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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

December 1, 2023

(FRIDAY SESSION)

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Taken before *D'Lois L. Jones*, Certified
Shorthand Reporter in and for the State of Texas, reported
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2 CHAIRMAN BABCOCK: All right, let's get
3 started here. Welcome, everyone, to the last meeting of
4 our year and the last meeting of our term. We've got a
5 lighter agenda today than we anticipated when some
6 subcommittees weren't ready to report yet on a couple of
7 items, excuse me, but we'll get through that and go to our
8 customary item of having Chief Justice Hecht report to the
9 committee on what the Court is up to.

10 HONORABLE NATHAN HECHT: Well, thanks, Chip.
11 Good morning, everyone. Several things,
12 mostly rules related to legislative directives and other
13 legislation, but the first one was we ordered referendum
14 on 12 changes in the disciplinary rules, which will be in
15 April of next year, April 1 through 30th. We have not
16 heard that those proposals are controversial, but the bar
17 will be putting out information about them and trying to
18 run its usual educational campaign before the referendum
19 in April.

20 On the legislative front, per our standard
21 practice, with the four sets of rules we went ahead and
22 made them -- we ordered them to meet the September 1st
23 deadline, but could not have public comments by that time
24 and responses to them, so typically, if we can, we try to
25 get the rules on an order and meet the deadline and then

1 have the public comment and make changes, which is what
2 we've done in several instances. One of them is respect
3 to jury summons. There was a House Bill that would give
4 clerks authority to summon jurors as well as sheriffs and
5 constables, so we made that order.

6 There had been a couple of bills on judicial
7 education and governing statements made by candidates for
8 judicial office, and so we discussed those changes, and we
9 made those by order amending the Code of Judicial Conduct
10 and the conduct commission's procedural rules.

11 You will remember we discussed the bill that
12 would return discovery in family law cases to requests for
13 disclosure rather than required disclosure, which is what
14 we had adopted previously in civil cases, and so that
15 change was made, and then some legislation regarding how
16 permissive appeals work their way through the system, and
17 we got comments from several of the chief justices,
18 including Chief Justice Christopher, and made responses
19 consistent with their recommendations and put those out in
20 order. So those four sets that we had already ordered,
21 but now had finalized changes in.

22 Then there were three other sets of rules.
23 One of them is technical. Criminal courts can refer --
24 I'm sorry, courts can refer civil litigation from in forma
25 pauperis inmates to a magistrate for recommendation, and

1 the bill increased that referral mechanism to include
2 sexually violent predators, so we made that change.

3 There are a number of changes in the
4 Judicial Branch Certification Commission rules in response
5 to four bills that were passed this session, and I won't
6 go through all of those, but of course, the commission
7 handles court reporters, court interpreters, guardians,
8 and process servers, and we ordered those changes to be
9 effective, and then finally adopted some minor changes in
10 the rules regarding training of -- with respect to
11 guardianships, alternatives, and support and services for
12 wards. So some kind of improvements on training in those
13 cases, and we made that change.

14 Then today is the final day of comment for
15 two sets of rules, so get your thoughts in. One on
16 supersedeas. The statute authorizes alternative security
17 for some judgment debtors worth less than \$10 million, and
18 then a change in the disciplinary rules regarding the --
19 regarding standing to bring a successful complaint against
20 a lawyer. So all total, nine sets of rules were flying
21 past us in November. I get about -- Jane and I get about
22 six e-mails a day from Jackie with the hard work on all of
23 these issues.

24 The rules process was initially adopted by
25 the Legislature in 1939 to facilitate the adoption of the

1 Rules of Civil Procedure, which had followed -- it was
2 kind of a national movement following the Federal Rules of
3 Civil Procedure, and for a long time that procedure was
4 not used very often. It was used to recognize
5 interrogatories and motions for summary judgment, but it
6 was pretty sparse. Beginning in 2003 we convinced the
7 Legislature that it should rely on that process, this
8 process, for changes in court-type administration and
9 procedural rules, because we have a thorough way of
10 vetting those. The stakeholders, lawyers who have to
11 practice under the rules have plenty of input, the
12 Legislature is free to set guidance, the kind of policy,
13 that they want it to go this way or this way without
14 getting down into the details that are hard to get into in
15 a legislative session, and it has proven very trustworthy,
16 and we have maybe more trust than we can handle with the
17 number of assignments that the Legislature continues to
18 send our way, but we're glad to have them all done, and of
19 course, we're working on the business court rules and a
20 number of other changes that will result from the
21 legislation this past Legislature, so we've been very busy
22 and I think very productive.

23 CHAIRMAN BABCOCK: Thank you, Chief, and I
24 think -- think about it historically, there was a Supreme
25 Court Advisory Committee I think starting in 1939, and as

1 I recall, it had like four people on it, right?

2 HONORABLE NATHAN HECHT: No, it had about
3 10.

4 CHAIRMAN BABCOCK: Did it have that many?

5 HONORABLE NATHAN HECHT: Yeah, it had 10 or
6 11 former law professors, former Supreme Court justices.

7 CHAIRMAN BABCOCK: And was Angus Wynne the
8 Chair?

9 HONORABLE NATHAN HECHT: Yeah. And they
10 were instructed to compose the Texas Rules of Civil
11 Procedure, and so, very wisely, they took all of the rules
12 that were in the Black Statutes and called them Rules of
13 Civil Procedure and said, "Thank you for the authority,
14 and God bless you" and went home. They made some tweaks
15 along the way, but you'll notice when you read through the
16 old Black Statute annotation, the West annotations in the
17 rules, this rule was taken from this statute. This rule
18 was taken from Federal Rule of Civil Procedure
19 such-and-such, so they didn't -- they didn't try to
20 reinvent the wheel in 1939.

21 And I don't like to say this, but it is the
22 truth. The next legislative session after we adopted the
23 Texas Rules of Civil Procedure, there was a significant
24 effort in the Legislature to repeal the Court's
25 rule-making power and the Rules of Civil Procedure and

1 return it all to the statutes, which thank goodness that
2 failed, but --

3 CHAIRMAN BABCOCK: Yeah. And as I recall,
4 you and I were there at that original meeting.

5 HONORABLE NATHAN HECHT: Yeah, yeah.

6 CHAIRMAN BABCOCK: All right. Justice
7 Bland, you're next.

8 HONORABLE JANE BLAND: Well, and to quote
9 Charlie Munger, who died this week just short of his
10 hundredth birthday and quite a fine legal career and in
11 particular advising one man in Omaha, Nebraska, "I have
12 nothing to add."

13 CHAIRMAN BABCOCK: All right. Very good.
14 Then we'll go to our first agenda item on the inability to
15 afford payment of court costs, and, Judge Estevez, are you
16 going to lead us through that?

17 HONORABLE ANA ESTEVEZ: I think so, because
18 Levi won't be here until later, so he told me to go ahead
19 and go.

20 CHAIRMAN BABCOCK: Let's go ahead.

21 HONORABLE ANA ESTEVEZ: Whatever you want to
22 do. All right. Well, we were assigned another issue.
23 The issue being that Chapter 14A had just been adopted,
24 and in it it also has -- we can call it installment
25 payments. We do this in the criminal world as well, where

1 we take the governmental -- the court clerks will take the
2 money out of their inmate accounts in order to pay their
3 filing fees, their fines, or whatever it may be, and so
4 traditionally when Chapter 14 was passed, which allowed --
5 which allowed courts to dismiss frivolous lawsuits that
6 were filed by incarcerated individuals, because they do
7 tend to have a legal library and a lot of time on their
8 hands so they find lots reasons to file lawsuits, and some
9 of them are good reasons, and unfortunately some of them
10 are not. And so in order to not get bogged down in that
11 system, the Legislature passed laws back in 1995 in order
12 to reduce that type of litigation and get it out if it
13 needed to be dismissed and find a way to get costs paid if
14 they needed to pay costs, if they were -- because they are
15 indigent, but people put money in their inmate accounts.
16 So I'm giving you guys this background because it's very
17 relevant to what now has happened.

18 So then after that at some point the
19 Legislature decided that we were -- that it would be a
20 good idea to civilly commit sexually violent predators so
21 that if there's a finding that they are very likely to
22 commit other violent sexual crimes, then they will stay
23 incarcerated until they are determined no longer to be a
24 threat to society. So that is where Chapter 14A came in,
25 and we did some projects on that earlier this year, and

1 then this section in the new assignment that we have here
2 has to do specifically with, well, chapter -- Rule 145 of
3 our Texas civil rules allow for installment payments if
4 someone cannot pay all of their court costs and fines and
5 they're required to pay them because there's a finding
6 that they can pay some.

7 And so likewise, in Chapter 14A, there is a
8 provision that is -- again, I'm going to keep going back
9 to Chapter 14 because I think some of our recommendations
10 we need to kind of look at what have we been doing for all
11 of these years for all of that because all they did, the
12 Legislature's actually -- and I talked to the Senators
13 that passed it. They intended to make it exactly the
14 same, except for where it had to change in order to meet
15 the needs they had. But 14A.054, court fees, court costs,
16 other costs, allows the court's order for civilly
17 committed individual to pay an amount equal to the lesser
18 of 20 percent of the preceding six months' deposits to the
19 individual's trust account or the total amount of court
20 fees, court costs, and other costs. So in each month
21 following the month in which payment is made under
22 subsection (b), the civilly committed individual shall pay
23 an amount equal to the lesser of 10 percent of that
24 month's deposits to the trust account or the total amount
25 of court fees, court costs, and other costs that remains

1 unpaid.

2 And so the question that was given to us
3 was -- or we are to consider is whether Texas Rule of
4 Civil Procedure 145 should be changed or a comment added
5 to reference or restate the statute and draft any
6 recommended amendments. The majority of our subcommittee
7 did believe that -- well, let's start with all of us
8 agreed we shouldn't change the rule, and the majority,
9 three of the subcommittee members, believed that we should
10 adopt a comment, and I was in the minority. I didn't
11 think -- I mean, no one did anything in 1995 to this time
12 to put anything in the rule or the comment.

13 We do get lots of cases under chapter --
14 Chapter 14. There's an increase in cases, so I do have
15 some under 14A, but the reality is, I mean, this is going
16 to be helpful to a judge more than a practitioner, because
17 we would have already been looking at Chapter 14 or
18 Chapter 14A if we're dealing with it, so the -- there
19 isn't any -- there's not a lawyer that's going to go and
20 say, "What do I need to do? Is there another rule for me
21 to help out my -- my friend there," because it's
22 usually -- it is pro se litigation that we're really
23 dealing with and if we're looking at the dismissal and
24 we're looking at the court costs, so the question is,
25 what -- does a judge need that to be able to look at it

1 and see that that's what needs to be done, and I would
2 suggest that once they start getting this inmate
3 litigation they will find that chapter and they will
4 highlight it and they don't -- it's not going to be
5 helpful. It's just going to take up more space more than
6 anything else.

7 Obviously any note will help anyone that
8 sees it, but then does it require you to continually add
9 as other other nuances show up in the law, and if that's
10 the direction we want to go, then, yes, let's do a
11 comment. So the comment we suggested as -- as a majority
12 is at the last page of that memo. It just says, "The
13 Texas Civil Practice & Remedies Code provides for specific
14 payment arrangements for those in criminal and civil
15 custody," instead of being specific of what they do, and
16 it just says, "See Chapters 14 and 14A of the Texas Civil
17 Practice & Remedies Code." Because I did think if we were
18 going to go in there to make a comment it makes no sense
19 to make one for Chapter 14A that is not going to be used
20 as much as Chapter 14 that's used every single day.
21 Probably any judge that has a prison in their jurisdiction
22 probably deals with it all the time. So you need to
23 either do something for both of them or not do anything
24 for either. And that's all I have.

25 CHAIRMAN BABCOCK: Great. Any views on

1 whether we should just leave it alone and not even have a
2 comment as the judge in minority on the subcommittee
3 advocates, just leave it alone? Anybody have any thoughts
4 on that? Judge Schaffer, you look like you're ready to
5 go.

6 HONORABLE MARIA SALAS MENDOZA: I would just
7 say I would agree to leave it alone except what was the
8 rationale for those folks on the committee who thought we
9 needed a comment?

10 HONORABLE STEPHEN YELENOSKY: I couldn't
11 hear you.

12 CHAIRMAN BABCOCK: Speak up.

13 HONORABLE MARIA SALAS MENDOZA: The folks
14 who wanted a comment, what was the reason for it?

15 HONORABLE STEPHEN YELENOSKY: Well --

16 CHAIRMAN BABCOCK: Yeah, Steve.

17 HONORABLE ANA ESTEVEZ: He was on the
18 committee.

19 HONORABLE STEPHEN YELENOSKY: I guess -- and
20 I understand the response for the judge. I don't feel
21 that strongly about it, but it was -- if you read it
22 literally, it says you can set up a -- you can have them
23 pay less because of their income. That's just not true
24 under 14 or 14A, right? So that's why.

25 CHAIRMAN BABCOCK: Okay. Yeah.

1 HONORABLE DAVID PEEPLES: On the question of
2 whether to have the comment or not, I'm strongly in favor
3 of it, because there are a lot of generalists out there,
4 both lawyers, but especially judges who do all kinds of
5 things and not going to know about this, and the people
6 before them may not know about it, but if it's in the rule
7 book as a comment, that lets them know, and the burden or
8 the cost of doing this is nothing. The benefit is the
9 generalist, like I kind of was for many years, it's there
10 and you know about it. I think it's a no-brainer to have
11 this comment.

12 CHAIRMAN BABCOCK: Okay. So one vote very
13 strongly in favor of the comment.

14 HONORABLE ANA ESTEVEZ: I'm a minimalist.

15 CHAIRMAN BABCOCK: Anybody else have
16 comments about the comment? All right. What about the
17 substance of the comment? Judge Estevez says we ought to
18 include both Chapter 14 and 14A if we're going to have a
19 comment, which makes some sense to me. Any other thoughts
20 on that?

21 I take it there was no dissension in the
22 subcommittee about the wording of the comment?

23 HONORABLE ANA ESTEVEZ: We just agreed -- I
24 mean, we made some slight changes, and that's what we all
25 agreed to submit, so if we had changes, it was unanimous

1 by the time we got to this point.

2 CHAIRMAN BABCOCK: Okay. It looks pretty
3 straightforward to me. Anybody got any thoughts?

4 All right. Well, tell Levi that -- unless
5 Justice Gray is pondering with his pencil there.

6 HONORABLE ANA ESTEVEZ: He is pondering. He
7 wants to defend me, but he thinks it was a no-brainer,
8 too.

9 CHAIRMAN BABCOCK: Is that a call for
10 recognition?

11 HONORABLE TOM GRAY: I will just make the
12 observation that you already have two pages of comments to
13 Rule 145, literally in the rule book.

14 CHAIRMAN BABCOCK: And so one could argue
15 what's a little bit more, or you've already got too much
16 so let's not add to it.

17 HONORABLE TOM GRAY: Or maybe we need to
18 remove everything that's there and have it nice and clean.

19 CHAIRMAN BABCOCK: Well, that would be
20 another project for us, right?

21 HONORABLE TOM GRAY: But in summary, let me
22 say I have nothing to add.

23 CHAIRMAN BABCOCK: Ah, there we go. Justice
24 Bland is leading the theme of today's meeting. Okay. Any
25 other comments about this?

1 All right. Well, tell Levi he didn't make
2 it in time, so too bad, so we will submit that one to the
3 Court and go on to the next, notice by qualified delivery
4 method, and, Harvey, are you -- are you on tap for that?

5 HONORABLE HARVEY BROWN: Yes, I didn't
6 expect to be this fast, so give me a second.

7 CHAIRMAN BABCOCK: We're lightning fast in
8 this committee.

9 HONORABLE HARVEY BROWN: Okay. Our
10 subcommittee was referred a number of House bills and
11 Senate bills. Four, four of them, that made changes in
12 the delivery system in estate matters and in guardianship
13 proceedings. The statutes are very long. That's the
14 statutes, but we went through them all, and in the end
15 decided that no changes in the rules need to be made, but
16 some changes in -- or some suggested comments would be
17 helpful, so if you have my -- or our memo, on overview on
18 the first page, I'll go through them each one at a time.

19 So again, these are changes in the delivery
20 system so you can now use Federal Express, private process
21 servers, and that's basically about it, and they're just
22 in these proceedings. So going a little bit out of order
23 let me take a big picture issue first, which is our
24 committee talked about whether we should change the rules
25 for delivery in all cases, not just guardianship and

1 estate cases, but all cases as a whole, and we decided not
2 to do that. One, these rules were supposed to take effect
3 pretty quickly, and we didn't have time to do that, and
4 two, that seemed like a wholesale change beyond anything
5 the Legislature had asked for or anything the Court had
6 asked us to look at. So if anybody wants that to be done,
7 that would be kind of new work, so to speak, but we just
8 noted that as kind of a policy issue as to why we should
9 have this change in guardianships and estate cases but not
10 other cases. It might make sense in all cases, but that
11 just did not seem within our task.

12 So then turning to our task at hand is
13 implementing these particular statutes, and if you'll see
14 in the bottom of page one and carrying over to page two,
15 we recommend in addition to Rule 21a and Rule 106 the
16 following comment: "The Estates Code provides for other
17 methods of service and citation and proof thereof in
18 estate and guardianship proceedings and governs those
19 proceedings." Pretty straightforward, pretty simple, not
20 creating a special rule just for guardianship proceedings.
21 Our thought was that probably the people who do this are
22 for the most part people who have some specialization in
23 that, and secondly, that having a rule, trying to tweak
24 the rule as a whole would make it more difficult, and a
25 comment would provide just what we needed to aid the

1 practitioner, kind of in line with what Judge Peeples was
2 just saying, educating the practitioner just in case
3 somebody takes up an odd case. So we were unanimous in
4 all of our comments, and we really, frankly, found these
5 not to be too controversial. So that's our first one.

6 CHAIRMAN BABCOCK: Okay. Any -- any
7 thoughts about this? Justice Gray.

8 HONORABLE TOM GRAY: I have nothing to add.

9 CHAIRMAN BABCOCK: Nothing to add. Anybody
10 else have anything to add to what looks like a fairly
11 straightforward thing? Any other comments about it?
12 Yeah, Nina.

13 MS. CORTELL: And I'm not well-schooled in
14 this, but just reading what you've written here, should it
15 say "for additional methods" instead of "other methods,"
16 or is that clear that, in other words, it's additive not
17 alternative?

18 HONORABLE HARVEY BROWN: Yeah, I don't see a
19 problem with that, at least initially without a lot of
20 thought about it, but, yeah, I think that sounds like a
21 good idea.

22 MS. CORTELL: Something to think about.

23 HONORABLE HARVEY BROWN: A friendly
24 amendment.

25 MS. CORTELL: Friendly suggestion.

1 CHAIRMAN BABCOCK: Well, yeah, if it says
2 "other," that suggests that it's exclusive --

3 HONORABLE HARVEY BROWN: Right.

4 CHAIRMAN BABCOCK: -- of what exists
5 already.

6 HONORABLE HARVEY BROWN: Right.

7 CHAIRMAN BABCOCK: And it really is
8 additional.

9 HONORABLE HARVEY BROWN: Right.

10 CHAIRMAN BABCOCK: So that's a great
11 comment. See, she had something to add.

12 HONORABLE TOM GRAY: I wished I had thought
13 of it.

14 CHAIRMAN BABCOCK: Yeah.

15 HONORABLE HARVEY BROWN: We already are glad
16 that Nina was here. We were happy beforehand, but even
17 more now.

18 MS. CORTELL: Thank you.

19 CHAIRMAN BABCOCK: All right. I don't hear
20 anything else about that comment, so --

21 HONORABLE HARVEY BROWN: All right. The
22 next is to add a provision to Rule 106. This is the
23 second page of our memo. It is the first full paragraph
24 that's in italics, and this is about the citation of --
25 the service of citation or summons in particular

1 proceedings where they must be personally served on the
2 parties. So, again, this is just for a limited number of
3 cases, just limited to guardianships, and as -- excuse me,
4 just limited to the Estates Code, and we have recommended
5 saying as a comment, "However, some statutes specify that
6 citations or summons must be personally served on certain
7 parties in certain specialized proceedings," and then we
8 give a citation for an example. So in certain cases you
9 have to do it by personal service. You can't use these
10 alternative systems. So we've just put that directly into
11 a comment.

12 CHAIRMAN BABCOCK: Are you going to cause
13 heartburn by saying it this way? Aren't you just saying
14 that it's the Estates Code that provides for additional?

15 HONORABLE HARVEY BROWN: You mean by saying
16 "some statutes" rather than by saying --

17 CHAIRMAN BABCOCK: Yeah.

18 HONORABLE HARVEY BROWN: -- Estates Code?

19 CHAIRMAN BABCOCK: Because if I'm a
20 practitioner and I see that, I say, okay, I see the "See,
21 e.g., the Estates Code," but what else am I missing?

22 HONORABLE HARVEY BROWN: I don't remember
23 off the top of my head, is this the one where we thought
24 the Family Code might have an exception? Do you remember?

25 MS. GREER: I think so.

1 HONORABLE HARVEY BROWN: I think we thought
2 there might be an argument about the Family Code, and
3 that's why we put "See, e.g."

4 CHAIRMAN BABCOCK: Is that the right way to
5 go about it?

6 MS. GREER: Well, it might be. I believe we
7 just weren't sure.

8 CHAIRMAN BABCOCK: I'm sorry, Marcy, did you
9 say something?

10 MS. GREER: We also thought it might -- that
11 it might be impacted by the Property Code. There's some
12 provisions in the Property Code. More the Family Code I
13 think, though.

14 CHAIRMAN BABCOCK: Yeah. Stephen.

15 HONORABLE STEPHEN YELENOSKY: I think now
16 about these comments, maybe we should just have one at the
17 beginning of the rules that says there are exceptions that
18 prove the rule.

19 CHAIRMAN BABCOCK: There you go. Well, if
20 we're sitting here saying, well, maybe there's some
21 others, maybe there are not --

22 HONORABLE HARVEY BROWN: We weren't certain,
23 so we thought better not take a position that it's just
24 the Estates Code.

25 CHAIRMAN BABCOCK: Okay.

1 HONORABLE HARVEY BROWN: So let the
2 practitioners research that if they want to further.

3 CHAIRMAN BABCOCK: So if I'm trying to
4 figure out service and I've got, you know, a run of the
5 mill case that I'm planning on serving in some way other
6 than personal service and I see this comment, I'm going to
7 have my young lawyer spend two or three hours trying to
8 find if there are any other statutes that cover what I'm
9 about to try to do.

10 HONORABLE HARVEY BROWN: Probably so.

11 CHAIRMAN BABCOCK: Professor Carlson.

12 PROFESSOR CARLSON: Can't you waive, the
13 other side waive that if they don't complain about the
14 service, if they file an answer?

15 CHAIRMAN BABCOCK: Yeah, probably, yeah.

16 PROFESSOR CARLSON: So roll those dice.

17 CHAIRMAN BABCOCK: Yeah, but if I'm trying
18 to do it right -- yeah, Justice Gray.

19 HONORABLE TOM GRAY: Doing it right makes a
20 difference when you get to a default judgment.

21 CHAIRMAN BABCOCK: Right.

22 HONORABLE TOM GRAY: And then you wind up on
23 bill of review that comes up to us. We look at the
24 record, we see it wasn't complied with, you may have been
25 served one way but not the right way, so I think it needs

1 to be either more of a warning and not so much for the
2 Estates Code or try to actually identify all of the
3 specialty situations, sort of go one direction or the
4 other, and this kind of seems to be landing in the middle
5 somewhere as kind of a -- a weak warning that there may be
6 other ways, and it just seems unsatisfactory to me.

7 HONORABLE HARVEY BROWN: We actually had
8 originally not put an example. We took out -- we did not
9 have the "See, e.g." at first, but we thought that since
10 this came up in connection with the new statutes about
11 estate matters that telling people specifically that
12 there's this new statute would be helpful. None of us
13 were practitioners in the family law area and just didn't
14 feel comfortable adding that as a, you know, definitive
15 statement without additional research on it. I mean, if
16 you wanted us to look at that, I guess I could talk to
17 Richard Orsinger and see if we could list another
18 provision.

19 CHAIRMAN BABCOCK: Well, I mean, we've got
20 some pretty broad experience in this room. Can anybody
21 think of any other -- other circumstance other than with
22 the estate -- newly amended Estates Code that requires
23 personal service? I mean, you said maybe the Family Code,
24 maybe the Property Code.

25 HONORABLE EMILY MISKEL: So I'm not aware of

1 general family law, but I was going to pull up the statute
2 and look at the CPS rules to see whether there might be
3 anything in there, so I don't know. I'm looking.

4 CHAIRMAN BABCOCK: Okay. It seems to me
5 that it might be a benefit to the practitioner who --
6 whose client can't afford to have a young lawyer reinvent
7 the wheel every time by spending three hours looking to
8 see if there's some other statute that we either figure
9 out what the other statutes are and put them in there or
10 have a generic statement without any "e.g." or not have
11 any at all. Judge Wallace.

12 HONORABLE R. H. WALLACE: I was saying hello
13 to Rusty.

14 CHAIRMAN BABCOCK: Well, when you raise your
15 hand like that. Yeah, Nina.

16 MS. CORTELL: I really agree with that. I
17 mean, I'd like the idea of these comments if they're
18 directive and informative such as Judge Peeples mentioned
19 on the prior vote, but to just have a comment that there's
20 something out there that might change the foregoing --

21 CHAIRMAN BABCOCK: Go find it.

22 MS. CORTELL: Yeah, right. I just
23 philosophically wouldn't agree with a comment in that
24 circumstance.

25 CHAIRMAN BABCOCK: Yeah, Marcy.

1 MS. GREER: I found the Family Code
2 provision we were thinking of, which is section 102.011
3 requiring jurisdiction over a nonresident, and it talks
4 about personal service.

5 CHAIRMAN BABCOCK: Okay. So there's one
6 other example we can point to.

7 MS. GREER: And there's also 65.058. Now,
8 these deal with personally serving someone who's out of
9 state when they're in this state, but we thought it could
10 be interpreted that way.

11 CHAIRMAN BABCOCK: Okay. So two more
12 examples. And maybe there are others. Yeah, Tom.

13 MR. RINEY: I have a vague recollection that
14 there's some case law that says a minor has to be
15 personally served. I mean, it's been years ago, but I
16 think, for example, a lawyer couldn't accept service on
17 behalf of a minor. I don't know if that's impacted by
18 this or not, and I candidly don't remember the law on that
19 very well.

20 CHAIRMAN BABCOCK: Okay.

21 HONORABLE MARIA SALAS MENDOZA: I think
22 that's true. That's what I'm thinking, if they're in a
23 CPS case you have to serve the minors.

24 MR. RINEY: I think even in like a tort case
25 that's true as well.

1 HONORABLE MARIA SALAS MENDOZA: Or in like a
2 juvenile prosecution.

3 CHAIRMAN BABCOCK: Okay. So we've come up
4 with three or four examples in addition to the Estates
5 Code that -- where it might be applicable, so I think we
6 probably ought to as a group decide which is the best
7 approach. Is it the one recommended by the subcommittee,
8 or is it one without an "e.g.," or should Jackie go and
9 find out all of the examples that there are and put them
10 in there? Since she's not here to defend herself. So we
11 haven't taken a vote, so let's just take a vote so we can
12 limber up here.

13 How many think we should have just a
14 comment that says, hey, there may be some stuff out there,
15 but not have the "e.g." for the Estates Code? Anybody in
16 favor of that, raise your hand. One hand is raised. Tom
17 -- is there somebody else from West Texas that was in
18 favor of that?

19 MR. WATSON: I used to be from West Texas.

20 CHAIRMAN BABCOCK: All right. So we have
21 two West Texans, where personal service may be more of a
22 challenge than it is in an urban area, but nobody else is
23 in favor of that, so that will fail.

24 So how about the comment as suggested by the
25 subcommittee? How many people are in favor of that?

1 And how many are opposed?

2 And how many people are not voting? All
3 right. So it's seven to five in favor of the comment as
4 proposed. Five against and three abstentions, the Chair
5 not voting, so I guess it's four abstentions. All right,
6 yeah, Harvey.

7 HONORABLE HARVEY BROWN: Speaking
8 individually, not for my committee, if we are sure we have
9 all of them I would favor that. I just was concerned if
10 we missed a number, that might suggest that's exclusive,
11 and I was just concerned that we might miss one.

12 CHAIRMAN BABCOCK: Yeah. Fair point. All
13 right. Is there another comment that you moved to?

14 HONORABLE HARVEY BROWN: Yes. There's
15 also a waiver of citation set forth in Section 14 of House
16 Bill -- or Senate Bill, excuse me, 1373, which provides
17 for waiver of citation on minors in certain cases, and we
18 have recommended adding to Rule 119, because right now it
19 just talks about waiver generally and acceptance of
20 service, the following provision: "The Estates Code
21 provides for the waiver of citation by certain parties in
22 probate and heirship proceedings and governs those
23 proceedings." So again, telling somebody there's a
24 special rule for the Estates Code and alerting them to
25 that in a comment but not changing the rule itself.

1 CHAIRMAN BABCOCK: I'm sorry. Could you
2 repeat that?

3 HONORABLE HARVEY BROWN: Yes. It's the
4 second page, the last sentence of the second paragraph
5 that's fully italicized and says, "The Estate Code
6 provides for waiver of citation by certain parties in
7 probate and heirship proceedings and governs those
8 proceedings."

9 CHAIRMAN BABCOCK: Okay. Any other comments
10 about -- about that proposal?

11 HONORABLE ANA ESTEVEZ: I just want to state
12 that is the next agenda item, too.

13 CHAIRMAN BABCOCK: Okay.

14 HONORABLE ANA ESTEVEZ: Just to let you know
15 that we're now doing both of them at the same time.

16 HONORABLE HARVEY BROWN: Yeah, there was a
17 little confusion as to which committee was looking at it,
18 and so two committees looked at it. Our committee
19 recommended a comment. I think their committee didn't
20 really think a comment was necessary.

21 HONORABLE ANA ESTEVEZ: I'm sure it was a
22 no-brainer that we should do it, though. It's not fun
23 when David's not in here.

24 CHAIRMAN BABCOCK: Yeah, I'm sorry about
25 that confusion.

1 HONORABLE HARVEY BROWN: That's okay. No
2 problem.

3 HONORABLE ANA ESTEVEZ: We weren't upset.
4 They had done a lot of work on it, and we had just started
5 the work on it, so it worked out just fine.

6 CHAIRMAN BABCOCK: Okay, great. So we've
7 got a -- we've got a comment and --

8 HONORABLE ANA ESTEVEZ: And I don't -- I
9 believe that our subcommittee was actually voting with
10 theirs. I don't think we had a majority no comment, so
11 that's --

12 CHAIRMAN BABCOCK: Okay.

13 HONORABLE HARVEY BROWN: And we sent it
14 around yesterday, our memo, to their committee to look at
15 and see if they had any concerns.

16 HONORABLE ANA ESTEVEZ: And Richard had sent
17 that section out before that, so they saw it.

18 CHAIRMAN BABCOCK: Okay. So we have that
19 rare instance where two subcommittees have looked at the
20 same issue and come up with the same result?

21 HONORABLE ANA ESTEVEZ: Yes.

22 CHAIRMAN BABCOCK: I don't know that we need
23 to have any further discussion about this, do we?

24 HONORABLE ANA ESTEVEZ: Just to get along.

25 CHAIRMAN BABCOCK: Anybody have anything

1 else on this? Hello, Rusty.

2 MR. HARDIN: Good morning.

3 HONORABLE TOM GRAY: Chip, I'd like to make
4 one comment on the comment.

5 CHAIRMAN BABCOCK: Justice Gray.

6 HONORABLE TOM GRAY: It would seem to me,
7 particularly given the last recommendation, that this one
8 would truly benefit from a statutory reference. If you're
9 going to make this comment, why not specifically reference
10 where in the Estates Code there's the waiver of citation?

11 CHAIRMAN BABCOCK: Yeah, because this is not
12 an "e.g.." This is a "There it is."

13 HONORABLE TOM GRAY: Yes.

14 CHAIRMAN BABCOCK: Yeah. That makes sense.
15 What do you think about that, Harvey?

16 HONORABLE HARVEY BROWN: That makes sense to
17 me, too.

18 CHAIRMAN BABCOCK: Okay. All right.

19 HONORABLE TOM GRAY: I'm glad I drove down
20 for that.

21 CHAIRMAN BABCOCK: Excuse me?

22 HONORABLE TOM GRAY: I'm glad I drove down
23 for that.

24 CHAIRMAN BABCOCK: Yeah, everybody is glad
25 they're here, Judge. I bet I came further than you did.

1 HONORABLE TOM GRAY: I'm sure you did.

2 CHAIRMAN BABCOCK: I came from San Diego.

3 HONORABLE TOM GRAY: No comment.

4 CHAIRMAN BABCOCK: Yeah, you have nothing to
5 add. All right. Anything more about this comment with
6 that friendly amendment? Okay.

7 HONORABLE HARVEY BROWN: Lastly, there was a
8 change or an amendment to Estate Code 20 -- excuse me,
9 Estate Code section 1251.005, about personal service on a
10 ward and a temporary ward. It's a directive that does not
11 go to lawyers but is to the clerks, and we did not
12 recommend any change in the rules or a comment as a result
13 of this one. It does not affect the way lawyers will be
14 practicing but just affects the clerks.

15 CHAIRMAN BABCOCK: Okay.

16 HONORABLE HARVEY BROWN: And it specifically
17 refers to Rule 21a in the amendment, so we didn't think
18 anything was necessary there.

19 CHAIRMAN BABCOCK: Okay. Any other thoughts
20 or comments about that? Judge Wallace, you look like
21 you're just on the verge of saying something.

22 HONORABLE R. H. WALLACE: No.

23 CHAIRMAN BABCOCK: This is one of those rare
24 instances where I can call on a judge rather than being
25 called on. Okay. Harvey, anything else --

1 HONORABLE HARVEY BROWN: That's it. That's
2 it.

3 CHAIRMAN BABCOCK: -- on that? All right.
4 So we will submit that to the Court. Now, Harvey, is our
5 next agenda item, waiver of citation in probate
6 proceedings, we just covered that, right?

7 HONORABLE HARVEY BROWN: We've already
8 covered that. That's the one that we were talking about
9 earlier that two committees looked at.

10 CHAIRMAN BABCOCK: Okay. So we've now gone
11 through our agenda, but Justice Bland wants to -- so,
12 Justice Miskel and Marcy -- did she leave? Oh, no, she's
13 up getting food. Hey, Marcy, guess what, you're on the
14 agenda again.

15 MS. GREER: Okay.

16 CHAIRMAN BABCOCK: By the fiat of one of the
17 justices of the Court. We want you and Justice Miskel to
18 report to us on issues relating to the business court
19 rules.

20 HONORABLE JANE BLAND: Not necessarily
21 issues but give the committee an update on their interim
22 work.

23 CHAIRMAN BABCOCK: Give a report. We've got
24 a little bit of time and --

25 MR. HARDIN: So give a four-hour recitation.

1 HONORABLE EMILY MISKEL: I have a Power
2 Point prepared.

3 CHAIRMAN BABCOCK: You have to be done by
4 5:00, though, because that's when we're going to adjourn,
5 if not before.

6 HONORABLE EMILY MISKEL: Could I open one
7 document for reference since I'm being put on the spot
8 here?

9 CHAIRMAN BABCOCK: Let the record reflect
10 Marcy is going for more food and her glasses.

11 MS. GREER: First time food. We're going to
12 be accurate here. This is the document I've been working
13 on.

14 Well, do you want me to get into what I
15 think are going to be the challenges to the Court
16 generally or the rules or issues that we kind of came
17 across in working through the rules and the proposals?
18 What exactly --

19 CHAIRMAN BABCOCK: Well, I personally am
20 interested in all of those things. I don't know if
21 Justice Bland had that in mind or not, but since we've got
22 a little bit of time and we're treading water, so you
23 can -- you can sculpt it the way you think is most
24 helpful.

25 MS. GREER: Well, let me start and talk

1 about some of the things that came up in the course of the
2 discussion. Some of this was discussed in our last SCAC
3 meeting --

4 CHAIRMAN BABCOCK: Right.

5 MS. GREER: -- that are going to be impacts
6 of the rules and trying to put them in operation. First,
7 because I'm not really as well-versed in the
8 constitutional challenges and, you know, the advisability
9 issues. I can speak to those at a very high level, but
10 there are other people who have spent more time on that.

11 The big issue I think is determining what is
12 jurisdiction under the business court rule, and that's
13 going to have some impact under the Fifteenth court rules
14 as well, because they use the word -- the Legislature used
15 the word "jurisdiction" in different contexts, and I don't
16 think all of those contexts necessarily mean jurisdiction
17 as in the judgment would be void. I mean, I think most
18 people would agree, but, you know, obviously the Supreme
19 Court would be the final arbiter of this, but most people
20 would agree that if you tried to bring a personal injury
21 case in business court and the business court issued a
22 judgment on the personal injury piece, that would probably
23 be void, because that is not within its jurisdiction.

24 You know, and one distinction I need to make
25 that I think is really important that's not intuitive to a

1 lot of people, y'all probably all know this, but I have
2 been surprised at how many people don't know this. The
3 business court is a court of concurrent jurisdiction with
4 all the other courts of the 254 counties. It is not an
5 exclusive jurisdiction issue. It's an elective, and this
6 raises another issue. If you meet the requirements for
7 removal or for initial filing, can you hold it in the
8 business court? Is it mandatorily required to be there?
9 And I think the answer is, yes, the Legislature meant
10 that, but, you know, that's an issue that is subject to
11 some debate. The --

12 HONORABLE STEPHEN YELENOSKY: Is the debate
13 because of the constitutionality based on --

14 MS. GREER: Well, I mean, I think it's a
15 debate as to what was intended by that, can you bounce
16 back and forth, how does that work. I think --

17 HONORABLE STEPHEN YELENOSKY: But wouldn't
18 that -- wouldn't that curtail jurisdiction of
19 constitutional courts? And maybe I don't understand it.

20 MS. GREER: Possibly so. I mean, I think
21 there are two different challenges. There's a
22 constitutional challenge probably that you're
23 articulating, but also just a practical how does the
24 statute operate, because I believe that the intention was
25 if you meet the standards you could pull it into and

1 remove it to business court, and it's going to stay there,
2 but I think there could be a challenge in that regard or
3 at least a question mark.

4 There are other uses of the word
5 "jurisdiction" in the statute that I don't think have the
6 same meaning in terms of it should void any judgment of
7 the court, because of the concurrent nature of these
8 courts, and so it gets complicated.

9 But back to the exclusive jurisdiction, the
10 Fifteenth court is different because where it has
11 exclusive jurisdiction they use that term, and it has
12 exclusive jurisdiction. It also has concurrent
13 jurisdiction over anything that it doesn't have exclusive
14 jurisdiction in, so that's why in the Fifteenth Court,
15 unlike the business court, you can pull the entire appeal
16 into the Fifteenth court regardless of whether the court
17 has exclusive jurisdiction over all of the issues.

18 The same is not true of the business court.
19 It's designed very differently and to have supplemental
20 jurisdiction over issues that are not within the core
21 jurisdiction, and I suspect -- I'm just throwing this out
22 there -- that you may end up getting to some sort of
23 concept like in bankruptcy court where you have core
24 jurisdiction and ancillary jurisdiction, but I'm not sure
25 how to resolve all of these words being used for the same

1 concepts or the same word being used for very different
2 concepts, but -- and I'm kind of jumping around because
3 you really caught me off guard on this.

4 CHAIRMAN BABCOCK: That's okay. That's why
5 you're a lawyer.

6 MS. GREER: But I think that there's a lot
7 of -- there's going to be a lot of discussion around how
8 this works, but back to the business court, you can't have
9 supplemental jurisdiction over a claim that is not within
10 the business court's jurisdiction unless all of the
11 parties agree and the business court judge agrees. So
12 it's kind of an unusual provision. It's not like federal
13 court where you have -- you remove, you have a federal
14 claim, and then you have supplemental jurisdiction, and
15 there are ways of dealing with that.

16 Here, you have to have everybody in
17 agreement, and I think that means that if everybody is in
18 agreement you could bring a personal injury case there,
19 arguably, but that provision itself, that you can confer
20 by agreement jurisdiction on the business court suggests
21 that this is not core or pure subject matter jurisdiction,
22 because you can build into a contract in advance that the
23 parties agree that this -- any dispute arising out of this
24 agreement or relating to it is to be brought in business
25 court alone. Well, that's a forum selection clause,

1 but -- and that confers jurisdiction, but clearly that
2 can't be core jurisdiction, because it's not -- I mean, it
3 makes it very, very complicated the way the statute is set
4 up. I don't envy your task of parsing through a lot of
5 this.

6 But another issue we talked about is what
7 types of things -- and when I say we've talked about, I've
8 talked about this in the context of our subcommittees,
9 which -- and by the way, I'm just going to do a shout out
10 to my subcommittee, which they have been incredible. I
11 mean, we have worked together so well, and I'm really
12 grateful. We had a lot of great lovely discussion, but
13 I've also been asked to speak on the courts, and people
14 are asking things like in what circumstances would it not
15 be a good idea to bring cases in business court and things
16 like that. So I think that's of interest, because people
17 are asking about it, and one of them is -- one instance
18 where I think that it would not be advisable is if you're
19 going to end up having two proceedings, you know, one in
20 business court and one not in business court, because that
21 is the default of having supplemental jurisdiction be by
22 agreement, is that you are likely to have one proceeding
23 in district or county court that is not within business
24 court jurisdiction and then one or two claims in business
25 court. So if that parallel proceeding situation is not

1 advisable for whatever reason, one or both parties may not
2 want to choose business court. So that was one of the
3 ones that we talked about.

4 The short tenure of the judges' appointment.
5 They're appointed for two years. Are you going to have
6 the same judge through the life of this dispute, because a
7 lot of commercial cases, a lot of the complex cases that
8 would be thought to be brought in business court are going
9 to be longer than two years most likely. The whole --
10 yeah.

11 HONORABLE TOM GRAY: I want to go back to
12 the -- before the two-year tenure. You were talking about
13 the two different proceedings. Is it your view that if
14 they do go forward, some claims in the business court,
15 some claims in the district or county court, that it
16 operates as a complete -- what we traditionally think of
17 as a severance of the claims, so that the appeals would go
18 up separately from the judgments of those two courts, or
19 is it more a separate trial question that it then has to
20 wait for the conclusion of both sets of claims before the
21 appeal is -- can be perfected?

22 MS. GREER: I mean, that's a great question,
23 and I don't know the answer to it. I do believe the way
24 the statute is set up that all of the claims from both
25 could go to the Fifteenth court, just because of the

1 nature, but arguably the claims that are not in the
2 business court would not, if they don't have another basis
3 for being in the Fifteenth court, like a governmental
4 entity or something like that. I mean, it's hard to
5 imagine that situation, but that's a very good question.
6 And then you have all kinds of issues of collateral
7 estoppel and res judicata and how is that going to apply,
8 and I think it's going to be probably the guidance that I
9 would suspect would be helpful is in arbitration type
10 situations, where part of the claim is arbitrable and the
11 rest is not.

12 CHAIRMAN BABCOCK: Kent.

13 HONORABLE KENT SULLIVAN: I'm just curious,
14 has anyone identified any purpose, any efficacy,
15 associated with not allowing ancillary jurisdiction? Or
16 is this just -- is this just a complete miss by the
17 Legislature? I mean, that's probably -- that would be my
18 guess, is that someone didn't anticipate it, and it was,
19 you know, not well-drafted.

20 MS. GREER: It's not a miss. They
21 specifically drafted that provision that requires --
22 you're talking about the supplemental jurisdiction, the
23 ancillary?

24 HONORABLE KENT SULLIVAN: Right.

25 MS. GREER: I mean, it's not a miss. They

1 specifically required that it had to have the agreement of
2 the parties and the court.

3 HONORABLE KENT SULLIVAN: Which violates the
4 normal rule of thumb, right, that you can't confer
5 jurisdiction by agreement, but I'm just curious what would
6 be the -- the purpose of saying -- they may have done it
7 consciously and intentionally. I just I literally cannot
8 identify a constructive purpose associated with that, and
9 I just was going to ask the people who have given a lot of
10 thought to this, what -- what's the reason behind this,
11 why it would make sense? Because otherwise one would
12 think, or at least at first glance I certainly thought,
13 that you would want to dispose of all related claims in
14 one proceeding for many of the reasons that have already
15 been suggested. You could have collateral estoppel
16 problems, res judicata problems. I mean, you could have
17 all kinds of problems, much less the horrific inefficiency
18 of having what is a nucleus of claims and common facts
19 that has to be distributed among multiple courts and fact
20 finders.

21 MS. GREER: Well, I don't know this for a
22 fact -- maybe you know.

23 HONORABLE EMILY MISKEL: I was just going to
24 say, so the supplement -- I think it's a political
25 decision. Here are the list of claims.

1 HONORABLE KENT SULLIVAN: We can all agree
2 on that.

3 HONORABLE EMILY MISKEL: But here are the --
4 you're asking like why wouldn't the business court just be
5 forced to take on all of the rest of the litigation?

6 HONORABLE KENT SULLIVAN: Normal ancillary
7 jurisdiction, because as I understand it --

8 HONORABLE EMILY MISKEL: So here are the
9 ones that are excluded -- here are the ones that are not
10 within the business court jurisdiction unless everyone
11 agrees, and it's suits by or against the government,
12 foreclosures, antitrust, D.T.P.A., Estates Code, Family
13 Code, liens, trusts, farm products, consumer transactions,
14 and Insurance Code and insurance policies. So my guess
15 is -- I mean, I'm sure a lot of those were specific
16 political concerns, but also, they didn't want the
17 business court busy doing estate litigation, farm product
18 litigation, Family Code litigation.

19 HONORABLE KENT SULLIVAN: Some of those I
20 think we would all concede are not likely to be within
21 normal ancillary jurisdiction of the sort of core business
22 disputes that were identified by the Legislature and given
23 to the business courts, but I suspect some are, right?
24 And those are going to be the problems. And I was just
25 curious whether you --

1 MS. GREER: Well, I do know from
2 presentations that I've attended that the specific
3 exceptions were very, very carefully negotiated and
4 very -- and absolutely critical to getting this bill
5 through. The plaintiff's bar was very much against having
6 any personal injury or any type claims in the business
7 court, and so it was critical that that be there, and I --
8 I suspect, but I don't know this for a fact, that
9 ancillary jurisdiction might be used as a bypass of that
10 to try to circumvent, and so they passed this provision to
11 make sure that everyone agrees that this belongs in
12 business court with supplemental jurisdictional.

13 HONORABLE KENT SULLIVAN: My mind may not be
14 creative enough. I don't see how out of one of these core
15 business disputes you end up with a personal injury case.
16 Maybe you do. I don't know.

17 MS. GREER: Well, family businesses get
18 ugly.

19 HONORABLE KENT SULLIVAN: They turn into
20 fistfights, is what you're saying? Okay.

21 CHAIRMAN BABCOCK: Marcy, something --

22 HONORABLE EMILY MISKEL: And I did want to
23 clarify something. So the things that are excluded for
24 business court jurisdiction no matter what, meaning they
25 can't even be there by agreement, are medical liability,

1 bodily injury or death, and legal malpractice. So there's
2 mandatory jurisdiction, supplemental jurisdiction, which
3 was that previous list, and then things that can never be
4 in the business court, even if anything else, which was
5 those three, medical liability, bodily injury, and legal
6 malpractice.

7 HONORABLE STEPHEN YELENOSKY: Is there
8 exclusive jurisdiction, exclusive jurisdiction on
9 anything? I thought you said that earlier, I'm sorry.

10 HONORABLE TOM GRAY: The Fifteenth Court of
11 Appeals has some exclusive jurisdiction.

12 HONORABLE STEPHEN YELENOSKY: But not the
13 trial court. Okay.

14 CHAIRMAN BABCOCK: So, Marcy, if -- if I've
15 got a client that has got a business dispute with Tom's
16 client there, and it's something that everybody would
17 agree that can be in the business court, so I sue Tom's
18 client in business court, and Tom says -- and his client
19 says, "We don't want to be in business court. This is not
20 good for us," so he files a similar, if not identical
21 lawsuit, in Potter County in state district court. What
22 happens then?

23 MS. GREER: If it's within the jurisdiction
24 of the business court, I would say that case could be
25 removed and consolidated.

1 CHAIRMAN BABCOCK: But what if in Potter
2 County Tom Riney rules, and that judge is not going to do
3 that?

4 MS. GREER: Well, that's the mandamus that
5 we've talked about. If the Court refuses to transfer a
6 case that is within the jurisdiction of the business
7 court, again concurrent jurisdiction, not exclusive, then
8 our recommendation was that the mandamus go to the court
9 of appeals of the administrative district where the
10 decision was made.

11 CHAIRMAN BABCOCK: Okay. But there's --

12 MS. GREER: On the transfer.

13 CHAIRMAN BABCOCK: But what -- the
14 hypothetical that I just advanced, that could happen.

15 MS. GREER: Oh, yeah. I think it could
16 happen. I mean, and I welcome other people's thoughts
17 about it. That's just how I would think about it.

18 CHAIRMAN BABCOCK: And there's nothing in
19 the rules -- there's nothing in the rules as we have them
20 developed so far that would require Tom's case to get
21 consolidated into my case. Right?

22 MS. GREER: Go ahead.

23 HONORABLE EMILY MISKEL: I was going to say,
24 I mean, we already have existing rules about if the same
25 litigation is filed in two counties there's rules about

1 abating and determining which one has --

2 CHAIRMAN BABCOCK: Right.

3 HONORABLE EMILY MISKEL: -- dominant -- I
4 can't remember. It's been a while since I looked at it.
5 So I would assume, like everything else, that the normal
6 Rules of Civil Procedure apply unless it's something
7 that's specifically changed by the business court statute.
8 So use Potter County very carefully as a county that is
9 not in a division of an active business court, so a Potter
10 County case could never be removed into a business court,
11 but if you have two lawsuits filed under the same subject
12 matter, we already have mechanisms for dealing with which
13 one should proceed.

14 CHAIRMAN BABCOCK: Okay. Stephen, and then
15 Justice Gray.

16 HONORABLE STEPHEN YELENOSKY: I haven't
17 studied this, but I'm still having trouble understanding
18 how somebody could be forced into the business court. I
19 mean, it's not a constitutional court, right? It's a
20 statutory court.

21 HONORABLE EMILY MISKEL: It's Article 1,
22 Section 5 of the Constitution is where they've said it is.

23 HONORABLE STEPHEN YELENOSKY: Well, where
24 they can add courts, right. So you can have concurrent
25 jurisdiction between a county court and district court,

1 right? But I don't understand how -- as in your example
2 -- and maybe I don't understand this fundamentally, and if
3 I don't, please tell me, but you're saying it could be
4 filed in the business court and could be filed in the
5 district court and somehow the district court would have
6 to potentially defer to the business court, even though
7 one party doesn't want that? How can that -- how can that
8 be? I mean, you've got a statutory court can't deprive a
9 constitutional court of jurisdiction, can it? I don't
10 understand that. Somebody please enlighten me.

11 CHAIRMAN BABCOCK: Well, I think what -- I
12 think my hypothetical was suggesting that there is a
13 circumstance like I -- like I posed that could happen, and
14 then the question is, is there a business court rule or do
15 we default, as Justice Miskel says, to the normal approach
16 that if I file a case in Harris County district court and
17 Tom files one in Potter County district court, then the
18 normal rules about how they would be consolidated would be
19 followed? But there is a twist here because, as you point
20 out, the business court is different than the district
21 court, even though they have overlapping jurisdiction.

22 Justice Gray. Sorry.

23 HONORABLE TOM GRAY: No, it continues on
24 exactly what you're talking about and gets into my
25 wheelhouse of then who gets the mandamus? The First Court

1 of Appeals, the Seventh Court of Appeals, or the Fifteenth
2 Court of Appeals? I mean, because all of them have a
3 court, trial court in their jurisdiction, to handle the
4 mandamus to decide if Tom Riney's case is going to go
5 forward or your case is going to go forward, and then, you
6 know, if it, God forbid, happened to be in Waco, you might
7 have a disagreement there, you know, on that court. So
8 who knows. I mean, it really is -- and I think that gets
9 to that one rule of where do you file the -- the appeal,
10 who gets to pick, and which one is the proper court of
11 appeals to take the mandamus or even the appeal to, and
12 that's why the TRAP rule on that designation of appellate
13 court can matter.

14 CHAIRMAN BABCOCK: What if -- what if in
15 Tom's case in Potter County I -- you know, I invoke the
16 normal consolidation rules under the Texas Rules of Civil
17 Procedure, and Tom's judge in Potter County says, "We're
18 going to carry that motion until trial"?

19 HONORABLE TOM GRAY: Well, I think the -- I
20 mean, what's going to happen is you're going to get the
21 mandamus. Somebody, one side or the other, either you or
22 Tom is going to do the mandamus, and the question is which
23 one -- under *Miles vs. Ford Motor*, which of you are going
24 to get first to a court of appeals that can decide it so
25 that you can be done with that level and go on to Nathan

1 and see what happens at the Supreme Court.

2 CHAIRMAN BABCOCK: And Jane.

3 HONORABLE TOM GRAY: Yes. I'm sorry, Jane.

4 CHAIRMAN BABCOCK: Nobody take offense here.

5 HONORABLE TOM GRAY: Yes, and I apologize
6 for using "Nathan." I should have said the Chief Justice
7 of the Supreme Court, yes. I apologize.

8 CHAIRMAN BABCOCK: He's very sensitive, by
9 the way, and everybody knows that. But the question is,
10 is this something that can be -- can be fixed ahead of
11 time in the rules, and it -- Justice Miskel, do you think
12 it can be?

13 HONORABLE EMILY MISKEL: Well, so I was just
14 Googling what is the current case law in dominant
15 jurisdiction, and so my understanding is the first filed
16 case should go forward and the second one be abated, but
17 then I was trying to figure out the answer of if a judge
18 isn't doing that, who do you appeal it to, and I can't
19 quickly find that answer live, but I would assume it would
20 be the same way we already do it.

21 CHAIRMAN BABCOCK: Okay. Skip, we're going
22 to bring you in as appellate counsel in Potter County, so
23 you're on Tom's side.

24 MR. WATSON: Well, I just -- I haven't
25 studied this, but it logically to me -- when there's a gap

1 like that, to me it's going to follow ordinarily just the
2 common law of primary jurisdiction, that, you know,
3 that -- that motion is going to be brought in one of the
4 two courts, and both courts, even if brought in both, both
5 of them should make the right decision, you know, based on
6 whatever the law is. The first one to make a decision is
7 going up. I mean, there's no way to say, "Whoa, stop,
8 Nelly, this is not going to happen." So it's going up,
9 and that decision is going to be made, and the law will be
10 applied of who has primary, and then it -- then it goes up
11 further, but there's -- I've never seen a logjam in the
12 court of appeals of saying, "No, on a typical primary
13 jurisdiction case, this court should not decide it" when
14 it's already in that court. You know, the same law should
15 be applied and the same decision should come down.

16 CHAIRMAN BABCOCK: But Tom's judge says,
17 "I'm not going to abate this. You know, that other case,
18 Mr. Babcock, you filed it in some junior, you know,
19 two-year statutory -- I'm not going to abate my case."

20 MR. WATSON: But that's failure to make a
21 decision that he is bound to make. That's mandamusable.

22 CHAIRMAN BABCOCK: Okay. So now I'm
23 aggrieved in Potter County, and so I'm going to mandamus
24 in the Amarillo court of appeals, and then in -- in the
25 business court, in Houston, the judge says, you know,

1 "We're going ahead, Mr. Riney. I'm very sorry, but we
2 were first and we're going ahead," and so then Tom files a
3 mandamus of the business court to the Fifteenth. Rusty.

4 MR. HARDIN: What's the downside of us
5 trying to solve that here?

6 CHAIRMAN BABCOCK: What's the downside?

7 MR. HARDIN: Yeah.

8 CHAIRMAN BABCOCK: I don't think there's any
9 downside.

10 MR. HARDIN: It seems to me your question is
11 not only a very legitimate one, but I think it's going to
12 have to happen a bunch of times. There are going to be
13 people, particularly with this new statute, who do not
14 want to be in the business court.

15 CHAIRMAN BABCOCK: Right.

16 MR. HARDIN: So I think it's not just a one
17 every so often deal, and it would seem to me that that's
18 got to be built into the rules. What I mean by what's the
19 downside is why wouldn't we want to try to solve it at
20 this issue -- at this stage?

21 CHAIRMAN BABCOCK: Yeah. Yeah. I was
22 trying to -- excuse me. I was trying to suggest that by
23 the hypothetical that here's something --

24 MR. HARDIN: Well, sometimes you're too
25 subtle for some of us, I guess.

1 CHAIRMAN BABCOCK: Well, certainly too
2 subtle for you.

3 MR. HARDIN: There you go, right.

4 CHAIRMAN BABCOCK: Marcy got it, and
5 Lamont's got it.

6 MR. JEFFERSON: Yeah. No, I agree with
7 Rusty and you as well that this is going to happen all the
8 time. I mean, we already have a bunch of first-filed case
9 jurisdiction in the case law, but the dominant -- and I've
10 been involved in this a number of -- the whole dominant
11 jurisdiction, which case gets to go forward, and
12 oftentimes you are in a situation where both cases go
13 forward because the second filed judge just denies the
14 motion, the motion to abate, and but it depends on Marcy's
15 first question of what is -- where is jurisdiction? And
16 is this concurrent jurisdiction? And maybe -- maybe
17 that's the question we have to decide, is is this a
18 jurisdictional issue? What are the jurisdictional issues
19 under the legislation?

20 I mean, I presume the legislation --
21 assuming we have the power to do that. I mean, but that
22 answers all of the questions, is if it's not concurrent
23 jurisdiction, if one court has exclusive jurisdiction,
24 then the answer is easy, but if it is truly a case of
25 concurrent jurisdiction, then, you know, it's a mess.

1 MS. GREER: It's really a case of concurrent
2 jurisdiction.

3 CHAIRMAN BABCOCK: Well, I was way too
4 subtle with my hypothetical for Rusty.

5 MR. JEFFERSON: Nothing you can do about
6 that.

7 CHAIRMAN BABCOCK: But Tom is a crafty
8 lawyer and rather than, as in my hypothetical, we have the
9 same set of facts in both cases, so if the business court
10 has jurisdiction, then it's okay, but Tom doesn't want to
11 be in business court in the Houston division, so but what
12 if Tom starts adding in to his case a bunch of stuff
13 that -- that the business court would not have
14 jurisdiction over? And that gets back to what -- the
15 question Marcy started with of, well, you've got two cases
16 running between the same parties, but you have different
17 claims and what happens.

18 But I'm saying on top of that, on top of the
19 problem she identified, you also have an issue of which
20 case is going to proceed. And Tom's going to say, "Well,
21 wait a minute, everything is here in Potter County.
22 You've got the business court claims, and you've got these
23 additional claims that I've come up with, so we're the
24 dominant. We're not first filed, but we're the dominant
25 one because we have everything. You can decide everything

1 here," and the business court says, "Well, I don't care
2 about that, I'm going to go forward with the claims I do
3 have."

4 MR. JEFFERSON: Yeah, I mean, it seems to me
5 like if it's truly a case of just concurrent jurisdiction
6 then the Supreme Court's got to answer the question of
7 which case gets to go forward.

8 THE COURT: Yeah. But Rusty's problem is
9 why can't we fix that in the rule ahead of time?

10 MR. JEFFERSON: Well, because the
11 Legislature says it's concurrent jurisdiction. I mean, if
12 that's the issue then we can't fix it by rule. Right?

13 MR. HARDIN: Yeah.

14 CHAIRMAN BABCOCK: Well, that's why all of
15 these smart people have been assembled, to try to figure
16 it out.

17 MS. GREER: Well, I did a search through
18 HB 19 to see where the word "exclusive" appears --

19 CHAIRMAN BABCOCK: Yeah.

20 MS. GREER: -- and it only appears in
21 discussing the exclusive jurisdiction of the Fifteenth
22 court, so it is definitely concurrent jurisdiction. And
23 by the way, I apologize, I -- Justice Miskel corrected me
24 that Potter County doesn't have a business court to remove
25 to --

1 CHAIRMAN BABCOCK: Right.

2 MS. GREER: -- so I missed that in your
3 hypothetical. It was a trick question.

4 CHAIRMAN BABCOCK: That's why I picked
5 Potter County.

6 HONORABLE ANA ESTEVEZ: I thought it was
7 because of me, because it's my county.

8 CHAIRMAN BABCOCK: I forgot, you're the
9 judge that said --

10 HONORABLE ANA ESTEVEZ: Yeah, it's like
11 you're saying Tom is this rock star, and I'm like, yes, he
12 is, and the judge didn't remove it. No, because it's Tom.

13 CHAIRMAN BABCOCK: I forgot we had the whole
14 panoply of judiciary in that, in Potter County.

15 HONORABLE ANA ESTEVEZ: You have all of the
16 players, and she's like they're not going to get a
17 business court. No, we're not.

18 CHAIRMAN BABCOCK: Tom.

19 MR. RINEY: The answer is simple. Our
20 clients have a dispute and I think there's a possibility
21 of jurisdiction in business court, I'm filing suit in
22 Potter County this afternoon. I mean, I think that's
23 practically what's going to happen, is it will encourage
24 people to get to the courthouse more quickly in the
25 dispute, which is --

1 CHAIRMAN BABCOCK: Because our clients are
2 big multinational companies, and they're mad as hell at
3 each other, and they're negotiating, and they're writing
4 letters back and forth, and you say, "Whoops, we need
5 to -- we need to be sure that this thing happens in our
6 hometown."

7 MR. RINEY: I'm thinking my clients are
8 going to be huge landowners with oil and gas disputes,
9 but --

10 HONORABLE ANA ESTEVEZ: And I'm thinking
11 there's going to be some mandamuses going, and we'll just
12 sit there and see what the court of appeals does.

13 HONORABLE TOM GRAY: Which one?

14 HONORABLE ANA ESTEVEZ: The Seventh.

15 HONORABLE TOM GRAY: What about the
16 Fifteenth?

17 HONORABLE ANA ESTEVEZ: Well, you know, they
18 filed in Potter County.

19 HONORABLE TOM GRAY: Fifteenth court has
20 jurisdiction of Potter County.

21 CHAIRMAN BABCOCK: All right. So, Marcy,
22 you've stirred up this hornet's nest. What else --

23 MR. HARDIN: Wait, wait. She was over there
24 getting food. She didn't start any of this.

25 CHAIRMAN BABCOCK: Rusty, that's Justice

1 Miskel. Marcy is over here.

2 HONORABLE ANA ESTEVEZ: She didn't even make
3 eye contact.

4 CHAIRMAN BABCOCK: But Justice Miskel can
5 stir up some stuff if she wants.

6 HONORABLE EMILY MISKEL: Want me to grab
7 another stir stick?

8 CHAIRMAN BABCOCK: Yeah, right. What
9 other -- what other things have you been wrestling with?

10 MS. GREER: Okay.

11 CHAIRMAN BABCOCK: Either one of you.

12 MS. GREER: Do what?

13 CHAIRMAN BABCOCK: I mean, either one
14 that -- or Kent.

15 HONORABLE KENT SULLIVAN: Before we pass on,
16 I just want to, you know, endorse the Babcock doctrine or
17 what I perceive it to be, and that is to the extent that
18 we have this within our control or the Court has this
19 within its control by way of its rule-making power, we
20 ought to create a bright line rule. There ought to be --
21 certainty is desirable here, and I just think that's
22 important, and I worry that sometimes we pass that by.

23 These, you know, puzzles that we leave, in
24 my view, are not amusing to the parties and the people
25 that have to pay for this. We ought to create a bright

1 line rule and minimize the uncertainty associated with all
2 of this.

3 CHAIRMAN BABCOCK: Yeah, Harvey. I second
4 that, and I want to make a comment in a minute, but Harvey
5 first.

6 HONORABLE HARVEY BROWN: Well, I could be
7 wrong about this because it's probably been 20 years since
8 I looked at this, but my recollection is that the dominant
9 jurisdiction issue is more than just a bright line rule of
10 who files first. They look at things like were you on
11 notice, was a demand letter sent, and a number of other
12 factors, so I think a bright line rule might be dangerous
13 in allowing this to be decided through the --

14 HONORABLE KENT SULLIVAN: Well, let me
15 interject --

16 HONORABLE HARVEY BROWN: -- dominant
17 jurisdiction rules might have some advantages.

18 HONORABLE KENT SULLIVAN: Let me interject
19 one obvious point, though, because you could view this
20 incrementally, and that is we ought to be able to decide
21 in the -- relative to the dispute that we've identified
22 which court of appeals will handle the mandamus to create
23 some level of consistency and certainty so you don't have
24 two potentially going up. That one seems to me to be an
25 easy one, and then you can incrementally look at how much

1 greater certainty that you can create. We can always come
2 up with a reason why it's going to be problematic to do
3 something, but we ought to do what we can.

4 CHAIRMAN BABCOCK: Yeah, the comment I was
5 going to add to your comments, Kent, was the reason the
6 Legislature -- I think one of the reasons the Legislature
7 created the business court was so that businesses in Texas
8 would have an attractive forum for them to litigate
9 business disputes. Well, what company is going to burn
10 millions of dollars in legal fees messing around with, you
11 know, whether we go to the, you know, the Seventh district
12 court of appeals or the Fifteenth or the First or the
13 Fourteenth or whatever, and so there's -- we ought to try,
14 to the best of our ability, to deal with these issues so
15 that there's not this big shake out period where for the
16 first two years of the business courts they're mired in
17 all of these -- all of these ancillary disputes.

18 MR. JEFFERSON: Chip.

19 CHAIRMAN BABCOCK: Yeah, go ahead, Lamont.

20 MR. JEFFERSON: Is someone looking at the
21 Delaware chancery courts, how they handle these
22 situations? Not everything is in --

23 CHAIRMAN BABCOCK: Well, there was a whole
24 lot of work done on that in previous Legislatures, because
25 remember, we were trying to pass the chancery model, and I

1 think there's some elements of that here, but I think they
2 rejected -- if I understand the lineage of this --
3 rejected many of the aspects of the chancery court, but
4 chancery court in Delaware, which I have been in a little
5 bit, they do have fights with superior court there about
6 who gets -- who gets what, but not to the extent that
7 we're talking about here, I don't think. And Delaware,
8 too, is I think they've got three counties, and so it's --
9 doesn't have the same challenges we do. Yeah, Stephen.

10 HONORABLE STEPHEN YELENOSKY: Well, first of
11 all, that's very helpful to me. It's really a dominant
12 jurisdiction question I guess, just as we've heard, but is
13 it possible that you have a district court decide a
14 question because nobody filed it in the business court and
15 then there is another case that seems to be on point in
16 the business court and the Fifteenth court and the Third
17 court answered that question differently, and that could
18 go to the Supreme Court, but not necessarily, right? And
19 so -- so then a company might spend millions and millions
20 of dollars because there's already a precedent in a
21 particular court of appeals. Does that make sense?

22 CHAIRMAN BABCOCK: Absolutely. Yeah.
23 Justice Miskel.

24 HONORABLE EMILY MISKEL: Maybe I'm not
25 understanding why this would be radically different from

1 the existing system of dominant jurisdiction and answering
2 the question of which court of appeals would it go to. So
3 just with a quick Google I found a Supreme Court case from
4 2015 where the first filed suit was in district court in
5 Henderson County. The second filed suit was in county
6 court at law in Hidalgo County. This is Twelfth Court of
7 Appeals, this is Thirteenth Court of Appeals, and so the
8 second filed suit judge failed to abate it, refused to
9 abate it. It was mandamused in the Thirteenth Court of
10 Appeals, so it was mandamused to the court of appeals for
11 the court that was not doing their ministerial duty,
12 right?

13 So that should be the same thing here. It
14 would go to the court of appeals that Potter County is in
15 if the Potter County suit is failing -- if that judge is
16 failing to abate the suit. I'm not sure why having one of
17 them be a business court versus a district court or a
18 county court at law makes that question more confusing,
19 and maybe there is something that I'm not understanding
20 why this is needing to be solved by rule and not just the
21 existing system.

22 CHAIRMAN BABCOCK: Yeah, maybe not. Maybe
23 not. Maybe that's enough.

24 HONORABLE TOM GRAY: But after September 1
25 of 2024 that case has two courts of appeals sitting over

1 Hidalgo County. You've got the Thirteenth and the
2 Fifteenth.

3 HONORABLE EMILY MISKEL: Oh, so you're
4 saying if the business court is second filed and refuses
5 to abate who mandamuses the business court?

6 HONORABLE TOM GRAY: No.

7 HONORABLE EMILY MISKEL: I think that's
8 clearly the Fifteenth.

9 HONORABLE TOM GRAY: No. In that case that
10 you just laid out, the facts of the county court at law or
11 whatever it was in Hidalgo County, after September 1 of
12 2024 there are two court of appeals that have jurisdiction
13 over that case.

14 HONORABLE EMILY MISKEL: Okay. Now I
15 understand.

16 CHAIRMAN BABCOCK: And my hypothetical,
17 there weren't. It was either the Seventh or the
18 Fifteenth, but not for the same case. The Amarillo case
19 would only have one court of appeals. Right?

20 HONORABLE ANA ESTEVEZ: He's saying no.
21 He's saying that the Fifteenth court would still have
22 jurisdiction over all Amarillo cases.

23 CHAIRMAN BABCOCK: Oh, you're saying that
24 the Fifteenth court would have jurisdiction over Amarillo.

25 HONORABLE TOM GRAY: Uh-huh. That part's

1 not -- the Fifteenth court has some exclusive
2 jurisdiction.

3 CHAIRMAN BABCOCK: Right.

4 HONORABLE TOM GRAY: But the Fifteenth court
5 does not have any prohibited jurisdiction.

6 CHAIRMAN BABCOCK: Okay. So you would have
7 a choice then. Tom would have a -- or I would have a
8 choice if I'm the defendant of either going to the
9 Fifteenth or the Seventh, no matter whether it was Hidalgo
10 County or Potter County.

11 HONORABLE TOM GRAY: The way the rules are
12 currently written.

13 CHAIRMAN BABCOCK: Okay.

14 HONORABLE TOM GRAY: Is my understanding.

15 HONORABLE EMILY MISKEL: So to go back to
16 your Potter County hypothetical, you're saying the party
17 that's upset about Potter County not abating their lawsuit
18 could mandamus Potter County to the Fifteenth Court of
19 Appeals because Potter County is within the Fifteenth
20 Court of Appeals district.

21 HONORABLE TOM GRAY: If I understand the
22 question, yes. Except that Tom is going to be the first
23 to file there and it --

24 HONORABLE ANA ESTEVEZ: Appeal in the
25 Seventh.

1 CHAIRMAN BABCOCK: Yeah, but I'm aggrieved.
2 I'm the defendant in Tom's case --

3 HONORABLE TOM GRAY: Right.

4 CHAIRMAN BABCOCK: -- and I'm aggrieved.

5 HONORABLE TOM GRAY: And you get to choose.

6 CHAIRMAN BABCOCK: And I don't want to be in
7 business court, so I'm not going to go to the Fifteenth.
8 I'm going to go to the Amarillo court of appeals.

9 HONORABLE EMILY MISKEL: Marcy, do you
10 recall how we addressed that in our Fifteenth Court of
11 Appeal rules?

12 MS. GREER: Well, we made a recommendation
13 that the court that makes the decision on transfer, it
14 goes to that court of appeals. But we didn't put it in
15 the actual rules, and to your point, Chief Justice Gray --

16 HONORABLE TOM GRAY: It's Tom.

17 MS. GREER: It is the statute. We didn't
18 create the rule saying that the Fifteenth court is over
19 all 254 counties. That's in the statute.

20 HONORABLE TOM GRAY: Yeah.

21 MS. GREER: We just went with that,
22 understanding that that's what gives concurrent
23 jurisdiction, but our recommendation -- and it was by, I
24 think this -- we even took a vote, or we may have never
25 taken a vote, but of our subcommittee --

1 CHAIRMAN BABCOCK: Well, let's take a vote
2 now then. Just kidding.

3 MS. GREER: We've already sent it in, we're
4 done. But we recommended that the decision -- the
5 mandamus go to the court of appeals in the region where
6 the decision was made. And I think that's similar to the
7 case that Justice Miskel is talking about, that you go to
8 the decision-maker, but with the Fifteenth court, I guess
9 you could have the choice under the statute.

10 CHAIRMAN BABCOCK: Stephen.

11 HONORABLE STEPHEN YELENOSKY: Well, until
12 dominant jurisdiction is resolved by the Supreme Court
13 some other way, couldn't you have -- you're aggrieved,
14 right? And you appeal to the court of appeals that is for
15 Potter County, right, and they claim that dominant
16 jurisdiction is in the Fifteenth court, right? And so
17 the -- the Potter County court of appeals could decide,
18 well, the trial court has dominant jurisdiction, and the
19 business court could decide that they have dominant
20 jurisdiction. And is that just a regular old dispute that
21 gets resolved higher up, or is that something you can
22 resolve by rule? And you would have two courts of appeals
23 answering that question, right?

24 CHAIRMAN BABCOCK: Justice Miskel.

25 HONORABLE EMILY MISKEL: And just to add

1 information, what the proposal was in the TRAP rules was
2 there was a section that the Supreme Court can transfer
3 appeals to or from the Fifteenth Court of Appeals if they
4 should or shouldn't be there, and so this is a complicated
5 question, it's hard to think on my feet, but if you're
6 truly having some bad game playing on the parts of
7 litigants in different counties and different courts of
8 appeal, this has a relief valve to put the case where it's
9 supposed to go. I don't know if additional TRAP rules
10 would be needed to clarify the question you raised, which
11 is, okay, Potter County is the one that's not doing what
12 they're supposed to do. Do you mandamus them to their --
13 was it Seventh Court of Appeals or the Fifteenth or what
14 if both are done at the same time? Clearly our rules say,
15 well, the Supreme Court can transfer an appeal that -- to
16 where it should go, but maybe we do need more detail on
17 answering that particular question.

18 CHAIRMAN BABCOCK: Yeah, Levi.

19 HONORABLE LEVI BENTON: So is the relief
20 valve triggered by the filing of a motion in the Supreme
21 Court even if there's no prior action related to that case
22 or those cases pending before that court?

23 HONORABLE EMILY MISKEL: Okay. So the
24 proposed rule -- and there's some redline here, so maybe
25 this is things that changed during the discussion of our

1 meeting, I'm inferring, so it looks like we initially
2 proposed a rule that said the Supreme Court can do it
3 either on its own initiative or with motion of a party. I
4 believe the redline says, "A motion to transfer an appeal
5 should be addressed to the Supreme Court and filed
6 simultaneously in the court in which the appeal is pending
7 and the court to which the movant requests transfer. Any
8 briefing by a party regarding the transfer motion should
9 also be simultaneously filed in those courts." So that's
10 what our current proposed rule says.

11 HONORABLE LEVI BENTON: Okay. So you just
12 file the motion, comes now Potter County case, tell the
13 Hidalgo court and the Thirteenth court to get out of the
14 way, filed in the Supreme Court.

15 HONORABLE TOM GRAY: The motion to transfer
16 procedure you just described is already the existing
17 methodology of transferring appeals for various reasons.

18 HONORABLE EMILY MISKEL: And I think that's
19 what we talked about, which is that's the way people do
20 it, but it wasn't written down anywhere.

21 HONORABLE TOM GRAY: Well, it's in a
22 miscellaneous order --

23 HONORABLE EMILY MISKEL: Okay.

24 HONORABLE TOM GRAY: -- that not everyone
25 knows about.

1 CHAIRMAN BABCOCK: Okay. Marcy, what next,
2 if anything?

3 MS. GREER: Oh, let's just stir up another
4 hornet's nest.

5 CHAIRMAN BABCOCK: Oh, I love it.

6 MS. GREER: Fees, fees for the business
7 court. That's going to be a big one, and, you know, we
8 were not -- we didn't feel that we were in a position to
9 recommend a fee structure because the concern is that the
10 business courts be self-sustaining, and that's going to be
11 a real challenge to try to figure out how to do that,
12 because we don't know how many cases -- there's really no
13 mechanism to determine how many cases pending in the
14 district courts right now and county courts would be
15 amenable to business court jurisdiction. And, of course,
16 because it's concurrent jurisdiction, how many people are
17 going to choose to go to business court and stay there, so
18 that's -- there are a lot of big issues as to how many of
19 these cases there will be, whether they're going to be
20 structured like a regular case where the filing fees would
21 be some multiplier of the current fees, or should it be by
22 the motions that are filed, the length of the motions,
23 something along the lines of how arbitrations are
24 expensed, if you will.

25 And, of course, that raises a lot of issues

1 as to the -- the smaller party that doesn't have the
2 resources, how are they going to be forced into business
3 court where they have to pay all of these fees that they
4 didn't anticipate paying, and so I think there's going to
5 be a lot of discussion and litigation around that before
6 that can be decided. We tried to be creative about
7 different ways to do it, and the best we came up with
8 would be some sort of X factor on regular filing fees,
9 or -- or the idea of certain motions would cost a certain
10 amount, or days of hearing, days of trial would cost a
11 certain amount per day.

12 HONORABLE STEPHEN YELENOSKY: So the
13 defendant could be -- has to pay as well?

14 MS. GREER: I mean, that's another big
15 question, who pays. Did the person that made it go to the
16 business court or filed it there in the first place or
17 does the party who invokes the process, is it split
18 between the parties, just depends on the circumstances. I
19 mean, those are things that are going to have to be
20 figured out.

21 CHAIRMAN BABCOCK: Marcy, when you say fees
22 sufficient to make the court self-sufficient, is there any
23 legislative guidance on what self-sufficiency means? Does
24 that mean, you know, salaries of the judge and staff and
25 court reporter, or does it mean the cost of the

1 facilities? Does it mean the cost of, you know, legal
2 research, or, I mean, what -- when you say
3 self-sufficiency -- John, you probably know. You know,
4 what all goes into running a -- financially, what goes
5 into running a district court, say the 95th, which some
6 people here have fond recollections of, although in the
7 very distant past, to the 95th?

8 MR. WARREN: You have to look at cost for
9 disposition, or actually the costs for the court, the
10 salaries, maintaining the records. I would say the
11 average cost for maintaining the court will be over a
12 million dollars per year.

13 CHAIRMAN BABCOCK: A year?

14 MR. WARREN: (Moving head up and down)

15 CHAIRMAN BABCOCK: So you've got to raise a
16 million dollars a year for each business court. That's a
17 lot of fees.

18 HONORABLE R. H. WALLACE: Exactly.

19 CHAIRMAN BABCOCK: Judge Schaffer.

20 HONORABLE ROBERT SCHAFFER: I don't think
21 that covers the salary and benefits for the judge, does
22 it, John?

23 MR. WARREN: Yeah.

24 HONORABLE ANA ESTEVEZ: The State covers
25 most of that.

1 MR. WARREN: If you have a judge, court
2 reporter, court coordinator, and you have to have at least
3 three support staff, that's going to be -- if you do
4 salaries plus benefits, that's going to be about 600 plus
5 thousand just for those six or so individuals, and then
6 there's the operation of the court. That's going to be
7 the other 400,000.

8 CHAIRMAN BABCOCK: Yeah, Judge Miskel.

9 HONORABLE EMILY MISKEL: And the phrase that
10 we've been summarizing as self-sustaining, what the HB 19
11 says is "The Supreme Court shall set fees for filings and
12 actions in the business court in amount sufficient to
13 cover the costs of administering this chapter," which is
14 Chapter 25A of the Government Code, which is the whole
15 business court chapter. So I have no idea what that
16 means, the costs of administering Chapter 25A. Does that
17 include the salaries? Possibly.

18 CHAIRMAN BABCOCK: Yeah. I guess that leads
19 back to my original question, is was there any guidance
20 beyond the plain language as to what they meant?

21 Justice Gray.

22 HONORABLE TOM GRAY: Megan LaVoie, director
23 of OCA, has been in -- I've heard her speak on this, and
24 she's been in contact with the primary authors of the
25 legislation, and the -- as I recall, the cost of the

1 judges' salaries, benefits, was not anticipated, and
2 they -- they had worked -- crunched some numbers on --
3 because as I understand, and I'm -- my mind, suddenly it
4 ran into itself, because it may have been part of the
5 business court versus the Fifteenth court that they are in
6 charge of, in effect, operations. I think the Fifteenth
7 court they're operating it. I'm not sure about how the
8 business court -- but the judges were in effect excluded.

9 CHAIRMAN BABCOCK: Okay. That's a big
10 number, but --

11 HONORABLE TOM GRAY: It's a big number, but
12 it's not probably by any stretch the largest number. I
13 mean, you're talking about facilities, if you allocate a
14 county's facilities to that court, and then you need the
15 personnel to operate it. The judge's salary, particularly
16 given what they're paying us now, is not a big number.

17 HONORABLE STEPHEN YELENOSKY: It's a
18 rounding area.

19 HONORABLE R. H. WALLACE: In their fiscal
20 note, is that the right term, I'm not sure, as I
21 understand the Legislature decided after -- said after two
22 years there would be no impact on the budget of this -- of
23 this creation of these courts, which I take to mean, okay,
24 then they're all going to be paid, everything is going to
25 be paid by the filing fees and whatever.

1 CHAIRMAN BABCOCK: And -- yeah, Steve.

2 HONORABLE STEPHEN YELENOSKY: Well, if the
3 defendant is going to have to pay a fee for every motion,
4 if that were the case, right, so I don't want to be in
5 business court, but it's been determined that the business
6 court has dominant jurisdiction, so now I have to pay for
7 every motion, right? And so you've got discovery -- a lot
8 of discovery disputes. Every time I want to file a motion
9 to compel, I've got to pay for it, and what if you claim,
10 you know, I can't do that and it affects my access to the
11 court?

12 MS. GREER: Well, that is one thing that was
13 addressed. I don't know if -- I didn't hear if Justice
14 Miskel read that part, but it says they're to take into
15 account fee waivers necessary for the interest of justice,
16 so that is built in to the process, but I don't know how
17 that's going to work either.

18 HONORABLE STEPHEN YELENOSKY: Seems like
19 that would be -- how do they determine fee waivers is
20 going to be litigation on and all that, because it's going
21 to determine whether or not a fee had to be waived or
22 that's a consideration in dominant jurisdiction. I don't
23 know, but a defendant having to pay who didn't choose to
24 be in that court and had it been dominant jurisdiction in
25 the district court, it's problematic.

1 CHAIRMAN BABCOCK: So one of Rusty's big
2 corporate clients is pretty dominant in this industry, and
3 I'm representing a small struggling company that's a
4 competitor, and we're really kind of a thorn in his
5 client's side. And Rusty says to his guy, "Hey, I've got
6 a great idea, we will -- we will sue them in business
7 court and they'll have to pay, you know, a half a million
8 in fees in order to -- over time to get this thing, and
9 that will drive them out of business."

10 MR. JEFFERSON: And the court will enjoy
11 receiving those fees.

12 CHAIRMAN BABCOCK: And the court will be
13 very -- is under a legislative mandate to get the fees.
14 So what about that?

15 HONORABLE STEPHEN YELENOSKY: Gamesmanship.

16 CHAIRMAN BABCOCK: Well, that's what they
17 pay us for, right? That's why Rusty gets the big bucks.
18 I'm pro bono on my case here.

19 MR. HARDIN: And if anybody believes that --

20 CHAIRMAN BABCOCK: All right. What other
21 nasty things do you have to talk about?

22 MS. GREER: Well, this is more of a
23 consideration, and we -- as a subcommittee, we decided to
24 leave it to the business courts to come up with rules, but
25 the anticipation would be that the business courts were

1 going to want to do something more along the federal style
2 of having pretrial conferences and discovery doesn't get
3 started until we have a plan in place and the parties get
4 together and meet and confer, like Rule 16(f) and Rule 26
5 in federal court. We're thinking that that would be one
6 way to kind of handle the litigation. I mean, we talked
7 about who would want to be in business court, and I think
8 the people who are more comfortable with federal court
9 type proceedings are going to be there and that the court
10 is most likely going to be along those lines.

11 CHAIRMAN BABCOCK: Does the business court
12 judge have any ability to send discovery disputes to
13 somebody? Associate judge, a special master? I mean, as
14 a routine thing. Like the federal judges have magistrate
15 judges.

16 MS. GREER: I would suspect that they would
17 have the same authority that any judge would have, because
18 of the way that the statutes have incorporated business
19 court judge into the various powers and authorities.
20 However, I think that it might be ill-advised for them to
21 do that if they want to get reappointed because one of the
22 concerns was developing jurisprudence in that court to
23 govern proceedings in that court, and so if you're
24 referring the hard stuff to special masters on a regular
25 basis, you're not developing the law as much.

1 CHAIRMAN BABCOCK: But they're not going to
2 have law clerks.

3 MS. GREER: Even though it's for clients,
4 there is a legal aspect to that.

5 HONORABLE STEPHEN YELENOSKY: And who pays
6 for the special master?

7 MS. GREER: Yes, exactly.

8 CHAIRMAN BABCOCK: Same problem. And
9 they're not going to have law clerks, right?

10 MS. GREER: They are going to have law
11 clerks.

12 CHAIRMAN BABCOCK: Oh, they are going to
13 have law clerks.

14 MS. GREER: Staff attorneys. And I believe
15 I saw somewhere that the staff attorneys may be part of
16 what's funded by the Legislature, but that would be the
17 only part. The court reporters, everything else, I mean,
18 as Justice Brown pointed out, there is -- there is some
19 discussion of having the counties provide services and
20 support of courtrooms, things like that, and that's going
21 to be a very complicated situation. I know Judge Evans
22 has been dealing with that in Fort Worth and interfacing
23 with OCA over mechanically or logistically where are these
24 courts going to sit, how are they going to get courtrooms,
25 how are they going to get court reporters, et cetera.

1 MR. WARREN: And in addition to that --

2 THE REPORTER: I can't hear you.

3 CHAIRMAN BABCOCK: Chief Justice Hecht.

4 HONORABLE NATHAN HECHT: The latest on the
5 comment Marcy just made about the facilities is OCA is
6 having some discussions with law schools who want to have
7 the -- at least the chambers and probably the courtroom
8 hearing room, probably just a hearing room, on law school
9 campuses. So I know A&M University has already signed
10 onto that. Baylor is working on it, but a number of the
11 law schools are interested in it, including SMU. And then
12 with regard to other space, some counties have a little
13 bit of space available, like the court of appeals building
14 in Harris County, for example, it still -- no, I'm sorry,
15 South Texas in Harris County, that still has the two court
16 of appeals courtrooms there.

17 CHAIRMAN BABCOCK: Yeah.

18 HONORABLE NATHAN HECHT: So it's looking
19 more positive that we'll find adequate space for chambers
20 and staff and hearings.

21 HONORABLE STEPHEN YELENOSKY: Is there a
22 jury in business court?

23 MS. GREER: Yes.

24 HONORABLE STEPHEN YELENOSKY: You're going
25 to need a jury room.

1 HONORABLE NATHAN HECHT: Well, probably
2 right now it looks as if the court proceedings,
3 particularly jury trials, would have to be in a county
4 courtroom.

5 CHAIRMAN BABCOCK: Yeah. Justice Miskel.

6 HONORABLE EMILY MISKEL: That's what I was
7 going to say. The statute says that when you go to have
8 the jury trial, the district judge in that county has to
9 share with you.

10 HONORABLE STEPHEN YELENOSKY: Oh, come on.
11 Good thing I'm not a district judge anymore.

12 CHAIRMAN BABCOCK: That will be fun.

13 HONORABLE ANA ESTEVEZ: We play well with
14 others.

15 CHAIRMAN BABCOCK: Any other issues, Marcy,
16 or Justice Miskel?

17 HONORABLE ANA ESTEVEZ: They go there,
18 right? So let's say this Potter County case --

19 CHAIRMAN BABCOCK: Yeah.

20 HONORABLE ANA ESTEVEZ: They'll go to Potter
21 County, even though they did everything in Houston, right?

22 CHAIRMAN BABCOCK: Well, if Tom has anything
23 to say about it.

24 HONORABLE ANA ESTEVEZ: I mean, isn't that
25 where the jurors have to be at the end of the day?

1 HONORABLE EMILY MISKEL: It wouldn't be a
2 business court case for Potter County.

3 HONORABLE TOM GRAY: Not you.

4 HONORABLE EMILY MISKEL: But if you pick
5 another county.

6 HONORABLE ANA ESTEVEZ: Okay. So it has to
7 be within their division.

8 HONORABLE EMILY MISKEL: Yeah.

9 HONORABLE ANA ESTEVEZ: So they can't --
10 even though --

11 HONORABLE EMILY MISKEL: But to answer your
12 question, yes, like, say they pick one in Harris County's
13 region but it's not a Harris County case, they could do
14 all of the business court proceedings in Houston, but the
15 case is tried in the county with proper venue.

16 HONORABLE ANA ESTEVEZ: Just a weird, weird
17 question. If they were fighting --

18 HONORABLE ROBERT SCHAFFER: I don't think
19 there's such thing as a weird question when it comes to
20 this bill.

21 HONORABLE ANA ESTEVEZ: So if they were
22 fighting about jurisdiction and they decided to get
23 creative and say, "Hey, I'll do everything out there in
24 Houston in the business court as long as we can do the
25 trial with our Potter County jurors" --

1 HONORABLE EMILY MISKEL: You can't remove a
2 case if there's not a operating division of the business
3 court that contains that county.

4 HONORABLE ANA ESTEVEZ: So that's a no.

5 CHAIRMAN BABCOCK: So Tom's out of luck.

6 HONORABLE ANA ESTEVEZ: Well, just if they
7 wanted to do it by agreement, you know. I mean, he
8 already won. He had dominant jurisdiction.

9 CHAIRMAN BABCOCK: Yeah, he's already beat
10 us to the courthouse.

11 HONORABLE ANA ESTEVEZ: Right, but let's
12 just say his issue is, hey, this should be the jurors, you
13 know.

14 CHAIRMAN BABCOCK: Right.

15 HONORABLE ANA ESTEVEZ: And there was more
16 than one place that the suit could have been brought.

17 MR. RINEY: I don't know why you're so
18 anxious to get out of Amarillo. You've had pretty good
19 luck there, you've got to admit.

20 HONORABLE ANA ESTEVEZ: I know, national
21 recognition.

22 CHAIRMAN BABCOCK: Just hypothetically, if I
23 did get sued there, I would stay for sure, but for the
24 purposes of discussion.

25 MR. RINEY: Right.

1 CHAIRMAN BABCOCK: What else?

2 MS. GREER: So another issue that I think is
3 going to be really interesting to watch is whether or not
4 there will be any other jurisdictions that will have
5 business courts, other than -- right now they have the
6 five major counties all have business courts with two
7 judges each, and but the rural counties are saying, "We
8 don't need a business court" for the most part, and so
9 that's why the five jurisdictions -- or I'm sorry, the
10 five areas are being funded now, with the idea that they
11 will re-evaluate over time whether the business court will
12 get larger in terms of geography, having operating
13 divisions, and I suspect the answer to that is going to be
14 no, because I think that's been part of the pushback. So
15 a lot of people -- I forget, a lot of people forget, that
16 the business court is only available in Tarrant, Dallas,
17 Harris, Bexar, and Travis Counties.

18 HONORABLE EMILY MISKEL: Not county, but the
19 divisions that contain those counties.

20 MS. GREER: Divisions that contain those
21 counties, exactly.

22 CHAIRMAN BABCOCK: Right. Yeah, I mean,
23 that reflects an ancient distaste on the part of the rural
24 counties, generally speaking. When we had the Commission
25 on Judicial Selection a couple of years ago, there was

1 resistance from rural counties to changing the elected
2 system, because they liked it, they know their judges and
3 elect good judges and are satisfied with it.

4 Anything else, Marcy?

5 MS. GREER: Well, I hate to even raise it,
6 but we've been trying to kind of think through the
7 implications of the TCPA and the new business court, and
8 that kind of makes my mind go into hyperdrive,
9 different -- I don't know that it would operate
10 differently there, but just having TCPA jurisprudence and
11 motions to dismiss and everything in that court, it's
12 going to be an interesting discussion.

13 Let's see, and that was one other thing that
14 we talked about in our memo, would be the timing of
15 addressing the jurisdictional issues, because especially
16 with the concurrent jurisdiction, you know, should there
17 be an endpoint at which that decision should be made, and
18 a similar discussion is at the Fifteenth Court of Appeals.
19 If it's pure jurisdiction, then arguably it could be
20 raised at any time, but should there be some limit on your
21 ability to remove or remand or, you know, dismiss,
22 et cetera, for lack of jurisdiction of the business court,
23 because otherwise that could set up for gamesmanship.

24 You know, you get a bad ruling from the
25 judge and the party that doesn't like it decides to do

1 something different. So in a removal situation to federal
2 court, there are limitations. You have to bring a defect
3 in the removal process within 30 days. Jurisdiction can
4 be raised at any time, but there are certain limits on
5 when -- when those motions should be made, and the removal
6 provision in the business court rule statute is different
7 because it's not a pure -- you can't really dissect
8 between removal -- the removal process and jurisdiction
9 because of the way they use the term jurisdiction, so it
10 gets complicated.

11 CHAIRMAN BABCOCK: Okay. Justice Miskel, do
12 you have anything that you want to raise about the
13 business courts?

14 HONORABLE EMILY MISKEL: Topic areas? I
15 think that pretty well covers it. I presented our
16 proposed rules to the litigation section of the State Bar
17 on Tuesday and got a lot of good questions, but they were
18 all questions that this committee has talked about
19 already, so I don't think there's anything -- a stone that
20 we haven't turned over that I've heard.

21 CHAIRMAN BABCOCK: Well, that's good to
22 know. That's great.

23 Justice Bland, any -- we've done nothing but
24 create problems as best I can tell.

25 HONORABLE STEPHEN YELENOSKY: That's what

1 we're good at.

2 HONORABLE JANE BLAND: It's a good
3 discussion.

4 CHAIRMAN BABCOCK: Yeah. Yeah. Okay.

5 Well, I think Dee Dee's ready for a break,
6 but I think we're at the -- we're at the end of our
7 agenda, and we do have lunch coming if anybody wants to
8 hang around for it, and but other than that, everybody
9 have a happy holiday season and enjoy yourselves and your
10 families. And I think, Chief, what's the -- what's the
11 plan for next year, if there is a plan?

12 HONORABLE NATHAN HECHT: Well, this is the
13 third -- end of the third year of members' three-year
14 terms, and so we will be looking at the committee going
15 forward. We -- it gives occasion for us both to say and
16 on behalf of our colleagues on the Court how grateful we
17 are for all of your hard work and thoughtfulness on the
18 rules projects and the issues that you've looked at. The
19 process just could not function at all without this kind
20 of input, thoughtfulness, and bouncing ideas around, so
21 we're very grateful to you, and we will look forward to
22 finishing up the business court rules and getting on with
23 some other business next year.

24 CHAIRMAN BABCOCK: Great. All right. Well,
25 we're in recess for the earliest recess that I can

1 remember, but Dee Dee's happy about it.

2 (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 1st day of December, 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 \$ 682.00.

Charged to: The State Bar of Texas.

Given under my hand and seal of office on this the 19th day of December, 2023.

/s/D'Lois L. Jones
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