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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

OCTOBER 13, 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 13th day of October,
2023, between the hours of 9:00 a.m. and 3:53 p.m., at the
South Texas College of Law, 1303 San Jacinto Street,
Houston, Texas 77002.

INDEX OF VOTES

No votes were taken by the Supreme Court Advisory
Committee during this session.

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2 CHAIRMAN BABCOCK: We're on the record now.
3 We have a recording in progress, apparently. Hey,
4 everybody, settle down.

5 Welcome, everybody. We want to thank the
6 South Texas College of Law for hosting in this and for
7 providing the technology so that our subcommittee chair
8 can -- can be present. And are we good?

9 DEAN BARRY: I don't know, we'll see.

10 CHAIRMAN BABCOCK: Well, we'll see. It
11 keeps coming up. If y'all can't hear me, you let me know.
12 But --

13 MS. GREER: I can hear you fine.

14 CHAIRMAN BABCOCK: Oh, good. Good. Yottis
15 Wilson is here somewhere, and she is the director of
16 events at the college, and we want to thank her very much
17 for organizing -- organizing this this morning, and Dean
18 Michael Barry is here, and he's going to make some
19 welcoming remarks, so, Dean, it's up to you.

20 DEAN BARRY: Thank you very much. It's so
21 good to see everyone. Thank you for coming to South Texas
22 College of Law Houston. This is our centennial year. 100
23 years ago and six months to the day we were founded here
24 in Houston, and as we could have been setting the history
25 for the centennial this year, we've learned that the

1 school was founded by the business leaders in Houston at a
2 time when the city was growing, and they knew if the city
3 was going to continue to grow it needed to have great
4 attorneys, and they created this law school to make sure
5 that there was a supply of great attorneys. And it's kind
6 of fun to think 100 years later as Texas continues to be a
7 leader in the country for growth for business that we are
8 still doing the exact same thing. We are preparing
9 attorneys to make sure that Texas continues to be a leader
10 across the nation. And we do that -- we are the 17th most
11 diverse city or most diverse law school in the country of
12 the 200 that are out there, and we have this commitment to
13 excellence.

14 I will tell you two quick things that
15 happened yesterday. One was downstairs in our atrium, we
16 had every major law firm in Houston recruiting our
17 students who are the one outs for summer positions and for
18 the future, and what was fun was the number of managing
19 partners and recruiting partners who came up and said, "We
20 love to get your South Texas graduates" because they're
21 ready. They're prepared. They don't come with a chip on
22 the shoulder. They're ready to do the work, and they know
23 what to do. And it wasn't just the lip service that you
24 typically hear when you're the dean, because when they are
25 surrounded by 2020, 2021, 2022 grads from this school that

1 these firms have hired, which is very gratifying for us,
2 and the reason we can do that is because of folks like
3 Professor Carlson who has been with the school for 40
4 years, who is not only a leading expert on the subject,
5 but who cares passionately about ensuring that our
6 students are ready for the real world.

7 And that's the second event that I had last
8 night. I had a student event, one of whom was carrying
9 his Texas pretrial procedure book with him and was saying,
10 "I hate this class and I love this class." I hate it
11 because it is so hard, it is so rigorous, and I am
12 learning so much, but I love it because I know I'm going
13 to be ready. And that's what this school embodies,
14 preparing people to be ready.

15 Thank you for being part of the leadership
16 of Texas, and thank you for being here today and being
17 part of the South Texas community. If I can be of service
18 to you at any time, please reach out. Have a great
19 meeting. Thank you.

20 (Applause)

21 CHAIRMAN BABCOCK: Dean, thank you very
22 much, and on behalf of my firm, Jackson Walker, we'll
23 second everything you said. Your students are just
24 terrific, and we have a bunch of your grads at our firm.
25 Thanks for doing what you're doing.

1 DEAN BARRY: I have more downstairs for you.

2 CHAIRMAN BABCOCK: Send them up when they're
3 ready. And we have our own opinions about Professor
4 Carlson, which we not only share your view, but we think
5 more of her than maybe you do, but --

6 DEAN BARRY: I believe that's likely
7 impossible. I have an academics crush on her.

8 CHAIRMAN BABCOCK: And everybody buy her
9 book. That's for the record.

10 Okay. We're ready to roll, and we start as
11 usual with the report from Chief Justice Hecht.

12 HONORABLE NATHAN HECHT: Well, good
13 morning, everyone. The Court's term started a few weeks
14 ago, and we're deep into it. We have new eager law clerks
15 of the caliber that the dean described, working very hard.
16 We had two oral argument sessions, and we're getting ready
17 for another, and conferences have started, so we're well
18 underway.

19 I thought I would tell you something of how
20 we have responded to the legislation in the 88th
21 Legislature. Some of these are kind of outside maybe some
22 of your interests, but I just wanted you to know how hard
23 the Court works with the Legislature on this to try and
24 maintain a very good relationship between the branches,
25 which I know from my experience with the Conference of

1 Chief Justices, not every state enjoys, but we -- Jackie
2 and Justice Bland and I and Vernis and others put together
3 I think 32 directives from the Legislature, and we divided
4 them up and sent some of them to you and kept some of them
5 for ourselves and sent some out to other groups that can
6 help with them, and our goal in all of that is to get all
7 of that work done timely, but by the end of the year. A
8 lot of it was done by September the 1st when the statutes
9 took effect.

10 One change is to make it easier to
11 participate remotely in IV-D cases. Judges can hear these
12 cases from anywhere in Texas and can permit or require
13 lawyers to -- and parties to do the same, and sometimes
14 the meetings have to be in person, but this was
15 legislation that was pushed by the attorney general.

16 You talked about discovery in family law
17 cases, and as we discussed at these meetings, we made
18 changes to the rules, rather than have the discovery
19 changes be separate family law rules, so they become
20 effective September the 1st, and the big change is in
21 changing requests for disclosure to requests rather than
22 making disclosure mandatory.

23 We're directed to change some aspects of
24 judicial education and ballot disclosures and warnings to
25 candidates who are running for judicial office, so we made

1 amendments to Code of Judicial Conduct and the procedure
2 rules. Judges who fail to meet educational requirements
3 will be listed by the conduct commission, and so people
4 will know who they are, and judges and candidates for
5 judicial office can be sanctioned for making false
6 disclosures on ballot applications.

7 One issue that has gotten the judges' and
8 clerks' attention is a directive to make court orders
9 available on the e-filing system, which is basically
10 re:SearchTX, the Tyler platform, and this is a little
11 harder than it looks. For the appellate courts there was
12 a lot of discussion about whether our internal case
13 management system, TAMES, met the requirements of the
14 statute. We concluded that it did, and so the change for
15 the appellate courts has not been too significant. We're
16 still -- we're already making orders and court-generated
17 documents available to parties and lawyers electronically.

18 In the trial courts it's harder. Some trial
19 courts already have case management systems, but only a
20 few, and most of the courts do not, so they'll be required
21 to send these -- send their orders and notices in civil
22 cases to Tyler to post on the e-filing system. The Court
23 of Criminal Appeals decided to confine the requirement to
24 orders, court orders, rather than other notices and
25 documents that are generated by the courts, but we'll see

1 how that develops. And I think as the courts go, at least
2 for civil cases, is that eventually all court-generated
3 documents in the Texas court system will be available
4 electronically on re:SearchTX, so it will be essentially
5 like the federal PACER system. So we're only about 35
6 years behind the feds, but we're quickly catching up, and
7 I hope the efforts made to place case management systems
8 in the courts throughout Texas will assist in all of this.

9 On supersedeas bonds, there's this new
10 statute that says a debtor who is worth less than \$10
11 million may post alternative security if the caps already
12 in the rule, and by statute we require substantial
13 liquidation of property necessary to the debtor's
14 business. So we made that change. And also supersedeas
15 bonds become effective now on filing rather than after
16 court clerk approval, and this was requested by several
17 lawyers and clerks, and so we've made that change.

18 We've revised the protective order kit. The
19 disciplinary rules were to be changed, again by statute,
20 to provide that a person complaining against a lawyer must
21 have standing to do so, and standing means in the words of
22 the statute cognizable individual interest, so we decided
23 not to try to define that further and let that work out in
24 practice. Attorneys may classify a grievance -- may
25 appeal the classification of a grievance as a complaint,

1 which they've not been able to do, and sanctions by a
2 district grievance committee are public when an attorney
3 makes false declarations on a ballot for judicial office.

4 Following Dobbs, the courts are concerned
5 across the country about confidentiality, so there have
6 been efforts in the federal and state courts throughout
7 the country to stiffen the requirements and make sure that
8 court personnel are aware of them, and the Senate Bill 372
9 requires that in Texas, so we've amended Rule of Judicial
10 Administration 7 to require all of the courts in the state
11 to adopt confidentiality policies and training, and we've
12 put ours in the rule or in the order as a model so that if
13 the courts are looking for something that they can use to
14 fashion one for themselves, it's available, but there are
15 a number out there. The National Center for State Courts
16 has a number for them. Federal courts have their own
17 version, so this is very serious business. I think some
18 of us have thought that disclosure of internal
19 confidential court information has been a crime since at
20 least the Sixties or Seventies, but this 88th Legislature
21 made it specifically a crime, and so very -- taking this
22 very seriously, maintaining court confidentiality.

23 A couple of other changes not requested by
24 the Legislature. One of the changes to TRAP Rule 6,
25 nonlead counsel need not jump through the same procedural

1 hoops to withdraw from the appeal as lead counsel, but
2 should file nonrepresentation letters just so that
3 everybody will be clear who's on the papers, who's on the
4 file, as the case goes through the appellate process.
5 Those changes were effective September the 1st.

6 We've made a change in e-filing, and clerks
7 are now required to process e-filed documents and put them
8 in re:SearchTX on the same day -- business day that they
9 are received, absent extraordinary circumstances. So this
10 has been an issue around the country. It's an issue for
11 the federal courts as well. Documents come in, sometimes
12 they are filed in the wrong court or maybe had the wrong
13 caption. Maybe there are other problems, information is
14 not redacted as required, some things that need to be
15 fixed before the document becomes a matter of the public
16 case record, so clerks try to do as much of that as they
17 can, but now there will be a requirement that they finish
18 that process on the same business day that they're
19 received.

20 We changed the briefing rules in TRAP last
21 week. We don't have to file paper copies anymore, so,
22 again, a nod to the 21st century. The automatic service
23 that's generated by the e-filing system is sufficient
24 evidence of service of process, and we've done something
25 that I'm not sure where they started, but it started some

1 years ago, probably at CLE conferences, to add in
2 petitions for review at our Court a section that's
3 introductory that basically states in very summary fashion
4 what the case is about and why it's important to the Court
5 and to the law that the petition be argued and decided.
6 So that's almost -- I think that's virtually every
7 petition I read, but it's not in the rules. So we've
8 added that to the rules, and there's some discussion about
9 whether we should take out the jurisdiction section, and
10 the committee talked about that, and we did not remove
11 that, but there will be a -- now a specific encouragement
12 to put the introductory reasons to grant section in
13 petitions for review.

14 There will be a referendum in April on 12
15 changes to the disciplinary rules that the bar committee
16 has worked on, so you'll be getting notices through the
17 bar journal about that. The changes are sort of
18 voluminous, so you'll need to take a look at those. The
19 election -- or the referendum is going to be held at the
20 same time as the election for bar officers, so they'll
21 come to you both at the same time, and you'll have the
22 month of April to vote.

23 Docket equalization between the courts of
24 appeals is now excluding cases that we anticipate will go
25 to the Fifteenth Court of Appeals, so we're already trying

1 to factor into the operation of the courts of appeals the
2 new Fifteenth court, even though it does not begin to sit
3 until September 1st of next year.

4 And then, finally, Justice Brown has agreed
5 to chair the Judicial Administration Specialization Task
6 Force, so the Legislature in House Bill 2384 requires that
7 there be a specialization, a board of legal specialization
8 for judicial administration, and Harvey is going to invent
9 that. He's -- he's canvassed the country, and we don't
10 know of another one like that, so Harvey is plowing new
11 ground here, and we're trying to have that ready, and
12 again, a directive of the Legislature.

13 So we got a lot of legislative businesses.
14 Just to say briefly, before 2003 the Legislature did not
15 feel like it was a good idea to leave rule-making to the
16 Supreme Court and the court system and to you. They felt
17 like it would be better to -- to make the rules
18 themselves. They still do that some. They still put in
19 statutes that the Court cannot change the statute by rule.
20 They don't put that in all the statutes, but they put them
21 in every once in a while. When I first got to the Court
22 when Chief Justice Phillips and I were there, first there,
23 we went over and asked Governor Bullock if he would
24 consider taking that out of the bill form that the -- that
25 they used to draft legislation, and he said of course they

1 would, and he was glad that we brought it up, and he was
2 just so proud of the courts and the judges and
3 particularly Chief Justice Phillips and me, and we were
4 just the best of the best. And the next bill that passed
5 had the language in it, so we called -- we called over and
6 we said, "There must be some mistake because Governor
7 Bullock told us that he was going to consider taking that
8 out of the bill form" and he -- they said, "Well, that's
9 interesting, he called us and told us to put it in every
10 bill."

11 So Governor Bullock was a good friend, but
12 we knew him sometimes difficult to deal with, but we've
13 come a lot further since then, and since 2003 the
14 Legislature has been very receptive to putting even major
15 changes in your hands and in the Court's hands to
16 deliberate like we're going to do here, rather than try to
17 do that, all of that hard detail work during the
18 legislative session when things are flying around and it's
19 very hard to pay attention. And also, of course, if we
20 make a mistake, it's a whole lot easier to change and
21 quicker to change than to wait until the next legislative
22 session, so we want that process to work well. We want
23 the Legislature to feel like it's working well on their
24 side. I think they do, but to do all of that, we pay
25 careful attention to the statutes that affect our

1 procedures.

2 So that's an update, Chip.

3 CHAIRMAN BABCOCK: Great, thank you very
4 much, Chief, and it appears that over the summer you guys
5 weren't very busy, didn't accomplish much, but -- just
6 kidding, obviously, after that 15-minute recitation of all
7 of the things the Court did this summer while the rest of
8 us were vacationing.

9 So now we're going to turn to business
10 courts, and fortunately we're at a venue which will
11 accommodate Marcy remotely, who is our subcommittee chair.
12 She has an excellent reason for not being here in person,
13 and I know she would be if she could. The subcommittee
14 has done an enormous amount of work and has just done a
15 terrific job, and the rest of this committee has made very
16 helpful comments to the draft that we received. And,
17 Marcy, are you going to lead us, or do you want a lateral
18 to somebody or just tell us how you want to proceed?

19 MS. GREER: I just wanted to make a couple
20 of comments and then announce Justice Miskel will lead the
21 discussion, just in case we have problems with Zoom and
22 since I'm not there. I really am sorry not to be there in
23 person. I do want to thank my subcommittee, which has
24 been unbelievable. We worked really hard together. Can
25 y'all hear me okay?

1 CHAIRMAN BABCOCK: Yeah. And now we can see
2 you.

3 MS. GREER: And now you can see my husband
4 in the background, too. Well, you are in it now, so Sam
5 says "hi." We're at an ABA meeting in the Bahamas, so
6 I'll do a full disclosure, and today's our free day, so
7 I'm getting to be here, which is great. I would have been
8 here no matter what, of course.

9 I wanted to mention that in the memos I was
10 remiss. I -- we also had Judge David Evans on our
11 subcommittee. We kind of drafted him to come and be
12 helpful, and I meant to change that in the memos before I
13 sent that out, because his contributions have been really
14 enormous as well. I want to be a special shoutout to
15 Robert Levy, who did the laboring oar on the rules on the
16 business court, but I also want to thank everybody on the
17 subcommittee and Jerry Bullard, Melissa Davis Andrews, and
18 David Shank, who joined us as kind of an immediate peer
19 review committee in all of our meetings and reviewed
20 drafts and had lots of great input. They have been very
21 helpful.

22 I also want to appreciate Chief Justice
23 Christopher's comments, which were incredibly insightful
24 and have given us a lot to think about, and we've made
25 some changes or are going to recommend some additional

1 changes as a result. It's been a privilege to be involved
2 with this -- these two subcommittees, and we've got a lot
3 of work to do, but hopefully we've given y'all a draft
4 that we can -- drafts of both sets of rules that we can
5 get going with.

6 CHAIRMAN BABCOCK: Great, thanks. Justice
7 Miskel, the ball is in your court now.

8 HONORABLE EMILY MISKEL: Do I need to be at
9 a microphone to be heard? Marcy, can you hear me, or do I
10 need to go to a microphone?

11 CHAIRMAN BABCOCK: No, you probably need a
12 microphone. Why don't you take that one to her?

13 No, you can sit down. We'll bring a mic to
14 you.

15 HONORABLE EMILY MISKEL: Okay, I can just
16 sit by one.

17 CHAIRMAN BABCOCK: They're wireless.

18 HONORABLE EMILY MISKEL: Okay.

19 CHAIRMAN BABCOCK: We want you to be
20 comfortable.

21 HONORABLE EMILY MISKEL: Okay. So basically
22 the -- is it -- Marcy, can you hear me now? Okay. So
23 basically the business court rules were longer and more
24 intricate, and so do we want to start with those?

25 CHAIRMAN BABCOCK: Oh, I think we want to

1 start with the business court rules, not the appellate
2 rules.

3 HONORABLE EMILY MISKEL: Okay. All right.
4 I think the memo addresses sort of the -- there are some
5 bigger conceptual areas of debate, and then I don't know
6 how much wordsmithing this group is going to do, but we
7 wanted to send it out in advance so that everybody could
8 have time to process and suggest any changes. I think the
9 only written changes I saw were from Chief Justice
10 Christopher. Is that correct?

11 CHAIRMAN BABCOCK: Oh, I think there may
12 have been some other comments, but I don't know.

13 MS. GREER: Well, no, Professor Carlson sent
14 some stylistic changes to one of the rules in the
15 paperwork that's attached that was distributed today, and
16 I thought that her changes were good ones, but they were
17 more language changes to make things consistent.

18 HONORABLE EMILY MISKEL: Okay.

19 MS. GREER: Is that fair?

20 HONORABLE EMILY MISKEL: Okay. Perfect.

21 MS. GREER: Is that fair, Professor Carlson?

22 PROFESSOR CARLSON: Yeah.

23 HONORABLE EMILY MISKEL: All right. So just
24 big picture where we started, I think our committee met
25 for like six two-hour meetings to go really in depth over

1 what rules need to be created as a result of this and
2 where should they go, so you see attached what we did, and
3 then we have wordsmithed it quite a bit. Marcy, where do
4 you think it would make the most sense to kind of open up
5 the discussion to the larger group?

6 MS. GREER: I think we're going to probably
7 have to go provision by provision, unless someone sees a
8 better -- I mean, the chart is helpful kind of as a
9 disposition. That was where we started, but then we went
10 deep -- a deeper dive into the rules, so if that makes
11 sense. So I have -- go ahead.

12 HONORABLE EMILY MISKEL: I will start with
13 that chart, so probably you might have skipped it. It was
14 Exhibit B to the materials that were sent out. It looks
15 like this, but this was sort of the biggest part of the
16 work that we did, which was to go through the bill and
17 decide does this section of the bill have anything that
18 should be in the TRCP, does it have anything that should
19 be in a different type of rule, like the Rules of Judicial
20 Administration, or should we just let this live in the
21 Government Code? And what we tried to do was only put
22 things in the civil rules that practitioners would need to
23 use, so some of the background things about how the courts
24 administratively function don't need to be in the TRCP
25 because lawyers don't need to worry about that. So that

1 was our sort of our guiding principle, so you can see how
2 we divided up the statutory language into which rule,
3 where will it live.

4 So I won't go through that, but I'll just
5 say once we had done that, then it became easy to say, all
6 right, these are the things that we need rules about, and
7 then we skipped to drafting the actual rules. So we took
8 our scope to be as narrow as possible, to not get into the
9 rules and suggest all of the types of changes that could
10 ever be made to the civil rules, but just to stay
11 laser-focused on the changes that were required by HB 19.
12 So what you see here in this redline is anywhere that is
13 underlined is exact statutory language. Any time we've
14 added something from the statutory language it's in
15 brackets, and any time we have altered or removed it, it's
16 in strikeout. You'll also notice curly brackets, and
17 that's where we've borrowed from federal stuff.

18 And so with that introduction, I mean, do we
19 want to just, Marcy, start with Rule 2 and march forward?

20 MS. GREER: I think that would make the most
21 sense, if you agree with that.

22 HONORABLE EMILY MISKEL: Okay. So I will
23 also note that a lot of questions and concerns that we've
24 heard about, why is it like this, why is it like that,
25 oftentimes the answer is because that's what the statute

1 provides. So, for example, the concept of having
2 proceedings concurrently in the business court and also in
3 district court seems like it might be rife with problems,
4 but that is exactly what the statute provides, and I know
5 that Chief Justice Christopher had some follow-up
6 questions about that, so we will get there. But starting
7 with Rule 2, that's an easy change. We just wanted to
8 mention the business court there. Go ahead.

9 MR. LEVY: So one small point about the Rule
10 2 issue is if the Court is of a mind, it might make sense
11 to delete after the first sentence, the language in Rule 2
12 currently is from the enactment of the rules originally
13 and most of it is really not relevant anymore, but that
14 was not part of our charge, so we did not recommend it,
15 but we noted that.

16 CHAIRMAN BABCOCK: What sentence are you
17 talking about? Is it in Rule 2 that you're talking about?

18 MR. LEVY: It's in Rule 2. It starts where
19 "Any statute in effect immediately prior to September 1,
20 1941," and it goes on to describe those prior statutes,
21 and that was relevant when the rules were enacted, but no
22 longer applies.

23 CHAIRMAN BABCOCK: Okay.

24 HONORABLE EMILY MISKEL: Yeah, so consider
25 deleting almost the entirety of Rule 2, but we just made

1 the one change that was within our scope.

2 CHAIRMAN BABCOCK: Yeah. Judge Miskel, just
3 a suggestion, if you put the thing between you and Robert
4 and just swivel the mic.

5 HONORABLE EMILY MISKEL: Yes, excellent
6 idea.

7 CHAIRMAN BABCOCK: You won't have to
8 continually go back and forth like that, and I know you
9 and Robert will have lots to say, so -- and everybody else
10 can --

11 HONORABLE EMILY MISKEL: Well, we had lots
12 to say, but now it's all in these rules, so --

13 CHAIRMAN BABCOCK: If anybody else wants to
14 talk, we only have another one or two mics, so just speak
15 up and let's not worry about, you know, migrating the
16 microphone around the room. If for some reason we're not
17 able to hear each other, then we'll change, but -- and
18 it's nice to have the microphone, by the way. So Judge
19 Miskel, sorry.

20 HONORABLE EMILY MISKEL: No problem.

21 MS. GREER: Can I just say one thing, Chip?

22 CHAIRMAN BABCOCK: Yeah, sure.

23 MS. GREER: The recommendation that Robert
24 just described, when we noted something like that, we did
25 put it in the memo so that other subcommittees might

1 consider looking at it or the Court may consider making
2 the changes. We made a list of all of those to keep for
3 future use, but again, as Justice Miskel said, we were
4 laser-focused on getting the rules to get this court up
5 and running.

6 CHAIRMAN BABCOCK: Yeah, great. Justice
7 Miskel.

8 HONORABLE EMILY MISKEL: Okay. I'm assuming
9 no other comments on Rule 2. We'll move to Rule 331, what
10 we found here was a chunk of rules that have been
11 previously repealed, so it seemed to make a nice home for
12 these new rules. So the rules we're proposing I believe
13 are numbered 331 through I think 345. Okay. Rule 331 is
14 straight out of the statute. Were there any questions or
15 changes on that? Seeing none, I'll continue.

16 332, the business court location. So the
17 clerk of the business court -- that should be "court" --
18 shall be located in Travis County. We had a question I
19 believe from Chief Justice Christopher about bench filing
20 trial briefs or jury instructions, charges, questions,
21 things like that. My understanding is that each business
22 court judge will have an administrative professional
23 person, whether that's a coordinator or assistant or
24 something. Was that -- is that in the bill, do you
25 recall, Robert?

1 MR. LEVY: There is a provision for
2 staffing, and I think it does include that.

3 HONORABLE EMILY MISKEL: Okay.

4 HONORABLE DAVID EVANS: That's what OCA has
5 used normally.

6 HONORABLE EMILY MISKEL: So my answer to
7 that would be the judge's staff would always be able to
8 e-file anything that was presented in analog form at the
9 bench. Justice Christopher, was there something more that
10 you wanted to add about the clerk in Austin accepting
11 things having to do with business court versus distributed
12 locally in the counties where they operate?

13 HONORABLE TRACY CHRISTOPHER: Well, to me,
14 you know, the way it's written, it seems like it can only
15 be filed by the -- you know, the clerk is the only one
16 that can accept the filings in Austin. I know that's the
17 way the statute is written, but it seems like we need a
18 little more wiggle room, like, you know, in terms of
19 accepting filings. I mean, lawyers always worry about
20 jury issues getting lost, right? And you may or may not
21 have your administrative assistant in trial with you. You
22 know, usually not, and I would imagine, you know, just
23 practical things. I don't know whether you can say the
24 clerk or its, you know, designees or, you know, having --
25 I think you would want to have a clerk of the business

1 court in Harris County that could accept a filing. Not
2 the administrative assistant, for example.

3 HONORABLE EMILY MISKEL: Well, so --

4 HONORABLE TRACY CHRISTOPHER: But maybe just
5 think that it can't under the --

6 CHAIRMAN BABCOCK: Justice Kelly.

7 HONORABLE PETER KELLY: Do we need to pass
8 the microphone to Justice Christopher?

9 CHAIRMAN BABCOCK: Yeah, sure.

10 HONORABLE PETER KELLY: We want to make sure
11 Marcy can hear.

12 HONORABLE EMILY MISKEL: Yeah. So I'll
13 recap for Marcy. Basically she was saying because the
14 attorneys may not always be able to file on the fly should
15 there be a clerk present in each of the divisions to
16 accept filings. I'm not sure we need a full-time person
17 present, so my recollection is when I used to accept
18 bench-filed things the lawyers would hand it to me and
19 then I would hand it to the clerk, so we can still do that
20 electronically because if they hand it to the business
21 court judge, the judge can hand it to their assistant who
22 will scan and e-file it.

23 HONORABLE TRACY CHRISTOPHER: I don't
24 consider that the same thing as filing when you -- when
25 you have someone who is not authorized to accept filings.

1 I mean, only district clerks are authorized to accept
2 filings, so to me an administrative assistant is not the
3 right person. I mean, I think you have to have someone
4 who is author -- who is an assistant district clerk, and
5 that person can also be an administrative assistant, but
6 just as a practical matter under, you know, various
7 statutes on duties of the district clerk, you know, I
8 don't think an administrative assistant is the same thing.
9 And they're not -- they're not subject to the same
10 statutes. They're not subject to the same immunities. I
11 mean, if I was an administrative assistant I would not
12 want to be responsible for accepting a filing because,
13 you know, that's not my job under the many other statutes,
14 so --

15 CHAIRMAN BABCOCK: Well, what does the MDL
16 court do?

17 HONORABLE TRACY CHRISTOPHER: They have a
18 clerk. They have a clerk in the county. So, you know, I
19 know it's not in the statute. I know the statute says
20 this. I am just concerned about that aspect.

21 CHAIRMAN BABCOCK: Yeah, Connie.

22 MS. PFEIFFER: I'm curious whether these
23 would be e-filed, and so if that removes the practicality
24 issue you're talking about when you're not in Travis
25 County that the parties would tender something to the

1 judge, consider it filed with the judge, and then you also
2 that same day e-file it.

3 HONORABLE TRACY CHRISTOPHER: Well, I mean,
4 that could be the way you have to do it. We also have the
5 problem of the judge signing it and where that goes, you
6 know, because the -- like the new law about district court
7 orders -- or court orders have to be e-filed, you know,
8 there's just -- and maybe I'm just worried about it too
9 much, it doesn't really need to be in the rules, people
10 will get it worked out. I would just think if I'm a brand
11 new business court judge, I may or may not have been a
12 judge before I got the appointment, and I just think it
13 would be -- they wouldn't understand all of the
14 intricacies.

15 CHAIRMAN BABCOCK: Yeah, just a question,
16 Chief, how do you handle jury notes now? What's the
17 practice now?

18 HONORABLE TRACY CHRISTOPHER: You hand it to
19 your district clerk who file stamps it.

20 CHAIRMAN BABCOCK: Okay.

21 HONORABLE TRACY CHRISTOPHER: And puts it in
22 the file, uploads it to the file.

23 MS. PFEIFFER: I can validate this is a real
24 practical issue, because there are definitely things that
25 happen in the course of a trial where you're

1 hand-tendering something to a judge, classically in a jury
2 charge conference, and you get a signed ruling right
3 there, and sometimes they get lost.

4 HONORABLE TRACY CHRISTOPHER: Right.

5 MS. PFEIFFER: And so it's not always easy
6 to get your signed rulings back and then go file those
7 yourself, but that's what a really cautious lawyer might
8 do, but sometimes this all happens so fast, and so I don't
9 know if the judge could be responsible for filing.

10 HONORABLE EMILY MISKEL: My experience has
11 been very different than Justice Christopher because I
12 never had a clerk in my courtroom, so what would happen
13 was people would bench file stuff with me. I would hand
14 it to my coordinator or administrative assistant, and she
15 would get it to the clerk just the same as it would work
16 in a business court. So when we got a jury note, we would
17 get it, I would sign it. I would hand it to my
18 administrative person, and she would scan it and e-file it
19 or get it to the clerk, so I didn't have a direct clerk
20 for my court.

21 HONORABLE ANA ESTEVEZ: I do it like that.
22 I mean, I had a trial yesterday, and somebody came in and
23 tried to --

24 HONORABLE TRACY CHRISTOPHER: But you don't
25 file stamp it, and your administrative assistant doesn't

1 file stamp it.

2 HONORABLE ANA ESTEVEZ: No, but I hand her
3 everything, and she e-files it, and I guess it goes to --
4 I don't know where it goes because that's the kind of
5 administrator I want, but I know it goes to the clerk.

6 CHAIRMAN BABCOCK: Judge Schaffer.

7 HONORABLE ROBERT SCHAFFER: This is a
8 potential problem, and I agree with Justice Christopher on
9 this, because everything we do, even if you have an
10 administrative assistant, it's going to still go through
11 the district clerk's office, and the district clerk is
12 responsible for maintaining the files of the courts. And
13 so this does create a kind of a hole in who is going to
14 take that document and make sure it's filed properly. And
15 filing properly is not such a routine matter anymore,
16 because things get misfiled routinely, and so to what
17 extent can we alter -- that's not really the right word
18 I'm thinking about, but add to what the statute says,
19 because I think we should be including the district
20 clerk's office in the county in which the court is sitting
21 as part of the maintenance of the records process.

22 HONORABLE TRACY CHRISTOPHER: I mean, the --
23 I -- so they're supposed to fulfill the functions of a
24 district clerk. Well, a district clerk has the ability to
25 hire assistant district clerks, right? So I just think we

1 need to put that in and that there needs to be an
2 assistant district clerk where the judges are. I just --
3 I just really think we need that person.

4 CHAIRMAN BABCOCK: Yeah, John.

5 MR. KIM: So from a practical standpoint, I
6 mean, we're dealing with complex cases, right? So there's
7 going to be a lot of injunctive issues, and injunctive
8 issues require direct access because of timing issues, and
9 because we're lawyers we wait until the last second, with
10 respect to being able to physically get down to the
11 district clerk's office and to have your documents, your
12 TI's your TRO's, everything filed, and so the problem
13 becomes if you have to post X amount in a bond, how are
14 you going to get it to Austin? What's effective filing?

15 CHAIRMAN BABCOCK: Great, great point. Any
16 other comments? Keep going, Justice Miskel.

17 HONORABLE EMILY MISKEL: I was going to add
18 that Robert pointed out that this HB 19 provides that the
19 business court may appoint personnel to assist the clerk
20 of the court, so the statute does enable the creation of
21 such a person. I think my concerns were just I know for a
22 fact that Dallas County is unable to hire clerks and
23 clerks are expensive, so it's just less of a -- it's sort
24 of a practical and I guess budget concern to mandate a
25 physical clerk present in every business court, but go

1 ahead.

2 CHAIRMAN BABCOCK: Judge Evans.

3 HONORABLE DAVID EVANS: I think this
4 assistant clerk that Justice Christopher speaks of is not
5 an employee of a district clerk, but an employee of OCA
6 through the business courts, and that's a position created
7 or hired out or contracted for, which might be one way of
8 doing an interagency contract between the business court
9 clerk and the local district clerks to provide services,
10 but there are 254 numbering systems. There are as many
11 numbering systems for case filings as there are district
12 clerks and county clerks, and the business clerk will have
13 one more filing numerical system to add to the ballou.
14 That was me fishing for a word. It has to be an assistant
15 clerk of the business clerk. It's got to be on the same
16 filing system, and it's an OCA employee.

17 I don't think it's a rule matter. I think
18 it's an administrative matter for the presiding business
19 court judge and the Supreme Court with OCA to work
20 through, but it does have to be filed -- it does have to
21 become part of the clerk's record to ever get up on
22 appeal, so --

23 HONORABLE TRACY CHRISTOPHER: I mean, I'm
24 perfectly -- you know, the statute says the clerk has to
25 be located in Harris County, fine, but it doesn't say that

1 the assistant clerks have to be located in Harris County,
2 and, you know, that's what we need. I -- and I think we
3 should have it in the rule just so that people will
4 understand that.

5 HONORABLE EMILY MISKEL: Okay. Is there
6 someone that can let Marcy back in? Do we know what --
7 oh, there she is. She's back. Okay.

8 Okay. So for purposes of Rule 332, one
9 option would be where it currently says "the clerk shall"
10 we could add the words expressly "the clerk or a deputy"
11 or somehow mention deputies there, or we can leave it out,
12 inferring that clerks always have deputies. What would be
13 your preferred option, to mention deputies specifically in
14 Rule 332 or leave it out, and would that solve your
15 concern?

16 HONORABLE TRACY CHRISTOPHER: I would
17 specifically mention deputies, and I would specifically
18 mention that deputies can be sitting with the business
19 court judge, because, you know, as opposed to sitting in
20 Travis County.

21 HONORABLE EMILY MISKEL: Okay. So something
22 like the clerk of the business court shall be located in
23 Travis County, other deputies of the clerk may be -- I'm
24 trying to think of how to give it discretion but not --

25 CHAIRMAN BABCOCK: Well, the question is do

1 you want the discretion? I mean, the deputy must be in
2 the county where the business court is sitting or may be
3 in the county?

4 HONORABLE EMILY MISKEL: Plus --

5 HONORABLE DAVID EVANS: I don't think it's
6 as simple as designating the county. It's the division
7 you need to designate, that the administrative clerk has
8 to be in the division, because the -- the three types of
9 hearings, remote, which don't have to be in the courtroom
10 and they'll probably be e-filed. There's in-person
11 hearings, and they're not bound by venue, so that will
12 probably be where the business court has its office and
13 can arrange to have a courtroom, and then there's trial
14 settings, which are venue-driven and venue-restricted if
15 it's a jury. So the administrative clerk that assists the
16 two business courts and the five divisions that are being
17 activated needs to have filing authority in all of the
18 counties of the division. And serves -- that would be
19 my -- also, I don't know that they have to be present. I
20 may disagree with you that they have to be physically
21 present because I think there are ways to communicate
22 those pleadings and assist, but --

23 CHAIRMAN BABCOCK: Justice Kelly.

24 HONORABLE DAVID EVANS: But anyway, I defer
25 to you on that.

1 MR. KIM: So who do I deliver my check to?

2 HONORABLE TRACY CHRISTOPHER: Right. That's
3 the question.

4 MR. KIM: And what if I get my temporary
5 injunction at 11:50 in the evening? What is effective
6 delivery?

7 HONORABLE DAVID EVANS: Well, that bond will
8 have to be approved -- will have to be approved by the
9 clerk in Austin through the administrative -- through an
10 assistant that provides that. At this point district
11 clerks are going to want fees for providing any service
12 and will not have electronic systems, case management
13 systems, that will equal that of the business court and
14 don't have an obligation to maintain a file for business
15 court.

16 HONORABLE TRACY CHRISTOPHER: I'm
17 anticipating it has to be a separate person. I mean --

18 HONORABLE DAVID EVANS: I am, too. I think
19 it's a separate person.

20 HONORABLE TRACY CHRISTOPHER: It would be
21 great if the -- you know, if the county -- you know, the
22 county could provide someone, but, you know, if we don't
23 think we would need it on a full-time basis, but, you
24 know, I mean, that's just difficult.

25 HONORABLE DAVID EVANS: You can do an

1 interagency contract.

2 HONORABLE TRACY CHRISTOPHER: Right.

3 HONORABLE DAVID EVANS: And so I think
4 that's how you contract for it, but then they would have
5 to have access in the business court, and that could be
6 done in that fashion.

7 HONORABLE TRACY CHRISTOPHER: But the
8 lawyers need to know where things go.

9 HONORABLE DAVID EVANS: Here's my problem.
10 I've got 18 counties in a division.

11 CHAIRMAN BABCOCK: Justice Kelly had his
12 hand up, but it may be --

13 HONORABLE PETER KELLY: I just wanted to
14 note that Rule 21, filing and serving pleadings and
15 motions, does have a carve out for "unless presented
16 during a hearing or trial."

17 HONORABLE DAVID EVANS: Right.

18 HONORABLE PETER KELLY: So there is a
19 precedent for that, and perhaps some sort of carve out
20 could be made in Rule 332 to address the concern of jury
21 questions or jury charge tenders.

22 CHAIRMAN BABCOCK: By the way, Marcy can't
23 hear us unless we're talking in the mic, so we've got
24 another mic, a roving mic, that people will rove around to
25 everybody.

1 HONORABLE EMILY MISKEL: Okay. So two
2 comments. How about for the proposed Rule 332 in (a),
3 "The clerk of the business court shall be located in
4 Travis County. Deputy clerks may be" -- "a deputy clerk
5 may be located in the business courts division," and then
6 as far as John's question about accepting things outside
7 of business hours and who's working and things like that,
8 throughout all of this is the concept that the business
9 courts are going to have their own local rules that are
10 appropriate for the size and type of cases that they
11 handle, and so a lot of times our questions in the
12 subcommittee were is this an appropriate thing to let the
13 business courts judges make decisions on how these types
14 of things need to be handled? So allowing -- expressly
15 providing that there may be deputy clerks locally, does
16 that address what we need to address within the text of
17 Rule 332, or do you think we need more text in Rule 332?

18 MS. PFEIFFER: I would suggest in that very
19 first part saying "the clerk or deputy clerk shall."

20 CHAIRMAN BABCOCK: Hang on, Connie.

21 MS. PFEIFFER: I would suggest in the very
22 first sentence adding "the clerk or deputy court clerk
23 shall" and giving them that expanded power.

24 CHAIRMAN BABCOCK: Yeah, Connie, are you
25 saying "shall" as opposed to "may" for the deputy?

1 MS. PFEIFFER: Yes.

2 HONORABLE EMILY MISKEL: I think she was
3 moving on to the second sentence where it currently says
4 "the clerk shall," colon. She was saying "the clerk or
5 deputy clerk shall," colon.

6 CHAIRMAN BABCOCK: Okay, but let's talk
7 about the location. You said, Judge Miskel -- Judge
8 Miskel, that the deputy clerk is discretionary.

9 HONORABLE EMILY MISKEL: I said "a deputy
10 clerk may be located in the business courts division," was
11 my proposed revision.

12 CHAIRMAN BABCOCK: And "may" means that
13 maybe yes, maybe no, so what happens if Houston, in Harris
14 County, or the Houston business court says, yeah, we need
15 a deputy clerk and the Dallas business court says we don't
16 need one?

17 HONORABLE EMILY MISKEL: Right.

18 CHAIRMAN BABCOCK: So you're going to have a
19 different system. John.

20 MR. KIM: Yeah, and so I'm a little
21 concerned about deferring to the local rule of the
22 different judges. I mean, the whole purpose --

23 CHAIRMAN BABCOCK: Speak into the mic, John.

24 MR. KIM: Because I thought the whole
25 purpose of this was to have some sort of uniformity to

1 deal with these complex type of cases.

2 HONORABLE EMILY MISKEL: Right, so the
3 business court will have its local rules, which would be
4 uniform.

5 MR. KIM: Which business court?

6 HONORABLE EMILY MISKEL: There's only one
7 business court.

8 MR. KIM: With seven different judges.

9 HONORABLE EMILY MISKEL: Uh-huh.

10 CHAIRMAN BABCOCK: Judge Schaffer.

11 HONORABLE ROBERT SCHAFFER: I think the idea
12 of a second sentence that says something to the effect of
13 "A deputy clerk may be" -- I'm sorry, I think the second
14 sentence that says something to the effect of "A deputy
15 clerk may be located in the county in which the court
16 sits" would probably -- probably work because that --
17 because it's going to be in every county where there's a
18 business court. You'll need a deputy clerk there for the
19 reasons we've already been talking about, and I think that
20 would probably fix the situation and leave it up to OCA to
21 make it work.

22 CHAIRMAN BABCOCK: Yeah, you would say,
23 look, the -- the Travis County clerk might think that
24 there ought to be a deputy in Dallas and Houston, but
25 maybe not in a smaller geographic.

1 HONORABLE ROBERT SCHAFFER: Right.

2 CHAIRMAN BABCOCK: With less cases.

3 HONORABLE ROBERT SCHAFFER: Yes.

4 MR. LEVY: Chip, the reason why I think we
5 would propose saying "the division" is that the business
6 court division encompasses multiple counties, so you don't
7 want to say -- and they don't sit in a county. They sit
8 in the division.

9 CHAIRMAN BABCOCK: Right.

10 MR. LEVY: So the clerk could travel with
11 the judge if the judge is presiding in Montgomery County
12 versus Harris County.

13 CHAIRMAN BABCOCK: Yeah, who pays for the
14 deputy clerk again?

15 MR. LEVY: That would be OCA under the
16 statute, and that's why I think we're a little reluctant
17 to put something in the rule that actually requires OCA to
18 staff a position that might not be needed practically.

19 CHAIRMAN BABCOCK: Well, but John says it's
20 always going to be needed practically in certain
21 circumstances, and you can't predict ahead of time whether
22 that circumstance is going to arise or not, because if
23 John gets an injunction at 11:50 at night and he can't get
24 a bond approved until the next day or two days later, a
25 lot of mischief can happen in that interim period. Is

1 that a fair summary of your problem, John?

2 MR. KIM: Sure.

3 MR. LEVY: But the -- the challenge I would
4 see there is that you would have the opportunity to
5 e-file, and that's always going to be available, and even
6 having a clerk in Harris County or the -- the division
7 that encompasses Harris County doesn't mean they're going
8 to be on duty at 11:00 at night anyway to be able to
9 process a bond, so that's -- I don't think having a clerk
10 there is necessarily going to solve the problem and the --
11 you know, you would need one when you're holding trial and
12 -- but if the court is not holding trial two weeks out of
13 the month, you don't have to have a clerk sitting there
14 doing nothing, but you can send one from Austin. That
15 would be up to the -- the clerk to staff, and it just
16 might not be necessary to have a staff person in every
17 division at all times.

18 MR. KIM: We get a temporary injunction at
19 11:50 at night. It's not effective until the bond is
20 posted with the district clerk. If we don't have a deputy
21 clerk within the jurisdiction, then if I get this -- if I
22 get this in McAllen, Texas, now I'm in a race to get to
23 Austin the next morning to get that bond posted so that no
24 shenanigans happen. I mean, that's not practical.

25 CHAIRMAN BABCOCK: Well, if you get in the

1 car in McAllen right as soon as you get the injunction and
2 start driving to Austin, you'll be there.

3 MR. KIM: No, I'm just --

4 CHAIRMAN BABCOCK: I'm being facetious.

5 MR. KIM: Rusty is going to buy a plane.

6 MR. LEVY: John, how would you do that
7 today? If you have an emergency hearing, you call the
8 judge up -- and, by the way, in this dynamic the judge
9 would have to be in the courtroom to have it.

10 MR. KIM: Sure. I just did it.

11 MR. LEVY: How did you file the bond?

12 MR. KIM: Because I got it in Houston, I was
13 in the district clerk's office at 8:00 a.m.

14 MR. LEVY: Right.

15 MR. KIM: Exactly, but if I --

16 THE REPORTER: Wait.

17 MR. LEVY: Not at 11:59. They're not open
18 then.

19 MR. KIM: But if I get it at 10:50 or
20 whatever in McAllen, Texas, and there's not a district
21 clerk that's effective, I've got to race to Austin under
22 this.

23 HONORABLE DAVID EVANS: Let me help.

24 HONORABLE EMILY MISKEL: I was going to say,
25 I do think, though, that the purpose of the Texas Rules of

1 Civil Procedure is not to mandate staffing and budgeting
2 within the clerk's office and create clerk's office
3 positions, so I think -- and I'll let you respond. I
4 think mentioning deputy clerks that may be located locally
5 in the rules is within the scope of the rules, but I think
6 mandating budget and staffing may be outside the scope
7 and --

8 HONORABLE DAVID EVANS: Well, let me point
9 out we're talking about service --

10 CHAIRMAN BABCOCK: Get a mic.

11 HONORABLE DAVID EVANS: We're talking about
12 service to be provided, not necessarily a staffing
13 position. For instance, you could enter in the business
14 clerk -- OCA could enter into an interagency contract with
15 the district clerk of Tarrant County to provide business
16 clerk services for the division in which that business
17 court is located. That wouldn't designate a single
18 person, but a responsibility and contract where the
19 district clerk of probably your largest county in each of
20 the divisions, five metropolitan divisions, would then
21 provide that service, and the business court judge would
22 know who that clerk is. That clerk would then coordinate
23 with the business clerk, the chief business clerk in
24 Austin, on how to file bonds, how to get papers filed, so
25 on and so forth. So it's not -- it's a service that is

1 needed by the judge, and I think -- with due respect, I
2 think that service needs to be available to the business
3 court, but it may be an administrative matter for OCA to
4 make sure how it's done. There's more than one way to do
5 it, and that's my comment. I'm comfortable with the
6 language you've added about "may have a clerk."

7 CHAIRMAN BABCOCK: Okay.

8 HONORABLE DAVID EVANS: That's it.

9 CHAIRMAN BABCOCK: Justice Kelly, did you
10 have your hand up? I'm sorry.

11 HONORABLE PETER KELLY: No, I did not.

12 CHAIRMAN BABCOCK: Okay.

13 HONORABLE EMILY MISKEL: Any other
14 discussions on 332(a)?

15 CHAIRMAN BABCOCK: That only took an hour.

16 HONORABLE EMILY MISKEL: That was one of the
17 functionally big questions, so that's fine. So (b), as an
18 example, you see the strike out. That's because this
19 language appeared in the statute, but we decided it didn't
20 really belong in the rule. This is an example of
21 something that's like background administration and should
22 live either in the Government Code or in the Rules of
23 Judicial Administration, so that's there for illustration.

24 So the third paragraph, which is (b), the
25 first part is directly out of the statute. The second

1 part is a strike out because, again, that's not necessary
2 for the litigants. That's more for background management.
3 Any other discussion -- yes.

4 HONORABLE TRACY CHRISTOPHER: So I was
5 just -- counties have to designate courtrooms, locations
6 of courtrooms, under other statutes, so I just -- and by
7 using the word "courtroom," I assume we're -- we're saying
8 it's a designated courtroom, and I assume it's a
9 designated courtroom by whom? I don't know.

10 HONORABLE DAVID EVANS: County management.
11 Currently counties designate space and control all space
12 for all state district courts and all statutory courts
13 that are located in their geographical area.

14 HONORABLE TRACY CHRISTOPHER: But this is
15 a newly defined judge, a new courtroom.

16 HONORABLE EMILY MISKEL: I think she's
17 referring there's a statute that says a district judge
18 must hold court in the place that's designated by the
19 county commissioners.

20 HONORABLE TRACY CHRISTOPHER: Right.

21 HONORABLE EMILY MISKEL: And so if the
22 business court judge has all of the rights, powers,
23 duties, obligations, et cetera, of a district judge, are
24 they also obligated to hold court designated by the
25 county's commissioners?

1 HONORABLE TRACY CHRISTOPHER: That's my
2 question. That's my question, and the reason I'm asking
3 that question is that, you know, well, for example, in
4 Harris County, what did we get, three, four new judges?

5 HONORABLE ROBERT SCHAFFER: Three this year
6 and three next year.

7 HONORABLE TRACY CHRISTOPHER: And they're
8 already scrambling to try and find locations for these new
9 district trial court judges. It might be necessary at
10 some point for a courtroom to be somewhere else, not
11 actually in the courtroom complex and I just --

12 HONORABLE EMILY MISKEL: No, I think you're
13 correct. I don't think it's required to be in a
14 traditional courtroom. This is a good question because
15 I'm trying to remember. Robert's looking at the statute.
16 It says elsewhere in the statute about the facilities that
17 a business court will have and how those are obtained.

18 HONORABLE TRACY CHRISTOPHER: I think this
19 could just be like a footnote, you know, in the rule that,
20 you know, courtroom is whatever, designated by OCA as a
21 courtroom. I don't know.

22 HONORABLE EMILY MISKEL: Or just change the
23 word "courtroom" to "facility."

24 HONORABLE DAVID EVANS: It's an
25 administrative rule as to where the courtroom is would be

1 my first comment. Might be an RJA on how they get
2 designated because appellate courts will hold appellate
3 arguments outside the designated courtrooms, and they do
4 that under some sort of statutory --

5 HONORABLE TRACY CHRISTOPHER: The statute,
6 yeah.

7 HONORABLE DAVID EVANS: And so it's an
8 administrative issue as to where, and every one of those,
9 all five of these divisions are going to have unique
10 circumstances as to how they arrange to get courtrooms for
11 the judges.

12 HONORABLE EMILY MISKEL: So here's what
13 HB 19 says. It says, "Each business court judge shall
14 maintain chambers within the geographic boundaries of the
15 division in facilities provided by the State," and then
16 part (d) underneath it says --

17 HONORABLE DAVID EVANS: And maybe at least
18 one county.

19 HONORABLE EMILY MISKEL: Right. And then
20 (d) right below it says, "A business court judge may hold
21 court at any courtroom within the geographic boundaries of
22 the division. To the extent practical, a county using
23 existing courtroom facilities shall accommodate the
24 business court." So it does appear that they did make a
25 difference between the chambers are in facilities provided

1 by the State, but court must be held or -- well, it says
2 "may hold court at any courtroom within the geographic
3 boundaries" and then where -- okay, go ahead.

4 HONORABLE TRACY CHRISTOPHER: Because the
5 whole -- you know, you might think, gosh, why are we
6 arguing about this? The whole idea of where a courtroom
7 is is very important in Texas jurisprudence, okay, and,
8 you know, you can't go have secret hearings, right? The
9 courtroom has to be designated so that everyone knows, you
10 know, where the hearings are, so I do think courtroom
11 probably means courtroom, but I just don't know if it
12 needs to be designated by the State as a courtroom so that
13 everyone knows where the courtroom is or whether the
14 county has to designate it as a courtroom.

15 MS. PFEIFFER: Isn't that also for open
16 courts?

17 HONORABLE EMILY MISKEL: So --

18 THE REPORTER: Wait a minute.

19 CHAIRMAN BABCOCK: Okay. Roger.

20 MR. HUGHES: I may hold the distinction of
21 being the only person to have litigated that question in
22 the room, and what happens is that most jurisdictional
23 statutes say that court shall be held at the county seat
24 of a particular county and/or county seats in the
25 district, and by tradition, a county seat has been

1 construed to mean the designated courthouse or wherever is
2 designated as a courtroom, court building, by a
3 commissioner's court, but a -- in my case the court
4 decided that it could be any -- that county seat meant any
5 place within the city limits of the county seat, provided
6 that there was notice and nobody made a specific
7 objection. And in my case nobody -- I won't go into it.

8 So by saying courtroom, in some counties
9 there are JPs who have courtrooms outside the county seat.
10 So if you're worried about this, I suggest changing it to
11 either courthouse or county seat, because of the -- there
12 may be courtrooms all over the county that are designated,
13 and I'm sure we don't want the business court to have to,
14 you know, wander out into someplace out on highway
15 whatever to a JP's office to hold court. That's all I can
16 say about it. So my suggestion is if you're really,
17 really worried about this, the courtroom is going to be
18 construed to mean whatever, I suggest either the county
19 seat or courthouse.

20 CHAIRMAN BABCOCK: Okay. Judge Evans, speak
21 into the mic if you would.

22 HONORABLE DAVID EVANS: Yes. Let me make
23 one note, Justice Christopher. My reading on remote
24 proceedings is it doesn't require a physical location,
25 because it says courtroom or facilities can be the site

1 for a remote hearing. So facility, if you go through the
2 whole thing, would be chambers and conference room, but it
3 does say it has to be public access, which would be the
4 YouTube access on remote, and the way I've approached this
5 and tried to find space in the Eighth Division is to try
6 and figure out if we're going to have the in-person
7 hearings and we have the trial issues. It's going to be
8 very difficult since venue is only county under this
9 statute. It doesn't get you to a direct district, and
10 there's a limitation of any space available in county
11 courtroom facilities. So you have all of the security
12 issues, but I regard courtroom as not being one that could
13 be a designated area that is used as a courtroom and may
14 not be an existing district court or statutory county
15 court. There may be other facilities that are courtrooms.

16 The appellate courts have looked into the
17 issue of courtrooms that might be available in other
18 locations in the county seat where the business court
19 could sit. In order for the business court to be
20 accessible, the local group is going to have to --
21 competitive -- competitive on two areas. The concurrent
22 jurisdiction with all district courts on all of these
23 causes of action, so there's no exclusive jurisdiction.
24 So the lawyers are going to be making choices as to which
25 court they want to be in, so there's got to be some sort

1 of designated reserved area for business court to get to,
2 but you cannot do it by Rule of Civil Procedure. It's
3 just going to be a matter of the Court and OCA trying to
4 find those locations in each area. And that's my --
5 that's my -- it's an administrative problem I think that
6 OCA -- I met with Megan Wednesday in Fort Worth, to be
7 frank with you.

8 CHAIRMAN BABCOCK: Rich Phillips. Speak
9 into the mic.

10 MR. PHILLIPS: So it seems to me the
11 question first started with do we need to say "courtroom"
12 in the rule or do we just say "facility," and the answer
13 to that question is in the statute. The statute says they
14 can meet in any courtroom, so the Legislature has decided
15 this question, and everything else about where it's going
16 to be and what it's going to be is an admin thing they're
17 going to have to figure out with OCA, but the initial
18 question was do the rules say they can hold it in any
19 facility, and I don't think under the statute we can do
20 it. It says it "may" -- I know it says "may," but it's
21 may at any courtroom, and I think that means at any place
22 that's been designated the courtroom in their division
23 they may sit there, but they have to sit in the courtroom
24 is the way I read that statute.

25 HONORABLE DAVID EVANS: May be designated as

1 a courtroom is what I would say. It could be designated
2 by the business court.

3 CHAIRMAN BABCOCK: So the business judge has
4 a big case. You know, John Kim is against Rusty Hardin,
5 and the press is there, and there are a whole bunch of
6 defendants represented by others, and he needs a big
7 courtroom to accommodate all of the lawyers and the
8 witnesses and the press and the public, so what authority
9 does the judge have to -- the business judge have to get
10 the courtroom there?

11 HONORABLE DAVID EVANS: Well, he can't get a
12 courtroom except as practical from a county facility. Let
13 me -- let me make sure what I'm trying to say here.

14 CHAIRMAN BABCOCK: Speak into the mic.

15 HONORABLE DAVID EVANS: Yeah. If you want
16 a -- if you're going to limit courtroom to one designated
17 by a county, then you designate the number of courtrooms
18 that are available in metropolitan areas or court-like
19 facilities that are available. If they're going to go to
20 the county, it's county's obligation only as practical.
21 Most counties are going to take the position, I believe,
22 that they -- that it has to be cost neutral, and they'll
23 have a day -- I know my county will have a day cost for
24 the designation for a courtroom. So that's -- I don't
25 want to get too mechanical about this, but there are other

1 locations that you can hold court in in a county like
2 Harris that have been used by appellate courts and other
3 places like that. Security, I know there's other issues
4 that go with that. So it is a courtroom, and it would
5 probably be a courtroom, I would say, designated by OCA
6 and/or by the business courts or the Supreme Court. I
7 wouldn't limit it just to county facilities. That would
8 be one issue.

9 The second issue is not all hearings are
10 required to be in a courtroom. Remotes are clearly
11 facilities, so none of the language in this should
12 restrict the judge. They can hold a remote hearing under
13 the statute in a courtroom or a facility, the way I read
14 that. I've got my marked copy somewhere. But, Robert, is
15 that right? Am I correct in my memory of that?

16 MR. LEVY: Yes, if you look at Rule 333.

17 HONORABLE DAVID EVANS: Yeah.

18 MR. LEVY: (c), it says, "The business court
19 shall conduct a remote proceeding from the courtroom or
20 the facilities provided to the business court judge by the
21 state." So it could be from chambers or other facilities,
22 and I don't think that it's practical to require a county
23 to provide the courtroom. Like we could envision that the
24 courtrooms that are in this building where the courts of
25 appeal used to sit would be very useful for a business

1 court, and I think that's a practical issue that the OCA
2 and the presiding judge of the business court will need to
3 work through, but I'm not sure how we can fix that in the
4 rule.

5 CHAIRMAN BABCOCK: Roger.

6 MR. HUGHES: Well, picking up on what Levy
7 just said, I think if your problem is, you know, one of
8 these massive multi-party cases that are going to need a
9 large courtroom, this is a Rule of Procedure. I think if
10 the parties can come to an agreement about this and, you
11 know, enter into some sort of Rule 11 agreement blessed by
12 the judge, they can hold it in a location. I mean, I --
13 when I came to Adams & Graham, there was a case where they
14 basically had to rent a convention hall. It was one -- it
15 was a massive construction case and as long as all of the
16 parties agreed to it, and it was, by the way, held within
17 the county seat's limits. No one squawked, and if it's
18 really serious enough, you might be able to get the local
19 commissioner's court to bless a temporary facility,
20 provided, of course, the parties pay for it.

21 CHAIRMAN BABCOCK: Yeah. Judge Miskel,
22 let's move on to Rule 333.

23 HONORABLE EMILY MISKEL: All right. So 333
24 is, I believe, a direct copy/paste from the statute. The
25 one change that was suggested on here was the strike

1 through of "or other individual," because in our
2 subcommittee meetings we couldn't think of who would be a
3 participant in the trial that would not be a judge, party,
4 attorney, witness, or court reporter. The only person
5 that we could come up with might be an interpreter, and we
6 didn't think having everyone in person but an interpreter
7 remotely would convert the proceeding into a remote
8 proceeding, but we could go either way on that. We could
9 just leave it as is from the statute, or this is the
10 proposed rule, that's the only change. Any discussion on
11 Rule 333?

12 CHAIRMAN BABCOCK: Well, if we're trying to
13 effect the intent of the Legislature, why would we strike
14 three words that they think should be in the statute?

15 HONORABLE EMILY MISKEL: It would be just as
16 fine to leave them in.

17 CHAIRMAN BABCOCK: Anybody disagree with
18 that concept? Yeah, Justice Christopher.

19 HONORABLE TRACY CHRISTOPHER: Does that mean
20 that any member of the public can get on the Zoom call,
21 and we have to -- the judge would have to make sure that
22 they're all silenced, have to put them in a separate room
23 when they have a, you know, private conference, that sort
24 of thing?

25 HONORABLE EMILY MISKEL: No. The statute

1 just says the public needs an opportunity to observe.

2 HONORABLE TRACY CHRISTOPHER: Okay, but
3 "other individual" could be the public.

4 HONORABLE EMILY MISKEL: The public is not a
5 participant is what we decided in the subcommittee.
6 They're not a participant in the proceeding.

7 HONORABLE TRACY CHRISTOPHER: Okay. Well,
8 then I would leave it out. I would leave out "other
9 individual" like the committee recommended.

10 MR. LEVY: On your point, Chip, that we did
11 in certain places suggest that while the -- although the
12 statute has specific language for a variety of reasons to
13 carry out the intent of what we thought the Legislature
14 was seeking, we did not follow the exact language, and I
15 think that the Court has the authority to do that and
16 through the enabling act. Obviously the Court might
17 disagree and just follow the language of the statute, but
18 we tried to stick to what the intent was without creating
19 more ambiguities, and this would be an example of
20 potential ambiguity.

21 CHAIRMAN BABCOCK: Yeah. Well, if I were
22 the Legislature, I would argue that the intent was to
23 include other individuals, and you say you've got
24 authority to go against my intent. What's your authority
25 for that? The general enabling statute that we can

1 overturn a -- a statute that we don't like?

2 MR. LEVY: I think the enabling statute does
3 give the Court some discretion in that respect, without
4 being contrary to the intent. Obviously, you know, a
5 party might disagree, but we -- we could not -- this is a
6 scenario where this would create a problem. You're in a
7 court, you have a witness from Czechoslovakia -- yeah,
8 Czech Republic, so you need an interpreter, and you call
9 up a service, and I think most courts have services to
10 call up for the interpreter to interpret without having
11 that person be in the courtroom. That would potentially
12 convert this to a remote proceeding, which would require
13 you to go through all of the steps, and it would seem
14 impractical and not needed in that kind of scenario. So
15 that's why we took out that language, and, yes, we do make
16 a leap of faith that we're not contrary to what the
17 Legislature intended.

18 CHAIRMAN BABCOCK: And Chief Justice
19 Christopher says "other individual" could be the public.
20 Is that a reasonable interpretation? So, for example, is
21 the Legislature saying we want to include the public, they
22 are a participant in the sense that they're watching,
23 observing?

24 HONORABLE EMILY MISKEL: I think in the bill
25 they provided separately for the public.

1 CHAIRMAN BABCOCK: All right.

2 HONORABLE EMILY MISKEL: I think the other
3 participant that we identified is if you're married you're
4 entitled to have your spouse sit with you at counsel
5 table, so we're saying if the spouse is participating
6 remotely does that mean it's a remote proceeding? But we
7 decided the spouse is not a participant either.

8 CHAIRMAN BABCOCK: Okay. All right. Any
9 other -- yeah, Kennon. Don't stab her with it.

10 MS. WOOTEN: He's ready for the discussion
11 ahead.

12 CHAIRMAN BABCOCK: Yeah, right, apparently.

13 MS. WOOTEN: This is just a -- a question
14 about whether the definition of remote proceedings and all
15 of the other definitions that are currently in 339 ought
16 to be moved to the beginning of the rule so that before
17 you start reading provisions about what's required you
18 know what the words mean. You-all probably have a good
19 reason for not having done that, but it just struck me
20 that it might be clearer to do it, absent a good reason
21 not to.

22 The other thing I just wanted to comment on
23 while I have the mic is that in current subpart (d) of
24 Rule 333, which tracks the statute, there is no language
25 requiring the courts to tell people how to observe the

1 remote proceedings, and that is included in Texas Rule of
2 Civil Procedure 21d(f)(1). It might be worth adding here.

3 CHAIRMAN BABCOCK: Yeah. Thank you. Yeah,
4 Justice Gray.

5 HONORABLE TOM GRAY: I was just wondering if
6 the addition explicitly of "a court clerk" right after
7 "court reporter" might solve one of your other problems
8 that you mentioned earlier.

9 CHAIRMAN BABCOCK: Tell me what subsection,
10 Judge.

11 HONORABLE TOM GRAY: The 333(a), third line,
12 "witness or court reporter or court clerk"; or if you
13 leave in "other individual," you would not have the
14 other -- but in other words, just add court clerk
15 explicitly --

16 CHAIRMAN BABCOCK: Yeah.

17 HONORABLE TOM GRAY: -- to the list of
18 people, and that may address John's concern that he's got
19 a court reporter -- a court clerk right there in the
20 proceeding that can approve the bond, see the bond,
21 approve the bond, whatever, but it just, I thought, might
22 solve the earlier problem.

23 CHAIRMAN BABCOCK: Thank you. All right.
24 Any other comments on 333? Let's go to 334.

25 HONORABLE EMILY MISKEL: Okay. So we

1 divided up the rules between cases that are initially
2 filed in the business court versus cases that are filed in
3 another court and removed to the business court, so Rule
4 334 talks about a plaintiff that files a case initially in
5 the business court. And I'm trying to see what we changed
6 from the statute.

7 Oh, one of the things that we talked about
8 is when you're deciding whether the business court has
9 jurisdiction over the matter and if it's in the correct
10 division, what information is going to be provided to the
11 business court to be able to know that and how are
12 challenges to that made, and so that's sort of the next
13 four rules all together. And, Robert, do you kind of want
14 to talk about the framework of how that works generally?

15 MR. LEVY: Which one?

16 HONORABLE EMILY MISKEL: Just talking about
17 how you've got to plead facts.

18 MR. LEVY: Right.

19 HONORABLE EMILY MISKEL: So we can tell if
20 there's a challenge that has to be notice and opportunity
21 to be heard.

22 MR. LEVY: So the -- some of the significant
23 provisions here include an expectation that parties will
24 plead with sufficient facts to make it clear that the
25 business court has jurisdiction, and that would be a

1 departure from our notice and pleading rules so that a
2 failure to appropriately plead would be the basis for a
3 challenge to, in effect, to the jurisdiction of the court.

4 And the other issue that -- that we added in
5 this rule that is significant is that a party would need
6 to file a motion to challenge jurisdiction within 30 days,
7 and it's 30 days of what is a choice that we can discuss,
8 but 30 days so that the issue of jurisdiction would need
9 to be raised timely so that it can be adjudicated timely
10 so that it can't be raised on the eve of trial or some
11 much later date as an ambush-type tactic, but that is not
12 in the statute itself. And similar language is proposed
13 in -- with respect to cases that are removed that would
14 also require challenge -- or motion to remand within 30
15 days, again, of what is a choice, but that was also a
16 proposal.

17 CHAIRMAN BABCOCK: Robert, when you say
18 jurisdiction, what sort of jurisdiction are you talking
19 about? Because, you know, there are a lot of cases that
20 say that you can challenge jurisdiction in a court any
21 time, not just 30 days, although the federal removal
22 statute has got that sort of a time limit in it.

23 MR. LEVY: Right.

24 CHAIRMAN BABCOCK: Even if it later turns
25 out to be adversity or whatever it may be.

1 MR. LEVY: And one of the issues there was a
2 concern -- well, it is unclear what would happen if a case
3 that was filed in the business court and the court -- and
4 it pled all of the jurisdictional requirements, but then
5 later, due to an amendment of the pleadings or a motion to
6 dismiss one of the claims that gave the court
7 jurisdiction, what would happen, and we chose to follow
8 the removal practice, the federal court removal practice,
9 to avoid situations where there might be gamesmanship on
10 either side to try to, you know, stop the case or have it
11 dismissed. And the -- the issue of jurisdiction that we
12 see in this was the facts that give the business court
13 itself jurisdiction, not just, you know, a general
14 jurisdiction, not -- or personal jurisdiction, but simply
15 the -- the fact that it has to meet one of the
16 requirements that are set out later in the rules to
17 maintain a case in business court, and frankly,
18 jurisdiction might not be the best term, because it could
19 be used in other contexts.

20 CHAIRMAN BABCOCK: Yeah, that's what I was
21 thinking and worried about. Yeah, Judge Miskel.

22 HONORABLE EMILY MISKEL: I was going to say
23 we did not intend for this to mean subject matter
24 jurisdiction, but HB 19 says, "The business court has
25 civil jurisdiction over," blah, blah, blah, and so we were

1 using the statutory language which talks about
2 jurisdiction over those claims. That's kind of what we
3 were referring to, but if there's another vocabulary word
4 that could be used better, that's fine.

5 CHAIRMAN BABCOCK: Well, that -- I don't
6 know. But John and then Justice Christopher.

7 MR. KIM: So under 334(b)(2), this is my
8 malpractice nightmare.

9 THE REPORTER: Louder, please.

10 MR. KIM: As I go to file the case on the
11 eve of the statute of limitations, you have the truculent
12 business court judge that just dismisses it out of hand.
13 Do we have anywhere where we address any savings language?

14 MR. LEVY: That was an issue actually Kennon
15 pointed out to me as well. The -- the issue about without
16 prejudice to the parties' rights, that's from the statute.
17 My interpretation of that is that it -- it would not be
18 any kind of dismissal with prejudice or something that
19 would limit their ability to refile it. It's unclear,
20 though, whether that intended to be a savings clause on
21 the statute of limitations basis.

22 It could be that we need to clarify that to
23 point out that there will be tolling or some ability to
24 refile in the appropriate district court or county court
25 without -- you know, without the running of the statute,

1 if that's what you're getting to.

2 MR. KIM: And I would discourage --

3 CHAIRMAN BABCOCK: Chief Justice
4 Christopher, and then Justice Kelly.

5 MR. KIM: Yeah. And I would discourage we
6 add that language.

7 HONORABLE TRACY CHRISTOPHER: Jurisdiction
8 is jurisdiction, I mean, so I'm a little worried about the
9 idea that if the business court judge loses jurisdiction
10 because of an amended pleading, that it -- that it can
11 remain in business court. You know, so, I mean, what
12 if -- what if you had a case that didn't quite meet the
13 criteria of business court, but it's business court enough,
14 and you and your opposing counsel decide, hey, I really
15 like the business court judge rather than the local judge
16 we're assigned to, and they, you know, remove it to the
17 business court judge? And the business court judge is
18 like "Great, good case, good parties, good lawyers, I'm
19 excited" and doesn't really examine jurisdiction.

20 CHAIRMAN BABCOCK: Business court enough.

21 HONORABLE TRACY CHRISTOPHER: Right.

22 CHAIRMAN BABCOCK: We've got to write that
23 in the rule somewhere.

24 HONORABLE TRACY CHRISTOPHER: But, you know,
25 I mean, I think we have to be real careful with

1 jurisdiction.

2 CHAIRMAN BABCOCK: Yeah. Yeah, there's
3 another thing, but first Justice Kelly.

4 HONORABLE PETER KELLY: On that note, the
5 statute uses the word "jurisdiction" 31 times, and the
6 populated canons of statutory construction, the
7 Legislature may not have meant jurisdiction 31 times, but
8 for this rule I think some formulation regarding business
9 court as the appropriate or correct forum and find some
10 way to say "forum" instead of "jurisdiction."

11 CHAIRMAN BABCOCK: Roger. Roger has his own
12 microphone, by the way. Did everybody notice that?

13 MR. HUGHES: I think probably the most
14 prudent amendment would be to say "subject matter
15 jurisdiction," because I think that's what the Legislature
16 meant. I don't think they were referring to like personal
17 jurisdiction or the question of standing. Standing being,
18 of course, a constitutional issue, and I'm -- I
19 question -- and I realize that it's an unresolved question
20 whether the Legislature can confer standing on a -- confer
21 statutory standing on someone that has no constitutional
22 standing, but I'll leave that for another day. I just
23 think it's more prudent to amend it that way.

24 CHAIRMAN BABCOCK: Rich.

25 MR. PHILLIPS: Since we're worried about

1 sort of trying to import the statutory criteria for the
2 court to have power over the case, what if the rule -- I
3 know we don't really like our rules to refer to statutes,
4 because if the statute changes later, that complicates
5 things, but in this situation would it make sense to say
6 that the party has to plead sufficient facts to show under
7 25(a), whatever section it is, that the court -- that the
8 case belongs in or can be heard in business court?
9 Something that refers to the statutory requirements rather
10 than trying to sort out what kind of jurisdiction we're
11 talking about.

12 CHAIRMAN BABCOCK: Okay. Roger, we've taken
13 away your microphone and given it to Elaine, but that's no
14 comment on your comment.

15 MR. HUGHES: That's a prudent course of
16 action.

17 CHAIRMAN BABCOCK: Professor Carlson.

18 PROFESSOR CARLSON: I think it speaks
19 volumes. No, really.

20 CHAIRMAN BABCOCK: Whoa, here we go.

21 PROFESSOR CARLSON: Just kidding.

22 MS. WOOTEN: Well done.

23 PROFESSOR CARLSON: Everybody's awake now.
24 Rule 334 was very troublesome to me in that it sounds like
25 subject matter jurisdiction. Case law says you can't

1 waive it, you can't confer it to void judgment, can be
2 attacked anywhere, any place. It's not like it's an
3 alternate forum, right. I mean, if it's not in the
4 business court's jurisdiction, it belongs in a different
5 court, and that -- I don't know if that's what the
6 Legislature intended to do. But right now under our case
7 law, as I understand it, if a court lacks jurisdiction,
8 its only power is to dismiss, not transfer, to dismiss it
9 without prejudice.

10 CHAIRMAN BABCOCK: Let me suggest another
11 problem along those lines, and that is the difference
12 between state and federal practice. Under state law you
13 can amend as a matter of right just right until shortly
14 before trial, right. Not so in federal court, and there
15 is a provision, I think, relative to the removal statute
16 that says if the amendment is going to be a
17 jurisdiction-destroying amendment then certain standards
18 have to be met and the judge can and should deny it unless
19 A, B, and C, and so that's completely different than
20 what -- because somebody, if they're trying to get out of
21 business court could just file an amendment as a matter of
22 right, remove the jurisdiction of the court, and then say,
23 "Judge, you have to dismiss it." Now, I don't know if
24 that was intended or not, but that's a potential problem.

25 PROFESSOR CARLSON: Robert, I'm bringing

1 this back to you.

2 CHAIRMAN BABCOCK: No, no, no. You can
3 leave it there.

4 PROFESSOR CARLSON: I feel like I've slammed
5 it now.

6 CHAIRMAN BABCOCK: Judge Miskel.

7 HONORABLE EMILY MISKEL: So this was one of
8 the aspects that we said rather than trying to make a
9 prescriptive rule for everything, that some of this we
10 need to leave to the development of case law, so we're
11 adopting the language of the statute. Now, there is
12 background Texas law that says in a statute where it says
13 jurisdiction we don't presume that that means subject
14 matter jurisdiction. In fact, we presume it doesn't mean
15 subject matter jurisdiction unless the Legislature said
16 so, primarily because of those reasons having to do with
17 void judgments.

18 So I know there are other examples. For
19 example, in the Family Code where it says a court has
20 exclusive jurisdiction, that that has not been held to be
21 subject matter jurisdiction, but again, that's a whole
22 discussion. Here in trying to implement what the statute
23 says, some of the details, for example, what about it's
24 properly in the business court to start, but then there's
25 a summary judgment or a pleading amendment or something

1 that changes later what happens, and I think our
2 subcommittee decided that we can't -- we don't know enough
3 now to address all of that by rule, and what we will see
4 is that being addressed by the Fifteenth Court of Appeals
5 as it plays out.

6 CHAIRMAN BABCOCK: Yeah. All right. Any
7 more comments about Rule 334?

8 HONORABLE EMILY MISKEL: But one fix that
9 would be an easy fix is in 334(a) we could say "to
10 establish statutory jurisdiction" or somehow say the word
11 "statutory" to just be more explicit that we're not
12 considering it subject matter jurisdiction.

13 CHAIRMAN BABCOCK: Okay. Not a bad
14 suggestion at all.

15 HONORABLE TRACY CHRISTOPHER: I'm not sure
16 that works.

17 CHAIRMAN BABCOCK: But it might not work.

18 HONORABLE EMILY MISKEL: Okay. We're not
19 going to solve these legal questions in our Rules of Civil
20 Procedure, I think, as far as our subcommittee was
21 grappling with.

22 CHAIRMAN BABCOCK: Chief Justice
23 Christopher.

24 HONORABLE TRACY CHRISTOPHER: Well, I guess
25 we can let the Fifteenth Court of Appeals decide that, but

1 maybe it will go to one of the other courts of appeals,
2 right, because if it gets sent back to a regular court
3 then it comes to a regular court, court of appeals, not
4 Fifteenth Court of Appeals.

5 MR. LEVY: I think Marcy had something.

6 CHAIRMAN BABCOCK: Marcy, were you trying to
7 say something?

8 MS. GREER: Yes, I didn't mean to interrupt
9 you, Chief Justice Christopher. I did want to address the
10 point that you made, Chip, about the removal statute,
11 which is 1447(e), and we talked about that a great deal.
12 That is limited to removal when you seek to join
13 additional defendants whose joinder would destroy the
14 subject matter jurisdiction. It's not just an -- it's not
15 any amendment that would change subject matter
16 jurisdiction, just that very specific context, which we
17 didn't feel was really going to be present in the business
18 courts to enough of a degree to try to legislate around
19 that, and that was one of the reasons we felt like it was
20 best to leave it to the development of the case law.

21 CHAIRMAN BABCOCK: Yeah. Great point, good
22 distinction. All right. Anything more about 334?

23 HONORABLE EMILY MISKEL: On (c), this is
24 what Robert was talking about. We wanted these to be
25 brought early, so our concept was 30 days after basically

1 the beginning of the case, and then we had a lot of
2 discussion on how do you measure the beginning of the
3 case. Is that 30 days from when the parties were served?
4 Is it 30 days from the answer date? Is it 30 days from
5 when they actually did answer if they answered earlier
6 than the answer date? So we went around and around on
7 that a few times, and I think we just left all of the
8 options in there and said the concept was 30 days after
9 the beginning of the case. Robert, was there further
10 discussion on that?

11 MR. LEVY: That's it.

12 HONORABLE EMILY MISKEL: Okay. So however
13 we measure the beginning of the case.

14 CHAIRMAN BABCOCK: Any comments on that?
15 Harvey.

16 HONORABLE HARVEY BROWN: Well, I was a
17 little troubled about this provision, although I agreed
18 with it in the end, because of the points that have been
19 made here about challenging jurisdiction at any time. It
20 seems to me that if we're going to use jurisdiction here
21 in kind of a special way, because the statute uses it, I
22 wonder if we should either have something about that in
23 the comments or if in our definitions we could come up
24 with a term that we create and put it in the definitions
25 section.

1 CHAIRMAN BABCOCK: And what term would you
2 suggest?

3 HONORABLE HARVEY BROWN: I don't know the
4 term. That's the problem. We struggled as a committee
5 coming up with another word other than jurisdiction.

6 CHAIRMAN BABCOCK: Okay. We can you give
7 that back to Judge Miskel? And now take the roving mic.
8 Anything else about 334? John Kim.

9 MR. KIM: Yeah, I would just urge that we
10 eliminate the option of 30 days after service. The client
11 gets served, doesn't turn it over to a lawyer until the
12 last second before an answer, I mean, you just have no
13 opportunity to do any work, so --

14 CHAIRMAN BABCOCK: Would you suggest a
15 longer period of time or no period of time?

16 MR. KIM: I think 30 days is fine after an
17 appearance, which I interpret to mean after an answer, so
18 essentially, you've got 50 days. It's like request for
19 interrogatories and all of that if you file them early, so
20 but I think that would work, but I just don't think 30
21 days after service works.

22 CHAIRMAN BABCOCK: Okay. After an answer or
23 motion to dismiss or some pleading form?

24 MR. KIM: An appearance.

25 CHAIRMAN BABCOCK: Yeah.

1 MR. KIM: Yeah.

2 CHAIRMAN BABCOCK: Okay. Anything else on
3 334?

4 All right. We're going to take our morning
5 break, and we will be back at roughly a quarter of the
6 hour. Thank you.

7 (Recess from 10:35 a.m. to 10:53 a.m.)

8 CHAIRMAN BABCOCK: All right, back on the
9 record, and recording is in progress for those of you who
10 don't know, so we're up to Rule 335, Judge.

11 HONORABLE EMILY MISKEL: Okay, so 335, so
12 the statute provides that there's these divisions, and I
13 think each division has two judges, and so we're talking
14 about how to allocate cases between the two judges, and so
15 we just went with random assignment, kind of like for any
16 other court. So that's 335(a), and then (b) we said,
17 okay, but there might be a time when you need to equalize
18 caseload numbers or for other reasons kind of reallocate
19 cases. So we said that the -- the way the statute works
20 is the business court judges elect their presiding judge,
21 and so we said that person has the power to equalize the
22 dockets. In (c) the Government Code provides --

23 CHAIRMAN BABCOCK: Can we just stop that for
24 a minute?

25 HONORABLE EMILY MISKEL: Yeah, sorry. Go

1 ahead.

2 CHAIRMAN BABCOCK: You've got in the --
3 since we're in Houston, the Houston division. How many
4 business court judges are in the Houston division?

5 HONORABLE EMILY MISKEL: Two.

6 CHAIRMAN BABCOCK: And each division has a
7 presiding judge or the whole --

8 HONORABLE EMILY MISKEL: The business court
9 has a presiding judge.

10 CHAIRMAN BABCOCK: The business court, okay,
11 and so the business court presiding judge can say, okay,
12 Houston division, you've got too many cases, I'm going to
13 send them to Eastland?

14 HONORABLE EMILY MISKEL: No, it says within
15 a division.

16 CHAIRMAN BABCOCK: Oh, within a division,
17 but you only have two judges.

18 HONORABLE EMILY MISKEL: Right.

19 CHAIRMAN BABCOCK: So --

20 HONORABLE EMILY MISKEL: If one is super
21 backlogged or one got an enormous filing or the other one
22 has smaller ones, or whatever it might be, there might be
23 local reasons. Does that answer the question?

24 CHAIRMAN BABCOCK: It does answer my
25 question. It seems odd to me. Well, it's one thing if

1 you've got, you know, the Eastland court of appeals that
2 has, you know, five appeals pending and then you've got
3 the Fourteenth Court, Fourteenth District's court of
4 appeals that's got millions, and I understand that, but if
5 you only have two judges --

6 MR. LEVY: This was an issue, Chip, that
7 seems like the legislative intent was very clear that the
8 case remains within the division.

9 CHAIRMAN BABCOCK: Yeah.

10 MR. LEVY: So you can have judges that can
11 come in, other business court judges, that can come in and
12 sit, but you could not equalize across divisions.

13 CHAIRMAN BABCOCK: Yeah, I get it. All
14 right. Sorry about that. Sorry about that detour.

15 HONORABLE EMILY MISKEL: No, it's -- these
16 are the kinds of things that are important to discuss.

17 All right. So (c), this is an example of
18 something that's already in the Government Code that
19 judges can do an exchange of benches and sit for each
20 other and sign orders for each other without transferring
21 the case, and so initially we said, well, that doesn't
22 need to go in the civil rules, but we thought that the
23 litigants, the practicing litigants, might have concerns
24 about that, so we duplicated it from the Government Code
25 here in the civil rules, the exchange of benches power

1 that already exists.

2 And then let me just read (d). I can't
3 remember what (d) was.

4 MR. LEVY: (D) is the --

5 HONORABLE EMILY MISKEL: Oh, yes, go ahead.

6 CHAIRMAN BABCOCK: Robert.

7 MR. LEVY: (D) is an issue that is part of
8 the statute, and it is -- I'm not sure if it's replicated
9 anywhere else where a judge can seek to transfer an action
10 from her or his court to the business court. So the judge
11 initiates the motion. It was a little bit unclear who
12 makes the -- who holds the hearing and makes the
13 determination. We felt it would be the presiding judge.
14 In this case it's the presiding judge of the
15 administrative region and not the presiding judge of the
16 business court. It didn't seem to make sense otherwise,
17 but that could be something that we would discuss. And so
18 that a hearing would be held and the presiding judge would
19 determine whether to transfer the case from the district
20 court to the business court, and it's a one-way option.

21 CHAIRMAN BABCOCK: Great, okay. Comments
22 about 335? Justice Gray.

23 HONORABLE TOM GRAY: The word "filed" in
24 (d), would that be better if it said "pending," and would
25 it be possible that the case would get -- not still be in

1 the case in which it was filed and yet need to be
2 transferred?

3 HONORABLE EMILY MISKEL: I think that's
4 consistent with some of the other wording choices that we
5 made, and so I think that would be a good change.

6 CHAIRMAN BABCOCK: Great. Other comments?
7 Yeah, Harvey.

8 HONORABLE HARVEY BROWN: This isn't directly
9 on 335, but it's related to it. I'm just -- I just
10 thought about what happens if you only have one court in
11 the division and that judge is recused. What happens?
12 Who hears it?

13 MR. LEVY: There is a provision for visiting
14 judges to be appointed, and I would assume that would be
15 the way to deal with it. I don't know of any other
16 process that could work.

17 CHAIRMAN BABCOCK: Harvey say something --

18 MS. GREER: In that regard -- I was just
19 going to say in that regard Justice Christopher had also
20 raised a point about visiting justices, and we had
21 proposed another division (e) that I can share my screen
22 -- well, no, I can't -- to deal with that provision, but I
23 just wanted to let everybody know that we agreed with that
24 and adding a provision (e) about a retired former judge
25 that's involved, and that can be assigned as a visiting

1 judge.

2 CHAIRMAN BABCOCK: So there exists language
3 that's got a subpart (e) in it?

4 HONORABLE EMILY MISKEL: Who's running the
5 Zoom meeting? Can you enable screen sharing?

6 MS. GREER: The problem is I had to join
7 from my -- I'm not on my computer.

8 HONORABLE EMILY MISKEL: Oh, okay.

9 MS. GREER: So I can't screen share from
10 here. I can try to log back in and share from my -- now,
11 that we have internet again. I've been doing it through
12 cellular.

13 MR. LEVY: I need to join the Zoom.

14 CHAIRMAN BABCOCK: Nothing like technology.
15 Harvey, say something into the mic just to validate
16 Shiva's effort to bring the mic all the way over to you
17 before.

18 HONORABLE HARVEY BROWN: Oh, yes, thank you.

19 MS. GREER: I'll log back on with my
20 computer now that I have internet and so I can share my
21 screen. That may be the easiest.

22 CHAIRMAN BABCOCK: Great.

23 HONORABLE EMILY MISKEL: Marcy, when you're
24 ready just pipe up and we'll switch over to you.

25 CHAIRMAN BABCOCK: In the meantime, anything

1 more about 335? Justice Christopher.

2 HONORABLE TRACY CHRISTOPHER: On the
3 exchange of benches, are we talking about within a
4 division or not?

5 HONORABLE EMILY MISKEL: I don't think it
6 was limited to within a division. I think it was within
7 the business court.

8 HONORABLE TRACY CHRISTOPHER: Okay. So then
9 in the recusal situation, a judge from the Dallas division
10 could sit --

11 MR. LEVY: Yes.

12 HONORABLE TRACY CHRISTOPHER: -- in the
13 Houston division. So it wouldn't necessarily have to be a
14 visiting judge or a -- right?

15 HONORABLE EMILY MISKEL: I think that's
16 right.

17 MR. LEVY: I agree. I agree.

18 CHAIRMAN BABCOCK: Okay. And Marcy is
19 coming back as soon as Shiva lets her in. That means
20 she's in. But loading. While Marcy is loading, any other
21 comments about 335? Justice Christopher.

22 HONORABLE TRACY CHRISTOPHER: Well, I raise
23 the issue of abuse of discretion by the presiding judge.
24 Is -- which court of appeals is that going to?

25 HONORABLE DAVID EVANS: Well, it wouldn't

1 happen. Sorry.

2 HONORABLE TRACY CHRISTOPHER: Just in case.

3 MR. LEVY: Justice Christopher, we actually
4 discussed that question with respect to this issue as well
5 as the question about who would have jurisdiction over the
6 issues of remand or should there be an appeal, and we -- I
7 think it's fair to say that we thought it would be better
8 addressed in the TRAP, in the Rules of Appellate
9 Procedure. There's some language from those rules that
10 might apply, but we also --

11 HONORABLE TRACY CHRISTOPHER: Well, the
12 TRAP -- the TRAP rule says the orders of the business
13 court judge goes to the Fifteenth court. This would be
14 presiding judge, which is not a business court judge.

15 MR. LEVY: Right.

16 HONORABLE TRACY CHRISTOPHER: So you think
17 then it would come to wherever the presiding judge --

18 MR. LEVY: Probably, although it -- there is
19 validity to that it should probably stay within the
20 jurisdiction of the court that's dealing with business
21 court issues, so it would make sense to --

22 HONORABLE TRACY CHRISTOPHER: Well, except
23 in this particular rule, okay, you've got something filed
24 in the 295th; and the judge of the 295th says, "Hey, I
25 want this to go to the business court," even though the

1 parties haven't asked for it. So then the presiding
2 judge, Susan Brown, would hear it, and Susan Brown would
3 normally get appealed to our court. So the case was still
4 in the 295th. Susan Brown is in, you know, our region,
5 and so it seems like abuse of discretion there would
6 follow the 295th.

7 MR. LEVY: Right, and I think that is
8 probably the case and why we didn't try to define that.

9 HONORABLE TRACY CHRISTOPHER: Okay.

10 MR. LEVY: Because the reasons might not
11 have to do with whether the business court had
12 jurisdiction. It might be, you know, the other factors
13 that might have caused the presiding judge to make the
14 decision.

15 HONORABLE TRACY CHRISTOPHER: Okay. I'd
16 just kind of like that advisory opinion in case we get it.

17 HONORABLE DAVID EVANS: The presiding judge
18 will be sitting in the district court and probably assign
19 him or herself to the district court for purposes of
20 hearing the motion, because it's still controlled by the
21 visiting -- you've got to have a visiting judge or an
22 active -- a presiding judge can only -- maybe, may be
23 authorized to hear a matter in a district court under this
24 without being a visiting judge, but I doubt it. It would
25 be a visiting judge under Chapter 74. You assign yourself

1 to the district court, and you would hear it, and that's
2 how we hear recusals now.

3 MR. LEVY: Yeah, but we're just talking
4 about in this case --

5 HONORABLE DAVID EVANS: Right.

6 MR. LEVY: -- it's the decision on
7 transferring.

8 HONORABLE DAVID EVANS: Right. And it's one
9 situation where the judge on his own initiative starts the
10 process.

11 MR. LEVY: Right. Right.

12 HONORABLE DAVID EVANS: Which if it follows
13 MDL, there will be one every 20 years.

14 MR. LEVY: Right.

15 HONORABLE DAVID EVANS: So just saying for
16 the appellate record, the clerk record, I think it ends up
17 in the court of appeals, the current court of appeals for
18 that district court, because of the way the judge will end
19 up sitting in it.

20 HONORABLE EMILY MISKEL: Marcy, can you Zoom
21 in on that red text a lot? We can't read it.

22 MR. LEVY: You lost the sharing, Marcy.

23 CHAIRMAN BABCOCK: Robert, do you have the
24 text? Let's read it.

25 MR. LEVY: I sent it to Shiva.

1 CHAIRMAN BABCOCK: I know you did, but it
2 won't load.

3 MR. LEVY: Oh, I'll read it.

4 CHAIRMAN BABCOCK: Read it into the record.

5 MR. LEVY: Okay. New subsection 335(e), "A
6 retired or former judge or justice who has the
7 qualifications prescribed by Texas Government Code,
8 section 25A.008, may be assigned as a visiting judge of a
9 division of the business court by the Chief Justice of the
10 Supreme Court. A visiting judge of a division of the
11 business court is subject to objection, disqualification,
12 or recusal, in the same manner as retired or former judge
13 or justice is subject to objection, disqualification, or
14 recusal, if appointed as a visiting district judge."

15 CHAIRMAN BABCOCK: Okay.

16 MR. LEVY: And that language is directly out
17 of House Bill 19.

18 CHAIRMAN BABCOCK: Okay. So is it
19 necessary, desirable to include that here?

20 MR. LEVY: That was Justice Christopher's
21 suggestion, and it seemed to be helpful, but it's a
22 choice.

23 CHAIRMAN BABCOCK: Justice Christopher, you
24 think that would be helpful to have this language?

25 HONORABLE TRACY CHRISTOPHER: I do. I'd

1 like to look at the language again today.

2 CHAIRMAN BABCOCK: Turn around.

3 HONORABLE TRACY CHRISTOPHER: Oh, okay.

4 Does it have to be a retired or former judge, or can it be
5 a current judge?

6 MR. LEVY: That is the language from the
7 statute.

8 HONORABLE TRACY CHRISTOPHER: Okay.

9 MR. LEVY: And there are qualifications that
10 are different for these judges versus district court
11 judges.

12 CHAIRMAN BABCOCK: Okay. Any other comments
13 about this proposed subparagraph (e)?

14 MS. GREER: My other question, to Justice
15 Christopher's comment is what if we added a current judge
16 with the qualifications of the statute, basically, or a
17 retired or former justice -- or I mean a current --
18 because if it's a current judge or justice that has the
19 qualifications then I don't see why they couldn't sit.

20 HONORABLE TRACY CHRISTOPHER: Well, I would
21 like that opportunity. I occasionally will sit in a trial
22 court, and that's kind of, you know -- it's allowed by
23 other statutes, a sitting judge, assuming I met the
24 qualifications, which I believe I do.

25 MS. GREER: I think so.

1 CHAIRMAN BABCOCK: Okay. Any other comments
2 about this? Okay. Let's move on to Rule 336. Marcy. Or
3 Judge Miskel.

4 HONORABLE EMILY MISKEL: Okay. All right.
5 So if -- okay. This has to do with divisions of the
6 business court, so not every county will belong to an
7 active business court division, at least at first. One of
8 the examples actually is I believe Harris County will have
9 an active business court division, but, for example,
10 neighboring Montgomery County is in a different
11 administrative region, and so they won't. So the purpose
12 of this rule is if the division of the -- of the business
13 court doesn't include a county of proper venue then you
14 can either transfer it to a different business court
15 division, if it does contain a proper county, or if the
16 case is not in a county that is subject to a business
17 court division, transfer the case to a district court or
18 county court at law in a county of proper venue. And we
19 adopted in (b) all of the current venue rules that apply
20 in the Rules of Civil Procedure.

21 CHAIRMAN BABCOCK: Robert.

22 MR. LEVY: The -- part of (a) is from the
23 statute, although we did add that a venue challenge would
24 need to be made by a party, and it's any party, rather
25 than a court sua sponte bringing that up to be what we

1 understand is consistent with Texas district court
2 practice, and so that a motion would need to be filed.
3 And then adopting the Texas rules, presumably it would
4 need to be a verified motion subject to the time limits
5 that the Texas rules currently provide. I think it's Rule
6 86. So we don't prescribe the time limits, but we assume
7 that the current time limits would apply.

8 CHAIRMAN BABCOCK: Okay. Kennon.

9 MS. WOOTEN: This is a very minor point, but
10 in Rule 334(b) you changed the statutory phrase "at the
11 option of" to "at the request of the party filing the
12 action"; and in this Rule 336(a)(2) you kept in "option,"
13 and if that change was intentional to be clear, you might
14 want to make it here, too.

15 MR. LEVY: Thank you. That is a good point.
16 We changed that language because the word "option of"
17 seemed to be unclear, so we put "at the request of," and
18 it would make sense to make that change here. Thank you
19 for catching it. Kennon is catching other typos as we go.

20 CHAIRMAN BABCOCK: Yeah. All right, 336.
21 There's Marcy back on our screen. Hi, Marcy. Any other
22 comments on 336?

23 All right. 337, removal of cases to
24 business court. Judge Miskel.

25 HONORABLE EMILY MISKEL: Okay. So this is a

1 case that's not initially filed in a business court. It's
2 initially filed in a regular district court and then a
3 party asserts that it should be in the business court. So
4 this is -- let's see, the first part is from the statute.
5 (B), the concept is from the statute, but we just reworded
6 it because it was a lengthy sentence that wasn't clear, so
7 it's (b) is meant to have the same meaning as the statute,
8 but just to be a shorter, more clear sentence. In other
9 words, you can't remove a case to business court if that
10 county doesn't have an operating division of the business
11 court.

12 (C) is -- is this something we borrowed from
13 federal or -- okay. I think (c) was borrowed from
14 federal, but the notice of removal has to provide some
15 details and provide information to the clerk of the
16 business court. And then I think the rest of it is just
17 straight out of the statute.

18 MR. LEVY: Except for the dates. Oh, no.

19 HONORABLE EMILY MISKEL: Oh, the 30-day
20 limit that we added. Okay. So this has the same sort of
21 30-day concept. You have 30 days from the date you
22 have -- you discover or should have discovered that the
23 business court should have jurisdiction over the case, so
24 if something changes and that leads you to believe that
25 subject to the business court, you have 30 days from the

1 amended pleading or whatever that happened that caused you
2 to believe it should now be in the business court.

3 CHAIRMAN BABCOCK: So September 15th of next
4 year can I remove a case to the business court?

5 HONORABLE EMILY MISKEL: Does the statute
6 say cases pending or cases filed? I thought -- it's at
7 the end of the statute, and it says what it applies to.

8 MR. LEVY: Oh.

9 HONORABLE EMILY MISKEL: It's at the very
10 end.

11 HONORABLE TOM GRAY: According to your notes
12 and comments that you've got after almost every rule, the
13 rules applies to civil cases commenced on or after
14 September 1, 2024.

15 MR. LEVY: That's from the statute.

16 HONORABLE EMILY MISKEL: Yeah, so it's
17 commenced on.

18 CHAIRMAN BABCOCK: So you would not be able
19 to do that?

20 HONORABLE EMILY MISKEL: So not a pending
21 case.

22 CHAIRMAN BABCOCK: So it would only be
23 post-September 1, 2024, cases. Got it.

24 HONORABLE EMILY MISKEL: Yes.

25 MS. GREER: That's correct, and also the 30

1 days in this provision, this rules provision, is coming
2 straight from the statute, which is why we thought some
3 sort of 30 days, and I like the idea of tying it to the
4 first appearance in the initial filing rule. We tended --
5 wanted to make those kind of mirror image situations so
6 that we could have these kinds of disputes ruled on, if
7 they're going to be raised early on.

8 CHAIRMAN BABCOCK: Yeah. Rich.

9 MR. PHILLIPS: In (c), is notice of removal
10 supposed to be a defined term because it's capital N
11 capital R, but not in any other places.

12 HONORABLE EMILY MISKEL: No, thank you.

13 MR. PHILLIPS: And I guess the only other
14 thing I was going to say is in (a) do we want to
15 specifically say that you can remove it by filing a notice
16 of removal because then we talk about notice of removal in
17 the rest of it, but the first time it shows up is in (c).

18 HONORABLE EMILY MISKEL: I agree. That's a
19 good change.

20 HONORABLE PETER KELLY: I think in sub (b)
21 we've got it backwards. It should be that if there is --
22 the county of venue is not in an operating division of the
23 business court.

24 HONORABLE EMILY MISKEL: Okay. So just the
25 word "in" is weird there, so if the county of venue is not

1 within an operating division of the business court then.

2 HONORABLE PETER KELLY: That tracks the
3 statute, and then we've got it with the realities.

4 CHAIRMAN BABCOCK: And this rule
5 contemplates that there can be removal to the business
6 court by agreement.

7 HONORABLE EMILY MISKEL: I think that's from
8 the statute.

9 CHAIRMAN BABCOCK: At any time. Not tied to
10 30 days.

11 HONORABLE EMILY MISKEL: Yes. The statute
12 says at any time.

13 While Robert's double-checking I will
14 highlight another change that we made in section (f) to be
15 consistent with the same change that we've made everywhere
16 else that we talk about the court that the action was
17 removed from, not where it was originally filed because it
18 could have moved around after the date of original filing
19 but before the removal, so that's consistent with the same
20 change we've made other places.

21 CHAIRMAN BABCOCK: Justice Kelly.

22 HONORABLE PETER KELLY: Just a very general
23 comment that it's sort of black letter law that you can't
24 create jurisdiction by agreement of the parties, and
25 that's why we continue use of the word "jurisdiction"

1 because it's an agreement of the parties that the business
2 court is a proper forum or it should be in the forum, not
3 that the court has jurisdiction. Just a general --

4 CHAIRMAN BABCOCK: Robert.

5 MR. LEVY: So the ability to remove by
6 agreement under the statute is can be made at any time
7 during the pendency of the action, and also there is a
8 provision in the -- what we might call the statutory
9 jurisdiction provisions for business courts that the
10 parties can agree to a dispute being tried in the business
11 court, so, excuse me, the agreement issue somewhat does
12 provide that a party -- that two parties or all of the
13 parties can agree, even if otherwise it wouldn't be within
14 the jurisdiction of the court.

15 HONORABLE EMILY MISKEL: Okay. Any other
16 substantive discussion about 337, removal?

17 HONORABLE TOM GRAY: On 337(c), you use a
18 party position reference of the defendants about service.
19 Every time I see a party position reference in a rule I
20 cringe, because the -- since this can be a plaintiff
21 that's removing this case, if I understand the method,
22 that needs to just be parties, I think, upon the service
23 upon the other parties. In (c) -- excuse me --

24 MR. LEVY: Well, before you -- can I just --
25 in that respect it seemed to us to be not possible that a

1 plaintiff could remove their own case. That was our
2 presumption that the plaintiff filing the case would not
3 then be able to remove it.

4 HONORABLE TOM GRAY: As a legal matter or as
5 a practical matter?

6 MR. LEVY: As a practical matter, but now
7 that you mention that, if the parties agree after the case
8 is filed then it could be that it was filed without
9 agreement but then the parties agree they could later --
10 yeah, I see.

11 HONORABLE TOM GRAY: I was thinking a
12 plaintiff might get creative and add another claim that
13 was within the business court's jurisdiction and so they
14 removed it to the business court.

15 MR. LEVY: Yeah, that's true.

16 HONORABLE TOM GRAY: Then in (g) and (h),
17 which I think must have been brought in from some other
18 source, it makes removal -- the reference to removal of a
19 case. Elsewhere throughout the rule y'all have been
20 pretty consistent in making a reference to an action as
21 opposed to a case.

22 CHAIRMAN BABCOCK: Yeah, Connie.

23 MS. PFEIFFER: I have a point of
24 clarification that might require an amendment, but are you
25 saying that the statute contemplates parties can simply

1 agree to removal, and that's all that you would have to
2 show is agreement?

3 MR. LEVY: Uh-huh. Yes. That's what the
4 statute says.

5 MS. PFEIFFER: Well, if that's the case, I
6 think (c) would need to be amended that the parties are
7 not required to state the basis for jurisdiction if they
8 agree, and so it seems like agreement is sufficient to
9 confer jurisdiction.

10 HONORABLE EMILY MISKEL: Well, they could
11 state the basis for the jurisdiction was their agreement,
12 right? I'm not understanding what you're --

13 MS. PFEIFFER: As it's currently written on
14 the second line it says "including the basis for the
15 jurisdiction of the business court and a statement whether
16 all parties agree to the removal of the action," so that
17 may be unnecessary to have both in cases where there's
18 just an agreement.

19 CHAIRMAN BABCOCK: Well, that gets back to
20 the whole issue we've been talking about, which is whether
21 this is subject matter jurisdiction or something else, but
22 I don't see that it would necessarily be inconsistent,
23 even -- even with an agreement that there be a statement
24 advising the business court why in the view of the parties
25 there is jurisdiction, quote-unquote, in the business

1 court.

2 MS. PFEIFFER: Well I --

3 MS. GREER: To your point, that is the
4 ultimate issue. I mean, I can't think that this truly
5 could be subject matter jurisdiction, because it can be
6 conferred on the court, so it's something else, and we
7 talked about authority, we talked about forum. It's --
8 really it's concurrent jurisdiction, so it's really a
9 forum selection, but that's not the language that the
10 Legislature used, which is part of the struggle on
11 attention here, you know, because again, it can't be
12 fundamental subject matter jurisdictional that's subject
13 to all of the rules about raising it, adding time, voiding
14 judgments, all of those kinds of things. It's really more
15 of a forum selection, exclusive. They have concurrent
16 jurisdiction, but there's a forum selection possibility.

17 CHAIRMAN BABCOCK: Connie.

18 MS. PFEIFFER: I would just propose changing
19 the "and" to an "or" in the second line of (c), so it says
20 "state the basis for the jurisdiction of the business
21 court or a statement whether all parties agree."

22 MR. PHILLIPS: Or maybe a statement that all
23 parties agree if you're going to do an "or."

24 CHAIRMAN BABCOCK: So you would do away
25 with -- if all parties agree, you would do away with the

1 requirement to state jurisdiction?

2 MS. PFEIFFER: It sounds like it's
3 unnecessary, so --

4 CHAIRMAN BABCOCK: Justice Christopher.

5 HONORABLE TRACY CHRISTOPHER: I don't see
6 how it can be unnecessary given the fact that there are
7 specific things that the business court does not have
8 jurisdiction over. I mean, so like a personal injury
9 lawsuit, you do not have jurisdiction over under the
10 statute. Even if the parties wanted to agree --

11 CHAIRMAN BABCOCK: They couldn't do it.

12 HONORABLE TRACY CHRISTOPHER: -- I don't
13 think they could. Under, you know, do not have
14 jurisdiction of a personal injury lawsuit. I mean, that
15 would be a conflict within the statute if otherwise you
16 could agree to the jurisdiction.

17 MS. PFEIFFER: Let me just say I agree with
18 that. So that's why I was trying to clarify if the
19 agreement of the parties is sufficient, then that's one
20 thing, but if it's -- if there really is some separate
21 jurisdictional requirement, then that's entirely
22 different.

23 MR. LEVY: I think that's probably the
24 correct reading of the statute, that the issue of
25 agreement relates to removal, not that the court can

1 adjudicate the case. We'll get to the language about that
2 which the parties can agree. There still are some other
3 limitations in terms of what would be within the
4 jurisdiction or whatever we're calling it for the business
5 court, so the parties can't agree to remove a personal
6 injury action to business court. That's clearly not
7 within the court's jurisdiction, so I think, Justice
8 Christopher, you are correct in that respect.

9 CHAIRMAN BABCOCK: Rich. Speak into the
10 mic.

11 MR. PHILLIPS: So the only question I have
12 on that is if the parties do agree -- any of these, it's a
13 legal malpractice claim or something and the parties
14 remove it, does that mean that the business court judge
15 has an obligation to get rid of it? If nobody raises it
16 but the court, I mean, this gets to that whole problem of
17 jurisdiction, but what happens if the parties agree to
18 remove, and the business court judge looks at it and says
19 this is a personal injury case? Does the court have power
20 to sua sponte send it back?

21 HONORABLE EMILY MISKEL: Okay.

22 CHAIRMAN BABCOCK: Judge Miskel.

23 HONORABLE EMILY MISKEL: So we talked about
24 the difference between sua sponte and notice and
25 opportunity to be heard. So the discussion was if we

1 require something to be raised on the motion of a party
2 does the court have the ability to raise it itself, and we
3 said in any way we don't want to describe it as sua sponte
4 because the parties should be entitled always to notice
5 and opportunity to be heard, because, for example, if the
6 judge says, "I don't think this case should be here,"
7 you're still entitled to a chance to have a hearing on
8 that and correct the judge's misapprehension or whatever
9 it might be. So I think we always try to say in here
10 either motion of a party or notice and an opportunity to
11 be heard. I think we tried to stay away from describing
12 anything as sua sponte. Does that answer your question?

13 MR. PHILLIPS: I think so, yeah.

14 HONORABLE EMILY MISKEL: Okay.

15 CHAIRMAN BABCOCK: But could -- it doesn't
16 answer the complete question because could a judge not
17 look at the pleading and say sua sponte that this doesn't
18 look like it belongs here and then send out, you know,
19 "Tell me why it does." That would be a sua sponte look at
20 the pleading. It might not decide it or she may not
21 decide it at the time, but rather give notice and an
22 opportunity to be heard, but still it would be something
23 that the judge could raise on her own, right?

24 HONORABLE EMILY MISKEL: Yes. So that's why
25 in 338(c), that's why we said the business court -- "If

1 the business court after notice and hearing determines
2 that it does not have jurisdiction of a removed action the
3 court shall remand the action." So --

4 CHAIRMAN BABCOCK: That doesn't entirely
5 answer the question of who -- who raises it in the first
6 instance.

7 HONORABLE EMILY MISKEL: I think what we had
8 talked about -- and I'm struggling to put my finger on the
9 language in here, but what we had talked about in the
10 committee was anyone can raise it, including the judge,
11 but if we use the word "sua sponte" people were saying,
12 oh, that means the judge can look at the pleadings and go
13 "Nope, dismissed," right, and you should have an
14 opportunity to be heard on that before you're dismissed.
15 Does that make sense?

16 CHAIRMAN BABCOCK: A couple of judges I've
17 heard from time to time will do exactly like that.

18 HONORABLE EMILY MISKEL: Which was very
19 inconsistent with what we talked about about Texas state
20 practice and --

21 CHAIRMAN BABCOCK: Right.

22 HONORABLE EMILY MISKEL: -- so we did not
23 want to adopt that aspect of federal practice.

24 CHAIRMAN BABCOCK: I got it.

25 MS. GREER: Justice Miskel, that's in

1 338(c), if pursuant to this rule, after notice and
2 hearing, determines the business court does not have
3 jurisdiction.

4 HONORABLE EMILY MISKEL: Yes, and I think
5 what Chip said is that doesn't explicitly say the judge
6 can be the one to raise that issue.

7 MS. GREER: Right, but I thought we were
8 just covering that it could be raised by the party or the
9 judge with that language. You think it needs to be more
10 explicit?

11 CHAIRMAN BABCOCK: I'm not sure it does,
12 but -- because I don't think you're going to have many
13 situations where the judge is inclined to throw the thing
14 out without giving the parties an opportunity to talk --
15 it's not like -- it's not like diversity jurisdiction
16 where you look at it and you see you've got a plaintiff
17 and a defendant both from Texas. The judge can probably
18 look at the pleading and say, okay, that's -- you know,
19 that's out of here, but -- so I don't know that it
20 needs -- but I do think there should be a record created
21 that the judge cannot raise the issue by -- by herself. I
22 mean, maybe she -- the best practice is she sees it and
23 then gives the parties the opportunity to be heard on it,
24 but it doesn't mean that the judge can't in the first
25 instance say, "Hey, I think I've got a problem with my

1 jurisdiction."

2 HONORABLE EMILY MISKEL: That was the
3 intention of the subcommittee is that it could be raised
4 by the judge, but you would have to give notice and
5 opportunity to be heard before acting on it, and if that's
6 not clear, my brain is kind of filling up right now, and
7 so if someone wants to point that out to me, we can
8 happily revisit the text.

9 CHAIRMAN BABCOCK: You've got a lot of
10 bandwidth left there. Kennon.

11 MS. WOOTEN: I think you could add a
12 sentence to the end of (b) along these lines but probably
13 in a more succinct matter: "On its own initiative the
14 court may raise a question as to its jurisdiction over the
15 removed action and give the parties an opportunity to be
16 heard on the matter."

17 MR. LEVY: 338?

18 MS. WOOTEN: 338(b) at the end. That's just
19 one suggestion, but I think if it's not explicit there may
20 be an unnecessary question.

21 CHAIRMAN BABCOCK: Say that again. Kennon,
22 what were you -- where were you proposing that language
23 for?

24 MS. WOOTEN: I was proposing it for
25 consideration at the end of what is now 338(b).

1 CHAIRMAN BABCOCK: Okay. That was helpful.
2 Thank you.

3 HONORABLE EMILY MISKEL: Or something like
4 "If a jurisdictional concern is raised by the court, the
5 parties will have an opportunity" -- or "notice and an
6 opportunity to be heard before" -- or something.

7 MS. WOOTEN: I think that would work, too,
8 but without an explicit reference there may be a question
9 among parties in the court.

10 CHAIRMAN BABCOCK: Okay. Yeah, Rich.
11 Sorry.

12 MR. PHILLIPS: So --

13 CHAIRMAN BABCOCK: Don't hog the mic there.

14 MR. PHILLIPS: Going back then to (c) in the
15 notice of removal and Connie's point, which I agree with,
16 if agreement by itself is sufficient to change it to an
17 "or." Now, we're talking about it and coming around to
18 the idea that agreement by itself may not be sufficient,
19 then I think we still need to have them state some basis
20 for why jurisdiction, whatever we're calling it --

21 CHAIRMAN BABCOCK: Connie, have you been
22 brought around to that point of view?

23 MS. PFEIFFER: Yes, I think we've decided
24 that agreement is not sufficient.

25 CHAIRMAN BABCOCK: Yeah. Okay. Well, good.

1 We have agreement.

2 MS. WOOTEN: I think we're done here.

3 HONORABLE ROBERT SCHAFFER: That is
4 sufficient.

5 CHAIRMAN BABCOCK: All right. Can't beat
6 that, right? So have we got everything out of 337 that we
7 can? Moving on to 338, that's got a suggested sentence.

8 HONORABLE DAVID EVANS: I have one issue.

9 CHAIRMAN BABCOCK: At the end of (b)?

10 HONORABLE DAVID EVANS: When you say the
11 plaintiff --

12 HONORABLE EMILY MISKEL: Can you wait for
13 that mic so Marcy can hear you?

14 HONORABLE DAVID EVANS: When you say the
15 plaintiff --

16 CHAIRMAN BABCOCK: No.

17 HONORABLE DAVID EVANS: -- waives the right
18 to remove based on filing, choosing to file in a
19 non-business court, did you -- and I was -- I was on a
20 cruise while you were talking, and I wasn't allowed to
21 look up and watch you. So here's the deal, what happens
22 when they replace counsel, and counsel looks at this and
23 says -- new counsel comes in and says this case shouldn't
24 have been filed in this court to begin with? I think
25 that's an awful severe penalty on a case being filed and

1 not having an opportunity to remove -- and I'm not
2 suggesting you can write, well, new counsel is hired, but
3 that's the unintended consequence of what you've done.

4 HONORABLE EMILY MISKEL: What we were basing
5 this on was a plaintiff can't file a motion to transfer
6 the case. If a plaintiff files in the wrong county, the
7 plaintiff can never transfer the case. The plaintiff
8 needs to dismiss and refile in the correct county, and so
9 we were saying similarly that if a plaintiff can't
10 transfer the case to a different county, the plaintiff
11 can't remove their own case that they improperly filed in
12 the wrong court.

13 HONORABLE DAVID EVANS: But there's no --
14 the statute of -- anything that extends the statute of
15 limitations in a case never applies to voluntary nonsuit
16 and refiling. It depends upon involuntary -- as I recall,
17 the involuntary dismissal out of federal system or another
18 jurisdictional then you get an extension on the statute of
19 limitations, and I don't want this to be a forum
20 shopping -- I don't want somebody to file and say, "Oh, I
21 don't like the judge that I drew in Harris County, now I
22 want to move as the plaintiff," but a lot of these
23 cases might be -- that could come under business court
24 jurisdiction may be reviewed by subsequent counsel and
25 they look at it and that's just -- that was just where I

1 was.

2 MR. LEVY: Judge, I think we -- after
3 reviewing it and looking at the statute that a plaintiff
4 could, in fact, remove the action, and the language of 337
5 would not limit the ability of a plaintiff to remove it.

6 HONORABLE DAVID EVANS: Ah.

7 MR. LEVY: And also, Chip, I just wanted to
8 note a small point that's referenced in the proposed
9 comment that the issue about the timing of when you would
10 need to remove it, that the -- we wanted to make it clear
11 that if there is a time limit on a removal that it
12 wouldn't -- the clock would not start running before the
13 party is served so that sending a courtesy copy of a
14 petition to a defendant would not start that clock
15 running, that it would start when the person -- when the
16 entity is appropriately served.

17 And then an additional point that we
18 suggested in the comment is language that says, "Federal
19 case law on removal and remand may be instructive to the
20 Texas business court where applicable," and we talked
21 about whether it should be "may be instructive" or "shall
22 be instructive." That's obviously up to the Supreme Court
23 to decide, but we felt that it would be helpful to draw
24 upon the case law practice on removal and remand in
25 federal courts, because this does not have a precedent in

1 Texas practice.

2 HONORABLE DAVID EVANS: Robert, I'm sorry,
3 maybe I just -- I must not have gone into this deep
4 enough. What about the estimated cases that are currently
5 in the system and currently in state district court? Do
6 they have a time limit by which they must remove after the
7 courts are created?

8 HONORABLE EMILY MISKEL: So for the business
9 court it only applies to actions commenced on or after
10 September 1st, 2024.

11 HONORABLE DAVID EVANS: So if we're doing an
12 estimate right now on what we have in the way of case law
13 based on existing cases in the system, none of those cases
14 apply unless they're nonsuited and refiled.

15 MR. LEVY: I think that's right.

16 HONORABLE EMILY MISKEL: It's different for
17 the Fifteenth Court of Appeals, but for the business
18 court.

19 HONORABLE DAVID EVANS: I'm really talking
20 about capacity and what we have to expect in the way of
21 capacity, so that is the answer to that, that a nonsuited
22 case that had been on file then conceivably could be
23 refiled in business court.

24 HONORABLE EMILY MISKEL: Was this the
25 discussion we had with Justice Kelly where we were -- was

1 this the discussion we were talking about it's tough to
2 tell when a case is commenced, or is that a separate
3 discussion?

4 HONORABLE PETER KELLY: I think that was in
5 the Fifteenth Court. There was one about perfection of
6 the appeal versus commencement of the case.

7 HONORABLE EMILY MISKEL: Okay.

8 HONORABLE PETER KELLY: And it was two
9 different --

10 HONORABLE EMILY MISKEL: Okay. That was a
11 Fifteenth discussion, so stay tuned for that for later on.
12 Okay.

13 HONORABLE DAVID EVANS: Thank you.

14 HONORABLE EMILY MISKEL: Okay. I didn't
15 mean to be facetious, but anything else on 337?

16 HONORABLE DAVID EVANS: No, I just -- I'm
17 more thinking about what the capacity is going to be on
18 the day we open.

19 HONORABLE EMILY MISKEL: Okay. 338, we
20 already started talking about (c), but basically we tried
21 to keep the same 30-day from 337 -- oh, okay, so this is
22 remand of improperly removed business court actions.
23 Okay. So the bigger discussion on this was this Rule 338
24 is not meant to solve every time a case should go out of
25 the business court. So the discussion that we previewed

1 about if a pleading is amended or if there's a summary
2 judgment or if there's a dismissal or if something about
3 the case changes, does the business court lose
4 jurisdiction, none of that is meant to be addressed by
5 Rule 338. Rule 338 is only addressing remand of
6 improperly removed business court actions. Is there any
7 other background discussion, Robert, from 338 that we need
8 to address?

9 MR. LEVY: Just that we have the 30-day.

10 HONORABLE EMILY MISKEL: Okay. So we
11 incorporate that same 30-day, and then the curly brackets
12 indicate that we base this off of federal court precedent.
13 And then (c) was the one where we were talking about if
14 the judge raises the jurisdictional question, there still
15 has to be notice and hearing, and the suggestion was we
16 need to make it explicit that a court can raise that
17 jurisdictional problem. Was there any other discussion
18 for 338?

19 CHAIRMAN BABCOCK: No other comments, so --

20 MR. LEVY: Yeah, just we'll note that we're
21 going to make consistent, I think, the consensus that the
22 30 days starts to run after the party enters an
23 appearance.

24 CHAIRMAN BABCOCK: Right. So 339.

25 HONORABLE EMILY MISKEL: Okay. I don't

1 anticipate any discussion on 339. That's a direct copy
2 and paste from the statute. The only discussion was we
3 said do we need to incorporate the definitions into the
4 civil rules or can we just trust these experienced
5 litigators know to look at the Government Code, and we
6 decided to paste them.

7 MR. LEVY: There is one change that is made
8 in a couple of places, that if you look under, for
9 example, (c) (6), we changed the word "and" to "or." The
10 reason for that is that rules construction would suggest
11 "and" would require each of the items to be included,
12 whereas it appeared to us that the statute was intending
13 them to be non -- or noncumulative, so that if you have
14 any of those items, that would be sufficient, so -- and
15 you'll see in other places where it wouldn't make sense to
16 construe "and" to require all of the items.

17 MS. GREER: One issue Kennon had raised
18 about moving the definitions up, one thought that I had is
19 if that would be advisable, we didn't use Rule 330, which
20 was also repealed, and so if we could do that without any
21 change to the order of all of the other rules with that.
22 We kind of put it where it appears in the statute, so to
23 speak, but where it fit in naturally, but we could
24 possibly move it up. What do people think about that?

25 CHAIRMAN BABCOCK: I personally think it's a

1 good idea. Scott -- and so does John Kim. Scott and
2 then --

3 MR. STOLLEY: Yeah, that was going to be my
4 first comment, was --

5 CHAIRMAN BABCOCK: Put the mic over by you.

6 MR. STOLLEY: -- to move. That was my first
7 comment, move the definitions to the beginning. Did I
8 understand correctly, these definitions all come directly
9 from the business courts statute? Are all of these
10 defined words used in these rules that we're drafting? I
11 would delete the ones that aren't being used in these
12 rules.

13 HONORABLE EMILY MISKEL: I don't think any
14 of the -- I don't think any of these are used in the
15 rules.

16 MR. STOLLEY: Then why are we incorporating
17 them from the statute?

18 HONORABLE EMILY MISKEL: That was the
19 debate.

20 CHAIRMAN BABCOCK: I hate it that your mic
21 is not working.

22 HONORABLE EMILY MISKEL: Yeah, it keeps -- I
23 don't know if it's low battery or something.

24 MR. STOLLEY: I mean, isn't the word
25 "derivative proceeding" used somewhere in these rules, for

1 example? I think it is.

2 MR. LEVY: Yeah.

3 MR. STOLLEY: But I just -- I'm going to
4 suggest to think about not -- about not including
5 definitions that have already been used in these rules. I
6 think that could be confusing. And then another point I
7 wanted to make about language is I've seen several
8 instances where you've use the word "shall." I would urge
9 the subcommittee to banish that word, because it's
10 ambiguous. It could mean must, it could mean may, it
11 could mean should. Bryan Garner has written persuasively
12 on this, so I would suggest putting in whatever you really
13 mean it to mean.

14 CHAIRMAN BABCOCK: You want somebody to do
15 something, they must do it as opposed to shall do it.

16 MR. STOLLEY: Yes.

17 MR. LEVY: I'm not sure if this is working
18 or not.

19 CHAIRMAN BABCOCK: It's not working.
20 Because you guys have been poking each other with it.

21 MR. LEVY: Right. All right. We're going
22 to switch. Thank you.

23 CHAIRMAN BABCOCK: So we need a mic.

24 MR. LEVY: Thank you. So there are some of
25 these terms, like the word derivative, here's one of the

1 challenges. Derivative proceeding is defined under now
2 340. It is used in 341 in terms of defining -- or
3 actually still in 340, talking about jurisdiction, and
4 even though it's a defined term, it's used later in the
5 statute. It's not used with derivative proceeding with a
6 capital D, so we could decide to normalize that by
7 capitalizing where we later -- where the term is later
8 used, but we did incorporate just the way the statute was
9 worded, but we probably should improve on that.

10 CHAIRMAN BABCOCK: Yeah, Connie had her hand
11 up a long time ago, and then Justice Christopher.

12 MS. PFEIFFER: My comments were already
13 captured, but I just want to say I strongly agree with
14 moving these to the beginning, but also some of these
15 terms are used throughout the statute, and where they are
16 used I would definitely capitalize them to just flag that
17 they are defined terms.

18 THE COURT: Yeah. Justice Christopher.

19 HONORABLE TRACY CHRISTOPHER: I understand
20 you're changing "or" and "to" or in certain circumstances
21 when the beginning thing says the term includes, all
22 right, so that would be in my opinion an "or," but when it
23 says "internal affairs means" in (g), I'm not really sure
24 as statutory construction that "or" would be appropriate
25 there. Because "means" versus "includes," but if there's

1 a reason why you did it, you see those as two different
2 things. All the others are termed "includes."

3 CHAIRMAN BABCOCK: Yep.

4 HONORABLE EMILY MISKEL: I think we did talk
5 about that in subcommittee, and I think we did come down
6 on those two things should be an "or." Do you read them
7 to be requiring both of them?

8 MR. LEVY: For example, if you look --

9 HONORABLE TRACY CHRISTOPHER: I would think
10 normally if you said "means" that would be an "and."

11 MR. LEVY: Okay. So look at (f), please.
12 It says "Governmental entity means the State of Texas" --
13 well, that one is "or," actually.

14 HONORABLE TRACY CHRISTOPHER: Yeah, you
15 didn't need to change that one.

16 MR. LEVY: I was thinking --

17 MS. GREER: What about governing documents?
18 That's --

19 HONORABLE TRACY CHRISTOPHER: That's
20 "includes." "Includes."

21 MS. GREER: Right, okay. That was -- okay.
22 So you're just saying where it says "means" that --

23 HONORABLE TRACY CHRISTOPHER: I'm asking the
24 question.

25 MR. LEVY: It just -- it seems to me that

1 you could have dispute regarding the duties of an officer
2 of a corporation, a dispute about whether the officer was
3 acting appropriately or ultra vires that did not relate to
4 the membership or ownership interest, so an ultra vires
5 act would seem to be something that a business court
6 should consider, but if it doesn't include a dispute about
7 ownership interest then the "and" would arguably mean that
8 it wasn't -- it wasn't within the jurisdiction.

9 CHAIRMAN BABCOCK: John Kim.

10 MR. KIM: So I can prove internal affairs by
11 just saying it's a matter relating to the organizational's
12 membership or organizational interest.

13 MR. LEVY: Yes.

14 MR. KIM: That's pretty broad.

15 MR. LEVY: It is, but that's a business --
16 wait until you get to the issue about the anything under
17 -- I think it was Justice Kelly made this point, where
18 there's reference to an action arising out of the business
19 organization's code. That's even broader.

20 MR. KIM: I like that.

21 MR. LEVY: So that -- that would encompass
22 this issue even more, ownership interest. That's
23 currently in Rule 340(b)(7), just so people can see it.

24 CHAIRMAN BABCOCK: All right. Any more
25 comments about this? All right.

1 HONORABLE EMILY MISKEL: Okay. So Rule 340
2 is what incorporates the jurisdictional part of the HB 19,
3 the jurisdiction, and I do really want to say that there
4 are explicit examples of other statutory definitions of
5 jurisdiction that aren't held to mean subject matter
6 jurisdiction, so that's not brand new with this statute.

7 Let me see. All of this I think is directly
8 out of -- the statute, we changed an "and" to an "or" in
9 (d), and then (f) is I think the first time we made a
10 discretionary change, so (f) said -- the statutory text
11 says that the parties "involved in a claim within the
12 business court's supplemental jurisdiction," et cetera,
13 "involved in" is not really a legal term, so we changed
14 that to "the parties to the claim" because who else would
15 sort of have the standing capacity to make this type of
16 complaint, so I did want to flag that.

17 And then we also -- I thought the business
18 court had to agree, and that was in the statute. Okay.
19 That may just be a rewording. Under the statute for
20 supplemental jurisdiction, the parties and the business
21 court have to agree that the supplemental jurisdiction
22 claim can also be in the business court. So I can't
23 recall why that is particularly bracketed, but that
24 concept is from the statute.

25 MR. LEVY: Right.

1 CHAIRMAN BABCOCK: It includes both the
2 judge and all the parties?

3 HONORABLE EMILY MISKEL: Yes.

4 MS. GREER: Yes.

5 MR. LEVY: And if there is not such
6 agreement then we get into the challenging issue of
7 concurrent cases.

8 CHAIRMAN BABCOCK: Okay.

9 MS. GREER: And this is another place where
10 Chief Justice Christopher raised a really good point, and
11 we've got some proposed language to address that, if we're
12 ready to talk about that issue.

13 CHAIRMAN BABCOCK: Let's talk about it.

14 HONORABLE EMILY MISKEL: Screen share.

15 MS. GREER: It's coming up.

16 CHAIRMAN BABCOCK: It's up. Could somebody
17 read that into the record?

18 MR. LEVY: I'll be happy to. So this would
19 be under subsection -- it would change subsection (e) to
20 add subsection (f), and then (2), under (f) (2), there
21 would be a subpart (i). "The business court judge is
22 encouraged to coordinate with the district or county court
23 of original jurisdiction regarding the orderly
24 adjudication of both actions in order to minimize
25 duplicative or overlapping proceedings."

1 And then subpart (ii), "Each court, business
2 and county or district court, that presides over
3 concurrent actions should take steps to ensure that any
4 final judgment recognizes claims fully adjudicated in the
5 other action, and the court entering judgment should apply
6 judgment credits applicable to the action based on any
7 judgment entered in the first action where judgment is
8 entered."

9 And, Justice Christopher, this goes to your
10 helpful comment. Hopefully it addresses it.

11 HONORABLE EMILY MISKEL: Okay. Rich wanted
12 to correct the oral reading. I think it was said "fully"
13 when the text was "finally" resolved, adjudicated.

14 MR. LEVY: Oh, did I say -- oh.

15 HONORABLE EMILY MISKEL: I think the issue
16 we're grappling with is the statute provides for claims to
17 proceed concurrently in the business court and the
18 district court, and that practically is going to cause a
19 lot of problems, but there are not necessarily rule-based
20 solutions for those problems because that's baked into the
21 system.

22 CHAIRMAN BABCOCK: Yeah.

23 HONORABLE EMILY MISKEL: Discussion on the
24 additional language or --

25 HONORABLE PETER KELLY: Again, I question

1 the use of the term "jurisdiction." It's -- because it's
2 not an original -- there hasn't been a transfer of
3 jurisdiction. It's been a transfer of the forum in which
4 it's been heard, and so there's an original forum and
5 subsequent forum, but --

6 MR. LEVY: That's a change I think we can
7 make. The original jurisdiction was not intended to mean
8 something significant.

9 HONORABLE PETER KELLY: Right. But that's
10 why we're having this meeting.

11 MR. LEVY: It could be -- we probably should
12 change that to be "The district or county court where the
13 case was pending" or --

14 CHAIRMAN BABCOCK: Is there consensus here
15 with our group about whether or not jurisdiction means
16 subject matter jurisdiction or some other thing that is
17 not subject matter jurisdiction?

18 HONORABLE EMILY MISKEL: I do not believe
19 that the Legislature meant for these uses of the word
20 jurisdiction for subject matter jurisdiction, and I think
21 that would be contrary to current Supreme Court case
22 precedent that unless they specifically said subject
23 matter jurisdiction, we don't infer it to mean that.

24 CHAIRMAN BABCOCK: Okay. Chief Justice
25 Christopher, you want to take the con on that?

1 HONORABLE TRACY CHRISTOPHER: I mean, the
2 only con is the fact that the statute specifically says
3 you don't have jurisdiction over these items. And that
4 sounds like subject matter jurisdiction when it is said
5 that way, but you know --

6 HONORABLE EMILY MISKEL: I don't -- that is
7 interesting, and I don't think it swallows up the rest of
8 it, but it might be correct. I don't know the answer, but
9 it might be correct to say that where they've said the
10 business court doesn't have jurisdiction over personal
11 injury claims, if the business court purported to enter a
12 personal injury judgment might the court lack subject
13 matter jurisdiction. I think that is a great discussion
14 to have and might be true, but I think all of the rest of
15 the times they say the business court has jurisdiction, I
16 don't think they're saying subject matter jurisdiction.

17 CHAIRMAN BABCOCK: Anybody else have any
18 thoughts about that? Because it's a pretty big issue.

19 HONORABLE TRACY CHRISTOPHER: Well, so just
20 a question. Suppose the original petition says my damages
21 are \$2 million, okay, and the statute says it has to be
22 5 million. All right. So is it okay for the business
23 court judge to preside over that case?

24 MR. LEVY: Well, I think under that
25 scenario, if I'm a defendant and you answer your

1 interrogatory and you describe damages of \$5 million or
2 more, even though the petition says 2 million, I think I
3 could remove it on that basis.

4 HONORABLE TRACY CHRISTOPHER: Okay. But
5 what if I plead two, my discovery says two, but everybody
6 wants to stay where they are in the business court? But
7 when -- and what I'm worried about as an appellate court
8 judge is at the end of the case when the one side loses,
9 they say, oh, time's out, judge never had jurisdiction to
10 begin with. And maybe we cannot answer that question. We
11 just have to wait and see what happens.

12 HONORABLE EMILY MISKEL: So the example is
13 there's a lot of family law statutes that say which courts
14 have jurisdiction or even exclusive jurisdiction, and
15 those have not been held to be subject matter
16 jurisdictional. Because people do, in fact, raise that
17 constantly.

18 CHAIRMAN BABCOCK: Anybody else have any
19 comments? Any thoughts about this? Because it is a
20 pretty important issue.

21 MS. GREER: Well, I mean, it's clearly one
22 that we've struggled with in trying to understand. They
23 use the same word, but it seems to have different context
24 depending on the usage. I mean, I agree with Chief
25 Justice Christopher that the court -- business court would

1 lack jurisdiction over personal injury claims, and if it
2 turns out that the amount in controversy is truly under
3 5 million, they would lack jurisdiction, and you could end
4 up with a void judgment, but elsewhere they've used it in
5 a way that would not seem to void everything. And I'm
6 sure it's the difficulty with the subject matter is
7 needing to be worked out, but we really did struggle with
8 this quite a bit.

9 HONORABLE EMILY MISKEL: And, Marcy, I would
10 even say that if it turns out it wasn't 5 million I'm not
11 sure that would be a void judgment. I don't think that
12 would be a subject matter jurisdiction issue. And I think
13 that's why in our subcommittee I believe this was the area
14 that we said we couldn't decide prescriptively by rule, we
15 would have to let this be worked out by appellate
16 opinions.

17 MS. GREER: Exactly. And, yeah, I mean, I
18 think it's -- you can argue it both ways.

19 CHAIRMAN BABCOCK: Well, as a matter of the
20 Chair's prerogative, we're going to take a lunch break
21 because Mr. Hardin and I have a Zoom call right now, which
22 we're going to find a nice private place to take together.

23 HONORABLE EMILY MISKEL: Is it a remote
24 proceeding?

25 MR. LEVY: Can we watch?

1 MS. WOOTEN: We didn't get notice of this.

2 HONORABLE LEVI BENTON: He's going to rest
3 before he starts?

4 CHAIRMAN BABCOCK: He's going to do that for
5 sure. He's had practice at doing that, as I understand.
6 We'll be back at 1:00, and in the meantime everybody get
7 together and decide whether it's subject matter or not.

8 (Recess from 11:59 a.m. to 1:02 p.m.)

9 CHAIRMAN BABCOCK: All right, we are two
10 minutes late starting. Thank you. What a lovely voice.
11 My fault.

12 So we were in the middle of talking about
13 Rule 340, I believe, with Judge Miskel. She's going to
14 need to get back in here.

15 MR. LEVY: She just ran to the restroom.
16 She'll be right back.

17 CHAIRMAN BABCOCK: Anybody have any comments
18 about Rule 340? Yeah.

19 PROFESSOR CARLSON: I just wanted to renew
20 my comments about I do think this goes to subject matter
21 jurisdiction.

22 MR. STOLLEY: Elaine, could you speak up?

23 PROFESSOR CARLSON: I apologize. I just
24 wanted to renew my comment and echo Judge Christopher's
25 concern that we are talking subject matter jurisdiction.

1 I don't know what other -- how you can otherwise describe
2 it unless somehow the legislation is read to give business
3 courts just general jurisdiction as a district court might
4 have, civil district court might have. Maybe that's the
5 legislative intent, but it doesn't read that way.

6 CHAIRMAN BABCOCK: Yeah, Judge Miskel and I
7 just had a conversation out in the hallway, and I think
8 she takes the contrary view, and -- and my thought, but
9 subject to what everybody else believes, is that we really
10 don't need to resolve this in this meeting. We have
11 raised it as an issue. I think it's a serious issue. I
12 think there are differing opinions about the issue, and
13 the reason the Court gets, you know, paid the big bucks
14 like they do, they'll get to decide how that's dealt with,
15 if at all, in the rules. Is that okay?

16 Let the record reflect that the Chief has
17 nodded his head in assent. So we don't need to spend any
18 more time on that, unless people just are desperate to do
19 it. So back to 340.

20 HONORABLE EMILY MISKEL: One of things that
21 Robert and I discussed on break was the reason that we put
22 the definitions right before Rule 340 is because that's
23 the first time they're going to be needed, and so those
24 definitions haven't been used in these rules up till that
25 point. They're needed for Rule 340, so rather than having

1 them separated and having to flip back and forth, we
2 thought it would be easier to have them next to each other
3 because they're used together, so that -- I would
4 recommend that we leave it that way, but I understand
5 normally definitions go at the beginning.

6 CHAIRMAN BABCOCK: Yeah, I would take the
7 con on that. You know, you always have to flip back and
8 forth, and it just seems to me the definitions are almost
9 always at the beginning.

10 HONORABLE EMILY MISKEL: It does not make a
11 huge difference --

12 CHAIRMAN BABCOCK: Right.

13 HONORABLE EMILY MISKEL: -- and we'll be
14 fine either way. Okay. I think we were done with 339.
15 340, I believe, is again, just directly from the statute,
16 and that's what talks about this authority jurisdictional
17 -- you know, well, the Legislature used the word
18 "jurisdiction" a lot in this rule, and we have basically
19 just incorporated the language. We have changed some
20 "ors" in places where it would be meaningless to require
21 all of the things. We also changed "parties involved in a
22 claim" to "parties to the claim" like we changed
23 previously. And I think that's all we changed.
24 Otherwise -- oh, subsection (b) of this rule is our add,
25 but I think other than those I think nonsubstantive

1 changes 340 is straight out of the statute and defines the
2 jurisdiction of business court, supplemental jurisdiction,
3 and things excluded from the business court jurisdiction.

4 CHAIRMAN BABCOCK: Judge, did you say you
5 added (b) or (d)?

6 HONORABLE EMILY MISKEL: Oh, I'm sorry, we
7 just added -- under subsection (c), we added the text "In
8 an action described by subsection (b) of this rule."
9 That's the only thing we added there.

10 CHAIRMAN BABCOCK: Okay. Got it. Thank
11 you.

12 HONORABLE EMILY MISKEL: Otherwise we didn't
13 take any other liberties with this. Any discussion on
14 340?

15 CHAIRMAN BABCOCK: We were talking at lunch
16 about your subcommittee has done such a terrific job that
17 there's not a lot to talk about, the way you've organized
18 it and the way you've integrated everything.
19 Nevertheless, if anybody has anything on 340, fire away,
20 and if you don't, we can go to 341.

21 HONORABLE EMILY MISKEL: Okay. 341 was
22 another area where we debated whether it needs to be in
23 the civil rules or not because this could just as easily
24 just live in the Government Code where the current
25 removal, disqualification, or recusal provisions live, but

1 we thought it would be helpful to practitioners to kind of
2 quell disputes to say business court judges are treated as
3 district court judges for removal, disqualification, and
4 recusal.

5 CHAIRMAN BABCOCK: Justice Christopher.

6 HONORABLE TRACY CHRISTOPHER: The first
7 sentence of (b), in my opinion, is incorrect because when
8 you're disqualified, you're disqualified. You're not
9 subject to mandatory recusal. The second sentence is
10 correct and covers everything you need to say.

11 HONORABLE EMILY MISKEL: Okay. So just say
12 and -- or say "or" instead of "and" in the first sentence?

13 HONORABLE TRACY CHRISTOPHER: No. Because
14 if you're disqualified, you're disqualified. If you're
15 subject to recusal, that involves a judgment call. So
16 there are two -- it's just totally different rules.

17 HONORABLE EMILY MISKEL: So you're saying
18 delete?

19 HONORABLE TRACY CHRISTOPHER: Delete that
20 first sentence.

21 MR. LEVY: Kennon has a rewording that might
22 solve it.

23 MS. WOOTEN: Is it okay to go now?

24 MR. LEVY: Kennon is going to fix this
25 problem.

1 MS. WOOTEN: One thing that I learned, Chief
2 Justice Christopher, that wasn't automatically apparent is
3 this is straight from the statute.

4 HONORABLE TRACY CHRISTOPHER: Oh.

5 MS. WOOTEN: So that's why it's phrased the
6 way it is, but I stumbled on that language as well and
7 wondered whether subpart (b) could be rewritten to --

8 HONORABLE TRACY CHRISTOPHER: But it's not
9 underlined.

10 MR. LEVY: Yeah, that was our mistake. It
11 should have been. That was my mistake.

12 MS. WOOTEN: Robert was almost perfect. So
13 I'm wondering whether (b) could be rephrased to say
14 something along the lines of this: "The disqualification
15 and recusal standards and procedures for a business court
16 judge are the same as those for a district judge."

17 HONORABLE EMILY MISKEL: Or I think Justice
18 Christopher was just saying delete sentence one and leave
19 sentence two.

20 HONORABLE TRACY CHRISTOPHER: Right, and
21 that covers everything.

22 MS. WOOTEN: You could, but does it cover
23 everything if it's speaking to procedures as opposed --

24 HONORABLE EMILY MISKEL: Oh, procedures and
25 standards.

1 MS. WOOTEN: -- to standards. There might
2 be a better word there, but I don't think that the
3 procedures necessarily encompass everything.

4 HONORABLE EMILY MISKEL: So delete sentence
5 one and then sentence two, procedures and standards.

6 MS. WOOTEN: Yeah, I think you could do
7 that.

8 HONORABLE DAVID EVANS: The word
9 "mandatory," I don't think -- I'm sorry, I'll just yell.
10 The word "mandatory" adds nothing to that sentence because
11 recusal -- let's look at 18a or b.

12 HONORABLE TOM GRAY: I'll just hold it for
13 you.

14 HONORABLE DAVID EVANS: Oh, Tom, thank you.
15 This is great. I don't know what to say. "Mandatory"
16 doesn't add anything to it. It's subject to
17 disqualification or recusal, and it would confuse the
18 reading of 18a and b, which all recusals are mandatory
19 under 18a unless waived. You must recuse unless the
20 parties waive it. Disqualification can't be waived. So
21 that would be my comment.

22 CHAIRMAN BABCOCK: Justice Gray, you had
23 an -- in addition to the microphone you had your hand up.

24 HONORABLE TOM GRAY: It's been covered.

25 CHAIRMAN BABCOCK: Justice Gray, Connie is

1 winding up to say something.

2 MS. PFEIFFER: Thank you very much. I just
3 appreciate the distinction from (a) and (b) as one is
4 removal from office and one is disqualification or
5 recusal. Can we just mirror them and make (b) like what
6 Justice Christopher is proposing where you strike the
7 first sentence and then make the second sentence modeled
8 like (a)?

9 MS. WOOTEN: I think --

10 HONORABLE TOM GRAY: Why would we say in the
11 Rules of Civil Procedure the grounds for removing a judge
12 from office? I mean, is that --

13 HONORABLE EMILY MISKEL: So that's what we
14 were talking about, is how much of this lives in the
15 Government Code and how much comes into the rules.

16 HONORABLE TOM GRAY: I would suggest that
17 provision lives in the Government Code, (a). (B), then we
18 can talk about how much of (b) may be need to be --
19 whether the first sentence or second sentence, but I
20 don't -- and I think I hear a couple of district judges
21 talking about that same thing, that (a) really doesn't
22 need to be in the Rules of Civil Procedure.

23 HONORABLE EMILY MISKEL: I don't feel
24 strongly about it either way. Does anyone?

25 MR. LEVY: No. I agree. That would mean

1 that the title of 340 we would also take out "removal."

2 CHAIRMAN BABCOCK: I think I know the answer
3 to this question, but is there any -- anybody have any
4 thought about the fact that all of the judges, I think,
5 without exception subject to 18a and b are elected judges
6 where these judges will not be?

7 HONORABLE DAVID EVANS: Well, there are
8 elected judges that aren't subject to 18a and b.

9 CHAIRMAN BABCOCK: True.

10 HONORABLE DAVID EVANS: Justice of the peace
11 is not.

12 CHAIRMAN BABCOCK: But any judge that is
13 subject to 18a or b is an elected judge.

14 HONORABLE ANA ESTEVEZ: Or will be, if they
15 got appointed.

16 CHAIRMAN BABCOCK: Appointed until they run
17 again.

18 HONORABLE DAVID EVANS: It is elected judge.
19 It's elected trial court judges at district and statutory
20 county court.

21 CHAIRMAN BABCOCK: Does it matter that
22 they're appointed in the first instance --

23 HONORABLE DAVID EVANS: No.

24 CHAIRMAN BABCOCK: -- without ever being
25 elected or subject to an election?

1 HONORABLE DAVID EVANS: 18a and b apply to
2 district.

3 CHAIRMAN BABCOCK: No, I know that. But I'm
4 asking --

5 HONORABLE EMILY MISKEL: It was in HB 19.

6 CHAIRMAN BABCOCK: This business court judge
7 is not subject to an election.

8 MR. HARDIN: Most district judges started
9 out their positions as appointed, didn't they?

10 CHAIRMAN BABCOCK: True, but then they're
11 subject to an election.

12 HONORABLE EMILY MISKEL: Are you saying why
13 are we assuming they're being treated the same when
14 they're not elected? Because HB 19 says it.

15 HONORABLE ANA ESTEVEZ: Well, what about
16 associate judges? Are you trying to make a difference
17 between being elected and associate? I guess I don't
18 understand what your question is.

19 CHAIRMAN BABCOCK: I think Judge Miskel has
20 got the answer to this question, which is the statute says
21 to treat them the same.

22 HONORABLE EMILY MISKEL: Yes.

23 CHAIRMAN BABCOCK: So that's what we'll do.

24 HONORABLE DAVID EVANS: And I think it's
25 because the statute never comes out and says that a

1 business court judge is a district judge.

2 MS. WOOTEN: Right.

3 HONORABLE DAVID EVANS: It defines a
4 district, and it gives them the powers of the district
5 judge, but it never comes out and actually calls them a
6 district judge, and so the statute did need to address
7 recusal and disqualification, address that issue. Thank
8 you, Tom.

9 CHAIRMAN BABCOCK: Okay.

10 HONORABLE EMILY MISKEL: Okay. Is my mic
11 working? It was saying it was having connection problems.
12 Okay.

13 All right, so the consensus seems to be
14 leave (a) in the Government Code, and so Rule 341 will
15 just be disqualification and recusal.

16 All right. 342 talks about jury trials in
17 business court cases. We made the same change we've made
18 other places, which was where the statute talked about the
19 county in which the action was originally filed, and we
20 have -- every place where we've seen that we've changed it
21 to "the county from which the action was removed" because
22 it could have been transferred before it was removed, so
23 we've tried to be consistent throughout. Otherwise, all
24 of this -- go ahead, Robert.

25 MR. LEVY: There's one additional change

1 that -- based upon Justice Christopher's comment. Under
2 342(f), at the end of the sentence it would read after the
3 word "held," comma, "and the district clerk for that
4 county will issue the notices for jury service," period.
5 And that addresses the concern about who would do that.

6 MS. GREER: And I'm sharing it on the screen
7 if you want to look at it.

8 HONORABLE EMILY MISKEL: Okay. Any other
9 feedback on 342? All right. 342, written opinions --

10 CHAIRMAN BABCOCK: Hang on for one second.

11 HONORABLE EMILY MISKEL: Okay.

12 CHAIRMAN BABCOCK: There was something about
13 342 that bothered me. Not bothered me, but I noted. "A
14 party in an action pending in the business court has the
15 right to a trial by jury when required by the
16 Constitution." The Constitution says, I think, that the
17 right to jury trial shall remain inviolate and that the
18 Legislature shall pass such laws as may be needed to
19 regulate the same. Does that matter?

20 HONORABLE EMILY MISKEL: So HB 19 says that
21 exact quote, "when required by the Constitution," but are
22 you proposing a change to say --

23 CHAIRMAN BABCOCK: Well, picky, picky,
24 picky.

25 HONORABLE EMILY MISKEL: -- "as provided by

1 law"? It could say "as provided by law."

2 CHAIRMAN BABCOCK: Well, the Constitution
3 talks about legislative statutes, and there are -- I know
4 of a few that apply in some courts and not in others. I
5 don't know. I don't know if that makes a difference or
6 not.

7 HONORABLE EMILY MISKEL: Are you proposing
8 an amendment that would say --

9 CHAIRMAN BABCOCK: No. I'm raising
10 questions.

11 HONORABLE EMILY MISKEL: Okay.

12 MR. LEVY: And it also doesn't define which
13 Constitution either, Chip. I assume it means Texas.

14 CHAIRMAN BABCOCK: Well, that's a good
15 point, too.

16 HONORABLE EMILY MISKEL: I mean, it also
17 caught my eye of "when required by the Constitution," but
18 if anyone has other wording suggestions.

19 CHAIRMAN BABCOCK: Yeah. Harvey.

20 HONORABLE HARVEY BROWN: Not other wording
21 but another question that's related. What if they don't
22 pay the jury fee until the day they walk into trial? Can
23 they cite this rule and say I'm entitled to jury?

24 HONORABLE EMILY MISKEL: I think the jury
25 has changed. They don't have to pay a fee anymore.

1 Right?

2 HONORABLE ANA ESTEVEZ: Right.

3 CHAIRMAN BABCOCK: Judge Estevez.

4 HONORABLE ANA ESTEVEZ: I just want to bring
5 up since he was adding that sentence that we had that same
6 problem with the district clerk about now you're using the
7 district clerk of that county instead of the district
8 clerk of Tarrant County to draw the summons, and that's
9 really expensive. So I don't -- I find the solution to be
10 that OCA just contracts with all district clerks in the
11 State of Texas to charge any time they're doing anything
12 for a business court, and they're just all assigned fees.
13 I think that would be the easy solution because my
14 district clerk would not be happy to find out that it had
15 to do a state business court summons on top of my summons
16 and someone else's summons and to another location that
17 may or may not be the courthouse.

18 MR. LEVY: In this situation the language in
19 (f) is drawn from the statute, and so it did seem to be
20 the Legislature's intent that the district -- the
21 processes currently in place would be followed, so that
22 the clerk will -- the business court clerk would not need
23 to do their own venire process.

24 HONORABLE ANA ESTEVEZ: But then they would
25 have to pay a filing fee in that county that they're doing

1 it because that's what's paying for all of the expenses.

2 HONORABLE DAVID EVANS: I have a different
3 reading on it, Robert. I've not read what you are talking
4 about. It is to be done in the same manner, but I thought
5 that would be instructive to the clerk of the court who
6 was acting on behalf of the business court.

7 Now, I don't think there's a simple solution
8 in the Rules of Civil Procedure for this, but the service
9 of getting the proper array for a jury and doing the
10 summons process and then bringing it in, and it will be by
11 county because venue is going to restrict this to a county
12 within the division. I think it's past the Rule of Civil
13 Procedures, and it's going to have to be something worked
14 out by administration, and there is definitely going to
15 have to be a fee study done on what would be required and
16 the payment of the jurors.

17 MR. LEVY: Right.

18 HONORABLE DAVID EVANS: So the whole -- you
19 know, the whole security issue, and that's the one time
20 that we have jury service you will need to be inside of a
21 county courthouse, because of the security issues. You
22 will not be summoning jurors to some location that can
23 serve as a courtroom. That's -- anyway, so I'm not sure
24 how to write that rule.

25 MR. LEVY: And the point you make about

1 paying the jurors I think is a very good one. I think
2 practically that type of issue hopefully will be developed
3 in local rules and that the parties would agree to pay
4 jurors, like I think in some cases the parties agree to
5 supplement jury service payments above the \$6 a day, and
6 that hopefully is an issue that would be worked out
7 procedurally.

8 HONORABLE EMILY MISKEL: Which is a great
9 point, because the Legislature intended for this court to
10 be self-funding and said that a fee schedule needs to be
11 developed, and so those costs could be passed through.
12 You know, there could be a fee in the business court that
13 gets passed through. A lot of the cases, the HB 19 talks
14 about the case that the -- the county the case was removed
15 from, so the parties would have already paid a filing fee
16 in that county, so it would only be cases that were
17 initially filed in the business court that hadn't paid
18 their fee to the county.

19 HONORABLE DAVID EVANS: Yes, that's right.
20 There are fees that would be involved in it. The real
21 question is going to come down to, you're not in a court
22 in that county. You're not just in a court. You may be
23 down at the courtroom, but you're not in the court, and
24 you're summoning -- you're having the jury bailiff for the
25 county summon both of those from the array, and you're

1 using the array features that are paid for by taxed
2 citizens. I think that's where the county governments are
3 going to back up on this, and the fees are going to have
4 to be high enough to cover those situations, or the
5 Legislature is just going to say you're taking on that
6 burden, and I didn't quite read this to say that they had
7 passed that on. Since they -- since they gave the power
8 to levy fees sufficient to cover the cost of the court,
9 and part of the cost of court is jury service.

10 HONORABLE EMILY MISKEL: So that's just a
11 note that in the fee schedule it should probably be
12 addressed.

13 HONORABLE DAVID EVANS: Yeah.

14 CHAIRMAN BABCOCK: Justice Christopher.

15 HONORABLE TRACY CHRISTOPHER: Well, it's
16 sort of a fee issue, but it's also a, you know, how
17 something is done, and so there are a lot of statutes that
18 govern what a district clerk has to do to get a proper
19 array for a county. And so, for example, a big county
20 like Harris, you know, we have a big jury wheel, and
21 that's how they get the cross-section. So I think it's
22 important that we decide and the Supreme Court says which
23 county -- which clerk is going to do it, whether it's the
24 county where the case is going to be tried, let's say
25 Harris, or whether it's going to be the business court

1 clerk himself or herself doing that. Finances can get
2 worked out, but to me, it could be a infirm jury if it
3 wasn't picked the correct way.

4 HONORABLE DAVID EVANS: Yes.

5 HONORABLE EMILY MISKEL: I guess my question
6 is obviously the business court clerk in Travis County
7 would not ever be capable of maintaining 250 current jury
8 wheels, right, so it has to be done by the local county's
9 clerk.

10 HONORABLE DAVID EVANS: It would have to be
11 a contract with the local county. It would -- or some
12 sort of fee schedule would have to be set up with that,
13 and what I don't know is how deep they went into the
14 research of whether or not the counties can perform that
15 service for this business court, which is neither a
16 district or a county court at law in the region.

17 The division concept, I understand, but I
18 think there's research that needs to be done. I do agree
19 with you that the only logical person to contract with to
20 provide the service is the existing entities that summon
21 jurors, but it's not a Tarrant County summons form. That
22 summons form will have to be redone, I've got mine for
23 Monday morning, and I wouldn't be summoned into a business
24 court right now. I would have to be designated into
25 Business Court No. 1 of Eighth Division to appear at a

1 certain location to be assembled, and I don't think I
2 would be -- and I don't know if that array has to be
3 different from the county one.

4 CHAIRMAN BABCOCK: So what you're saying,
5 Judge, is the jury that is summoned may not be confined to
6 the county but rather to the whole division?

7 HONORABLE DAVID EVANS: No, venue would
8 confine it to the county. Venue will confine it to the
9 county, and it has to be pulled from the citizens of the
10 county, but there's -- of course, there's a whole system
11 of regulation on how you -- how you compose an array, a
12 jury array, and how you drop people off, and I just didn't
13 find the language in the act satisfied -- go as far as
14 maybe others see it going, but I do think there's -- I do
15 think it gave us instructions that whatever system is in
16 place for summoning jurors in the district courts must be
17 used by the business court. I didn't see it saying that
18 it was the jury bailiff of the county and venue that had
19 to do it, but that doesn't prevent Megan, OCA, or the
20 clerk contracting with -- contracting with the district
21 clerk of Harris County or Tarrant County to do it, but it
22 is -- that is a issue that is going to have to get worked
23 out, whether it is the district duty of the district clerk
24 and if it is the district duty of the -- I'll be more
25 concise.

1 If it is a district duty of the jury bailiff
2 of Tarrant County to summon jurors for those in case --
3 those business court jury trials in Tarrant County, that
4 goes into the budget process of the county. What's the
5 extra workload that comes in and whether that's a separate
6 array that has to be maintained and a separate summons
7 that has to be maintained. And it's not a summons for
8 district courts. It's a summons for a business court. So
9 there will be a -- and it will be -- we'll have a -- it
10 will have a lot of fun.

11 HONORABLE EMILY MISKEL: So, Marcy, can you
12 screen share the section (f), that additional red text on
13 section (f)? I think what I'm hearing from this
14 discussion is it may not be appropriate within the Texas
15 Rules of Civil Procedure to issue the edict for the
16 district court clerk to be sending out these summons.

17 HONORABLE DAVID EVANS: That's my opinion.

18 HONORABLE TRACY CHRISTOPHER: And I am the
19 opposite. I think we should put it in the rule and then
20 have OCA figure out --

21 HONORABLE EMILY MISKEL: How to do it.

22 HONORABLE TRACY CHRISTOPHER: -- how to do
23 it and to pay the county for doing it.

24 HONORABLE EMILY MISKEL: So what's on the
25 screen there under (f) with the additional red language,

1 just to like get the feeling of the room --

2 MR. LEVY: Let's vote. We haven't had a
3 vote today.

4 MR. PHILLIPS: All day.

5 CHAIRMAN BABCOCK: Could you read that into
6 the record, the additional red language?

7 HONORABLE EMILY MISKEL: Sorry?

8 CHAIRMAN BABCOCK: Could you read that into
9 the record?

10 HONORABLE EMILY MISKEL: Oh, section (f),
11 the additional red language says "and the district clerk
12 for that county will issue the notices for jury service."
13 And so the question we're confronting right now is are the
14 Rules of Civil Procedure the correct place to tell the
15 district clerk to do that?

16 HONORABLE TRACY CHRISTOPHER: No, but, you
17 know, I mean, the answer is no, but I mean, there's a gap
18 in the statute. So, you know, I mean, we have to figure
19 it out somehow, and if the Supreme Court passes a rule, at
20 least the district clerk will have say, "Okay, but OCA
21 better pay me." That's why I say let's put it in there.

22 HONORABLE DAVID EVANS: I might put it in a
23 rule of administration after I vetted it through several
24 clerks. You know.

25 MR. KIM: Sorry.

1 CHAIRMAN BABCOCK: All right. Time to wake
2 up, John.

3 MR. KIM: I'm awake, but who pays for it?
4 So, I mean, because I'm sensitive to the statute saying
5 that this needs to be self-funded, but at some point -- I
6 mean, this is an expensive process. I think the OCA
7 should pay for it, but you can't count on them, right?
8 It's bureaucratic in nature. I mean, no offense, but if
9 you're talking about fee schedules, you get to a point
10 where you're going to start to price people out of the
11 courtroom.

12 MR. LEVY: I will point out that the --

13 MR. KIM: Come on, tell me, Exxon.

14 MR. LEVY: No. Marcy, you're still screen
15 sharing, by the way. The statute does provide a little
16 bit of guidance on this, and it relates to -- Marcy,
17 you're sharing.

18 HONORABLE TRACY CHRISTOPHER: We're looking
19 at your e-mails.

20 CHAIRMAN BABCOCK: You're sharing more than
21 we want to see.

22 MR. LEVY: All right. So this does answer a
23 question that came up earlier under House Bill 19. It
24 says "In the county in which a division of the business
25 court sits, the sheriff shall in person or by deputy

1 attend the business court as required by the court. The
2 sheriff or deputy is entitled to reimbursement from this
3 state for the cost of attending the business court."

4 So that -- that doesn't answer the question
5 about who pays for the clerk to do the array, but the
6 suggestion would seem to be that the same principle would
7 apply. It does, though, Judge Evans --

8 HONORABLE DAVID EVANS: Well, but the
9 sheriff is a -- and, yes, that's exactly right, and that's
10 the thing that we've picked up, reviewing it locally. The
11 sheriff does have the opportunity to bill for whatever he
12 has to put forward as the command of the business court to
13 be present, and he bills separately for that.

14 What's completely silent in the act, except
15 for the fact that it just says you'll collect such fees as
16 to cover the cost of it, is what's the cost and use of
17 courtrooms and the cost to -- two primary areas. Cost and
18 use of courtrooms, which, of course, includes cleaning,
19 maintenance, HVAC, the whole nine yards and then the cost
20 of jury services, and so that's what counties I think are
21 right now trying to put together on this. I don't --

22 MR. LEVY: Should that be in the Rules of
23 Judicial Administration?

24 HONORABLE DAVID EVANS: Justice Christopher
25 is always candid. That's not the greatest place for it,

1 but I'm not sure it's always a district clerk in each
2 county that issues summons. So that term -- if you're
3 going to put it in there, that's not the same person in
4 every county that does it. We use a term called jury
5 bailiff, and that's a different term, so --

6 MR. LEVY: Should we vote on this one, Chip,
7 since we haven't had a vote?

8 CHAIRMAN BABCOCK: I don't know that we need
9 to vote on it.

10 MR. LEVY: I don't think so. But I did want
11 to point out, though, you did make a point that I thought
12 was very good. If you end up serving on a district court
13 jury and then you get a summons for business court, does
14 that -- do you get credit for the district court service?

15 HONORABLE DAVID EVANS: Well, yes. Yes, the
16 way I read it right now, because service anywhere in the
17 county gives you credit, whether you're municipal or
18 anywhere else. So I think it would give you credit.

19 HONORABLE EMILY MISKEL: Is there any other
20 discussion we need to have on the --

21 CHAIRMAN BABCOCK: Well, something is
22 bugging me, but I'm sure you're going to say, oh, that's
23 decided by the statute.

24 HONORABLE EMILY MISKEL: Let me get my
25 control-F ready.

1 CHAIRMAN BABCOCK: If you're in federal
2 court and you're in the Houston division of the Southern
3 District, you're going to be drawing jurors from multiple
4 counties, so what about being in this business court
5 division? Do you only draw from one county or multiple
6 counties?

7 MR. LEVY: The statute was very clear on
8 that, and it's -- and I believe that was a specific point
9 that was discussed in the Legislature, that they intended
10 that a jury would come from the county in which the venue
11 sits.

12 HONORABLE EMILY MISKEL: I have it -- I have
13 it pulled up. My microphone is not connecting for some
14 reason.

15 CHAIRMAN BABCOCK: And now your microphone
16 is not working either. And I don't think mine is.

17 HONORABLE EMILY MISKEL: Now it's working.
18 Wait. Nope. Okay. So in cases that were initially filed
19 in the business court, the trial should be held in any
20 county in which the case could have been filed as chosen
21 by the plaintiff. For cases that were removed to the
22 business court -- cases removed to the business court will
23 be held in the county in which it was removed from, that
24 it was filed in.

25 CHAIRMAN BABCOCK: Okay. Thank you.

1 MR. LEVY: But it's one county.

2 CHAIRMAN BABCOCK: Yeah. Note for the
3 record that Judge Miskel is now on her third microphone.

4 HONORABLE EMILY MISKEL: Sounds like a
5 challenge. Okay. Any other discussion on 342?

6 All right. 343 -- okay, it can't be me. It
7 just was going off again. Okay. 343, I think I missed
8 this meeting where the most robust discussion was had on
9 opinion, so, Robert, do you want to --

10 MR. LEVY: Sure. So this is a -- again, a
11 provision that is in the act that the intent of the
12 Legislature was that business court judges would prepare
13 written opinions on their cases, but the -- and that's in
14 25A.0016, but the language does not provide further
15 guidance on how those opinions would be prepared or what
16 the -- what things -- what decisions are subject to
17 written opinions.

18 So we borrowed from the Texas Rule of
19 Appellate Procedure 47.4 with this language, so it is
20 mostly drawn from the appellate rule, but we also added
21 additional language. The threshold -- first of all, it's
22 "should," not "shall." We didn't feel it would be
23 appropriate to mandate in every case, but that might --
24 there might be a different view on that. And written
25 opinions would be written on significant issues of law or

1 procedure, so it's obviously not a -- every decision.

2 And then it defines an issue is significant.
3 If, for example, it addresses any of the following, and we
4 put an example in there so that it wouldn't be exclusive
5 and the judge would have discretion to write on an issue
6 that she or he felt was significant, but the -- the
7 threshold standards are a new rule of law alters, modifies
8 an existing rule or applies an existing rule to a novel
9 fact situation that is likely to happen in another case or
10 involves issues of constitutional law or other legal
11 issues important to the jurisprudence of Texas, and we
12 added "or the business court." And that -- that's to
13 address some cases that might be helpful in other business
14 court cases.

15 One of the other key points about this issue
16 is that -- and this was our add, that opinions of the
17 business court are considered persuasive authority and not
18 precedential, and the basis for that was applying the same
19 standard that applies to federal district court cases that
20 their decisions are not precedential, other than before
21 that same judge. So that a judge of the Southern District
22 of Texas writing an opinion does not bind another judge
23 from the Southern District of Texas.

24 CHAIRMAN BABCOCK: When does a trial court
25 opinion -- when is it ever precedential?

1 MR. LEVY: It would not be, and we felt like
2 it would be helpful to clarify that it was not precedent
3 to avoid any dispute about that, since it is the business
4 court, but there are going to be many judges in the
5 business court.

6 CHAIRMAN BABCOCK: I don't think that's any
7 harm. I don't think it breaks new ground, though.

8 MR. LEVY: Right.

9 CHAIRMAN BABCOCK: Harvey.

10 MR. LEVY: And, yeah, we also put in there
11 -- we felt it was very important to point out that judges
12 should not write longer than necessary to describe their
13 reasoning.

14 CHAIRMAN BABCOCK: Famous last words. Okay.
15 Anything more about this?

16 HONORABLE HARVEY BROWN: One comment.

17 CHAIRMAN BABCOCK: Yeah, Harvey.

18 HONORABLE HARVEY BROWN: On subpart (a),
19 Elaine pointed out to our committee in the last couple of
20 days that it's not normal for our rules to say "for
21 example." So she suggested that the language should read
22 "Among the factors the business court judge may consider
23 in determining whether an issue is significant, includes
24 the following," and I do think that's probably a little
25 cleaner language.

1 THE COURT: And it would give the -- it
2 would give the trial judge the ability to say well, it
3 doesn't fit into these four, but I want to write on it
4 anyway.

5 HONORABLE HARVEY BROWN: Right.

6 CHAIRMAN BABCOCK: Rich.

7 MR. PHILLIPS: If the opinions of these
8 courts are not precedential then how are they going to
9 resolve a conflict in the law?

10 CHAIRMAN BABCOCK: Well, because they would
11 just add their voice to one side or the other. I don't
12 think it would resolve it, though.

13 MR. PHILLIPS: But it does say, (a)(4),
14 resolves an apparent conflict of authority.

15 CHAIRMAN BABCOCK: Yeah, I know, I see that.

16 MR. PHILLIPS: If they're not precedential,
17 they can't resolve it.

18 HONORABLE TOM GRAY: They resolve it for
19 that case.

20 HONORABLE TRACY CHRISTOPHER: For that case.

21 CHAIRMAN BABCOCK: Yeah, I was going to say
22 they can resolve it for that judge. Says, here's a
23 conflict, I'm going to resolve it this way, not that he
24 can bind the court of appeals. But it's a good point.

25 MS. GREER: It puts the burden on the

1 business court judges to be very persuasive.

2 MR. PHILLIPS: Maybe "addresses an apparent
3 conflict of authority" instead of resolves it.

4 CHAIRMAN BABCOCK: Yeah, probably a better
5 way to put it. By the way, Judge Miskel, I'm gaining on
6 you. This is my second mic now.

7 HONORABLE EMILY MISKEL: Is there something
8 that we're doing that we could stop doing?

9 MS. ZAMEN: Yes. He said when you're
10 grabbing it not to grab the top.

11 HONORABLE EMILY MISKEL: Okay. In (d) where
12 it says decisions of business courts are persuasive and
13 not precedential, does that mean opinions, or did we
14 really mean to be as broad as decisions?

15 MR. LEVY: No, it would be opinions.

16 HONORABLE EMILY MISKEL: Any other
17 discussion on that one, especially from our --

18 CHAIRMAN BABCOCK: Scott.

19 MR. STOLLEY: Maybe this is just me, but
20 does anybody else have misgivings about saying that these
21 opinions are persuasive? I'm just not sure we want to
22 tell the business courts and the rest of the district
23 courts in the state that they should start issuing all
24 kinds of, quote, persuasive opinions.

25 CHAIRMAN BABCOCK: Robert is going to tell

1 you it's in the statute.

2 MR. LEVY: No, I am going to suggest,
3 though, that it was the intent of the Legislature, in my
4 opinion, that the judges should be writing opinions and
5 that the pattern for this is the Delaware chancery court,
6 which does issue opinions, and those opinions are very
7 helpful for businesses that are governed by Delaware law,
8 and so they want to encourage writing them.

9 MR. DAWSON: Yeah, but that's not -- Scott's
10 question is a different one. He's saying you're already
11 mandating that they have opinions. Why do you need to say
12 that they're persuasive?

13 HONORABLE EMILY MISKEL: I think they wanted
14 the development of like a big field of coherent law so
15 that everyone would know what to expect, so I think the
16 Legislature wanted the development of this coherent
17 business court law that would be predictable, and I think
18 that's why they require opinions.

19 MR. LEVY: We did -- I think the way that
20 language came about was just to differentiate that they're
21 not binding authority, not precedential. We don't -- we
22 could just say, "Decisions of business court judges are
23 not precedential," or we could just take that all out if
24 there's not going to be a question about it.

25 CHAIRMAN BABCOCK: Connie has got a comment,

1 and then Harvey.

2 MS. PFEIFFER: My comment is about the
3 examples listed in subsection (a). I have misgivings
4 about including all of these examples, and some of them
5 arguably give the court perhaps more authority than a
6 trial court would normally have, and so I would just
7 suggest taking out the list of examples and let the
8 district court determine when something is significant
9 enough that they need to write about it.

10 CHAIRMAN BABCOCK: Yeah, I think this whole
11 concept derives from our lengthy discussion almost 20
12 years ago about unpublished opinions, and we abolished the
13 unpublished opinion concept in favor of memorandum
14 opinions, and you're supposed to write a precedential
15 opinion if it met certain factors, and that's what this
16 all came from. Somebody else had their hand up. Yeah.
17 Harvey first, and then Rich.

18 HONORABLE HARVEY BROWN: I think -- I think
19 (d) is helpful because I think there will be at least some
20 debate about this initially, and so I think clarity is
21 better. I do think we could change the phrase "are
22 considered persuasive authority" to "may be considered
23 persuasive authority," because frankly, it depends how
24 persuasive it is, right? So "may be considered
25 persuasive" authority or just say "are not precedential."

1 Either one of those I think works.

2 CHAIRMAN BABCOCK: You know, I smell a book
3 here, Elaine. I can see her rubbing her hands under the
4 table. "The Law of Business Courts." Yeah. Judge
5 Schaffer.

6 HONORABLE ROBERT SCHAFFER: These are the
7 Rules of Civil Procedure, right?

8 CHAIRMAN BABCOCK: Supposed to be.

9 HONORABLE ROBERT SCHAFFER: How does (d) --
10 how is (d) a procedural issue? Why is it even in there,
11 in the rule at all? "The decisions are considered
12 persuasive authority and not precedential" has little to
13 do with procedure, and I don't think it adds anything to
14 what we're trying to do here, and that's to establish the
15 procedures on which the business courts should run.

16 CHAIRMAN BABCOCK: I think I made the same
17 point a minute ago, similar point, that it sort of states
18 the obvious, that it can't be precedential because it's a
19 trial court opinion, and it may or may not be persuasive.
20 But I don't think it does any harm being in there.

21 HONORABLE ROBERT SCHAFFER: Well, none of
22 this does any harm being in there. It just doesn't -- I
23 don't think it belongs in there.

24 CHAIRMAN BABCOCK: Yeah.

25 HONORABLE ROBERT SCHAFFER: It's not a rule

1 of procedure. It's telling you the effect of what these
2 opinions may have, but it's not a rule of procedure.

3 CHAIRMAN BABCOCK: Okay. Rich.

4 MR. PHILLIPS: So --

5 CHAIRMAN BABCOCK: Steal Connie's mic.

6 MR. PHILLIPS: Just responding to that piece
7 of it, we actually say something similar in the Rules of
8 Appellate Procedure about what's binding and what's not
9 binding, and I do think if we're going to comment on it at
10 all, it makes sense to me just because it will affect
11 procedure in other cases when somebody cites one of these
12 things, a prior decision from a different court, then it
13 is affecting procedure because we're talking about how
14 those prior decisions affect.

15 But I have -- and similar to my question
16 about resolving conflicts, Connie pointed out and this is
17 what led to her comment, how does a trial court alter or
18 modify an existing rule of law? I mean, I get that we
19 borrowed these from the memorandum opinions so that makes
20 a little more sense in the appellate. But I think if
21 we're going to have examples we need to look carefully at
22 what those examples say and make sure we're not suggesting
23 the courts can do something that trial courts can't do.

24 CHAIRMAN BABCOCK: Yeah, good point.

25 Let's -- anything else on 343?

1 MR. LEVY: Chip, just one quick point.

2 CHAIRMAN BABCOCK: Sure.

3 MR. LEVY: This is where I get to answer
4 Judge Schaffer saying that the Legislature did say that
5 the Supreme Court shall adopt rules for the issuance of
6 written opinions by the business court. Now, it could be
7 somewhere else, but that's why we did it.

8 CHAIRMAN BABCOCK: This is your answer to
9 everything.

10 MR. LEVY: It is a great answer.

11 MS. WOOTEN: It's kind of like because I
12 said so, because the Texas Legislature said so.

13 CHAIRMAN BABCOCK: Let's go to 344, the
14 uncomplicated issue of fees.

15 HONORABLE EMILY MISKEL: We totally kicked
16 the can down the road and said the Supreme Court shall
17 establish a schedule of fees, so we did not, in our
18 subcommittee work, come up with the fees.

19 CHAIRMAN BABCOCK: Okay.

20 HONORABLE EMILY MISKEL: We just said they
21 have to -- you know, they'll probably be set by Supreme
22 Court order I guess is what we were anticipating, and then
23 that they would just have to be published, and I think we
24 added that the court can waive fees necessary for the
25 interest of justice. That was our addition.

1 CHAIRMAN BABCOCK: Okay. So the Court asked
2 for our advice, and we say we don't have any advice?

3 HONORABLE EMILY MISKEL: We couldn't get it
4 by October 13th.

5 CHAIRMAN BABCOCK: Yeah.

6 MS. GREER: Well, the problem is we don't
7 have any data to go on. I mean, we're still trying to
8 figure out how many of these cases would be there, and
9 it's almost like trying to do, you know, cost pricing for
10 a hospital. You know, they do it as a defined revenue in
11 advance, but we don't even know what the potential
12 revenue, number of cases that will be filed here, et
13 cetera, so we really would be making it up and think that
14 we need to really think about how we're going to derive
15 that data, et cetera, so that these can be determined.
16 Because it is a little daunting to say they've got to
17 cover themselves for the most part and not really know
18 where to start, and there was also a concern that if we
19 set the fees too high, just shoot them high, that people
20 are going to not use the court.

21 CHAIRMAN BABCOCK: Yeah. And that's advice.
22 Judge Schaffer.

23 HONORABLE ROBERT SCHAFFER: During a
24 previous discussion -- I need the microphone, please.

25 Thank you. During a previous discussion

1 about fees, we talked about who's going to pay them,
2 and -- and I feel strongly that if I am a plaintiff and I
3 file in a district court and pay my 300-dollar fee or
4 whatever it is in the district court and then big corp.
5 comes along and drags me into the business court where
6 there is a 20,000-dollar fee -- I'm just throwing --
7 obviously, I'm throwing numbers out in the air, but if it
8 turns out to be a substantial fee, at the end of the case
9 is that going to be attached for court costs?

10 I chose as a plaintiff to pay the lower fee.
11 You chose as a defendant to pay the higher fee. Am I
12 going to be punished later on because if I'm the
13 nonprevailing party, because as the plaintiff you have to
14 pay that fee? I don't think I should be. I think I chose
15 where I wanted to go, and somebody else chose otherwise.
16 That's a business decision that they make, and I don't
17 want to -- I don't think the plaintiff in that case should
18 be punished. Now, I may be in a distinct minority on that
19 point, but I think it's something that has to be given
20 some consideration when he decide how much the fees are
21 going to be.

22 CHAIRMAN BABCOCK: Yeah. I don't think
23 you're wrong to raise it at all. I think it's a form of
24 cost --

25 HONORABLE ROBERT SCHAFFER: Shifting.

1 CHAIRMAN BABCOCK: That's the word I'm
2 looking for. Cost-shifting. And is there anything in the
3 statute? Robert, you're probably going to say it's right
4 there.

5 HONORABLE ROBERT SCHAFFER: Well, he shot me
6 down once before. Let's see what he can do now.

7 CHAIRMAN BABCOCK: So pull your rhetorical
8 gun out and shoot him down again.

9 MR. LEVY: I agree, Judge Schaffer, that
10 this is an issue, and we did not address -- actually, we
11 talked about it initially, but we did not address the
12 cost-shifting award of costs provisions that might be
13 worth consideration. The language from the statute
14 provides that the Supreme Court will set the fees for
15 filings and actions in the business court in an amount
16 sufficient to cover the cost of administering this
17 chapter, taking into account fee waivers necessary for the
18 interest of justice.

19 So that -- that's all the statute says, but
20 the question of award of costs could be something that we
21 might want to add to this, but -- and I think our
22 discussion in terms of at least the initial round of fee
23 shifting -- or fee setting, could be based upon the
24 current district court fee schedules that are in use and
25 then later adjusting it to cover, to try to address the

1 cost recovery, but we could add in here language on an
2 award of costs, but, you know, if a -- I would argue if
3 you as a plaintiff bring this suit that could be brought
4 in business court then the Legislature is giving the
5 defendant the option to remove it there, and that's a
6 determination the Legislature made, just like if you sue a
7 party in state district court and I remove it to federal
8 court. That's -- you know, I have the right to do that,
9 and if I get a cost award, it's going to be based upon the
10 federal court costs, whether they're higher or lower than
11 your -- you know, the cost of pursuing it in district
12 court, state court.

13 CHAIRMAN BABCOCK: Yeah, award of cost is
14 always -- award of costs against the loser and in favor of
15 the winner is always cost-shifting.

16 MR. LEVY: Right.

17 CHAIRMAN BABCOCK: So it's just a matter of
18 whether there's a disparity between the district court and
19 the business court, and if the business court is going to
20 have fees that are so high as to fund, the Legislature
21 said that's what's going to happen, and the Legislature
22 has not said but in that event we don't want fee shifting.

23 MR. LEVY: Right.

24 CHAIRMAN BABCOCK: So it's not expressly in
25 the statute, but one could argue that it is. Judge

1 Miskel, let's --

2 MR. LEVY: Judge Christopher.

3 CHAIRMAN BABCOCK: Oh, Judge Christopher.

4 I'm sorry.

5 HONORABLE TRACY CHRISTOPHER: Did you-all
6 look at the current statute requiring the setting of fees
7 in civil cases?

8 MR. LEVY: Yes.

9 HONORABLE TRACY CHRISTOPHER: What is that
10 supposed to cover? Because, I mean, court costs don't
11 cover the costs of courts. I mean, you know, they just
12 don't. And, I mean, when they say here "sufficient to
13 cover the costs of administering this chapter," I don't
14 really think they could mean covering the costs of the
15 court.

16 MR. LEVY: I will point out that the
17 Legislature did allocate funds, at least for the next
18 biennium, for the business courts and also funds to OCA to
19 cover the OCA portion of the costs, but the goal, I think,
20 is to have a court that is funded by the participants just
21 like arbitration is, but the actual process of figuring it
22 out is -- is going to be difficult, and we looked -- John
23 Warren was very helpful, pointing us to the current
24 statute on district court fees, and we thought that was a
25 place to start, but it's not going to answer the --

1 HONORABLE TRACY CHRISTOPHER: What are the
2 fees supposed to cover, under that statute?

3 MR. LEVY: I'm not sure that they define --
4 they define the fees, but I'm not sure that they're based
5 upon specific costs associated with different activities.
6 I think they just have a schedule of fees in that statute.

7 CHAIRMAN BABCOCK: Justice Kelly.

8 HONORABLE PETER KELLY: For what it's worth,
9 it had a zero fiscal note from the Legislature, so it's
10 supposed to be funding everything, including any new
11 judges; and to the extent that's part of the legislative
12 history, that's a little background of what the
13 Legislature was thinking.

14 HONORABLE TRACY CHRISTOPHER: It just
15 couldn't possibly do it. I mean, I mean, when you think
16 of just the salary of a district court judge, you know, by
17 the time you include benefits and, et cetera, that's
18 \$200,000, roughly, when you include all of the extra stuff
19 that you have to put in there. Then you have to rent a
20 building. You have to hire two, three people, four
21 people. I mean, there is no way it could self-fund.

22 MR. LEVY: I think they had like \$10 million
23 allocated in the biennium, which obviously will -- part of
24 that -- this year we're not incurring any costs, but next
25 year we would, so that might not be enough, or it might be

1 more than enough.

2 CHAIRMAN BABCOCK: Megan.

3 MS. LAVOIE: Yeah, I was going to say, so it
4 is in the local -- there's two court costs. They were
5 consolidated two sessions ago, I think, into a local
6 consolidated court cost and then a state consolidated
7 court cost, and it's in Government Code -- the local one
8 is in Government Code 135.101. It's 213 on initial filing
9 and then subsequent filings are \$35, and that's the local
10 consolidated court costs. And then the state consolidated
11 court costs is \$137 and then 45 on subsequent filings.

12 And you're right that OCA -- the comptroller
13 will pay the salaries for the judges, but the rest of the
14 funding did go to OCA. It was about 9.2 million over the
15 biennium. We're still waiting. There was multiple
16 versions of this bill, and they're doing LBB is doing a
17 fiscal size up, and that will come out in November so we
18 will get the actual dollar amount that we have to work
19 with, but we have -- since the last SCAC meeting we have
20 been trying to look at how many cases would go to the
21 business courts.

22 We've been working with Tyler Technologies
23 through the e-filing system and then also looking at
24 research, and the big number is max 13,000. We think that
25 number is way, way high, so we're going to do some initial

1 looking through research on like level three discovery and
2 try to pull those cases. So hopefully in the next month
3 or two we'll have a better idea, but you're right, that is
4 one of the biggest challenges, is that we don't have an
5 accurate number of cases that will go to these courts.

6 HONORABLE TRACY CHRISTOPHER: Well, and, you
7 know, if the fees are too high no one will file them. I
8 mean, it's concurrent jurisdiction, right, so --

9 MS. LAVOIE: And it is outlined, too, in
10 Government Code where each -- the state consolidated court
11 costs, which funds it gets distributed to, as well as the
12 local consolidated costs.

13 HONORABLE TRACY CHRISTOPHER: I guess my
14 question was is there anything telling us how to set that
15 amount every year?

16 MS. LAVOIE: I mean, I think that a good
17 starting point would be to work back from how many -- I
18 mean, if we want to use that 13,000 as the max number and
19 work back from that and set the fee based on those
20 numbers. I probably would go higher because I don't think
21 that the court is going to have 13,000 cases, but that
22 would be a starting point and work back and set the fee
23 based on that.

24 CHAIRMAN BABCOCK: John.

25 MR. KIM: Yeah, but so given the absence of

1 a fee schedule and the ability for either party to remove,
2 and I understand it says, you know, the Court shall have
3 the authority to waive any and all fees, but can we
4 consider adding in the notes a comment that the inability
5 for a mom-and-pop company who gets removed or is in the
6 business court -- the inability to pay those up-front fees
7 is absolute justification for waiver so they're not denied
8 access to any court?

9 MR. LEVY: When you say waiver, that they
10 wouldn't be required to pay the fees?

11 MR. KIM: Yeah.

12 MR. LEVY: The fee waiver?

13 HONORABLE EMILY MISKEL: I would assume that
14 our current rules about indigent litigants would apply
15 that, you know, but are you saying someone who's not
16 indigent but just doesn't have a lot of money?

17 MR. KIM: Yeah. I mean, typically in these
18 cases where you get a lot of explosive verdicts, it's
19 mom-and-pop corporation whose intellectual property or
20 technology or idea or the contract, you know, they don't
21 have any money. They have the intellectual property or
22 the great idea or the contract that's supposed to protect
23 them, but they don't have any money. They're banking on
24 it, and so if big company removes them into a business
25 court that has X amount of fees that they just don't have

1 anything, then --

2 MR. LEVY: Well, I think -- and it's always
3 the big company is the evil one, but that's a joke, by the
4 way. But the process would be that the mom-and-pop
5 company, if they file an action in district court and they
6 pay the standard fee and then the defendant removes it,
7 the defendant would have to pay a fee, whatever the
8 Supreme Court sets, for the removal of the action to the
9 business court so that mom and pop plaintiff does not have
10 a fee to pay in that case. The only time that the cost of
11 the business court fee would come into play would be at
12 the end of the case if the mom and pop lose and there's a
13 cost award. That would be when they might end up having
14 to pay for that removal, but not to make -- you know, not
15 to proceed with the case in the business court.

16 MR. KIM: I know, but then you're
17 encouraging mom-and-pop company to improvidently file a
18 case in district court when it clearly should be in a
19 business court because they don't want to incur those
20 fees.

21 HONORABLE EMILY MISKEL: Well, and also, the
22 last time we talked about this we talked about the
23 potential of having costs broken out, like you pass
24 through the cost of the court reporter, you pass through
25 the cost of the sheriff or the jury summons and have like

1 a per motion filing fee as well. So one option could be
2 an up-front big filing fee or you could pay as you go
3 thing where each thing has a filing fee, so in that system
4 you're right that if they get removed into a system that
5 has more of a pay as you go model then they are subject to
6 those increased costs.

7 MR. LEVY: And one other point, if it is
8 helpful to the Court or to OCA, we do have a list of fees
9 that are charged in the states that have business courts
10 so that -- that can give some helpful guidance on how
11 other states have addressed the fees, and some of them are
12 pretty similar to district court fees, but others are in
13 the thousands.

14 MR. KIM: Robert, do those other states by
15 statute require that the fees self-fund the administration
16 of the statute?

17 MR. LEVY: I'm not aware of that. I
18 don't -- I don't think so, but I'm not aware.

19 CHAIRMAN BABCOCK: Scott, did you have a
20 comment?

21 MR. STOLLEY: I was just going to raise the
22 question that just came up. You might know this, Chip.
23 What do they do in the Delaware chancery court?

24 CHAIRMAN BABCOCK: It's in the statute. I
25 really -- you know, I've been in that court a bunch of

1 times, but I've never studied the fee issue.

2 Yeah, Judge Wallace.

3 HONORABLE R. H. WALLACE: The point Peter
4 just made, and he got us some information on business
5 courts in other states, but at least it's my observation
6 from what I was able to review that most of those are
7 referring matters to existing courts or, you know, where
8 there's an existing court that somehow they refer these
9 complex commercial litigation to. I didn't see -- I don't
10 recall seeing one where they set up a whole new court
11 system and said now we're going to be self-funded.

12 CHAIRMAN BABCOCK: Yeah. Yeah, chancery is
13 -- I think this whole idea of business courts was modeled
14 after chancery. I mean, historically, I mean, this bill
15 has been in the Legislature for, you know, three or four
16 or five sessions, and it was modeled on chancery, which
17 it's my understanding you've got to have some request for
18 equitable relief to get into chancery, but they're pretty
19 loose about, you know, what equitable relief you're asking
20 for, in my experience.

21 MR. LEVY: And the Delaware court, by the
22 way, sets fees including on the type of relief sought, so
23 that certain types of derivative actions have certain
24 fees, but other types of claims in the chancery court are
25 higher and also can depend on how many parties are in the

1 case, so it -- it varies, but I don't know that there's
2 any attempt to try to have the fees cover the cost of the
3 Court.

4 CHAIRMAN BABCOCK: Judge Schaffer. He needs
5 the mic.

6 HONORABLE ROBERT SCHAFFER: I really don't.
7 Does this --

8 CHAIRMAN BABCOCK: Just don't drop it.

9 HONORABLE ROBERT SCHAFFER: Does this
10 statute state that if the defendant removes it, removes
11 the case to the business court, that the defendant pays
12 the fees?

13 MS. GREER: No.

14 MR. LEVY: It was our expectation that a fee
15 schedule would include that, but it is not in the statute.

16 HONORABLE ROBERT SCHAFFER: So as we're
17 sitting here right now, if the plaintiff files in the
18 district court, the defendant removes it to the -- to the
19 business court, it's not stated who has to pay the fee?
20 Shouldn't our rules of procedure state something along
21 those lines to make it clear who has to pay the fee in
22 that circumstance?

23 CHAIRMAN BABCOCK: Yeah. It wouldn't hurt,
24 but I would think that if a defendant is trying to cause
25 something to happen and there's a fee for that thing to

1 happen, if the defendant wants it to happen, they're going
2 to have to pay.

3 HONORABLE ROBERT SCHAFFER: I would agree
4 with you, but putting it in a rule, since it's a rule of
5 procedure --

6 CHAIRMAN BABCOCK: Yeah.

7 HONORABLE ROBERT SCHAFFER: -- putting it in
8 the Rules of Procedure would make it clear so that there's
9 no question who has to pay that fee up front.

10 CHAIRMAN BABCOCK: Yeah. Good point.

11 We have anything more about the fees rule?
12 Then let's go on to the business court local rules. Judge
13 Miskel has a wry smile on her face.

14 HONORABLE EMILY MISKEL: I was just hoping I
15 could get the microphone to work. All right. Well,
16 business court local rules, so this is the last rule of
17 the TRCP rules that we're proposing, so great job,
18 everybody. This one is directly from the statute except
19 we added one thing. So the HB 19 said that "The business
20 court may adopt rules of practice and procedure consistent
21 with the Texas Rules of Civil Procedure and the Texas
22 Rules of Evidence."

23 So I was talking with John earlier about his
24 concern that there would be 10 business court judges and
25 so they would all have 10 sets of business court rules.

1 Our subcommittee's reading of this was the business court
2 may adopt local rules. The statute provides for a means
3 for electing a presiding judge and all of that. So we
4 read that to mean there is a business court local rules,
5 not 10 business court local rules. So we basically
6 imported that language directly, but we added subject to
7 Rule 3a and 3a is the current TRCP that governs local
8 rules that was just recently modified. So any discussion
9 about the business court local rules?

10 CHAIRMAN BABCOCK: Anybody have any thoughts
11 on that?

12 Okay, Alistair. Wait until you get 10
13 business court rules and you're going to be mad about it.

14 MR. DAWSON: Not if they're consistent with
15 the Texas Rules of Civil Procedure and Texas Rules of
16 Evidence. Then it will all be fine, I'm sure.

17 CHAIRMAN BABCOCK: Justice Christopher.

18 HONORABLE TRACY CHRISTOPHER: Well, are we
19 sure that a business court is clearly defined as all of
20 the judges together versus a business court? Do we need
21 some sort of --

22 CHAIRMAN BABCOCK: Definition?

23 HONORABLE TRACY CHRISTOPHER: Because I was
24 trying to see if the business court was defined somewhere,
25 versus a business court.

1 HONORABLE EMILY MISKEL: So the statute says
2 the business court is a statutory court. The judicial
3 district of the business court is composed of all counties
4 in this state. The business court is composed of
5 divisions.

6 HONORABLE TRACY CHRISTOPHER: But we don't
7 repeat that in this rule.

8 CHAIRMAN BABCOCK: Why wouldn't we put that
9 in the definitions?

10 HONORABLE EMILY MISKEL: Because we decided
11 that was more of an administrative one, not helpful to
12 practitioners, but --

13 CHAIRMAN BABCOCK: Well, except that there
14 could be ambiguity on the local rules issue. When you say
15 the business court may adopt rules of practice.

16 MS. WOOTEN: You could refer to the judge
17 having the power.

18 HONORABLE EMILY MISKEL: Well, we don't --
19 we don't want one presiding judge to have all of the
20 power, right.

21 MS. WOOTEN: The power of the local rules.

22 HONORABLE EMILY MISKEL: Right.

23 MS. WOOTEN: Or one division you don't want
24 to give that to.

25 HONORABLE EMILY MISKEL: Right.

1 MS. WOOTEN: Okay.

2 CHAIRMAN BABCOCK: Okay.

3 HONORABLE EMILY MISKEL: What was y'all's
4 proposed language?

5 MR. DAWSON: Who has the authority to issue
6 the local rules?

7 HONORABLE EMILY MISKEL: So the -- let's
8 see. There is -- the statute provides for all of the
9 business court judges to elect a presiding business court
10 judge, but I was assuming this would work like our normal
11 local rules where we have a local administrative district
12 judge, but all of the judges participate in the local rule
13 process.

14 MR. DAWSON: So I'm confused. Is it the
15 committee's preference that the presiding business court
16 judge would be the person who would issue the local rules?

17 HONORABLE EMILY MISKEL: I don't think that
18 you want to give unilateral power to one person, just
19 based on how things go behind the scenes.

20 MR. DAWSON: Then I'm still not clear on who
21 has the power to issue the local rules.

22 HONORABLE EMILY MISKEL: I mean --

23 MR. LEVY: Well, again, I'm referring back
24 to my pat response. This language is from the statute,
25 but I think that the expectation would be that the judges

1 of the business court, under the leadership of the
2 presiding judge, the presiding administrative judge,
3 will -- who is, by the way, one of the judges of the
4 business court, will work together to set their local
5 rules rather than defining who has the ultimate authority
6 to make that decision.

7 MR. DAWSON: Well, I think it should say
8 who, because, I mean, that could be read so many different
9 ways. Each business court could say, hey, I am a business
10 court, I'm the judge of a business court, and therefore,
11 I --

12 MR. LEVY: I think you're --

13 MR. DAWSON: -- hereby adopt these local
14 rules.

15 MR. LEVY: You fix that by addressing the
16 definition of the business court, by putting that in a new
17 rule of definitions that pulls it from the statute that
18 says the business court is all of the judges together, not
19 one judge. So the business court is composed of all,
20 however, 10, 12 judges that will be appointed under the
21 statute.

22 CHAIRMAN BABCOCK: All right. Anything
23 else?

24 All right. Looks like we're done with the
25 TRAP -- or the TRCP rules. So we can go onto the Rule of

1 Judicial Administration.

2 HONORABLE EMILY MISKEL: Okay. Did we end
3 up with only one judicial administration rule?

4 MR. LEVY: Yes.

5 HONORABLE EMILY MISKEL: Okay. So there's
6 two things. Part one is the statute provides for the
7 presiding judge of the business court to have a couple of
8 responsibilities, but the Government Code and the Rules of
9 Judicial Administration provide behind the scenes, for
10 example, that district courts will have an administrative
11 district judge that has these administrative
12 responsibilities, and so we thought it was also helpful to
13 say to the extent that those same responsibilities exist
14 in the business court, the presiding judge of the business
15 court will do those same responsibilities. So obviously
16 all of them won't apply, but to the extent that they do,
17 somebody has got to help with these management
18 responsibilities.

19 So we added (c), which says -- which follows
20 onto Rule 9, which governs the duties of local
21 administrative district judges, and it says, "The
22 administrative presiding judge of the Texas business court
23 shall, to the extent applicable, be responsible for
24 carrying out the duties of the local administrative judges
25 as they pertain to the business court," like you won't

1 deal with county auditor or county purchasing or the
2 juvenile detention facility, but some of them will apply
3 to the business court. And then (1) and (2) there are
4 from HB 19. We thought it was helpful, but it didn't
5 belong in the TRCP because it doesn't really affect
6 litigants.

7 CHAIRMAN BABCOCK: Okay. Anybody -- Judge
8 Estevez.

9 HONORABLE ANA ESTEVEZ: I just have a
10 question, just --

11 CHAIRMAN BABCOCK: Pull that microphone to
12 you.

13 HONORABLE ANA ESTEVEZ: So does that local
14 administrative judge, if they have at least six judges
15 that they work with, get more pay?

16 HONORABLE EMILY MISKEL: The statute doesn't
17 say anything about that. Actually, I don't think the
18 business court judges get a county supplement, right?
19 They just get the base pay of the district judge, so I
20 don't think they get a bonus for being administrative
21 judge. I'm not sure, though.

22 HONORABLE ANA ESTEVEZ: Someone should
23 decide that and let them know before they take on that
24 job.

25 HONORABLE EMILY MISKEL: I think Megan looks

1 like she knows the answer.

2 MS. LAVOIE: So I can't remember. I need to
3 look at the statute. We had talked about this, but it's
4 either five or six. Yeah, we have five or six district
5 judges who do get a supplement for being the LADJ, but --

6 HONORABLE EMILY MISKEL: This person will
7 not be a local administrative district judge.

8 MS. LAVOIE: I know.

9 HONORABLE ANA ESTEVEZ: But usually
10 administrative -- you know, like the presiding judges do
11 get a supplement, so there may be -- you may want to
12 consider that.

13 HONORABLE EMILY MISKEL: Also it's like less
14 than \$400 net, so it's not worth the work anyway.

15 CHAIRMAN BABCOCK: All right. Any other
16 comments? Yeah, Alistair.

17 MR. DAWSON: So this is a related question.
18 Did the committee consider whether any of the provisions
19 of the Code of Judicial Conduct should apply to business
20 judges?

21 HONORABLE EMILY MISKEL: Yes. It says
22 every -- and where did we put this? We talked about this.
23 I don't know if we just left this in the Government Code
24 or if we put this somewhere but it says --

25 MR. DAWSON: My question is whether there

1 are any changes needed to the Code of Judicial Conduct to
2 make that clear.

3 HONORABLE EMILY MISKEL: Let me just find
4 where it says in the statute. Okay. It says, "A business
5 court judge has all powers, duties, immunities, and
6 privileges of a district judge." So you have all of the
7 duties, so we thought all of the professional
8 responsibility and conduct responsibilities apply.

9 MR. LEVY: We didn't --

10 MS. GREER: We actually put that in Rule
11 331.

12 HONORABLE EMILY MISKEL: Okay. Thank you.
13 I thought it was in here somewhere.

14 MR. LEVY: And but we didn't -- we did not
15 see any issues of the -- of the rules governing judges
16 that would need to be changed to incorporate the business
17 court judge. We thought they were treated the same way.

18 CHAIRMAN BABCOCK: Justice Christopher.

19 HONORABLE TRACY CHRISTOPHER: So how do we
20 get --

21 HONORABLE EMILY MISKEL: Do you have a
22 microphone?

23 HONORABLE TRACY CHRISTOPHER: -- the
24 presiding judge picked?

25 HONORABLE EMILY MISKEL: I think they vote.

1 MR. LEVY: Every two years they pick the
2 presiding judge from amongst the judges, and that's in the
3 Government Code now pursuant to HB 19, and the judge will
4 have a term of that two years, and there's also provision
5 for if the presiding administrative judge leaves office or
6 whatever, picking a replacement.

7 HONORABLE EMILY MISKEL: That is 25A.009(d)
8 is the selection process for the administrative presiding
9 judge.

10 CHAIRMAN BABCOCK: Anything else on this?
11 All right. Let's go to the Fifteenth Court of Appeals.

12 HONORABLE EMILY MISKEL: Do we want to take
13 a restroom break before we start that?

14 CHAIRMAN BABCOCK: We can do that. You want
15 to take a restroom break?

16 HONORABLE EMILY MISKEL: It would help me.

17 CHAIRMAN BABCOCK: As the subcommittee
18 cochair, you have certain privileges. Be back in 15.

19 (Recess from 2:20 p.m. to 2:36 p.m.)

20 CHAIRMAN BABCOCK: Okay, guys. Let's go
21 back on the record.

22 MR. LEVY: Chip, before -- Chip, before we
23 go to the TRAP rules --

24 CHAIRMAN BABCOCK: Yeah.

25 MR. LEVY: Kennon had a point that I think

1 is worth noting about a potential additional provision.

2 CHAIRMAN BABCOCK: Okay.

3 MS. WOOTEN: Thank you, Robert. So we were
4 talking about the business court judges being subject to
5 the same ethical requirements as district court judges;
6 however, they are referred to very specifically as
7 business court judges as opposed to district court judges;
8 and in the canons for the judges, Canon 6A lists those
9 individuals or types of judges who are subject to the
10 code, and it might be worthwhile to amend that to
11 expressly reference the business court judges as well.

12 MR. LEVY: That's in the Code of Judicial
13 Conduct.

14 MS. WOOTEN: Yes.

15 CHAIRMAN BABCOCK: Code of Judicial Conduct.
16 Got it. All right. Thanks, Kennon.

17 And, Robert, while we still have everybody
18 here, I've been told by many people that you should get a
19 special merit badge for being the draftsman on this and
20 doing such a good job.

21 MR. LEVY: Thank you, Chip.

22 CHAIRMAN BABCOCK: So we're going to create
23 a little Boy Scout-like patch that we're going to give
24 you. In fact, that would be a good thing to make a
25 tradition on this committee, if you do exceptional work

1 you get a patch.

2 PROFESSOR CARLSON: Can you do jewelry?

3 CHAIRMAN BABCOCK: Elaine wants jewelry, and
4 that's good.

5 HONORABLE R. H. WALLACE: The Chief's patch?
6 Is that what it will be?

7 HONORABLE EMILY MISKEL: It will just have a
8 footnote on it.

9 CHAIRMAN BABCOCK: Yes. I think a pair of
10 -- a necklace and some earrings for Judge Wallace will be
11 perfect.

12 All right. So let's go to these -- and
13 explain the -- how the highlighting --

14 HONORABLE EMILY MISKEL: Yeah, so this one
15 looks different, but it's conceptually similar. In this
16 one we didn't have to change that many rules, so what
17 you'll see here is usually the text of the existing rule
18 with the highlighted stuff being things that we're adding,
19 ~~strikeout~~ being things that we're recommending being taken
20 out, and then of the things we added in highlighting,
21 those are generally directly from the statute, unless you
22 see some brackets, is my understanding of how this redline
23 works.

24 CHAIRMAN BABCOCK: Got it.

25 HONORABLE EMILY MISKEL: I'm going to start

1 with the memo. Oh, Marcy, did you want to start with
2 the -- any intro to the appellate rules?

3 MS. GREER: No, let's go ahead and dive in.
4 We're making such good progress.

5 HONORABLE EMILY MISKEL: Okay. So there's
6 not that many changes, so the first question was where do
7 we put the creation of the Fifteenth Court and its rules
8 into the Rules of Appellate Procedure, and it did seem to
9 fit conceptually the best under Rule 25, which was
10 currently titled "Perfecting Appeals." So we kind of went
11 through adding it as a new 25.3, and when we got to the
12 end of it we're like, well, this is not really perfecting
13 an appeal, so we recommended changing the title of Rule 25
14 to "Perfecting and Prosecuting Appeals," but we felt like
15 the subject matter of the rule, that it really belonged
16 best there, and if we had to find a different place for
17 it, it ended up being too far away, so that just seemed to
18 be the best home.

19 But so we created a new 25.3, and we added
20 it basically just directly from the statute. Big picture,
21 I want to back up. People think of the Fifteenth Court of
22 Appeals as the business court court of appeals, but it's
23 primarily not really that. It is claims relating to the
24 State of Texas and its officers and also business court
25 cases, so our guess is the bulk of its work is going to be

1 government cases, so just keep that in mind as we go
2 through the rules.

3 All right. So 25.3(1) and (2) are directly
4 out of the bill. I think Chief Justice Christopher had a
5 question about the rule -- the statute doesn't explicitly
6 say that the Fifteenth Court can grant writs against the
7 business court judges, which seems to be an important
8 oversight, but my guess is since business court judges are
9 treated the same as district court judges, it applies.
10 Did you think that we needed to spell that out in 25.3?

11 HONORABLE TRACY CHRISTOPHER: Well, I mean,
12 it's specifically --

13 CHAIRMAN BABCOCK: Get the microphone,
14 Judge.

15 HONORABLE TRACY CHRISTOPHER: I'm sorry.
16 Because the Legislature has been so careful to make a
17 business court judge different from a district court
18 judge, I don't think we can assume that the same things
19 about a, you know, district court judge apply to a
20 business court judge, and so it seemed to me that it was
21 missing from the statute, and I don't know if we can fix
22 that by rule. Because --

23 MS. GREER: Well --

24 HONORABLE TRACY CHRISTOPHER: -- they have
25 like changed the definition in certain spots, but they

1 didn't there.

2 MS. GREER: Well, are you referring to the
3 mandamus rule, the mandamus part of the statute? I was
4 trying to figure that out.

5 HONORABLE TRACY CHRISTOPHER: Yes.

6 MS. GREER: Okay. The way that I tried to
7 do this was to do it a little bit backwards so to
8 hopefully take care of that, and maybe we need to have a
9 little bit more explicit language in (a)(1) but in (a)(1)
10 it says the procedure governing an appeal yada, yada,
11 yada, is the same as the procedure for an appeal or
12 original proceeding from a district court, but that's not
13 saying that it only applies to district courts. It's just
14 that the same procedure would apply to anything that the
15 Fifteenth has exclusive jurisdiction on.

16 And then as to the mandamus rule we wrote it
17 the opposite way to say that the Fifteenth Court lacks
18 authority to issue writs of mandamus against -- instead of
19 the way that they've stated it, which is every other court
20 of appeals has the ability to issue writs of mandamus. So
21 I think by doing it this way it would pick up the business
22 court, because that's clearly the intent elsewhere in the
23 statute that they're going to have exclusive jurisdiction
24 over appeals from the business court.

25 HONORABLE TRACY CHRISTOPHER: And I could be

1 wrong, but I thought that 22.220(d) defines who you can
2 issue writs against, and a business court judge is not in
3 there.

4 CHAIRMAN BABCOCK: Rich.

5 HONORABLE TRACY CHRISTOPHER: But I could be
6 wrong.

7 CHAIRMAN BABCOCK: That's you, right, Rich?

8 MR. PHILLIPS: Yeah. So I understand trying
9 to find a home for some of these rules. 25 seems a
10 little -- I mean, right now 25 is about filing a notice of
11 appeal and perfecting the appeal. We have to change the
12 rule to prosecuting the appeal, but that now only applies
13 to the Fifteenth Court and not the rest of the courts, and
14 some of these I wonder if we can just leave them to the
15 statute. Like I don't think there's anywhere in the TRAPs
16 where we talk about who a court of appeals justice -- or
17 who the court of appeals can issue mandamus against.
18 That's in the -- that's in the Government Code. So not
19 sure why we need to put in the TRAPs specifically the
20 jurisdiction of the Fifteenth Court for mandamus if that's
21 already in the Government Code. It's just not something
22 that's already there, so I guess I would just think about
23 how much of this needs to be here. Even the idea that,
24 like, these rules apply to the Fifteenth Court. It's a
25 court of appeals, so it would apply unless. I don't know.

1 Conceptually I'm a little bit concerned about the idea of
2 trying to cram all of this stuff into the rule about
3 perfecting appeals.

4 MS. GREER: Yeah, well, a couple of things.
5 We did talk extensively about that and at the last SCAC
6 meeting and about whether to put the jurisdictional
7 provisions of these new statutes in the actual rules, and
8 I felt like -- especially as to the business court rules,
9 the consensus was that we needed to put as much in the
10 rules to help practitioners, and even though I grant you
11 the mandamus, we did talk a lot about that, you know,
12 there's a lot in the Government Code that doesn't
13 translate here, we felt like it would be helpful to
14 practitioners to kind of have one stop shopping, at least
15 to get them -- you know, the bulk of what they need to
16 practice in this court.

17 And we also noted that in 25.1 and 25.2
18 there's actually more than just perfecting an appeal. It
19 talks about the jurisdiction of the appellate court in
20 25.1 regarding civil cases, et cetera, and so it's not
21 just an enforcement of judgment not suspended by appeal,
22 things like that, and rights to appeal in criminal cases,
23 et cetera, so we felt like it was -- if the committee was
24 amenable to it, this would be the right place to put it
25 because it would be the most natural place to look for it.

1 MR. PHILLIPS: So the only comment I have on
2 that is I don't think it's really one-stop shopping for
3 mandamus because now for most of the 14 courts their
4 mandamus jurisdiction is in the Government Code, and for
5 one court it's in the rule. So I -- for this court I
6 think my feeling would be those sorts of jurisdictional
7 things can be in the Government Code, because that's where
8 we're used to looking for them to see what jurisdiction
9 the appellate courts have.

10 CHAIRMAN BABCOCK: Got it. All right. What
11 else? Justice Gray.

12 HONORABLE TOM GRAY: I'm not sure this is
13 the place to bring it up in the discussion, but I think
14 there's a -- if I have read this correctly, an inherent
15 problem with the way that we have approached the
16 jurisdiction of the Fifteenth Court of Appeals. I, first
17 of all, share Tracy's -- if I understand her comment, was
18 it the county court at law judges that we did not have
19 jurisdiction to issue a writ against until the last
20 session?

21 HONORABLE TRACY CHRISTOPHER: Right.

22 HONORABLE TOM GRAY: And it was specifically
23 added because it had been held that we did not have that
24 jurisdiction, and it was added, and so that's the problem.
25 Since the business court judge is not listed, your concern

1 is that there's a statutory gap in our ability to do that.

2 HONORABLE TRACY CHRISTOPHER: Right.

3 HONORABLE TOM GRAY: Then we probably can't
4 fix it with a rule, but if I understand the jurisdiction
5 of the Fifteenth Court of Appeals, it has exclusive
6 jurisdiction of some things, but I haven't found anything
7 that says it doesn't have jurisdiction of, for lack of a
8 better way to say it, everything else. Meaning a
9 garden -- other than civil cases. It is limited to that,
10 but a garden variety district court decision, car wreck
11 case, 50,000-dollar recovery judgment, no issue that the
12 business court or any other court would have jurisdiction.
13 I don't see anything in our -- in the statute that
14 prevents the notice of appeal from that case being filed
15 for the Fifteenth Court of Appeals, and I think we need to
16 fix that.

17 MR. LEVY: There are provisions from the
18 statute that explicitly state what the Fifteenth Court
19 would not have jurisdiction over, and that includes
20 criminal matters. It includes matters involving suits
21 between a district attorney or county attorney with
22 criminal jurisdiction. It also includes anything arising
23 out of the Family Code or related --

24 HONORABLE TOM GRAY: Okay. You're right.
25 There are -- there is a laundry list of some exclusions,

1 but --

2 MR. LEVY: And personal injury actions.

3 HONORABLE TOM GRAY: Okay. Is it --

4 MR. LEVY: Personal injury or wrongful
5 death.

6 HONORABLE TOM GRAY: Let me go back and
7 revisit then the statute the way it's written, because the
8 way I was looking at it is, it is like the overlapping
9 counties in the Fifth, Twelfth, and Sixth Court of Appeals
10 District where now we have overlapping appellate court
11 jurisdiction of 254 counties.

12 MR. LEVY: That was exactly the example that
13 we talked about. Marcy can elaborate on that, but that
14 exact overlap issue was what we were trying to provide
15 guidance on.

16 HONORABLE TOM GRAY: But y'all are
17 comfortable that there is not the chance of anything
18 outside the exclusive jurisdiction of the Fifteenth Court
19 of Appeals that can wind up in that court?

20 MR. LEVY: No. There are provisions --
21 well, I think that's right, in thinking of it that way.
22 There's certainly issues that could be appealed to another
23 court of appeals that could have been within the
24 jurisdiction, but the -- but if it either rises out of the
25 exclusive list of claims such as the ones involving the

1 State or proceedings that arise out of the business court,
2 that they would only be able to be brought in the
3 Fifteenth Court.

4 HONORABLE TOM GRAY: I agree that there are
5 a lot of things that the Fifteenth Court of Appeals has
6 exclusive jurisdiction of. What I was trying to figure
7 out is how the overlap with the other 14 courts of appeals
8 is prevented, and I have failed to appreciate the laundry
9 list of -- that that may exclude some.

10 HONORABLE EMILY MISKEL: I think you're
11 actually right, though, because the laundry list, it says,
12 "The court of appeals for the Fifteenth has exclusive
13 intermediate jurisdiction over the following matters:
14 Matters brought by or against the State," excluding
15 personal injury, but it doesn't say like any old car wreck
16 can't be appealed to the Fifteenth Court of Appeals. So
17 you're right that it gives exclusive jurisdiction to
18 things against the State, challenging the
19 constitutionality of a statute, appeals from the business
20 court, or any other matter as provided by law.

21 So you're right it doesn't say regular
22 appeals can't come to the Fifteenth. I think it may get
23 there anyway, because it says you can't docket equalize
24 out of the Fifteenth Court out into others, so if the
25 Fifteenth Court is being super slow, I guess there's

1 nothing prohibiting the Fifteenth Court from taking on
2 other work, but if the Fifteenth Court is full of things
3 it has exclusive jurisdiction over, there's not going to
4 be any room for ancillary matters.

5 HONORABLE TOM GRAY: I'm more worried about
6 someone that has the ancillary matter that they want to go
7 to the Fifteenth and do not want to wind up in one of the
8 1 to 14 courts and file their notice of appeal to go to
9 the Fifteenth.

10 CHAIRMAN BABCOCK: Justice Christopher.

11 HONORABLE TRACY CHRISTOPHER: I mean, I
12 didn't recognize this until Tom brought it up, but it's
13 true. I mean, the way this statute is written, I could
14 have a breach of contract case that is under \$5 million,
15 and it appears I could file it in the Fifteenth Court of
16 Appeals.

17 MS. GREER: Well, I mean, I think it's
18 implicit in the transfer provisions that if it was
19 improperly filed in the Fifteenth Court, but I mean, I
20 definitely hear your point, and it also concerns me the
21 point that you raised, Chief Justice Christopher, what do
22 you do if there are two parts to the appeal, one of which
23 is in the Fifteenth and one of which is not. Because
24 there's nothing in this statute like there is in the
25 business courts that allows them to go on parallel tracks

1 in the two courts of appeals, and I don't -- you know, I
2 don't know how we address that by rule, because there's
3 zero guidance.

4 CHAIRMAN BABCOCK: Rusty.

5 HONORABLE EMILY MISKEL: I was going to say,
6 Marcy, I think Justice Christopher's point was they aren't
7 improperly filed in the Fifteenth Court of Appeals because
8 nothing says they can't be filed in the Fifteenth, right?

9 HONORABLE TRACY CHRISTOPHER: Right.

10 CHAIRMAN BABCOCK: Rusty.

11 MR. HARDIN: I think it's true what they're
12 saying. I read this about four times and I didn't
13 realize. I think Justice Gray is right. I think it
14 doesn't say they don't have concurrent jurisdiction with
15 the other 14. I think anything can go there. I was
16 originally misreading the laundry list, but it does deal
17 with just exclusive here. It doesn't say nothing else.
18 It looks like that what Chief Justice Christopher is
19 saying that you can go there for anything, except --
20 except these other things that they've got exclusive over.

21 CHAIRMAN BABCOCK: Well, if that's an
22 ambiguity in the statute, is it something that can be
23 remedied by rule?

24 HONORABLE TOM GRAY: Yes. Rule 25.1.

25 CHAIRMAN BABCOCK: Oh, don't start citing

1 authority.

2 HONORABLE TOM GRAY: Okay.

3 CHAIRMAN BABCOCK: No, go ahead.

4 HONORABLE TOM GRAY: There is a rule that is
5 provided for designating which court of appeals an appeal
6 goes to.

7 CHAIRMAN BABCOCK: Okay.

8 HONORABLE TOM GRAY: And I think that if you
9 rewrite 25.1 you can make it where you can only designate
10 the court of appeals for things that it has exclusive
11 jurisdiction of, and therefore, anything of which the
12 Fifteenth does not have exclusive jurisdiction would be
13 improperly filed in the Fifteenth, and therefore, it could
14 then be transferred back out to the other court of appeals
15 for that county, would be the way that I think you could
16 fix it, but Tracy doesn't agree with me on that.

17 HONORABLE TRACY CHRISTOPHER: No, no, I
18 think you could probably fix it, but while you're fixing
19 it I want you to fix the multiple parties and multiple
20 causes of action, one of which is included and one of
21 which is excluded. I just want it fixed one way or the
22 other.

23 CHAIRMAN BABCOCK: Don't come back until you
24 have it fixed.

25 HONORABLE TOM GRAY: Okay.

1 CHAIRMAN BABCOCK: So I'm looking at 25.1 of
2 the TRAP rules, and how does that -- how does that
3 interrelate to the problem that we're trying to solve
4 here?

5 HONORABLE TOM GRAY: (D) (4). That provision
6 is specifically for the overlap counties of the Sixth, the
7 Fifth, and the Twelfth Courts of Appeals, because you have
8 to basically tell the district clerk where that court --
9 where that appeal is going to go.

10 CHAIRMAN BABCOCK: Okay.

11 HONORABLE TOM GRAY: And if you write it so
12 that the Fifteenth is not an option under that rule, then
13 if someone tries to designate it going to the Fifteenth,
14 it is improper.

15 CHAIRMAN BABCOCK: Yeah, but (d) (4), isn't
16 that permissive for the litigant?

17 HONORABLE TOM GRAY: Yes.

18 CHAIRMAN BABCOCK: Doesn't that mean that I
19 can file it in the Fifth or the --

20 HONORABLE TOM GRAY: Yes.

21 CHAIRMAN BABCOCK: Okay. So now we're
22 trying to say it's not permissive.

23 HONORABLE TOM GRAY: Yes.

24 CHAIRMAN BABCOCK: Okay. And we can do that
25 because?

1 HONORABLE TOM GRAY: Because he writes the
2 rules, and he who writes the rules wins.

3 CHAIRMAN BABCOCK: Well, sure, but --

4 HONORABLE TOM GRAY: And if you don't
5 believe that, I'm going to say this on the record, just
6 talk to my mother, because you never want to play any type
7 of game with my mother because she writes the rules as she
8 goes along, and she will win.

9 CHAIRMAN BABCOCK: We're going to --

10 HONORABLE TOM GRAY: Even with her
11 grandchildren, I might add.

12 CHAIRMAN BABCOCK: We're going to remand
13 this problem to your mom. Okay. What else?

14 MS. GREER: Well, I was trying to find the
15 source of authority that says if you have a case in Travis
16 County you have to take it to the Third Court of Appeals
17 and kind of see if the Government Code might help us out
18 on that.

19 So it's such that we could make the argument
20 for doing what Chief Justice Gray is proposing, that we
21 can do it because the presumption in the Government Code
22 or whatever other source is that if it's from one of the
23 counties in the Third Court of Appeals it goes to the
24 Third Court of Appeals, unless it's within the exclusive
25 jurisdiction of the Fifteenth.

1 HONORABLE TOM GRAY: Well, and the
2 Government Code in I think it's 220 -- I forget what
3 the --

4 MS. GREER: 22?

5 HONORABLE TOM GRAY: -- sections are, but
6 each court of appeals has the list of counties that are in
7 its district specified in the Government Code, and so we
8 don't have that for the Fifteenth Court of Appeals because
9 it says all 254 counties.

10 MS. GREER: All it says is the Third Court
11 of Appeals district is composed of the counties of yada,
12 yada, yada, and these county have to submit, but I'm not
13 finding it where the source is that you can only appeal
14 from those counties to the Third or, you know, that it's
15 -- 22.201 has the districts and the counties that are --
16 that they are comprised of, so I was just trying to see if
17 there was a fix that way. And we can go back and look at
18 this, because I do think that's the way to fix it, is
19 through 25.1, and we'll take a look at the multiple
20 parties and causes of action. Do you have a suggestion on
21 that, Chief Justice Christopher, which way it should come
22 down?

23 HONORABLE TRACY CHRISTOPHER: I think they
24 should all go to the Fifteenth. I mean, because, I mean,
25 you could -- you could argue that because of the text of

1 the business court rule with the supplemental jurisdiction
2 that we should, you know, adopt something along that line,
3 that parties all have to agree that the, you know,
4 noncovered claims will go there. I mean, when it's
5 multiple parties under Tom's interpretation of the
6 statute, it's not a problem. When it's multiple causes of
7 action it is, because the multiple causes of action in the
8 example I gave you was an employee suing a community
9 college for breach of contract and discrimination and
10 discrimination is excluded from the Fifteenth Court's
11 jurisdiction, so, you know, you certainly don't want to
12 have to split up the appeal.

13 MS. GREER: Right. I mean, but do we want
14 to split it for parties, if you have a government official
15 and an -- a private actor both in the same lawsuit with
16 different claims, do we want to split those? I mean,
17 there's obviously judicial economy with one court hearing
18 the whole thing.

19 HONORABLE TRACY CHRISTOPHER: Yeah, I'm
20 just -- yeah. In my case, those are the cases -- in my
21 court those are the ones I see most often, right, breach
22 of contract and a claim of discrimination. Or I see a tax
23 case involving community college where, you know, other
24 local entities who don't qualify as the state are
25 included.

1 MS. GREER: Right.

2 HONORABLE TRACY CHRISTOPHER: So, you know,
3 from my point of view, I don't think the parties to those
4 lawsuits would want their appeals split up. Now, it might
5 be possible if there was a government official and some
6 nongovernmental officials all sued in the same lawsuit
7 that the governmental official would want their appeal
8 split off. So, I mean, I can see it going both ways.

9 MS. GREER: Right.

10 CHAIRMAN BABCOCK: Rich.

11 MS. GREER: I can, too.

12 MR. PHILLIPS: Marcy, I think I found what
13 you were looking for. It's in 22.220, civil jurisdiction.
14 It says, "Except as provided by (d)," which is the
15 Fifteenth Court, "each court of appeals has appellate
16 jurisdiction of all civil cases within its district of
17 which" --

18 MS. GREER: There you go.

19 MR. PHILLIPS: -- "the districts have
20 jurisdiction." So it's in the 22.220 that says that those
21 courts have jurisdiction of the cases in their district,
22 and then (d), really what it says is, it has exclusive
23 jurisdiction of all of this other stuff. So it strips
24 jurisdiction from the other 14 courts for those cases, but
25 it doesn't say anything in there that gives it

1 jurisdiction -- I mean, I think the way I read it is it
2 has only the jurisdiction that's stripped from the other
3 14 on those -- the things which it has exclusive
4 jurisdiction.

5 HONORABLE TOM GRAY: That's --

6 MS. GREER: Yeah.

7 HONORABLE TOM GRAY: And, see, the way I
8 read it is it has exclusive jurisdiction of those, but
9 there is nothing that keeps it from having jurisdiction of
10 everything else. And that can be used to fix Tracy's
11 issue that if it has exclusive jurisdiction of any issue
12 in the appeal, it should have the entire appeal.

13 MR. PHILLIPS: Yeah.

14 HONORABLE TOM GRAY: Because there are
15 definitely things that -- where it will have exclusive
16 jurisdiction. I mean, that's the whole point of it, and
17 if you're going to give the court exclusive jurisdiction
18 of some part of an appeal, I wholeheartedly agree with
19 Tracy that you don't want to be splitting up an appeal for
20 a whole bunch of reasons.

21 CHAIRMAN BABCOCK: And you're talking about
22 the situations where you have a case that's just in the
23 business court, or are you talking about when there's one
24 case in the business court, one case in district court?

25 HONORABLE TRACY CHRISTOPHER: No, no. It's

1 a case in district court that stays in district court,
2 doesn't go to business court at all until it's time for an
3 appeal.

4 MR. PHILLIPS: It's not a business court
5 case. It's one of these against the government --

6 CHAIRMAN BABCOCK: Okay. I'm with you. I
7 got it.

8 MR. PHILLIPS: -- that starts in district
9 court. In looking at it, though, the problem with -- I'm
10 going to contradict myself. The idea that it only has
11 jurisdiction over the stuff it stripped, you go back to
12 201 or wherever where it lays out all of the counties
13 within the district, and it says the Fifteenth, its
14 district is all 254 counties.

15 HONORABLE TOM GRAY: Right.

16 MR. PHILLIPS: And then (a) says "Except as
17 provided by (d)," which is just the exclusive for the
18 Fifteenth, "each court of appeals has appellate
19 jurisdiction over all civil cases within its district."
20 It's a bust for sure, but I -- I don't know what the
21 solution is other than it's clear what the Legislature
22 intended was just for the Fifteenth to have those
23 exclusive cases.

24 HONORABLE TOM GRAY: But if it was going to
25 have just the exclusive cases, it would have said

1 exclusively has jurisdiction of --

2 MR. PHILLIPS: Right.

3 HONORABLE TOM GRAY: -- and its jurisdiction
4 is exclusive --

5 MR. PHILLIPS: I'll also say --

6 HONORABLE TOM GRAY: -- to those.

7 MR. PHILLIPS: This whole discussion
8 counsels against putting any of this in the rules. Let's
9 leave it in the statute where all of the other
10 jurisdictional stuff is and not try to put it into the
11 rules.

12 CHAIRMAN BABCOCK: Justice Kelly.

13 HONORABLE PETER KELLY: I'm going to see
14 Rich's statutory citation and go to the Texas
15 Constitution. It says, "Said court of appeals shall have
16 appellate jurisdiction co-extensive with the limits of
17 their respective districts, which shall extend to all
18 cases of which the district courts or county courts have
19 original or appellate jurisdiction." So arguably under
20 the Constitution there would be no appellate jurisdiction
21 for a court -- for a court of appeals for the district
22 over business court cases.

23 MR. PHILLIPS: Yeah.

24 HONORABLE PETER KELLY: Because it's not a
25 district court or a county court.

1 MR. PHILLIPS: Right, but then, of course,
2 we have all of these other different cases that are in
3 district court and go to the Fifteenth Court. I mean,
4 that's the business court --

5 HONORABLE PETER KELLY: Right.

6 MR. PHILLIPS: -- but you've got to remember
7 the Fifteenth is bigger than that.

8 HONORABLE PETER KELLY: Restrictions and
9 regulations as may be prescribed by law, and so it's
10 whatever the statute says after that.

11 MR. PHILLIPS: Yeah.

12 CHAIRMAN BABCOCK: Okay. All right. What
13 else? What other thorny problems can we spot?

14 HONORABLE EMILY MISKEL: So after that
15 discussion, is there a sense on do we want to just take
16 all discussion of jurisdiction out of the TRAP or leave it
17 in and try to find a solution?

18 HONORABLE TOM GRAY: Well, I couldn't be
19 facetious and say something about, now, is this really
20 jurisdiction, or is this like the other type of --

21 MR. LEVY: But you're not going to do that,
22 right?

23 CHAIRMAN BABCOCK: You could say that.

24 HONORABLE TOM GRAY: But I'm not going to
25 raise that at all. Not even going to comment on it.

1 I think it needs to be in the rules. And
2 the reason I think it needs to be in the rule is because
3 of 25.1, and you're going to have this problem the first
4 time somebody accidentally sends one to the Fifteenth.
5 It's going to come up, and because we -- because I think
6 we can fix it, I think we should fix it.

7 And I think the problem that Tracy raises is
8 even larger than the kind of litigant that wants to create
9 the problem of I just need to know where to go to get my
10 appeal decided. Do I file one notice of appeal? Do I
11 file two? You know, what do I do? And that gets back to
12 where you file the notice of appeal and how you designate,
13 but that's a -- you know, do you designate both? I mean,
14 it's just I think we can fix it, and I think it's -- I
15 think if you fix it where the notice of appeal designates
16 the Fifteenth if it has any exclusive jurisdiction, that
17 that's the only time, if it's one of those cases, and
18 anything else that was tried in the same case that's part
19 of the same judgment, and let it go from there.

20 CHAIRMAN BABCOCK: Okay. Yeah, Elaine.
21 Professor Carlson.

22 PROFESSOR CARLSON: I agree, and I think
23 it's really important that the wording --

24 MS. GREER: Can you give her a microphone?

25 CHAIRMAN BABCOCK: We have a microphone on

1 its way.

2 PROFESSOR CARLSON: I think it's really
3 important -- can you hear me -- that any attempt to
4 address this deal with appealing the judgment so it's
5 clear everything from that case is going up, because the
6 idea of having two different or splitting up a case on
7 appeal is daunting.

8 HONORABLE TOM GRAY: The only thing that
9 could be more daunting for me than that would be the
10 splitting it up at the trial level. And that's --

11 HONORABLE TRACY CHRISTOPHER: Exactly.

12 HONORABLE TOM GRAY: We're living with that,
13 which seems a little bit bizarre, and then they're -- do
14 you understand, are they going to put it back together in
15 one judgment somewhere?

16 HONORABLE TRACY CHRISTOPHER: I don't think
17 so.

18 MS. GREER: I don't think so. I mean, you
19 could move maybe to transfer and consolidate, but you
20 would have to have grounds for that, and I don't know if
21 that's going to ever work.

22 CHAIRMAN BABCOCK: Justice Christopher.

23 HONORABLE TRACY CHRISTOPHER: Okay, so I
24 think Tom's idea of fixing it in the notice of appeal is a
25 good one.

1 MS. GREER: Uh-huh.

2 HONORABLE TRACY CHRISTOPHER: I did note
3 that I thought we also had to change the notice of appeal
4 anyway because it's talking about the trial court clerk,
5 which is true with respect to all of those government
6 cases that we're talking about, but is not true with
7 respect to the business court, and I don't want people to
8 get -- I don't want them to lose their appeal by
9 inadvertently filing in the wrong place, so I also think
10 we need, you know, something to that effect. If I, you
11 know, file here in the wrong trial court clerk, and I
12 don't think we have that right now. Maybe someone else
13 who knows the TRAP better than me.

14 MS. GREER: And I agree with that. I
15 definitely want to save anybody from losing their appeal
16 because they filed in the wrong place. I had originally
17 not wanted to tinker with Rule 25 because I thought we
18 covered it in 25.3, but in light of the fact that we're
19 going to make these other changes, I mean, I sense that we
20 have a consensus on that. Do we have a consensus on that?

21 HONORABLE TOM GRAY: Chip said we couldn't
22 take any votes today.

23 CHAIRMAN BABCOCK: Hey, I did not say that,
24 but in fact, I'm itching to vote. I'm itching to vote,
25 but not on this question, so --

1 MS. GREER: I like the idea. Actually, I
2 think it's a good solution.

3 CHAIRMAN BABCOCK: I do, too.

4 MS. GREER: The only thing that worries me
5 is somebody saying, well, you know, the Legislature saw
6 fit how to deal with supplemental jurisdiction in the
7 business courts rule and didn't deal with it here, but I
8 think you could also argue that they left it an open
9 question for us to resolve, or at least for the courts to
10 resolve.

11 CHAIRMAN BABCOCK: Justice Christopher.

12 HONORABLE TRACY CHRISTOPHER: I don't know
13 if we want to talk about the transfer rule that's in 25,
14 the new 25. The transfer --

15 MS. GREER: Sure.

16 HONORABLE TRACY CHRISTOPHER: -- between the
17 courts of appeals. I had written in my notes that I think
18 the Supreme Court is the one that should be doing the
19 transfers, not the courts of appeals, and that way there
20 is no potential jurisdictional problem as noted in the
21 cover. I mean, that's how we do it now, right now, so if
22 for some reason we want to transfer a case to a different
23 court of appeals, which sometimes happens in connection
24 with we've already gotten case number one from Waco and
25 case number two from Waco comes up, and case number two

1 from Waco should be transferred to us because we've
2 already dealt with that, and that all happens through the
3 Supreme Court. It doesn't happen Waco, Fourteenth Court
4 transferring back and forth, and I don't think -- I think
5 this procedure should go up to the Supreme Court.

6 CHAIRMAN BABCOCK: What was the reason not
7 to do it that way?

8 MS. GREER: So it was really -- and I don't
9 have an objection to that. The issue here is that, unlike
10 the situation that Chief Justice Christopher described,
11 we're going to have motion practice around transferring
12 between the courts of appeals, and it struck me that to
13 take it to the Supreme Court, which we did talk about this
14 in committee, it struck us to take it to the Supreme Court
15 means a mandamus, and we thought the Supreme Court
16 probably has enough mandamus work right now to keep it
17 busy and happy and that maybe the courts of appeals ought
18 to work it out on their own. Because this concept that
19 both the Fifteenth Court and the transferring court would
20 both throw up their hands and say "not mine" is probably
21 going to be pretty rare, and that would be the situation
22 that it would go to a mandamus. But again, I'm not
23 adverse to doing it this way. It's just this is -- and I
24 can't speak for the whole committee obviously, but that's
25 why we kind of came down on this approach.

1 HONORABLE TRACY CHRISTOPHER: But there is
2 already a motion practice for transfers, and the motion
3 practice requires the motion to be filed in the Fourteenth
4 Court that says "Please transfer this case."

5 HONORABLE TOM GRAY: It actually gets filed
6 in the Supreme Court with copies to us.

7 HONORABLE TRACY CHRISTOPHER: With copies to
8 us, and then we weigh in on it and send them a note saying
9 "Yeah, we agree to the motion" or "We disagree for X, Y, Z
10 reasons," and then whatever court it's going to get
11 transferred to does the same thing and then the Supreme
12 Court decides. So I don't see a reason to deviate from
13 how we've been doing it.

14 CHAIRMAN BABCOCK: What do you think about
15 that, Marcy?

16 MS. GREER: Works for me. I don't have a
17 problem. Does anybody on the committee? I wasn't aware
18 that there was actually motion practice going on for the
19 transfers like that, but if that's already in place, then
20 it seems to me to make sense.

21 CHAIRMAN BABCOCK: Anybody on the committee
22 have a problem with that?

23 HONORABLE PETER KELLY: I missed that day of
24 judge school.

25 CHAIRMAN BABCOCK: What's that?

1 HONORABLE PETER KELLY: I missed that day at
2 judge school.

3 HONORABLE TRACY CHRISTOPHER: Only those in
4 the know know about motion to transfer.

5 CHAIRMAN BABCOCK: All right. So let's go
6 to the next thing.

7 HONORABLE EMILY MISKEL: There's one more
8 thing.

9 CHAIRMAN BABCOCK: One more thing.

10 HONORABLE EMILY MISKEL: Sorry, one more
11 thing right underneath the transfer is that we wanted to
12 have an appropriate deadline for that request to be made,
13 and so we talked about various deadlines and when somebody
14 would figure it out or put it together, and we decided
15 that everybody should know by the time the deadline for a
16 reply brief arrives, so you've at least got to bring it up
17 and request it by then.

18 Go ahead.

19 HONORABLE TRACY CHRISTOPHER: But if it's
20 exclusive jurisdiction, and it's jurisdiction, it can't be
21 waived. It can be transferred at any time. I mean, we
22 have to examine our own jurisdiction. We look at it
23 ourselves and we say, "Oh, no, this should have been filed
24 in the Fifteenth." We transfer it, even if we've been
25 sitting on it for a year.

1 HONORABLE EMILY MISKEL: But the parties
2 should point it out to you by the time they file a reply
3 brief.

4 HONORABLE TOM GRAY: You can put "should" in
5 the rule or you can put "shall" in the rule, you can put
6 "must" in the rule, but it's not going to matter, because
7 they haven't seen it. We may be the ones that see it, and
8 it may be six months after that reply brief is filed
9 before we get to pick up that case and decide it, and we
10 go -- well, I won't say what we first say. The next thing
11 we say is "This probably needs to go somewhere else. We
12 don't have jurisdiction of it." And there is already a
13 rule, 40 -- or is it Rule 10? If we question our
14 jurisdiction, we have to send notice and opportunity to
15 respond before we dismiss one. But maybe that would be
16 where we could have the Supreme Court transfer it to a
17 court that did have jurisdiction of it.

18 CHAIRMAN BABCOCK: Well, are we better off
19 not having any kind of deadline?

20 HONORABLE TOM GRAY: I think with the
21 existing rule practice on transfers you could do away with
22 (c) completely, and I guess you could make a reference to
23 it. I don't know that you need to, when if people's ox is
24 gored, they start filing motions. If we notice it, we
25 start sending notices, and if -- there's just not a need

1 for a deadline, because if it comes up, it comes up.

2 We're going to have a motion sent to the
3 Supreme Court to transfer it if that's the remedy, and
4 we're going to -- two courts involved, whether it's the
5 Fifteenth and one of the existing 14 or maybe even three
6 courts. You know, everybody is going to send a letter to
7 the Supreme Court as to whether or not it needs to be
8 transferred, and if it is, then maybe it will save
9 somebody's appeal, and I don't think it's going to happen
10 that much once we kind of get a rythm, so I think you can
11 do away with (c).

12 HONORABLE EMILY MISKEL: The problem with
13 doing away with (c) is the Legislature specifically said
14 the Supreme Court shall adopt rules for (c).

15 HONORABLE TOM GRAY: And they can write the
16 Legislature back a little note and say "Got it already
17 done, see our local" -- what's this, y'all's local docket
18 -- I wish I had brought that, but there's a number for the
19 order. It already exists. So if you feel like it's got
20 to be in the rule then we could have a rule that
21 references to the miscellaneous docket number of the
22 Supreme Court for transfers.

23 HONORABLE EMILY MISKEL: Okay. I think
24 there should be a rule because that's what the Legislature
25 said "shall" to.

1 HONORABLE TOM GRAY: Okay.

2 CHAIRMAN BABCOCK: That seems right. Yeah,
3 Rich.

4 MR. PHILLIPS: We could put that -- Rule of
5 Judicial Administration 15 covers transfers in concurrent
6 jurisdiction counties, so you could also put it there. Or
7 reference the order in that rule.

8 CHAIRMAN BABCOCK: Yeah.

9 MS. GREER: I mean, we did talk about that
10 with the concurrent counties. It seemed like this was
11 something different, and we were kind of harkening back to
12 the conversation of more about the business courts than
13 this court, but trying to kind of help practitioners know
14 what the rules are, especially because they -- the
15 Legislature did tell us to do this, so I'd kind of be
16 inclined to leave it there so that people know where to
17 look. In 33 years I've never had a situation like what
18 Chief Justice Christopher described. I've never seen a
19 proceeding like that. And maybe I haven't done enough
20 appellate law, but I just think it's very rare and this
21 may come up more because we've got a brand new court, and
22 it might be helpful to have guidance in the rule on it.

23 HONORABLE TRACY CHRISTOPHER: No, I agree
24 with you, because we've talked about this before. There's
25 a lot of appellate stuff that goes on that only hyper --

1 hyper-hyper-technical appellate people know about because
2 it's not in the rules.

3 HONORABLE TOM GRAY: Are you trying to avoid
4 using the word "nerdy"?

5 HONORABLE EMILY MISKEL: Insiders, though.
6 There's stuff that the insiders know that aren't written
7 down anywhere.

8 HONORABLE TRACY CHRISTOPHER: Insiders,
9 right. Right. And so I don't mind having it in the
10 rules. I just want it to be the procedure that we
11 currently have, which is a motion practice, everybody
12 weighs in, Supreme Court decides.

13 HONORABLE TOM GRAY: Texas Rule of Appellate
14 Procedure Order 06-9136, the policies for transfers of
15 cases between courts of appeals. That will give the
16 record a reference to the rule that I've been referring
17 to, that Tracy and I have been.

18 CHAIRMAN BABCOCK: Okay.

19 MR. LEVY: Who had authority to sign that
20 order?

21 MR. PHILLIPS: You mean jurisdiction?

22 MR. LEVY: Yeah.

23 HONORABLE EMILY MISKEL: All right. Any
24 other discussion on the changes we recommended for 25.3?

25 All right. 32.1. So Rule 32 is the current

1 docketing statement rule. The only reason that we
2 addressed this is because we were aware from our last
3 meeting that in identifying the currently pending cases
4 that will be shipped to the Fifteenth Court of Appeals on
5 September 1st, we know that OCA is working on revising the
6 docketing statement to help identify all of this, and we
7 realized that Rule 32 sets forth like too many details
8 about what should be in a docketing statement, and so we
9 recommend wholesale replacing the 32.1 with just "The
10 appellant must file a docketing statement," you know, "in
11 the form approved by the Supreme Court" or "with the
12 information required by the Office of Court
13 Administration" or something, and let them have a form
14 that can be changed rather than try to set every
15 requirement out in the Rules of Appellate Procedure.

16 CHAIRMAN BABCOCK: All right. Any comments
17 about that?

18 HONORABLE TRACY CHRISTOPHER: My only
19 comment was I would do "required by the Office of Court
20 Administration as approved by the Supreme Court." That's
21 all I -- I just want Supreme Court oversight. Sorry.

22 CHAIRMAN BABCOCK: That's all right.

23 MS. GREER: No, and I agree with that
24 friendly amendment.

25 CHAIRMAN BABCOCK: Yeah. Okay. What else?

1 HONORABLE EMILY MISKEL: Rule 39.8 talks
2 about the notice from the clerk and because SB 1045 says
3 something to the effect of the Court can transact its
4 business in any county in the district as the court
5 determines is necessary and convenient, we first thought
6 it would be helpful for cases in the Fifteenth Court of
7 Appeals to specifically say where the argument would be
8 held, and we thought actually that would be helpful for
9 every court of appeals to say the location of the oral
10 argument or instructions for joining electronically, so we
11 added (e) to the rule for the clerk's notice that applies
12 to everybody.

13 Now, I think Chief Justice Christopher took
14 issue with the fact that the current rule requires 21 days
15 notice, and she said it can be moved, so I think you were
16 also requesting that we revisit the 21-day advance notice
17 requirement; is that correct?

18 HONORABLE TRACY CHRISTOPHER: Yes. My
19 understanding, and I could be wrong, is we give 21 days
20 notice, but that when we reschedule we don't have to give
21 21 days notice again, so at least that's the way we've
22 always done it, and, you know, so to the extent that
23 there's not a rule that allows me to do that, I would like
24 a rule that allows me to do that.

25 MS. GREER: How does this work?

1 HONORABLE EMILY MISKEL: Oh, there's a
2 change on the screen now.

3 HONORABLE TRACY CHRISTOPHER: Great.

4 MS. GREER: Because I agree with you.

5 HONORABLE TRACY CHRISTOPHER: Great. I like
6 it.

7 HONORABLE TOM GRAY: I don't.

8 CHAIRMAN BABCOCK: Read that into the
9 record.

10 HONORABLE EMILY MISKEL: I'll read it for
11 the record. So the friendly amendment is it currently
12 says, "A party's failure to receive the notice does not
13 prevent a case's argument or submission on scheduled
14 date," and then the additional text is "Once issued, the
15 appellate court can amend the notice with less than
16 21 days notice."

17 Any other discussion about what a notice
18 should say and if there's anything special about the
19 Fifteenth?

20 HONORABLE PETER KELLY: I think the
21 amendment is a little bit -- the way the deadline is
22 phrased in the opening sentence, "at least 21 days before
23 the date the case is set for argument," I think the
24 amendment should say instead of "less than 21 days notice"
25 it should recapitulate the language of the first sentence,

1 "less than 21 days before the date the case is set for
2 argument or submission."

3 CHAIRMAN BABCOCK: Anybody have any thoughts
4 about that? Any comments about --

5 MS. GREER: That actually --

6 CHAIRMAN BABCOCK: Justice Gray.

7 HONORABLE TOM GRAY: This rule slows us down
8 on cases that aren't going to be argued, and it also
9 creates a problem in Anders cases because when you send
10 the notice of a submission date and you haven't asked for
11 a response from the State or sent them a late brief
12 notice, everybody knows what the result is going to be.

13 My understanding of the need for the 21-day
14 notice on nonargued cases was that that was to give the
15 parties time to object to the panel. I'm a three-judge
16 court. I can tell you pretty quickly after a case is
17 filed what three judges are going to decide the case. Not
18 always, because sometimes there's a recusal or something,
19 and I've got two very -- two justices now that were very
20 active trial judges, and those recusals can come up much
21 later than you would think, but they do.

22 And so my point is I would like to see this
23 rule -- and I know this is -- we get into this all the
24 time, we're tinkering with one part of it, but if we could
25 split out the panel designation part and then divide it

1 also by argued and nonargued submissions, you could
2 squeeze a couple of weeks out of a number of type cases,
3 including termination cases, which sometimes we wind up
4 having to -- if we're getting up to the 180-day deadline,
5 we'll submit them on less than 21 days notice to make that
6 deadline, and I -- I would like to see some tinkering in
7 that regard as well. I think it would make the rule
8 better.

9 We have not had problems with the location
10 or time allotments, any of that. If we're doing a special
11 location, we're scheduling that ahead of time with the
12 parties anyway, and so I can see where on the Fifteenth
13 Court of Appeals if they're meeting around the state,
14 that -- but that's not -- that's never been an issue with
15 our court when we travel somewhere. It's always about
16 giving them notice, making sure they're going to be there,
17 because the last thing you want to do is go to, you know,
18 Sam Houston State and have oral arguments and nobody shows
19 up for one of the parties. And so we're all over that.
20 But --

21 CHAIRMAN BABCOCK: Any other comments?

22 HONORABLE EMILY MISKEL: I think that's the
23 end of our proposed changes. Does anyone think there was
24 anything that should be changed that we didn't make a rule
25 on?

1 CHAIRMAN BABCOCK: Justice Christopher.

2 HONORABLE TRACY CHRISTOPHER: Original
3 proceedings and permissive appeals do not have docketing
4 statements, and I would like something in them that would
5 indicate whether they need to go to the Fifteenth Court of
6 Appeals. Because, I mean, you know, if there's a case
7 filed in Harris County with a governmental entity that is
8 ultimately going to the Fifteenth Court of Appeals, the
9 permissive appeal or the original proceeding out of that
10 case also goes to the Fifteenth Court of Appeals, is my
11 understanding of the statute. So --

12 HONORABLE EMILY MISKEL: Could you require a
13 docketing statement for those cases?

14 HONORABLE TRACY CHRISTOPHER: Well, no,
15 because it's different because, well, first of all, they
16 don't file a notice of appeal. They file it directly with
17 us, right? So that -- on both of those things, so, I
18 mean, that's another problem. They file it with us. We
19 look at it, what needs to be -- it needs to be in the
20 Fifteenth, but that's why I think it needs to be actually
21 in the two documents, the original proceeding document and
22 the permissive appeals, because those just come to us just
23 like that. They just get filed with us as opposed to
24 going through the whole court clerk process. And no one
25 files -- you know, no offense, but docketing statements

1 are -- are often not filled out or filled out very well at
2 all.

3 CHAIRMAN BABCOCK: Kennon.

4 MS. WOOTEN: Question, and that is what the
5 courts of appeals are doing now to assess whether the
6 filings since September 1, 2023, are going to go to the
7 Fifteenth Court of Appeals.

8 HONORABLE TRACY CHRISTOPHER: Well, we've
9 got the new docketing statement, so we're looking at those
10 when they come in. For my court, you know, I did a brief
11 review of where I thought the cases would be, and I came
12 up with our community college cases. All right. Because
13 that's most likely the type of case that would fit within
14 the statute of the Fifteenth.

15 So I'm just going to do a search next summer
16 for those cases to see what I can find, if they haven't
17 already been identified in the docketing statement.
18 That's what I'm doing. I think Austin has got a more
19 elaborate identification process going on, because they're
20 expecting 10 to 20 percent of their cases maybe, right? I
21 can't remember exactly what Darlene, Judge Byrne, said.

22 HONORABLE TOM GRAY: I think it was 10
23 percent of the transfer cases she thought were -- not 10
24 percent of their total cases. I don't remember.

25 HONORABLE TRACY CHRISTOPHER: Anyway.

1 HONORABLE TOM GRAY: It was not a huge
2 number.

3 HONORABLE TRACY CHRISTOPHER: Right. So
4 that's what I'm doing. We don't have anything, you know,
5 in particular other than that at this point that we're
6 supposed to be doing. As we work up cases, if there's
7 motions then we might flag it, but just like a filing in a
8 district court, you tend to not worry about it until, you
9 know, somebody's asking you to do something on it. So
10 that's what we're doing.

11 CHAIRMAN BABCOCK: Yeah, Rich.

12 MS. GREER: Can I ask -- I just wanted to
13 ask a clarifying question. So, Chief Justice Christopher,
14 are you saying that in the mandamus petition you'd like
15 some representation that this is going to be to the
16 Fifteenth Court in this interim year that we're already
17 in?

18 HONORABLE TRACY CHRISTOPHER: Well, at all.
19 Not just the interim year. Because the government cases
20 are going to be still in, you know, Harris County district
21 court. They are not going to be in the business court. I
22 mean, if it came from a business court judge, everyone
23 would know where it was going to go. The government cases
24 are going to be staying in Harris County. Until --

25 MS. GREER: Right. So where -- where and

1 what do you -- or do you think the practitioners should
2 do --

3 HONORABLE TRACY CHRISTOPHER: In the
4 requirements for the -- the original proceeding and in the
5 requirements for permissive appeal, it's just a statement,
6 statement of jurisdiction. Specifically, you know, does
7 this case belong in the Fifteenth?

8 MS. GREER: Okay, but that would only apply
9 for the transitional year, because once the court is up
10 they would file the permissive appeal directly there and
11 the mandamus directly in the Fifteenth, right?

12 HONORABLE TRACY CHRISTOPHER: They could,
13 but they might do it wrong. See, that's why I'm hoping
14 that by putting it in the rule people will stop and think
15 again where is their case going to be appealed. Right?

16 MS. GREER: Okay.

17 HONORABLE TRACY CHRISTOPHER: It's the same
18 thing with the docketing statement, right? You know, even
19 once the Fifteenth Court of Appeals exists we're expecting
20 cases will be filed in our court that need to go to the
21 Fifteenth, just because people won't be that familiar with
22 the new court.

23 CHAIRMAN BABCOCK: Rich.

24 MS. GREER: Okay.

25 MR. PHILLIPS: So one thing I will say is

1 for permissive appeals, because we were looking at this
2 recently, 28.3(i) requires the petitioner to file the
3 docketing statement with their petition for permission to
4 appeal.

5 HONORABLE TRACY CHRISTOPHER: No one does.

6 MR. PHILLIPS: Nobody does, but they're
7 supposed to, so that's already in the rule --

8 HONORABLE TRACY CHRISTOPHER: Okay.

9 MR. PHILLIPS: -- for that. We may need to
10 add something to the mandamus petition to -- that may
11 require them to include that in the mandamus petition,
12 but -- and it may counsel whether we ought to add a
13 specific thing in either the notice of appeal or somewhere
14 where they're supposed to identify whether this is a case
15 that falls under the jurisdiction of the Fifteenth or
16 something that, as you say, would require them to at least
17 go look at it and figure out if they're filing it the
18 right way.

19 HONORABLE TRACY CHRISTOPHER: Well, maybe
20 OCA would prefer that they do a docketing statement
21 with original proceedings.

22 MR. PHILLIPS: We could definitely do that,
23 too, just copy 28.3(i) and put it in the mandamus rules,
24 too, with your mandamus petition file a docketing
25 statement.

1 HONORABLE TRACY CHRISTOPHER: Yeah, I mean,
2 whichever works. I just want something in there to make
3 people think, oh, am I supposed to go to my local court of
4 appeals or am I supposed to go to the Fifteenth Court of
5 Appeals?

6 MS. WOOTEN: Is OCA using docketing
7 statement for data collection purposes?

8 MS. LAVOIE: No. So we actually before this
9 have -- I guess a long -- several years ago when that
10 docketing statement was developed, you worked with one of
11 our developers, but we traditionally don't have anything
12 to do with that docketing statement, but we did this time
13 around because some of the justices asked us to revise it
14 to account for these Fifteenth Court of Appeals cases or
15 the cases that would technically be transferred next
16 September. So we're happy to do whatever is needed and
17 help in any way, but traditionally we hadn't -- I had
18 never even seen that before we were asked to help.

19 HONORABLE TRACY CHRISTOPHER: I'm going to
20 defer to Tom on that, because I thought OCA was always
21 involved in the docketing statement, but --

22 MS. LAVOIE: And my general counsel, we
23 had -- and Mena has been with OCA for over 20 years.

24 HONORABLE TRACY CHRISTOPHER: Right.

25 MS. LAVOIE: She had said she had never seen

1 it before.

2 HONORABLE TOM GRAY: She had never seen the
3 docketing statement?

4 HONORABLE TRACY CHRISTOPHER: Why would the
5 court of appeals want it? I mean, I guess it was a local
6 -- it was the rule from the Supreme Court, so the Supreme
7 Court wanted it.

8 MS. LAVOIE: It could be. So we're happy to
9 continue to help and help revise it. It's something that
10 we worked on this summer, but it was at the direction of a
11 couple of the justices on the courts of appeals.

12 MS. GREER: Well, then we may want to take
13 out the language about OCA altogether and just go with
14 "approved by the Supreme Court" on the docketing
15 statement, but I think our main focus was just when we
16 amended it to deal with the family law rules changes,
17 it -- we had to put in a bunch of -- I mean, it's up to,
18 what, (m) in items, and we felt like it would just be
19 easier every time there's going to be a change to the
20 docketing statement to handle it through the docketing
21 statement rather than the rule.

22 CHAIRMAN BABCOCK: All right. Any other
23 comments about this rule, proposed rule?

24 HONORABLE TOM GRAY: Chip, I would say, to
25 follow up on the point, I think the need for the reference

1 to whether or not the Fifteenth Court of Appeals is
2 involved in a proceeding is best addressed in the content
3 listing of the rule. For permissive appeals it would be
4 28.3(e), and for mandamuses it would be 52.3 -- I can't
5 find the list of contents right now. I know it's there,
6 but the contents of the petition I guess is 52.3, and --

7 CHAIRMAN BABCOCK: Okay.

8 HONORABLE TOM GRAY: Because Tracy is right.
9 The docketing statements are afterthoughts. They're done
10 in a hurry. They don't get the attention that the actual
11 petition or the request on a permissive appeal.

12 HONORABLE TRACY CHRISTOPHER: They're often
13 filled out by the paralegal, not by the lawyer.

14 HONORABLE TOM GRAY: And in appeals they
15 come much later than the notice of appeal. I mean, it's
16 not even around the time of the judgment, and sometimes
17 they don't get filed at all.

18 HONORABLE EMILY MISKEL: Big picture, should
19 we just do away with docketing statements? If they're not
20 helping anybody, why have them?

21 HONORABLE TOM GRAY: Every once in a while a
22 party forgets to file them, and we send them notice, and
23 then we get to dismiss the appeal.

24 HONORABLE EMILY MISKEL: Dispositions.

25 HONORABLE TOM GRAY: So there's that.

1 HONORABLE TRACY CHRISTOPHER: And we never
2 do that.

3 HONORABLE EMILY MISKEL: But seriously,
4 though, if it's not a useful requirement, is there any
5 reason to continue requiring it?

6 HONORABLE PETER KELLY: Mediation statement
7 is helpful.

8 HONORABLE TRACY CHRISTOPHER: Mediation.

9 HONORABLE EMILY MISKEL: Could you just
10 replace the docketing statement with a mediation
11 statement?

12 HONORABLE PETER KELLY: And a state of the
13 jurisdiction why it doesn't belong in the Fifteenth Court.
14 Maybe a two-item docketing statement that would probably
15 give us everything we need, because all of the information
16 used to be included in the docketing statement or still is
17 included in the docketing statement, name of opposing
18 counsel, all of that is included in the e-filing
19 information anyway now.

20 MS. GREER: There's also the pro bono piece
21 of the docketing statement so that people can sign up to
22 get pro bono assistance through the appellate program.

23 HONORABLE EMILY MISKEL: All right, so OCA
24 can have a three-item docketing statement.

25 HONORABLE PETER KELLY: Three-item docketing

1 statement.

2 HONORABLE TOM GRAY: That would be the
3 Supreme Court, not OCA.

4 HONORABLE EMILY MISKEL: Yeah. Yeah.

5 HONORABLE TRACY CHRISTOPHER: Justice Hecht,
6 do you ever remember why we started down that long
7 docketing statement?

8 HONORABLE NATHAN HECHT: I don't. You
9 know --

10 HONORABLE PETER KELLY: Because Delaware did
11 it?

12 HONORABLE NATHAN HECHT: -- we did it in all
13 the trial courts and --

14 HONORABLE TRACY CHRISTOPHER: Right.

15 HONORABLE TOM GRAY: I think it started off
16 as a gathering -- information gathering that now TAMES and
17 the electronic filing now capture, and I think Peter is
18 right. I think the electronic filing has overtaken the
19 manual preparation of the docketing statement.

20 MS. WOOTEN: It's comparable to the civil
21 case information sheet which used to be required and then
22 was no longer needed in light of e-filing and the
23 information inputted during the filing process.

24 HONORABLE TOM GRAY: Yes.

25 CHAIRMAN BABCOCK: Rich, did you have --

1 MS. GREER: What was that comment?

2 HONORABLE EMILY MISKEL: Kennon was
3 comparing it to the civil case information sheet that you
4 used to have to fill out, but now with e-filing you don't
5 have to anymore.

6 MS. GREER: Okay.

7 CHAIRMAN BABCOCK: Rich, do you have your
8 hand up?

9 MR. PHILLIPS: Yeah, I was just going to say
10 I think this form -- we had assumed it was OCA. My
11 recollection is -- because we used to just have to create
12 a document and type all of that stuff out. I think years
13 ago one of the courts created the PDF, fillable PDF, and
14 it just kind of got circulated and everybody else adopted
15 it. I don't remember which one did it, but I think one of
16 the courts of appeals created it, and everybody else
17 started using it because it had all of the information
18 that the rule required.

19 The other thing that Connie points out --
20 and I don't know if this is helpful to the Court. Maybe
21 it's not, but the docketing statement also requires you to
22 explain like how is this an appealable order, is it a
23 final judgment, does it dispose of all claims and parties,
24 does it have a Mother Hubbard clause. Does it -- if it's
25 an interlocutory appeal, what's the basis for the

1 interlocutory appeal, did you do anything to extend the
2 deadline, did you file a motion for new trial or anything
3 else? All of that stuff is in there, too. I don't know,
4 maybe at some -- as a practitioner I assume it's because
5 somebody at the court's looking at that to check their
6 jurisdiction, but if it's not being used that way then
7 maybe there's no point in doing that.

8 HONORABLE PETER KELLY: It's not binding.
9 You don't waive anything by making a misstatement in
10 there, so it's ultimately worthless. We actually look at
11 the briefs and the real documents and not the docketing
12 statement to determine all of the important stuff.

13 MS. LAVOIE: I do think, too, that some of
14 the information that's in there, from what I understand,
15 is that the clerks are minimally putting some of the
16 information that's on that docketing statement into TAMES,
17 but I'm not sure exactly which fields they're putting in
18 there.

19 HONORABLE TOM GRAY: And some of the trial
20 court clerks do use the information on a cover sheet that
21 they have started using. I don't know if that's something
22 that OCA promulgated or not, so I guess I'm not yet ready
23 to second your motion that we drop the docketing statement
24 entirely. But I think the information that Tracy is
25 looking for about the Fifteenth Court of Appeals goes

1 better in the content section of the rules for those two
2 type proceedings than in the docketing statement.

3 MR. PHILLIPS: And what is it we want to put
4 in there? That's the other thing I'm trying to figure
5 out. Because if you're filing it in not the Fifteenth
6 Court, I'm not going to say, "By the way, this belongs in
7 the Fifteenth Court." So you want something to show the
8 negative why this didn't belong in the Fifteenth Court?

9 HONORABLE TRACY CHRISTOPHER: Right. This
10 does not belong in the Fifteenth Court.

11 MS. GREER: Kind of like in an interlocutory
12 appeal where you say this is not a parental termination
13 case?

14 MR. PHILLIPS: Yeah. That will work.

15 MS. GREER: Okay.

16 HONORABLE PETER KELLY: And we can check
17 with our clerks to make sure that they're not serving some
18 occult purpose of which we're unaware.

19 CHAIRMAN BABCOCK: Halloween is coming up,
20 so --

21 HONORABLE EMILY MISKEL: Just the last thing
22 real briefly is we talked about some of the issues that
23 were unique to the transition period starting
24 September 1st, 2024, and we thought it didn't make any
25 sense to make whole rules just for a one-time transfer, so

1 our memo suggests some things that might be contained in
2 like an administrative order that would help with the
3 transition in that limited time period. So that was our
4 recommendation. Rather than make any rules that have to
5 do with the transition, let that be handled by
6 administrative order because it would really only make a
7 difference in that first window of time.

8 CHAIRMAN BABCOCK: Okay.

9 HONORABLE PETER KELLY: And that is
10 thematically consistent with where we started today with
11 amending Rule 3 to get rid of the reference to the 1941
12 cases. So we've gone full circle.

13 HONORABLE EMILY MISKEL: To avoid having to
14 amend this in 80 years.

15 HONORABLE PETER KELLY: Right.

16 CHAIRMAN BABCOCK: Robert, did you have your
17 hand up?

18 MR. LEVY: No, no. It's Rule 2, not Rule 3.

19 CHAIRMAN BABCOCK: Do you want the last
20 word?

21 MS. WOOTEN: I think he just got it.

22 CHAIRMAN BABCOCK: You're a scrivener.
23 You're a writing guy, not a -- Marcy, do we have anything
24 else to take up here?

25 MS. GREER: Well, there were a few -- I

1 think the courts of appeals are really wanting some
2 guidance on what is going to be happening, you know, the
3 amount of work that they're supposed to do during this
4 interim period, et cetera, and I know they're trying to
5 work that out internally, but -- let's see. I'm just
6 looking through the comments, talked about all of that.
7 I've got a lot of different screens open right now for
8 this.

9 MR. LEVY: Chip, while Marcy is looking I
10 did want to point out that Marcy really deserves all of
11 the credit. She took these projects and made them happen
12 in a very short period of time, and I think really she
13 deserves the patch more than anyone.

14 CHAIRMAN BABCOCK: So you're waiving your
15 right to the patch and giving it to Marcy?

16 MR. LEVY: Sure.

17 CHAIRMAN BABCOCK: I don't know, we may have
18 to vote on that because we haven't voted on anything
19 today, but Marcy is not denying it. She's not saying,
20 "Oh, no, no."

21 MS. GREER: Well, I'm trying to find the
22 answer to your question.

23 CHAIRMAN BABCOCK: Well, we were talking
24 about important things like the patch.

25 MS. GREER: Yeah, the patch, the Eagle Scout

1 patch.

2 CHAIRMAN BABCOCK: Yeah, Robert's trying to
3 give it to you.

4 MS. GREER: I heard, I heard that, but it's
5 been a great effort, and I really -- I really want to do a
6 shoutout to the whole subcommittee group, who has been
7 wonderful. I mean, we thrashed all of this around a lot,
8 and especially to Justice Miskel for taking the laboring
9 oar today and being the point person in there. I just
10 felt like if anything went wrong with Zoom, which it did,
11 it would be a lot smoother for her to run with it, and I
12 appreciate everyone's comments.

13 There was one other additional comment that
14 was raised that we haven't discussed, and I think this is
15 more to the administrative piece of it that would go in
16 the Supreme Court rule and that was, you know, unlike the
17 business courts which have provisions for OCA getting the
18 court up and running, finding facilities, et cetera,
19 leasing space, is that being done as to the Fifteenth
20 Court? Is that just happening, or is there something we
21 need to do in the administrative guidance to ensure that
22 that happens so that the court is open for business?

23 Because we talked about things like making
24 sure that they're ready, the judges are ready -- justices,
25 excuse me, are ready to do business on day one, you know,

1 you might want to have them sworn in ahead of time, and
2 you know, a lot of work can be done, advance work, to get
3 that going, and so I don't know if that's really within
4 our jurisdiction, but it seems to be something that's not
5 addressed in the statute that needs to be sure to be
6 happening.

7 MS. LAVOIE: So I'll say that, you know, I
8 think it was on third reading in the House they
9 administratively attached the Fifteenth Court of Appeals
10 to OCA.

11 MS. GREER: Okay.

12 MS. LAVOIE: And then they called us and
13 said, "Is this okay?" And we said we can't have an
14 appellate court attached to us, so they removed that
15 language, but we have been in talks with legislative
16 leadership about helping to implement the Fifteenth Court
17 of Appeals, and one thing that we're working with
18 leadership on is releasing some of the funding so that we
19 can hire a staff person to be the point person in
20 implementing the court; but yes, we have to find space,
21 courtroom space for them to use, and then all of supplies,
22 furniture, all of the logistics of setting up that court.
23 So we're working on that. I saw a draft of a letter that
24 legislative leadership is supposed to sign directing LBB
25 and the comptroller to hopefully release some of the funds

1 so that we can get started on that.

2 MS. GREER: Wonderful. Thank you. We'll
3 take that off our list then.

4 HONORABLE EMILY MISKEL: Well, I guess
5 that's a natural transition. Was there something that was
6 referred to the subcommittee that we didn't address or
7 that needs further subcommittee work?

8 CHAIRMAN BABCOCK: I will say from my
9 perspective, no, but --

10 HONORABLE NATHAN HECHT: No. I think we've
11 got what we need to get to work on it.

12 CHAIRMAN BABCOCK: One more time, what a
13 great job. I mean, I was thinking we would take all of
14 today and, you know, need to maybe work beyond the 5:00
15 o'clock deadline; but the thing was so well done that, you
16 know, I think we're finished for today, which to me is a
17 surprise, but it's great. So I don't think we should
18 award more than one patch, but we'll have a little arm
19 wrestle between Robert and Marcy to see who gets it, and
20 anybody wants to pay the price of admission to see it,
21 well, the arm wrestling I mean, you're welcome to be
22 there.

23 We'll be back on December 1. Anybody want
24 to take bets on whether the Legislature is still in
25 session?

1 We'll see you then. Thank you. We're in
2 recess.

3 MS. GREER: Thank you.

4 (Adjourned)

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REPORTER'S CERTIFICATION
MEETING OF THE
SUPREME COURT ADVISORY COMMITTEE

* * * * *

I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above meeting of the Supreme Court Advisory Committee on the 13th day of October, 2023, and the same was thereafter reduced to computer transcription by me.

I further certify that the costs for my services in the matter are \$ 1,892.00.

Charged to: The State Bar of Texas.

Given under my hand and seal of office on this the 10th day of November, 2023.

/s/D'Lois L. Jones
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