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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

AUGUST 18, 2023

(FRIDAY SESSION)

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Taken before *D'Lois L. Jones*, Certified Shorthand Reporter in and for the State of Texas, reported by machine shorthand method, on the 18th day of August, 2023, between the hours of 9:00 a.m. and 4:41 p.m., at the State Bar of Texas, 1414 Colorado Street, Austin, Texas 78701.

INDEX OF VOTES

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

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CHAIRMAN BABCOCK: So welcome, everybody. We're on the record, and thank you for being here. Jim and Judge Schaffer, we're ready to roll.

I don't see Kennon here, but I want to thank her for filling in most ably in my absence last meeting. For those of you who don't know, I, after avoiding it for three years, got COVID. A very mild case, but nevertheless, I didn't think it would be right to -- the first day I tested negative to be back here and cough on all of you, so Kennon filled in beautifully, and I would thank her personally, but she's not here just yet, so when she gets here we'll do that. And for maybe the first or second time I can remember the Chief is missing one of these meetings. He's not here, but he has a good excuse, better than the one I had. He is doing official business for the State of Texas and couldn't be here today, but we have improved our lie, just as with Kennon, by having Justice Bland here to talk to us in the role that the Chief would usually fill about what has gone on with our rules and other rules and matters of interest. So Justice Bland.

HONORABLE JANE BLAND: Good morning, everyone, and welcome. We are -- the Court has been busy over the summer and in particular with respect to rules.

The Chief is at the council for -- the Council of the Section on Legal Education for the ABA, and the reason that that's important is because that's the official -- that section is official accrediting agency for law schools. They asked the Chief if he would serve on their council, and he is the guy who can't say no, so that's where he is today.

In terms of legislative projects I think we had about 15 assigned to us by the Legislature, which is a lot even for this committee, but we got, thanks to Kennon who did a masterful job, and by the way, got through the agenda so we didn't have to work on Saturday, Chairman Babcock, but --

CHAIRMAN BABCOCK: Not only that, recessed at 3:09. So not only do you have to not work on Saturday but not Friday afternoon either.

HONORABLE JANE BLAND: Well, right. It still seemed like a long day because there were a lot of projects, and the committee really stepped up and got started quickly on some of these projects. As you know, some of them have September 1 deadlines. So just to go through a few that have been completed, there was a discussion last meeting about magistrate referrals in the context of sexually violent predators. This was in response to Senate Bills 1179 and 1180, and we had

already -- this committee had already proposed and the Court had adopted rules for magistrate referrals in suits brought by inmates, and so the Court sent out an order with a preliminary rule change expanding the applicability of those rules to sexually violent predator suits. We are accepting public comment on the rule until November 1st and we expect that they will take effect on December 1st. And we're going to add those rules to the statewide rules web page as the committee suggested.

Next, permissive appeals, we issued an order amending TRAP 28.3, the permissive appeal rule, and this is in response to Senate Bill 1603. The order takes effect on September 1, but we are accepting public comment until November 1st, and the reason for that is the legislative deadline of September 1. We don't often use post-effective date comment periods, but sometimes it's necessary when we have a legislative deadline, and we obviously do not want to lose the value of the comments that we often receive in connection with preliminary orders that help us tweak them. Even with this committee's work and the Court's careful eyes, we overlook things sometimes, and comments from practitioners will help and others and judges will help refine the rule, the final rule.

So as you know, those amendments require

courts of appeals to explain the specific reasons for their denial of a permissive appeal, and it provides that the Texas Supreme Court has de novo review over that decision and might direct in an appropriate case the court of appeals to grant permission to appeal, you know, ensuring two layers of appellate review in those cases.

In the same order we repealed TRAP 28.2, which governed permissive appeals filed before September 1st, 2011, to make it clear that the amended TRAP will govern the procedures for all permissive appealed filed after September 1. We received some great thoughts and comments from several of the Chief Justices from around the state. Chief Justice Christopher, Chief Justice Adams, Chief Justice Worthen. And they have suggested that we look at the procedural process because now that we're requiring significant explanation and analysis in connection with deciding whether or not to permit a permissive appeal, their view is that we need to rethink the briefing rules in connection with those appeals and maybe take a look at some of the other requirements, so we'll be talking about that today. The Court referred that concept or that suggestion to this committee for its -- for its review.

Discovery in family law cases, as you might recall House Bill 2850 pretty much legislatively repealed

the initial disclosure rules in family law cases that the Court had in our discovery rules that had been the culmination of a lot of work among the family law bar and this committee, but basically now in family law cases we're just going back to the old process, which requires request for disclosures in family law cases rather than, you know, immediate initial disclosures without a request. And so that had been implemented in 2020, but now we're going back to the old rule, and that -- those, too, those changes, too, take effect in September, September 1, and there will be a post-effective date comment period. Consistent with your discussions at the last meeting, we incorporated the changes into the rule rather than simply refer to the statute.

Okay. Next, House Bill 2384 and House Bil 367 involve judicial education, ballot disclosures, and requirements for candidates for judicial office, and it's kind of a two-part thing. There's an education piece of it that the Texas Board of Legal Specialization is going to be looking at, the Texas Center for the Judiciary is going to be looking at, but then there was the question about amendments to the Code of Judicial Conduct, and this committee had a discussion last meeting about the appropriate amendments in light of those new statutes, and so House Bill 2384 requires additional education, but the

conduct piece of it is it also requires that we make public any sanction against a judicial candidate for making false disclosures on a ballot application and also requires the commission to publicly list judges who do not comply with education requirements. So we've amended the Code of Judicial Conduct to specifically incorporate these changes, and we're accepting public comment on them until November 1st. They, too, went into effect on September 1, or will go into effect on September 1.

Okay, we revised the will forms. That was one of the simplest tasks. It didn't need to go through this committee. You now -- there are now -- there's now the possibility in connection with wills that a convicted felon can serve as an executor in certain circumstances under Senate Bill 1373, and we amended the forms to take out the restriction that we had in the form that said you cannot be a convicted felon, because in some instances you can.

Next, jury summons, House Bill 3474, it provides that clerks may directly summon jurors, and so we had to make minor changes to all of the jury rules, so there are minor amendments to Texas Rules of Civil Procedure 221, 222, 225, and 504.2. They take effect on September 1, but again, we're allowing public comment, accepting public comment until November 1st before we

issue the final rule.

Electronic participation rules. We added a comment in light of Senate Bill 870. In Senate Bill 870, which came -- emanated from the attorney general's office and in particular their section that handles Title IV-D cases, which can be anywhere in the state, and now it allows a IV-D associate judge to work anywhere from Texas and may allow or require a party to participate electronically. So it's a little bit broader than our electronic participation rules, so we updated the rule to say effective immediately that some statutes further permit electronic participation and that those, of course, control over the rule.

Next, delivery of orders through the e-filing system, House Bill 3474, and this is an issue that I think this committee has discussed from time to time about notification, electronic notification of the parties, of not so much service of other pleadings from other parties in the case but from the court when the court signs an order or some other piece of information, like a notice, and not all parties receive electronic notice of the order. So the -- we amended our e-filing rule, Texas Rule of Civil Procedure 21, to require clerks to send orders, notices, and other court documents to parties through the e-filing system. House Bill 3474 only

really required it in connection with the delivery of orders, but we decided to go ahead and expand that and include notices and other court documents. Again, the change to this rule takes effect September 1, and we will accept public comment until November 1st.

We're working on related amendments in the Texas rules of civil -- I'm sorry, appellate procedure and the criminal e-filing rules, and we will try to have those done before September 1 as well. The ultimate goal, at least in civil cases, is for court documents to be available through Search Texas, which is like Pacer in the federal courts, and we've asked JCIT to study that so that we can effect that throughout the state. And we have to, of course, take care of sensitive data, which is in a lot of orders, and so they're working on that. And we hope to have all of that in place by the end of the year so that not only will there be electronic delivery of orders, but there also will be posted to Re:SearchTX by the end of the year.

Then we also finalized rules amendments to the Texas Rule of Appellate Procedure 6.5. That makes it clear that if you are transitioning off a case and you're not the lead counsel, you don't have to go through all of the same procedures for withdrawal that you would if you were lead counsel, and we encourage nonlead counsel to

file nonrepresentation letters when they withdraw from a case. And this was not in response to a legislative mandate but was in connection with a suggestion that this committee received and discussed. And that will take effect on September 1.

And so those are -- those are some of the major -- well, a lot of the major legislative mandates that we received. Unfortunately, that was kind of the low-hanging fruit. We still have lots of legislative mandates to go, and we tried to triage them so that we met those statutes that had September 1 deadlines. We obviously needed to meet those deadlines, and then we're working away on additional projects, and I know this committee's assistance is invaluable, and I know we're going to discuss several of them today. So thank you all for your work on what has been a pretty hefty work -- hefty assignment from the Legislature this time.

CHAIRMAN BABCOCK: All right, thanks, Justice Bland. As the Chief explained last -- the last meeting, we have -- this committee has gone from a adversarial relationship with the Legislature, really more an extension of the Court's just not speaking as clearly to the Legislature and vice versa, to one of real collaboration as expressed -- as is evidenced by what you just heard from Justice Bland, which has been a great

development. It's really a good thing when the two branches work together collaboratively as we have, and I hope it keeps up, and it's been a great thing to watch because I've seen it from back in the days when it wasn't so good all the way to now when it is so good.

So one of the challenges, big challenges, we have is the business courts and the creation of the new Fifteenth Court of Appeals, and I did think, as Justice Bland mentioned, that it might be a good idea if we just had a subcommittee devoted exclusively to those things, and so I asked Marcy if she would be the chair of that subcommittee, and then we in collaboration with the Chief and Jackie and Justice Bland we populated the subcommittee. And so, Marcy, if you could tell us where you're at on the Fifteenth Court and then after that the business court, and I will say that the statutes become effective this September, but the courts do not spring to life until a year from now, and somebody told me, they said, "Well, we've got plenty of time." Well, we really don't, because we've got to go through what I think is a fairly complex thing and then make our recommendation to the Court, and then the Court's going to need to spend some time thinking about it and then we need to send it out for public comment, so our time line is not leisurely. Do you agree with that, Marcy?

MS. GREER: Absolutely. I think the whole subcommittee does as well. And can I have permission to take them out of order and start with business courts first?

CHAIRMAN BABCOCK: Sure, yeah. Anything you want to do.

MS. GREER: Okay. Well, I'll first give a high level view of what we're doing. We do recognize that this is going to have to happen very quickly because the Court has deadlines, and that's something we probably should talk about offline, when we need to have drop dead these rules. That's a Jackie conversation.

HONORABLE JANE BLAND: Well, I think we sent those deadlines around.

MS. GREER: Okay.

MS. DAUMERIE: We had said the October meeting in the referral letter.

MS. GREER: Okay. All right. We have been meeting every other week and talking about the rules, and there are a couple of stumbling blocks that I want to bring up and get the issue -- get the input from the larger group. I don't know if we necessarily need to vote, but we definitely want some guidance on this because there are a number of different ways to do this. The statute is extremely detailed, and the reason I'm starting

with the business courts first is because that's by far the more complicated piece of this, and I think once we have that set, we are having a separate subcommittee that's going to focus on the Fifteenth Court -- or I guess it's sub-subcommittee -- court of appeals rules, but those are going to I think fall out and be clearer and easier, especially if we've done the work on the business courts as we move forward.

So the business courts, you know, we've been asked to propose rules in several different respects with respect to removal, remand, writing opinions, and fee structure, and fee structure I think is the most daunting of the -- the rules, because the idea is that the business courts will be initially funded, but they are supposed to become self-funded over time by the fees, much like an arbitration process, and so that's -- that gets, you know, complicated. But before we even get out of the chute, so to speak, we need to kind of understand where are these rules going to go, where would they best fit. An argument could be made -- and we've discussed all of this within our group, so I'm not going to give any kind of tentatives, because I really want the input from this robust group. As you can see, we have an incredible group that we're working with. I'm very blessed. Thank you for that.

But the first question is where should the rules go. I mean, should we try to put them in the civil -- Rules of Civil Procedure, and that's going to bulk them up considerably and kind of create a subspecialty. Would they be better off in the Rules of Judicial Administration where the MDL rule? It kind of makes sense to put them there because the MDL rule is over all courts, just like the business courts will be removals from all courts as well, so that kind of has some appeal to it. Would it -- how complex do we want these rules to be? That's a subpart of this same issue, is you've got a statute that's incredibly complex and very detailed. I mean, it's got several pages worth of definitions alone, so it's unusual. Do we want to append that statute to these rules in order to keep them a little bit simpler?

You know, I think the presumption is that the Rules of Civil Procedure are going to apply except where we would recommend that they don't or where they are added to for specialty of the business courts, but these are -- these are really big issues, and I'll just outline the two big issues right now, and we -- probably the first one -- we'll take them in order and invite input from everyone.

The second one is the level of specificity for the pleadings surrounding jurisdiction in the business

courts because Texas is a notice pleading state. We always have been. We're very proud of that. We're very wed to that. We've never taken on specificity as a standard except in very, very specific contexts. Nothing like the federal courts, and -- but the federal courts jurisprudence on removal/remand is very highly developed, and the practice is based on the higher pleading standard that gives more information, and is it -- you know, if we're going to be addressing these motions to remove and remand on the basis of jurisdiction, how do we -- what do we need to require. Specificity of the factual allegations and kind of evidentiary standard, things like that. So these are the two kind of threshold questions that if we could get input and resolve those I think it will make our job a little bit easier. At least we'll have context in which to put it in, and I invite my wonderful comembers to weigh in as well, but we felt like these were the questions of the day for today's meeting.

CHAIRMAN BABCOCK: Any comembers want to weigh in? John.

MR. WARREN: I was just going to say Marcy is correct, we've actually taken our time to frame the parameters so that we're not excluding anything, because it's going in a lot of different directions. So we're making a lot of progress. It may not appear to be where

we want to be, but we're getting there.

CHAIRMAN BABCOCK: Okay. Robert.

MR. LEVY: To contextualize the issue about pleading, there are two places where this would come in. One is that if you were going to plead a case within the jurisdictional parameters of the business court as the plaintiff, the presumption or potential approach would be that the rules would require you to plead sufficiently to demonstrate that you have pled within the jurisdiction so that it would be in addition to the general notice pleading requirements. If you are a defendant and you want to remove the case to the court, then the potential approach there would be that you would have to put in your removal petition sufficient facts that would demonstrate that the court has jurisdiction.

There are going to be some challenges that we were actually discussing before. When you have both a jurisdictional limit based upon the types of claims as well as the dollar amounts that are in controversy and, you know, if you are a plaintiff who does not want to be in the business court, you're not going to plead the dollar amount, and so then the issue is can the defendant in the removal petition say this claim is worth X amount based upon this evidence or interrogatory answer or whatever it is that would provide some basis for the court

to determine, yes, it hits that threshold. So those are some of the potential approaches that could be taken to address the specificity of pleading to provide guidance to a judge.

CHAIRMAN BABCOCK: Okay. Any other subcommittee member want to comment?

HONORABLE EMILY MISKEL: We're in the -- we're in the problem finding stage of the committee, not yet in the problem solving stage.

CHAIRMAN BABCOCK: Any other problems you've found?

HONORABLE EMILY MISKEL: Oh, I have a list.

MS. GREER: This is the tip of the proverbial iceberg.

CHAIRMAN BABCOCK: Yeah.

MS. GREER: But it's important, and I think we kind of -- if we understand how this is going to fit together at that level, the rest of it will be easier to develop.

CHAIRMAN BABCOCK: Okay. Robert.

MR. LEVY: Just adding on, the issue about where this should sit in the rules, one of the -- one of the challenges is if you want a clear complete guide to practicing in the business courts will West put out a business court book that has the statute and all of the

applicable rules and then for the other rules you go to the Rules of Civil Procedure, but, you know, the other argument is this is -- you know, the trials are going to be the same trials, the same standards, same rules, so why not just add to the Rules of Civil Procedure in the -- you know, a new rule on removal, but -- and then amendments to other rules so that it doesn't like carve it completely out. And there are merits I think to both, but -- and part of it will depend on how many rules we actually end up proposing, but I think the committee's perspective on what makes the most sense for practitioners and courts would be helpful.

CHAIRMAN BABCOCK: Yeah. Well, anybody have any views on that? Yeah. Judge Evans.

HONORABLE DAVID EVANS: I sit on the MDL panel, and my recommendation is that it be put in the Rules of Civil Procedure. The availability of the Rules of Civil Procedure to the judges and to the public and to the bench, to the bar, is greater than the Rules of Judicial Administration. Access is just easier, and it gets better -- it will integrate better, and that would be my suggestion. I would feel more comfortable with it there, and I think there's sometimes a problem with the rule being just in the judicial administrations, so --

CHAIRMAN BABCOCK: Okay.

HONORABLE DAVID EVANS: But I think the key may be how much comes out and where it is, because you're going to have venue involved in here. You're going to have removal, remand, and I would assume you're going to have to figure out some way -- you may end up doing something about how to schedule trials when you're dealing with having to use facilities occupied by elected officials.

MR. LEVY: Well, that's not going to be a problem, will it?

HONORABLE DAVID EVANS: Well, if there's a problem, I bet a PJ will get appointed to solve it by somebody, so, you know, that just seems to happen. But anyway, my -- after having been on the MDL panel for I don't know how many years now I think I would be more comfortable with it being in the Rules of Civil Procedure, and just to throw that out, but wherever they are, are good. That's up to the Court.

CHAIRMAN BABCOCK: Kennon, and then Justice Miskel.

MS. WOOTEN: I agree that they should be in the Texas Rules of Civil Procedure. I've found that many lawyers don't even know the Rules of Judicial Administration exist. So in addition to there being greater accessibility to the Texas Rules of Civil

Procedure, I think there's greater familiarity of them as well, and there are parts of the Texas Rules of Civil Procedure that I believe have no content because content that used to be there was moved over to the Rules of Appellate Procedure. So I think you can find a home for the business courts provisions in the body of the Texas Rules of Civil Procedure. I also think that if some of the traditional Texas Rules of Civil Procedure are going to apply, and I think they will, to the business courts, it's much easier to have business courts provisions in that body of rules and to refer readers to other parts of those rules than to refer them to an entirely different place, if, for example, you were going to put these rules in the Rules of Judicial Administration and say "See that other body of rules for additional applicable guidance."

And in regard to detail, my current thought is put it in the rule, because again, if you don't put it there you're making people go to another source and hoping they find the right source, and it's already going to be somewhat complex I think, and if you make them put together two different sources of information to figure out what to do I think it will increase complexity potentially, as opposed to increasing simplicity, which I realize is the goal potentially of putting less content in the rules. I just think making readers combine two

different sources to figure out what to do could lead to error.

MS. GREER: Can I ask a question?

CHAIRMAN BABCOCK: Go ahead.

MS. GREER: Do you mean the -- like the definitions, for example? I mean, there's literally three pages -- or a page and a half of definitions in the statute that are -- there's no way we can write these rules without referring to those definitions, so that's one of the questions. Do we reprint the definitions, or do we attach the statute? We can't do that if we put it in the civil rules clearly. And I definitely hear what you're saying.

MS. WOOTEN: I don't know. My immediate reaction is I don't know what's best. My thought, though, is if you refer to the statute for the definitions, I suppose one benefit to doing that is if they change later you won't have to amend the rule again if you simply refer to the statute for the definitions, but I think that's different from the question of where do you put the procedures, from my perspective, right, like making somebody go somewhere to look at the definitions is less of an ask than for your mind to put together two different sources of procedures and figure out how to move forward.

CHAIRMAN BABCOCK: Justice Miskel.

HONORABLE EMILY MISKEL: Okay. I just changed my vote on this issue because I think earlier I was on board with the comments that we've heard so far, but as I'm thinking about it, big picture one of the issues that we have in committee with this is we have no idea how many cases this is going to be, but what I can tell you and the rest of the people in this room that have district court experience, this is not a large percentage of our docket, right. If I had 2,000 cases a year, you know, this would be less than 20 cases, I'm sure by far. So -- and I would defer to anybody else who had more civil jurisdiction than I did, but this is not the bulk of what our Texas courts system does, and so I don't want to clutter up our TRCP that are used by a variety of litigants that are never going to have this type of case come up, and what I've heard so far is, well, it will be complex, it will be hard to figure out. Okay. These are 5 and 10 million-dollar cases. They're not pro se litigants. I would expect an attorney hired on a 10 million-dollar case can look at a Rule of Judicial Administration, so I think that because these are going to apply to a very tiny number of litigants compared to the size of our Texas courts system and the fact that everybody who is in a 10 million-dollar lawsuit can afford a lawyer that it's okay to put them in a special location.

CHAIRMAN BABCOCK: Okay. Pete.

MR. SCHENKKAN: I think as to the question of whether they ought to be in the Rules of Civil Procedure generally or in the special section for business courts or in Rules of Judicial Administration the correct answer is yes. They should be in all three. The question is how much of specificity in the rules needs to be in each place, but one of the problematic areas I can see happening is a case that somebody thinks ought to be in the business courts, but it isn't absolutely clear on the face of it even if you have mastered the complex statute and whatever rules we come up with, and it's at least crucial that the people who are used to practicing under the regular Rules of Civil Procedure know that there's another set of rules out there, and so if we have at least have that much in the rules saying, you know, "For the special rules of pleading applicable to filing business court or removing, see X." We need at least that.

I'm guessing that when we dig into it, we're going to need more than that because the number of places where there is a specific juxtaposition that might or might not look to some people like a conflict, we're going to need to explain what we think the correct answer or at least the correct way to think about getting to the correct answer is, and we need to make sure people get

quickly to the right part, and they're not all going to be -- I agree that once we know we're in the business court, we can be pretty sure that the lawyers for the parties there will be able to figure out what they need to do regardless of where the substance that they're dealing with is, but whether we get there or not is going to be harder on a lot of folks.

CHAIRMAN BABCOCK: Judge Estevez, and then Judge Evans.

HONORABLE ANA ESTEVEZ: Well, I think if you're looking to make it easier for the practitioners and the judges, you should have a book that's called the business courts.

CHAIRMAN BABCOCK: Yeah.

HONORABLE ANA ESTEVEZ: And so I think it should be separate, and Westlaw should do a separate section that includes civil rules of procedure for all of the business courts statute and whatever these business court rules, and I absolutely agree with him that in the Rules of Civil Procedure you should also have something that refers you to this other section. Whether you put it in judicial administration or somewhere else, I don't think that matters, but I don't think it should be just in the Rules of Civil Procedure. I think there should be some -- I think that would make it easier for everyone to

practice that kind of law.

CHAIRMAN BABCOCK: Judge Evans.

HONORABLE DAVID EVANS: The -- I think the two titles, Rules of Civil Procedure, Rules of Administration, should provide some guidance. If it deals with procedure, it should be in the Rules of Civil Procedure or if it's criminal it should be in the rules of criminal procedure, because it concerns a procedure in the courts in the State of Texas, or in the TRAP rules when it's an appellate. If it has to do with administration and the substance of the rule has to do with administration that is done by judges then it should be in the Rules of Judicial Administration. An example may give you a comment where I think multidistrict should have been placed, but having said that, where you are now is if you'll look at Rule 12, which is the information request to judiciary, that's clearly a Rule of Judicial Administration. How do you respond to that? So I would suggest to you that anything that does -- has to do with procedure should be given strong consideration for placement in the Rules of Civil Procedure where the public, the bench, and the bar, all of the bench and the bar and not just those that might handle those type of cases, would go to.

CHAIRMAN BABCOCK: Anybody else? Elaine.

PROFESSOR CARLSON: Well, I agree with Judge Miskel. I think if it's a small percentage of cases that we're going to see in this -- in the business courts, it could be in the Rules of Judicial Administration. We already have 800-and-some-other rules, and, Judge, you're right. Ideally it all would be in the rules, but really now you have to go all over the place to piece together what procedure is. Civil Practice & Remedies Code, you have Government Code, now Family Code now has rules of some procedure and the Court can't make rules contrary, so it's already not great, and if it is of value case as you're describing, the lawyers will figure it out. And most practitioners who don't do MDL don't know anything about it, and they don't need to, and that's where I come out.

Insofar as how much specificity, how fluid is this process? I mean this is kind of a new thing. Is this all going to -- is this going to be tweaked again significantly the next time the Legislature meets, in which case maybe it's like a 226a, where you attach something to the rule that can come in and out. I don't know.

MS. GREER: That's a great idea. And the answer to your question is I have no idea. I don't think anybody does, but I would -- it wouldn't surprise me if

there would be some tweaking that would come out of the next legislative session because there will have been some time for experience by that point. Not a lot, but some.

CHAIRMAN BABCOCK: So what I'm hearing is that some people think they should be in the Rules of Civil Procedure and others think they should be somewhere else, but the Rules of Civil Procedure should reference the somewhere else.

MS. GREER: Well, and I think as a practical matter there will have to be a couple, at least a couple of rules in the Rules of Civil Procedure, to Pete's point, just to -- to set up the practice.

CHAIRMAN BABCOCK: Right.

MS. GREER: And then refer to a different place, if that's what the consensus is. So but the concept is how much do we want to load up our Rules of Civil Procedure that are already pretty full for a subset of cases that's going to be extremely small and specialized. So this has been really helpful.

CHAIRMAN BABCOCK: Well, they're going to need rules for sure.

MS. GREER: Yeah. Oh, we're going to give you rules. I mean, I know that the initial question when Chip called me was do you think we're really going to need rules and I'm like -- maybe you'll recommend that we don't

really need them. I'm like, yeah, no.

CHAIRMAN BABCOCK: Well, if we're going to need rules for sure, and just a matter of placement, is there any reason why we just couldn't have a new section of the civil procedure rules that say business courts?

MS. GREER: Well, I mean, that's the question.

CHAIRMAN BABCOCK: Yeah. I mean -- Judge Wallace.

HONORABLE R. H. WALLACE: Well, that's what I was thinking, and I don't have the rule books in front of me, and I can't get on the internet contrary to what the log-in instructions are, but as I recall, the Texas Rules of Civil Procedure have different sections pertaining to supplemental proceedings, ancillary proceedings. Those are a part of the Texas Rules of Civil Procedure.

CHAIRMAN BABCOCK: JP rules.

HONORABLE R. H. WALLACE: Yeah. So maybe there's a Texas business court section that can be slipped into the Texas Rules of Civil Procedure that way.

CHAIRMAN BABCOCK: And then the argument against that is -- somebody said -- articulated a minute ago. The argument against doing what Judge Wallace says is what?

MS. GREER: Is -- is that these really apply to such a small subset of cases that -- that it would make sense to have it like the MDL rule, which you know, is in the same rule book.

CHAIRMAN BABCOCK: Right.

MS. GREER: And I have it flagged because I use it, but a lot of people don't use it and don't need it, and so it just bulks up the Rules of Civil Procedure which already are voluminous anyway.

CHAIRMAN BABCOCK: Well, I mean, I don't go to JP court much anymore, but there is a big bulky part of the rules about JP court, right?

MS. GREER: But there are a lot more cases in JP court. I'm just articulating. I'm not taking a position, please understand, but there are a lot more cases in JP court of all different kinds than in this highly specialized business court, which will be, you know, high dollar cases with supposedly well-paid lawyers.

CHAIRMAN BABCOCK: Yeah. Just to be the devil's advocate, so why make the JP lawyers go through all of these other rules when they've got their own issues?

HONORABLE EMILY MISKEL: Well, and JP cases are 40 percent of our civil court system, so actually our whole rules should be JP rules with like a subsection for

district court.

CHAIRMAN BABCOCK: There you go. Richard.

MR. ORSINGER: Just based on this morning's discussion it seems to me that some of the rules are going to be unique to the business litigation and then they would conveniently be all in one location, and other rules are going to be just part of our typical litigation process.

CHAIRMAN BABCOCK: Right.

MR. ORSINGER: Like giving notice to other parties when you file a motion or filing special exceptions to pleadings, or there's so many rules. Selection of juries, jury charge. They -- they would belong -- the rules that are in the civil rules that would apply to business litigation ought to stay in the civil rules and maybe if it's necessary drop a little extra comment or something, but the ones that are dedicated to just the business court, clearly they should be separate. I don't see that it's really a problem.

CHAIRMAN BABCOCK: What's not a problem, putting them into the rules or keeping them out of the rules?

MR. ORSINGER: It seems to me that the procedures that are unique to business litigation belong together somewhere.

CHAIRMAN BABCOCK: Well, yeah. But the somewhere is what we're debating right now.

MR. ORSINGER: Yeah. Well, I mean, to me, does it matter? I mean, if it's in the subpart of the civil rules it's going to be published in all of the books that have the civil rules. If it's a separate thing, I think it will probably still be in the same books, but just in a different chapter.

CHAIRMAN BABCOCK: Yeah. Pete and then Robert. Sorry, he had his hand up first. Unless he yields.

MR. SCHENKKAN: I'm happy to yield.

MR. LEVY: I just had a real quick comment just to keep it going that the statute also provides that the courts can establish their own rules, the business courts can establish their own rules. So there actually is another part of this, you know, where will they go basically.

CHAIRMAN BABCOCK: Pete.

MR. SCHENKKAN: And I want to say --

CHAIRMAN BABCOCK: Troublemaker.

MR. SCHENKKAN: As someone who's had extremely limited experience with MDL, this is a guess, and I would like to have those with more experience correct me if the guess is erroneous, but my guess is

there are going to be a whole lot -- even though this may be -- these cases that qualify for the business courts may be a very small percentage of all of the courts, civil cases in the courts of Texas, there are going to be a whole lot more of them than there are of MDL cases, and the MDL practice has some specialized aspects to it that are truly different from the otherwise applicable Rules of Civil Procedure, whereas our starting assumption, which we've just heard is not necessarily correct, is that otherwise most of the rules will be the same.

And so to me this argues for -- it doesn't answer the question at the level of detail, but it argues strongly for there being a business courts section of the Rules of Civil Procedure, with cross-references to the Rules of Judicial Administration to the extent there are things that really are what the courts need to think about in managing the administrative aspects of this new machine.

CHAIRMAN BABCOCK: I mean, I'm looking at the rules right now, and you have parts and sections, and you could add an additional part and have sections to it in the current -- current rules. Anybody else got -- Harvey.

HONORABLE HARVEY BROWN: I don't have a strong view either way. I think both would probably work,

but whichever one we adopt I think that we should say something about the business courts adopting their own rules. I mean, it would not have occurred to me until you just said that, that not only do I need to read the rules but the business courts themselves may as a collective committee have rules. I know to do that for individual courts, but it would not have occurred to me for a court that is statewide, if you will. So I think that should definitely be referred to for the practitioner to be advised you better check those, and it should be in the rule itself.

CHAIRMAN BABCOCK: Yeah, and what -- what part of that -- what part of the HB 19 is that? Does anybody know?

HONORABLE R. H. WALLACE: Where they said they can make their own rules?

CHAIRMAN BABCOCK: Yeah.

HONORABLE HARVEY BROWN: And while you're looking, does the Supreme Court have to approve those rules? Does the statute say?

HONORABLE EMILY MISKEL: The statute, if I recall correctly, does not say the Supreme Court has to approve them, and I think the new procedure for rules is they just have to be posted, and I think the Supreme Court only gets involved if someone challenges them.

HONORABLE HARVEY BROWN: Oh, that's right. Okay.

MS. GREER: So it's 25A.020(b), "The court may adopt rules of practice and procedure consistent with the Rules of Civil Procedure and Evidence."

HONORABLE TOM GRAY: Well, then our job here is finished. Just let them do it.

MS. GREER: I actually thought about that, with the deadline looming. But I think that they -- that would not be well-received by certain members of the Supreme Court.

CHAIRMAN BABCOCK: That's probably right.

MS. GREER: And, you know, one thing to keep in mind is that most people are getting their information on the internet these days anyway, and like when I go to the Fifth Circuit or the Texas rules I more than often will go to the online version that's word searchable than this, although I keep this close by, and so we can have, you know, like the Fifth Circuit rules have -- are built in with the Federal Rules of Appellate Procedure available on the website. So there may be ways to kind of merge all this together in a way that makes sense to the practitioners.

CHAIRMAN BABCOCK: Yeah, Kent.

HONORABLE KENT SULLIVAN: I wonder if we're

not approaching this perhaps in the wrong order in the sense that the question of what the ultimate work product looks like I think is perhaps important in terms of issues of placement. In other words, the scope of what the rules ultimately cover, the length of these rules, are they voluminous or not, that might influence my view, but ultimately the other component of this is once you have a final work product you could arguably test where would be the best placement of those rules. And by that I mean I ultimately think that what we think as a group is not nearly as important as what users generally think, because I don't know how representative we are of a hundred thousand plus members of the State Bar, and you can actually test for that. You can determine what's going to be the most user-friendly arrangement to offer up.

You know, simplicity, plain language, user-friendliness, those are things that I think should ultimately guide what we're talking about doing, and once you've got a final work product you can ask some questions. It can be very informal and very inexpensive focus group sort of work of people who are perhaps more diverse than this group is, or if you wanted to, depending on the questions you needed answered and how important they were, you could do something that was more sophisticated in terms of actually collecting information

and data and making some decisions about how to best communicate. This could be a larger project, something that perhaps should be entertained about how to organize the rules generally, how to make our court system more user-friendly for the much larger group of users than -- than we really represent.

CHAIRMAN BABCOCK: Yeah. Okay.

HONORABLE KENT SULLIVAN: Just a thought.

CHAIRMAN BABCOCK: Rich, and then Hayes.

MR. PHILLIPS: Just as we were talking about the idea of the online version of the rules, I think that actually for me suggests a new section in the civil procedure rules, not judicial administration, because that's a different document right now. So if I'm looking for the rules somewhere and I'm looking at the online version, I'm going to go click on the Rules of Civil Procedure. I'm not going to go click on the Rules of Judicial Administration looking for rules about procedure for business courts, so if we're thinking about people that are going to look online then that to me weighs in favor of putting it as its own section, call it section 9 or 10, wherever we are, in the Rules of Civil Procedure so it's searchable in that document.

CHAIRMAN BABCOCK: Yeah, Hayes, and then Judge Evans.

MR. FULLER: From a practitioner standpoint it seems to me, just thinking out loud, that if I want to be in a business court I'm going to plead in accordance with the business court statute, wherever that statute is located, and I'm going to do it in accordance with the existing Texas Rules of Civil Procedure. If I think it ought to be in business court as a defendant then I'm going to be looking at a notice of removal similar to the federal practice, which probably should be located in the Rules of Civil Procedure. If I think it ought not to be in the business court, I'm going to be looking at a motion to remand.

I think the most important rules we're going to see coming out of this beyond what we already have the ability to do is going to be found in the rules that the business courts adapt -- you know, adopt for themselves, because those are going to differ significantly from the Rules of Civil Procedure. So earlier whoever said we're likely to find these rules in three different places, yes as to all, I think that's probably correct. I don't think we're going to have to do a lot of tweaking with the Rules of Civil Procedure, knock on wood, and we just need to figure out where to put the statute and if that's -- the MDL rules are located in the Rules of Judicial Administration or whatever. Maybe that's where we put

them, and I mean, we're adding this onto our existing deal, and also, David, what sort of MDL problems have y'all encountered? What made you think that, you know, we have -- using the analogy of MDL and business court, what sort of problem -- I mean, would you now move the MDL rule to someplace else or --

HONORABLE DAVID EVANS: I would. The Rules of Judicial Administration are obscure, but judge -- Justice Brown is here. He served on the panel for years and wrote many of the opinions that guide the current panel in deciding MDL cases, but you could not locate an MDL opinion within an hour unless I was to tell you how to go find them in each of the case files online. There will -- the judges in these courts will have to issue reasoned opinions, and you may find that the reporter systems may want to annotate the rules with decisions on removal and remand from the business courts. You cannot do that with the rules -- it has not been done with Rules of Judicial Administration. There's over a hundred MDL opinions out, and not a single one of them is annotated.

Number two, there is no doubt, even though I agree with you, the volume -- I predict the volume may be smaller. These cases are going to go to the appellate court. Well, they're going to go to an appellate court, and they're going to end up with the Supreme Court. You

cannot find an annotated decision to the Rules of Civil Procedure on MDL in this state. Doesn't exist. And for those reasons, because of the way the reporter system is, I grant you that usage is changing, Ken, and people have different things they look at, but their traditional methods of research are still the foundation of legal research, and you're cutting something from whole cloth that you're trying to sell in Manhattan and Delaware to bring business litigation to Texas, then you're going to put it in the most obscure document we have.

I don't think that's what the Legislature had in mind, and I don't think that's good for the practitioners. I'm right now in the midst of a panel decision in which we have no less than 12 prior decisions that are going to come into play, and we're going to have to tell the lawyers in the MDL, who are high-dollar lawyers, if you had gone and found these opinions you would find we've already denied this approach.

HONORABLE EMILY MISKEL: All right, I change my vote back.

CHAIRMAN BABCOCK: Yeah, go ahead, Justice Gray.

HONORABLE DAVID EVANS: Wow, I've never won against a Harvard lawyer.

HONORABLE TOM GRAY: I was just going to add

that I'm not equipped to help the panel because I don't know the volume of antagonism or modifications or changes that will need to be made to our existing rules to accommodate this. As a result, I've got to look to the subcommittee of where it starts. Once y'all have drafted something that says these are the rules for this court then maybe I could provide some informed information about where they best fit.

From what I've heard here it sounds like we need to fold them into our existing Rules of Civil Procedure, but I look at what we're going to talk about later today on a -- what I think the Legislature thought was a fairly simple issue on help preparing an appendix and the work that Bill Boyce and his subcommittee did and how many little collateral rules are impacted by that seemingly simple change, and if this results in something akin to a wholesale overlay of our existing Rules of Civil Procedure just to accommodate two dozen cases a year or 50 cases a year or opinion at any given time or whatever, then I think the mix is entirely different. But if it's just another subsection to 20 or 30 rules that then make this whole process work and maybe bounce out to another section like the JP rules or the original proceedings that we see over in the appellate rules, if you're talking about being able then to separate that, then I think your

answer is there.

But if it really is truly a different world of practice akin to the distinctions between state and federal practice, then not in the Rules of Judicial Administration, not in the Texas Rules of Civil Procedure. Then create, as Judge Estevez says, a book that may largely duplicate many of our Rules of Civil Procedure, but yet this is what happens with them. And like one brief exchange I just heard Judge Miskel talk about with Robert on the what happens if the issue that makes it a business court litigation case gets disposed and then what happens and does it remand or not and then I'm thinking about, okay, now you've got two different issues. You've got one that's disposed and one that's not, and one is going to go to the Fifteenth Court of Appeals, and one is -- I mean, it starts really getting complicated, and we've made the law pretty gnarly already, and, you know, it seems to me that I'm not equipped to answer this, and so I'm looking for what is the recommendation of the MDL -- or excuse me, the subcommittee that has already studied this issue a lot more in depth than any of us that are not on that subcommittee. So what are you thinking?

MS. GREER: I'm leaning towards putting it in the Rules of Civil Procedure, but I mean, I want to -- I don't want to make a commitment for the subcommittee

because we all have opinions, but I'm -- as I'm listening to this discussion it's starting to clarify in my mind, so this has been extremely helpful to me personally. I think we could create a subgroup like the justice of the peace courts that would focus on the things that are particular to this court. Like how to write the opinions, because that's going to be a really interesting one for me, because, of course, most district courts in Texas don't write opinions, so this is going to be a new thing, and we're going to have to give guidance. That's not going to apply to any other court but this, so that would mean its own subsection, but we're probably going to need to put in the regular part of the civil rules some enhancements that drive traffic to that part and also apply generally with respect to pleadings, like just specificity, you know, and if you're pleading in the business court you need to say more about jurisdiction. You know, you need to include a description of the basis for the jurisdiction supported by alleged facts, not just, you know, there's jurisdiction, so let's go. That's where I'm tentatively leaning right now, but I really don't want to call the question without the benefit of all of our input.

HONORABLE TOM GRAY: So if I understand it, notwithstanding Judge Miskel's vacillation on the issue, the --

HONORABLE DAVID EVANS: She didn't vacillate. She was persuaded.

HONORABLE TOM GRAY: What concerns me is it's always the last speaker.

HONORABLE DAVID EVANS: Do not talk about my ally and defame her like that.

HONORABLE TOM GRAY: Just wait until we get to the Fifteenth Court of Appeals since she's now on a court of appeals and see what happens. So if I understand, it's not such a aggressive change to the rules that you think incorporating them into the existing Rules of Civil Procedure with potentially a -- for the lack of a better characterization, a targeted subsection for business courts practice within the Rules of Civil Procedure, that that is undoable. That that is a doable project.

MS. GREER: Yes, with one caveat, and that is the definitions, because we cannot write these rules without reference to the definitions in the statute, and I'm wondering -- so this is a subset question, but I think it's an important one. Do we -- would everyone feel comfortable if we said for purposes of this subsection we're relying on the definitions in the statute?

HONORABLE TOM GRAY: Well, actually, I had written down a question earlier that I was going to ask,

and I will ask it now. Are the definitions that the Legislature used inconsistent with the use of the term in the existing Rules of Civil Procedure?

MS. GREER: I don't think so, because they're really pretty specialized terms. You know, controlling person, controlling entity, those kinds of things, which are just not in the rules, but that's a fair point, and we ought to make sure that all of them are not in conflict elsewhere, and if we -- if we know we're going to have this kind of interlay we can do a broader search and make sure.

CHAIRMAN BABCOCK: Skip.

MR. WATSON: Marcy, you know, usually our comments are sometimes very specific. Sometimes they're from 10,000 feet. It's very clear on this one, those of us who are not on your committee, this is from the edge of space comments, because of the detail and the size of what -- of the fire hose you're drinking out of, but that said, from that perspective what justice -- Chief Justice Gray is saying makes a lot of sense to me, is to -- I mean, I as a newbie on this committee was put on the justice of the peace rules committee, which was the longest year of my life and --

CHAIRMAN BABCOCK: It's a right of passage. Elaine and I were both on that subcommittee.

MR. WATSON: You said that at the time, and I nearly didn't passage, but I really see this as a separate section, and I see your definitions, albeit however many pages it is, as being an appendix or something at the back of that separate section that just, see this, not at the front where you have to wade through them, but at the back.

MS. GREER: Okay.

MR. WATSON: And, but I don't see -- I don't see kicking somebody out of go see -- you know, pull your statutes and read this. It needs to be in there, but it needs to be like the justice courts and as a separate animal. The difficulty I think you're going to have is -- is our tendency to want to granulize and get everything that might conceivably affect another Rule of Civil Procedure in the Rules of Civil Procedure, and I see that's where your discipline is going to have to come in, is separating those that need to be in there and those that don't. And I foresee that our next discussion may be "Help us with this, you know, laundry list of 10 things, should they be in and should they not, and this is where we are." That's just for whatever it's worth, and it's probably worth what you're paying for it.

CHAIRMAN BABCOCK: Pete, and then Judge Wallace.

MR. SCHENKKAN: My understanding is that one of the strong arguments in favor of there being business courts and that was part of the advocacy over in the Legislature over what has now been many, many sessions before we got to adoption of the statute is there are a bunch of other states that have business courts and we are losing out to some extent in terms of the -- in crude terms business law, but I think it's really kind of more civic than that.

MS. GREER: Market share.

MR. SCHENKKAN: Market share, and really the position to advance our own view of our interests by having cases that have something substantial to do with us be brought here. That said, if that's right, I've never looked at any of these business court provisions in other states, nor had any occasion in my practice to do so, but I would guess that our law professors and some members perhaps of the committee or the larger Supreme Court Advisory Committee who are part of the large firms at least have partners who have practiced before them in other states. I'm kind of wondering if there's anything out there in the way of a survey to go by of business courts in other states that would at least be a reference tool.

MS. GREER: We've been looking at the rules

of other courts, and certainly the chancery courts in Delaware are, you know, kind of the gold standard. Their rules are 125 pages long, so they kind of are all-in, so there are different models and different ways of doing it. That research hasn't been completed yet, but it's fair to say that there are a lot of different ways to do this.

MR. SCHENKKAN: Yeah. And I recognize that there isn't likely to be a go by that is of any very clear direct use in most cases, because Texas is different in so many other ways as well and wants to be, but still it would shed more light on this perhaps for some of us to know that, and maybe we just need to wait until the time comes on that.

CHAIRMAN BABCOCK: Yeah, in Delaware there's a fairly sharp division between chancery and superior court, and they -- the chancery deals with equitable claims, but the judges all come from the same system. They're not like here where they're appointed as opposed to the elected judges, you know, and here you can have overlap between the two systems. The same case could be in district court or it could be in business court. It's just a matter of complexity and how much -- so I don't know if I would look too carefully at the chancery because their rules are very -- geared to very different things than we're dealing with.

MS. GREER: It was more just to get context of ways to go about it. You know, do you do a standalone set of rules, do you integrate, you know, where do these fit.

CHAIRMAN BABCOCK: Yeah. If you go to Delaware -- and I will yield to anybody that does more than I do there, which is probably many of us, but if you're in chancery you don't even look at the superior court rules.

MS. GREER: Right.

CHAIRMAN BABCOCK: And vice versa. I mean they're in two different parts of the book. So Judge Wallace, and then Justice Kelly.

HONORABLE R. H. WALLACE: Let me address what we were just talking about. Pete I believe was kind enough to give the subcommittee some references to a lot of other states and their rules, and just from what I was able to tell from quickly viewing those, none of them were as complex as what the set of rules is that we're dealing with here. A lot of them they were talking about, you know, complex litigation and -- but anyway, we have looked at that. I'm not sure how much guidance we're going to find.

Let me -- the one thing I want to point out and get back to, and maybe my vision is too narrow here,

but I think one thing we've got to focus on is that -- and throughout this statute there's four things that the Legislature said the Supreme Court will adopt rules pertaining to. One of them was the issuance of written opinions by the business courts. The other was setting fees for filings and actions in the business courts sufficient to cover the cost of administering this chapter. The third one was to adopt rules for the timely and efficient removal and remand, which we've -- takes a lot of talking about, and the last one was assignment of cases to judges of the business courts. Those are the four specific things.

Now, there was a catch-all, and any other rules that the Court, you know, may deem necessary, but I think we need to keep in mind that we're not -- I don't think we're charged with drawing up a complete set of rules for every aspect of how these courts are going to operate, but those are the things that we need to at least initially focus on and address.

CHAIRMAN BABCOCK: Well, but the statute says "including," and it doesn't say "excluding all others".

HONORABLE R. H. WALLACE: I know it says "including."

CHAIRMAN BABCOCK: And here's -- and,

Justice Kelly, if you'll let me interrupt for one second before your comment. One thing I'm troubled by is this provision in section 25A.020(b), and that says, "The business court may adopt rules of practice and procedure consistent with the Texas Rules of Civil Procedure and the Texas Rules of Evidence. Now, the business court, quote, unquote, is not defined I don't think in the statute, certainly not in the definitions, so I assume the business court is the 16 judges that are appointed by the Governor with the advice and consent of the Senate, right?

MR. LEVY: I think there is some provision for a chief judge --

CHAIRMAN BABCOCK: Right, yeah.

MR. LEVY: I think that's right.

THE COURT: And maybe that makes it 19 or more. So yeah 16, 17, whatever the number is, that's the business court. Now, are those judges going to sit down in a room like this and say, "Okay, now we're going to do our own rules, we don't care what the Supreme Court says"?

MS. GREER: They haven't been appointed yet.

CHAIRMAN BABCOCK: Well, I mean once they're appointed.

MS. GREER: Right, but I mean --

CHAIRMAN BABCOCK: It says they may adopt rules of practice and procedure consistent with the Texas

Rules of Civil Procedure and Evidence, right? Now, if the Supreme Court puts these rules somewhere else, they're not going to be part of the Rules of Civil Procedure. So --

MS. GREER: That's a great point.

CHAIRMAN BABCOCK: So can the business court say, you know, they don't know what they're talking about, we're going to do our own rules. And somebody just said that the Supreme Court doesn't have authority to approve or disapprove the business court rules like they do local rules. Is that right? Did everybody agree with that?

MS. GREER: Well, I think they're just -- Jackie, do you want to speak to that?

MS. DAUMERIE: The Court is no longer approving local rules

CHAIRMAN BABCOCK: Okay. So not only are we no longer approving local rules, we're not going to approve these rules either.

MS. DAUMERIE: It's not required by statute.

MR. SCHENKKAN: Well, yeah, but it's --

CHAIRMAN BABCOCK: Well, it's not required by statute. Is Justice Bland going to get on her high horse and say, "Are you kidding me, you can't do this"?

HONORABLE JANE BLAND: Maybe.

CHAIRMAN BABCOCK: Did you get that?

HONORABLE JANE BLAND: The local rule -- I

think the idea is that they would work like local rules work for any court right now, which is they must be consistent with the Rules of Civil Procedure and state law. If they are consistent, they then must be posted on the website, and then on the back end, any party or interested citizen may challenge the local rules as being inconsistent with state law or the Rules of Civil Procedure or just unduly burdensome or onerous. I think that goes initially to the regional presiding judge and then to the Court for review. So there is a -- there is a review process, but it is on -- it is after those rules are adopted and in practice and there's some indication that they're either inconsistent with rules of procedure or not working.

CHAIRMAN BABCOCK: Yeah. And -- and just from a consistent with the statute, because we always have to be consistent with what the Legislature says, but doesn't the Supreme Court have an interest in making sure that the rules, not just the four that Judge Wallace talks about, but overall practice in this court, doesn't the Supreme Court have an interest in promulgating those rules as opposed to another set of brand new judges who are appointed, not elected, coming up with a comprehensive set of rules?

MS. GREER: Yeah, no, I agree with that, and

we were just saying that you've now produced the tipping point for these rules need to be in the Rules of Civil Procedure so that they can't adopt local rules that would conflict.

CHAIRMAN BABCOCK: The first time in 30 years I've contributed to anything. Okay.

MS. GREER: Okay, so we won't vote Kennon to take your place.

CHAIRMAN BABCOCK: What's that?

MS. GREER: We won't vote Kennon to take your place.

CHAIRMAN BABCOCK: Well, I was going to nominate her soon, but Justice Kelly, sorry to take that detour.

HONORABLE PETER KELLY: Actually, that was precisely the point I was going to raise, that what is the rule-making authority of the Supreme Court. The rule-making authority is statutorily granted back in 1940, and they were going to take it away from the Supreme Court this last session, too, so how narrowly do we have to read the granted rule-making authority in the business courts bill and what can we actually advise the Supreme Court to make rules about if so much of it is reserved or allowed to the business court. So in theory you could spend months on this process, then the business court could

convene and make their own rules and disregard everything that's done. So that is a challenge we have to face as we're going forward on this.

The other point was going to be we can't just borrow from other states, as was discussed, because they have completely different jurisdictional bases and different processes. You know, in New York the commercial cases are in Manhattan County, separate, and you can't just borrow from another state, even as attractive as it might sound.

CHAIRMAN BABCOCK: Yeah. Well, the statute says -- mandates that the Court do rules in four areas, as Justice Wallace points out, but it does not -- it does not withdraw the rule-making power in any other area, and -- and it just gives discretionary authority to the business court presumably or those judges that they can do some things, but like -- like local rules, it seems to me that that is intended to be more of a gap-filling thing.

HONORABLE PETER KELLY: If we turn to the language of the statute, the statute does not -- I mean, if we're going to do a textualist analysis here it is a little bit ambiguous of what the ultimate rule-making authority is going to be, does it reside in the business courts or in the Supreme Court.

CHAIRMAN BABCOCK: Yeah. And I would only

say that -- that it seems to me that the business court authority, number one, being discretionary, but then being consistent with the Texas Rules of Civil Procedure, which expressly is said there in subsection (b), means that if the Supreme Court passes business court rules that are in the Rules of Civil Procedure or in the Rules of Evidence then the business court cannot pass inconsistent rules. That's how I would read it, and I think that's how -- and I'm not sure that's ambiguous.

HONORABLE PETER KELLY: What would be the process, right, that the business court can come up with rules and someone says, hey, that's inconsistent. Then the Supreme Court would then have to pass its own Rule of Civil Procedure, a new Rule of Civil Procedure, to negate what the business court did.

CHAIRMAN BABCOCK: Not necessarily. Not necessarily, because if the Texas Supreme Court rules are comprehensive and because of the work of this committee is adopted or modified by the Supreme Court covers something, and if the Supreme Court says you've got to pay a 2,000-dollar filing fee and then the business court says, no, you don't, 500 is fine, that -- the business court rule has got to yield. Now, if there's a gap, if there's an ambiguity in the Supreme Court rules, then I agree, then you've got a fight on your hands maybe.

HONORABLE PETER KELLY: Well, just to use your example, Supreme Court says 2,000-dollar filing fee. Business court says, okay, $2,000; because we have to be self-funding there's also a 5,000-dollar supplemental fee.

CHAIRMAN BABCOCK: Yeah.

HONORABLE PETER KELLY: Is that inconsistent with what the Supreme Court said, or is it supplemental? Then does the Supreme Court have to go back and say the fee is -- this is the type of thing that could take years to work out --

CHAIRMAN BABCOCK: Right. But if the Court leaves the field wide open, as Marcy said, oh, we're done, right, because we can punt this to the business court, is that -- is that something that we would recommend that the Court do, leave the field just wide open; or should we, consistent with the referral letter, develop rules that will presumably now go into the Rules of Civil Procedure that would prevent the business court from coming up with inconsistent rules or arguably inconsistent rules. Pete.

MR. SCHENKKAN: It seems to me that either way the Texas Supreme Court gets the, big asterisk, final decision on whether business court rules are or are not consistent with the Rules of Civil Procedure. Mainly the question is whether it's handled in this administrative way or handled in an actual litigated case. But either

way, big asterisk, they are -- the Texas Supreme Court is most emphatically within the province of the Texas Supreme Court to say what Texas law is. The big asterisk is, of course, the Legislature is the one that set this thing up, and the Court has to be mindful of the possibility that the Legislature won't like the Court's answer, and so that may affect prudentially how far the Court wants to go in the first round of rules in the -- of civil procedure and of whatever the other place is that this was supposed to go.

CHAIRMAN BABCOCK: One other thing, Pete, though is the process.

MR. SCHENKKAN: No, I'm saying we can't answer that.

CHAIRMAN BABCOCK: We shouldn't be -- we shouldn't be forcing litigants to say, "Oh, I don't like the business court rule. It's inconsistent with the Rules of Civil Procedure; therefore, I'm going to, you know, make this an appellate point, or I'm going to file a mandamus" or whatever. I mean, we shouldn't put our litigants to that burden.

MR. SCHENKKAN: Exactly. And that's what I'm saying. I think it's a prudential question for the Texas Supreme Court, how far do you want to go in these rules as opposed to that other alternative, and you've

just given a powerful case for when it's supposed to be something that is of general applicability, rules are a better way to go.

CHAIRMAN BABCOCK: Yeah.

MR. SCHENKKAN: And so we ought to start with that, be mindful as we go along is there something in here that, you know, runs an appreciable risk that somebody is going to challenge the Texas Supreme Court on.

CHAIRMAN BABCOCK: There's no risk right now because the business court doesn't exist really. I mean -- I mean, no judges have been appointed to the business court, so there's no risk right now of anything inconsistent because they don't have any rules.

MR. SCHENKKAN: Right.

CHAIRMAN BABCOCK: And I would suggest that -- that our focus ought to be on having robust rules that we can recommend to the Supreme Court and then they will -- the Court will do whatever it does, but -- but my advice would be that we ought to -- we ought to have all of the reasonable rules we can think of, not just the four categories, but basically set out the practice in the business court.

MR. SCHENKKAN: I strongly agree, but the only question is -- I mean, and the practical implication is just because we may have a concern that a particular

possible rule that the SCAC thinks the Court should consider adopting might run afoul of somebody's view of what is appropriate there --

CHAIRMAN BABCOCK: Sure.

MR. SCHENKKAN: -- that's a relevant consideration, but it's really relevant for the Court ultimately to determine because they're the ones that are going to have to take the position, either in the rule making or some other time, if it's litigated, how far to go. And I'm on your side of that question going in.

CHAIRMAN BABCOCK: Professor Carlson may not be, though.

PROFESSOR CARLSON: I am. You've convinced me that this should go in the statewide rules.

CHAIRMAN BABCOCK: Say that again.

PROFESSOR CARLSON: That it should go in the Rules of Civil Procedure. You actually convinced me and Judge Evans. I didn't really realize about the opinion writing aspect and the problem it was for MDL, but I would say I think there's enough nuances, if you look at the statute and I'd be interested to what the subcommittee thinks, that if you're going to put them in the Rules of Civil Procedure, do a complete set of rules for the business court. Don't have people jumping all over the rule book and modifying all of these other rules, because

I think there's going to be a lot.

CHAIRMAN BABCOCK: Yeah.

MS. GREER: And, you know, one thing that strikes me is that, yes, it's a small subset based on the jurisdiction currently defined, but this is likely to be a pilot program that will expand the jurisdiction of the business courts later, so we need to write them to handle the cases that they're going to have, you know. I mean, we need to do it -- do our job.

PROFESSOR CARLSON: And these judges are appointed for two years by the Governor, is that my understanding?

MS. GREER: Yeah. That's -- I'm not touching that.

HONORABLE ANA ESTEVEZ: How will they finish a case in two years? Have you finished one of those cases in two years, one of your 50 million-dollar cases in two years?

CHAIRMAN BABCOCK: My record right now is 11 years, but I think I'm going to beat that.

HONORABLE ANA ESTEVEZ: So then the new judge starts over, or do they just get reappointed? It's just a reappointment cycle?

CHAIRMAN BABCOCK: I don't know how it's going to work. Probably reappointment. I don't know.

Yeah.

MS. GREER: I would think so.

HONORABLE ANA ESTEVEZ: That's a lot of --

CHAIRMAN BABCOCK: Yeah, we face -- I mean, in this county that we're sitting in, you have that problem all the time because every motion you file you get a new judge, and you can have a judge that maybe has taken the case the whole way, and then right before trial he says, "Oh, by the way, you're going to get somebody else." Not only this county but Bexar County as well.

MR. ORSINGER: Right, yes. Yeah, and we love it.

CHAIRMAN BABCOCK: And they're very proud of it, and any thought of changing that is not going to happen.

All right. Anything else? Having spent now an hour and a half on whether we put it in the Rules of Civil Procedure or somewhere else, I think we've got consensus on civil procedure, so we've answered one of your questions for you, I think.

MS. GREER: Well, you've actually answered a lot of questions.

CHAIRMAN BABCOCK: Well, thank you.

MS. GREER: I think this has been super helpful to really vet these ideas and have the input from

everyone, so I --

HONORABLE R. H. WALLACE: I have a question, just to make sure. I have all the way been assuming that the other rules relating to procedure that are in the Texas Rules of Civil Procedure, the rules governing citation, service, notices, things of that nature, all get -- will be the same for the business courts.

CHAIRMAN BABCOCK: Right, yeah.

HONORABLE R. H. WALLACE: And we're not looking at expanding the scope of discovery and stuff like that. Just all those -- maybe that's the type of thing that is the local rules of the business court want to address, but I just want to make sure that I'm not the only one thinking that.

MR. LEVY: If I could --

CHAIRMAN BABCOCK: Yeah, Robert.

MR. LEVY: The question that you raise, we talked briefly about, about the scope of discovery. We could say that for the purposes of these rules that business court cases are all section three or level three cases, but presumably the courts are going to want to develop their own discovery plans that pit the issues in the case. They might want to do motion practice first and then discovery, those types of things, so that they can have a more tailored approach, and you might even have

rules that suggest that.

CHAIRMAN BABCOCK: Yeah. Yeah. The other thing you raised, Marcy, which I think is something that's worthy of discussion is what the pleading standard is going to be, and so we will take that up in 15 minutes after our morning break.

MS. GREER: Okay. I don't think the Fifteenth Court of Appeals discussion will need to be an hour and a half. It's a lot easier.

CHAIRMAN BABCOCK: No, no, I'm talking about the pleading standard --

MS. GREER: Yeah. No, no.

CHAIRMAN BABCOCK: -- in the business court rules. Okay. So we'll be in recess for 15 minutes.

(Recess from 10:28 a.m. to 10:44 a.m.)

CHAIRMAN BABCOCK: All right, we are back on the record, and now we're going to talk about pleadings, and does everybody agree that under our pleading rules that it's just notice pleading, it's not this Iqbal/Twombly federal kind of plausibility standard? Does everybody agree that's what Texas law is right now?

Justice Gray.

HONORABLE TOM GRAY: I didn't raise my hand.

CHAIRMAN BABCOCK: No, you nodded your head knowingly and looked with pleading eyes like "I want to

talk about this."

HONORABLE TOM GRAY: I just -- you have to acknowledge that where we are in much of our sovereign immunity litigation is some blend of a whole lot higher pleading requirement to plead a jurisdictional bases and then turn around to a standard where you have to plead sufficient to prove a waiver in the pleadings or you get a pleaded -- you're going to get the plea to the jurisdiction anyway and then you're going to fight over the adequacy of those pleadings and then there's going to be a fact component that comes in through the affidavit. So while in theory we still have a notice pleading requirement, there are many places in Texas jurisprudence that we already have a lot more pleading required, both of evidence as well as the -- the particular claim. You flip over and look at the TCPA, it's the same thing. You've got lots of, you know, what's pled, you know, what's the reason, this shifting burden back and forth. So --

CHAIRMAN BABCOCK: Well, what's the standard under 91a, the motion to dismiss?

MS. WOOTEN: I think there was a split among the courts of appeals on that very question, and some courts came out and said now we have 91a, and, yes, it's different from 12(b)(6), but it's similar.

HONORABLE TOM GRAY: Believe it or not

there's some splits on the courts of appeal, on a three-judge panel.

MR. ORSINGER: Not Waco. Certainly not Waco.

MS. WOOTEN: I don't know whether -- I should know this, but I don't know whether the Supreme Court of Texas has addressed that particular issue, but the last time I researched it different courts of appeals were coming out differently.

CHAIRMAN BABCOCK: Well, when this committee debated 91a there was considerable discussion about that, and some people think that the rule that the Court ultimately passed did incorporate Iqbal and Twombly while others said it didn't, and I think that that maybe has found expression in the courts of appeals, but I don't know that that's been resolved, which is why I asked the question. Because Marcy started out by saying, yeah, you know, pleading, it's just notice, but do we want to do something more here. And I think Justice Gray, Marcy, points out something that I think is not disputed, which is on jurisdiction you do have to be more specific, and you can't -- the court can consider things outside the pleadings in order to demonstrate jurisdiction, so that's probably going to inform -- inform us in terms of whether or not a particular case meets the standard for the

business court. So what else?

MS. GREER: Oh, from me?

CHAIRMAN BABCOCK: From anybody.

MS. GREER: We would -- we do want to talk a little bit about the fee-setting provision, because that is mandated. We've got to come up with something.

CHAIRMAN BABCOCK: Right, but before we get to that are we done with pleadings? Is everybody -- yeah, Roger.

MR. HUGHES: Well, to say I do a lot of governmental immunity or governmental defense, you know, we haven't really had in that area to ask about any change in the actual rules of pleading. I mean, yes, we have fairly detailed problems about what you have to allege to get around immunity, and that's often based on the Civil Practice and Remedies Code provisions as well as some case law, but that hasn't required a wholesale change in how we go about pleading them, and we have fairly good guidance and case law about, you know, if you want to challenge the pleadings on the pleadings or do you want to challenge jurisdiction on the evidence. You can go -- there's two roads you can go, and the other -- so I think in this case, the parties can decide whether they want to slug it out that the pleadings are insufficient, or they can offer some evidence to support that there is or is not

jurisdiction, somebody is not telling the truth.

But I think the other thing is where, you know, we work in an environment here in Texas where you get to amend your pleadings every day of the week if you want, which is wholly different than federal court where the judge controls it. In other words, you're not stuck with what you plead. You can, so to speak, amend around your problems fairly easy, so I think the rule needs to deal with the -- if anything, what they need to deal with the possibility that it's not going to be judged strictly on the pleadings, but you can offer supporting or controverting evidence and so forth.

The other thing is it's a paradigm shift here. In federal court if you haven't established jurisdiction, you're out of the federal system altogether. That's it. You don't get to come back to another federal court. Whereas, in this one, if you haven't pled yourself into jurisdiction for a business court, you have at least established jurisdiction for the district court, and it's really -- I mean, I hate to use the -- the dreaded word of venue problem, but that's almost really what it is, because you're either going to be in district court or in business court, so I don't know that we need to get wrapped around writing new pleading rules for the business court. I think it probably can be solved by using one of

the means that we already have when jurisdiction is challenged.

CHAIRMAN BABCOCK: Yep. Any other comments about -- about pleading? You got what you need, Marcy, or you got more questions?

HONORABLE R. H. WALLACE: Let me just throw out some thoughts so people can comment.

CHAIRMAN BABCOCK: Judge Wallace.

HONORABLE R. H. WALLACE: I think one thing -- and I was thinking like in terms of challenging venue. You just plead venue is in Tarrant County, and somebody wants to file a motion challenging it. You file affidavits, and the judge decides. I think the thing we want to try to avoid here is turning the jurisdiction arguments into a full blown trial of saying, "Judge, this is, you know, pie in the sky things that they think they have $10 million in damages. There's no way," and try to avoid that kind of situation, so there's going to have to be some, I would think, fairly summary method of presenting some evidence if there's a challenge to the jurisdiction.

CHAIRMAN BABCOCK: Well, I think that's probably right, but Twombly was a complicated antitrust case, if I recall correctly. The federal -- you know, the case that started this overruled *Conley vs. Gibson* and

started this plausibility business, and it went out on the pleadings because the Supreme Court said there had been inadequate pleadings in a complicated case, so there may be advocates out there somewhere that are going to say, yeah, business courts, they need to comply with Twombly and, therefore, the pleading standard not just on jurisdiction, not just on venue, not just on getting in there, but on the merits have to be more detailed. I don't -- I'm not saying that that's right. I'm just saying that somebody might -- might say that.

MS. GREER: Yeah, I'm sure.

CHAIRMAN BABCOCK: And the business court, whatever that is, the 16, 17 people might think that, so it's an issue to be considered, I would think.

MS. GREER: Okay.

CHAIRMAN BABCOCK: Okay, fees.

MS. GREER: Can we talk about fees? The provision is section 25A.018, and it says, "The Supreme Court shall set fees for filings and action in the business courts" -- and this is the hard part -- "in an amount sufficient to cover the cost of administering this chapter, taking into account fee waivers necessary for the interest of justice." So, I mean, this -- we don't even know where to start because, you know, one of the questions that has been asked repeatedly and the answer is

we don't know, is how many of these cases can we count on? I mean, I feel like we're doing a, you know, cost matrix for a hospital of what health care is anticipated for the next, you know, year. We don't know, because there's no way to designate in -- or encapsulate that we're aware of with OCA that would tell us how many of these cases are going to be there.

And obviously if there are 2,000 cases, that's a different number for coming up with fees, and I understand that the court is going to be funded by legislative appropriation for the first period of time, but after that, I mean, the -- and I'd like to also pose the question -- I haven't discussed this with my group. Do we need to have a rule on fees by October, you know, proposed, because I don't know -- it's such a vacuum. We don't have any way of knowing what that's going to look like, and I think arguably -- I mean, not arguably, but I would advocate that we wait on the fee rule until the cases start getting filed and we get an idea of what's coming in the door and what's staying, because I just don't know. Now, I mean, others on my -- on my subcommittee may see it differently, but every time I think about this, that's when my mind starts blowing up.

CHAIRMAN BABCOCK: Well, we can't have that. Robert.

MR. LEVY: And further complication, I think John was the one that pointed this out, that there is a statutory guidance now in Texas on fees for court proceedings which governs general fee schedules, and this statute arguably could supercede it as being more recent, but the -- one of the questions is do we want to have a -- a much higher fee for any case filed in the court and that by the party that brings the case or removes the case, or do we want to have a fee structure based upon the activity in the proceeding, individual filings or motions or something of that nature.

MS. GREER: Or both.

MR. LEVY: Or both. And I agree with Marcy, it's an important issue, but we don't have any track record to determine, so is it, you know, each case is a hundred thousand dollars or 10 thousand or a thousand or whatever. And another factor that is important is there is a -- a level of support that's associated with the business courts that was established by the statute, but some of the -- most of the people that are supporting the judge will be part of OCA and paid for out of OCA's budget, so it's not entirely clear that the fee recovery needs to include the administrative staff versus just the judges and that cost element.

CHAIRMAN BABCOCK: I've got a couple of

points on that. One, if the judge is going to have to write opinions, is there contemplation that there's going to be a law clerk or law clerks?

MR. LEVY: Yes. That is also contemplated.

CHAIRMAN BABCOCK: That's an expense. Second point, loosely related, and that is you might look at JAMS and AAA because their fees are gradiated based on how much is in controversy, so if I'm a claimant in a -- in one of those proceedings and I say we're talking about a hundred million dollars here, then the filing fee is going to be much higher than if I say it's 10 million.

MR. LEVY: Right.

CHAIRMAN BABCOCK: So the plaintiff or claimant can sort of judge for themselves and self- -- self-structure their fee if you follow that model. So if it's a hundred million then the fee is, you know, whatever.

HONORABLE ANA ESTEVEZ: So what happens if a verdict comes back at 70 million and they only filed for a 10 million? I'm just curious. Do they have to pay a greater fee later?

CHAIRMAN BABCOCK: Well --

HONORABLE ANA ESTEVEZ: Because that would be a way to save money.

CHAIRMAN BABCOCK: In arbitration, an

arbitrator can say, you know, hey, you only -- this is a 10 million-dollar arbitration, and so that's what I'm going to award.

HONORABLE ANA ESTEVEZ: Oh, okay.

CHAIRMAN BABCOCK: It's a little harder with a jury, I think.

MS. GREER: Well, we could also do it like Charles Dickens and pay the judges by the word and encourage them to write long opinions.

CHAIRMAN BABCOCK: Yeah, right a tale of five cities. Yeah, Richard.

MR. ORSINGER: It seems obvious, but whoever -- if the case is filed and the person that files it pays the costs, and if the case is removed over objection, I would assume that the person who got it removed has to pay the cost, and at the end of the case the trial court is going to be able to assess the cost, and normally that's kind of a trivial part of the outcome, but if we're talking about $10,000 for a filing fee and this and this and this, then the award of the costs at the end of the case could be a really significant factor.

CHAIRMAN BABCOCK: Yeah, that's a good point. Yeah, Justice Gray.

HONORABLE TOM GRAY: Well, you chose to say 10,000. I tend to think that Robert's number, if you're

talking about a truly self-funding process, a filing fee more in the nature of a hundred thousand is going to be necessary to self-fund these, because I mean, if you just take 18 judges at even the current salary, no support staff, with their other expenses associated with payroll, retirement, that kind of stuff, you're easily talking, you know, 6 or $7 million a year. And depending on how many of these cases there are, if there's a hundred new cases added a year, that's $63,000 per case. So 10,000 is I think on the low end of what it's going to need to be to be self-funding, but if that's what we're talking about trying to collect as the fee for one of these cases, you may see a whole lot fewer of them filed.

CHAIRMAN BABCOCK: Right, yeah. Justice Miskel.

HONORABLE EMILY MISKEL: That's what I had sort of facetiously talked with Robert about, is the upfront filing fee may be one thing, right. We don't want to discourage people from using the system. You could charge a fee for every other task that you do, so it's more like a toll road. You pay for your usage, not just, you know, being in the system, and I had joked that we could figure out the hourly rate for a litigation partner in Texas's top law firms, and I literally have no idea what that is, but I was saying $700, and say -- oh, no.

CHAIRMAN BABCOCK: Hush your mouth.

HONORABLE EMILY MISKEL: Okay, 1,700, so $1,700 to file --

MS. GREER: Not ours.

HONORABLE EMILY MISKEL: -- your type of motion, $1,700 for your notice, $1,700 for your -- because you know the lawyers on this case are spending an hour on it, so we just charge an hour for every task that you do at the court.

MS. GREER: And then the sanctions practice gets really interesting.

CHAIRMAN BABCOCK: Yeah, Richard.

MR. ORSINGER: It seems to me that if it costs a $100,000 to get in the door that nobody is going to open the door.

MR. LEVY: Right.

MR. ORSINGER: This court would have to be miraculously better than the regular court in Texas for someone to pay a hundred thousand dollars just to have this -- this judge.

CHAIRMAN BABCOCK: Well, yes and no, because if the competition is chancery court, then you pay a reasonable filing fee in chancery court, then you go there and you don't have to pay as you go; but arbitration, not only do you pay your filing fee, but you pay -- you know,

you get a bill for the arbitrators, and you pay all of the expenses, so you provide the facility where you have the arbitration and you buy lunch for everybody and dinner, so it's not a cheap thing.

MR. ORSINGER: So you think filing in the business court, even a hundred thousand may be cheaper than arbitrating?

CHAIRMAN BABCOCK: Yes. Yeah.

MR. WATSON: Oh, yeah.

MR. ORSINGER: In which event maybe people will try to get out of arbitration agreements.

CHAIRMAN BABCOCK: Or not have them to begin with, because once you have them they're not easy to get out of.

HONORABLE HARVEY BROWN: Or put in your contract you're going to business court, which the statute permits.

MR. WATSON: Richard, you may get people doing -- you know, both sides agree to bail out of arbitration and get into this for certainty, just because there's no review and the arbitrator can -- you know, if they go off the rails, they're off the rails, and that's all there is to it.

MR. ORSINGER: Interesting.

CHAIRMAN BABCOCK: There you go.

MR. ORSINGER: Wow. We'll see how it plays out.

CHAIRMAN BABCOCK: What else? Anybody else on this, on the topic of fees? Yeah. I'm sorry, I can't see you down there.

HONORABLE MARIA SALAS MENDOZA: So I guess the question is how do we do that up front, and I think it's impossible really, and I do think the issue is the inconsistency with filing fees and how many are just going to -- will begin at the district court level. So we haven't come to a conclusion, but my thoughts are that we start with using the current filing fee schedule that's already in place and then the OCA is supposed to report, right, and then you know what those numbers are, and that might be a better time to try to fix fees when you know what the numbers are. I think initially it's a lot of cost for a few cases. That's my guess, but not knowing that, I think it's really difficult to try to set those fees and be so inconsistent.

I don't disagree that maybe a motions charge and that kind of stuff might be useful, just as a vehicle of collecting some fees, but I think not knowing the numbers that I would argue that we should just be consistent about what the filing fees are. We already have a schedule for every other case and that we should

hold to that schedule.

CHAIRMAN BABCOCK: Judge Schaffer.

HONORABLE ROBERT SCHAFFER: It seems -- it seems inconceivable that we could start with the -- as our starting point with what the fees are now. The fees are now -- I think a filing fee in Harris County is around 300 to $400. If you start at that point with these courts and then a year from now you've done your analysis, and now the fee is going to be 7,500 or 15,000 then the bar is just going to go apocalyptic about it. Now, that could mean that your business court will not become a very popular place to go, but I think a better idea -- and I'm just thinking this as I'm sitting here right now is to just analyze how much the court is going to cost to run using all of the economic factors you can come up with, salaries, benefits, space, everything else, and figure out what each court is going to cost to run and then make a guess, because otherwise, the bar will go crazy when you go from $300 to $15,000 in six months.

CHAIRMAN BABCOCK: Well, is the -- the bar is not going to be paying those fees.

HONORABLE ROBERT SCHAFFER: Then let me restate that. Your client, Chip, is going to go crazy.

CHAIRMAN BABCOCK: And, yeah, Megan.

MS. LEVOIE: So we do have the costs. So

when the bill was passed OCA was required to do a fiscal note, so just in -- and this does not include the judicial salaries, because I don't think that the fees -- because they're state judges and the state pays for the salary for judges, so I don't think that that is included, that the fee should support the salary for judges, but just the operation of the court. So in fiscal year '24 it's 4.1 million, and in fiscal year '25 it goes down to 3.7 million, and that includes space, staffing, so the fees eventually would have to support that cost.

HONORABLE ROBERT SCHAFFER: Is that per court or total?

MS. LEVOIE: That's total, for business courts in total. And so you are right that we don't know how many cases are going to go through the court, so right now the way that we collect data in these cases would most likely fall into other contract or other -- all other civil cases, which doesn't tell us very much, but you can -- just looking at the data in calendar year '22 we had in other contract cases across the state about 12,500 cases filed, and then in all other civil cases about 32,000 cases. So that's a starting point, and I would say a majority of those would not fall under the jurisdiction of the business court.

We do have filing fee experts with OCA that

would work directly with the trial courts, so we're happy to help this committee try to come up with a number, but I agree that it's going to be difficult until we have better data, and we are required to report data after the first year of the business courts operation. We are looking into -- there is going to be a case management system that the judges will use, so we will be able to easily access this information. We have a couple of other programs that have to be fully funded by fees, and I will say it's very difficult and the budgets get very tight. One of them is the Judicial Branch Certification Commission. The other one is the Forensic Science Commission. So once you have the data you can have a better exact science to it, but I agree coming up with the number initially is going to be challenging, but we're here to help.

CHAIRMAN BABCOCK: The numbers you mention, Megan, when you say court staff, what is included in court staff? I mean, you're excluding the judge but who else?

MS. LEVOIE: So there's 43 FTE's that are going with the business court, and that includes staff attorneys, legal assistants, purchaser, HR specialist, a data analyst, the clerk. I believe there's two assistant clerks, and then each judge has a staff attorney, and I think there's one chief staff attorney as well.

CHAIRMAN BABCOCK: And does each judge have

a -- I mean, is a court reporter in there, and is a docket coordinator or case management person?

MS. LAVOIE: So the bailiffs, the sheriff's office is supposed to provide the bailiffs, but the State will reimburse those costs.

CHAIRMAN BABCOCK: So is that in your number, the bailiff?

MS. LAVOIE: The bailiff is not in our number.

CHAIRMAN BABCOCK: Okay. What about the court reporters?

MS. LAVOIE: The court reporter is not in our number as well.

CHAIRMAN BABCOCK: What about the case management office?

MS. LAVOIE: The case management system is in our number, and we already have a uniform case management system that we believe that the court will use.

CHAIRMAN BABCOCK: Okay. Great. So we've got more information than we thought we had, right, Judge Schaffer?

HONORABLE ROBERT SCHAFFER: It's interesting because the court reporter alone now, the salaries of court reporters are now inching up. In the metroplex area it's 130 to $140,000 a year for a court reporter. You add

to that the benefits and the equipment that goes along with that, so that charge right there could get us closer to $200,000 a court reporter, and that's just one of the charges not included in that calculation.

MS. LAVOIE: So you are right, and there is a shortage of court reporters and something that we're working on. That is something that we will need to look into what that cost would be.

CHAIRMAN BABCOCK: Yeah. Thanks, Megan.

HONORABLE EMILY MISKEL: So we talked about court reporters in committee, and so for purposes of establishing fees to make the system self-sustaining, I think that's an easier problem to solve, because we had talked about likely the courts in these cases might want to use court recorders or something that doesn't have a fixed salary cost, and you could move that cost to the parties.

HONORABLE ROBERT SCHAFFER: Wait until you hear from the court reporters on that issue.

CHAIRMAN BABCOCK: Well, and you're going to hear from the clients, too. You know, Judge Schaffer is right that the -- you know, I'm not paying the fees, but the client is, and they might howl about it, but remember these are cases where there's a lot of money at stake, and so a 15,000-dollar fee may not -- filing fee may not be

that much of an impediment for somebody that is trying to recover 200 million. And to Judge Miskel's point, the clients -- and Robert maybe can speak to this better than I, but the clients don't have -- my clients that I know of don't have as much confidence in the recorder type as opposed to the court reporter and the accuracy of the transcript. And, man, you just get one word that is -- that they don't catch, and it can be really important.

HONORABLE EMILY MISKEL: But that's an easier fee to assess, right --

CHAIRMAN BABCOCK: Yeah, it is.

HONORABLE EMILY MISKEL: -- because you could have a court reporter fee, right, and you could fully pass that cost on, and it doesn't have to be part of undefined overhead.

CHAIRMAN BABCOCK: And in California, any time you want a court reporter, doesn't matter what, a hearing or a trial or anything in between, the parties -- the party that wants the court reporter has got to pay for it.

MR. ORSINGER: Interesting.

HONORABLE MARIA SALAS MENDOZA: Is that a set cost, Chip, or hourly?

CHAIRMAN BABCOCK: Excuse me?

HONORABLE MARIA SALAS MENDOZA: Is that a

set cost or hourly or by time appearing?

CHAIRMAN BABCOCK: I think it's hourly. I don't think it's a set fee, but I'm not sure, but I think it's hourly.

MS. GREER: Well, is that -- I mean, do they basically bring in a private court reporter?

CHAIRMAN BABCOCK: Yes.

MS. GREER: So they take it completely off the court system.

CHAIRMAN BABCOCK: Yeah, superior courts, at least in LA county, I think it's pretty much statewide, don't have their own court reporters. You have to bring in a private court reporter.

MS. GREER: I mean I think that's something we can certainly play with --

CHAIRMAN BABCOCK: Yeah. Megan, did you have -- was that your hand, or was that Jackie's?

MS. DAUMERIE: I was saying thanks for jumping in. Sorry, it was my hand.

CHAIRMAN BABCOCK: All right. That's noted on the record now.

MS. DAUMERIE: Great.

CHAIRMAN BABCOCK: Okay. Justice Miskel.

HONORABLE EMILY MISKEL: Okay. So the number I heard from Megan was 3.7 million after the first

year; is that right?

MS. LAVOIE: Yes.

CHAIRMAN BABCOCK: Right.

HONORABLE EMILY MISKEL: Okay. And so if we assume that there's a hundred thousand dollars a year of other costs per judge, that would be like $4.7 million, if you had a thousand cases, that would be a 4,700-dollar filing fee. I don't know, are we thinking there's going to be a thousand? Are we thinking there's going to be like 500 cases? So 500 cases would be a 9,000-dollar fee.

HONORABLE ANA ESTEVEZ: You probably have a number to that, too. How many cases?

MS. LAVOIE: How many?

HONORABLE ANA ESTEVEZ: Did anybody check what we've had in the past?

MS. LAVOIE: We don't know. That was those first two numbers that I threw out that they're lumped into two different case categories, and we can't break them out. I mean, we could -- we probably could look at -- go to a couple of the biggest counties and look at the past five years and do a study that way and work with the clerks on -- on getting a more accurate number.

MS. GREER: That would be super helpful.

HONORABLE TOM GRAY: Maybe Exxon could tell us how many there are.

CHAIRMAN BABCOCK: You know, the business court, at least initially, is in competition with arbitration and Delaware chancery, and there are a lot of contracts that mandate arbitration, and you're not going to be able to avoid that, absent agreement from the other side, which is not likely to be forthcoming, and there are also a lot of agreements that mandate exclusive venue in Delaware, either in chancery or in superior court, and you're not probably going to avoid that either. So it's going to take some time before the -- before the business interests become comfortable with this business court, so if -- if the results are acceptable to the business community then the usage will increase, because they'll take arbitration out of their contracts and maybe they'll put Texas business courts in their contracts, but that's not going to happen right at the beginning.

HONORABLE ANA ESTEVEZ: Aren't you just going to implement a few at a time anyway?

THE COURT: Aren't we what?

HONORABLE ANA ESTEVEZ: Implementing a few at a time. I don't know that the Ninth Region needs one in two years.

HONORABLE EMILY MISKEL: They've started with the biggest cities.

CHAIRMAN BABCOCK: Right.

HONORABLE ANA ESTEVEZ: Right, so you'll make some money first.

CHAIRMAN BABCOCK: Yeah, Harvey.

HONORABLE HARVEY BROWN: I wonder if OCA could change its form that designate the type of cases so that we could start keeping track of data quickly in looking at the types of cases that are going to go in the business court. Like derivative proceedings, I doubt you have a checkbox for that right now on the form, I don't remember, but if we had some more checkboxes you might get better data, at least in the next six months to a year to find out how many cases would actually fit.

MS. LAVOIE: I mean, we're -- I don't want to jump ahead, but for the Fifteenth Court of Appeals we're working on -- on the docketing statement that parties have to file. Because of the transfer of cases to the Fifteenth Court of Appeals, we're working on that and making a change in the case management system. The problem is, is that for the appellate courts they use one case management system, but for the trial courts they use -- there's probably 10 different bigger case management systems and then some have homegrown, and so that is something that we can look up.

CHAIRMAN BABCOCK: Robert.

MR. LEVY: You do make a good point about

the fee structures in arbitration, and typically they are based upon the amount in controversy. So I just want to test, would this committee have any concerns about a fee structure that is based upon the type of case that's being brought and/or the amount in controversy as a way to, you know, assess fees or have higher fees for cases that are -- that have more controversy? And I will point out in the arbitration area the parties do pay the fees of the arbitrators as well as the administrative entity, whether it's AAA, ICC, JAM, so those fees get very expensive, but it's still a choice that many parties will make to adjudicate disputes.

CHAIRMAN BABCOCK: Absolutely. Roger, before -- just to follow up, Robert, what's the argument against having a gradient of fees?

MR. LEVY: Well, the question is, is the amount of the fee actually determinative of the complexity of the case or the time that it would take a judge to adjudicate it and is that a fair way to -- to gate keep the case, because you could have a 10 million-dollar case that's much more complex than a 1 billion-dollar case.

CHAIRMAN BABCOCK: Yeah, but isn't the focus on what you're trying to get the plaintiff to pay? So you say to the plaintiff, you know, the ABC Company, hey, if you're going to claim a hundred million, I don't care how

complex the case is, if that's your recovery, you're going to pay more than if you're only claiming 10 million.

MR. LEVY: Right.

CHAIRMAN BABCOCK: Because as a portion of what you're hoping to recover, it's a smaller percentage.

MR. LEVY: I think that's -- I think personally I think that's right. I do also agree with or the comment that Richard made that this -- the fee award should be a recoverable cost, and so that if you prevail you would recover that fee as well as other court costs.

CHAIRMAN BABCOCK: And what if the defendant says, hey, I agree this is eligible to be in business court. I don't have any argument against it, but I'm a small mom and pop organization. I can't -- I can't pay a hundred thousand-dollar fee at the end of the case, and I can't -- you know, it's just you're being unfair to me because you're allowing the big company to sue me, and I can't compete with the big company in terms of resources.

MR. LEVY: I think that's a policy issue that the Legislature would need to address if there's a --

CHAIRMAN BABCOCK: And they do allow for waiver of fees in the interest of justice, so Judge Schaffer, and then Richard.

MR. ORSINGER: My point was your point, was that there's discretion to waive the fee based on economic

considerations or justice.

CHAIRMAN BABCOCK: Right. Yeah.

HONORABLE ROBERT SCHAFFER: It's also based on you as the plaintiff deciding which forum you want to be in. If you want to be in the state district court with an elected judge, the system we have now, the fee is $300, $400, whatever it is. If you want to go in these special courts which you've asked for from the Legislature, you're taking advantage of, then you're going to have to pay for it. The legislation is clear on that issue, so you pick your forum and then you pay the fee accordingly.

CHAIRMAN BABCOCK: Yeah. Harvey.

HONORABLE HARVEY BROWN: But that wouldn't be true if I didn't want to be in that forum and it was removed and then at the end of the case I have to pay a 50,000-dollar filing fee that if I'd known I was going to have to pay I may have done something different. I mean there is an access of justice. There are some parties that may be able to afford, you know, a 5,000-dollar fee, but you tell them it's going to be a 20,000-dollar fee they're not going to use the business courts, and the reasons that we want the business courts for predictability and uniformity, et cetera --

CHAIRMAN BABCOCK: Right.

HONORABLE HARVEY BROWN: -- might be

destroyed.

CHAIRMAN BABCOCK: And unintended consequences, if a plaintiff thinks that they're at risk of getting removed to a business court in Texas and they have a choice of whether they go to Texas or New Mexico or somewhere else, then they say, "I'm not going to go to Texas because I don't want to run that risk."

HONORABLE HARVEY BROWN: Yeah.

CHAIRMAN BABCOCK: Pete.

MR. SCHENKKAN: It seems to me that it is a policy question. It's a policy question that in the first instance lies with the Texas Supreme Court, and the policy goal set by the Legislature is to encourage the success of the business court initiative in Texas, and you can fail in either direction. You can fail in setting it too high and you don't have enough customers for the whole thing to be worthwhile, or you can fail in setting it too low and the State has to eat a bunch of costs for what should have been on the parties, who at least the ones that chose voluntarily to initiate this process. And given that, given that the Court's got to call it the first time and the Court can err in either direction, the single most important thing it seems to me for the Court is to demonstrate that it tried its best to get it right.

Thus, Megan, I think the single most

valuable potential input here is what realistically OCA can get the benefit -- can provide the benefit of from, as you say, the thing that makes the most sense is starting with these five metropolitan areas, see what you can get from each of those quickly that sheds some light on this. And then the Court says, look, we did our best and then it's back in the real policymakers hands two years from now to say this didn't go very well in one direction or the other, and then they'll -- they can weigh in again, say they don't want to do this, they've changed their mind about the whole idea, or they do want to give it some more, but they're going to give us some different rules about these things.

CHAIRMAN BABCOCK: Yeah, there is a tension between the Legislature's desire for business courts to succeed and their desire not to have to pay for it.

MR. SCHENKKAN: Yes, precisely. Not to have to vote that their constituents pay for it.

CHAIRMAN BABCOCK: And the latter may inform the success or level of success of performers. So, Roger, sorry.

MR. HUGHES: Well, since the Legislature has asked us to set a fee for court support, I don't think right now it's advisable to have a sliding scale based on the amount you allege. The mandate is we've got to look

at supporting the Court. That's how we set the fees. The second is, I'm not opposed to a pay-as-you-go system. I mean, whoever wants to get in the door has got to pay the filing fee, whether it's by removal or by original filing, but then maybe fees for handling motion. We already do that in the court of appeals. Doesn't seem to deter anybody from -- of course, it's not a great deal to file a motion in the court of appeals, but it doesn't seem to deter people from filing motions. Personally, I think what's really going to drive business to or away from the court is the quality of judging they get, and if people think they're going to get smart, savvy, fair-minded judges for business matters, they'll -- they'll pay the fee. But if they don't think that's what they're going to get, they're not coming no matter how low you set the fee.

HONORABLE R. H. WALLACE: About 50 percent of them will feel that way.

CHAIRMAN BABCOCK: That pattern seems to follow no matter what court we're in, right?

Justice Gray, did you have your hand up? Did somebody else have their hand up? No?

MR. ORSINGER: Chip.

CHAIRMAN BABCOCK: Yeah, Richard.

MR. ORSINGER: I was going to suggest, I was just thinking about how unpleasant discovery disputes are,

and I could imagine between two major businesses there could be quite a few. Right now the court can cost-shift the attorney's fees on discovery objections, discovery ruling, but our rule perhaps should permit the judge to impose the court costs associated with contentious matters, so right now we have fee shifting from one party's attorney's fees to the other, but we could also have the cost to the system also being shifted in the rulings on individual motions.

CHAIRMAN BABCOCK: No, that's a great point, and in a lot of big, big cases there is a discovery master appointed by the court, and the parties pay the master. So you could -- I mean, one idea would be that for discovery disputes the trial court has the discretion to appoint a master, and the parties will pay for the discovery master and then some and the then some would go to the court.

MR. ORSINGER: Yeah, and I think that it's also important to incentivize people to be reasonable. So that cost which maybe is paid 50/50 to begin with, you should give the master or the judge the authority to assess that cost against the party who's acting unreasonably.

MS. GREER: And then just a set 10,000 per Rule 91a, a motion and the same for TCPRA.

CHAIRMAN BABCOCK: All right. Now Justice Gray has got his finger pointed.

HONORABLE TOM GRAY: Well, and following up on Marcy's idea, we could just go ahead and make the fee contingent upon the result and part of that fee goes to pay the judge.

I'm kidding, of course. Boy, nobody said anything.

PROFESSOR CARLSON: We're in shock.

CHAIRMAN BABCOCK: The record will reflect that shock --

HONORABLE TOM GRAY: You can't do that, people.

CHAIRMAN BABCOCK: Roger.

MR. HUGHES: In the same vein maybe the judges should be given the -- a percentage of the fees collected as a bonus.

CHAIRMAN BABCOCK: Another facetious comment, the record should reflect.

HONORABLE ROBERT SCHAFFER: Yeah, I'm sure everybody wants that stuff on the record.

CHAIRMAN BABCOCK: Yeah, right. Robert.

MR. LEVY: So to Richard's point, the statute that requires -- requires the Court to develop the fees, talks about the costs -- set fees for filings and

actions in the business court. Now, the question is, is actions the cause of action or requested action. There is in Delaware a provision where they -- they set out fees when -- depending on the number of defendants, the types of claims that are being asserted, but there's also a cost of $150 per day for any court proceeding scheduled upon the request of a party, whether in person or telephonic. So that would be a way to address motion practice disputes on discovery and things of that nature.

CHAIRMAN BABCOCK: Yeah. Good point. I forgot about that. What else? Anything else on fees?

Well, that may be of some help, Marcy, more questions than answers, but -- yeah, Harvey.

HONORABLE HARVEY BROWN: I guess I have an initial reluctance to be able to shift court costs to the party that does not want to be in that court. It just seems like that the party that elects to be there, at least they know what they're taking on for the fees, but if I didn't want to be there and that gets assessed to me, that seems a little bit unfair to me, but I haven't thought about it a lot, but I just encourage the committee to at least think about that. That's an automatic in state court right now, pretty much. I don't know that it should be the same rule.

CHAIRMAN BABCOCK: Yeah. Good point. Okay.

Any other issues that we need to discuss about the business court, Marcy?

MS. GREER: I mean, I think this has been a great discussion. We have a lot more to talk about, but I realize we have a pretty full docket this time.

CHAIRMAN BABCOCK: Yeah, okay.

MS. GREER: Anybody else on the committee have anything they want to bring up right now?

CHAIRMAN BABCOCK: Well, I planned to devote until the lunch hour to talk about the business courts and the Fifteenth Court, so I don't know how much time you're going to need for the Fifteenth District Court of Appeals, but we could go to that now if you want.

MS. GREER: Sure.

CHAIRMAN BABCOCK: Okay.

MS. GREER: Sure. So with the Fifteenth Court it's more -- it's less complex by comparison, but it's definitely going to be complicated. I think based on our discussion, I mean, I was going to ask the same question, do we put this in the Rules of Appellate Procedure or elsewhere, and this seems more naturally I think to go in the Rules of Appellate Procedure. We have -- at this point we have not spent a lot of time dissecting this bill. We were kind of going through as much as possible of the business courts bill, but we

certainly have gotten, you know, questions coming in about how this is going to work as well and how cases are going to be transferred, et cetera. You know, I don't have a lot of questions at this point with respect to this bill, just because we've been focused I guess on the business courts.

CHAIRMAN BABCOCK: Okay. Anybody else have any thoughts about the Fifteenth Court? Yeah, Robert.

MR. LEVY: I just wanted to ask in terms of the OCA analysis, do you currently have a sense of how many cases would be in the Fifteenth Court that are now in other courts of appeal?

MS. LAVOIE: We did a hard estimate, and I think it was less than -- it was about around 150 cases.

MR. LEVY: Okay.

MS. LAVOIE: But I wouldn't say that that is a reliable estimate.

MR. LEVY: But that's a helpful rough number.

MS. GREER: And you said you were working on a report on -- on the Fifteenth Court of Appeals.

MS. LAVOIE: Well, we have to report also how many cases and what kind of cases are going through the Fifteenth Court of Appeals after --

MS. GREER: After the --

MS. LAVOIE: After the court is created.

MS. GREER: So what we need is like McKenzie to come in and advise us.

CHAIRMAN BABCOCK: Another facetious comment on the record we'll note.

MS. LAVOIE: In the testimony they -- there was several -- or a few courts of appeals judges that testified about the numbers, and we've provided just a -- the number that I gave you, so --

MS. GREER: No, that was not to be criticism of you guys at all.

MS. LAVOIE: We will in the future and moving to collecting case level data have more accurate and granular information, but right now it's just put in buckets, so it's difficult.

CHAIRMAN BABCOCK: Justice Miskel, and then Richard.

HONORABLE EMILY MISKEL: Did you say a hundred cases in the Fifteenth?

MS. LAVOIE: 150.

HONORABLE EMILY MISKEL: 150. Okay, it just seems low because it's any lawsuit against a government agency or a government officer, right? So I would have expected way more.

MS. LAVOIE: So, I mean, basically when we

were looking at it, we took the numbers that we could get from the Third Court and then we applied a percentage -- and I don't have it with me, but we applied a specific percentage, and I can't remember if it was like one or two percent to the rest of the 14 courts of appeals to come with that number.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: Yeah, just an inquiry, is the Fifteenth Court of Appeals going to get all of the administrative appeals that the Austin court of appeals is handling right now?

HONORABLE EMILY MISKEL: No.

MR. ORSINGER: No?

HONORABLE EMILY MISKEL: Oh, I was answering a different question.

MR. LEVY: Are you saying the ones that are currently there, like the --

MR. ORSINGER: No, I'm talking about the category of administrative appeals in the future once the Fifteenth Court is established. Is all of that routed from the Austin court to the Fifteenth Court?

MR. LEVY: That's what the statute contemplates.

MR. ORSINGER: Okay. So why can't we look at that part of the docket of the Austin court of appeals

and get a pretty clear --

MR. LEVY: I'm assuming that's what OCA did.

MR. ORSINGER: Is that what you did?

MS. LAVOIE: Yes.

MR. ORSINGER: All right. I'm catching up. Thank you.

MS. GREER: I'm really astounded by that number, though. It seems low.

HONORABLE ANA ESTEVEZ: It seems low.

CHAIRMAN BABCOCK: Skip.

MR. WATSON: Just two clarifying questions. Is there a cheat sheet anybody did on all of these subsections in section 105 that this thing, you know, applies to? I mean, they are just, you know, such and such and such and such a code, you know, it will have jurisdiction over them. It's not just administrative appeals, and I have no idea what that laundry list is. Yes.

HONORABLE EMILY MISKEL: I think it's a lot of small cases that can be brought by the government, by the State of Texas, as in like the attorney general. So, for example, cases under the Family Code. That's all your IV-D child support cases that are brought by the State. You don't want those going to the Fifteenth Court of Appeals. The next one is 7B of the Code of Criminal

Procedure. Those are stalking protective orders and other protective orders that can be brought by the State. So I think it's stuff that's high volume dockets that can be brought by the State that they don't really need to be in this specialized Fifteenth Court.

MR. WATSON: So it's all over the map. This is not just administrative. My point was I was saying Family Code, Government Code, Local Government Code, just on and on and on, so I have no idea what their jurisdiction is without something saying what this -- you know, what each of these talks about, and I didn't look them up.

The other question is section 110, unless I'm misreading this, the Travis County court can transfer on its own motion actions pending in the Travis County district court to the Fifteenth Court of Appeals. Am I missing something there, or I mean, I -- and that appears to go on in 1.11, other kind of transferring apparently from -- did anybody look at that, or am I just totally misreading it?

MR. SCHENKKAN: All they're doing there is changing something that currently allows Travis County district courts to kick a case up to the Third Court to instead allow them to kick it up to the Fifteenth.

MR. WATSON: Okay.

MR. SCHENKKAN: That's the only change, is that -- and it's in parallel with the notion that we're not going to allow these appeals in the future to go to the Third Court. We're going to instead send them to this Fifteenth Court that -- whose district is statewide.

MR. WATSON: Just to fill in a big gap of my ignorance, Pete, is that -- that doesn't involve cases where there are fact findings, are there? Is it just a pure question of law that gets kicked?

MR. SCHENKKAN: This doesn't happen very often. This is one of those deals where we keep saying it sounds like a good idea.

MR. WATSON: Yeah.

MR. SCHENKKAN: But in practice nobody thinks it is, so they don't really -- I may be exaggerating.

MR. WATSON: I just see no limit to what the Travis County district court can kick up.

MR. SCHENKKAN: If you look at the words of 1.11, for example, at page nine in the statute, "The Travis County district court can request a transfer if the district court finds that the public interest requires a prompt authoritative determination of the legal issues in the case," knowing that it would normally be --

MR. WATSON: Yeah, that's in 1.10, too.

MR. SCHENKKAN: And then the transfer may be granted by the court of appeals if it agrees. So you've got to have both courts agree it would be better if it went straight to the appellate court.

MR. WATSON: I didn't know that could happen.

MR. SCHENKKAN: All they're doing is moving that to the Fifteenth instead of the Third.

MR. WATSON: Thanks.

THE COURT: Justice Miskel.

HONORABLE EMILY MISKEL: And I was going to say that subsection specifically applies to declaratory judgments about rules, so it's not any type of case.

CHAIRMAN BABCOCK: Okay. Anything else about the Fifteenth Court? Yeah, Justice Gray.

HONORABLE TOM GRAY: There has been some discussion, as you might imagine, among the courts of appeals about how to get this started. So that everybody understands, the cases that can be transferred to the Fifteenth Court of Appeals are those that are filed after September 1 of this year and then on September 1 of '24 all of those cases that have been identified as being in the exclusive jurisdiction of the Fifteenth Court get transferred to it.

One of the questions that we have had in the

interim, for this interim year is, one, how do we go about identifying those? OCA is working on that as we speak about both the docketing statement and then identifying them within our management system. One of the questions that is not -- has not been answered that the Supreme Court needs to be thinking about is between September 1 of '23 and September 1 of '24 can those cases that are Fifteenth Court of Appeals cases, or will be if they are still pending on September 1 of '24, can they be transferred for a docket equalization process? Workload equalization, not docket equalization. It's file, filings equalized, but under the current transfer system. And that is in part precipitated by the fact that the Third Court is an overfiled court right now and is transferring out cases. So it's a real problem. I mean, sometimes Texarkana, Corpus, El Paso, they get one of these type cases transferred to them, and so -- and how are you going to track those and then make subsequent transfer later.

A more interesting question from a -- from the practitioner's perspective is to what extent should the courts of appeals work those cases in the year of September to September and what happens if they get to the point that the case is ready for a disposition? Do you -- I mean, it's a very philosophical question among the Chiefs. Does the Legislature want the Fifteenth Court to

decide these cases that are being filed in this year, or is the focus really on getting the disposition done? Do we want the answer regardless of what court and go ahead and let the existing 14 courts work the case, or does it become what we call at issue, ready to be decided, and we abate the case and wait until the docket transfer September 1 of '24? A lot of difference of opinions. I don't know that that's a committee rule issue or simply a, Supreme Court, this may be something you may want to be thinking about, because I think we need to approach it uniformly across 14 courts that are --

CHAIRMAN BABCOCK: What do you think the intent of the Legislature was?

HONORABLE TOM GRAY: I think the whole point of the business courts and the Fifteenth Court of Appeals is speed and predictability, and I think it is some -- there's some tension there with the way that our existing dockets work, but I see nothing in what the Legislature has done that would suggest that if we can dispose of one of these cases before September 1 that we should just put it on the shelf and wait for the Fifteenth Court to get there and handle it. So I think the Legislature intended us to push these out the door as quickly as possible. I mean, a lot of these could very easily be accelerated appeals anyway, and so I don't see that they -- but I will

say I'm in the minority out of the 14.

CHAIRMAN BABCOCK: Huh. Well, say it proceeds as you indicate and so you decide a case. What sort of remedy does the losing party have? Did they say, wait a minute, the Waco court shouldn't have decided this because the Fifteenth Court is waiting in the wings and they were supposed to decide it?

HONORABLE TOM GRAY: That will be a question that Jane and her colleagues get to answer at some point.

Now, one part that does need to be in the rules I think is if we do dispose of these cases in this time period --

CHAIRMAN BABCOCK: Yeah.

HONORABLE TOM GRAY: -- this one-year transition, what if it's in a June, July, August time frame and they file a motion for rehearing?

MR. WATSON: Yeah.

HONORABLE TOM GRAY: Where does it go? I mean, so that's a -- that would be in the -- potentially in the rules.

MS. GREER: And also the emergency rules. I'm glad you raised this because this is something that I meant to include as well, because Chief Justice Bern also reached out to me about it, and I mean, they're very complicated questions, what do we do with the emergency

proceedings. I mean, they shouldn't sit on a motion for stay when there's no court that could grant it.

HONORABLE TOM GRAY: And so, I mean, there are some -- but it's not as much about the operation of the Fifteenth Court of Appeals as it is about the transition, and that's why I raise the issues here because they're part of this, but they're not really part of the rule writing part, except -- or the ongoing operations, except possibly -- well, even the motion for rehearing is a transition rule.

MS. GREER: Right.

CHAIRMAN BABCOCK: And Justice Gray, for the record, is very demonstrative and so with his hands he's pushing the problem to Marcy and then washing his hands of the whole problem. So what else?

MS. GREER: A related question is what would happen to the stats for the court, and again, this may be operational more than others. If they don't transfer the cases and they just sit on the dockets, does that kick in -- it makes it look like the disposition rates are going to be off kilter, and it may even impact docket equalization orders, so --

CHAIRMAN BABCOCK: Well, I don't want to quote the Chief, but he -- often I hear him say that, you know, we should not have a system of justice that we know

just doesn't work, so allowing cases to just sit on a docket because of this transition thing doesn't seem to me to be something that is good policy or good practice. So that's my opinion.

HONORABLE TOM GRAY: I'll quote you on that.

CHAIRMAN BABCOCK: I'll be in the record. With my hand raised.

HONORABLE TOM GRAY: Well, since Tracy was unable to be here today, the other Chiefs, which we have a meeting scheduled in early September, they reluctantly are relying upon me to make a report to the Chiefs of what happened today in regard to this. So that's when you will be quoted.

CHAIRMAN BABCOCK: Okay. Sounds good to me. Harvey.

HONORABLE HARVEY BROWN: So I guess following up on that point, it seems like you're going to need to maybe think about drafting two sets of rules that are going to be impacted by the appellate procedures. One is almost a set of transition rules as a draft for the Supreme Court maybe to consider, such as motions for rehearing, because you don't want to create disincentives for the court to not write any opinions in June or July because motion for rehearing would be heard by another court. So I think you need some transition rules, but

they don't need to go in a permanent rule book.

MS. GREER: That's a good point.

CHAIRMAN BABCOCK: Yep. All right. What else? Anything else? Done with this for today, and we'll bring it back on October 13th, I think, which was our next meeting?

MS. GREER: Okay.

CHAIRMAN BABCOCK: And y'all are going to be done by then?

MS. GREER: We're definitely going to have a report, and we're going to have some things in writing to discuss. I mean, I don't know that we can fully vet this as a group, but we can certainly -- and we can -- I mean, to Judge Brown's point, I do think the idea of an interim rule, a transition rule, would be a good thing and separate that out so that we can focus on that to get us through, because --

CHAIRMAN BABCOCK: Yeah.

MS. GREER: -- there would be a little more time for the other rules, but --

CHAIRMAN BABCOCK: Justice Bland, is my understanding correct that the Court wants this committee's work done by the October meeting on the business court and on the Fifteenth District Court? Jackie, no pleading.

HONORABLE JANE BLAND: That was what was in the Chief's referral letter.

CHAIRMAN BABCOCK: Oh, so you're going to put it off on somebody who's not here.

HONORABLE JANE BLAND: Correct. And look, I think there will definitely be more work to be done after the committee presents its report in October, because they'll -- we and they will need guidance from the larger group about next steps, and we have a little bit of time, but not a lot of time --

MS. GREER: No, I know.

HONORABLE JANE BLAND: -- to consider that, and, you know, it's mostly trying to stick to a schedule that keeps the engagement flowing so that we can come to a place of rest in time for my colleagues to consider the work of this committee.

CHAIRMAN BABCOCK: Not to mention Jackie.

HONORABLE JANE BLAND: My colleagues including me and all of the wonderful people that we work with, and of course we also have that -- unusually we have this intersection between rules and operations with OCA, and I know during the discussion about fees, for example, I was wondering whether the rules could say what we need to say in connection with fees in rules, but place sort of the operational piece of it, which would maybe be the

amount set and things like that, over with Megan and OCA because they are going to be the people that are going to be working on that. So that to me would be one place that maybe we wouldn't have definitive answers in October, but just an idea of where we might rule making in connection with that and where we think that it's more operational policy of the courts, in which case we'll do what Justice Gray was doing and push it that direction.

CHAIRMAN BABCOCK: We've got an image now. So, Marcy, if I can interpret what I just heard, we need to have as much of a report as final report as we can have. If you need more resources, talk to me offline and we'll see if we can get some other volunteers to help you-all, but this I think is one of the most important things we've done, and so we need to --

HONORABLE JANE BLAND: And, Chip, to that end, I think at the very first meeting when we got the referral and met, I guess in June, we -- when the committee got the referral, I mentioned that there may be people that have a particular interest in this that are not on the committee, but if you are one of those people and you would like to serve, you know, please let Marcy and Chip know, because we could use as much help as we can with this project.

MS. GREER: And can I ask, do they have to

be a member of this group, or can they be someone who -- there have been a couple of people who have approached me that are particularly interested, and I haven't made any commitments because I just don't know.

CHAIRMAN BABCOCK: People in the SCAC or outside the SCAC?

MS. GREER: No, outside.

CHAIRMAN BABCOCK: I mean, we rely on resources outside the SCAC all the time.

MS. GREER: And so theres's --

CHAIRMAN BABCOCK: They don't get to vote, and whether you have them as part of your deliberations or not, we're kind of fluid about that, but this meeting is open to everybody. It's open to the public, so if they want to show up here, and, you know, I won't let them take over the meeting, but I'll certainly let them talk if they want to talk.

MS. GREER: Well, I was thinking more for the subcommittee meetings, if that's okay.

CHAIRMAN BABCOCK: Yeah.

HONORABLE JANE BLAND: We used people outside this SCAC for the Remote Proceedings Task Force, and --

CHAIRMAN BABCOCK: Right.

HONORABLE JANE BLAND: -- I know that

Justice Boyce has relied on additional help in connection with -- I don't know if it was domestic violence protection -- protective orders, and it's really not -- it's really great when somebody volunteers and offers that kind of help, and in particular, looking toward the future and future committee membership, so, yes, if you can find --

MS. GREER: Especially as we go into the, you know, sub-subcommittees I think it's going to be really important, so thank you for that. That's all.

CHAIRMAN BABCOCK: And it goes without saying, I mean, you don't just let them take over the subcommittee.

MS. GREER: No, no.

CHAIRMAN BABCOCK: But that's probably not the type of people you're talking about. Justice Miskel, and then Richard.

HONORABLE EMILY MISKEL: And just a fine point, I don't want to get too in the weeds, but on the filing fee thing, you may have to set forth the dollar amount in the rule because as our clerk helpfully pointed out, the Legislature has set filing fees by statute, and so to the extent our filing fee conflicts with a statute, you may have to overrule that by rule. We talked about it because the Legislature has directed us to do two

inconsistent things, right, set filing fees to make the court self-funded and then they previously may also have set different conflicting filing fees, so that's just something that may have to be specifically addressed.

HONORABLE JANE BLAND: Those would be statutory conflicts and not rule conflicts. There's a sensitivity about that word "overruling by" -- or that phrase "overruling by rule" right now as you might know.

HONORABLE EMILY MISKEL: That's why I wanted to -- that's why I wanted to explicitly say it.

HONORABLE JANE BLAND: I think the Governor has convened a task force that's going to look into that -- that interplay and how it results in the best product for the State.

HONORABLE EMILY MISKEL: Okay. But just if a statute says the filing fee for a civil case is $335 and then we say the filing fee for a business court case is $3,500, we just may have to address that somehow.

CHAIRMAN BABCOCK: Well, yeah, but the statute -- the business court statute says, you know, addresses the fact that there are going to be filing fees that are going to support the court, so $350 is not going to support the court, so I think you've already got permission from the Legislature to do that myself, but anyway. Richard.

MR. ORSINGER: I just wanted to say that especially during this ramping up period I think Justice Bland's suggestion about making the fee structure something that comes out of OCA is better because it's flexible, and we may find that what we initially assume doesn't work out and it needs to be changed or may need to be changed multiple times in the first year or two, and that would be very cumbersome if you tried to do that through the rule process. So it seems to me like having a schedule that can be interactive based on --

MS. LAVOIE: I think that we can -- OCA can recommend to the committee and the Court what we think based on our estimates the fee should be, but I think OCA doesn't -- we don't have any authority by statute to set a fee for anything. So I think that it would still have to be in the rule.

HONORABLE JANE BLAND: Or order.

MS. LAVOIE: Or order, that's true.

MR. ORSINGER: Well, administrative order.

MS. LAVOIE: Yeah, that's true.

CHAIRMAN BABCOCK: So, Megan, when you do something like that which is very deft, you push back like that at Richard.

MS. LAVOIE: And I think we definitely could come up with a recommendation just based on our work that

we have done with -- like so the Judicial Branch Certification Commission, they do have authority to set fees, so they periodically do raise their fees based on budget and needs, so we do have experience in doing that, but I don't think we have the authority to say what the fee should be, that it would have to be in rule or ultimately perhaps in statute later on.

CHAIRMAN BABCOCK: Great, thanks. Okay. We're done, right, on the Fifteenth Court?

MS. GREER: I think so.

CHAIRMAN BABCOCK: Now, everybody is sitting there thinking, oh, we're getting lunch now. No. Bill, how long do you think we're going to be on clerk's record, or is it Elaine? Which of the two of you is doing it, Elaine?

PROFESSOR CARLSON: No.

HONORABLE BILL BOYCE: Scott. I'm going to defer to my learned colleague, Scott.

CHAIRMAN BABCOCK: How long do you think we're going to be with this?

MR. STOLLEY: It depends on if Chief Justice Gray gets to speak or not.

CHAIRMAN BABCOCK: What about hand signals?

PROFESSOR CARLSON: Incoming.

HONORABLE TOM GRAY: I deserved that.

CHAIRMAN BABCOCK: All right. So all kidding aside --

MR. STOLLEY: I mean, we spent a good hour on it in our last call, so I don't know if it would take that long this time. I think we honed in on some of the issues. I mean, it could be 30 minutes, it could be maybe an hour.

CHAIRMAN BABCOCK: This group could easily take that long, so we'll break for lunch right now, and we will be back at 1:00 o'clock sharp.

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

CHAIRMAN BABCOCK: Scott, you're up to bat, and we're here to talk about the clerk's restaurant -- not restaurant, record, and we've got Tab E as the subcommittee report. So take it away.

People quit talking, to Richard, in a rude way.

HONORABLE ANA ESTEVEZ: They can't hear you.

CHAIRMAN BABCOCK: With no self-awareness. Finally, those two.

MR. SCHENKKAN: Sorry.

MR. STOLLEY: Ready?

CHAIRMAN BABCOCK: We're ready.

MR. STOLLEY: So in House Bill 3474 the Legislature added section 51.018 to the Civil Practice and

Remedies Code. In general what this new section does is it creates a process for the appellant to file an election to file an appendix in lieu of the clerk's record, and when that happens the clerk is prohibited from preparing or charging for a clerk's record.

Now, when we discussed this in the subcommittee none of us had any insight as to why the Legislature passed this new section. We hypothesized perhaps a legislator got burned by a district clerk charging an exorbitant amount for a clerk's record. That's certainly a possibility. When we discussed this we had four courts of appeals justices ask to be on the call with us. So that told me immediately that this was a hot button issue to the appellate courts, and so then we decided to draft a new rule that for the most part tracks the new section, but we realize with analysis that this new statute has significant gaps in it, and so we felt like we needed to try to fill in some of those gaps in drafting this proposed rule.

The first decision we made was to propose a new rule, numbered 34.5A, and I know that numbering is a little odd, but our thought process was this. I originally drafted the new provision as a subpart under current Rule 34.5, which is the rule for clerk's records. The group was persuaded that it really doesn't belong in

34.5 because it's intended to supplant the whole idea of a clerk's record rather than supplement the idea of a clerk's record, so we felt like it probably needs to be its own rule. We couldn't -- well, we could, but we decided we would not propose making it sequential as 34.6, because 34.6 as it exists right now is for the reporter's record, and when you start changing the numbers then it makes historical research looking for annotations, et cetera, more difficult, so we decided to create this new number in between the two current rules.

Now, I made a joke to Justice Gray's expense earlier, and one of -- he was one of the justices on the call, by the way.

CHAIRMAN BABCOCK: Yeah, but he's not making any further comment today.

MR. STOLLEY: Okay. One of the ideas he threw out was something I think he wants to discuss at the end, and I think that makes sense, but he had the idea of why are we going to do a rule at all, it's in a statute. So we can talk about that later. In the meantime, I suggest we talk about this proposed rule and then maybe circle back to that question. So subsection (a) is pretty much from the statute. The appellant has to file an election within 10 days after filing the notice of appeal. Then that triggers the right to file the appendix in lieu

of the clerk's record.

The next section (b), again, is mostly from the rule, because in this part of the rule the statute actually ventures into not only the option to file an appendix but also when it's due and when that makes the brief due. So now we've got the Legislature telling us when the appendix plus the brief are due, so we've laid that out in here. We do have this exception in here which says "except by order of the court under Rule 38.6(d)." It was our thought that the courts should have the ability to grant extensions on -- on when the appendix and the appellant's brief are due.

And, by the way, one thing we did talk about, going back to (a), which says, you know, you've got to file this election within 10 days after your notice of appeal. We talked about should courts have the ability to extend that deadline, and we decided to leave it alone, because there's nothing in the new statute that says the deadline can be extended.

In subpart (c), we are attempting to fill in a gap here, and the gap is this. The rule allows for the appellant to file the election and the appellant to file the appendix in lieu of clerk's record. The statute says nothing about any other party filing an appendix, which we view as a problem because you can bet that we're going to

get a lot of appendices filed by the appellant that are incomplete. Certainly in some other party's eyes there's going to be some kind of incompleteness. So we thought it makes sense for the rule to specify that other parties can file a supplemental appendix with their brief at the time they file their brief. Although the statute doesn't address this, we feel like this falls within the Court's rule-making ability to allow supplements to a record. Also, in (c) we've got a sentence here for the parties to agree to file a joint appendix.

The next subpart, (d), was a good idea by several of the justices on our call, which is a fear that they're going to get incomplete appendices and, for example, they might get an appendix that does not tell the court whether the case is actually final and whether they actually have jurisdiction, so we built in this provision to allow the court to direct a supplemental record, specifying that certain -- or describing that certain items should be included; for example, items that would disclose whether or not the court has jurisdiction.

And we built in some of the presumptions. The Court can dismiss, for example, for lack of jurisdiction if the supplemental record doesn't demonstrate jurisdiction or the presumption that if something is not included we're going to presume it

supports the judgment. That one may deserve some further discussion.

Subpart (e) is largely from the statute, which says that the appendix must have a file-stamped copy of each document required by Rule 34.5A, which makes sense. The courts want to see those mandatory contents that would go in the clerk's record. They want to see that in the appendix. And then also every other item referenced in the party's brief. We had a late comment yesterday from Chief Justice Christopher. We may have to tweak this a little bit because one of the required contents is the appellate docketing statement, and we weren't -- Chief Justice Christopher raised the idea that those probably aren't file-stamped, certainly not by the district clerk, so how -- how are you going to get a file-stamped copy of that document put into this appendix, and so we may have to huddle to resolve that small issue.

MR. PHILLIPS: Scott, just to be clear, you said docketing statement, but I think you meant docket sheet.

MR. STOLLEY: Oh, docket sheet. Okay. Very good, thank you. Subpart (f) is something we've added for the -- well, not all of it's added, but some of it is. The statute does allow the parties to -- well, in general it says cannot put something in the appendix that wasn't

filed with the trial court except if the parties agree, so we've left that in, and I added this sentence that the appendix now becomes part of the appellate record under Rule 34.1.

We added (g), which is not in the statute, to specify that the appendix must meet other applicable filing requirements in Rule 9, specifically 9.4, 9.8, and 9.9, and I think this was Chief Justice Christopher who also suggested we put in language in this last sentence that warns the parties that the court can take action if your appendix is somehow nonconforming such as requiring you to fix it or dismissing your case. I think that sort of the thought process, at least that I had, in adding this subpart (g) is I think we can expect a lot of sloppiness when these parties are creating their own appendices rather than the district clerks and the county clerks who know how to do this, are used to doing this; and like, for example, one thing we put in here is the pages need to be consecutively numbered. So, you know, a good lawyer would understand my filing has to meet Rule 9, but we felt like it was important to put that in here to remind people these appendices are really important to the appellate courts, and they feel it's really important that these filings conform to the filing requirements. So we thought it made sense to specifically say that in the

rule.

And we also put in here at the justices' urging that the appendix be filed separate from the brief. The thought was that the appellate courts don't necessarily want this appendix to be part of the case filing that appears on the web page for that case, because right now the way the filing happens is clerks' records and reporter records are not on the web page. They are accessible only through the attorney portal, and so I think at least some of the justices on our call were thinking these appendices would be treated the same way. They would go -- they would not be on the web page, but they would be accessible only through the attorney portal. That may be something to discuss. But that's why we put that in there.

The last section comes from the statute specifying no clerk's record at all, no clerk can prepare a clerk's record, no clerk can charge for one. We're suggesting a comment that basically gives a very brief overview of where this came from, what it does, and what the effective date is. And then finally, we added two very brief conforming amendments to Rules 35.3 and 38.6 that the conforming amendment in 35.3 is to make sure clerks understand that if an appeal is governed by this new rule the trial clerk has no responsibility for a

clerk's record at all, and in 38.6, I think it needs a clarification there. That's the rule that governs the time for filing a brief. Since this new statute actually has a timing element in it we felt like we better refer the parties to that rule so that they're not fooled into thinking the timing requirements are only governed by 38.6.

One other big concern that we identified with the statute is it doesn't contemplate what happens in multiple appellant appeals and what happens in multiple appellee appeals. What if the one appellant files a notice that they want to do an appendix in lieu of a clerk's record but another appellant files a request for a clerk's record? What happens? Does the notice of appendix in lieu of clerk's record govern everything and require everybody to follow that procedure? And another question we saw that's open is what about cross-appeals? So let's say that the appellant doesn't file the election within 10 days and then somebody files a notice of cross-appeal after that. Does the cross-appellant have the right under the statute to invoke the procedure for filing an appendix in lieu of clerk's record? So our heads started hurting as we were talking about this problem. I mean, there's a lot of permutations if you start thinking about big appeals with multiple parties and

with cross-appeals involved, and ultimately as a group I think we decided to kick that can down the road and just not discuss it and let the courts wrestle with that on a case-by-case basis as this thing moves forward.

I think that's all the narrative I have. I don't know if we want to open it up or if Chief Justice Gray wants to supplement what I've said or raise his particular question.

CHAIRMAN BABCOCK: We can unmuzzle him. You're unmuted.

HONORABLE TOM GRAY: I actually think it would be more productive to have conversation about what has been proposed first.

CHAIRMAN BABCOCK: All right. Justice Kelly, and then others.

HONORABLE PETER KELLY: So the appellate justices who wanted to be on the -- I was one of those -- wanted to be on the phone call, staff attorneys are outraged and upset about this. I don't think people -- the practitioners in this room are not the problem. It's there's a lot of sloppiness, people can barely file briefs, let alone put together a whole appendix that's supposed to be the record on appeal, and we spend a lot of court resources just trying to get the record together, just trying to figure out what order is being appealed,

and the idea that now parties can just do this on their own is alarming to those of us who are trying to get the cases done efficiently and on the merits. So with that background, I think the committee has done a very good job of trying to build in safeguards and trying to make things as clear as possible, but any recommendations anybody has for making -- from the practitioner side of what would be useful to include in the rule to make it clear what the party has to do to give the court a functional appendix.

And as Chief Justice Christopher pointed out on the phone call, if the goal was to reduce the cost of appeals, they could have just capped the cost for a clerk's record. Instead of a dollar page they could have said it's 25 cents a page, because really all they're doing is clicking a button on a PDF. I mean, it's not -- it used to be costs associated with someone actually having to make copies, but they didn't do that so instead they gave us this Frankenstein appendix that nobody wants to deal with, and that's why Justice Gray's suggestion actually kind of make sense, don't make any rules, just keep it hidden in the Texas general statutes and nobody will know it ever happened.

CHAIRMAN BABCOCK: Sharena. Did you have -- was that a little -- what was that?

MS. GILLILAND: Yeah, I'm a district clerk.

And statutorily the clerk's record is a dollar per page for an appeal, and I agree, maybe in lieu of this appendix idea maybe looking at those costs if that was the concern would have made sense. Preparing it is more than just right clicking and e-mailing and uploading. It's a little bit more involved, but that's for another day.

I do like the committee's proposals in this rule. When I read the statute my fear was that we would end up in some sort of hybrid Frankenstein clerk's record appendix situation. I like the rule because it says if you go the appendix route, you go the appendix route the whole way, and if the court of appeals is missing information, it's on the party to get those documents to the court of appeals. I was really fearful if you had an appendix that had just a few pleadings but the court of appeals said, no, we need more, and usually in that situation when you're doing a clerk's record they order -- you know, ask for a supplement, and you supplement, and it was going to be kind of a nightmare trying to figure out what's been submitted, what hasn't. So I'm happy to see that you choose your path, and that's the path that you're on. And, yes, there's some situations with cross-appeals that will make things more interesting.

And then the only other comment was with respect to the docket sheets. Those would not be

file-marked, but the parties could request copies of the docket sheets, and how you wanted to reference that in the rule, you know, but that is not something that would typically have a file mark on it. So I appreciate the committee's -- the subcommittee's work on this. I think it addresses what the clerks were fearful of with this particular statute.

CHAIRMAN BABCOCK: Roger.

MR. HUGHES: This applies to like interlocutory appeals as well?

MR. STOLLEY: I believe it does.

MR. HUGHES: Well, I have noticed, because our firm does some med mal defense. A lot of these are multidefendant cases, and they will all challenge the expert reports, and of course they will all be denied, and so you have four or five notices of appeal coming in, and what I have noticed recently is that each notice of appeal gets docketed as a separate appeal in the court of appeals so what might have been four appeals from one case suddenly become four separate appeals, not one conglomerate appeal. And so what I'm thinking in a case like that if you have a court of appeals that says, well, yeah, they're all defendants appealing from an interlocutory decision, well, we're going to docket them as four separate appeals. You might get a mix and match

type situation where two appellants go "I opt for an appendix" and then two of them go "I opt for a clerk's record," which is fine, but then generally speaking they're going to join the cases for briefing or something. That's what I've seen happen where they're not truly conglomerated into one appeal, but they are for the purposes of briefing, and I don't know whether you want to deal with that situation where you would have separate appeals and one appendix and a clerk's record or you want to just let that be and see what they do with it.

MR. STOLLEY: Yeah, another permutation that we just weren't sure how to deal with that the Legislature obviously did not think about, so I mean, we could certainly try to game out some of the permutations, but then the rule becomes very cumbersome.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: So it sounds like y'all did a very comprehensive job. My compliments on that. My personal experience also is that orders signed by judges and judgments are not file-stamped, so if that's true you universally then the most important thing in the case is not even going to be possible because you won't have a file-stamped copy of the appealable judgment.

It occurs to me that, you know, we have a framework right now for parties to designate portions of

the record that the clerk will forward to the court of appeals, and if the appellant makes a designation the appellee can make a designation, and the clerk generally pulls those together and presents one record, one clerk's record, to the court of appeals. We can require that the party who is self-filing file-stamped copies of records meet that minimum requirement, that every transcript, every clerk's record, must contain the following, even these that are being filed informally.

And then my next question is if the appellant underdesignates or designates only items that are favorable to the appellant and not the appellee, does the appellee have to file their own informal clerk's record, or can they make a designation and require the appellant to do it? It seems to me we could mimic the process that exists and perhaps make it closer to the process that exists if we think those through.

CHAIRMAN BABCOCK: Harvey.

HONORABLE HARVEY BROWN: I wonder if it would be helpful to the court to have a table of contents with the appendix. I know I liked a table of contents, saved me time. Given that you are expecting problems with these appendixes, I wonder if you should require the appendix to be filed like a week before the parties brief. It just gives the other side a little more time to look at

it and say, hey, he doesn't file this, would you add that, et cetera. If you did do that, you would have to change subpart (c) so that if the party as its wrapping up writing its brief finds there's something it didn't designate seven days early that it wants to add now that it would have the right to do that, too. In other words, anybody could supplement, but I do think that a lot of times the other side wants to get that brief -- they're awfully busy, and then to expect them to go through and find the parts that are missing and cure it and get it all done is just -- it's another thing to do in that 30 days you've got to write your brief, so a week ahead of time seems to me like that should be fair that the appellant can prepare that a week ahead of time, particularly if they have the right to supplement.

MR. STOLLEY: Could I --

CHAIRMAN BABCOCK: Yeah.

MR. STOLLEY: -- comment on these last few comments?

CHAIRMAN BABCOCK: Yeah, sure.

MR. STOLLEY: It's a good point, and I am concerned about the idea that there are orders and judgments that are not file-stamped. Is it true that they are available from the court clerks but they're not file-stamped?

HONORABLE EMILY MISKEL: Okay, so -- I'm sorry.

CHAIRMAN BABCOCK: Go ahead, Justice.

HONORABLE EMILY MISKEL: What I was going to say is when orders were paper there were some counties that would actually like, cha-chunk, file-stamp the orders and others that would not, but now that they are electronic and especially now that the law changed that all of the orders have to be provided through the electronic filing system, I think they will all automatically have a file mark at the top.

MR. LEVY: Is that the official sound, cha-chunk?

HONORABLE EMILY MISKEL: It used to be.

CHAIRMAN BABCOCK: Sharena.

MS. GILLILAND: With respect to file marking orders and judgments, I think most clerk's offices are file marking those whether electronic or paper. There are some who do not. There are some judges who insist that they not be file-marked because their signature is sufficient without a file mark. There are still a lot of orders and judgments that arrive in the clerk's order via paper, so I can't tell you all of them are file-marked or all of them are not. I think it's a county by county and office by office situation.

HONORABLE EMILY MISKEL: But with the new law change that even if they arrive in your office by paper they will now have to be recirculated electronically.

MS. GILLILAND: But that would not generate a file mark necessarily.

HONORABLE EMILY MISKEL: It doesn't automatically have the thing at the top?

MS. GILLILAND: Not when it's generated from the clerk's office to the parties.

HONORABLE EMILY MISKEL: Okay.

MR. STOLLEY: One of the things I had built into my initial draft that we took out after the subcommittee talked was a provision that said basically the parties may consult with and the clerk would sort of be expected to cooperate with parties to the extent the parties actually need the clerk to help them and supply them with documents that maybe the parties don't have or aren't file-stamped or something like that. Does this group think we should put some sort of cooperation clause in there to make sure that the clerks who are being cut out of this process can be consulted and are expected to assist if they are consulted. Yes.

MS. GILLILAND: I would ask that you not go that route.

MR. STOLLEY: Okay.

MS. GILLILAND: I think if the clerk is preparing the record, the clerk prepares the record. If a party needs a copy, they are entitled, as is anybody who walks in off the street and wants a copy. You can purchase a paper or electronic copy from the clerk.

MR. STOLLEY: And as to Richard's comment about the problem of an appellant underdesignating, we did consider that. That's why we built in the paragraph that allows other parties to file a supplemental appendix with their brief, or if the parties are cooperative they can do a joint appendix.

The question of who pays for a supplemental appendix did come up in our discussions. I think we ultimately sort of the sense of the group was this is kind of like the procedure we now have for mandamus records where the relator files a mandamus record and the real party in interest who responds can file their own supplement and everybody pays for their own, and it just occurred to us that's probably the better procedure here, because what if you get an appellee who has -- if the rule is written that the appellee can tell the appellant, well, you left out X, Y, and Z and a million other documents and we hereby request you supplement your appendix with those documents, all of the sudden the appellee has got the

power to really burden the appellant with the time and expense and difficulty of filing things that the appellee supposedly wants, but maybe there's some gamesmanship going on here and they're just making it harder for the appellant. So let's just let the parties have to do this on their own nickel in order to just sort of keep it from that kind of gamesmanship happening. So that was our thought there.

And then Harvey's comment about filing the appendix a week ahead I think would have some merit worth discussing except for the fact that I don't think the statute allows that. The statute says the appendix is to be filed at the same time as the brief and specifies when that should be, although I think the statute does allow the court to grant extensions. The Legislature has sort of injected itself not only into telling us when this appendix is to be filed but also when the corresponding brief is to be filed. So I'm not sure we could -- we could implement that suggestion.

CHAIRMAN BABCOCK: Roger.

MR. HUGHES: Maybe to address the problem that I arose -- I raised about where you have one appeal with a clerk's record and one with that, we might amend paragraph (h) to allow the clerk to file a record in a case where two cases have been consolidated, one with a

clerk's record and one with an appendix, because if they're merely consolidated for briefing purposes, I suspect the answer to that is the clerk can file a clerk's record in the one where you have a clerk's record but not in the other because they aren't consolidated for all purposes. But if they have been consolidated for all purposes then I think that the party who opted for a clerk's record shouldn't be hobbled. They should be able to go ahead and file a supplemental clerk's record as needed in a totally consolidated appeal.

MR. STOLLEY: So just yet another permutation that is not covered by the statute, what do you do with a consolidated appeal?

MR. HUGHES: Well, yeah, and to me it produces confusion because the party who opted for a clerk's record type appeal doesn't run into the problem where they want to order a supplemental record after consolidation from the clerk and the clerk goes, oh, no, there's this statute. I mean, it would solve that problem and if that went on, but again, only in a case where it's a complete consolidation and not just for briefing and argument.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: Scott, did you-all -- I mean, one of the advantages to the clerk's record is it's word

searchable, and do you have a requirement in the rule that the document be word searchable?

MR. STOLLEY: That's why we cross-referenced it to Rule 9.4, because isn't that the rule that says it has to be PDF word-searchable? Am I right about that?

MR. PHILLIPS: It's one of those. That's why we put that in there.

PROFESSOR CARLSON: Somewhere in 9.

MR. ORSINGER: And in the Adobe software they'll automatically bookmark individual files that they can identify, but that's probably too technical to specify, but that's certainly an advantage to having a professionally prepared report is that -- I mean record. It will generate the bookmarks automatically, so just a thought.

MR. STOLLEY: If Rule 9.4 requires that --

MR. ORSINGER: No, it doesn't.

MR. STOLLEY: -- then our draft would require that and give the court of appeals the ability to direct people to either fix it or have their case dismissed.

CHAIRMAN BABCOCK: Skip, and then Justice Gray.

MR. WATSON: Well, to Roger's point, that came up briefly either in the subcommittee or in my brain

while we were talking. I can't remember which, and the way I kind of thought through that was -- but I really stand to be corrected here, is if somebody didn't want to go through the cost and expense of a clerk's record -- and I suspect the vast majority of us who do appeals full-time will get there pretty quickly -- that we choose appendix then why even if in the case you're talking about of multiple appellants, why would somebody choose to go through the cost and expense of a clerk's record when it can be done so much more cheaply? I mean, I just don't get it. We have a provision, I think, don't we, or at least we talked about this, that if there's something that needs to be in there that's not file-stamped the parties can agree that this goes in and shall be considered file-stamped.

I just don't see -- in my mind I didn't see how that was going to come up, how somebody could justify to the client, okay, you know, there is this rule to keep you from having to pay a kazillion dollars for a clerk's record, and I'm going to choose not to do it and choose the expensive version just because I like expensive versions but they're going to be cited the same. You know, there's going to be a record reference the same, and they're going to be searchable. I just think that the mandamus analogy of just, look, if there's something in

the -- not in the first one filed or if you want something else. Let's say these really are separate, you know, appeals going up. If you -- you know, you're probably going to do exactly the same thing the ones before you did, and if there's something else, you're just going to put it in there. That's all there is to it, and your brief is going to be citing to your appendix, which is going to be in the record.

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: I'm going to try to structure this in something that makes sense. It probably won't, but I'm going to try to first address the drafting and the -- some issues there, some of the problems, because in the subcommittee there was -- it was a long meeting, a lot of conversation, a lot of problems were discussed. And Skip talked me off the ledge at one point, assisted by Tracy, in some of the details, but --

MR. WATSON: Some of the others were saying "Jump, Judge, jump."

HONORABLE TOM GRAY: So first of all, remember that as the appellate court we have to assess costs. The costs that we are assessing is for the appellate record. I don't know exactly in response to Skip's point about this being cheaper if the affidavit that someone at some point is going to file along with

their appendix as to what this appendix costs, so I mean, there's going to be the point at which the appellant wins and they want their costs for appealing -- preparing the record, the clerk's record, reimbursed. They want it paid.

Then comes the question of the frequency of these. Do you have to give notice to use this rule within 10 days of the date that the notice of appeal is filed? And it's the person that files the notice of appeal that gets to opt in to this process. As other folks have pointed out, there can be multiple notices of appeal in any case, and they all have under the statute and the rule the right to trigger this provision. Neither the statute nor the rule directly addresses service of the appendix, in my view.

There is the issue of the current clerk's record does not get served. There's not multiple copies made. If you have a 4,000-page clerk's record, now do you have to serve that on everyone, paper or electronic, whatever method is used, so that's another issue. I just footnote along with the orders and the docketing sheet the certified bill of costs from the clerks that is currently required under provision 11, it's not going to be file-stamped either probably.

There's this problem of cross-appeals,

multiple appellants, et cetera, and then there is some terminology stuff in whether a court of appeals can direct versus order the appellant to do it. I noticed that we used the word "direct" here, which is actually a term that the Supreme Court used in a recent -- I think it was the permissive appeal rule rather than the word "order." I happen to think the word "order" is clearer, more -- everybody is going to understand and then that can lead to a dismissal if they don't comply with an order from the appellate court.

There is the notice and opportunity to cure supplement in 35.3 I think is where we -- where they put that. Another place to put that possibility is by tweaking 44.3, I believe it is, where you could add a -- the court of appeals must not affirm or reverse a judgment or dismiss an appeal, deny a mandamus or deny permission to appeal for -- excuse me, that was permission to appeal. We'll get to that. All right. You could actually put it over there as well on this concept, but, you know, we've always had the opportunity that if they don't fix it pursuant to the order of the court we can dismiss their appeal. I also note that in this problem of what to include, the actual rule as proposed requires that everything that is supposed to be there under Rule 34.5 is included. So it requires everything, and if it's missing

something, it -- well, it shouldn't.

If you get to this selective appellant and then what gamesmanship the appellee may do, you actually have the 34.5 requires it, and they can pursue it through a motion at the appellate court, but they could also under 34.5A(14) they can designate and require the appellant to supplement their appendix because at that point if they designate something else to include then the appellant has to include it in the way the -- at least that's the way I read the proposal.

I looked at all of this and all of the problems, considering the frequency with which I think that this rule will ultimately be used, and I said, look, the Legislature, I'm going to presume a thinking, intelligent, insightful Legislature wrote this provision to address a specific problem. This is a Legislature that absolutely knows that the Supreme Court can and will write rules when so instructed. In this statute, which I have -- it has been a long time since I have seen a statute that inserted itself more into the appellate procedure than this statute does. So it is very specific to a appellate procedure. No substance here. This is purely procedural, and the Legislature chose to do it and chose not to have the Supreme Court write rules on this statute. To implement, expand, it's not here, and I think

Justice Bland pointed out earlier that like 13 times this session, or whatever it was, they included that language in a bill somewhere. And so it's clear the Legislature could have done that but chose not to.

We also have at least 79 intermediate appellate judges that are thinking, clear-headed, intelligent individuals, that when faced with one of these --

HONORABLE DAVID EVANS: I'm sorry, I was just trying to make notes. I'll get out.

HONORABLE TOM GRAY: I didn't hear it, so go ahead David.

HONORABLE DAVID EVANS: That's all right. I think I'll withdraw it.

HONORABLE TOM GRAY: If you're wondering there are 80 intermediate appellate judges that I attributed that to and excluded myself from that 80, and so --

CHAIRMAN BABCOCK: Well, we want to add you back in.

HONORABLE TOM GRAY: So but the point is we deal with problems all the time. This is not going to be something that we deal with frequently, I don't think, because it's 10 days to notice it. If it's folks like Chip -- or Skip, that do appellate work all the time and

they are using it and have identified a way to save money, they're going to know how to do it. I'm not worried about a record that Skip prepares, and so my point is -- and you've heard everybody talk about the need to maintain a good relationship with the Legislature and their working and this kumbaya point in their history.

CHAIRMAN BABCOCK: Around a campfire.

HONORABLE TOM GRAY: Around a campfire. We've got to get those -- are you going to put that in the record that you made a circular motion with your hand?

CHAIRMAN BABCOCK: Yes, yes, around the campfire.

HONORABLE TOM GRAY: And so my point is this statute, crafted as it is, it exists for people to use. There is no need to put it in the Rules of Appellate Procedure. Leave it there. Leave it where the Legislature put it. They didn't ask for us to draft any rules around it, and I would -- that's what I would have proposed had I been the only member on the subcommittee.

CHAIRMAN BABCOCK: Well, there you have it. Pete.

MR. SCHENKKAN: This is a nit that is taking us away from the rest of the substance of this discussion, but in (f) of this proposed rule we have an appendix filed, quote, "in accordance with this rule must not

contain a document that was not filed with the trial court except by agreement of the parties." I think I recall having occasionally included in an appendix in some of my appeals some Brandeis brief material such as a report, periodic report of the relevant governmental agency that was responsible for the rule or administrative order and whose validity or interpretation was at issue in the case, and those were not filed with the trial court in most cases.

I assume the Legislature should not be deemed to have the intent of prohibiting this -- that practice by making a decision that's supposed to allow somebody to use an appendix instead of a clerk's record, and it might help us reduce the risk that it would be interpreted that way if instead of the words "in accordance with this rule" we tracked the legislative language "filed under this section." So an appendix filed under this section couldn't include such material, but you can still do it.

MR. STOLLEY: Yeah, we had the discussion about what -- what could possibly the parties want to put in the record that's not actually filed with the trial court, and I remember one person said, well, what about, for example, a PowerPoint that was used at a hearing? That usually doesn't get filed with the clerk, but maybe

the parties want to agree for some reason to put it in the appellate record, and the statute does allow the parties to agree to put things in the record that are not actually filed with the district clerk.

MR. SCHENKKAN: I'm really addressing a different issue. These are things that might not necessarily be agreement on. There's not a legitimate objection to an appellate court's considering a public record or public report including the relevant government agency.

CHAIRMAN BABCOCK: How often are Brandeis briefs filed these days? I know of a few examples, but this statute would seem to prohibit it, wouldn't it?

MR. SCHENKKAN: It -- well, that's why I'm hanging my hat on "an appendix filed under this section."

CHAIRMAN BABCOCK: Yeah.

MR. SCHENKKAN: It prohibits it in such appendices but not in others --

CHAIRMAN BABCOCK: Yeah.

MR. SCHENKKAN: -- is the proposition I'm hoping we can leave open for argument.

CHAIRMAN BABCOCK: Yeah.

MR. SCHENKKAN: I mean, I do it fairly regularly in free man court briefs less often in brief as appellant because when I'm appellant I'm also usually the

trial lawyer, and I've tried to make it included in the record, but sometimes it doesn't.

CHAIRMAN BABCOCK: Yeah. Yeah. Scott.

MR. STOLLEY: To respond to some of the comments from Chief Justice Gray, is it possible for the court of appeals to -- to include the cost of the appendix in the court costs on appeal? The statute doesn't say that it's chargeable as a court cost, but I guess it's open for discussion, can the court do that anyway. How would the court do that? How would the court know what it cost?

HONORABLE TOM GRAY: Do you consider the appendix the clerk's record?

MR. STOLLEY: No. It's not the clerk's record. It's in lieu of the clerk's record.

HONORABLE TOM GRAY: So under the 40 -- whatever the rule is on assessing costs, when I'm supposed to assess the costs for the record, if I have an affidavit from the appellant that prepared the appendix as to what it costs, your argument as the appellee is that that is not part of the cost of the record?

MR. STOLLEY: I don't know if I have a position on that. I'm just saying it will be a fight. It could be a fight, because the statute doesn't say anything about taxing these appendices. And if the Supreme Court

wants to say it is a taxable court cost then they're also going to have to figure out how do you determine the amount of that.

HONORABLE TOM GRAY: It's another issue we don't have to address if we don't write the rule.

MR. STOLLEY: That's right. And I think there's -- you know, it's worth discussing your idea whether we even do a rule. I mean, it's up to the Supreme Court, and maybe for various reasons they feel like they have to do a rule, but it is true the statute doesn't direct the Supreme Court to write a rule pertaining to this statute. And one option, if the Court wants to go in that kind of direction, is just put a one sentence subpart in Rule 34.5, which is the clerk's record rule, that just says "For the option of filing an appendix in lieu of clerk's record go to Civil Practice and Remedies Code section 51.018" and just leave it at that.

CHAIRMAN BABCOCK: Justice Gray, suppose an appendix is filed pursuant to the statute, we don't have a rule, and you notice that there's -- it's a contract action, and there's a contract that's in the appendix, but you notice in the briefing that there's reference made to a supplemental contract, which you think could be important to the appeal. Does the court have a right to ask the party to supplement the appendix? Say, hey, you

know, give me this -- give me this supplemental contract that everybody has briefed?

HONORABLE TOM GRAY: Without going into the weeds of philosophy on judicial restraint versus judicial activism, I think we absolutely have the authority to order up a party to provide something that they have talked about in their briefs. Whether or not we choose to then consider that as part of the appeal is an entirely different question. I think even with the rule as it has been proposed or with no rule and having just the statute, I think that we still have that authority to order the clerk to send it to us. Now, whether or not it becomes a clerk's record at that point, that may be a different issue for another day, but one of the questions that came up on the call that I don't think any of the four court of appeals justices on the call could answer is when we order something up as part of the clerk's record how does the clerk collect for it? Or do they? Do they just comply with the order and not send a bill to anybody? Because it's -- more often than not it's something that got left out that probably was a requirement under 34.5.

CHAIRMAN BABCOCK: What if there's six defendants and you notice that the appendix only has documentation for disposition for five of them? Can you ask for supplement on the sixth?

HONORABLE TOM GRAY: We're more likely to send a letter that questions our jurisdiction.

CHAIRMAN BABCOCK: Okay.

HONORABLE TOM GRAY: And possibly point out that there's not a disposition with regard to one of the defendants. That would be a -- we would question our jurisdiction letter.

CHAIRMAN BABCOCK: And what if they don't respond, they don't say anything?

HONORABLE TOM GRAY: Well, the letter would be addressed to all of the parties, and the appellant if they want to pursue -- continue the appeal, they better explain why we have a final judgment at that point.

CHAIRMAN BABCOCK: But if the appellant doesn't respond, do you have discretion not to dismiss?

HONORABLE TOM GRAY: I don't think so. I mean, if we're sitting there, looking at a nonfinal judgment, and we've questioned our jurisdiction -- there would be two basis to dismiss that appeal if the appellant didn't respond, either that the appellant failed to respond to an order of the court or that we don't have a final judgment and therefore dismiss the appeal.

MR. STOLLEY: Well, you could have a final judgment without a timely notice of appeal.

CHAIRMAN BABCOCK: Yeah, this -- the reason

I ask these questions is because, Scott, look at 34.5(d) of the proposed rule, and it says that "The court may direct the appellant to file a supplemental appendix containing items described by the court." So the court says, "Hey, I see reference to a supplemental contract, but it's not in the appendix, so send it to me." Okay. So they do or they don't. They don't. Then it says the next sentence, "If the appellant fails to supplement as requested," so they haven't sent you the supplemental contract, "and the record fails to establish the court's jurisdiction." So sometime later or even then, you notice, wait a minute, all six defendants haven't been disposed of as far as the appendix is concerned. "The court may dismiss the appeal."

Well, there are only two situations that could exist. Either the court does have jurisdiction, but it's not reflected in the appendix, or it doesn't because not all six defendants -- and if it doesn't, then the "may" is out of place, right, because as Chief Justice Gray just said, if all six defendants haven't been dealt with, you've got -- you don't have discretion. You have to dismiss, right? But then it says, "In cases where the court has jurisdiction and the appellant fails to supplement as requested, the court may presume that the missing items support the judgment." Well, you don't know

if you have jurisdiction or not because you haven't requested documents on the sixth defendant, which is not in the appendix, and so you can't make any presumptions because you don't know that you have jurisdiction.

MR. STOLLEY: Yeah, that last sentence is actually addressing a different issue. It's not --

CHAIRMAN BABCOCK: I know.

MR. STOLLEY: -- addressing jurisdiction.

CHAIRMAN BABCOCK: Right, but it's all muddled up together.

MR. STOLLEY: The judges on the call felt like they wanted something in here to warn the parties that if you're going to file an insufficient record and we've asked you to do it, to file more, and you don't do it, you might be stuck with this presumption that whatever you didn't include was --

CHAIRMAN BABCOCK: So in my example the supplemental contract, you know, whichever way it cuts might be construed to presume in support of the judgment.

MR. STOLLEY: Right.

CHAIRMAN BABCOCK: But you start out in the second sentence assuming, I think, that one of the things that the court-directed supplement was asked for was jurisdictional information.

MR. STOLLEY: Yeah. It's two different

concepts.

CHAIRMAN BABCOCK: Two different concepts, but you're squeezing them into one.

MR. WATSON: It needs two different sentences, one jurisdictional and one nice stuff. The nice stuff can get "may" and the jurisdiction gets "shall."

CHAIRMAN BABCOCK: Right. That's right.

MR. STOLLEY: We -- and we can certainly change "the court may dismiss" to "must dismiss".

CHAIRMAN BABCOCK: Well, Skip, you may not have heard him, but he said you really need two sentences, and one it could be "may," although, frankly, unless they showed jurisdiction, it should be "must," right?

MR. WATSON: No, I think the jurisdiction is --

CHAIRMAN BABCOCK: It's got to be "must."

MR. WATSON: It's got to be "shall" or "must."

CHAIRMAN BABCOCK: Yeah, right.

MR. WATSON: But the other one is a, you know, nice to have and if you don't we may presume. So just two sentences, one talking about stuff other than jurisdiction, one talking about jurisdiction.

MR. STOLLEY: Personally I probably would

have left out that third sentence in (d), but the judges on the call --

MR. WATSON: Correct.

MR. STOLLEY: -- felt like they wanted the parties to understand what could happen if you're going to mess around with filing your own appendix it may come back to bite you.

CHAIRMAN BABCOCK: Yeah. But I'm really more troubled by the second sentence.

MR. WATSON: Yeah.

CHAIRMAN BABCOCK: Because the second sentence assumes that the court has requested supplementation in the appendix on jurisdiction.

MR. STOLLEY: Right.

CHAIRMAN BABCOCK: But it may not have. It may have been on something totally unrelated, and it's almost a gotcha. Somebody, some clerk says, "Oh, well, they didn't supplement with the supplemental contract, but now we notice that there's no jurisdiction," so we may dismiss even though you probably must dismiss. Yeah, Skip.

MR. WATSON: If I may address kind of the core of what justice -- Chief Justice Gray was talking about. I don't know how many people in the this room were around that horrible summer before tort reform was

implemented. I know you do because you and I were here week after week after week grinding that thing out to make rules, that mess of a statute to try to make it make sense, and at one point in that I kind of took a quasi-justice -- Chief Justice Gray's point of this thing doesn't say "shall." We're doing this because some legislators, you know, asked for us to make rules to make sense out of this mess, and so we were; and I was saying is this really what we're supposed to be doing, kind of making legislation making sense; and the consensus that came out of that, which I -- it really opened my eyes to the workings of the Court and another aspect of the judicial branch was, well, we're the ones that are going to have to administer this; and if we're the ones that are going to have to administer it, we want it in a form where the rules of the road are very clear so we can administer it; and if we need to change the rules of the road, we can alter them; and we have an opportunity to smooth out some of these bumps and some of the curves that shouldn't be there that make this potentially much less workable; and we owe that to the other members of the judiciary to do that.

And I flipped on that. I was just that's -- I get it, I'm sorry. I didn't realize that that whole underpinning in the eyes of the Supreme Court were in

this. So that underpinning and that experience is there of why we were working not just one weekend every two months, but, I mean, there were times we were up there consecutive weekends trying to get that stuff out, and it was not fun. But the product, the work product, seems to work, you know, and where we didn't quite get it right it's been tweaked, and I just -- I -- with great respect for Chief Justice Gray and what Scott's saying, that experience was formative for me to realize that there is more at play here than meets the eye, and it's the people who are administering this had a reason for making this request, and that was the way it was explained to me a long time ago in a summer that I would choose to forget.

CHAIRMAN BABCOCK: Yeah, I remember that summer. You had a full head of hair, but -- Richard.

MR. ORSINGER: To go back even further down the memory hole than Skip did, all the way back to when the Legislature adopted chapter 10 of the Civil Practice and Remedies Code. There was tension between the Supreme Court and the Legislature over sanctions, and when they adopted 10 the committee was prohibited -- I mean, the Supreme Court was prohibited from altering the statute, and so I can remember we all spent a lot of time and energy trying to figure out how to adapt Rule 13 on sanctions to accommodate the provisions in chapter 10 of

the Civil Practice and Remedies Code, and we finally just gave up and let the statute be and Rule 13 be. And, you know what, that's worked successfully because you can bring your motion under Rule 13 and meet those standards or you can bring your motion under chapter 10 and meet those standards, and they are not inconsistent and it's worked. So, you know, there are situations in which the legislation is so complicated that we just can't really effectively deal with it in a rule and keep the rule, you know, simple and easy to implement.

Now, when the Legislature tells the Supreme Court to adopt a rule by September 1, the Supreme Court has to adopt a rule, but if they just pass a statute and what we're asking ourselves is do we need to change our rules to be more like the statute, or do we need to tell people to go read the statute in a comment, that becomes optional, and it -- I'm not taking sides in this debate yet, but it seems to me that we should consider if the rule changes are too complex and the Supreme Court is not mandated to implement the statute by rule, maybe the best thing to do is to let the rule be where it is, and just refer people to the statute or let them figure out that there's a statute out there. That's what we did on sanctions, and it's worked, so just a memory.

HONORABLE TOM GRAY: In adding to that

response, one of the things that I thought would happen with these 79 judges is that different panels may have different solutions as they run into problems with the implementation of the statute and different ideas about how to solve it, and that may at some point if the frequency of the use of the rule becomes a lot higher than I think it will be, then that -- those individual experiences and ideas and solutions can then inform the rule that's ultimately drafted. I think that's where the phrase about courts of appeals becoming laboratories for justice come from. There will be different ideas about how to solve this problem.

One of the ideas that I have wondered why we haven't implemented long before now that would greatly facilitate what we do -- and I want to echo one statement earlier from Peter that the courts of appeals, the Chiefs have preliminarily talked about this rule as well as the staff attorneys. All we see is chaos, I mean, from this whole process, but separate and apart from that, I would love the opportunity to just click on the district clerk's website and go look at the record, what's already filed. It's there. It's electronically accessible. Why do we even have to have something now called the clerk's record that's carved out of what has been filed in the clerk's office? And so I would advocate long-term rule writing

that does away with both of these rules so that we can just give us the authority to go look at what was filed, give the appellants, the parties, the ability to cite the document in the clerk's record actually in the clerk's file and not have this artificial restraint.

You know, when the Supreme Court or the Court of Criminal Appeals wants the appellate record they reach down and grab what's electronically filed at our court. Why stop there? Why not reach all the way back to the trial court and grab it? But that's another conversation for another day, and I've already said too much.

CHAIRMAN BABCOCK: No, not at all. Scott.

MR. STOLLEY: Well, that's kind of similar to federal practice where the entire clerk's record gets transmitted to the court of appeals. You don't have to ask for anything. It just all gets compiled and sent up, but two points. I think the subcommittee felt like because we got an assignment from the Supreme Court we -- we felt obliged to draft a rule, but in speaking just for me personally, that doesn't mean that I necessarily agree that a rule is required. I'm -- I mean, I think there's merit to Chief Justice Gray's idea, so I don't know what the rest of the subcommittee members think, but I don't want this entire group to think just because we drafted a

rule means we're all in favor of a rule. We just felt like the Supreme Court wants our help here, let's draft a rule and see where it goes.

CHAIRMAN BABCOCK: Yeah, I mean, we face this all the time where we study something and we draft something and at the end of the day we say we really don't need it.

MR. STOLLEY: Yeah.

CHAIRMAN BABCOCK: But the the Court -- we can't start with we don't need it. The Court has to have something to look at so they can reach the same decision if they want to.

MR. STOLLEY: Right.

CHAIRMAN BABCOCK: And the charge here was the committee should consider whether the Texas Rules of Appellate Procedure governing the clerk's record should be changed or a comment added to reference or restate the statute and draft any recommended amendments, so I think that charge is fairly broad as I read it, and I think you've done that, so but -- yeah, go ahead.

HONORABLE TOM GRAY: On the reason that I thought about the cost issue is in Rule 43.4 that we have to give a judgment for costs in civil appeals, and it says the court of appeals judgment should award to the prevailing party cost incurred by that party related to

the appeal including filing fees in the court of appeals and cost for preparation of the record. That's not defined, and I was concerned that an affidavit filed by an appellant that prepared the appendix that it took a paralegal 40 hours and 4,000 copies and the cost for the appellate record is $5,000 might be a problem. So --

CHAIRMAN BABCOCK: Scott.

MR. STOLLEY: And, Chip, somebody mentioned the word frequency of use. I'm curious what the appellate lawyers in the room think in terms of is this something you think you would use frequently or other lawyers would use frequently? Because honestly I don't see me invoking this procedure very often. As an appellate lawyer, as a solo practitioner, I think I would probably tend to stay away from it because it's more work for me, and I just don't really want to get into the hassle of it unless it's a small appeal where I think I can efficiently do an appendix and get it over with, but I'm curious what the rest of the appellate lawyers in this room think.

CHAIRMAN BABCOCK: Richard, do you do appellate work?

MR. ORSINGER: Absolutely. And I would almost never do this, Scott. I mean, you've got to do it in a mandamus. I'm doing that right now in between breaks, but it's a pain in the posterior, and there's a

great convenience to having the record prepared by the district clerk because it's going to be -- it's going to be chronological, it's going to be numbered, it's going to be word searchable, and it will automatically have bookmarks, all of which are a great aid in allowing the briefing attorney or the justice on the court of appeals to click where you cited something, and they can click on it, and they can see it, and then they can go right back. To substitute that with some mishmash stuff that may not be in chronological order, may not even be numbered, certainly is not word searchable, I just think that's a nightmare, so I would never do it.

CHAIRMAN BABCOCK: Justice Kelly.

HONORABLE PETER KELLY: As I said earlier, the issue is not the practitioners in this room. It's what we get in lower dollar cases, pro se representation, and sometimes having the -- like I said, we try to reach the substance, the substance of the cases, but sometimes it's such a mess we can say there's nothing in the record here that actually supports jurisdiction or anything else, so that is sort of an easy way for us to dispose of the case. But the problem is going to be on these lower level cases where we already get mishmashes of documents just attached to the brief that have nothing to do with the record and trusting that to actually file an appendix,

appendix in lieu of clerk's record, is -- I just can't see it happening efficiently.

One thing we do need to be mindful of is that the rules already specify the appendix, you know, appendix attached to the brief, so if we are going to adopt rules we have to clarify that the appendix in lieu of a clerk's record is separate and apart from the appendix that is attached to the briefs, because the Rule says 38 point -- whatever it is, (1)(k), "the appendix must contain a copy of." But we need to clarify there's two different appendices, two different types of documents or filings that need to be made.

CHAIRMAN BABCOCK: Bill.

HONORABLE BILL BOYCE: I'll make a couple of observations in response to Scott's question. Number one, I would adopt what Richard said about in terms of frequency of use just as a practical matter. I would also adopt Justice Kelly's observation that this is going to happen. The statute is there. You know, these dog's breakfasts of, you know, records are going to be visited upon the courts. So my pitch would be I think there is utility in setting out some baseline of requirements, not trying to answer every single possible complication, because we -- we can't imagine them all. They're just going to appear.

One complication that I've been thinking about as we've been discussing it is how are, you know, sealed records going to be handled, and I can't even contemplate it, so I'm stepping back from this and I'm just not going to go there.

CHAIRMAN BABCOCK: So rather than pushing it you're going "whoa."

HONORABLE BILL BOYCE: I'm fleeing. So I would make a pitch that some baseline requirements along the lines that we've sketched out that at least provide some framework for what is going to happen anyway could be useful, could reduce some difficulty, and then, you know, we may think about some additional flexibility language in there to, you know, give appellate courts discretion to handle stuff as it comes up that's not expressly addressed here in rule language, maybe something to do. But that would be my pitch, because otherwise it's going to be people printing junk off the internet and all the rest of it.

CHAIRMAN BABCOCK: Skip.

MR. WATSON: To answer Scott's question, no, I don't think I'll use it. I don't. But I assumed that this was for small appeals or even pro se appeals to try to give some structure to the record where the cost of a record may be the difference between somebody pursuing an

appeal, and I -- I personally don't think it -- you know, ordinarily if it is used by somebody who routinely does appeals that there's going to be any cost. I mean, I can't -- I don't think I would submit an affidavit saying it took a paralegal this long to do it. To me that's sort of getting into the area of, you know, billing my overhead and, you know, my attorney's fees. I just see -- I don't see the -- think there are any costs, and I don't see a -- I just don't see that coming up, but I could be dead wrong and proven dead wrong in practice.

So I see it used by lawyers not in this room who do do small appeals, probably plaintiffs lawyers who are trying to decide whether to run the risk of already having too much time into a contingency fee that was lost or are they going to, you know, put more cash into it, pursue it even though they think they may have a winning point. And that's where my unspoken -- you know, in committee idea was that this is going, and I kind of think that's where this came from, you know, where it was born.

CHAIRMAN BABCOCK: Yeah, I wonder if it might not be helpful for the Court to get a sense of our committee whether this rule that has been drafted is necessary. And besides we haven't voted all day and it's almost 2:30.

MR. WATSON: Necessary or helpful?

HONORABLE HARVEY BROWN: Yeah, I was going to say.

CHAIRMAN BABCOCK: So I feel a need to vote, don't you?

HONORABLE HARVEY BROWN: Yeah, I was just going to -- I think Skip said the same thing I was going to, which is I don't think it should be whether it's necessary but whether we think it would be helpful to have in the rules.

CHAIRMAN BABCOCK: Yeah. Okay. So everybody that thinks we don't need a drafted rule, a new rule along the lines that has been proposed. Everybody that thinks that we don't need that, raise your hand.

Everybody that thinks we should have a rule along the lines that was drafted.

Well, 18 of our members think we should have a rule along the lines that was drafted, and five think we should not, and the Chair did not vote.

So we can go on to the next issue unless Harvey wants to prolong this for you.

HONORABLE HARVEY BROWN: This will hopefully be quick. Subpart (d), I would I suggest on the third line in the carryover from the second to last line that you change the word "requested" to "ordered." I don't think when the court directs somebody to do something that

that's a request. I think that's an order.

CHAIRMAN BABCOCK: There you go. Okay. Who is taking us through permissive appeals?

HONORABLE BILL BOYCE: Rich is going to do that.

CHAIRMAN BABCOCK: Rich, here we go.

MR. PHILLIPS: I thought we were done when the Court issued the order adopting 28.3(l) I sent an e-mail to subcommittee, I said I guess we're done with this and then we weren't. But I think this should be hopefully shorter than the last discussion we just had. The Court, in case you didn't see it it is attached to the materials, issued Miscellaneous Docket 23-9047 enacting 28.3(l), slightly modified from what we had discussed, but largely tracking that language to require the courts of appeals to give an explanation when they deny a permissive appeal.

That rule is to go into effect, as Justice Bland talked about, on September the 1st, but they opened up the time for comments, and there were some comments from Chief Justice Christopher, Chief Justice Worthen, and Chief Justice Adams, which are also attached to the materials, and they were all along the same lines of if we're going to have to do this to give this additional explanation when we deny one of these, we need a little

more information before we decide what to do. And they all kind of recommended we consider adopting something similar to what's required for a mandamus petition rather than just having the parties send up the order that they want to appeal from to include other materials.

So we had a subcommittee meeting. We, as I noted in the materials in the memo you've got, Chief Justice Christopher, Chief Justice Gray, Justice Kelly, and Justice Miskel joined us for that discussion; and based on that you've got the proposal in front of you. It is not everything that would normally be required in a mandamus. We are not requiring a copy of the statute or rules. We also tweaked a little bit the language. Rather than certified or sworn with electronic copies being available, we went with file-marked copy or a copy of the file-marked document. Justice Kelly suggested that might be the better way to describe it than file-marked copy. That may need to have some discussion given what we've just talked about with the appendix rules that may -- the order itself may not be file-marked in every case, but we did decide to not require it to be certified or sworn.

We considered in part (b) -- by the way, these amendments are to 28.3(e), which is the contents of the petition. We suggest amending (e)(2) to have these three subparts of things that are required. We -- for

(2)(b), a copy of every file-marked document that's material to the order, we considered actually being more specific there to say a copy of the motion, any response and replies and exhibits that resulted in the order being appealed from, but we decided to keep it more general because that may not capture every situation and thought this would at a minimum capture that, and the parties may include additional materials. And as I think it was Chief Justice Gray or in one of the comments I think says justice works better if we have more information, so if the parties decide to send up more information, that would not be a bad thing.

And then part (c) is the transcript, if there is one, and this one took a little bit of thinking through because a properly authenticated transcript may not be available in the time that you have to file a petition for permission to appeal. That petition is due 15 days after the order giving you the right to appeal is signed, and that's in the statute, so we did not feel like we could extend that deadline. So what we put in part (c) is you need to send up a transcript or a statement that you've requested the transcript, which frequently happens with some mandamus filings where there is a transcript that needs to come up but it's not available and you want to get the mandamus on file. The parties frequently will

tell the court we've requested the transcript and we will send it up as soon as we get it. Or a statement that no evidence was adduced at the hearing. So you could avoid sending up the transcript if there was no testimony or no evidence at the hearing. So that's what we would propose as far as the additional materials to send up with your petition for permission to appeal.

The other part of our recommendation, Chief Justice Christopher pointed out that there's different -- courts are doing different things with defective petitions, and this harkins back a little bit I think two meetings ago where we discussed an amendment to the mandamus rules related to defective mandamus petitions, that the court of appeals should be required to give the parties an opportunity to fix procedural defects before denying it on the basis of that.

And I want to be careful here. She's not here to defend herself. Justice Christopher didn't say she initially wanted this rule, but she suggested that given that the courts are going to do different things, the Court may want to consider something like this, and if there -- particularly if the Court is going to ultimately adopt a similar rule for mandamus, it would probably make sense to consider a similar rule for this section as well.

And so we propose putting that in 28.3(m).

I thought about whether it could be worked into 28.3(l), but as a subcommittee we decided it was best as a stand-alone section. So that I think is all I've got to say on any of that unless one of the justices who was on our call wants to make a comment or any of the other subcommittee members. Otherwise we can open it up for discussion.

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: Justice Christopher was the one that drove this idea for getting more information. She pitched it to the Chiefs of -- in an e-mail meeting, and there was no dissension, no disagreement about the need for more information, and so I can tell you that the Chiefs would like to see clarity brought to what's added, and so --

CHAIRMAN BABCOCK: Great.

MR. PHILLIPS: Look at that.

CHAIRMAN BABCOCK: The record will reflect two thumbs up from Chief Justice Gray, above his head.

HONORABLE ANA ESTEVEZ: Gig 'em.

MR. ORSINGER: Are you sure those are not horns?

HONORABLE ANA ESTEVEZ: They are definitely thumbs.

CHAIRMAN BABCOCK: They are thumbs.

HONORABLE ANA ESTEVEZ: Those are Aggie thumbs.

MR. PHILLIPS: I will take that win.

MR. ORSINGER: Oh, gig 'em Aggie thumbs.

CHAIRMAN BABCOCK: Yeah. Any comments, not about the thumbs but about the rule? Is it perfect? Apparently so.

MR. WATSON: Boy, that's a first.

CHAIRMAN BABCOCK: This will be a first, Rich.

MR. PHILLIPS: For real.

CHAIRMAN BABCOCK: All right. Want to move on to Rule 42? Richard, what do you think?

MR. ORSINGER: I think it's entirely possible we might get it done today.

CHAIRMAN BABCOCK: Rule 42?

MR. ORSINGER: Yeah. Well, maybe not. We only have about half the committee here. Okay. So there are two resources for you. One is the electronic -- the documents attached to the electronic agenda that were e-mailed out yesterday, and the other is a paper in the folder here over on the table which has slightly different information. What I'd like to do is to start out with the memo that I had sent to our subcommittee back in June, which is in the electronic agenda at PDF page 86, and go

through that and then revert to the paper documents, which is largely carried forward the statutes or rules in which cy pres awards have either been legislated or enacted by the court of that state.

So to begin with, back in August of 2022 Chief Justice Hecht referred the issue to the Supreme Court Advisory Committee about what do you do with unclaimed funds when you have a class action that settles or where the class case has been litigated and you have funds in the registry of the court on deposit somewhere for the benefit of the class and you make the distributions that are agreed upon or required and there are a number of class members who either did not claim their share of the recovery or they could not be identified. There's going to be funds sitting there somewhere, in the registry of the court maybe, that no one probably will ever use, and what do you do with it? There are other class actions in which the recovery to members of the class on an individual basis is less than the cost of distributing it to them or even giving notice to them, and so you want the class action to have its punitive effect of the defendant who maybe did harm to a lot of people, has to pay something, but what's paid in cannot effectively be distributed to all of the people who were harmed. And so those funds will be on deposit somewhere,

and the question is what happens to them if they never get distributed to anyone.

Then there are other class actions in which the damages that are contributed by the defendant are in excess of the cumulative total of damages to the class plaintiffs, and then the question becomes, well, if we have excess money here, the plaintiffs have already been compensated yet there's more money, should we just pay members of the class more than their damages to get rid of this money, or is everyone capped out at what their entitlement is as an individual member of the class and then we have this money left over and what are we going to do with it.

So according to my research, this thought of applying the cy pres doctrine to unclaimed class action funds or funds that cannot be distributed actually surfaced first in a law review article by a university -- I mean a Chicago law school student, which I think is pretty impressive, but it was picked up after that, and it is now becoming widespread practice around the country, but even though it's widespread, it's also controversial. Now, in the class action, if you opt out you have no standing to complain about whatever the settlement or court order is about the disposition of funds, so we have a relatively reduced number of people who are filing

objections to settlements or ultimate dispositions that take the undistributed money and send it somewhere, but there appear to be enough people interested in it that they'll appear and make an objection to the attorney's fees because the attorney's fees can be in the millions, even if the class recovery is $10 per member.

And while we're thinking about it, what is the defendant's incentive? Well, with opt out classes, a defendant has the opportunity to buy a res judicata bar against everyone who does not opt out of the class, including those who received no notice or don't even know that they have harm. The defendant gets a res judicata bar against all of those potential claims, which is incentive for them to fund the settlement that's perhaps in excess of what could be distributed to the class members, at least as a practical matter.

So from the outside, since I don't do class actions, it seems to me that a lot of these cases end up being settled before there's really an independent adversarial hearing about whether the requirements for class action are met, and the plaintiffs lawyers representing the class members and the defense -- the defendant agrees to a class, and it's going to be an opt out class rather than an opt in class, so it may include thousands or tens of thousands of people who don't even

realize that their rights are being adjudicated and that there will be a res judicata bar. And then in connection with some of these settlements, since there will be unclaimed funds or it may be impractical to distribute any funds, this money will be available, and I know that the cases we see and can read are just the tip of the iceberg. Some have migrated all the way to the U.S. Supreme Court, and there are, in fact, legal foundations that have taken it upon themselves to fight these kinds of class action settlements. So there is a little bit of stuff out there.

In the federal circuits, most of the courts have ruled on the idea of a settlement, which had to be approved by the judge, that includes the payment to people or institutions other than members of the class who were harmed. The U.S. Supreme Court has never spoken on the process. All the cases that have gotten there have either been denied or settled or a bankruptcy filed or whatever. The circuit courts, some are more aggressive in policing what's going on in these class action settlements at the trial court level. Others are less so, and probably one of the things that I hope we can discuss here today is if we bring this process into Texas and recognize it officially, the abuse of discretion standard for the appellate court to review the trial court's decision to approve a settlement that involves a cy pres award to

third parties, the abuse of discretion standard is so broad that it probably doesn't ever lead to reversal except in perhaps maybe the most egregious misapplication of funds.

So if we are going to introduce this process into Texas and we are going to have discretion with the parties and the trial judges to select who is going to get the money that can't be claimed, I certainly for one would ask that we all consider having a tighter review standard on appeal than just abuse of discretion. The one Texas case that I found -- and I think it's the only one that is out there that actually has reviewed a cy pres award, rubber-stamped basically what the parties and the trial judge did, because there was no known standard for what's right and what's wrong in this area and there's no cases saying you can't do something. So they said how can it be an abuse of discretion for you to approve this settlement when we have no standards to apply and no other case law to use as guides? So that's one reason why I think we should consider if we're going to formalize this process that we consider at the same time the scope of review.

Now, to get back to the focus on cy pres, it was originally a law French term. I think as far as I can tell traces back to the Code of Justinian, which is kind of a modern Roman law so to speak, and it comes from a law

French phrase that said that a doctrine that as close as possible to original intent. Those are not the literal Latin translation, but there were situations in which charitable institutions were created or charitable requests were made that through the passage of time or inadvertence they could not be fulfilled as written, and in the law you're just dead. If you're -- if you designate a beneficiary in your trust and it doesn't exist or it's gone out of business or it's changed its name, then it just lapses. But they developed the equitable doctrine inherited by us through England that the equity courts had the ability to reform a charitable trust or a charitable bequest or a will if the original charitable intent of the creator or the benefactor could no longer be achieved, and you would go into court, you would put on your case to show that the intent was to help, you know, the orphans in a particular orphanage in a particular community, but let's say, for example, the orphanage burned down, and so there's one other orphanage left.

Well, you could go into an equity court and say it was obviously intended by this benefactor that orphans in this community would receive this support, that orphanage is gone but there's another one over here, so it would be as close as possible to the original intent. Then the court was allowed to rewrite something even if it

was the will of a deceased person. So that idea of as close as possible is part of this whole cy pres doctrine, which is if we're going to come in and rewrite what something else did, we should try to stay as close as we could to their original intent.

Now, in Texas we don't have -- we have not recognized this doctrine officially in statutes except I found in the Texas statutes -- let's see, this was in the Property Code, section 5.043, is a section addressing bequests or a transfer that's in violation of the rule against perpetuities, and the Legislature was faced with someone that had made either a charitable or a family designation of wealth that violated the rule, and therefore it was unenforceable, so what happens in that situation? Does it just lapse and go to residual beneficiaries or what? And so the Legislature in Texas adopted section 5.043, and in section (a) it says, "Within the limits of the rule against perpetuities a court shall perform or construe an interest in real or personal property that violates the rule to effect the ascertainable general intent of the creator of the interest." So there we have a situation where an interested real or personal property violated the rule against perpetuities, but instead of being voided the court was empowered to do the next best thing closest to

the original intent that wouldn't violate the rule against perpetuities.

Subsection (b) says, "The court may reform or construe an interest under subsection (a) according to the doctrine of cy pres by giving effect to the general intent and specific directives of the creator within the limits of the rule against perpetuities." So there we have a legislative expression of the use of the doctrine of cy pres to save a transfer that is unenforceable under the rule against perpetuities, but instead of forfeiting it they permitted the court to rescue it. So when we --

CHAIRMAN BABCOCK: Go on the next best thing.

MR. ORSINGER: Yes, I mean, to go to the actual literal translation --

CHAIRMAN BABCOCK: So you're stealing from a Disney movie, Frozen 2.

MR. ORSINGER: I am? I didn't know that.

CHAIRMAN BABCOCK: Yes, you are.

MR. ORSINGER: How much does that cost?

CHAIRMAN BABCOCK: It's copyrighted, suit to follow.

MR. ORSINGER: So cy pres comme possible means as near as possible. That's what the actual Latin phrase is, cy pres comme possible. So the question then

becomes if you're going to use cy pres as a justification for taking class proceeds that belong to class members and for one reason or another, justifiable or not in different people's eyes, you're going to take those funds that belong to those people and give them to somebody else. The doctrine of cy pres would suggest that it should be given to someone that is as near as possible the original intended beneficiary, and in the class action you can usually identify the intended beneficiaries as being people that were harmed and became part of this class. The harm might have been, as in one case they were cheated out of $7.50 per pair of Levi jeans that they purchased in the last 20 years, but you had to prove that you bought Levi jeans in the last 20 years, and nobody could prove that they bought jeans. They might have a receipt from somewhere, but it doesn't necessarily say Levi jeans. So that was impractical, but it was only $7.50 per person so you would spend more than that trying to figure out who they were.

Another one was Google. So everybody knows now that Google had these cars that drove down streets, and they had cameras on four sides if you never saw one, and they took pictures of everything, and so when you were doing Google maps you could do the street view and you could see the street. You could see the houses, the

buildings. Well, it turns out that Google was also taking all of the information out of all of those houses that were on the internet that didn't have a security code and were taking all of their data off of their computers inside of their house. So I don't even know that Google intended that. If they intended that, they're motto was do no harm, but I'm not sure, but it may have been inadvertent. But anyway, somebody figured out that they were scooping up all of this intelligence on people on all of these streets of America, so when Google was confronted with it, they said "mea culpa," and they put some money in, but it was completely impractical for anybody to be identified because it was all part of some Google cloud somewhere as to what the data was and what your damages were and so as a practical matter no one in that class could be compensated. They were clearly harmed, whoever they were.

Google may or may not have profited from it, but they needed to pay some big dollars, because what they did was so egregious, so they did. They paid some big dollars, but this money couldn't go to anybody, so in that particular case I believe they settled that they would give some money to the attorney general of California division that protects consumers, safety and consumer rights.

And so what you have is this doctrine of cy pres that in some cases is stronger than others where you try to find some worthy beneficiary for the unclaimed funds, and the people who are more traditionalists would say, well, the unclaimed beneficiaries have to be really close. I mean, it has to be types of people that were harmed in this class, even though we can't identify maybe all of the members of the class. So if somebody was injured by predatory practices in the insurance industry and we are going to have some unclaimed funds, then what we ought to do is we ought to put the money into foundations or agencies that advise people about their rights under insurance companies or who represent people in lawsuits against insurance company, some tie.

But on some of these if you read the case law -- and I'm not saying what's right and what's wrong, but I'll tell you what happens is a plaintiff's lawyer and a defense lawyer get together and they agree on who's going to receive these funds under the cy pres doctrine, and then it requires the court's approval, and so in a couple of instances you have significant sums of money are contributed to a private charitable organization that the judge's husband is on the board of trustees. Okay. That's maybe a bad example or may be representative, because I've seen it more than once, but perhaps there's a

thought process between some of the settling lawyers that they can enhance the chances of the judge's approving their settlement if the cy pres payment is going somewhere the judge likes, like -- like a favorite chapter of some group.

One of these settlements, it was going to American Board of Trial Advocates, state chapter in Florida. Now, I don't know, I'm a member of the American Board of Trial Advocates, and I think it's a great organization, but it's not -- it doesn't necessarily operate for the good of the people at large. I mean, I know they're in favor of the Seventh Amendment and not waiving jury trials, but my point is, is the process is open to abuse if all you do is have the lawyers privately agree on where the unpaid money will go and then the only supervision you have is the judge and then you find lawyers, you know, perhaps increasing the chances of approval by selecting beneficiaries that the judge would appreciate, which is one of the reasons why if we're going to have a process where the lawyers and the trial judges are going to do this I would prefer myself to have closer supervision from the appellate court.

But anyway, having said that, the referral from Justice Hecht was sponsored in 2002 or prompted in 2002 by a request from the organization here in Texas

that's responsible for services to the poor, the Texas Access to Justice Commission, which is different from the Texas Access to Justice Foundation, Lisa pointed out to me. And they had made a proposal back in 2002 which is in the electronic materials and also the written materials to a rule enactment here in Texas which would basically require that the access to -- the Access to Justice Commission be given notice of every class action settlement before the approval hearing so that they could send a representative to make a pitch or a request or a justification for why some or all of the unclaimed money could go to the operations of the commission to assist in delivering legal services to the poor.

And this is a -- of the say 11, 12 states that have done this, that seems to be a favorite designated beneficiary, or at least an allowed beneficiary is any of these 501(c)(3) corporations or even government agencies that are helping to deliver legal services to the poor, but it's not required. This proposal does not require that any money be given to the Access to Justice Foundation, just that they be given notice and the opportunity to come into court and to be heard, but there's no requirement that they be given anything. Whereas in some states you'll find when you go through them that sometimes 50 percent of the unclaimed funds have

to go to Access to Justice Foundation or up to 50 percent.

So having said that, we had a meeting in September 2002, and that is in the paper transcript over here rather than in the electronic transcript, but there was a lot of discussion, but what it boiled down to was a vote, one of Chip's favorite things, and on page -- gosh, it's on page 7,638 of that transcript Chip announced the vote. "If we do anything, the preference of the committee of the people assembled here today by a vote of 15 to 2 is that, the chair not voting, is that we have a comment as opposed to the rule." So when voting on what to do about this proposal from the Access to Justice Foundation of having a rule that required notice and an opportunity to participate in the settlement hearing, by 15 to 2 the vote was to put it in a comment but not a rule, but then there were five people who voted to do nothing, and to do nothing would mean neither a rule nor a comment.

So that was the stage we had, and when this was referred to us again, Chief Justice Hecht said, you know, take a look at what we discussed before and then also look at the Texas Supreme Court's case of Highland Homes vs. State, 2014. That was a Supreme Court opinion written by Chief Justice Hecht. It was a 5-4 opinion and the dissenting opinion was written by Justice Devine. And in that case the State of Texas through the attorney

general's office was claiming that these unclaimed funds were governed by the Unclaimed Funds Act here in Texas, which we would apply to our normal money on deposit where there's been no activity for a certain number of years and then notice is given and then after a certain period of time the money eschetes to the state, and the Texas attorney general was taking the position that that statute applied to these unclaimed funds, and by a vote of 5 to 4 the Texas Supreme Court ruled that it did not because of the actual technicality of who owned the funds would be the class members, et cetera, and therefore, he concluded his majority opinion by saying the correctness of the actual cy pres agreement was not prevented for review, and so the majority didn't fight about it.

But in the case itself there was a settlement involving a large general contractor that did business around the state that announced that all of his subcontractor who didn't prove that they had worker's comp insurance or liability insurance, they were going to subtract part of the payment to the subcontractor to cover the general contractor's liability, derivative liability for those claims. And they got sued by some of these subcontractors saying, "Wait, if you took our money for insurance you should have bought insurance, because the insurance would cover me, and it would cover you. No, you

just took my money and you kept it." And so that case was settled, and there were unclaimed funds, and they agreed that it would go to the Texas Nature Conservancy.

Okay. I joined the Texas Nature Conservancy back in the Eighties. Yeah, it's a great thing. You know, they're trying to protect the land from development, from abuse, to preserve for future generations. I think it's a great organization personally. I don't see how anyone can object because everything is done by agreement. Somebody gives them an easement, they get money for it and then it's protected forever, but what does it have to do with subcontractors who basically are extorted out of $2,800 apiece for not having insurance and then -- I'm sorry.

MS. GREER: So that's my case.

MR. ORSINGER: You were in it, so I may not be saying this fairly, but let me finish at least this description and then you can --

MS. GREER: I just wanted to let you know that.

MR. ORSINGER: I saw your name in there, Marcy. I tried to be as fair as I can.

CHAIRMAN BABCOCK: Marcy, he does this all the time. He did it to my cases, with no resemblance to what happened.

MR. ORSINGER: I think that -- we'll see. But the point is that the agreement was made to give the money to the Nature Conservancy, approved by the trial judge, and five out of nine justices on the Supreme Court took no position other than that the unclaimed deposit statute didn't apply, but justice -- the dissenting opinion was very revealing about the dissenter's concern about the possibility that lawyers with trial judge might -- oh, I forgot to mention it was put in a footnote that the trial judge's husband -- or excuse me, be sure I'm right. The trial judge's husband was on the volunteer board of trustees for the Texas Nature Conservancy.

MS. GREER: No.

MR. ORSINGER: What did I get wrong there?

MS. GREER: I think that the note was that our client was involved with the --

MR. SCHENKKAN: The president of Highland Homes was on the board.

MR. ORSINGER: The president of the defendant, okay. That's a complete --

MR. SCHENKKAN: Correct.

MS. GREER: A green builder.

MR. ORSINGER: -- on my part. Okay.

MS. GREER: Nexus?

MR. ORSINGER: Yes. Well, the point is if

you leave it up to the two groups of lawyers and the judge and you read the opinions from around the country, and particularly the dissenting opinions because there's not many reversals under the abuse of discretion standard, you're going to see that there's a lot going on behind the scenes in those settlements. So it seems to me that we're left with some fairly simple choices, and in my subcommittee I had sent around a ballot, which is in our electronic -- is in your electronic agenda paperwork, and golly, I wish I could find it.

HONORABLE ANA ESTEVEZ: It's page 98 of the electronic one.

MR. ORSINGER: Thank you. It looks like this, and what I was trying to do was to display the different perspectives of choices. We have basically six choices. You could leave Rule 42 as it is where we don't say anything about this cy pres stuff. We could return the funds to the defendant, because after all they're not going to compensate the plaintiffs so why make the defendant pay it? Or you could eschete the funds to the state, either for specific purposes for legal services for the poor or general services just to pay.

CHAIRMAN BABCOCK: Business courts.

MR. ORSINGER: Yeah, we could pay for the business courts. This is the way to pay for business

courts. Chip, thank you.

CHAIRMAN BABCOCK: Just trying to be helpful.

MR. ORSINGER: You could let the lawyers and trial judge decide, subject to some kind of standard of review, or you could put in a rule you could designate agencies or foundations who are approved or who are mandated to receive funds, or you could go back to the cy pres doctrine to find entities that are as near as possible to the class of individuals who suffered the injury. And so what I asked is the subcommittee members to rank from least desirable to the most desirable, and each vote is represented by an X on this little table here, and it doesn't show any kind of majority, or what it shows is the diversity of people on my subcommittee, because we have on return the funds to the defendant, out of six people four voted that that was the least desirable and one voted it was the most desirable.

So then on leaving Rule 42 as it is, one thought that was the least desirable, one thought it was relatively undesirable, one was neutral about it, and nobody was in favor of it. So that gives you a little bit of a drift there.

Escheting the funds to the State, three were against it, one was, you know, strongly against it, one

was moderately against it.

Letting the lawyers and judge decide, two found it least desirable. One was okay, and one found it most desirable. Then to designate an agency or foundation, one thought it was slightly undesirable, two thought it was better, and three thought it was the best. And then as the true cy pres doctrine, oddly enough we have one vote in each category, so we were really across the board on that one.

Bottom line, there is no recommendation really from this subcommittee on what we should do, and there is really no obvious choice about what the best process is if you look at the case law at the federal circuit or look around the country, but if you look at the paper agenda, we have the advantage of having gathered together the statutes and rules that were in effect that govern this, so let me go through it quickly.

California has a statute that says after the report is received -- and that is the report of how many people claimed and didn't claim so we know the amount of unclaimed funds. "After the report is received the court shall amend the judgment to direct the defendant to pay the sum of the unpaid residue of unclaimed or abandoned class member funds plus any interest to nonprofit organizations or foundations to support projects that will

benefit the class or similarly situated persons." That's the cy pres part. "Or to nonprofit organizations providing civil legal services to the indigent." So the California Legislature has said either apply cy pres and find your closest beneficiary or give it to legal services to the poor. So that's a restriction on the discretion of the parties and the judge.

If you go on to Hawaii what you'll find is that "Unless otherwise required by governing law is when the" -- "within the discretion of the court to approve timing and method of distribution of residual funds as agreed by the parties including nonprofit tax exempt organizations eligible to receive assistance from indigent legal services." Now, I interpret that to be telling people you can do this, but you're not required to do this because the way I read it is whatever is agreed to by the parties including if they agree to fund legal services to the poor. So Hawaii leaves it to the discretion of the parties and the judge, with a nudge toward legal services to the poor.

So now when we go on and take a look at Illinois, "An order approving a proposed settlement class with this residual shall establish a process for administration of the settlement and provide for the distribution of residual funds to one or more eligible

organizations, except that up to 50 percent may be distributed to nonprofit charitable organizations that serve the public good." Doesn't say serve half. What is an eligible organization under Illinois law? Must be in existence for three years, tax exempt for three years, must comply with the Charitable Trust Act and Solicitation of Charity Act of Illinois, and it must have a principal purpose of promoting or providing services that would be eligible for funding under the Illinois Equal Justice Act. So again, one of the requirements of an eligible recipient is not only that they be tax deductible and charitable, but they also be dedicated to legal services for the indigent.

So then if you look at Indiana here, Indiana has a statute -- no, I'm sorry, it's a class action rule. Indiana has a rule that "No less than 25 percent of residual funds shall be disbursed to the Indiana Bar Foundation to support equal access to the courts in pro bono." So that means that you have to give at least a quarter to legal services of the poor, but you're free to give the other 75 percent away, and it appears to me that that's going to be a decision between the settling lawyers and with the approval of the court.

If you go to Kentucky, again, they mandate not less than 25 percent of the residual funds shall be

disbursed to their IOLTA organization. If you go to Massachusetts rule of civil procedure, and these are coming up as local rules 23 quite often. "In matters where the claims have been exhausted," et cetera, et cetera, "the residual funds shall be disbursed to one or more nonprofit organizations or foundations which support or benefit the class or similarly situated persons consistent with the objectives and purposes of the causes of action." So that's the cy pres doctrine in action. "Where residual funds may remain no judgment may enter or compromise be approved unless the plaintiff has given notice to the Massachusetts IOLTA committee for the purposes of allowing the committee to be heard." So that is a notice requirement and an opportunity to allow the IOLTA people to come and request the allocation of funds, and that was similar to what the 2002 process was for the Texas Access to Justice Foundation.

North Carolina has a statute, and it says "After the report has been received" -- and that report would be how many funds we have left over -- "unless it's otherwise consistent with obligations under 23, the court shall direct the defendant to pay the sum of the unpaid residue to the indigent person's attorney fund and the North Carolina State Bar for the provision of civil legal services for indigents." So the Legislature in North

Carolina has mandated that a hundred percent of these excess funds go to the legal services to the poor.

And then we go to New Mexico, and New Mexico also is mandatory. "Residual funds. The court shall provide for the disbursement of residual funds to one or more of the following nonprofits to benefit the class similarly situated." So that's a cy pres concept. "Educational entities, training, teaching or legal services that further the goal of the underlying cause of action." Again cy pres. "Nonprofit organizations that provide legal services to low income persons, entities administering the IOLTA fund, and entities administering the pro hac vice fund that to support activities that promote access to justice." So basically what we have there is a requirement that they be provided either cy pres closely or more distantly to the injured class or to low income persons.

If you go to Pennsylvania, "No less than 50 percent shall be distributed to legal assistance to indigents." We go to South Dakota, "Shall provide up to 50 percent." "Shall provide up to 50 percent," pardon me. "Shall provide for the distribution of any residual funds to the commission on equal access; however, up to 50 percent of the residual funds may be distributed to one or more nonprofits that serve the public good, if the court

finds good cause." So that's a backwards way of saying that half of it goes to legal services for the poor and the other half can go to organizations that work for the public good generally.

The Tennessee code does nothing more than say that their fund for indigent civilization is authorized to receive contributions from these residuals. So they don't require anything about what the people involved in the residuals do. They just simply codify here that their indigent services for the poor can receive funds from this source.

So that's basically the array of choices that we have, and the one Corpus Christi court of appeals said whatever you do is not abuse of discretion because there are no standards. The one Supreme Court case on it didn't rule on it, but the dissent felt strongly about it to write a spirited dissent, and Marcy is going to straighten out my recitation of the exact circumstances of the case, but those are the choices we're left with.

We don't have a proposed rule because as far as we're concerned it's wide open. We have to figure out what the committee thinks is a good idea and then we can start writing something, whether it's mandating something, whether it's leaving it completely up to the litigants and the trial judges, whether we just recommend, whether we

just give indigent services the right to know. Those are all policy choices, and once we know what they are we can start writing a rule.

CHAIRMAN BABCOCK: You want to talk about Highland Homes for a minute?

MR. ORSINGER: Yeah. In the Highland Homes case the argument was that the residual funds were covered by the state statute on unclaimed funds, and the Texas Supreme Court ruled that it wasn't. Now, the argument that the AG was making, well, you know, there are protections built into there. You know, in some of these cases -- I don't think in this case, Marcy, but in some of these cases there were unreasonable restrictions saying if you don't claim your funds within 90 days you forfeit your right to your share of the class action funds. Well, that's not fair, and so the AG was saying that's not right, there should be safeguards there.

There are safeguards in the statute about escheteing funds, and you shouldn't -- so it's governed by the statute. Well, the majority said, no, it's not, and the majority didn't say it was, I mean, I think that they thought it could have safeguards, but my takeaway from the minority opinion, I mean, the dissenting opinion, is that there is a reason to be concerned about having unfettered discretion among parties who have an interest in giving

away other people's money. That's what it boils down to. Who's going to decide who's going to receive other people's money.

CHAIRMAN BABCOCK: Now, Marcy, what did the case really say?

MS. GREER: So, well, first of all, I mean, I think the case raises why there's a need for flexibility in crafting a settlement agreement, because, now, this case was a litigated class, so the class was certified for litigation purposes, settled afterwards, so it doesn't raise some of those concerns, but it -- what happened was the subcontractors were each going to get a check, and for current subcontractors they got it in payroll through the system. For prior ones they were mailed a check. And there was no -- they didn't have to do a claim form. They just got a check, and we were able to get a lot of money to those class members, and my client was fine with paying that money to the class members. He just wanted to make sure that they got it and that someone else didn't claim it for them. And he also did not want the money -- or they did not want the money going to the state. They wanted it to go to the next best use, because I don't know if you've tried to get money out of the unclaimed property fund, but it's really hard. It may be there, and guess who gets the interest off of the unclaimed property fund?

That would be the state, so there's an interest. That's what gave them the standing to object here. So, you know, to suggest that there's something funny going on, it's not.

But in our case most of the money went to the class members. I mean, an unusually high amount. I think it was like 70 percent went to the class members, but even in that situation there is a hundred percent of the time going to be money from uncashed checks. People are going to die, they're going to move on, they're not going to be able to be found, and there's going to be money sitting there. So the question is do you put it in the unclaimed property fund so that somebody might claim it, and in some cases you can't even do it because you don't know who the people are, or do you put it to the next best use, and so we decided to ask the court to approve the Nature Conservancy because our client is a green builder, and they felt like that was a good next best thing for these contractors.

I've had another case involving the Fair Credit Reporting Act where the money went to two nonprofit financial literacy programs in Texas as the next best thing for the money that couldn't be given to the class members. So, I mean, Legal Aid is always a pretty good possibility, but when you're structuring these settlements

people have different needs. The defendants always want to get the money back. I mean, if you can pull off a "We get the money back," that's a great thing for the defendant, but that raises red flags in some situations. But each settlement is different, you know, and the Facebook case that you were talking about or the merit case, the one where Chief Justice Roberts wrote the statement, which I don't know what that is, is that a dissent, is it -- anyway, he wrote a statement where he talked about the abuses, and there are definitely abuses with cy pres. You know, you don't want to give it to the booster club for the judge's granddaughter's school, you know, or things like that, but you need to have a nexus, and so the nexus is what I think gives some support for that. I think the amount of the cy pres award is significant.

If you've done everything you can to get the money to the class members like we did in Highland Homes, and they were marked on that opinion. I hope you noticed that. It was an incredible percentage of recipients where the checks were cashed, but what was left over was still $500,000, and that's not chump change, so what do you do with that? We had agreed to cy pres, and so I heard that the state was making this argument that, no, if you can identify the class members it has to go to unclaimed

funds, so we invited the state to the hearing, and they objected, and that's what ended up in the case on appeal.

But when you're trying to settle a class action, it is so complicated, and you need -- there are so many different moving parts to it, and that's why the judges don't have the authority in any court that I'm aware of to line item veto anything in the class action. They give an up or down vote on is it fair overall and adequate and reasonable for the class members or not. Now, they can say, gosh, I might grant, you know, I might grant approval of this if you would just, you know, put in a provision about this, but the parties go back and negotiate. And so I think that -- I don't think you can have bright line rules. I do not favor that.

I do not favor escheting to the State because it takes away an important ability to try to settle the case, because, you know, a lot of times they're saying, okay, if I'm going to say this money I want it to benefit the class members, and the reality is there are always uncashed checks. There's always money left. The settlement that I'm doing in Arizona has -- they pay the class members and then they pay them again until they -- until there's no way to get to the class members. Okay. And these are people who have to submit a claim form, so they're going to know them. Even in those classes there

will be money left over, and so we're going to be giving it to a financial literacy because it has to do with variable annuities.

So anyway, long story short, it's the next best thing, and so you look at things like if this is a nationwide class do we want to give it to a local organization, or you look at those things in the nexus and also how much money. If we're talking about $10 million that's obviously one thing. If we're talking about $20,000, that's a whole other situation, which is why I think if you have the two adversaries, you know, working it out and hammering out -- and you believe there's no collusion, because that's a finding the judges have to make, there's no collusion, this is not a pick off settlement where, you know, you bought out the weakest link in the defendant's -- I mean, in the plaintiff's side, and it's a hard fought battle, and they've come to a reasonable settlement and then the judge reviews it. Then I think the only -- abuse of discretion is really the only standard that can apply, because this is not -- this is equity.

Like you said, it comes from the chancery courts, but I would really, really advocate that y'all -- that you not take away an important tool in the settlement box, because these class actions are just so difficult to

settle, and they're so creative. Some of the most complex settlement agreements I've ever written are coming out of these class actions because you're trying to get them some relief, and I've been on both sides of plaintiffs and defendants now.

HONORABLE ANA ESTEVEZ: What do you mean by tools? Are you saying you want to have all of the options, or we can't limit it down to two?

MS. GREER: I think that you should have all of the options and let the parties figure it out with the judge having -- because keep in mind, a class action settlement is not confidential. It has to be filed of record. It's scrutinized. They send out notices to every class member, and you have to ensure that every class member gets notice as much as practicable, so direct mail. You look at the different ways. There's so much science around this, and so they're also judging it because people can come in who are class members who are not class counsel and say "No, no, no, I don't like this, take this out," and they do. They show up, and they file objections, so the judge hears that.

So there are a lot of -- and if it's a settlement in federal court involving the Class Action Fairness Act, you have to notify every attorney general of every state that's impacted with a class member, so it's

usually a 50-state deal, plus the attorney general of the United States, and give them 90 days before the settlement is approved so that they can weigh in and look for an abuse of the process. So I think there's a lot of inherent checks and balances already there and that for us to say -- I mean, it's one thing to say, you know, here's some ideas, and I'm all about access to justice getting that money, especially if you can't think of a better -- a better cy pres recipient, you know, providing access to justice is always a winner, but I think when you start telling people how they have to do it you're making it very difficult to settle. And I've settled dozens of class actions in mass tort cases, and each one is different.

HONORABLE ANA ESTEVEZ: But why is this -- why does this even affect the settlement? This is the money that wasn't distributed after you're done. Because then they can't come back later?

MS. GREER: Because you have to build it into the settlement. It has to be approved in the up-front process, and it can impact how you structure the settlement.

CHAIRMAN BABCOCK: Robert has been patiently holding his hand up for about a half an hour, so you're next, Robert, and then --

MS. GREER: I was shorter than Richard.

MR. LEVY: Yes, well, that was -- I did note that Richard said we would finish and we barely finished with his layout today.

CHAIRMAN BABCOCK: Dee Dee's been typing for two and a half hours.

MR. LEVY: I wanted to speak from a different perspective from my personal view in terms of cy pres or cy pres, and in my view it's actually a very problematic trend that has been taking place in recent years. Cy pres, the doctrine itself is a trust doctrine that addresses a very specific issue. You give money to a charity. The charity is no longer available or there, and what do you do to -- with those funds that were designated for that particular charity, and so the doctrine was developed to indicate the donor's intent and provide for a new recipient, but it's now been used in the class action settlement dynamic and other mass tort settlements, and it creates a concern that the parties and the lawyers will become very motivated by where those funds will be going and not focusing on their fundamental duties in terms of a settlement to ensure that the injured parties are being appropriately compensated, and we see this situation when you have coupon settlements where the settlement is either so difficult to get or so meaningless to most class

members that they have very low uptake on settlement, but when you've got this cy pres process where the funds that are unclaimed will go to some great organization or cause then that provides the motivation to approve the settlement, because it's -- it's good, but it's not good because it creates a dynamic where these cases that maybe aren't meritorious or otherwise -- wouldn't otherwise be brought are going to be brought in the courts.

One of the ironies is that typically class funds or the attorney's fees and the load starts that are developed in the case are going to be triggered based upon the total amount of the settlement, and yet a significant portion of that settlement might go to a cy pres beneficiary, and that -- the problem is that it provides an outlet or an excuse for the parties not to work harder on trying to ensure that class members actually get the funds that they need to compensate them, because it's okay if we don't distribute 25 percent of these funds, it's going to award the organization, so we shouldn't have to worry about that. But that means that justice has been denied to 25 percent of the class members who aren't getting the compensation that they need based upon the terms of the settlement.

And it obviously feels good to provide for critical public need, whether it's IOLTA or other equal

access to justice organizations, but the decisions about funding organizations like that fundamentally if they're state-based are left with the Legislature. They're the ones who make the public policy choices about which organization should get funds over other organizations, what are our -- what are our priorities in the state. Is it education, is it taking care of the poor, is it the bench, whatever it might be, that is the Legislature's job to make that determination and not a judge in a particular case or the parties in a case. Nobody has appointed them as the policymakers to distribute the public purse, and the -- the problem I think is that -- or at least the facts show that when there are cases where there is a much better distribution and where there isn't a cy pres recipient, where there is a higher motivation to distribute the funds, those cases end up with far greater distribution than the vast majority of traditional class action settlements, and large unclaimed funds suggest that there are problems with the settlement, either in the process of settling it or in the management of the actual distribution of the settlement funds.

In the case that Richard mentioned, whether it's the Google case or Facebook or other situations where you just can't figure out how to pay the people who were injured, you know, we just don't know, so we're just going

to provide this big settlement where the plaintiffs' lawyers will get a big chunk of it and then the cy pres recipient will get a big chunk. So the injured plaintiffs don't get anything, but the reality is, is that is a nonjusticiable case. It should not have been maintained, because if you can't figure out who your injured parties are there's no case to bring, and we actually deal with that. We have legislation where we have agencies who are charged with prosecuting companies who violate privacy rights. We just passed a new legislation that taxes that will do just that, and they have the power to fine the defendants, and that money goes to the public purse that is used to prosecute future cases, and that's the policy decision, and it shouldn't be based upon just who a judge and two other parties or whoever is involved decide is a worthy recipient.

And, Marcy, in your reference to deciding the next best thing and it gives us flexibility, we settle cases, we settled class action cases before cy pres became the thing to do, and it -- it becomes too convenient I think to allow parties to be able to rely on that as the -- as the relief valve to potentially not be as focused on making sure that the settlement process works. And the -- you know, one of the other ironies about this is that, if we did have a cy pres rule and we excluded cy

pres amounts from the, you know, the amounts that are paid to class counsel, you sure would get a lot better distribution in that kind of dynamic; and, you know, that obviously all of the parties to the case have a charge to try to make sure that the settlement process works; but the plaintiffs, the class representatives and the class counsel, are the ones that are first in that duty to ensure that the settlement funds get to the people that have been injured and not to the next best thing. And it kind of rubber -- not rubberstamping but actually formally whether by rule making or otherwise or just by practice allowing cy pres to become prevalent is taking away that incentive.

Now, then the question would be asked what do you do with the funds, and, you know, it -- it is somewhat easy to say return it to the defendant. The party that is paying the money has the closest connection to those funds if they're not going to anyone else, and the problem then, you know, it gets back to where are the incentives in the process, and the incentives then clearly become making sure that the settlement gets the money not to the defendant but to the parties that have been injured, and that motivation is diluted from the process if we rely on cy pres, because plaintiffs reps get their money, plaintiffs' lawyers get their money. The other

thousands or tens of thousands of plaintiffs, their voice isn't being heard, so they're not getting their money, and that's why you have these organizations that Richard mentioned.

Ted Frank is one of them. He's actually in Houston, where he's -- he actually intervenes in cases and objects to settlements that don't distribute funds well, and he is a big opponent to cy pres, or at least I believe he is based upon what he's said, because of the problems and the abuses that happen. You don't want judges also charged with making that decision, whether by approving the settlement or providing their in terms of where they think the money should go because that's not their job. They're not charged with that determination. That's not, you know, class action case is a case between parties, and it's not a case on deciding what the right organization to receive extra funds are. So ultimately in my view I don't think that we want to have a rule that endorses cy pres as an element in settlements. If we did, I would certainly suggest that we try to develop processes to make sure that it doesn't shift the incentives and the responsibilities and distribution of funds to the parties that are injured.

CHAIRMAN BABCOCK: Okay. We're going to take a break, because we have three people that want to speak, and rather than make Dee Dee type for more than two

and a half hours in one go, but, Richard, good news, the copyright problem is not there --

MR. ORSINGER: Good.

CHAIRMAN BABCOCK: -- because the song that Ana sung in Frozen 2 was *The Next Right Thing*, not *The Next Best Thing*.

MR. ORSINGER: Oh, good, not *The Next Best Thing*. Don't I have derived governmental immunity because I'm assisting the Supreme Court?

CHAIRMAN BABCOCK: Whatever immunity you have is qualified and it's overcome in this case, but the other thing that I've learned is that in the Kingdom of Airrondale it's pronounced cy pres, not cy pres.

MR. ORSINGER: Well, I looked it up right before today, and they say -- whoever they are out here in the cloud -- they say cy pres.

CHAIRMAN BABCOCK: Yeah, well, Elsa and Ana say cy pres, so there. We'll take a break, be back in 15 minutes.

(Recess from 3:29 p.m. to to 3:51 p.m.)

MR. ORSINGER: Chip, I think we're ready.

CHAIRMAN BABCOCK: We're not ready because Justice Bland is not here, but she'll be here in a minute. So, Pete, you've been winding up for at least an hour now, so --

MR. SCHENKKAN: All right.

CHAIRMAN BABCOCK: The only thing I'd ask you to do is could you talk a little longer than Robert?

MR. SCHENKKAN: Okay. All right, so I think we need to start with what is the question before us, and I take it from Justice Hecht's letter or Chief's letter that he thinks the question is should we amend, should the Court amend Rule 42 to provide that at least a minimum amount of unclaimed or undistributable class action settlement funds go to Legal Aid. That's the question.

The second question is does the Court have the authority to do this as opposed to where we are now where no one knows what the parameters are of who you could give the money to except that they are subject to review for the abuse of discretion standard as to whether the settlement itself is under existing rules of 42 -- existing words of Rule 42, fair, reasonable and adequate.

Yes, the court has the authority to say that. Class actions are a creature of rules. They were invented in the United States more or less by Federal Rule of Civil Procedure 23, and the Texas Rule 42 and other states' class actions rules are essentially borrowed and adapted from Federal Rule 23. They're also subject to regulation by statute, of course, and mention has been made that Congress used its power to do that with Class

Action Fairness Act to force some changes in Federal Rule 23 practice.

The Texas Legislature did so in 2001 with substantial class action reforms that were what led to our lengthy discussions of amending Rule 42 the last time we considered it, which was in 2001, 2002. So unless the -- unless and except to the extent the Texas Legislature has said otherwise, the Texas Supreme Court has the power to say that these unclaimed or undistributable funds are going to go in whole to Legal Aid or in part to Legal Aid or perhaps a wide array of other possible answers.

So what is the merit of the argument that cy pres, meaning the notion that anything that the plaintiff's counsel and the defendant can agree on and get the judge to approve as fair, reasonable, and adequate recipient for such funds, what's the argument to be made that that's a better situation than having the rule say all or some portion of it should go to Legal Aid? The arguments I've heard very interestingly from Marcy and Robert had to do with the incentives to enable class action cases to be settled or the incentives for the settlements to be better at getting a larger chunk of the actual money into the hands of the people who it commonly is for, the members of the class. I think that's mixing up two sets of issues.

We may well have incentive problems, and we may well be able to come up with new ideas to improve the incentives to get to that result, but it's not apparent on its face that the difference between we're going to give it all to Legal Aid or we're going to give 25 percent of it to Legal Aid or we're going to just generally see what somebody can come up with as the next closest thing changes the incentives of either plaintiff's counsel or the defendant in any meaningful way. We're not bound to do it using the cy pres doctrine. The cy pres doctrine was originally common law, but class actions are not common law. They're creatures of rule and statute. Cy pres is not a matter of statute. The only statute in Texas that is -- that embodies the cy pres doctrine is on page two of Richard's memo, section 5.043 of the Property Code, reformation of interest violating the rule against perpetuities for charitable trusts, on its face, far less applicable, far less plausible claim could be made that that requires us to use cy pres in class actions than the argument made by the attorney general that was rejected in the Highland case.

There is no need to start with cy pres as the way we should decide this. No need in terms of law. You may feel that there's an argument out of the underlying thinking that went into cy pres as a doctrine

that says, well, we all ought to approach it the same way here. The citation for cy pres as a widespread practice, it's true it is increasingly widespread practice, but the citation that's used for it is to the ALI's principles of aggregate litigation. ALI's principles documents are not restatements of the law. That's why they're not called restatements of the law. They are principles that are out there, and so there isn't anything even from the ALI that says if you're doing class actions you have to do it this way, or it's usually been decided that you have to do it this way. You don't.

So -- and the question of whether you should do it this way is genuinely controversial. In the Highland Homes case in the majority opinion at footnote 9, the Chief explains how the -- the same notion Richard did, that we go back to the Norman-French phrase and tracing the origin of it, and then it says, "In the class action context it refers to awards," quote, "'to an entity that resembles, either in composition or purpose the class members or their interests,'" close quote, "when direct distributions to class members are not feasible," so forth, citing the principles of aggregate litigation, and then says, "Despite the principles' endorsement of such awards, issues regarding their legality and propriety have been raised," and it cites United States Chief Justice

Roberts' statement in the United States Supreme Court case respecting a denial of cert. And then finishes the Court -- the Texas Supreme Court concludes, "We have not had occasion to address such issues and none is raised in this case."

So there is no Texas law on whether it's even appropriate to use cy pres to sort out the question of where should all or some portion of the unclaimed and undistributable money go. So we're back to the question, the Court is asking us for our counsel on the possibility that they answer the question of how they want to do it in Rule 42, what would be the best option. I'm a proponent of answering the question should all or at least some minimum portion of it be deemed the -- provided in Rule 42 it's a requirement of a fair, reasonable, and equitable settlement of a class action that such funds go to Legal Aid. We can talk about what form, to what organizations, and whatever.

The policy argument for that is, I submit, as follows. In addition to the fact that we need more money for legal services to the indigent in civil matters and we don't have very many sources of it, and we preferably need ones that don't require asking the Legislature to take a vote in favor of taxing somebody to do it. The argument is why do we have class actions?

Mostly the ones that account for most of the cases that are filed and settled and most of the money, they come under the subheading, the type of class actions where there are common issues in the case and there are also issues that vary by the individual potential class members, but we -- we conclude that the common issues predominate enough over the individual issues that we're going to let a case go forward that would not otherwise be allowed to go forward because we're not treating the individual plaintiffs', potential plaintiffs', rights as their own. We're just going to do the best we can to solve as many of the problems for as many of the members of the class as we can, and we're going to have a lot of stuff left over, and we're going to try to solve that two ways. One, potential class members who don't like it can opt out, and two, we're going to do something with the money that's left.

So if that's where we started with class actions, we're allowing them because they address a different defect in the economics of the judicial system. It doesn't pay to have a lawsuit over $10 worth of -- I forget what the example was, or it doesn't pay to have a lawsuit over each individual homeowners' privacy rights affected by Google coming by their house and taking pictures of it, you know, from the highway and then

matching that up with the data available on that house. We're already using class actions to address the facts that our standard way of doing law, one real plaintiff, one real defendant, or three real plaintiffs and three real defendants, each with represented by their own counsel, doesn't work adequately, so we're going to do something different.

To me that argues we ought to use the side effects of such class actions, that there's going to be some money that can't get to those people to go to help address a different defect or a different set of people. So it is a policy argument, and it's one where there is a good policy reason for saying let's give it to Legal Aid.

Back to the only question that is on the other side, will that upset the incentives of plaintiff's counsel or defendant's -- class action plaintiffs' counsel who are actually the ones making the decisions for the plaintiffs. Will it upset their incentives to settle? Why would it? It's going to simplify the settlement matter quite a bit to know that any money that doesn't make it to the class members is going to go to Legal Aid. Just takes that issue off the table so you don't have to spend any time talking about it, and the defendant still has the fundamental incentive, which is what it wants, is to buy res judicata for as many people as possible for as

little money as possible, meaning as little money paid by the defendant. If the price of buying res judicata for the defendant is $10 million of which 7,500,000 is going to wind up going to class members and 2,500,000 is going to go to Legal Aid, as long as it's the total is 10 million, if they think 10 million is worth that much res judicata, they'll continue to pay.

For plaintiff's counsel maybe there's a question about the effect on their legal fees of having a portion go in the end to Legal Aid versus The Nature Conservancy or -- or the -- what was your example, the judge's granddaughter's --

MR. ORSINGER: There's so many examples out there.

MR. SCHENKKAN: -- soccer booster club. You know, maybe there's a way in which that affects the plaintiffs' counsel's incentives, but I -- frankly, I'll say I don't see it, and I don't think there is a hint of information out there that North Carolina, which is the one you read out where a hundred percent of the money goes to Legal Aid, is having any more trouble settling class actions than Texas is.

CHAIRMAN BABCOCK: What Richard was -- or maybe Marcy brought up, though, is if you only allow the plaintiffs' lawyers to recover attorney's fees based on

recovered funds by class members and not the --

MR. SCHENKKAN: And that's -- while I'm not taking a position on that specific --

CHAIRMAN BABCOCK: I know, but that's going to affect something.

MR. SCHENKKAN: That would have an effect on the incentives, and that's the point, is the incentive questions are a different set of questions. If we have a problem --

CHAIRMAN BABCOCK: Yeah.

MR. SCHENKKAN: -- with the incentives, if we think they're either tilted in favor of plaintiffs' counsel or against them in a way that is counterproductive for settlement, let's face that issue. That's not the question we were asked to do, and I don't think it's intrinsic to the answer. I don't think it drives the answer to the question if you've got to have money left over where does it go to say we're just going to decide on the front end everybody knows, plaintiffs' counsel when we filed the class action and the defendant when he decides how much money to put in settlement, knows that any of the money left over --

CHAIRMAN BABCOCK: But friendly amendment to what you just said, if you restrict the plaintiffs' counsel, class counsel, recovery to only what gets

distributed to class members then you're going to have more money for Legal Aid.

MR. SCHENKKAN: Okay.

CHAIRMAN BABCOCK: Right? Don't you think?

MR. SCHENKKAN: I don't know.

MR. ORSINGER: Yes.

MR. SCHENKKAN: Because it depends on does it change the incentives in the way the settlements get written, and that I thought was Robert's point, but I don't see it, in fact, changing the incentives in a meaningful way.

CHAIRMAN BABCOCK: Robert had many points which he is apparently afraid to defend, he left the room. I'm sorry, I didn't mean to interrupt.

MR. SCHENKKAN: No. Go ahead. All I'm saying about that is I really think the incentives as between the plaintiffs' counsel and the defendant's is a different question from what we do with whatever money is going to be left, and to the extent there is even an overlap between them, we would do a better job of addressing the incentive questions if we address them directly and took up a referral from the Chief saying let's look at the incentives to get the maximum money to class members, are we doing a good job with that by only having the words "fair, reasonable, and adequate" in

there. Or do we need to, you know, put in something more specific to make sure that the best possible efforts are made? That's just another question. It's not the one we are presently being asked to look at.

CHAIRMAN BABCOCK: Okay. Anything else, Pete?

MR. SCHENKKAN: No.

CHAIRMAN BABCOCK: Judge Wallace.

HONORABLE R. H. WALLACE: I'm okay.

CHAIRMAN BABCOCK: Passes. Justice Kelly.

HONORABLE PETER KELLY: In 49 of the 50 states, bizarrely not including North Dakota, one of the public policy principles underlying the development of tort law is that the defendant should not receive a windfall, and the cy pres doctrine is developed in the context of class actions to prevent the defendants from getting a windfall. They have committed a wrong. They have caused this much damage. They are liable for that much damage, so in order to -- it's not punishment, but to get compensation from the liable defendant and to deter for future misconduct the doctrine of cy pres has developed.

So the deeper principle is not the mechanics of incentives to settle a class action, but rather to prevent the defendant from getting a windfall, and due

respect to Mr. Levy, I mean, he says we can't distribute to a plaintiff and defendant should get to keep it. Well, that's defendant getting a windfall, so implementing -- in a way it doesn't matter who ultimately gets the benefit of the cy pres funds, but it is important for the underlying public policy of tort law that the defendant pay the full amount of damages that it has incurred. So the primary answer to the question is, yes, we need to have cy pres. Whether it goes to the indigent or Legal Aid or whoever, that's a secondary question, but I think the public policy analysis is actually relatively simple, and we don't have to get into incentives for plaintiffs or defendants to settle class actions.

CHAIRMAN BABCOCK: Justice Kelly, does the windfall argument -- is it affected by whether or not there's been an adjudication of wrongdoing? Because a lot of these things are settlements, and I've seen a lot of agreements that say, "We don't admit we did anything wrong, nobody says we did anything wrong, but we're going to pay $600,000,000."

HONORABLE PETER KELLY: That's because they don't want the risk of paying $6,000,000,000. I mean, people settle for a lot of different reasons --

CHAIRMAN BABCOCK: Yeah. Yeah.

HONORABLE PETER KELLY: -- of course,

they'll disclaim -- I mean, you don't have to admit liability in order to be liable.

CHAIRMAN BABCOCK: Well, to be responsible for a lot of money. Sorry, two hands went up simultaneously. Kent, I saw you first, so --

HONORABLE KENT SULLIVAN: This is a conversation that has been going on for a long time, and, you know, I've been in and out of it for I think about 20 years, at the AG'S office, on the bench, and in private practice; and you've got disturbing issues or at least potentially troublesome issues that arise at the point of class certification, approval of a settlement, and then distribution of money and in particular with respect to cy pres; and I think it's -- you know, what we've discussed is that you've got the potential for collusion and conflicts of interest relative to the parties, the lawyers, sometimes even the judge.

One proposal that I remember hearing and being a part of the discussion on was the notion of if you were going to allow cy pres to bifurcate the process, that is have one judge that rules on certification settlement issues and have a separate judge that will rule on any cy pres or distribution issues. There are cases that have come down in which there are then issues raised about whether a judge was improperly motivated and either judge

had an interest or some family member had an interest in the ultimate disposition of funds, and that seemed to me to be a practical thought as a potential solution for that. So that assumes of course that you continue to allow cy pres.

We've raised the issue of access to justice a couple of times, which is interesting because I think it's at least worth noting that from my perspective that's not a cy pres objective. Cy pres, you know, as was mentioned, is what is near as possible or something like that, and that's -- in my view access to justice is essentially an arbitrary charity designation, and that perhaps is what someone meant, but I think we need to at least make that distinction and acknowledge that it's really not some extension of the cy pres doctrine because cy pres generally is derivative of the merits of the case and the purpose of the original settlement that wasn't otherwise achieved.

And it's interesting, of course, when you start designating charities or purposes for undistributed funds. That really becomes the eye of the beholder. I think we've seen or we've heard a number of folks prick this up, and it's in no small part I suspect based on the composition of the group that's in this room. If I convene a group of doctors, I suspect there would be a lot

of discussion about how worthy some medical charity was, and I think it's just something we need to keep in mind.

CHAIRMAN BABCOCK: Thanks, Kent. Somebody over here had their hand up. Justice Gray.

HONORABLE TOM GRAY: I actually thought I was going to get through this whole conversation without saying a word, but I should have known better. You should have known better.

CHAIRMAN BABCOCK: Yeah. I was desperate for you to raise your hand.

HONORABLE TOM GRAY: But Peter sort of -- I had already written it down, but he triggered my desire to say it, which is --

CHAIRMAN BABCOCK: Without a warning.

HONORABLE PETER KELLY: I apologize.

HONORABLE TOM GRAY: So it's your fault. But I'm -- and I don't see how we can excise the question of motivations of the different parties from how much money is left over or what to do with the money that's left over or what to do with the money that goes into the initial pot, because as someone was talking I said, well, what if the excess money that, you know -- or the money that's paid in, the excess goes to the -- back to the defendant? Because the defendant doesn't think that there's that many people out there that have been injured,

and so but they're willing to put $20 million in a pot and say "As long as I get back what you can't show me people were injured, then I'll put the 20 million in." And especially if the class counsel only gets their percentage out of you show me the injured party and they get this much and you get this much, you know, off of that or in addition to that, and as long as everything comes back to me at the end, sure, I'll -- you know, I'll put in the pot. I'll make everybody whole, and it just doesn't seem like that's about what the defendant damages -- or what damages the defendant has caused, which is why Peter's comments caused me to respond. So --

CHAIRMAN BABCOCK: Okay. Anybody else have any comments? Yeah, Harvey.

HONORABLE HARVEY BROWN: Well, I was here in 2002 when we debated this; and at the time I thought we need to do something because if we do nothing it's status quo and the judges have no guidance; and so we've let this go for 21 years now without the judges having a lot of guidance; and the money, at least anecdotally, has gone on occasion to organizations we think it should not have. That suggests to me that this is something that we should not wait another 10 years on, that we should address it now, and before Pete spoke I was thinking to myself, well, 11 states are doing this. Is there any evidence that

they're not getting settlements because of this? Because my view is the same as what he said, which is if you're defendant, you want to buy your peace, and I only had one of these in my court, but that's what they cared about --

CHAIRMAN BABCOCK: Yeah.

HONORABLE HARVEY BROWN: -- was they wanted their peace. And if you say, I'm sorry, it's going to this organization and not your favorite charity or over here or one you like or one that's even the next best use, just to make it simpler and to remove the temptations and potential problems we talked about, it seems like to me that's a pretty good fix. I mean, in the perfect world I agree with Marcy that it should be the next best use, but we're not in a perfect world, and so I think having a list of one, two, three, four organizations that the judge could pick from to me seems like that's a good fix, and we should try to get moving forward on it.

CHAIRMAN BABCOCK: Well, if it goes to access to justice, could you not make a argument at least that -- that it is the next best thing in the sense that Legal Aid, access to justice, benefits the whole system, and among the people who can't afford legal services there will be a whole panoply of injuries in there that will be encompassed by a part of this settlement case? I mean, I think I could make that argument.

HONORABLE HARVEY BROWN: Yeah, I don't disagree with that. I'm not even sure whether I would say it should be three or four, but I think we should decide. I think was my point.

CHAIRMAN BABCOCK: Marcy.

MS. GREER: I just want to be clear. I wasn't advocating that you have to give the choice of cy pres. What you're describing to Legal Aid is a cy pres award.

CHAIRMAN BABCOCK: Right, yeah.

MS. GREER: So it's just I'm saying I think it's important to have that available because there always is money and you've got to figure out what to do with it, and I mean, if we want to pre-ordain, you know, a few organizations, I mean, that's helpful. I've actually had a number of cases where we've had more than one cy pres recipient, and it's helpful because you're benefiting more than one organization and you're not creating an over-incentive.

CHAIRMAN BABCOCK: Do you -- is there an argument to be made for limiting it to -- to one type of organization, like Legal Aid?

MS. GREER: I always think it's better to have choices because, you know, for flexibility, but I mean, there is benefit to that because it makes it

simpler, to Pete's point, you know where it's going.

CHAIRMAN BABCOCK: Well, and I don't do a lot of class action work, but I've done some, and I've had cases where the plaintiffs' lawyer is not quite so blatant as to be trying to get the soccer fund for the kid, but they are funding some group that is going to advocate for their law practice.

MS. GREER: Yeah, that's not okay. Never.

CHAIRMAN BABCOCK: No, but it's not very clear either, so, you know, it's you've got to dig around and say, oh -- so that's not good, but you would take that sort of suspicion away if you limited it to Legal Aid.

Judge Estevez.

HONORABLE ANA ESTEVEZ: I just have more of a question. When the IOLTA account started, how did that become nonnegotiable, like that everybody had to -- all the interest had to go? I mean, was that -- that wasn't a rule. Was that the statute? Was that a rule?

CHAIRMAN BABCOCK: I don't know. Anybody know?

MR. ORSINGER: I comment on that at the very end of my memo because there are constitutional issues here, which have been addressed by some courts but not the U.S. Supreme Court, but you're having a government taking. The argument is you're having a government taking here,

and it's a hard argument to defeat because by rule we're saying we're taking the unclaimed money that belongs to the members of the class that are not notified or can't collect and we're giving it to somebody else, so then the question is two things. Is there a compensation obligation there, and the other one is if you give it to an institution that's -- that espouses political views, there's a constitutional right to not have your money appropriated in the plight to a view that you disagree with.

But my recollection and the research that I did for this memo was the Fifth Circuit ruled that there was a property right in the interest on the IOLTA's account, but then I think the U.S. Supreme Court later made the decision that that didn't really -- under the -- under the fractured statutes, the federal statutes, that that didn't really belong to the depositor, and so there was -- ended up being no taking.

In *McDonald vs. Longley*, 2021, the Fifth Circuit Court of Appeals ruled against the State Bar's collection of mandatory dues saying "In sum, the bar is engaged in non-germane activities, so compelling the plaintiffs to join it violated their First Amendment rights."

CHAIRMAN BABCOCK: But that's different.

MR. ORSINGER: It is, but it's a principle that applied to labor unions, and it's been applied to a lot of things over the last, say, 40 years.

CHAIRMAN BABCOCK: Right.

MR. ORSINGER: And so whenever we make a decision at the official government level to take someone's money and spend it on something that could be politically sensitive --

HONORABLE ANA ESTEVEZ: I was just trying to do it only to Legal Aid.

MR. ORSINGER: Yes, I don't see --

HONORABLE ANA ESTEVEZ: That's why I asked the question about the IOLTA.

MR. ORSINGER: I see that's less of a problem with Legal Aid, because they're generally are not espousing political positions.

CHAIRMAN BABCOCK: And whose money are you taking, arguably taking? Are you taking the defendant's money because the defendant has already released those funds? They've already said I'm giving these funds to a bunch of people and so now you have some people who are entitled to those funds, but for whatever reason have not -- not claimed them.

MR. ORSINGER: Yeah. Chip, the case --

CHAIRMAN BABCOCK: So the defendant --

MR. ORSINGER: The cases that I have seen that have addressed that say it's not the defendant's funds at this point. It's the members of the class's funds.

CHAIRMAN BABCOCK: So it would be the class members who didn't claim their funds and then later complained because you gave it to Legal Aid.

MR. ORSINGER: Right.

CHAIRMAN BABCOCK: Or to the Republican Party of Texas.

MR. ORSINGER: For example.

CHAIRMAN BABCOCK: For example.

MR. ORSINGER: But I think that's kind of a more remote consideration for us, that it would be given to a political organization.

CHAIRMAN BABCOCK: Yeah, of course.

MR. ORSINGER: I mean, if they take this money and give it to the Republican Party we can't have that happen. So back about the IOLTA accounts, the U.S. Supreme Court finally decided in *Brown vs. The Legal Foundation of Washington* that the bar or the -- yeah, the bar's taking or the Supreme Court taking the funds was not administrative taking that triggered the Fifth Amendment right to compensation from the property holder. So I felt like that was kind of a technical way around the

underlying argument, but anyway, that's -- that doesn't figure largely. I mean, most of the cases you read are not constitutional law cases. They are cases where a few people are objecting to what looks like a sweetheart deal.

CHAIRMAN BABCOCK: Oh, yeah.

HONORABLE ANA ESTEVEZ: So my question was more when the IOLTA issues came up and they determined that everyone's interest, however it got there, no longer belonged to them but belonged to Legal Aid, those were the same issues that -- they have to be the same issues we're discussing here. So if it was okay for them to take that then it's okay for us to either by rule or by statute to take money for Legal Aid under the same premises. Because there's no one to claim it. I mean, that's the whole point. This is money that's not claimed. That money belonged to someone, too. The interest belonged to someone somewhere. I mean, I would argue that it could be my interest.

MR. ORSINGER: Well, that was --

HONORABLE ANA ESTEVEZ: So I'm saying that obviously the State, whether it was the Legislature, whether it was the Supreme Court, whoever made those determinations, at some point determined that this was okay. So if it's -- and I believe there was some cases about it at some point, and so if it's okay then we don't

need to talk about whether it's okay. We just need to decide do we think that's still so important that this would be a great place to put these assets, and I would argue a percentage, not a hundred percent, but maybe 50 percent. I like that 50 percent statute where they could determine another charity so they could work that out that was specific to the case that they actually settled and then the other 50 percent would always go to access to justice. I think that's a great solution.

And I think this other argument about whether you can do it or can't do it should be the same argument as when they took all of that interest out of everybody's client accounts. I don't see any difference. You're taking someone's money.

CHAIRMAN BABCOCK: Richard, she's looking at you.

MR. ORSINGER: There's -- I think the constitutional questions are here, but I don't think that people are motivated too much by the constitutional questions. I think that people are motivated by an underfunding of legal services for the poor. That's the primary motive I see everywhere I look.

HONORABLE ANA ESTEVEZ: Me, too.

MR. ORSINGER: And so the question is do we elevate that to a mandatory use of these funds or a

mandatory use of half of these funds, or do we just give them notice so that they can come into court and have their lawyer or their finance chair argue that funds should be discretionarily allocated to them? That was the proposal back in 2002, just a right to be heard. Or do we say, no, you can do whatever, you can get the other lawyer and the judge to agree to -- which obviously creates the potential for abuse. And if we're going to do that that's why I said earlier on then we need to supervise that potential because the abuse of discretion standard when there are no standards means there will never be a reversal, and I think that that's not the way the judicial system should operate.

If we're giving away other people's money, there should be some kind of standards. There should be maybe a second judge or some kind of hearing or public record or a separate hearing, especially in the settlement cases where no judge is really digging into the details, and then there should be a public supervision in my view.

CHAIRMAN BABCOCK: But, Richard, if you accept that the defendant has already relinquished those funds, so it's not their money anymore, and the people that have not made a claim on the money have in a sense abandoned the money, it's not like you're giving away other people's money.

HONORABLE ANA ESTEVEZ: I want to tell you that your Texas Local Government Code allows the county to take back all of the proceeds after a foreclosure after two years. Did you know that? Because it drives me nuts and so I violate -- oh, off the record.

MR. ORSINGER: Give Dee Dee a break.

HONORABLE ANA ESTEVEZ: Government somehow has -- I don't know if the clerks get a lot of those, but you know, the county comes and they foreclose on the properties asking for the tax foreclosures. They sell the property. There's an excess of proceeds. Everybody has had the notice. Nobody has come forward after two years, it doesn't belong to them anymore.

MS. GILLILAND: It goes back to the taxing entities.

HONORABLE ANA ESTEVEZ: Yeah. But it wasn't their money. It didn't go to -- I'm just saying this is something that our government does to us all over the place, and nobody knows about it, and so -- and it belonged to specific heirs that were listed that were represented by a attorney ad litem that either couldn't find them or however it worked, but I had one that was over, I don't know, $80,000. And I won't tell you what I did.

CHAIRMAN BABCOCK: Well, Tom Riney might

know. He had his hand up.

HONORABLE ANA ESTEVEZ: Oh, he doesn't do that.

MR. RINEY: No, I don't do that. But IOLTA is a little bit different. We voted on that as a bar '84, '85 and then the Supreme Court adopted it by rule. We weren't taking other people's money in that situation because prior to that you could not put your trust funds in an interest bearing account. So basically it was a system whereby we could put trust funds in an interest bearing account. The interest didn't -- wasn't there before, and that's what the Court directed towards Legal Aid.

CHAIRMAN BABCOCK: Okay.

MR. ORSINGER: You know, the statute for escheting funds, the Unclaimed Property Act --

CHAIRMAN BABCOCK: Yeah.

MR. ORSINGER: -- shows that the State in certain circumstances is willing to take people's property. That's -- I don't know that that's really what our debate is. I mean, the Supreme Court probably has the authority to adopt a rule that says that we're going to give all of this money or half of this money or whatever, and if the Legislature doesn't like it, they can pass a statute and change that or wipe it out or make it a

hundred percent instead of 50 percent. To me that's a philosophical question, but the practical question is, is the Supreme Court going to make the decision who will get these funds, or are the two lawyers on opposite sides with the approval of the trial judge going to make that decision?

We kind of have to choose that, and if we're going to let the two trial lawyers and the judge make the decision, is there going to be any supervision of that process, whether it's an appellate court or a panel or another judge, the question is can they do anything they want or are there some limits on it. So I think Chief Justice Hecht is saying, first of all, we need to write some choices for the Court, because internally they may decide they like one option better than another, so I don't think we just should vote and write one rule, but I think he's asking the committee to say, you know, what would you suggest.

We have 11 states. We have all of these choices, but to me the real question for us to resolve is, is the decision made on an ad hoc basis by the lawyers on the case with the supervision of the judge, or is it decided by the Supreme Court statewide in a rule?

CHAIRMAN BABCOCK: Yeah.

MR. ORSINGER: To me that's really what

we're debating today.

HONORABLE HARVEY BROWN: Would it help your committee to get a sense of this committee?

MR. ORSINGER: Well, it would, but I have a sense of my subcommittee which you can't figure out.

HONORABLE HARVEY BROWN: But this committee may be completely different.

MR. ORSINGER: It could be, Harvey. It could be.

HONORABLE HARVEY BROWN: Especially if you don't put it into a pare-down of six choices and say you've got two choices, broad discretion or the list of one or a few charities.

CHAIRMAN BABCOCK: Yeah.

HONORABLE ANA ESTEVEZ: I'd like to know how many other people besides Robert think that the defendant should get some of the money back.

CHAIRMAN BABCOCK: I don't know.

HONORABLE PETER KELLY: No.

CHAIRMAN BABCOCK: I don't know.

HONORABLE ANA ESTEVEZ: Yeah, well I know how you can find out -- I know how can you find out.

CHAIRMAN BABCOCK: Huh?

HONORABLE ANA ESTEVEZ: I know how you can find out, of our committee.

CHAIRMAN BABCOCK: Oh, oh.

HONORABLE HARVEY BROWN: You put that as a third choice.

MR. ORSINGER: Well, see that boils down to it's not necessarily a choice between A and B, which is why I had six different.

CHAIRMAN BABCOCK: Well, it is. It is. Because if you say that it's the parties and the judge on one hand, then it's going to go somewhere. If you say it's the Supreme Court's choice, the Supreme Court could say it goes back to the defendant, or the Supreme Court could say it goes to Legal Aid, or the Supreme Court could say it goes to four charities that we designate.

MR. ORSINGER: Sure, yeah. That would be a divide.

CHAIRMAN BABCOCK: Yeah, it still works on the two --

MR. ORSINGER: Sure. Okay.

CHAIRMAN BABCOCK: -- two choice.

MR. WATSON: Chip, can you state the narrow question for those of us that are completely lost?

CHAIRMAN BABCOCK: Sure. And speak for yourself about being completely lost. Everybody else is following me.

HONORABLE TOM GRAY: I'm with him.

MR. WATSON: And the other question is, are we going to vote, and if so, is it while we're still living or just lives-in-being plus 21 years?

CHAIRMAN BABCOCK: We're going to revisit this question every 20 years.

MR. ORSINGER: Into perpetuity.

CHAIRMAN BABCOCK: Yeah, there's a rule against that.

MR. WATSON: I'm just asking.

CHAIRMAN BABCOCK: Yeah, Elaine.

PROFESSOR CARLSON: I just want to say before we vote that I was on the committee, too, in 2002 when this was presented, and we did not recommend its passage, but we have seen so much happen in the last 20 years, particularly with access to justice, bad interest rates, lots of people underrepresented. We've had to go to forms. There is a huge, huge need to a lot of our citizens, and just bear that in mind when you're thinking you're being charitable.

CHAIRMAN BABCOCK: There we go. So I think the vote would be, Skip, that we are collectively in favor of a rule that allows the unclaimed money to be distributed pursuant to an agreement by the parties, lawyers for the parties, and the judge. That's over here.

The other option is the Supreme Court option

where the Supreme Court adopts a rule that says the unclaimed monies are going to go to, for example, Legal Aid or some other permutation of something. So it's Supreme Court versus the parties and the judges. So those are the two things we'll vote on.

MR. WATSON: Okay.

CHAIRMAN BABCOCK: Who's in favor of parties and judge? Who's in favor of Supreme Court?

MR. WATSON: Thank you.

CHAIRMAN BABCOCK: I knew that would make sense.

MR. ORSINGER: The Supreme Court, of course, as many of these states have done, could say half of it goes to Legal Aid and the other half is whatever the lawyers and judges --

MR. WATSON: No, no, no, it's just can they do anything.

CHAIRMAN BABCOCK: Let's not --

MR. ORSINGER: I'm sorry.

HONORABLE ANA ESTEVEZ: But I like that.

CHAIRMAN BABCOCK: Yeah, but then somebody is going to say, well, I didn't vote for that because -- let's keep it the Supreme Court or the parties and the judge for now because you're going to go back and work on this and come back in October, right?

MR. ORSINGER: Yeah. I mean, I've got all kinds of statutes and rules here that --

MR. WATSON: Oh, no, please. Please.

CHAIRMAN BABCOCK: Yeah, we'll have a five-day meeting next time.

MR. WATSON: Just shoot me.

CHAIRMAN BABCOCK: Justice Kelly.

HONORABLE PETER KELLY: Is going back to the defendant off the table?

CHAIRMAN BABCOCK: It is. Unless -- unless you -- unless you vote for the parties and judge option and they agree that the defendant gets it.

MR. WATSON: Yeah.

HONORABLE ANA ESTEVEZ: Yeah, that's true.

CHAIRMAN BABCOCK: They could agree to that I suppose.

HONORABLE PETER KELLY: I suppose they could agree to that.

CHAIRMAN BABCOCK: Not likely.

MR. ORSINGER: Well, you never know. The defendant might come up with more money if they think they're going to get a refund on the uncollected funds.

CHAIRMAN BABCOCK: Good point.

MR. ORSINGER: Didn't you say that?

CHAIRMAN BABCOCK: That could happen, but

otherwise we're not voting -- we don't have a third option that the defendant gets it all. All right?

MR. ORSINGER: Okay.

CHAIRMAN BABCOCK: You happy?

MR. ORSINGER: Yep.

CHAIRMAN BABCOCK: So who thinks that the Supreme Court should have the authority to designate who gets the unclaimed money?

MR. ORSINGER: Exercise the authority.

CHAIRMAN BABCOCK: Whatever. Supreme Court. Okay. How many people think the parties and the judge? Okay.

Supreme Court wins that one, 12 to 7 with the chair not voting. So although I know how I'd vote, but I'm not saying.

MS. WOOTEN: So mysterious.

CHAIRMAN BABCOCK: So we are not in my judgment going to spend the next 20 minutes talking about small estate affidavit kits. We're going to save that for tomorrow.

MR. ORSINGER: We have something to look forward to.

CHAIRMAN BABCOCK: We have something to look forward to, and the great news is no subcommittee has looked at this. The Court instructed that the full

committee should look at it, but we need a leader, and I nominate Elaine.

PROFESSOR CARLSON: No, no, no, I know nothing about this.

CHAIRMAN BABCOCK: And then right after that she's going to lead us through the JP rules again.

PROFESSOR CARLSON: Fool me once.

CHAIRMAN BABCOCK: So we'll come back tomorrow to take the last three agenda items, and we'll be done for sure by noon tomorrow, and anything else, Justice Bland?

HONORABLE JANE BLAND: Nope.

CHAIRMAN BABCOCK: All right. So thank you, everybody, and we'll be adjourned.

(Adjourned at 4:41 p.m.)

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REPORTER'S CERTIFICATION
MEETING OF THE
SUPREME COURT ADVISORY COMMITTEE

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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 18th day of August, 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 $ 2,044.00 .

Charged to: The State Bar of Texas.

Given under my hand and seal of office on this the 16th day of September, 2023.

/s/D'Lois L. Jones
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