magistrates that they --

HONORABLE TRACY CHRISTOPHER: It could just be a little tab down here, special rules regarding magistrates.

MS. WOOTEN: Or you could replace, you know, what used to be Section 3 of the Texas Rules of Civil Procedure, all of the appellate stuff was there, and maybe have a section.

HONORABLE TRACY CHRISTOPHER: I just, you know, I think having a transparent rule is important, and unfortunately having the rule on the Supreme Court website doesn't always do it.

HONORABLE PETER KELLY: That's where we need

the judicial education they were talking about.

HONORABLE TRACY CHRISTOPHER: True.

MS. WOOTEN: Any further discussion?

Seeing no hands, we'll move on to item 11, business court. Marcy Greer.

MS. GREER: Well, we are new and very excited to get started. We've got -- it was interesting, Chip, when he called me said -- signaled very strongly that he and the Chief hoped that we would not see the need to make a lot of recommendations and hopefully the rules would cover them, and I wasn't sure if he was kidding or suggesting, but after the committee kind of brainstormed a little bit last night at dinner at my house, I think we're going to have some rules for you and some suggestions.

One thing we're trying to figure out is whether or not the Legislature has funded the business courts. Do you know that or --

HONORABLE DAVID EVANS: From my understanding they're funded through the -- for the first round of judges to be hired in '24, the first round and not the second.

(Sotto voce comment)

THE REPORTER: I can't hear you, Mr. Dawson.

MS. WOOTEN: Can you repeat what you said, Alistair?

MR. DAWSON: Yeah. My understanding is that they have approved funding for the business courts in the five metropolitan cities. Houston, Dallas, Fort Worth, Austin, and San Antonio.

MS. GREER: Well, we were hoping that we wouldn't be out of a job before we even got started, so that's good to know.

MR. DAWSON: No such luck.

MS. GREER: But we talked about the fact that the two that have been delegated to us, one deals with the Fifteenth Court of Appeals, which I think will be the easier one because there are already rules for the appellate courts and things like that. I think that will be comparatively easier, but it's going to be a really interesting challenge for the business courts themselves, and we talked about different analogies. We also had a meeting, not just the dinner at my house with involved wine and probably less meeting, but we also had a meeting this week, and I think it's going to be a terrific group.

But we were looking kind of at analogies for the business courts for the trial court part of it, and I think the best analogies seemed to be the Class Action Fairness Act of 1995, which in the federal courts, it basically was designed to pull class actions out of federal courts -- I mean, into federal courts from the

state courts, and so it has these complex remove and remand provisions in them, which sound a lot like what's in the statute. So I think that's a good analogy. The MDL rules are a good analogy.

We're going to try to keep them as streamlined as possible, but it's going to be a challenge. It's kind of like -- has anyone seen the movie, Intolerable Cruelty? It's one of my favorite movies. It's really great, and the guy goes in and he's been caught in the act of infidelity and, you know, his wife has him on video, the whole thing. It's terrible, and he's asking George Clooney, the lawyer, marital lawyer, so he goes, "So basically you're telling me that you've been unfaithful, you've done all this, and you want to throw her out without any money?" And he goes, "Is that possible?" George Clooney, the lawyer, said, "It will be a challenge."

So that's -- we welcome everyone's ideas. I know there are a lot of people who have a lot of different experience that I think would be very helpful for this. We're going to start by dissecting the statute and really sitting down and looking at all of the different provisions because there's a lot in there, both statutes, and we welcome everyone's ideas. I don't know if there's anything else. I'll open it up to the members of the

committee if they want to add to this. There's more to report, but we just got the message last week, so we're trying to move as fast as possible.

MS. WOOTEN: All right. Any discussion -- we'll start with the business courts, any discussion on that, ideas that you want to share? Robert Levy.

MR. LEVY: As I mentioned earlier, I do think that the committee, the subcommittee, will want to look at where in the rules, the current rules, that will need to be amended to reference business courts. One of the interesting questions is while the business court has concurrent jurisdiction with district courts, is a business court a district -- is a business court judge a district court judge? Probably not, because a district court judge is a constitutional provision, and so that issue might need to be addressed in the rules to incorporate rules of discovery. Presumably a business court case would follow the same discovery provisions. Maybe always track three, but it's not clear. Those are some of the issues.

MS. GREER: Or the family court proceedings.

MR. LEVY: What was that?

MS. GREER: No.

MR. LEVY: That might be at the second bottle of wine stage, but, you know, and it seems also

that there is a little bit of time to address this as they don't go into effect until September of 2024.

MS. GREER: Well, that was my first panic attack, was before I confirmed that.

MS. WOOTEN: Chief Justice Christopher.

HONORABLE TRACY CHRISTOPHER: I think there's a -- if I remember correctly, there's some sort of transfer provision.

MR. LEVY: Removal.

HONORABLE TRACY CHRISTOPHER: No, in the appellate court, in the appellate court, in a year, I believe, that we can start transferring cases to the Fifteenth Court of Appeals, and so I think there should probably be some sort of a procedure that maybe you could work on that. I don't know whether that's a Supreme Court procedure, if there's any right to object. I mean, right now there's not a right to object to a transfer from one court of appeals to another, so whether -- and I don't know this, whether the description of the Fifteenth Court of Appeals jurisdiction is limited so that you really actually have to make sure if the case we're transferring fits that criteria. So I'm sure the Supreme Court would love to look through every one of them, but there's got to be some better way, I would think. I don't know exactly, but it would be something that we would be thinking of

sooner rather than later.

HONORABLE R. H. WALLACE: The jurisdiction is limited. It's limited by some dollar amounts as well as suits against the government officials and stuff like that, so I think what you're talking about, transferring cases because of workloads or --

HONORABLE EMILY MISKEL: That's prohibited.

HONORABLE TRACY CHRISTOPHER: That's prohibited, but I'm just talking about that the -- I believe that the statute says cases that are on appeal that meet this criteria can be transferred on the -- on 9-1-24, because that way it gives the business court something to do.

HONORABLE R. H. WALLACE: Right.

HONORABLE TRACY CHRISTOPHER: While they're waiting for -- the Fifteenth Court of Appeals something to do while they're waiting for things to wind up there.

MS. WOOTEN: Nina Cortell.

MS. CORTELL: I just had a question whether there are any other analogous procedures in other states, you know, similar to this that we could borrow from.

MS. GREER: Yeah. Delaware comes to mind as being the first place to have a chancery court, and then there's also in Pennsylvania they have the mass torts, and Los Angeles they have the complex courts. There are some

things like this, but I think the chancery court in Delaware is probably going to be the first place to look, and we're going to dig up the legislative history, too, of this, these statutes. Thank you. That's a great point.

MS. CORTELL: Yeah, I was just -- it's always good to find other models if we can.

MS. GREER: Absolutely.

MS. WOOTEN: Further discussion on the business courts? Yes, Richard Orsinger.

MR. ORSINGER: I just had a question that's maybe not procedural, but I was reading the types of cases where the business court has concurrent jurisdiction, and they are cases where a claim could be raised in a divorce that would fall within the jurisdiction of the business court. So do we have a dominant jurisdiction concept there where you have concurrent jurisdiction wherever the case is first filed, has dominant jurisdiction, or is there a transfer process that preempts dominant jurisdiction, or does the court where it's first filed have the ability to refer to the business court or the business court have the ability to grab the case that -- I don't know if there are answers to those questions.

HONORABLE PETER KELLY: Not yet.

MR. ORSINGER: Not yet?

HONORABLE PETER KELLY: We just got the

statute, Richard. We're really trying to --

MS. GREER: It does seem like it's more of a removal/remand type paradigm. It's closer to that type situation than a dominant jurisdiction for us to file, but there will be definitely questions. Some great questions were raised as to what do you do about TROs, and it's implied -- great question -- that the TROs would probably still have to be handled in regular -- in the existing constitutional courts, because you have to actually get referred. You have to get to the business court, and there wouldn't be time, and there's a reference to temporary injunctions being handled by the district -- I mean, by the business court after it's removed.

MR. ORSINGER: So, Marcy, is it your idea that the Court that would be the referring court, they have the election to refer or not refer?

MS. GREER: No, no, no, I'm sorry. The business court has to actually pick a judge to send it to, if it's removed, so --

MR. ORSINGER: Removed, though, but who removes?

MR. LEVY: Richard, let me -- let me speak to your provision. So the statutory authority of the business court does not include family court cases, so that -- so a case that arises out of the Family Code is

not subject to the business court's jurisdiction, but the business court could have what's referenced as supplemental jurisdiction over a case that involves the Family Code, but the only opportunity for the business court to exercise supplemental jurisdiction is if all of the parties agree to the claim and a judge of the court before which the action is pending also agrees. So there is a process to exercise supplemental jurisdiction, so that would be a dynamic where there could be a Family Code issue involved, but it would have to be with the agreement of the parties.

MR. ORSINGER: Okay. Interesting.

MR. LEVY: But there probably should be a rule that outlines that.

MR. ORSINGER: Okay. Probably should.

MR. LEVY: Who's going to do that?

MS. WOOTEN: Who will it be?

MR. ORSINGER: I don't think it falls within the scope of my subcommittee, but we'll do it if nobody else will.

MS. WOOTEN: Any further discussion on business courts? What about Fifteenth Courts of Appeals -- Fifteenth Court of Appeals? Any further discussion on Fifteenth Court of Appeals? Going once, going twice?

Onward to item 13 in the agenda, Texas Rule of Evidence 509. Is that you, Professor Hoffman?

PROFESSOR HOFFMAN: Sure. Sure.

MS. WOOTEN: Turn it over to you.

PROFESSOR HOFFMAN: Okay. I'm going to start this discussion by saying I'm not sure about the best order to do this, but I think most of the issues are relatively manageable, so I don't know that it's critical, but so I'm going to start by giving a very quick description of what kind of is going on here, and then I'll kind of dive into the weeds after that.

So Rule 509 of the Rules of Evidence is a rule that deals with a privilege as to health care information, and what prompted these changes, most of these proposed changes, is that there's a committee of the State Bar of Texas, called the Administration of Rules of Evidence Committee, or AREC, A-R-E-C, that watches out for whenever there is a potential conflict between some statutory change that would require adjustment of the rules or a narrowing. So some of that is captured by what they're after here, others are just like, oops, how did we not catch that before. So things sort of fall into this category where their sort of primary purpose is to align statutory changes with rule changes, but not always.

So with that said, I think the first issue

we're going to talk about is going to be the proposed deletion of (e)(1)(b) and (e)(5), so let me, I guess, start with what document you should be looking at. There's a memo from our subcommittee, dated May 22nd, 2023, that sort of looks a little bit like this, and it says in the subject line "TRE 509." Everyone there or does anyone have any questions?

MS. WOOTEN: Page 315.

PROFESSOR HOFFMAN: Page 315, thank you. Everybody okay there? All right. So if you'll turn to the -- what is the easiest place to see that? Well, what page, because I don't have the PDF, what page is the memo from AREC? So this is the memo dated -- it's Exhibit A there, so December 5, 2022.

HONORABLE EMILY MISKEL: Page 320, number on the bottom.

PROFESSOR HOFFMAN: Thank you. So if you're in the PDF, it's page 320, and if you'll turn there to the second page of that memo is probably the easiest place to see it. You could also just go to the Rule 509 itself. The first proposed change is to get rid of (e)(1)(b) and (e)(5). The reason is the same, which is the rationale here is that both of those provisions concern things that happen in administrative proceedings that, of course, are not -- that the Rules of Evidence are not meant to apply

to. They're Rules of Evidence that apply in courts. Both AREC and our subcommittee are clear, we're not -- no one is saying that the administrative proceedings cannot incorporate the Rules of Evidence, so again, there's no major change being suggested here.

It's just AREC looked at this and said, hey, wait a minute, why are we talking about disciplinary proceedings here in the Rules of Evidence? And so their first proposal is to simply delete (e)(1)(b) and (e)(5), and again, I will repeat, this is not an example where the statute got changed. This was just language that's been hanging around that eventually someone said, oops, this probably doesn't belong in Rule 509. So I'm going to pause there because that's as good a place as any to pause, to say, was that clear? Do I need to clear anything up? Does anybody have any questions or have any reactions to their proposal? Our subcommittee favored this change. I mean, we were okay with it.

HONORABLE TOM GRAY: What does the change do?

PROFESSOR HOFFMAN: To delete it.

HONORABLE TOM GRAY: What does the change do?

PROFESSOR HOFFMAN: It doesn't do anything other than clarifying that the Rules of Evidence don't

apply in administrative proceedings unless those administrative -- the statutes governing those administrative proceedings specifically make them apply.

HONORABLE TOM GRAY: The shorter and more concise answer is absolutely nothing.

PROFESSOR HOFFMAN: Sure.

MS. WOOTEN: Richard Orsinger.

MR. ORSINGER: Okay, so in my mind there's a distinction between the Rules of Evidence that talk about ordinary admissibility, predicates, and whatnot, and the Rules of Evidence that establish privileges.

PROFESSOR HOFFMAN: Right.

MR. ORSINGER: And privileges are more than just the way you conduct a hearing. They also preserve fundamental privacy that's recognized for purposes of official litigation, and would this change removed from administrative proceedings the recognition that the Rules of Evidence have given to these traditional privileges that are almost universally recognized?

PROFESSOR HOFFMAN: So I think the answer that proponents would make, and I think I am for my own part convinced, but the rest of the subcommittee who's here can speak to, the answer is no. That is, again, sort of responsive to what Tom just asked, is that as long as the statutory -- statutes for administrative proceedings

authorize the applicability of rules of privilege that are in the Rules of Evidence to their proceedings then that can continue to be recognized.

MR. ORSINGER: Do we know if the statutes do that at the present time?

PROFESSOR HOFFMAN: They do, and so the relevant section is -- I think it is the occupation -- I think I've got this right. It's the Occupations Code, section 159.003 and subparts from there, that provide various exceptions to these privilege rules that would, you know, otherwise apply for license revocation proceedings and other disciplinary investigations, of physicians, I'm sorry.

MR. ORSINGER: Okay. Well, without reading that to be sure, does anyone have the conviction that if we eliminate these two sections we're not reducing the scope or the applicability of privileges in administrative proceedings by this act? I mean, I can do all of the research myself and figure it out, but somebody may already know. If we're not in any way reducing the privacy rights and the recognized privileges, then there's truly nothing happening here.

PROFESSOR HOFFMAN: Let me add one other thing. So Texas Government Code, section 2001, 2001.083, quote, "In a contested case, a state agency shall give

effect to the Rules of Privilege recognized by law," and then section 2001.091 excludes privileged materials from discovery in contested administrative cases. So I think the concept is none of these changes would have any effect on the statutory provisions, of course.

MR. ORSINGER: Very good.

PROFESSOR HOFFMAN: And so this is just a way of clarifying the Rules of Evidence shouldn't really be referred to disciplinary proceedings since they don't actually apply unless they've been imported in by way of statute.

MR. ORSINGER: And the privileges basically have been imported in by statute.

PROFESSOR HOFFMAN: Yes, but there are, of course, exceptions that are statutorily --

MR. ORSINGER: Exactly, okay. Thank you.

PROFESSOR HOFFMAN: Uh-huh, good.

MS. WOOTEN: Chief Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, if there are some proceedings that incorporate the Rules of Evidence, isn't there some advantage to keeping it in?

PROFESSOR HOFFMAN: I don't know how to -- I don't know how to react to that. I mean, I think the proponents of this rule first looked at it and just think that the language that's in existing (e)(1)(b) and (e)(5)

aren't doing really anything, that they're just making a reference and that the statutes or the administrative codes have to then set out whatever the details are behind the exceptions. And so, again, to Tom's point, it doesn't really feel like they're doing much work now other than sort of adding some confusion, hey, why are Rules of Evidence talking about administrative proceedings? Other than that, Tracy, I don't know what else.

There is one sub issue, and since it may have reached that I'll just add, for whatever it's worth, which is usually worth a lot, Professor Goode at the University of Texas has one concern, which is that under the existing language it relates to nurses. So, in other words, if you'll look at (5), (e)(5), "In a disciplinary proceeding against a physician or a registered nurse," and that gets deleted, but Professor Goode's concern is that the proposal may change the status quo regarding investigations or proceedings against a nurse, and the reason for that, again, Richard, going to your observation that details matter in the statute, the cited sections of the Occupation Code that I mentioned earlier, so 159.003, only refer to physicians. They don't cover nurses, and he's not aware of any statutory exceptions regarding nurses, so this may be something to keep in.

On the other hand, the Rules of Evidence

should, again, not be setting rules for administrative proceedings at all, including proceedings against nurses, and so AREC recommends its removal, and again, the subcommittee voted in that direction also. For my part, I'll just add -- and you'll see this in the memo that Harvey put together, that this is his third paragraph of Harvey's memo. So, I'm sorry, what page of the PDF is it?

MS. WOOTEN: 315.

PROFESSOR HOFFMAN: 315, the third paragraph, and this is what he mentions here. It said, "Professor Goode raised the issue of whether (e)(5)'s provisions against nurses should be left in place," and AREC's response was that nurses practice under a hospital or a physician's supervision, and so it should likewise be deleted. I must say for my own part, I don't know, so are there ever circumstances that nurses don't practice under a hospital or physician's supervision? For that matter, what about health care professionals who aren't nurses, like other categories that don't fall under the category here? So for my part, I'm a little unclear, to say the least, about how this is done. Again, the subcommittee has favored AREC's proposal to do away with it entirely and not leave anything for nurses, so I flagged this issue for the committee and the Court's awareness, but I don't have an answer on it.

MS. WOOTEN: Got it. Any further discussions or discussion about the changes to 509(e)(1) and (e)(5). Yes, Richard Orsinger.

MR. ORSINGER: Yeah, I'm a little worried now that AREC appears to feel like they're affecting a privacy or a privilege with regard to administrative proceedings related to nurses and possibly to other health people, and, you know, it's probably just an artifact in history that our privileges are largely stated in our Rules of Evidence, but they're not entirely stated in our Rules of Evidence, and so there are some statutory privileges that are recognized. But generally my perception of it is that the privileges were recognized over a period of time in common law, and then when we got down to adopting the Rules of Evidence, the federal rules had a chapter for privileges. They decided to back off and not prescribe federal privileges, let that develop through the common law, but we filled that chapter in with our common law privileges, and again, I think that's an artifact of history.

I don't think that privileges that are traditionally recognized should be subject to the nature of the administrative proceeding you're in. Now, if you're a physician, and there's a proceeding against something you did wrongful with your patient, obviously

that's an exception, but that's an exception because it's built into the privilege itself. So I don't know enough, I'm sorry to say, to really have a strong opinion about this, but I'm a little worried that AREC committee feels like they're affecting a privilege relating to at least some administrative proceedings, and so I think we should be cautious. That's really all I can say without a better understanding. I'm sorry.

PROFESSOR HOFFMAN: Okay.

MS. WOOTEN: Thank you, Richard. Professor Hoffman, do you want to go onto the next item?

PROFESSOR HOFFMAN: Sure. All right. The second item relating to 509 has to do with section (e)(2), so if you're in Harvey's memo, so that's the one that begins on page 315. You're probably on page 316. You'll see he's got actually the current (e)(2) language is there, consent, and the changes that AREC is recommending here are -- okay. So let me describe them and then I'll show you where they are. Well, let me show you where they are first. So go to the next page under Harvey's memo. It's the section where it's got the strike out, "(f), consent for release of privileged information." The proposal is that the language that begins with the word authorization that's there in red would be the new (e)(2).

So they're proposing changing the word

"consent" for "authorization." That's the first change they're making, and again, I'll explain -- I'll try to explain what's going on here in a second. And then that sentence in red, "If a written authorization is executed that complies with applicable state or federal law governing the release or disclosure of otherwise privileged health care information." So that's basically the change that AREC came to us. There's one slight edit we did.

So what's going on here? So it seems to be a simple as the word "authorization" is a term of art used by HIPAA as well as the Texas equivalent as to the protection of health care information and when that information can be disclosed to a third party. And so the proposal is that we should get rid of the word "consent," which is the word that the Rules of Evidence have been using and substitute the word "authorization." And so that's the primary change that's being recommended, and the only difference between AREC's recommendation and what our subcommittee is, is instead of the words "health care information," they had used the words "medical information," and apparently my subcommittee thought "health care information" was a better term. So but -- but then AREC says, yeah, they're fine with that.

So to sum all of that up, the proposal is to

change "consent" to "authorization" and then to add that sentence that isn't in there now that basically says if you get an authorization from someone that allows for the disclosure of their health care records, then you can do that, and you'll treat that as an exception to the privilege. So you can waive the privilege that you would otherwise have by HIPAA or Texas law. So I have a little bit more to say about (e)(2), but that's kind of the main part of the story. Any questions? You need any more from me on that, anybody?

MS. WOOTEN: Richard Orsinger.

MR. ORSINGER: Okay. You may go onto this next, and if so I'll let you make a presentation, but (f), is that a separate issue from this amendment about what to do with (f) and the persons who are authorized to release, or is it part of this discussion now? The very next paragraph after (e)(2) is a listing of the people who have the authority to consent, and now we're substituting a phrase in (e)(2), "A written authorization is executed that complies with Texas or federal law." So now basically the list of entitled persons is replaced by a generic reference to all state and federal law. And I don't know if that's a comment to make at this time or whether we're going to take up paragraph (f) separately.

PROFESSOR HOFFMAN: Okay, I'm not sure how

to --

MR. ORSINGER: You see what I'm saying, though?

PROFESSOR HOFFMAN: Not exactly.

MR. ORSINGER: Okay. Let me show you what my computer is showing me.

PROFESSOR HOFFMAN: I know what you're talking about, but I'm not sure how to -- let me see if I can address Richard's comment properly. So one of them is just administratively, logistically, it's a little hard to figure out what's being done here, so maybe a bird's eye view would be more useful. AREC, as well as my subcommittee, is in favor of doing away with all of (f)(1) and all of (f)(2), which is inclusive of what Richard is asking about right now. So I want to be clear that -- which is kind of a separate conversation, but I see, Richard, why you think these are linked together, but the proposal is to do away with all of (f)(1) and (f)(2), and let me see if I can give you why, what AREC explains as to why.

HONORABLE PETER KELLY: I think the short answer is that "authorization" is defined elsewhere in HIPAA and in the Texas cognate to HIPAA, and we don't need to define it again because the statutory definition might change. We don't need to define it again if we use the

word "authorization." So all of these subcategories have similar subcategories in -- in statutes, so they don't need to be replicated here in the rule.

PROFESSOR HOFFMAN: Thank you, Peter. So what Peter is saying is we're trying to take -- AREC is trying to eliminate (f)(1) and (f)(2) and put the concept into this newly redrafted version of (e)(2), which again, the easiest way to see that is on page probably 317 of the materials, in red, "The authorization," period. "If a written authorization is executed that complies with state or federal law," and so what Peter is saying is they're just trying to capture that with that concept as opposed to trying to write it all out, which is what (f)(1) and (f)(2) are sort of doing right now.

MS. WOOTEN: And, Professor Hoffman, just for point of clarification, on page 317 what Richard Orsinger was asking about, it's grayed out text, but it's not struck, and then right below that, we move on to text that is struck. So I think the recommendation is to remove what's currently grayed out but doesn't have a black line through it; is that correct?

PROFESSOR HOFFMAN: Richard, can I see that on your computer?

MR. ORSINGER: I just changed pages, Lonny, so let me get back to it.

MS. WOOTEN: Here.

PROFESSOR HOFFMAN: Ah, no. So, no, I'm sorry. I couldn't see that on my version. So what -- so let me just -- that's probably useful to bring the whole story here. The language that Kelly is talking about there, which is after the citations in red to HIPAA and to the Texas statute, the sentences begin, "The patient or person otherwise authorized to consent," all that is (f)(3) and (f)(4) that the subcommittee, that our subcommittee, is just simply recommending we retain and put into this newly constituted (e)(2).

So the -- and AREC doesn't oppose this. They initially recommended doing away with (f)(3) and (f)(4), which is what that language is, but our group thought it was useful for all sorts of folks who maybe don't practice in this area routinely. They don't maybe routinely do personal injury information, and there was some fear that if we eliminated (f)(3) and (f)(4) that some people might think, wait a minute, we're not allowed to get medical records at all anymore, if the patient, you know, signs the authorization? And so by including (f)(3) and (f)(4) we're trying to make clear, even though it may be redundant of what is already in HIPAA and the Texas equivalent statute, that they have the right to waive their confidentiality protections. So that language is

not -- that gray language is not going away. It's just being moved to a different part of the statute.

MS. WOOTEN: And so Richard Orsinger.

MR. ORSINGER: Yes, we're looking at two different drafts of redlines that apparently are in different colors on different computers because mine are black and red.

PROFESSOR HOFFMAN: Yeah. Yeah.

MR. ORSINGER: No gray.

PROFESSOR HOFFMAN: Same.

MR. ORSINGER: However, it does appear to me that there's an effort to eliminate the list of people who are authorized to waive the privilege. Am I assuming for a second that that is, in fact, intended?

PROFESSOR HOFFMAN: That is. And again, as Peter just said, it's not that -- it's not that there's a disagreement with -- no one is saying -- AREC and our subcommittee is not saying we think there's anything in (f)(1) or (f)(2) that's wrong. It's just that that's -- (f)(1) and (f)(2) are simply an attempt to capture what's in federal and state privacy law right now. So instead, the recommendation is to do away with the details and put it into the general statement that's now being proposed for new (e)(2), that if a written authorization is executed, as long as you did it in compliance with HIPAA

or Texas law, then you're perfectly free to waive privilege.

MR. ORSINGER: Okay. My lingering concern is there's not a direct or complete equivalence between HIPAA and this privilege, and I can't tell you about the Texas cognate, as you described it, but my recollection of HIPAA is that it applies only to medical service providers, and it has to do with release of information, but it's not a privilege per se. It's a restriction on medical service providers to release information about patients without their consent.

This is a privilege that's a little bit different in its description, and I'm a little worried that you maybe borrow a list off of HIPAA, but it only -- it only relates to the health service provider releasing confidential information. I think that this privilege is more extensive than the healt service provider or maybe -- maybe doesn't have a full equivalency, and so I'm a little concerned at this point. I'm going to have to do a little more research, but the health care privilege, which has existed for a long time, and the mental health privilege, which was really a creature of our own rule process here in Texas, which was slightly different from the statutory recognition of the mental health privilege, they are more -- they're more focused on the relationship between

the professional and the patient, and HIPAA is more related to the health organization and the patient, and maybe those are completely equivalent. I'm concerned they're not, so I'm going to continue to look into this.

MS. WOOTEN: We have several hands up. We'll start with Jim Perdue, who I saw first.

MR. PERDUE: Well, so first of all, I think that the subcommittee's report is better than the -- subcommittee's proposal is better than the AREC proposal, what you've done. I think health care information is a term of art, and we want to capture that and carry that over there. Authorization is -- makes more sense than "medical information." You'll just -- you'll get some crosswinds between law that's interpreted, but Richard's -- Richard's point does kind of raise a little bit.

So in concept, right, you're talking about physician-patient communications, and we do have a privilege in that this is not just your medical records. It may include, for example, a deposition of the patient about the medical care from irrelevant health care providers or communications with other people that are not relevant to the matter in the case, and if you -- so I don't have a problem with deleting all of the people who had signed the authorization, I think that that tracks the

law, but because of the redline I'm having trouble with it a little bit, Lonny.

PROFESSOR HOFFMAN: Yeah.

MR. PERDUE: But Richard's point is well-taken as far as the scope of the privilege regarding the patient-physician communication contemplates something slightly more than just your medical records, and if you're bracketing down to solely HIPAA, that is protected health care information under the statute, that is contemplating really only medical records and doesn't preserve a privilege that would be revocable, whether it be under Kroger or something in a deposition that is just a conversation or something outside of the scope of just medical records authorization. So that is the point.

PROFESSOR HOFFMAN: Okay.

MS. WOOTEN: Tom Riney.

MR. RINEY: I agree with Jim. I mean, the 509 covers things other than just medical records, and I'm no expert on HIPAA by a long shot. It scares me, but it is not just a restriction on medical service providers. It goes to a lot of different groups, including law firms. And so I -- for that reason, I would like to think this through a little bit more. I think Jim's point is an excellent one, and I think the rule as written right now, you don't have to have a HIPAA compliant form

authorization in order to talk to your patient's doctor.

MR. PERDUE: Right.

MR. RINEY: And you're changing that, and I understand the convenience of adopting terms of art that are defined by statutes, but I think we really need to study the implications before we make that change.

PROFESSOR HOFFMAN: So I'm going to sort of pick up on Tom's and Jim's comments to maybe add another layer that I think bears relevance here. Another way to look at this, and this I'm really getting from more Steven Goode than anywhere else, is to think about it is much of the way this language is written seems to be about -- like if you look at (f)(1), it's all about consent for the release of privileged information, none of which has anything to do with privilege.

In other words, if you -- I mean, it may comply with HIPAA. It may be necessary for that information to then be disclosed to some third parties, but arguably none of this really belongs in the Rules of Evidence is really what Steve is saying, and so he's saying maybe we would be better off eliminating all of (e)(2) and all of (f) and just simply treating that -- the question of what is a proper authorization for the disclosure of what would otherwise be private information to a third party is governed by whatever laws govern that

and that, you know, the privilege holder can voluntarily disclose that information or not. But -- but the rules of privilege are just designed to allow them to, you know, resist being compelled to disclose. That's what -- and to prevent others from disclosing privileged information and that we ought to limit the rules to that fact.

And so Professor Goode's remedy to this would have been to eliminate all of (e)(2) and all of (f) in their entirety, because it just kind of keeps the two camps doing different things. The Rules of Evidence deal with when privileges in a court case are going to be enforced and someone isn't going to be compelled to disclose something, and then authorizations are all about whatever the statutes tell you you have to do in order to, you know, have information shared with third parties.

MS. WOOTEN: And they are complex. Okay. We have two people before you, Tom. Justice Miskel, Chief Justice Gray, and then Tom Riney.

HONORABLE EMILY MISKEL: I was just going to add to what Richard was saying, so HIPAA has a much more limited scope, but in Texas, the Texas Medical Records Privacy Act extends and expands the HIPAA regime to anyone who possesses protected health information. Like you, like me, like everyone. So -- and then there's also federal law, federal law that relates to drug and alcohol

treatment records that comes up a lot, but at the end of the day, I kind of agree with what you just said, which is let the evidence rules talk about privilege and let federal and state law talk about disclosing that stuff by consent or by court order, which we spend a lot of time litigating anyway.

MS. WOOTEN: Chief Justice Gray.

HONORABLE TOM GRAY: I'm still trying to comprehend. I think part of, at least my confusion, is it looks like there's a phrase left out that was subsection (1) under (e), if I understand how the part of the conclusion is supposed to work. Is that right?

PROFESSOR HOFFMAN: That is correct, so in other words, what Tom is saying is if you look on page 316 where we included "exceptions in a civil case," there should be "(1), proceedings against physicians," but the words are not there.

HONORABLE TOM GRAY: Okay. And then that would be in place of where (a) is now, the (1) and the insert?

PROFESSOR HOFFMAN: That's right.

HONORABLE TOM GRAY: Okay. And then over on the new (f) --

PROFESSOR HOFFMAN: It's not. So you're on page 317 now --

HONORABLE TOM GRAY: Yes.

PROFESSOR HOFFMAN: -- of the materials? Where it says (f), that's right below where the word "consent" has been redlined out and the word "authorization" is in red, that is (e)(2). So, again, Jim, to the -- it is done -- it's been done, there's nothing you can do. This is the new proposed (e)(2) that your subcommittee is offering. It's changing the word "consent" to "authorization," including that new first sentence, deleting and adding "health care," adding the two references to the federal and state statutes. And then that last part, Kennon, is taking what is currently (f)(3) and (f)(4) and moving it up into what is now the new (e)(2).

HONORABLE TOM GRAY: Okay. In that moving up, it references consent again. Should those -- because it says, "The patient or other person authorized to consent." Is that just -- are we going to make that now "authorization"?

PROFESSOR HOFFMAN: I don't think so.

HONORABLE TOM GRAY: Okay.

PROFESSOR HOFFMAN: And again, I can tell you that's not their proposal. I think the word "consent" there, which, again, is just straight out of (f)(3), they're talking about consent to the release of

information. So I think that's not a term of art there. It's just like a description of what they're doing, they're consenting to the release of information.

HONORABLE TOM GRAY: Okay. So to me as a reader --

PROFESSOR HOFFMAN: Yeah.

HONORABLE TOM GRAY: -- it's very confusing when it says "person authorized to consent," and it seems like it's relating back to that written authorization up there.

PROFESSOR HOFFMAN: Yeah.

HONORABLE TOM GRAY: And then the next sentence, "but a withdrawal of consent," it would seem to be that you're trying to withdraw that written authorization.

PROFESSOR HOFFMAN: I think it's a nice point. I do.

HONORABLE TOM GRAY: Okay.

MS. WOOTEN: Tom Riney.

MR. RINEY: I tend to agree with Justice Miskel and some of the others that have said maybe we ought to just have a rule of evidence regarding privilege, and how you can get an authorization would be separate. And I think -- and this is my recollection, I could be wrong, haven't thought about this in a long time, but I

think when I started practicing law there was no physician-patient privilege in Texas. I think it just was not something that was developed in the common law, and then I believe there was a statute, and then I think the Rules of Evidence came in with some privilege rules and then the statute went away. I don't remember exactly, but if that is correct, that may explain how we got some of the authorization provisions into the rule.

But another question I have, if we're going to keep the authorization provisions in here, modified or not, if we're going to modify them, what is the problem we're trying to solve by modifying?

PROFESSOR HOFFMAN: Which modification? You're talking about --

MR. RINEY: About how you can -- this subpart --

PROFESSOR HOFFMAN: (e)(2)?

MR. RINEY: Yeah, (e)(2). I mean, I don't quite get what the --

PROFESSOR HOFFMAN: Again, the two motivating sort of big picture things are that rather than --

MR. RINEY: I'm sorry, (f) is the part that I'm talking about.

PROFESSOR HOFFMAN: Right, so rather than

doing what (f)(1) and (f)(2) do now, which is to try to capture the details that are in federal and state law as to authorizations, it's moving that into a broader general statement. As long as the authorization complies with federal or state law, it's good to go. You know, you're free to do that. So it's generalizing it. It's not unlike the conversation we had earlier today, do we track the statute in the rules or do we leave it to a general reference? And so here the proposal is to go to a general reference and eliminate the detail. And then the change of consent for authorization is just, again, as Jim was confirming, authorization is a term of art in this space, so it seems like it would be better for the rules to the extent that you're referring to an authorization to release information to use the term of art "authorization" and not use "consent," bracket, Justice Gray's comment that we still may not have fully fixed that problem.

MS. WOOTEN: Richard Orsinger.

MR. ORSINGER: I'd like to go back to Judge Miskel's comment that there's not a complete overlap between HIPAA and the state equivalent, and this is a rule of admissibility, and what happens if you comply with the federal statute but don't comply with the state statute? Is that possible, Judge Miskel?

HONORABLE EMILY MISKEL: The state statute

is more protective, more protective, so it covers more people, it requires more authorizations.

MR. ORSINGER: What would happen when we're in the middle of a trial, we don't have this rule of evidence anymore, and we have an authorization that complies with the federal law but doesn't comply with state law? Can that happen?

HONORABLE EMILY MISKEL: Okay. So bigger picture, in Texas if you possess protected health information and you want to disclose it to others, for example, offer it as an exhibit in court, you either need an authorization, which Texas under that Texas Medical Records Privacy Act there's a specific form that the person who -- whose records they are can sign to authorize it. If the person hasn't signed that form authorizing the release of their information, then no one can do it unless the court orders them to. So, for example, sometimes they will call the witness and the person will say, "Those are my records, I don't authorize it," and then everyone will turn to the trial judge, and the trial judge says, "I order you to disclose it.

If -- you know, there's a whole provision about when the court can order disclosure, and it's different under HIPAA, Texas Medical Records Privacy Act, and the drug and alcohol treatment record statutes, and

there's very different procedures for each of those, which is why I agree with we should not try to summarize those procedures in our evidence rules. We should leave those details to the statute and just talk about privilege.

MR. ORSINGER: Is it possible that there could be a compliance with one statute while there would be a failure to comply with another statute?

HONORABLE EMILY MISKEL: I don't think you can have a scenario where you comply with the Texas one and fail to comply with the HIPAA because --

MR. ORSINGER: What about HIPAA, comply with HIPAA but not Texas?

HONORABLE EMILY MISKEL: The other way around, yes. Correct, because the Texas statute is more protective.

MR. ORSINGER: So what happens here, if a written authorization is executed in compliance with the Texas or federal law? So if the federal law is less inclusive than the state law, if they comply with the federal law, it's admissible, even if they haven't complied with the state law; isn't that right?

HONORABLE EMILY MISKEL: Incorrect.

MR. ORSINGER: No? Why?

HONORABLE EMILY MISKEL: Because the Texas Medical Records Privacy Act says otherwise.

MR. ORSINGER: Yeah, but this rule says if you comply with either the federal or the state.

HONORABLE EMILY MISKEL: But this can't -- and then the Texas Medical Records Privacy Act says it can't, and it can't.

MR. ORSINGER: So what you're telling me is that we're writing a rule here that doesn't really apply because there's a statute that has a different rule, and so I wonder if we're helping by eliminating all of these details and replacing it with the necessity of looking up three different statutes, which are not identical with each other, and we're leaving the trial courts and litigants not knowing for sure whether their evidence is admissible?

HONORABLE EMILY MISKEL: I think you're blending two things, and that's the problem they're trying to solve, right, because our evidentiary concept of privilege is different than who's allowed to disclose medical records and when, and so, for example, the drug and alcohol treatment statute is not even mentioned here. For that one you have to file a lawsuit under a fake name, hold a hearing in a closed courtroom, and have all kinds of steps, which aren't even mentioned here, so -- so this is talking about too much stuff and too little stuff at the same time, and I think that's why I agree that it's a

good idea to get all of -- I mean, I would eliminate (e)(2) entirely, just take it out and say this is privileged. To talk about who is allowed to disclose medical records is a different question that's not and doesn't join the evidence rules.

MR. PERDUE: Because I don't think the basis for your privilege has anything to do with the scope or propriety of the authorization.

MS. WOOTEN: Justice Kelly, and then Kent Sullivan.

HONORABLE PETER KELLY: When we were discussing this in the subcommittee, I thought it would be, you know, a nifty way to do it, just to incorporate these concepts, but in thinking it through and reading Professor Goode's e-mail again and hearing these other comments, I think it would make more sense just to remove this -- remove this entirely. Because authorization is a different concept from privilege, and trying to combine the jurisprudence of those two things, you're just going to get, you know, the same word meaning two things in two different situations. It would be best to have them litigated as separate issues.

MS. WOOTEN: Kent Sullivan.

HONORABLE KENT SULLIVAN: A practical question. Would the reason for the rule changes be

reflected in a comment?

PROFESSOR HOFFMAN: No comment is being proposed right now.

HONORABLE KENT SULLIVAN: Let me suggest that I think it might be appropriate, particularly if we are going to change and/or remove language -- rule language that's been present for a significant amount of time. I just pulled this up and noted that, for example, in your 407 and 408, it appears that there are comments to each one dealing with, in this case, both 2015 restylings of the rules, which I think are very useful, and I think it's extremely important that we be user-friendly. And to the extent that the reason for the change is very limited, it's not the result of some statutory change or not the result of some overriding substantive purpose, I think it's very useful for judges, practitioners, to be able to see in the same place what the reason for a change in long-standing rule language was. One-stop place to shop.

MS. WOOTEN: How do other people -- before I move on, Richard Orsinger.

MR. ORSINGER: Yes, so the rule as written right now under subdivision (e) is exceptions in a civil case, and the first one is proceedings against the physician, the second one is consent, the third one is an action to collect, and the fourth one is a party relies on

the patient's condition. And next is involuntary civil commitment, and (f) is consent for release of privileged information. If we just eliminate (e)(2), we're eliminating consent. I don't think we can actually eliminate consent, but we could change it to where -- define consent in a way that incorporates an external standard, but I don't think we can eliminate it, because clearly consent is an exception to invoking the privilege in a civil proceeding. So the -- I mean, the thought is that we still need to keep (e)(2) in there.

PROFESSOR HOFFMAN: What about 511? Can't you waive the privilege and the court can so find under 511 so we don't need (e)(2)?

MR. ORSINGER: Well, I guess you could -- 511 waiver, which I don't have in front of me, but from memory, that's like past actions that you've taken to disclose or failed to preserve the privilege and, therefore, you've waived it. This is more like, I think, we have an official formal consent that meets statutory requirements as opposed to behavior in which you revealed it in an unprivileged circumstance, but maybe it doesn't make a big difference, but to me the idea of eliminating (e)(2) entirely and taking consent out of the list of exceptions is going too far.

HONORABLE EMILY MISKEL: So, Richard, would

it answer your problem to just -- instead of that whole paragraph, which is labeled on page 317 as (f), just have the word "consent or authorization under relevant law"?

MR. ORSINGER: To me --

HONORABLE EMILY MISKEL: And stay out of the discussion.

MR. ORSINGER: To me the word "consent" is really not that important, but I do think that consent generally means I agree, but written authorization means that I've complied with the following seven subparagraphs of subparagraph X of some regulation issued by the Department of Health and Human Resources. So there is a difference to me between consent and authorization in accordance with federal statute, and when we toss out consent, let's just take our -- take a moment here and think, is that what we really want to do, is just toss out consent and replace it with conformity with federal regulations?

MS. WOOTEN: Does it make sense at this point to have the subcommittee examine this part again --

PROFESSOR HOFFMAN: Sure.

MS. WOOTEN: -- with all of the feedback in mind?

PROFESSOR HOFFMAN: Sure. Happy to do that, and let me just add there's one other very small piece. I

suspect it won't generate much discussion, but for the sake of completeness.

MR. DAWSON: I wouldn't presume that.

PROFESSOR HOFFMAN: There's one last proposal, which is (e)(6), and so we talked earlier today on a different context about civil commitments of sexually violent predators. That program didn't exist when (e)(6) was originally written, and so this is an example of sort of AREC doing what they actually say they only and primarily do, which is to reconcile subsequent statutory changes with existing rules, and so they recommend making a change to (e)(6) to reflect this sort of now extant statutory scheme relating to civil commitments. And so they recommended it, our subcommittee was fine with it, and Professor Goode didn't have any objections, so the proposal is to add (e)(6).

MS. WOOTEN: That's on page 316 of the memo. Chief Justice Christopher.

HONORABLE TRACY CHRISTOPHER: This is the first change I'm in favor of.

MS. WOOTEN: Okay.

PROFESSOR HOFFMAN: There you go, and that's all I have on 509.

MS. WOOTEN: All right. Richard Orsinger.

MR. ORSINGER: Could I add one last thing

for the subcommittee's consideration? If you're in a trial and the -- there's a witness on the witness stand and the plaintiff is the patient and the question is asked and then there's an issue about whether there's consent or not to reveal that information in front of the jury, I can envision the plaintiff's lawyer standing up and saying, "Your Honor, my client consents to the release of this information." Under this new rule, we're going to have to recess the trial, run the jury out, find the right form and have it signed, right? Is that not right?

HONORABLE EMILY MISKEL: That's not right. So oftentimes the provider will not disclose it without the written consent of the patient or a court order, so if it comes up mid-trial, then what happens is the patient says verbally, "I consent," and then the professional who is on the witness stand waits and looks at me and then I say, "I order you to disclose it." So you don't have to wait on the written form because the court can order it also, but there's different --

MR. ORSINGER: Well, there's a difference between that consent and this authorization, because this authorization requires a signature in compliance with federal or state law, and you're invoking a provision in the state statute to override the requirement of a written authorization at all. So again, the word "consent" is not

identical to the word "authentication" here.

HONORABLE EMILY MISKEL: But this one doesn't say only a written authorization, it says, if a written authorization, whatever the rest of the sentence goes on to say, but it doesn't say only when a written --

MR. ORSINGER: Well, it says the privilege does not apply if there's a written authorization that complies with state or federal law.

HONORABLE EMILY MISKEL: So, again, that's why we need to separate privilege from when is a witness allowed to disclose protected health information under state and federal law.

MR. ORSINGER: Okay. Well, I think we've made a record.

MS. WOOTEN: Yes, we have. Yes, we have, and I think the subcommittee is going to reanalyze that particular part of the rule, but before we close the discussion I want to direct people's attention to page 316, the change to 509(e)(6), the addition of the records to Title 11, Chapter 841. Anyone want to speak in opposition to that change? Hearing no opposition, I don't think we need a vote, so we will take a break. Let's take a 15-minute break until 3:00.

PROFESSOR HOFFMAN: And then we'll pick up with 510 after this?

(Off the record discussion)

MS. WOOTEN: I take it back. I did that for Dee Dee, and Dee Dee doesn't need it. So there seems to be a desire to move on. Move on? Keep going?

(Simultaneous crosstalk)

MS. WOOTEN: And so before we move on to the last substantive item, there's a special guest here that we want to recognize.

HONORABLE NATHAN HECHT: Yes, I'll just take a minute of privilege to recognize Bill Dorsaneo back.

(Applause)

PROFESSOR DORSANEO: Thank you.

HONORABLE NATHAN HECHT: Bill Dorsaneo has not been on the committee much over 40 years, and we -- he was back in the old days, way before my time, and made enormous contributions to civil procedure as have been recognized in many tributes to him in the last several years, so we're always glad to see Bill.

MR. ORSINGER: Hear, hear.

MS. WOOTEN: All right. And now we will move on to the final item on the agenda. I'm guessing that is you again, Professor Hoffman.

PROFESSOR HOFFMAN: It is. So the only thing standing --

MR. DAWSON: Please note that it is the

final item.

PROFESSOR HOFFMAN: I heard you. I heard. I heard. The only thing standing between you and recess is me, I got it.

MR. DAWSON: That will inspire you.

PROFESSOR HOFFMAN: All right. I was the point person on this one, so I have at least what I think is a better grasp of this, and I will kind of quickly describe what's going on here first. So we're talking about 510, Rules of Evidence 510, and before I get into the weeds, and there are not that many weeds to get into, here's the overall concern that animated AREC's proposed change. They're worried that lawyers may be deterred from getting the help they need from TLAP.

I assume everyone knows TLAP, but the Texas Lawyers Assistance Program. That any lawyer, judge, or law student can call if they're in the middle of an acute crisis, whether it's related to mental health or a substance abuse issue, and so AREC's concern is that 510 does not include an express privilege protecting communications with TLAP staff. And so that's what the concern is. TLAP staff could be -- could be a mental health professional for whom there would be protection, but they may not be. They could be a lawyer staffing it who doesn't have any special, you know, counsel or

license, and so the concern is that they wouldn't be -- potentially that those conversations would not be privileged, and that is potentially deterring lawyers from seeking TLAP's help.

Okay. So I'm going to short circuit this. I'm going to give you -- this is mostly Lonny Hoffman's interpretation of this, though I think I'll let the subcommittee who is here speak if they want to disagree, but I must say I just don't buy it, and I want to be clear that at the end of this I'm still in favor of AREC's recommendations, and I'll try to explain why, but it does seem to me to be a remarkable position to take. There is not a single example they have of anyone trying to subpoena TLAP and let alone having success in subpoenaing TLAP in a case and getting a TLAP person to have to testify in, say, a divorce case or a legal malpractice case or something. It has never happened. As far as we know it's never happened.

In addition, I must just say for my own part, I would think that the reasons that a lawyer primarily is hesitant to call TLAP probably are the -- not first, second, or third on list is that there may potentially be a case, a civil case against me, and they may subpoena TLAP, and those people may have to testify. I would think first and foremost a lawyer who is

struggling is likely worried that that information that they share with the TLAP person could be used against them in a disciplinary proceeding against them. And guess what, that is a legitimate concern because the statute specifically authorizes that, and so obviously there's nothing we can do about that in terms of providing the protection. There was exceptions in the relevant statutes that we'll talk about that allow that to happen right now. That all said, although I guess there is more to say, to short-circuit it, we nevertheless -- and I'm on the second page of our memo, so can anybody help me with the PDF on that? So this is the June 5th, 2023, memo.

MS. CORTELL: 337.

PROFESSOR HOFFMAN: What?

MS. CORTELL: 337.

PROFESSOR HOFFMAN: Thank you, page 337. I'm just reading under our subcommittee's recommendation. Although we weren't convinced by the reasons that AREC proposed, we still voted in favor of it, and it was fairly straightforward. We really could foresee no harm to adding this, what they're calling this new peer assistance privilege, and we acknowledge the possibility, may be remote, but if we can help some lawyers -- I may be wrong about that. There may be lawyers who are worried that this may be an added deterrent to them going to TLAP, and

if we really can't think of a reason why this would be a bad idea, and, again, we may be able to think of one, but in the absence of a harm here, it does seem like the better part of valor here is to err on this side. Looks like Robert wanted to jump in on that.

MR. LEVY: I'm just thinking about this beyond the context of TLAP, but like, if somebody called the suicide prevention hotline and the people that staff that are volunteers, I don't know, but very likely are, so they wouldn't qualify as a professional, and it would seem like we would enhance the protection of that type of outreach. And while there aren't cases where people have tried to carve into that privilege, I do think we want to support that as well, and it seems like this change would protect that.

PROFESSOR HOFFMAN: Robert, let me make sure I understand what you're asking. Are you saying you think this proposal shouldn't be limited just to lawyers seeking assistance from a professional assistance program, but any professional, like doctors, nurses, et cetera?

MR. LEVY: Well, not even professionals, but is it -- I mean, under the 510 as it sits now, if I call a suicide prevention hotline, could I be later asked in a deposition did I do that and what did I talk about?

PROFESSOR HOFFMAN: Okay. So let me reframe

what Robert is asking because it actually relates -- it relates to this other thing I was bracketing to come back to, but let me just for now, there are -- with your addition there are now sort of two kind of policy choices. If you like what I just said, if you're sort of generally on board with the idea that it's probably not a bad thing to provide a peer assistance privilege such as when a lawyer or a law student or a judge calls TLAP -- that could also include others -- the next two sort of remaining questions, one of them that I've got in the memo here is should we limit it only to lawyers or should it be to all professionals? And you'll see that both AREC and our subcommittee thought it should be all professionals.

So that's one issue, and then what Robert is raising as a sort of yet additional question that we didn't consider, and as far as I know AREC didn't consider, what if you call an assistance line that isn't a peer assistance. So what if you called the new -- I think it's 988 is the hotline, the suicide hotline, but just -- you call some suicide, but it's not run by your State Bar or by your -- some other professional association, and Robert is framing should that also be protected?

So we -- I don't believe -- I can tell you our subcommittee didn't talk about that. I don't know if AREC did. So let's hold your thought, Robert, because I

think it's a little bit ahead of us but we're going to get there in just a second. So let's stay on the main event, which is what discussion, if any, do people want to have vis-a-vis amending 510 to add a peer assistance privilege that would cover communications that you have with a professional peer assistance program that someone not limited to lawyers -- but for now if you want to focus on lawyers you can, we can expand it in a second -- were to call and talk with them, even though they're not -- they potentially are not covered as recognized counselors or doctors who would be otherwise covered by 509.

HONORABLE PETER KELLY: Maybe we should start with the narrow question of TLAP and then expand it.

PROFESSOR HOFFMAN: Yeah, yeah. So I guess that's really what I'm trying to say. What do you think of this idea --

HONORABLE PETER KELLY: Start with TLAP and then see if --

PROFESSOR HOFFMAN: In the context of TLAP, sure.

MR. LEVY: I guess there -- I'm sorry to jump in, but it goes back to what is the purpose of the privilege, and I think you covered that before. It's you don't want to -- you want to allow somebody to have an unencumbered risk-free dialogue. Obviously if you're

talking about things that involve threat of harm or issues like that, statutory exceptions would apply anyway, so I would think we would want to support that type of outreach.

MS. WOOTEN: So, Robert Levy, you're in favor of the --

MR. LEVY: I'm in favor of it except to the extent that I would go further, which --

PROFESSOR HOFFMAN: We'll come to that.

MS. WOOTEN: Understood. Chief Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Does TLAP want the privilege?

PROFESSOR HOFFMAN: They do. They do, they do.

HONORABLE PETER KELLY: And our hesitation was there's no indication this has ever happened, but the idea that it might have some sort of -- the absence of it being specified, might have some in terrorem effect of someone calling, and it's all speculative, but in a way it's offering institutional support for TLAP and to hopefully prevent harm.

PROFESSOR HOFFMAN: So I spoke to the State Bar's general counsel. I spoke to half a dozen people on the AREC subcommittee, the committee that worked on this,

and I have spoken to TLAP people, and every one of those people are strongly in favor of this, precisely as Peter just said, which is the fear that we may be deterring some lawyers from calling cuts in favor of expanding this.

HONORABLE TOM GRAY: But it doesn't apply to the lawyer disciplinary hearings.

PROFESSOR HOFFMAN: That's right. Because, again, 510 is only about court proceedings, and then on top of that the statute specifically excludes -- the information you share with a TLAP person can be shared with the disciplinary proceeding folks. I'm sorry, let me say one other thing. So how are they dealing with that problem? If you were to go to their website, you would discover a memo, and the memo is signed by Trey Apffel and the current chief counsel, disciplinary counsel, and it says we currently have a practice that we don't ever ask for that. So rest assured that problem doesn't exist right now under the current leadership.

MS. WOOTEN: Judge Schaffer.

HONORABLE ROBERT SCHAFFER: Have we talked to any other jurisdictions or looked at other jurisdictions about similar type issues and how they might be handled?

PROFESSOR HOFFMAN: So I did a quick -- I did a -- I did a little bit of looking to see other

states. The term itself "peer assistance privilege" is not a like widely used term, so when I searched for that I actually found a couple, but there are others that refer to the -- using the concept, using other language, and there are a number of places that sort of recognize some equivalent privilege, but I would not -- my sense of it is it wasn't a majority rule by any means, but there were some other places that had recognized essentially the equivalent of this peer assistance privilege.

MS. WOOTEN: Justice Miskel.

HONORABLE EMILY MISKEL: Okay. So I'm looking at the proposed language on page 348, which I believe -- oh, okay. It does use the term "peer assistance program," but it specifically references Chapter 467 of the Health & Safety Code.

PROFESSOR HOFFMAN: Right.

HONORABLE EMILY MISKEL: So I am neutral on whether or not to add that particular peer assistance program. I would be cautious expanding it and using a generic term like "peer assistance program" because, for example, I've had all kinds of witnesses try to argue privileges. For example, somebody didn't want to talk about what they told their paramour under the clergy-penitent privilege.

HONORABLE ROBERT SCHAFFER: That's

interesting.

HONORABLE EMILY MISKEL: Bless their hearts, it was not effective, but again, I'm neutral on whether or not to add a specific Chapter 467, but before I would use a general term to expand it further beyond that I would want it to be specifically referencing some kind of specifics and in line with the statutes or peer assistance program so we don't have -- "Yeah, I told my buddy all of the crimes I did, he's my peer assistance program."

PROFESSOR HOFFMAN: So the reason for referencing 467 of the Health & Safety Code is that it's the general statute that governs peer assistance programs in Texas. Now, there are other more specific statutes that apply to specific professions. I mean, there's like a whole list of them. Actually, we were going to talk about that in just a second, but 467 is sort of the general statutory recognition of what it takes to have an approved peer assistance program.

HONORABLE EMILY MISKEL: I just want to make sure that whatever proposal we do can't be expanded to anybody is peer assisting.

PROFESSOR HOFFMAN: So I think if that's the case, Emily, then you would be in favor of eradicating 467.

HONORABLE EMILY MISKEL: I'm neutral about

whether or not to add it at all, but if the group decides to add it, I want it to have some sort of objective reference for what an approved peer assistance program is.

PROFESSOR HOFFMAN: Okay. It may just require that you and others take a look more closely at 467, but I mean, that is what 467 is doing. The statute, it's in your materials. It's the next attachment, so you can look at it now or later and give additional feedback, but the idea is, is that the statute describes what you need to have a peer assistance program that is, in fact, recognized.

HONORABLE EMILY MISKEL: And I was just responding to the -- to the --

PROFESSOR HOFFMAN: To Robert.

HONORABLE EMILY MISKEL: -- desire to expand it to like suicide hotlines and stuff, like, again, I'm neutral on that, but if it's going to happen I would request an objective definition.

PROFESSOR HOFFMAN: Yeah.

MS. WOOTEN: Okay. We have three hands, Alistair Dawson, Chief Justice Christopher, and then Tom Riney.

MR. DAWSON: Well, I was going to suggest we take a vote on whether to have the privilege generally, whether to have a peer assistance privilege, and then let

the subcommittee go back in light of these comments and see what they want to come back with in terms of do they want to make it more specific, do they want to make it beyond TLAP, do they want to address, you know, other areas as Robert suggested. That was going to be my suggestion.

MR. LEVY: He's saying come back at a future meeting.

MR. DAWSON: Yes.

HONORABLE TOM GRAY: AKA, motion to adjourn.

MS. WOOTEN: We have other people who want to speak. Chief Justice Christopher.

HONORABLE TRACY CHRISTOPHER: This is real short. Whenever you create a privilege, you put duties on the person receiving that privileged information, which is why I specifically asked about TLAP. I don't think we want to create new privileges without understanding the duties on the other person.

MS. WOOTEN: Tom Riney.

MR. RINEY: I agree with that, and I just want to add if you're extending it to other professionals, you have to be careful. I'm very much in favor of TLAP. I've supported TLAP forever, but particularly when you start talking about extending it to medical professionals, I mean, I've actually been involved in a case on the side

of a patient, Jim, where there was a doctor that was having mental health problems, and he shouldn't have been practicing, and we actually had to mandamus to get some records, and he clearly from these records should not have been practicing and people were dying, several people. And so you've always got -- when you're adopting or expanding a privilege you have to consider the consequence of that.

MS. WOOTEN: Justice Bland.

HONORABLE JANE BLAND: Further to Chief Justice Christopher's comment, so I'm wondering whether the committee has thought about this in the context of civil commitment proceedings and other proceedings. Civil proceedings instituted when a person is perceived to be a danger to herself or himself or others and whether this would chill any ability to engage a civil judge or a civil commitment proceeding instituting that or to notify law enforcement. And you-all mentioned the 988 hotline, and one of the things that's talked about and debated in that context is the degree of privacy that a person may have in seeking assistance there, and the reason is, is because you've got this balance between wanting to protect a person's privacy, but also then wanting to protect their safety and their well-being and those around them.

PROFESSOR HOFFMAN: Uh-huh.

HONORABLE JANE BLAND: So that's just something we need to think about in terms of whether or not we want to recognize this privilege.

MS. WOOTEN: Further questions or comments?

PROFESSOR HOFFMAN: Do you want to take a vote to just get a general temperature of the committee as to including a peer assistance privilege?

MS. WOOTEN: Would you like me to take that vote?

PROFESSOR HOFFMAN: I think that would probably be useful for the group.

MS. WOOTEN: All right. By a show of hands, all of those in favor of adding a peer assistance privilege to existing Texas Rule of Evidence 510.

MS. GREER: General or lawyer?

MR. DAWSON: It's to be determined.

MS. GREER: Oh, okay.

MR. DAWSON: At a future meeting.

MS. WOOTEN: 28 in favor.

By a show of hands, all of those against the concept of adding a peer assistance privilege to existing Texas Rule of Evidence 510. Nine against.

Any other votes you want at this time?

MR. LEVY: I think it -- I mean, it might be helpful to reach out to the Board of Medical Examiners and

other professional agencies to test what you've tested with TLAP.

PROFESSOR HOFFMAN: Good thought.

HONORABLE CATHLEEN STRYKER: Are doctors excluded from 467?

PROFESSOR HOFFMAN: No, but there's a specific statute that relates to doctors, beyond 467. I can give it to you if you want.

MS. WOOTEN: Is that all right to do it off the record? Okay, all right. So we're going to go off the record. Thanks, everybody, for being here. We are adjourned.

(Adourned at 3:06 p.m.)

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

REPORTER'S CERTIFICATION
MEETING OF THE
SUPREME COURT ADVISORY COMMITTEE

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

I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above meeting of the Supreme Court Advisory Committee on the 16th day of June, 2023, and the same was thereafter reduced to computer transcription by me.

I further certify that the costs for my services in the matter are $ 1,649.00 .

Charged to: The State Bar of Texas.

Given under my hand and seal of office on this the 13th day of July, 2023.

/s/D'Lois L. Jones
D'Lois L. Jones, Texas CSR #4546
Certificate Expires 04/30/25
P.O. Box 72
Staples, Texas 78670
(512)751-2618

#DJ-707