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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

JUNE 19, 2020

(via Zoom videoconference)

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Taken before *D'Lois L. Jones*, Certified Shorthand Reporter in and for the State of Texas, reported by machine shorthand method, on the 19th day of June, 2020, between the hours of 9:00 a.m. and 3:15 p.m., via Zoom videoconference and YouTube livestream in accordance with the Supreme Court of Texas' First Emergency Order regarding the COVID-19 State of Disaster.

INDEX OF VOTES

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

Documents referenced in this session

20-26 New Rules for Civil Actions, Level 1A-REVISED

20-27 2/28/20 Memo - New Rules for Civil Actions

20-28 6/19/20 Memo - Remote Depositions

20-29 6/15/20 Memo - Parental Termination Appeals

20-30 6/3/20 Parental Continuance Rule Proposal

20-31 State Bar Texas CRC Proposal, Parental Leave Continuance

20-32 Florida rule re Continuance and FL Supreme Court Opinion

20-33 Harris County Vacation Letter Local Rule Civil Courts

20-12 Rule 26 North Carolina Secure Leave, Parental Leave

20-15 Family Medical Leave Act 2019 Section 2612, leave requirement

20-34 6/15/20 Memo - Compelling a Ruling

20-35 6/15/20 Report on Civil Rules in Municipal Courts

20-36 Exhibit A to June 15, 2020 Report

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CHAIRMAN BABCOCK: Well, if everybody is okay with it, why don't we get started, and people can get admitted into the meeting as we go along, right?

MS. EASLEY: Yes, so give me one second and let me start the YouTube livestream.

CHAIRMAN BABCOCK: Okay, great. You like my clock in the background?

MS. EASLEY: We are live.

CHAIRMAN BABCOCK: On the stroke of 10:00 according to my clock. Well, welcome, everybody. This is our first official Zoom meeting. I regret that we can't be altogether in person, but for now this will have to do. And, by the way, this meeting is being recorded. So, without further adieu, Chief Justice Hecht, if you would like to make your remarks followed by Justice --

HONORABLE NATHAN HECHT: Thanks, Chip. Of course, it's Juneteenth. President Abraham Lincoln's Emancipation Proclamation really changed nothing in Texas for more than two years until Major General Gordon Granger landed at Galveston with news that the Civil War had ended and the slaves were free. It was 155 years ago today, and still we find ourselves engaged in critical conversations about equality and justice under the law. For judges and lawyers whose life work is trying to assure that equal

justice under law is a reality for all, nothing is more disturbing than to hear that we have not always understood the concerns of all those we serve or responded as effectively as we must.

We must redouble our efforts to make the justice system the model it should be. For over 80 years this committee has had a singular role in those efforts. So it is fitting, I think, that we convene on this anniversary to try to make the justice system more effective, more efficient, more accessible, and fairer for all. I hope we'll be guided by that spirit today.

This is another historic first for the committee, meeting remotely as we do today, but in the last 16 weeks since we met on February 28th, a lot has happened. The first COVID case in Texas was March 4. A hundred thousand cases ago, 2,100 deaths ago, but also 64,000 recoveries ago. So we're deep into this historic pandemic, learning as we go. The disaster declaration for the state was on March 13th, and later that day the Supreme Court of Texas and the Court of Criminal Appeals issued their first emergency order for the courts in trying to navigate these difficult times. Now we've issued 17, and I'll just go briefly over kind of what we've done and how we've tried to order things in the justice system in Texas.

The first thing was to give courts broad discretion to modify procedures and deadlines so that the justice system could continue to function but safely. So that meant closing for most courts or severely curtailing procedures in both civil and criminal cases. Excuse me. Other changes that we made were not discretionary, but were to impose fixed procedures, like, for example, the extension of the statute of -- statutes of limitation to August the 15th. But through it all we've directed that courts must conduct proceedings remotely whenever possible, and Zoom has become the platform of choice.

There are 3,220 judges in Texas. The Office of Court Administration bought about 3,000 licenses, Zoom licenses for the judges to use. Well over half are using Zoom as a platform to conduct their business. We logged in -- we have logged in so far 340,000 hours of Zoom hearings with 525,000 participants. Zoom has taken over the operation of the courts. The Supreme Court of Texas has had arguments on Zoom and conferences on Zoom, and we're functioning well. Courts across the state are doing the same thing. This, of course, is a profound change for us, a change in the system, a change in the profession, and we're beginning to wonder now what lies ahead. I think we'll talk about remote depositions going forward, and this is a permanent change. Will there be as many

court hearings, will more be done remotely, will the practice of law change, what's ahead for us, and these are questions that we're asking all over the country, but the answers are still not clear.

Through it all, one thing that's been very important and what we're doing today with this meeting is to ensure transparency and public access to all of these hearings so that the courts do not by becoming remote become invisible, because we want people to see that -- how the courts are performing, what they're doing in cases just as they would -- just as they did before.

We're gradually reopening, but to reopen a court in Texas it must have a plan, and the plans can be regional. They can be for a county or a jurisdiction. We've -- OCA has gotten more than 600 so far, so we're almost fully opened as far as being able to conduct some proceedings in person, but they're still very limited. So here's kind of the basic structure that we have gone to. The Supreme Court has issued emergency orders that are mostly general. A few of them were more specific, but mostly they're general sort of principles to guide the operation rather than the details. Courts have wanted to know more details, and so the Office of Court Administration has provided usually weekly published guidance, they call it, that courts can use to try to

answer questions that they have about how courts in the State are operating and should operate.

Then we've also relied heavily on the regional presiding judges to supervise all of this, so Judges Evans and Estevez have kind of picked up new duties through all of this and are helping, along with the other nine regional presiding judges, to sort of shepherd things along, guide things along.

And then for specialized areas we're relying more on instruction, specific instruction. For a while the Court imposed a statewide moratorium on evictions and debt collection, but things are changing differently in different parts of the state, and we decided it was time to leave that -- leave the conduct of evictions and debt collection and other kinds of cases like that to the courts that handle them. So we have formed a justice of the peace task force, which has about 16, 17 people on it, some judges, also stakeholders in those cases like Legal Aid, the Texas Apartment Association, creditors bar, creditors attorneys, landlord attorneys, to try to come up with best practices and guidance for those judges. So we go from the very general in the emergency orders down to more specific instruction in hopes that we can help everybody move along either as quickly as they want and safely, or at a -- at a more cautious pace, but to try to

get everybody back where we were before this hit.

The hardest nut to crack is jury trials, so there can be none before August the 1st without permission, and I imagine that the date will get pushed back to September and maybe even later than that as time passes, but we don't know yet. The first virtual jury trial in the country, we think, was in Collin County a few weeks ago. Judge Emily Miskel up there put it all together. It was a summary trial for settlement purposes, and it went -- it went well, and the participants got to reflect on what the virtual presentation to a jury was like, but the whole trial was virtual.

Since then Federal District Judges Barbara Lynn and Amos Mazzant have tried cases, I think one each. I think Barbara tried a criminal case and Amos tried a civil case. Our first state court in-person jury trial started yesterday in a criminal case in Bowie County, and I haven't gotten a report on that yet this morning, but it was moving along yesterday. We have four more lined up in Scurry County, Cameron County, Fort Bend County, and Henderson County. These are judges who have volunteered who want to go to the trouble of trying to make sure that jurors can socially distance, that they screen as they come in the building, that court staff will be screened, and that everybody can stay safe.

Then we've got another partially remote, partially in-person trial scheduled in Comal County in a couple of weeks, and then several others as jury trials that are pending approval. So we're moving in that direction, but all over the country the courts are trying to figure out how do you try jury cases, and we're still finding our way. Of course, it would be easy if we had a quick and accurate test for COVID, but we don't. And it's -- doesn't look likely that we will much before there may be other curative medicines or vaccines or other ways of attacking the disease. So we'll -- we'll be slow going on jury trials. We try -- Texas tries about 4,500 criminal jury trials a year and about 1,200 civil jury trials. There's -- we don't know exactly how many there are in the country. Probably 70 or 80,000 a year in the country, and so as the weeks pass, we're getting further and further behind on those, but we're trying to catch up. That's it on the pandemic.

On the bar exam you've probably heard that at the recommendation of the Board of Law Examiners and the law school deans, the Supreme Court decided to keep the in-person bar exam in July and added a second exam in September but shortened the exam to two days from two and a half days to lower the risk of exposure and the expense of giving the exam. And states -- other states are all

over the map. Some are delaying the exam, some are giving it online, some are waiving the exam altogether, and those states have just taken different approaches, which is probably good because we'll see how those turn out.

We've -- the Court's also updated its decades-old supervised practice rules to serve as a stopgap measure that allows recent graduates to practice under supervision until they can take the exam.

You may have heard that the appellate courts suffered a severe ransomware attack on May 8th, and thanks to the years of careful preparation by OCA and by the state DIR, the state agency in charge of technology, very little information was lost. Almost all of it was backed up. It has been quite a bit of work and a significant expense to get back -- put everything back together and have it functioning fully again. We're closing in on it, although we still have a ways to go. People have been working 24/7 trying to -- trying to get this done, and Microsoft, we've hired Microsoft to help us and others where we needed more expertise in trying to resume.

I will say that the courts of appeals have just done remarkably well under very difficult circumstances, and this is really -- the court management system that we use, we call it TAMES, is kind of the backbone of our functioning, and so it has really

hamstrung the courts of appeals, but they have worked through it. They're working through it, and they -- my hat's off to them. They've just done remarkably well under these difficult circumstances. I know the bar has had to kind of get used to that a little bit, but we hope the lawyers will remain patient, because this -- the attack came from outside the country, and we don't talk very much about it because it's been criminally investigated, and the advice of homeland security and others is just don't talk very much about it, so we haven't, but it -- it has severely hampered our operations.

On the rules front, we have delayed the effective date of the rules requiring citation by publication on the OCA-run website because they turned to trying to get our case management system up and running again, so that will come up July 1st instead of June 1st. We've given final approval to the changes to Rule 277, effective May the 1st, requiring specific jury questions in parental termination cases. We adopted the changes in Rules of Civil Procedure 47 and then 500 and 509, the jurisdictional limits in statutory county courts and justice courts, and they will be effective September the 1st. The Supreme Court and the Court of Criminal Appeals adopted the Rule of Evidence 103 amendments to clarify

that offer of proof provisions apply in bench trials, and they became effective June the 1st.

We revised protective order forms that have been worked on for sometime, and we just amended the Judicial Branch Certification Commission rules, largely in response to legislation; and the big changes, perhaps the biggest changes, were creating a court reporter apprenticeship and a provisional certification for court reporters. So those changes have just been approved.

So while we have struggled to try to keep the courts in Texas functioning, we've also been able to do some work with the rules, and the Supreme Court is in a good place. We've had five oral arguments by Zoom, and they -- all but one was flawless, and the one had some technical glitches in it, but it didn't keep the argument from happening, and so it went fairly well, and almost all of the high courts in the United States have by now had remote oral arguments. The Court's -- our Court has also had seven conferences by Zoom, and that's very easy for us. The only particular challenge we've had is what to do with the staff, because the more you meet outside a room or outside the strictures of the room, the more you risk confidentiality being compromised, so we're still working with that, but the conferences themselves went well, and I think after this morning we have five argued cases that

have not been decided, and final orders are scheduled for a week from today.

So despite the pandemic, a ransomware attack, and a rookie judge all year long, we seem to have done pretty well, and that's my report, Chip.

CHAIRMAN BABCOCK: Thank you. Other than that, what have you been doing?

HONORABLE NATHAN HECHT: Doing Zoom calls all the time.

CHAIRMAN BABCOCK: Yeah. Thank you very much, Chief. Justice Bland, do you have any comments you would like to share with us?

HONORABLE JANE BLAND: Well, I'm the rookie judge, and the -- there have been a couple of members of the Court that have said this unconventional year, is it a coincidence that it happened when you joined, and that I don't know, but I hope that our years are more conventional in the future.

The Court would like to express its gratitude to everyone who serves on this committee, and many of you have taken on additional voluntary roles as parts of task forces that are looking at all of the things that might need to be amended either temporarily or for a longer term in connection with COVID, and without your guidance and wisdom I'm confident that we would not have

been able to react quickly to the needs of both the bench and the bar in addressing this crisis.

I also would like to express the Court's gratitude to Jackie and Pauline, who are representative of the staff of the Court who have really had to work an extraordinary number of hours to not only keep up with their own work, and in particular in the area of rules and emergency orders, Jackie has, you know, had to do double duty keeping up with her regular work, and she and Pauline have been instrumental in facilitating the Court's processes to these amendments to the rules and being our liaison between the stakeholders that are providing us with information and enlightning us on the problems, and we just couldn't do it without them and all of our staff who have been working so hard. So with that, Chip, I'll turn it back over to you for our meeting because I know we have a lot to cover.

CHAIRMAN BABCOCK: Okay. Great, thank you, Justice Bland. I appreciate it, and I should add a word of thanks to Marti Walker, who makes our meetings run very smoothly and spends an enormous amount of time trying to organize everything that we're doing, so thank you, Marti. And finally, you know, just following up what the Chief has said, we are living in extraordinary times. We have lost people to the pandemic and to other events that are

well-publicized, and I'd like to take just a few seconds of silence to remember those people in our lives who we've lost and who we miss. So just a couple of seconds.

(Moment of silence)

CHAIRMAN BABCOCK: Okay. Thank you. Our first agenda item is expedited actions. Bobby Meadows and Justice Christopher, I believe, are leading up that effort, so whoever wants to take the helm, go for it.

MR. MEADOWS: Thank you, Chip. This is Bobby. Let me just kick it off because Tracy will be doing most of the talking. The discovery subcommittee has convened on our first two agenda items, expedited actions, specifically revision of level 1-A, and Rule 199 and just for remote depositions. As I indicated, Justice Christopher prepared the memo from our subcommittee on both topics, and she will lead the discussion on both.

HONORABLE TRACY CHRISTOPHER: Thank you. So if y'all will remember back in February we discussed how we were going to implement the legislative law about creating new rules for the 250,000-dollar or less cases. We discussed three options at the meeting, and although the majority of the people voted for level three -- or the third option, which was to put the cases in level two and change the deposition limits for all level two cases, the subcommittee ultimately went back and decided that that

was not a workable way to do it. We also felt that we would not be true to the Legislature asking us for specific rules -- asking the Supreme Court for specific rules about these cases and that if we made only minor changes to level two it would not look like we were actually doing our job.

So the subcommittee then went back to the level 1-A option for these cases, which we have drafted. We -- we talked a lot about what Lisa had said in Connection with the enactment of this new rule, that people said the expedited action rules were working, and from the judges' point of view, the part of Rule 169 in terms of the actual trials never really seemed to come up. So what we ultimately concluded that what was working out of the expedited actions, the rule, was the limited discovery that we put in level one. And so what we have done is we've created a level 1-A with limited discovery for these cases involving $250,000 or less, but not changing or trying to put them actually into Rule 169. Because, as we discussed, especially in the county courts, if all of their cases are $250,000 or less, there's no real way to give priority to those cases, which is contemplated in the expedited action rule.

So that is where we have ended up, and you-all should have all gotten a copy of our proposed

level 1-A. It is almost identical to level one, with some exceptions, which we have highlighted, so we have added a provision about "without leave of court." We've changed the hours to 20, same thing for interrogatories, request for production, request for admissions. We also added a sentence with respect to reopening discovery. So we think that -- and we talked a lot about whether we thought the number of hours and the limitations on discovery would be enough. We think that it is enough for the vast majority of the cases, and for the few cases where it's not enough, the parties can either amend their pleading or they can go to court and ask for more discovery. So that's basically what we've done in connection with this new rule.

CHAIRMAN BABCOCK: Okay. Thank you, Justice Christopher. I think if you hit your participant button you can raise your hand if you wish to make a comment and then I will see it on my screen hopefully, so if anybody wants to comment on this, raise your hand on your little thingamabob there. Or you can just start talking.

Frank Gilstrap, I see your hand up.

MR. GILSTRAP: In the real world, you know, is there -- what would be the result if we simply collapsed all of the level one discovery into 1-A? I mean I just wonder what the proportional amount of cases in

each one is.

CHAIRMAN BABCOCK : Justice Christopher.

HONORABLE TRACY CHRISTOPHER: I don't know the answer to that. I do know that, you know, we've been tasked by the Legislature to have rules for both levels, so that's why we went with the separate level for the $250,000.

MR. GILSTRAP: So we couldn't do it even if we wanted to?

HONORABLE TRACY CHRISTOPHER: Maybe. I think it would be clearer to the Legislature, especially since level one then ties into Rule 169, which is a shorter trial and getting to the, you know, top of the docket, so I think we need to keep them separate.

MR. GILSTRAP: All right. Thank you.

CHAIRMAN BABCOCK: Lisa Hobbs.

MS. HOBBS: So when I was reading it this morning I was not as thrilled about excluding these from 169, but as you're talking, Judge Christopher, I think I'm coming around to maybe your view. You know, when we started this expedited actions thing, it was a trade-off, like you're not going to have as much discovery maybe, but we promise you we'll get you to trial -- or we'll do our best to get you to trial as quickly as possible. But I do hear what you're saying, if everything on the court of --

the county court's docket is expedited then nothing is expedited, so I think -- and that kind of goes to Frank's comment, too. I kind of think this might be the best middle ground, like maybe not ideal in the initial compromise of expedited actions but practically speaking might be the only way to do it. So I'm supporting right now what the subcommittee did, and thank you, Judge Christopher, for taking my comments to heart.

CHAIRMAN BABCOCK: Justice Gray, and then Roger Hughes.

HONORABLE TOM GRAY: Tracy, excuse me, I was looking at the placement of the "without leave of court." Is it the intent of the subcommittee to allow the trial court discretion only with regard to the discovery period, or should it be in regard to all of the subparts of limitations?

HONORABLE TRACY CHRISTOPHER: I think you're right. I think that "without leave of court" needs to move up.

HONORABLE TOM GRAY: Specifically, what I thought worked was right after the word "following additional limitations unless expressly modified by leave of court" and then you just allow modification on all six of the subparts then.

HONORABLE TRACY CHRISTOPHER: Yeah. I think

you're right. I think that -- the idea was that you could go into court and say the 20 hours is not enough or the 20 interrogatories is not enough. So I think you're right, that needs to move up to at the top under (b). Rather than (b)(1).

CHAIRMAN BABCOCK: Roger.

HONORABLE TRACY CHRISTOPHER: You're muted, Roger.

MR. HUGHES: Okay. I just wanted to say I'm persuaded by the subcommittee's reasoning. I think the only real value to making the change is to get limited -- a limitation on discovery in these cases. The other benefit of an expedited action is to get cases to trial faster, and frankly, I don't know how it's going elsewhere, but getting cases to trial with -- in the expedited trial period just doesn't seem to be happening. And so the real benefit of these discovery levels is not the rapid progress to trial, but instead is the limitation on the costs and amount of discovery involved. So I think it's good.

CHAIRMAN BABCOCK: Okay. Does anybody else have a comment? I don't see any hands up. Any parting words, Justice Christopher or Bobby?

HONORABLE TRACY CHRISTOPHER: I don't think so. It looks like -- we had put in that Rule 47 also

needed to be changed, but it sounds like the Court has already done that.

CHAIRMAN BABCOCK: Yeah. All right. So that will conclude our discussion about expedited actions. That recommendation will go to the Court for its consideration, and we'll move on to --

MR. PERDUE: Hey, Chip.

CHAIRMAN BABCOCK : Yeah.

MR. PERDUE: Can I ask a question on one of these notes in the memo?

CHAIRMAN BABCOCK: Certainly.

MR. PERDUE: I know in the discovery rewrite that Bobby and Justice Christopher were working on there was this idea of automatic disclosures versus request for disclosure practice as we have now, but I don't think I see that in the rule. Is that something that's tabled on the discovery rules or -- because I see it in the memo, but I'm a little confused.

HONORABLE TRACY CHRISTOPHER: Yeah. Well, we wrote the rule assuming that there would not be a change to the automatic disclosures, and we are still advocating as part of our wholesale changes to the discovery rules the idea of automatic disclosures. You know, I have no idea whether the Supreme Court wants to take that -- you know, those changes at this point in

time. We know that they are under a time constraint to get rules out with respect to these cases, so we have written it with the idea that the bigger changes have not happened, but we are still hopeful that the bigger changes will happen.

MR. PERDUE: And is it -- is it -- so I know this is not a -- your subcommittee is not a judicial body, but the clear language of the statute was "filed in county courts at law." Is it despite that clear language there is a finding of alternative legislative intent, or that's -- we're going to blow that off?

HONORABLE TRACY CHRISTOPHER: Well, I think we discussed that last time or two times ago, and I think the majority of the SCAC did vote to make them applicable to all cases, just under the Supreme Court's general rule-making ability; and the reason that we did that was that there's overlapping county court, district court cases in various counties; and the idea of, you know, having one set of rules for 250,000-dollar cases in county court versus another set of rules for 250,000-dollar cases in district court did not make sense to us, so that's the way we wrote it the way we did, and I think we've -- we did vote on that a couple of times, I think.

MR. PERDUE: Well, I get it, but I'm not sure I disagree with the logic of it. I'm just curious

about whether -- I mean, so it's clear we're talking about the general rule-making authority rather than complying with the legislative mandate in a clear language of a statute.

HONORABLE TRACY CHRISTOPHER: Well, I think it does both. I mean, we have clearly written rules for county courts where they have the amount in controversy of $250,000 or less, and then under the Court's rule-making authority they have applied that rule to district court. So, I mean, I think we've -- we have done both things.

CHAIRMAN BABCOCK: Jim, the question would be whether the legislation prohibited making these changes in district courts. I don't have it in front of me, but my recollection from our discussion was we did not believe that the Legislature said, "Make this change for county courts and only county courts," but if it did say that or if that intent was manifest from the language of the statute, then -- then I think we better be careful, but I didn't remember that.

MR. PERDUE: I don't disagree with that either, Chip, but having read more than a few court opinions interpreting legislative intent depending on the clear language of the statute versus kind of an implicit takeaway, that's not always the rule.

CHAIRMAN BABCOCK: Fair enough. Any other

comments about this before we move on? Okay. Marti, if you will note that this has completed our work on this topic, so we will move on, again, to the same subcommittee, Bobby and Justice Christopher, talking about remote depositions.

MR. MEADOWS: Thank you, Chip. As I said, Justice Christopher will lead this discussion. I have to say, though, it does seem that this new Zoom platform has added a level of efficiency to our committee that I haven't seen in the last 20 years.

CHAIRMAN BABCOCK: Fair enough.

HONORABLE LEVI BENTON: We're having trouble hearing what Bobby said.

HONORABLE TRACY CHRISTOPHER: Bobby said the Zoom platform has made us more efficient.

HONORABLE LEVI BENTON: Thank you.

CHAIRMAN BABCOCK: Less verbose. Justice Christopher.

MR. MEADOWS: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Okay. So the Court asked us to look at Rule 199 in connection with remote depositions and whether we should change the rule once the COVID-19 situation is over, and our subcommittee does not recommend changing the rule. So we have talked to people that have taken depositions remotely. They seem

to be working, but most people consider it a stopgap measure to sort of keep the wheels of justice going, and so I think in particular we were asked to look at whether someone could mandate basically that the deposition take place by Zoom and that no one could object to that procedure, and we -- we did not feel once the COVID-19 crisis is over that that should be mandated.

So right now Rule 199 allows for remote depositions, and so basically if you want to take a remote deposition, you notice it as a remote deposition. In practice, we understand some people will say, "Okay, but I'm flying to wherever my witness is, and I'm going to be with my witness when they're being deposed," and so then sometimes that makes the lawyer who noticed the deposition say, "Well, if you're going to do that then I'll fly out there, too." So -- which kind of ended the whole idea of the remote deposition. But when people want to do the remote deposition, we have the rule of procedure already in place that allows it, and at this point in time we do not recommend changing that.

The only thing that we recommend changing is in connection with the administration of the oath to the witness, and right now -- well, under the rule it was kind of a hybrid thing, and I think a lot of judges used that when they were letting people testify remotely in a

hearing or trial. You would have a person who could administer the oath actually with the witness and swear them in, and then they would be, you know, officially sworn in for testifying, and at least I know when I was a trial judge I swore them in, too, just to make sure, right. So there would be someone actually with the witness that would swear them in and then the judge would swear them in, and off we would go.

However, since the COVID crisis, people have been swearing in witnesses over the computer, and we think that's a good change, and that change can be made to Rule 199. I mean, Judge Busby, Justice Busby swore in all the new lawyers from home. I mean, people are swearing in -- administering the oath to people remotely over the computer. You know, we could do a little micromanaging, you know, the witness has to show their ID so you know who they actually are and that they're the person who's being sworn in, but with the ability to actually see someone as opposed to just over the telephone, we think the whole idea of requiring the person to be present with the witness could be changed. But the actual rule, the way we've allowed it, we think it's flexible enough for people to continue to do remote depositions in the future if they want to, but we don't think it should be a mandatory type rule.

CHAIRMAN BABCOCK: Okay. Thank you. Professor Hoffman.

PROFESSOR HOFFMAN: Thanks very much. So I agree with this. I think the suggestion of the subcommittee makes sense. I have one small additional suggestion. So 199.1(c) allows for nonstenographic recordings to take place, and I, in fact, have taken a few of these nonstenographic remote depositions in the last few weeks, but -- and they work reasonably well. One of the problems with the rule is it doesn't -- it's not super clear about who is authorized to administer the oath. There is a Texas -- I've done some research. There's a Texas Attorney General opinion that seems to make it clear that lawyers can do it. Kennon and Bob Wise have a good article that cites to that as well, and part of the Government Code also seems to make it clear, but my suggestion I'm leading to is I wonder if we might -- if we're going to make changes on the administration of the oath, we might specifically talk about who is authorized to administer an oath when you have a nonstenographic deposition.

HONORABLE TRACY CHRISTOPHER: I didn't realize that lawyers were authorized to administer the oath.

CHAIRMAN BABCOCK: Kennon Wooten.

MS. WOOTEN: I also suggest not including a provision to mandate remote depositions. I've over the course of the last two and a half months had approximately a dozen remote depositions, all via Zoom, and I think they are a wonderful alternative to no depositions occurring. I think that in part because if you stopped everything one of the consequences that you confront is damages potentially getting higher and higher and higher as discovery is halted, right. So the remote deposition option has been very good, but it does have some limitations. One of them is, of course, technology that can be spotty at times.

Another potential limitation that I've experienced that I can't really quantify, but I can qualify is that people tend to get more exhausted with Zoom after being connected to the computer about seven, eight hours, than they would feel if they were in person, and I think that affects how witnesses respond. I think it affects how attorneys interact with one another. So remote depositions are good, but I would strongly advise against making them mandatory, because I don't think they're the same as in-person depositions.

In regard to a comment, however, I think it would be helpful if there were some comment to kind of specify that this rule does apply, it allows these remote

depositions. I think sometimes what's apparent to us as the Supreme Court Advisory Committee, as a group of people who have been looking at these rules for a long time, isn't necessarily apparent to the average person picking up the rule book. So if the rule is going to be modified in part to address remote depositions, I think it would be helpful to specify in a comment that these remote depositions are permissible so that there's no question to people reading the rules.

CHAIRMAN BABCOCK: Thank you. Robert Levy.

MR. LEVY: I also agree with the subcommittee's recommendation, but I thought it would be helpful to point out a couple of issues that if there was either a comment or rule-making that items that could be addressed. One of them has to do with exhibits to the deposition. In talking to colleagues who have handled a number of these remote depositions, they've noted that when a party is taking a deposition they'll try to show a witness an exhibit on the screen, obviously in the Zoom format, and that can be very difficult for the witness to review a multipage document on the screen, particularly when they don't control the document; and one of the processes that has been followed, which seems to work well, is to send the witness a sealed envelope with the exhibits; and that is opened prior to the deposition

starting or when it starts, so that the party taking the deposition still has a chance to, you know, use their exhibits without a lot of prepping and but yet the witness will still have a physical copy of the materials.

Another question I think will probably come up that relates I think to what Professor Hoffman was noting is at trial the use of the Zoom video itself, how will that actually function as terms of playing the Zoom video before the jury, and obviously it's a little bit different to edit that versus a regular video deposition.

And the final issue that comes up from time to time is whether the -- it should be clear that all the lawyers, including the party that's defending the deposition, should be on screen so that it's -- it's clear that there's no one coaching the deponent immediately off screen, particularly if the lawyer is sitting in the room with the deponent. So those are --

HONORABLE TRACY CHRISTOPHER: So we -- I mean, we did talk about a lot of those things in committee and thought it's really hard to write a rule to manage everything, and that for -- as this procedure continues, more and more lawyers are suggesting ideas, like the sealed envelope idea, and we kind of felt like we should let it play out a little more and really see if there are problems. Like, you know, if -- if they end up going to

court and you see a problem with it, you know, then we'll have sort of an idea of what might happen. With respect to the actual Zoom deposition, my understanding is that it's not just the Zoom platform that's recording, that you actually have somebody else who is recording it. Like I just gave -- and I could be wrong, but I just gave a speech for the Texas bar CLE, and it was over Zoom, but they were recording it. You know, not -- it wasn't just the Zoom record. It was a separate record that they were doing that they then would be able to edit easily, which was good, because I made a few mistakes, and so them being able to edit those out before the final presentation, so I think we felt like getting into those details was premature, and so we didn't.

CHAIRMAN BABCOCK: Thank you. Thank you, Judge. Robert, just when you send the sealed envelope with the exhibits in it, in your experience do you send them to the court reporter or to the opposing counsel?

MR. LEVY: You would send them to all the participants, and if the witness is in a separate location I guess you would send that to the opposing counsel who would provide a copy to the witness, but you would send multiple copies so that everyone is working off the same set of materials.

CHAIRMAN BABCOCK: And how do you protect

that the sealed envelope is not unsealed before the deposition?

MR. LEVY: At least from the witness' point of view you can actually watch the witness open the envelope on the screen, and I guess you could do that also with the opposing counsel as well. Hopefully, though, there is some level of trust in the process. But it's not foolproof, clearly.

CHAIRMAN BABCOCK: Yeah.

HONORABLE TRACY CHRISTOPHER: One thing that we did discuss, which would be a simple fix that could help, is if we put the court reporter with the witness after COVID is over. Okay. Because right now the way the rule is written -- which is the second part of our report. Right now the way the rule is written, the court reporter is with the person who noticed the deposition. Okay. And if we put the court reporter with the witness then the court reporter could be given the exhibits ahead of time. The court reporter could make sure that there's no other person in the room, you know, giving hints to the witness about how to testify. So that would be a potential change that might be useful.

MR. LEVY: I think you would want to avoid limiting the flexibility of the platform, though, in cases where the witness might be remote, and there are other --

there are other issues that I don't think can be avoided. Like if -- if I'm looking at the comments and my lawyer is sending me a comment about a question, how to answer it, that's not going to show up in the -- in the video, nor will it be apparent to the court reporter even sitting next to me taking my testimony. So there are challenges. Obviously you could ask a witness that question, so to try to get that information, but I do agree, though, ultimately that I don't think the rule itself should be changed, but those are issues that should be developed either through practice or potentially commentary.

CHAIRMAN BABCOCK: Great. Roger, then Frank, then Kennon. Roger.

MR. HUGHES: Yeah, I wanted to echo the comment or the suggestion that we let this play out a little bit before we start changing the rules, and here is why I think it's important. I think this is going to be the wave of the future. Once corporate clients, insurance companies, et cetera, realize that lawyers have this technology in place and the court reporters have this technology in place, they're going to insist that it be done that way. They don't like paying lawyers to travel to the court reporter or travel to distant locations to take depositions, and it's just going to be -- I think a lot of pressure is going to be put at least on a certain

segment of the legal community to do every deposition possible by Zoom, and I think any change in the rule is going to have to reflect the likely problems that are going to come up, and I'm going to comment on a few of them.

One, about exhibits. Sometimes you don't use all the exhibits you bring to a deposition. Sometimes all of the sudden something pops up and you have something you haven't thought of before, but you do have it with you, and now you can show it to the witness right there.

The next thing is who's going to take charge of the exhibits? Because sometimes witnesses are asked to draw on things, mark things, et cetera, et cetera, so who is going to take charge of those? Who gets custody of the exhibits that the witness actually used, saw, draw on, et cetera.

The next thing is objections in multiparty cases. Right now if you have all the lawyers in the room I don't think it's horribly difficult for the court reporter to realize objections are being lodged, that they have to be written down before the witness answers. That gets a lot more difficult if you have five lawyers online and four of them are all going "objection" at the same time. It drives the poor court reporter crazy. So there may have to be something done to work out getting the

objections down, and whether we continue to require they be lodged at the time or later, may have to be an issue to be revisited, and finally, if we're going to allow the Zoom recording to be the video of the deposition, then we're going to have to work out who certifies that, whether we're going to have -- I mean, once again, clients are not going to want to pay a videographer just to sit there and watch the deposition and then download the video from Zoom. They may find that a bit excessive. So we may have to rethink about who is going to certify the video and how they're going to certify it. Those are my -- so that's why I think we may want to watch this play out a bit before we start really changing the rules. Thank you.

MR. GILSTRAP: Hello.

CHAIRMAN BABCOCK: Thanks, Roger. Frank, you're next.

MR. GILSTRAP: Yes. Currently, as I understand, remote depositions have to be done by agreement, and you know, everybody is trying to be nice, but over time lawyers will be lawyers, and we'll see them use the rules for the advantage of their clients. As I understand -- read the rule, I have an absolute right to attend the deposition. Is there -- because that's what Rule 199.5(a)(2) says, "A party may attend an oral deposition even if the deposition is taken by telephone or

other remote electronic means." Is there any way that a judge can -- under the present rule can mandate -- and you can see that, for example, it can be used as an intimidation factor. If you have a witness who is concerned about his health and some lawyer or party comes in and says, "I want to sit across the table from you and cough." You can see that happening. Is there any provision where the court can mandate a remote deposition presently?

HONORABLE TRACY CHRISTOPHER: Well, I believe that there is an emergency order, and Justice Hecht can double check me on this. There's an emergency order that says you cannot object to the fact that the deposition has been noticed remotely during this place in time. I don't know if there is a specific rule addressing what you talked about, Frank. Although, my husband has done quite a few of these remote depositions; and he did have opposing counsel who initially said, well, I'm going to do exactly what you said. I'm going to go, you know, and be with my witness. And basically all of the other lawyers said, "Okay, well, we'll go into the court to get an order saying you can't because it would be dangerous to the witness," and he backed down. So I don't know whether anyone else has had that problem.

MR. GILSTRAP: One more thing I -- you know,

you mentioned the possibility of the problem of coaching the witness, and I had all sorts of, you know, scenarios set up where people would stand behind the camera and hold up cue cards, but Robert Levy is smarter than me, and he says, look, you can just send it to them on their phone, and the only way you can deal with that I guess is to ask the witness not to have the phone with him or not to look at his phone. Is that -- is that generally what's done?

MR. LEVY: But you can actually use the Zoom chat feature and tell them what to say, so and they're looking at it.

HONORABLE TRACY CHRISTOPHER: Though, apparently I've heard that backfires, because even though you send a private chat message to your witness, at the end of the Zoom all of those chats are available to whoever was the host. So --

MR. LEVY: No, they are private. They are private.

HONORABLE TRACY CHRISTOPHER: Okay.

MS. WOOTEN: No, they're available after the fact, is what Justice Christopher is saying. So during the deposition they're private, but if somebody wants to capture the chat they can capture the private components of the chat, at least under the current technology.

MR. GILSTRAP: But that might be too late.

The witness has already answered the question.

MS. WOOTEN: But it evidences coaching that shouldn't have occurred along the way.

MR. GILSTRAP: Well, so you could object to it at trial then. Okay.

CHAIRMAN BABCOCK: Kennon.

MS. WOOTEN: One thing I'll share, for what it's worth, is that when we first started having remote depositions in the case I referenced earlier, several of us were a little unclear as to what we would need from a technological perspective in order to make these depositions as smooth as possible via Zoom. In the past I know the Judicial Commission on Information Technology has prepared technology standards to kind of go with the e-filing rules, and the standards, of course, can be modified more readily than rules and can be more quickly updated to account for changes in technology. It may be overkill in this context. It may, however, be very helpful, because in our case we spent a fair amount of time figuring out what we really needed versus what would be ideal to have; and lawyers, although we are learning how to exist in this remote world, a lot of us don't have technological savvy necessary to tease apart what we really need versus what would be ideal. So I offer that up for consideration to the Court to consider whether

technological standards could be set forth via JCIT that might help the process be more efficient for a lot of lawyers and parties alike.

CHAIRMAN BABCOCK: All right. Any other -- any other comments from anyone else? We are indeed efficient.

HONORABLE LEVI BENTON: Chip, hey, so, Tracy, under the example you used of the depositions that your husband has taken where there was a lawyer wanting to attend where the witness was, I don't see why the court couldn't order proper social distancing within the room, couldn't order the -- you know, I don't know that there's specific language, but a judge can always order anyone who insists on attending to wear a mask and to maintain a distance from the witness. You agree with that, right? You're nodding.

HONORABLE TRACY CHRISTOPHER: No, I do agree with that. I think at the time when people were doing this there was like shelter-in-place orders as opposed to the opening that we have had, so I would imagine there will be more people that are going to want to say, "I want to be with my witness." And, you know, masks, social distancing, yes, I mean, I could see how the court might say, "Well, that seems reasonable to me, and as long as you do X, Y, Z, it's okay." But, you know, that's just

COVID-related, and our task was should we change these after, after the COVID crisis.

HONORABLE STEPHEN YELENOSKY: Chip?

CHAIRMAN BABCOCK: Yes.

HONORABLE STEPHEN YELENOSKY: A couple of things. One, my experience with Zoom as a mediator is that the host can disable the chat function between participants. Is that relevant to the discussion on inappropriate chat?

MR. LEVY: That is true. You can. You can disable the chat so there is no chat function. Now, obviously there are other ways to chat. You could have a different chat tool.

HONORABLE STEPHEN YELENOSKY: Sure, but the comment was that you could do it through Zoom, and that --

MR. LEVY: Right.

HONORABLE STEPHEN YELENOSKY: -- could be prevented.

MR. LEVY: You can.

HONORABLE STEPHEN YELENOSKY: Second thing, Chip, as to what the court could require for depositions, I'm on a local committee for juries, and, of course, COVID is a big issue there. I'm not sure that Tracy was suggesting this, but to the extent there's a suggestion that the court could order somebody to sit for deposition,

even at social distance and with a mask, I think is dubious. I mean, the court could order it, but is that what you're suggesting as a possibility, Tracy?

HONORABLE TRACY CHRISTOPHER: No. I was suggesting that assuming that the witness was okay with it.

HONORABLE STEPHEN YELENOSKY: Yeah. Okay. That was just going to be my point.

HONORABLE TRACY CHRISTOPHER: Right. Right. Assuming it was, you know, you want to depose the defendant, and I'm the defense attorney, and, you know, the two of us have agreed it's okay to be in the room, socially distanced or wearing a mask or whatever, you know, that the court could allow that. I mean, it's allowed under our rules right now. It was the forced idea that with my husband's deposition that the -- you know, they felt that the lawyer was trying to do that just to bust up the deposition.

HONORABLE STEPHEN YELENOSKY: Yeah, I think my comment then is general, and this has come up in the question of jury trials locally, and my comment to them as a judge was that when you talk about juries and to the extent it's applicable here, I don't think I as a judge would ever compel anybody to even appear anywhere physically inside, despite social distancing and a mask,

and so to the extent in this context we're suggesting anything like that, I think it's problematic.

HONORABLE TRACY CHRISTOPHER: No. I was not suggesting that it would be over anyone's objection.

HONORABLE STEPHEN YELENOSKY: Okay. Thanks.

HONORABLE TRACY CHRISTOPHER: Yeah.

CHAIRMAN BABCOCK: Kennon. Yeah. Justice Gray had his hand up, but I thought he put it down.

MR. MUNZINGER: Chip, this is Richard Munzinger.

CHAIRMAN BABCOCK: Sir?

MR. MUNZINGER: I would like to go back to Roger's comments which in general addressed the integrity of the proceeding and the integrity of the exhibits. The rules should specifically state how exhibits should be managed, which is the record copy of the exhibit, mandate that there be no communications with the witness during the proceeding, direct or indirect, et cetera, et cetera.

If these remote depositions are going to be used in court, which they obviously are, why are they not subject to stringent rules that verify their authenticity and their, quote, purity, close quote. For God sakes, this is evidence. It's affecting people's rights. There is no time to say, well, let us have a rule that we work out over time, and we'll work the kinks out. Until the

kinks are out, people may have been victimized by coaching lawyers, by chats, or something else.

A fight could come up in a courtroom, "Well, wait a minute, that -- that exhibit isn't the exhibit that you questioned the witness about." And an argument comes up, well, which is the record copy of the exhibit? You don't have that with an in-person deposition, because the court reporter's copy of the exhibit is the record copy of the exhibit, and people are present to make certain that the exhibits are kept properly, that they are, in fact, the same exhibit that the witness is looking at, et cetera, et cetera. You don't have any of these controls in a Zoom deposition, but the Zoom deposition goes into court and affects people's rights.

I -- I understand that you don't like to make complicated rules and you don't want to do all of these things. Nevertheless, look at what we are doing and the process that we are doing. The end result of these proceedings affects people's legal rights in any kind of a case, in every kind of a case that the civil courts have jurisdiction over. There's no room, in my opinion, for any kind of informality or taking a chance on any of this. We've all -- we all know that not every lawyer is honest and not every witness is honest, and we all know that people attempt to game the system. Not all lawyers are

honest and what have you.

The rule should specify a number of things, such as no communication with the witness, no one present with the witness, et cetera. If it turns out -- I mean, we say that the lawyer has a right to attend the deposition, what does that mean? Can he go be with the witness? You know, the rule of thumb ought to be six feet and a mask. That's good enough to have a court hearing, it's good enough for everything else, but the long and short of my point is that I agree with Roger, except that I think that the rule should specify these things to avoid problems, because I could see a problem right now. I've got a 50-page exhibit, and it's a multimillion-dollar lawsuit or what have you, and someone says, "That's not the exhibit I testified to. The exhibit I testified to said A, B, C," and who's going to resolve that issue now in the trial? How does the trial judge resolve that issue correctly, meaning truthfully? What is the truth? How does he know? He doesn't know. And so he says, "Well, I overrule the objection, get on with it." We've all been there.

The rule should specify these things. This is a new effort here. This is a new experience. I don't think that we should take a chance that allowing this thing to work its way out and to mature itself is what the

Supreme Court of Texas is all about. It's about truth, justice, and it needs to specify in the rule how you secure that. I'm finished speaking. Thank you. I'm sorry I don't know how to raise my hand with this dang machine.

CHAIRMAN BABCOCK: You go up to the right -- or somewhere there's a thing that says "participants," and you hit that, and then your name will be there somewhere, and when you want to raise your hand you just hit it, and your hand will come up.

MR. MUNZINGER: I'll try and do that next time. Thank you.

CHAIRMAN BABCOCK: But you can butt in any time, Richard. And, Kennon, who has patiently had her hand up following the rules, is next.

MS. WOOTEN: I just want to make one comment in regard to the statement about requiring masks, you know, parameters for an in-person depositions that are sufficiently protective of the participants. Anecdotally what I've heard is that people will go into remote depositions with ideas about how they will play out and that within a matter of an hour or two people's masks are coming off, they're getting close to each other. I'm not saying that people couldn't be safer or better in how they act in person during this time in depositions and

otherwise, but the reality is I think it becomes quite difficult sometimes when you're in person to keep the six feet between you. You've got the witness who can't wear a mask when being deposed, so there's a limitation right there in terms of what can be done effectively to protect health and safety in person during these times.

I share that information only because I think so far what I'm hearing is it can be done, but when it's done it's not going to be as safe for the people involved, and it's probably not going to entail masks on everyone, primarily the witness you have not wearing a mask at all, because that's just not practical.

CHAIRMAN BABCOCK: Okay. Levi Benton. Levi Benton.

HONORABLE LEVI BENTON: I construed Richard Munzinger's comments as a motion to remand this to the subcommittee, and I second the motion.

CHAIRMAN BABCOCK: Okay. I guess -- go ahead, Tracy.

HONORABLE TRACY CHRISTOPHER: Well, remote depositions have been in the rule for a long time. Now, I think David was telling us in our subcommittee that, you know, the court reporters were excited about it, got all geared up for it, and then they never happened. But they are happening now, and I actually think that Kennon's idea

of perhaps a best practices for remote depositions would be the best way to go rather than to try to micromanage it in the rule, just because technology does change. We would need, you know, a bunch of people that have done it and have come up with ideas to, you know, sit in a room, and get those things together.

And then the question is if we should spend that time to do that when anecdotally we haven't seen problems yet. Now, you know, maybe they're out there. Maybe there's massive coaching of witnesses. Maybe there's, you know, lost exhibits that, you know, we haven't seen yet, but anecdotally it seems that, you know people are working it out. But so that's my two cents' worth on remanding it to the committee, especially if the rule is only for COVID time, which we hope will -- will end in, you know, a year, assuming we get vaccines.

CHAIRMAN BABCOCK: Yeah. Lisa has got something to say about this, and Kennon does, too.

MS. HOBBS: Okay. It might be kind of the same thing. I think Kennon's comment, just for the Court's benefit, she was talking about the technology, like what speed does the computer that your witness is going to be on need to be, and like I think she was thinking about like technology. I think that -- I can't believe I'm saying this, but I do believe that it would be

hard for the Court to write best practices of like if you're going to allow a lawyer to be next to a client what is the -- you know, what are best practices for that. I would be scared for the Court, as their former general counsel, one, because, one day WHO tells me masks are not helpful, and the next day, the very next day, WHO is saying, oh, yeah, they're totally helpful. That just kind of seems like a recipe for disaster. So I don't want to misinterpret what -- I think I'm -- and Kennon can correct me if I'm wrong. I think she was just talking about like the technology of it and not necessarily the Court weighing in on if you do these things you'll keep witnesses safe.

On the other hand, I do think I concur completely with Yelenosky that we should be doing things -- I mean, we've got to take into account when trial courts listen to orders -- you know, decide on motions, like you do need to make sure you're keeping participants, especially third party participants that aren't the plaintiff or the defendant, safe during depositions, but I don't know that we can do that on a statewide basis, especially when we have, you know, some counties that are hard hit by the corona and then a lot of counties that may not have even seen their first corona case.

It just seems that -- I agree with Tracy, like I don't know that this is the role of the subcommittee. First of all, none of us are doctors or epidemiologists or anything like that. I don't advise it for the Court. I hear all of the concerns, but I think they would have to be taken on a case-by-case basis, including the witness' own statement about what their vulnerabilities are, because it might, you know, matter more for a 65-year-old nonparty witness than it would matter to a, you know, 24-year-old super healthy person, none of which we know. I mean, we're all just learning about this. I just -- I don't know. That's a little bit of a soap box, and I'm sorry if I went too far.

CHAIRMAN BABCOCK: That's okay. Not to mention when you're 105 like Munzinger. Kennon.

MS. WOOTEN: I will note that what I was thinking about was technology because that was something that presented the biggest hurdle for us in the beginning in terms of internet speed, whether we needed external speakers, what kind of cameras were required, would it suffice if it were just in the computer versus needing something external. In my case we had a lawyer on the other side tell us all this stuff we needed, and when we probed about why we would need certain things the response was "I just copied it and pasted from the Zoom website."

So there wasn't a lot of understanding exactly of what was being demanded because it was picked up and repeated. So ultimately we realized we didn't need everything on the list, but had to work with our IT people, go back and negotiate with them, et cetera, et cetera, and I think probably when it was all said and done about 10, 15 hours, went into the process that could have been avoided if there were some technological standards that we could just look at and follow.

I do want to follow-up on the prior conversation we were having about the portion of the chat that's visible after the fact. I received a very helpful article that indicates that maybe now the private chats aren't available after the fact, but I point this out as a perfect example of how quickly the technology can change, so if you were to try to document what should be done in the rule proper, I think you would just be stale within a relatively short period of time if you provided any meaningful degree of detail.

CHAIRMAN BABCOCK: Okay. Thank you. Alistair, and then Stephen.

MR. DAWSON: So it seems to me that, as this committee does from time to time, we have gotten fairly far afield of the committee's recommendation. The recommendation is a recognition in part that remote

depositions are going to continue in the future, even after COVID. I think that they will become used much more often than they had been in the past, and so as I read the recommendation, it's merely to amend the administration of the oath to permit it to be done via video or via computer as opposed to in person. I think that's a no brainer. We ought to allow that.

All of these issues that are being raised, you know, maybe -- maybe they happen in isolated situations. You know, maybe there are problems with exhibits or maybe there are problems with, you know, lawyers coaching witnesses, but those are, I think, isolated. I haven't experienced them, and I don't think we could write rules to address all of those. I don't think we can write rules to have best practices nor should we. I think all we should do is vote on the recommendation to change the rule as it relates to the administration of the oath so that people can use remote depositions in the future. So I move that we vote on that.

CHAIRMAN BABCOCK: Thank you. Stephen.

HONORABLE STEPHEN YELENOSKY: Yeah. One thing I want to follow up on the chat issue. Kennon, were you saying that the current rule is that -- or the current technology is that you can or cannot or have the choice of

recording chats?

MS. WOOTEN: I am digesting right now an article, and I'll go ahead and say that Robert provided it, and I'm not sure ultimately whether you can or cannot see the private chats after the fact.

HONORABLE STEPHEN YELENOSKY: Yeah, I mean, since -- since private chats could be improper, like during a deposition, they might also be quite proper between attorney and client that are not a violation of any rule. I know that in mediation the private chats are attorney-client privileged conversations in -- between the attorney and the client who are in different locations, and neither the host nor anyone else should be able to see those at the time or after the fact.

MR. LEVY: I posted the article in the chat.

MS. WOOTEN: And I will note that if somebody wants to test this --

MR. LEVY: Right.

MS. WOOTEN: -- they could capture our meeting chat and see whether Robert and I, our private conversation, is visible when it's captured.

MR. LEVY: But, yeah, one answer would be, as Kennon notes, you just turn off the chat so that that's not even an option, and in Zoom, but you certainly would have the ability to chat through another means, even on

the computer. So, you know, again, I think that -- that there is so much and such a dynamic environment that I don't -- I agree with -- again, with Tracy's comment that the rules itself really can't address that, but maybe an issue for the State Bar to develop best practices and helpful guides to how to do it to cover these types of issues, and then as we get more experience then perhaps in a, you know, few years we can work through additional rule making.

CHAIRMAN BABCOCK: David Jackson.

MR. JACKSON: Yeah, I would just like to kind of take you back to 1989 when videoconferencing first started. We went through this at that time. We set up 28 different locations throughout the United States. We all used the same equipment. We all operated at an optimum bandwidth of 512, which is a half of a T1 so that we didn't have lag time and their lips weren't moving outside the audio, so we've done a lot of these things and had a lot of these issues come up, and some of the gamesmanship that happened back then, looks like could happen now, and I'm just telling you that that lasted -- we finally shut down our unit in like 1995 because of lack of use. Lawyers used it some. We took some depositions in England. We took them basically all over the world, but the issues of gamesmanship probably was the leading cause

of people not being comfortable taking videoconference depositions.

CHAIRMAN BABCOCK: Thank you, David. There are no more hands up. So, Roger, to the extent you made a motion, which Levi seconded, I wonder if I could reframe it slightly and have a vote on whether or not we should follow the subcommittee's recommendation and leave the rule as is, and the "no" vote would be, of course, that we should propose a different rule, and that would require a remand. So everybody that follows the subcommittee's recommendation and thinks that the rule should be left as is for the time being, raise your hand. Remotely.

All right. I've got 11 votes. Let me count it again. 13 votes now. Everybody done voting? 14, 15, 16 votes now. Anybody else?

Okay. Everybody against the proposal, raise your hand.

MS. DAUMERIE: Hey, Chip, this is Jackie. Remember we need to lower hands first.

CHAIRMAN BABCOCK: Right.

PROFESSOR ALBRIGHT: Can you restate the proposal, please, so we're sure what we're voting on?

CHAIRMAN BABCOCK: Sure. The proposal was to follow the subcommittee's recommendation and leave the rule as is for the time being. How do you want to vote on

that, Alex?

PROFESSOR ALBRIGHT: I'm voting for the subcommittee's proposal.

CHAIRMAN BABCOCK: Okay.

PROFESSOR ALBRIGHT: I'm sorry.

MS. HOBBS: But to be clear, there was a change to -- are we ignoring the oath right now?

CHAIRMAN BABCOCK: No. No. No, we're not ignoring that, Lisa.

MS. HOBBS: Okay.

CHAIRMAN BABCOCK: With the oath. The subcommittee's proposal. So anybody that is against the subcommittee's proposal, raise your hand.

HONORABLE ANA ESTEVEZ: Chip, I didn't -- I didn't vote, so I would like to vote with the first. This is Ana.

CHAIRMAN BABCOCK: Yeah. I'll count you with the first group.

HONORABLE ANA ESTEVEZ: Thank you.

CHAIRMAN BABCOCK: Anybody else?

PROFESSOR HOFFMAN: Yeah, same thing here, Chip, with Lonnie, vote in favor of the subcommittee proposal. Sorry about that.

CHAIRMAN BABCOCK: Anybody else?

MS. PHILLIPS: Same is -- Same is -- it's

Kim Phillips, Chip. I'm voting for it, too.

CHAIRMAN BABCOCK: Okay. Perfect.

MR. STOLLEY: Chip, this is Scott Stolley. I vote in favor as well.

CHAIRMAN BABCOCK: Okay. The vote is 22 in favor and three against, the Chair not voting. So we will submit that to the Court, and, Marti, note that we're done with this particular rule, and let's take a 10-minute recess and come back at 15 minutes before the hour.

(Recess from 10:32 a.m. to 10:42 a.m.)

CHAIRMAN BABCOCK: Justice Hecht, Chief?

HONORABLE NATHAN HECHT: I'm here.

CHAIRMAN BABCOCK: All right. Well, let's go to item three, suits affecting the parent-child relationship and out of time appeals in parental rights termination cases. Pam Baron and Bill Boyce I believe have got the helm on this one.

MS. BARON: Yeah, thanks, Chip, and Bill Boyce was recently named vice-chair of our subcommittee, and he is taking the lead on this for our subcommittee.

CHAIRMAN BABCOCK: Great, thank you. Go ahead, Bill.

HONORABLE BILL BOYCE: Thank you. So this proposal that we've outlined in the memo today revisits the topic that we have discussed at the last -- at least

the last two meetings. The overall inquiry is addressing circumstances that may lead to claims of ineffective assistance of counsel based on missed appellate deadlines in parental termination cases in circumstances when there is an entitlement to representation in connection with efforts by a governmental agency to terminate parental rights. If you want to see the roadmap -- I'm not going to go through the whole background that's set out in the memo, because we've done that a couple of times already, but if you want to follow the roadmap, the roadmap is issues for discussion on page two of the memo, and we're at stage 1(a), which is dealing with the threshold issue.

The threshold issue is showing or addressing either authority of an attorney to pursue an appeal or, a flip side of that, intent of a parent to pursue an appeal. As a threshold inquiry about whether there is a -- a desire to move forward with an appeal that there is an entitlement to.

What's new in this draft that you have in front of you are proposed revisions for discussion to rule -- Texas Rule of Civil Procedure 306. I want to give a hat tip to Roger Hughes because this proposal in large part stems from discussions that -- that he initiated after our last meeting, but before we get to the particulars of a proposed rule, I want to put down a

couple of qualifications.

Number one, I don't know that there is really consensus among the subcommittee members at this point that this is the ideal way to go. The subcommittee members may well weigh in with additional thoughts, but -- but I think, as in many situations, rather than have an abstract discussion, it's a lot easier to have a draft rule to talk about to flesh out the issues, and so that's the purpose of this draft right now. You'll recall from our prior meetings that there was substantial discussion around the issue of the difficulty of -- in some circumstances, of determining whether there is a desire on the part of a parent whose rights have been terminated at the initiation of a government agency, that there sometimes can be difficulty in determining whether there's a -- there's a desire to appeal that, for reasons that we discussed. The terminated parent may have never participated in the litigation, or the terminated parent may have come in and out of the litigation at different stages. A parent may be difficult to establish communication with because of a variety of factors, such as homelessness or domestic abuse or substance dependency or some combination, and so there's not necessarily going to be a clear answer in all cases about whether there is a desire to pursue an appeal.

That circumstance led to our prior discussion about the issues around attorneys who are not sure if their clients want to appeal pursuing a protective appeal or a phantom appeal that then leads to other consequences. The wheels of the appellate process are engaged perhaps when it's not clear whether or not they really need to be because there's an intent to appeal, and that has consequences for courts and court reporters and such.

So our prior meetings discussed potential mechanisms for trying to -- to create a determination about whether or not there was an intent to appeal, and I think -- I'm not sure that there was -- there was a universal consensus about the best way to go. I think there were some concerns about creating additional mechanisms or additional procedures, and we can flesh that out here shortly. But if you go to page seven of the memo that was distributed for today's meeting, what you'll see is -- and carrying onto page eight, a showing of the current text of rule -- Texas Rule of Civil Procedure 306 and a draft discussion version of Rule 306. Prior discussions at the full committee meeting and the subcommittee meeting had identified Rule 306 as a potential area to place additional rules, if that's the ultimate decision that we want to do that, because it

already talks about requirements for a judgment in a suit for termination of the parent-child relationship. Rule 306 is not the only place in the rules that talks about that, and as Chief Justice Hecht mentioned, there's now additional guidance under Rule 277 for the types of jury findings that are needed to be made.

We can have a discussion about where an appropriate rule should live if -- if we want to continue down the path that this draft suggests. One of the topics that was discussed at the subcommittee was perhaps as part of a large -- this larger issue we should look at putting all of the parental termination related rules together in one place, you know, similar to the way that they are assembled in part seven of the Rules of Civil Procedure for other types of specialized court activities. We'll put that out there. We can come back to that later.

Here's the point: Based on the discussion at the prior meetings and some concerns about the difficulties of determining whether or not there really is an intent and how to make that finding and when it should be made and so on and so forth, this draft rule that's contained at pages seven and eight of the memo attempts to realign the discussion around the existing statutory standards in the Texas Family Code for the duration of the attorney's representation and when that attorney ad litem

is going to cease representation of the parent or the putative parent. And so the idea here is to have a mechanism that aligns with existing statutory standards, but also provides room to make the determinations that we've discussed previously about whether there is good cause to continue with the representation and thus the appeal.

So if you look at page seven under the draft Rule 306, that first paragraph continues the second sentence of the existing rule. The subcommittee's thought was that the first sentence of existing Rule 306 probably could be moved to Rule 301 because it's generic to all types of cases and not necessarily specific to parental termination. But the draft rule picks up the second sentence of existing Rule 306, and then the paragraphs (2)(a), (b), and (c) cover circumstances under which the attorney, the appointed attorney, would continue or not continue with the representation; and within that, specifically under (2)(a), that contemplates a finding of good cause. That may be the place where further discussion can be made about whether or not there really is an intent to appeal, any difficulties in maintaining contact with the client, that sort of a thing.

2(b) points out or focuses on an area that I think that there was a significant amount of agreement

with. I won't say universal or consensus, but I think a significant amount of agreement with in the prior discussions, and that was that, sort of dividing the world into two, there are cases in which the putative father never appears in the case after citation, never participates, never evidences any circumstance or any evidence to indicate a wish to participate or contest termination, and I think there was probably some greater comfort level about having a default rule that said in that particular circumstance it may be appropriate to say we're going to reach a conclusion that there's not a desire to pursue an appeal here and avoid a phantom appeal or a protective appeal in that circumstance.

So that's what 2(b) is trying to get to, as distinguished from the other circumstance that was described where a parent involved in a parental termination proceeding may enter intermittently participate in the case, may disappear for a while and re-emerge, may participate in trial but then be unreachable after trial, those sort of situations where there was a greater concern about having some sort of a default rule that would cut off rights. And so I think that's a sufficient preamble at this stage to open up the floor for further comments, and I guess I would suggest that to the extent that any of the subcommittee members

want to elaborate on this introduction or point out anything that I've omitted, this would be the time to do it.

CHAIRMAN BABCOCK: Thanks, Bill. I think Pam's got her hand up, and then Alex.

MS. BARON: Yeah, let me just say, we are suggesting changes to Rule 306. We realize those are not in the appellate rules. We're not trying to engage in a takeover here. We did coordinate with Frank Gilstrap's committee, subcommittee, and they participated in our discussion on these changes. That's it.

CHAIRMAN BABCOCK: Thank you. Alex.

PROFESSOR ALBRIGHT: I don't want to get into gender politics here, but I -- it occurred to me as I was reading this, would it be -- I understand why we say "alleged father," but might it be better to say "alleged parent"? I don't know that I'm qualified to know whether that's appropriate or not, but I just raise it for Jackie or someone who might want to check and see with all. You know, gender is very fluid these days, so I don't know if fatherhood is fluid, but I just want to flag that.

CHAIRMAN BABCOCK: Thanks, Professor Albright. Justice Christopher, and then Frank.

HONORABLE TRACY CHRISTOPHER: So I was a little unclear what we're doing with respect to replacing

by another attorney. Usually what happens now, you have a trial attorney in the parental termination cases, and then they -- the court appoints someone else for the appeal. It's not the same lawyer generally that goes up for appeal. So was that intended to be there in section (a)?

HONORABLE BILL BOYCE: Are you talking about 2(a)?

HONORABLE TRACY CHRISTOPHER: 2(a), uh-huh.

HONORABLE BILL BOYCE: Yes. Yes. So the -- I think the short answer is yes, to just make it as broad as possible to -- to provide -- to cover whatever might happen at the conclusion of the trial, either a termination of the -- of the trial attorney ad litem's participation in not going forward with the appeal or termination of the attorney ad litem's participation at trial in going forward with the appeal with another attorney. Not -- trying to not limit it either way, but to provide a place in the rule where if a discussion is going to be had, you know, does this terminated parent really want to appeal, that would be a place that would authorize it. Does that make sense?

HONORABLE TRACY CHRISTOPHER: I would be confused if I was a trial judge reading this.

HONORABLE BILL BOYCE: Okay.

HONORABLE TRACY CHRISTOPHER: As to what it

specifically addresses. I mean, if the idea is to capture only those cases where they don't want to appeal, I think the rule needs to be clearer, because, you know, I mean otherwise we have this regular practice of -- at least in Harris County, we always get a different lawyer, appointed lawyer for the appeal versus the trial. I mean, that's just a matter of course, you know, for a number of reasons. The primary -- primary one is that you want the appellate lawyer to have an opportunity to say that the trial lawyer was ineffective, so, you know, when you do the appointed process, you usually pick a different person for the appeal. So to me I would be confused about what we were doing here.

HONORABLE BILL BOYCE: Okay.

CHAIRMAN BABCOCK: Okay. Frank, then Roger, then Lisa.

MR. GILSTRAP: First of all, with regard to Pam's comment, it was pretty easy to bring our subcommittee on board since we have considerable overlap with the appellate rules subcommittee, although the people that came on later were very helpful. With regard to the draft, I do have a comment on 2(b). The idea is, is -- as I understood it, was that, if, say, the father hasn't appeared at all or maybe he's only appeared once briefly, then that's kind of a de minimis appearance, and so we're

going to say under those circumstances we can go ahead and conclude that there's good cause. But when I read the draft, it says "in any manner," and a clever lawyer could read that just the opposite. Well, you know, there were 10 appearances and you only made nine, so you failed to appear in some manner. That's got to be clearer.

CHAIRMAN BABCOCK: Roger.

MR. HUGHES: Yeah, two things. First, to address the thing about gender politics, I had a hand in suggesting this draft, and I chose that language to track the statutes when an ad litem must be appointed, and those are in two circumstances, one in which the government agency is attempting to terminate some parent's parental rights, or it's a paternity suit and they're trying to serve an alleged father. That's why the "alleged father" is in there.

The second thing was -- and this is a purely personal thing. I think trying to figure out what a parent who has very little contact with the attorney ad litem or maybe none at all, trying to figure out what they want done in a given circumstance, personally, and this is my opinion, it's a legal fiction, and in that if you appoint an appellate attorney, the only way they're going to feel safe is to march forward. So to me I think to try to follow the statute, the question needs to be not does

the attorney have authority to appeal. I think the question is, is whether there is good cause, yes or no, and that's a factual question, just to terminate the appointment of an attorney altogether, and that ends having to try to figure out a hypothetical issue as to whether the attorney, who may never have seen or met with the parent or has only met one or two times and not recently, whether that attorney has authority to appeal. That's my two bits. Thank you.

CHAIRMAN BABCOCK: Lisa. Lisa, we can't hear you if you're talking.

MS. HOBBS: Sorry about that. I promised myself I would not do that today. I'm unmuted now, but to Judge -- Justice Christopher's comment, when I first read 2(a) I thought it was a little bit cumbersome, too, and maybe not clear, and maybe that's reason for us to all look at the language a little bit closer, but keep in mind that it says, "The judgment may state that an attorney ad litem appointed for a parent or alleged father is relieved or replaced by another attorney." So I think that the "relieved or replaced" takes care of Harris County that always appoints a different appellate lawyer versus some of these small counties where they don't, that the trial court -- they don't have an appellate wheel. They just have like a trial court CPS wheel and not an appellate

wheel. So I think just -- and I'll look forward to further discussion with you about it, Judge Christopher, but I just wanted to point that language out.

The -- the -- and then Roger made the point about alleged father versus putative father. I always thought it was a putative father. Am I just making that up? Does the statute really talk about an alleged father?

MR. HUGHES: I don't have the statute in front of me, so I can't remember the exact statutory language, but I was attempting to attract -- pardon me, to track the statutes in their language so that nothing would be missed or go astray.

MS. HOBBS: Uh-huh.

MR. HUGHES: So if you go back to the statutes and they only use one term, then that's what we use.

MS. HOBBS: As to your broader point, Roger, I think that Justice Boyd does a good job of laying out at the bottom of page six, top of page seven, where the -- what the real problem is meant to address, which is somebody disappears from a case for an amount of time. They might be imprisoned. They might be just going through, you know, mental illness issues, and so I'm mostly speaking from experience of my partner being an appointed appellate attorney where we don't -- like we are

way past any -- I mean, hopefully before we file our brief we will have talked to -- finally gotten in touch with the parent whose rights have been terminated, but there's all kinds of reasons it comes up. Incarceration, you know, other issues going on. Just they move for a job, and trying to get in touch with family members of like where they went for their job, like it's just harder than you can imagine, and it's never as timely as you think it can be before we can even get on the phone call. Like a phone call with the client. And I thought Justice Boyce did a really good job of outlining that for the committee, so the problem that we're trying to solve here.

CHAIRMAN BABCOCK: Okay, thanks, Lisa. Pam.

MS. BARON: Yeah, I think in response to Justice Christopher's comment, I see why she said that, and I'm wondering if this might fix it if we changed (a) to say, "or replaced by another attorney for purposes of appeal" and then add language in (b) and (c) that says -- that makes clear that the attorney ad litem is discharged and no one will be appointed from there on for appeal. So we have, you know, part (a) that says you're relieved or replaced with an appellate attorney, and (b) and (c) have two situations where you're discharged without anyone else being appointed to continue the appeal. Would that work, Justice Christopher?

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, okay, so do we really have to have the judge put in good cause if they've decided to hire a different appellate attorney? You know, as is just sort of the normal practice in Harris County, the trial attorney is out, the appellate attorney is in. I mean, do we have to have a finding of good cause all the time in the judgment to that effect? That's what I'm confused about. I mean --

MS. HOBBS: No, I think -- I think the first one says that -- the intent, and Justice Boyce can correct me if I'm wrong. The first one says that it's sort of the timing, like we want in the judgment whether we're going to relieve the -- the trial court and/or appoint a new one. The rest of them are meant to be the standard for when you're relieving them, but you might -- a trial court -- I don't know. Some trial courts who do CPS cases tell me, and I can talk to Karlene about it, but I think -- I think (b) kind of only kicks in if you're going to -- like if you've gotten some reason to believe that the -- under Rule 12 or whatever standard we adopt, that the client doesn't want to pursue an appeal. Right? And then at that matter -- it's the standard -- I don't know. It might be complicated because we're trying to do too much in one rule.

CHAIRMAN BABCOCK: All right.

MS. HOBBS: In other words, we're -- we're trying to -- we're trying to determine like both the duration of an appointment and -- and whether they have authority to pursue on. We're also trying to put the standard in there. So we're trying to do the timing of when -- who and when makes these decisions, and we're trying to do the standard for them, and we're doing it in the same rule, and that might be where the confusion is, Justice Boyce.

HONORABLE BILL BOYCE: Uh-huh.

CHAIRMAN BABCOCK: Pam.

MS. BARON: Yeah, I don't think we need good cause in (a). Because good cause is in (b) and (c).

MS. HOBBS: Yeah, Justice Boyce, you tell me, was (a) meant to be that you -- maybe I'm wrong about what you intended (a) to be. Is that the timing of it? It needs to happen -- maybe I'm just confused, too. Sorry.

HONORABLE BILL BOYCE: No. So the intent was to have kind of an overall provision that could be adapted to multiple circumstances. Maybe the attorney ad litem is relieved and not replaced, maybe the attorney ad litem is relieved and replaced. I think at least the way I was thinking about it is 2(a) is kind of a catch-all to

cover multiple circumstances; (b) and (c) are more specific to address the specifics that we talked about; for example, the alleged father who was served but never has appeared at all. And, Lisa, just to follow-up in your earlier question, I double-checked the statute, and it does refer to "alleged father."

MS. HOBBS: Okay. Very good.

HONORABLE BILL BOYCE: For whatever that's worth. Now, that being said, maybe 2(a) is too much of a catch-all, and that's what's causing confusion, and there's going to be uncertainty about exactly what it authorizes or what it requires in the trial court, so if it's too much of a catch-all, then that could be granulated out some more.

CHAIRMAN BABCOCK: Roger.

MR. HUGHES: There -- the reason -- the reason the word "good cause" keeps appearing throughout the draft is that is a statutory and a case law requirement. The Supreme Court has basically said if the ad litem is going to be relieved, there needs to be a finding of good cause, and I think in one of the cases -- and it's cited in the note -- they said good cause is not going to be "I think the appeal is meritless." That's not good cause for relieving the attorney. That's good cause for a brief stating the attorney's opinion, but not for

relieving the attorney. So the reason why it was phrased that way was to give the judge a discretionary basis which would be fact-intensive or fact-specific to the case that -- for good cause, and that -- that was all it was intended to do.

MS. HOBBS: To that point and in further criticism of (a) that we may need to rework it, I don't think that replacing an ad litem requires good cause. So the way the rule is worded is that to relieve them -- and I agree with Roger that that is the statutory standard, but appointing an appellate attorney in this case doesn't require good cause. In fact, it's the default that you would appoint them, absent some acknowledgement by someone that the client doesn't want to appeal.

CHAIRMAN BABCOCK: Okay. Justice Gray.

HONORABLE TOM GRAY: The issue -- there's a lot of moving parts here, and I agree with whoever it was that said maybe we're trying to address too much in one -- one place in the rules, but specifically with regard to replacing an attorney, there's a well-developed body of law in criminal cases that you cannot replace appointed counsel over the objection of a client, particularly prior to judgment. So the "for good cause" language in 2(a) may avoid a due process violation appointing appellate -- and appointing an appellate specialist may, in fact, be the

good cause you need, but there is a due process argument that once an attorney is appointed and the client is satisfied, you can't replace them just because, you know, you want somebody that's more cooperative or something to get in a judgment, is the problem.

CHAIRMAN BABCOCK: Thank you, Justice Gray. Harvey Brown.

HONORABLE HARVEY BROWN: It seems to me the "relieved" is the thing that is requiring the good cause, and the "replaced by another attorney" may be that we need consent. So I would break those down into two separate things. I mean, I would have a little (i) for "relieved" after "stating a finding of good cause" or two little (i), "replaced by another attorney with consent of the parent or alleged father."

MS. HOBBS: I think that's a great idea, breaking them out. The problem is that we're addressing a point where we don't necessarily know whether we're going -- like we don't know -- we're assuming under this rule that we don't know where the parent is, so I don't know what you mean by consent. Maybe you mean unless objected to. It can't be consent, though, because that assumes like an affirmative action by a client that we may not be able to get in touch with at this moment.

HONORABLE HARVEY BROWN: I think that's a

good point, so maybe what you suggested, something of a consent or some other language to take up the person who we can't reach.

MS. HOBBS: Yeah.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: I was making -- I'm sorry, I was making an effort to sort of rewrite it, and to me, I mean, if we're going to put this in here, I would say, "The judgment must address a parent or alleged parent's appeal by one of the following: (a), acknowledging the appointed ad litem will continue the appeal, or (b), replacing the trial attorney with another attorney for the appeal, or (c), where the parent or alleged parent has failed to appear," then you go into the good cause that you have in (b) and (c), that, you know, there will be no appeal because the parent or alleged parent has failed to appear. I mean, let's make it clear what we're doing. There won't be an appeal at that point.

CHAIRMAN BABCOCK: Roger. Roger, you need to unmute.

MR. HUGHES: I just wanted to make two points. First, when I made my suggestions, I thought that the judgment ought to be the place where if an attorney is going to be relieved or an attorney will be replaced, that's where it be, that that issue be resolved in the

judgment so that everybody will know when and where that order is going to be, and that it not be some collateral order, which God only knows when it gets made.

The second thing is I was -- when I read Justice Boyce's memo, I was really attracted to the idea of dealing with the phantom appeal by saying that there be a rule of -- or an appellate procedure that incorporates Rule 12 and simply refers the matter back to the trial court to determine the attorney's -- the ad litem attorney or the appointed counsel's authority to pursue the appeal. I think that's a good way to do it. And that's my two cents' worth.

CHAIRMAN BABCOCK: All right. Bill, back to you.

HONORABLE BILL BOYCE: Okay. Well, I've got the committee's guidance and can work with the subcommittee to reconfigure this proposal to try to make it more clear. I guess I would ask for the full committee's thoughts about whether Rule 306 is the place to do this or do it somewhere else or gather rules together. I have to say that I am persuaded by Roger's point that if we're going to try to have a clear place where everybody knows what to look to to figure out what's going on and whether or not an attorney is going to continue and/or there's going to be an appeal, steering

the findings and the discussion to the judgment seems like a good place to do that, but there may be different thoughts about how to approach it.

CHAIRMAN BABCOCK: Okay. Lisa, and then Frank.

MS. HOBBS: Okay, I just -- first of all, Justice Boyce, I'm sorry that I didn't read this before this committee. I probably could have given you some advice before today, and I know you circulated it, and I apologize that I didn't get some comments to you before that. I really like Justice Christopher's idea of like breaking this down a little bit more simpler, and I think we do need to go back to the drafting table. I think one thing that struck me about her word choice, though, which I know she was just on the fly and not committed to, when she says, "There will be no appeal if (b) or (c)," I don't think -- I don't think you can say it that -- Shelby, stop it. Sorry. Sorry. That's my dog. Dog number one.

I don't think you can say it that bluntly just because you still have discretion. A trial court, even if a father failed to appear in any manner, he might -- I don't know, I can't think of the scenario, but I certainly would like for him to have some discretion based on the record and what he learned about the father or whoever, whatever parent. So I still want a little bit

of discretion in there. I think we move into statutory drafting as legislators instead of just trying to interpret the Family Code if we go too far there, so that's just kind of a rule -- just a thought as we move forward on redrafting.

I kind of like the idea of the -- Roger's suggestion about a Rule 12 but in the appellate court, because things move so fast at the end of these trials, we may actually have more facts as the appeal is perfected where someone could figure out how to show authority on appeal. The problem, of course, with that is that appellate courts, these can be fact-intensive and appellate courts aren't exactly the best place to resolve factual disputes. They could obviously, obviously, abate it, but I think the reason why we've gone to the point of this needs to be made at the judgment stage and maybe before the client ever leaves the courtroom after the verdict is because of the problems either getting the client after that moment or just who can really serve that fact-finding purpose.

CHAIRMAN BABCOCK: All right. Frank Gilstrap.

MR. GILSTRAP: Chip, I think Bill had called for comments about placement, but apparently there's still some people that we need to -- would like to talk about

the provisions of the rule, which is much more important at this juncture than placement, so my comments don't have anything to do with the -- the wording of the rule, and maybe you want to defer that.

CHAIRMAN BABCOCK: No, I think go ahead now.

MR. GILSTRAP: Okay. Okay. Well, you know, we don't talk about placement much, and, you know, as you know, when we have a problem with the rules, we just try to fix the rule because we know that if we start tampering with other provisions it can have unintended consequences. It's kind of like fixing a leak on a ship. You just fix the leak because you don't want to rock the boat, but after a while you fix leak after leak and the ship tends to become unseaworthy, and I think we've kind of reached that point here with the Rules 300.

Originally, you know, as everybody has pointed out, the first sentence of Rule 306, which simply calls for the names of the parties against whom the judgment is rendered to be in the judgment, is not a big deal, and it could easily be moved to Rule 301. But originally Rule 306 was a big deal because it also required that you recite the findings of the jury and upon which the judgment of the court is based, and that was a big deal, but the Court got rid of that in 1971 so we just had the first line of Rule 306, which was kind of a throw

away.

But then in 2012 the Court came back in and put this second sentence that we're struggling with about the recitations in a suit for termination. I don't know why the Court put it there, but that's where it is, and now we're talking about making Rule 306 kind of a standalone rule dealing with this termination issue. That's not a bad idea, but it doesn't need to be in 306. It needs to be further back in the rules, and if you'll look at the rules, bear with me here, Rule -- in the 300s, Rule 300 through about, gosh, 307 or 308, are generalized rules that apply to every kind of case. Then when you get after that, you have very specialized rules that apply to different cases, foreclosures, suits against executors, appeal from justice court. The first one of those rules is a rule that's entitled, "In suits affecting the parent-child relationship." That's 308(a) and when you -- you say, well, that's a great place to put this rule, except when you read that rule it has nothing to do with what we're talking about. It has to do with enforcing child support obligations, and, you know, possession of child, and I don't know if that rule is still being used. I don't know anything about the area. It would be helpful to know what the current status of that rule is, but I think we need to -- we need to take the rule that we're

drafting and put it in in 308(b).

It will be fine there, and it will stand alone. It will be next door to another suit -- another rule involving parent-child relationship, and I think Scott Stolley on our subcommittee said, well, this may be the time to go ahead and kick it over into the last part of the rules, which where we have specialized rules, like with trespass to try title, that type of thing. I don't think the time has come yet, but certainly I think the rules involving judgment that touch on the parent-child relationship need to be together, and we don't need to put this rule back at the beginning of the rules where it's misplaced. That's all I have.

CHAIRMAN BABCOCK: Thanks, Frank. Justice Gray.

HONORABLE TOM GRAY: This is a comment, first, back where Lisa was talking about the need to have the ability to do the appeal even if you didn't participate in the trial. We've had the situation in Waco where the father never -- and actually the mother as well, so it's gender neutral here -- never showed up at any point during the trial, and the reality of it all didn't hit until the actual judgment. And so the -- and there may or may not have been problems about participation in the trial, but it was -- they may not even have known

about it until they wound up getting a copy of the judgment, and, you know, that's when it became real, that's when it became important to them. Sometimes it's where the child wound up that is the part that triggers the parents' reaction to the judgment, and so I agree with Lisa that there needs to be some way to preserve that ability to appeal, even if there was no participation during the course of the trial.

And then second, I question whether or not we should be doing anything without Richard. You know, should we even get close to the Family Code without Richard's presence. So with that I'll sign off.

CHAIRMAN BABCOCK: All right. Scott Stolley.

MR. STOLLEY: Yeah, Chip, I want to echo Frank -- a little bit of Frank's comments. In our subcommittee meeting I mentioned that we -- we meaning the Court eventually -- might want to consider putting all of the rules related to the parent-child relationship in a different, separate subpart toward the end of the Rules of Civil Procedure, and toward the end there we have separate subparts for various things like garnishments, attachments, injunctions, foreclosures, trespass to try title, and it seems like it would be a good idea to capture all of the rules relating to the parent-child

relationship lawsuits in one place rather than having them scattered throughout the Rules of Civil Procedure.

I mean, we're talking about one of the very fundamental constitutional rights here, the parent-child relationship, and we have other types of lawsuits that have their own subparts in the rules that are not nearly as important as the parent-child relationship, so I would urge that eventually the Court create that separate subpart in the rules so that they're all -- they're all in one place and not so hard to find. Thanks.

CHAIRMAN BABCOCK: All right. Thank you. No other hands are up, so I'll pitch it back to Bill.

HONORABLE BILL BOYCE: Okay. I think that gives us the guidance we need to retool and come back.

CHAIRMAN BABCOCK: All right. Great. So we will -- we will, in Levi Benton's words, remand this one to the subcommittee and bring it back at our next meeting. Unless everybody is violently opposed, I'd like to work until -- for another hour until about 1:30. Would that be another hour? Yeah. Before we take our lunch break. The reason for that is not because I'm trying to starve everybody, but because Judge Mazzant while we've been in this meeting has set me for a TRO hearing this afternoon at 2:00. So that way I'll be able to hopefully get ready for the TRO, have the TRO, and be back with everybody by

2:30. So if there's no violent objections to that, we'll move on to the next rule, which is the parental leave continuance rule, and Professor Carlson and -- is the chair. Tom Riney is the vice-chair, and, Elaine, are you there?

MS. WOOTEN: I will chime in and say that she has asked me to take the lead today.

CHAIRMAN BABCOCK: Okay. Great. And I couldn't see who was speaking.

MS. WOOTEN: Kennon.

CHAIRMAN BABCOCK: Okay, great. Fire away.

MS. WOOTEN: All right. So we have provided a memo for the committee's consideration, and in this memo we have now presented a recommendation of the subcommittee for full committee consideration. To refresh everyone's memory, during the last meeting in which parental leave continuances were discussed, the subcommittee had for the committee just a draft, discussion draft. This is an actual recommendation based on input received from the full committee both during the last meeting, which was on February 28th, 2020, and during the prior meeting on November 1, 2019. I'll just walk through some of the key points in the memo and then defer to other members of the subcommittee to make any further points that they think should be made before we have full discussion.

So as noted in the memo, first paragraph, like I said earlier, we've had two meetings to discuss parental leave continuance and related issues, and I noticed in reading the transcript from the February 28th, 2020, meeting that perhaps there was an error in the vote characterization that got carried over to this memo, so we'll have to go back and check, but from what I can tell from our last transcript, the full committee voted 20 to 1 in favor of proposing a rule addressing parental leave continuance on November 1, 2019; and over the course of time what we've seen is a little bit of development in that when the State Bar Court Rules Committee was first looking at parental leave continuance, we had only the Florida rule and a local rule to kind of guide us.

Since then, of course, we've had North Carolina come on board with a continuance rule for further guidance and also some -- some good language that's been carried over in part to the proposal before you today. Both the Florida and North Carolina rules are provided as attachments if you want to look at them. In addition, for your review if you want to look at it, is the State Bar Court Rules Committee's proposed changes to Rule 253, the continuance rule. In addition, if you want to look at it again to refresh your memory, we've provided the Harris County local Rule 11 that entitles the lead counsel to

file a vacation letter that precludes the case from being set for trial and relieves counsel from engaging in pretrial proceedings during that time frame.

Over the course of our discussion, we received input from the Court, both during Supreme Court Advisory Committee meeting and also separately, to consider broadening the proposed continuance rule to extend not just to parental leave continuances but also to situations set forth in the FMLA that, of course, extend beyond just the birth or adoption of the child. So that all of you can look at what's provided in the FMLA, we have also provided a copy of that as an attachment.

So the proposal for consideration today begins on page two of the memo that's been provided to you. So we'll turn to that, and you can see at the top of page two you have the existing language of Rule 253 to kind of ground you, and then the subcommittee recommendation follows. So I'll cover some high points here and again leave it to the other subcommittee members to fill in any gaps they think need to be filled before we have a broad discussion, but I think a high point to make before we dive in is that there is this desire to kind of balance our personal needs and including parental needs and the need to care for our loved ones with the need for efficient administration of justice. And so the challenge

is striking the right balance in the proposal, and that's what the subcommittee has tried to do.

So if you look at the rule that's proposed, subpart (a) is the part dealing with parental leave continuance specifically. As noted in footnote 1, we could refer to this as "secured leave period" following North Carolina, but as of now it's referred to as "parental leave continuance" because that is the subject matter at hand, specifically the birth of a child or the placement for adoption of a child. I know there was a lot of discussion during the last meeting about the scope for this rule, what it should cover. As of now the recommendation is to include both trial settings and determination of summary judgment motions.

Just to kind of give you-all some additional background there, in North Carolina there is application to proceedings and depositions, and I believe our legislative continuance rule here in Texas applies simply to trials. In this proposal you'll see that 12 weeks is the presumptive maximum length for the parental leave continuance that may be taken within the 24 weeks of the birth or placement of a child for adoption. Unpacking that just a little bit, I believe that's what North Carolina does as well, and more specifically has the 12-week presumptive maximum leave that it's within this 24

weeks after birth or placement of a child for adoption. I'll insert just a personal note here that I think that 24-week period is good, in part because what it allows is for parental leave to be taken by a father, for example, perhaps not right after the birth of a child, but after the mother goes through a parental leave period.

You'll see in the proposal there, paragraph (a), still that upon a showing of good cause the trial court may allow a longer time for the parental leave period. So that's just discretion accounting for variations that occur in our lives when we become parents that we shouldn't try to imagine all of those possibilities here as a committee or put them into the rule.

There is then finally the last part of subpart (a) there, an exclusion clause, saying that the rule does not apply to cases arising under Chapter 54, 83, or 85 or 262 of the Family Code. You'll see in footnotes explanations of what those chapters cover, and it also says that this wouldn't apply in involuntarily civil commitment or guardianship proceedings. In footnote 6 you'll see that there's a recommendation as of now from the subcommittee to recommend presumptively mandatory parental leave application to expedited trials, but if we do that, we're going to need to amend Rule 169(d)(2) to

reflect the application of the proposed rule.

Subpart (a)(1) addresses timing for filing. I know there's been a lot of discussion about when the filing should occur, so you'll see here that it's at least 90 days before the date of commencement of parental leave period as to an existing trial settings and then for others within seven days of a trial setting made less than 90 days before commencement of the secured leave period.

Again, there's a sentence in here accounting for the fact that there's no way to predict the needs, timing, et cetera, for when we become parents and how that all unfolds, so last sentence of subpart (a)(1) reads, "Because of potential medical complications and the uncertainty of a child's birth or adoption date, the trial court must make reasonable exception to this requirement." So some discretion, but also a mandate to make some reasonable exception.

Turning the page to three, you'll see that there is a requirement to support your motion for parental leave continuance and have an affidavit or an unsworn declaration confirming several things. I won't read all of those things, but you can see them all set forth there. One bracketed area for discussion is in 2(B), where you have to show the continuance is not sought merely for delay. Bracketed language is in there, "but to care for

the child." That language, I believe, comes from the North Carolina rule. As you know, the default showing for these continuance motions is that you're moving so that justice may be done. So that's something to be discussed by the full committee whether we should change the bracketed language or run with it.

Then in (3), subpart (a)(3), you see that the trial court must grant the continuance absent extraordinary circumstances stated in the trial court's order. The trial court shall enter a written order resetting the date of trial or determination of the summary judgment and adjust its pending pretrial deadlines in the scheduling order, if any, to correspond with the new trial date. And then finally, it states, "Absent extraordinary circumstances the trial court shall not set the case for trial, including summary judgment, during the designated leave period."

Subpart (b) is intended to address other situations beyond this parental leave situation. I think most importantly for the committee's knowledge and discussion is to know that right now the subcommittee's proposal is that the FMLA parameters would be addressed in a comment that would correspond with the text of the Rule (b). So if you turn finally to the last page of the memo, four, you'll see some standards for considering a motion

for continuance under subsection (b). What the trial court should consider is in that first sentence, and then in the next sentence you see the FMLA standards there. So "Although discretionary, trial courts should give serious consideration to granting a requested continuance when the attorney seeking the continuance," and then you have a list of three items which are coming straight from the FMLA. And then finally in this comment, "When granting a continuance under subsection (b), trial court should consider using orders to minimize the harm caused by delay. If a prompt reset is difficult to fit in the trial court's schedule, the trial court should consider seeking the assistance of an assigned judge."

I'll say my recollection, high level, of why the subcommittee decided to address FMLA in the comments is primarily that in the circumstances set forth -- specifically (1), (2), (3) in the comment there are coming from the FMLA -- it's a little different, if you will, from the parental leave context. Most notably for a parent, a new parent, we all have this three-month period where we know there is extreme dependency of the infant, and I think, as I mentioned before, it makes sense for us to consider that that period where there is dependency needs that are more extreme than in other parts of a human's life, it's really more than three months. People

say it's more about six months, which is why in my case, for example, my husband and I had a six-month parental leave period starting with me and then going to him for three months.

In these situations addressed by the FMLA, however, it can be a very long period of time potentially that comes into play. For example, I know in my own life, I've had a father-in-law who was in the hospice-type situation for many, many months. Some people have had family members who were in hospice for years, and so these health conditions that may come up or the need to care for a family member, it's harder to peg down how much time you need. The standards become much fuzzier. This conversation about whether you should make it mandatory or discretionary for the judge gets a lot more difficult and thorny, if you will. So ultimately, bottom line, the subcommittee felt like giving the trial court discretion made more sense and just providing this guidance in a comment as opposed to trying to address everything in the rule text proper.

With that I'll stop talking and turn it over to the subcommittee to address things that I most likely inadvertently omitted.

CHAIRMAN BABCOCK: All right. Who wants to speak from the subcommittee? Okay, we're done. Just

kidding. Just kidding. Well, if no subcommittee members want to talk, any comments about this proposal?

HONORABLE DAVID PEEPLES: Chip, I'll say something.

CHAIRMAN BABCOCK: Yes.

HONORABLE DAVID PEEPLES: This area seems to me very, very difficult because I think there are weighty concerns on both sides. The concerns in favor of a mother, especially, but also a father who, you know, had had their career trajectory at stake and all of that, and to be at the mercy of a trial court, that's a serious thing on one side, but the potential damage to the administration of the judicial system is also at stake, and so I think this is a very, very hard problem. I don't think that we can finish -- I just would be very surprised if we come up with something today that is, you know, tight and good, and but it's just hard, and I think that the wisdom on this committee is the subcommittee would really love to have good discussion before we go back to the drawing board.

CHAIRMAN BABCOCK: Yeah. Well said, Judge. Thank you. Frank.

MR. GILSTRAP: Thank you, Chip. First of all, I oppose this, and prior meetings I've opposed this rule, but you know, that battle is over, and I think we've

got to try to draft a good rule, and looking at the problems, I don't envy the subcommittee's position, because there are some difficult issues here, but nevertheless, I'd like to look at Rule 253 as proposed and point out some issues. I think that's what we want.

First of all, as I understand, we're going to put the triggering event is going to be a trial setting or a summary judgment. I understand, summary judgment is a big deal now. More cases decided by summary judgment than by trial, but the language here, it says that -- in the first line it says, "Continuance of a trial, including the determination of a summary judgment." Well, that's different from the hearing. I mean, judges sometimes take summary judgment and sit on them until before trial, and then you go in and say, "Well, Judge, I want a continuance because you haven't determined the summary judgment. You're determining it right now, so I get a continuance." That needs to be clarified.

And at the end of that line it says, "in connection with the birth." Well, that's pretty vague. I'm not sure what "connection with a birth" means, but I would prefer "because of," something definite. And then in the next -- then we say "the birth or placement for adoption," and I'm not sure what the purpose of the rules "placement for." It would make sense just to say "the

birth or adoption of a child." You could read that to say, "Well, yeah, Judge, I'm placing a child for adoption in another court, and it's not my child, but I'm the attorney doing it." Again, I don't see why we need the word "placement for."

And then we get into the real problem of, as somebody pointed out, gender politics. It's without placement, it would say "birth or adoption of a child by an attorney movant, regardless of the movant's gender." Well, that makes sense where there's an adoption, but it doesn't make sense literally speaking where there is a birth because at last -- the last time I read, fathers don't give birth. I know that's difficult to draw, but it -- right now it doesn't make sense.

Next issue, as I understand, we're talking about a minimum period which you have an absolute right for, and then the judge can extend it, but you -- as I understood, you were going to get 12 weeks during the first 24 weeks. Well, it doesn't say that. It says 12 weeks is the presumptive maximum length. I'm not sure what that means. "Okay. Counsel, the presumption has been rebutted. You're getting one week." If we're going to give a guaranteed period of time, it needs to be specifically, and I don't think "presumptive maximum length" does it.

Then moving down into (1). It says that -- you know, in (1) we start talking about parental leave period, as existing -- as to the existing trial setting and within seven days of the notice of trial setting, but we're not -- we don't mention summary judgment there. Then in the fourth line we talk about "secured leave period." Obviously a mistake, because we haven't used that term to begin with. Finally, the last line of that sentence, "The trial court must make a reasonable exception." Well, what -- what is a reasonable exception that you must make?

Let's see. Again, on page three, we have in (2)(A), we don't have any mention of the summary judgment, and in (2)(C) we do. And again, in (3) we get back to this language, "determination of the summary judgment" whatever that means, and finally we say "designated leave period." I'm not sure what that means. That's all I have.

CHAIRMAN BABCOCK: All right. Thanks. Justice Christopher.

HONORABLE TRACY CHRISTOPHER: I think I have said this before. I'm opposed to the 90-day time frame, and I think Frank was right in terms of the way that paragraph is written, in terms of what exactly does that mean in terms of reasonable exception. And then my other

comment was in No. (3), "The trial court must grant the continuance absent extraordinary circumstances stated in the trial court's order." I assume that means they must grant the continuance if the movant has fully complied with No. (2). I envision that there will be a debate over "substantial responsibility for the preparation or presentation of the case." And so the question -- you know, if someone is opposing it. If someone files their motion, the other side is opposing it and says, you know, "I've never seen this lawyer on the case. How on earth do they have substantial responsibility for the preparation or presentation of the case?" And I assume that the extraordinary circumstances wouldn't apply there. I mean, if they don't meet the requirements of the rule, they don't get the continuance, right? That's my thoughts.

CHAIRMAN BABCOCK: Okay. Judge Estevez.

HONORABLE ANA ESTEVEZ: Yeah, I -- I was listening to Frank's comments regarding placement or adoption of a child, and I think it would be very helpful to have a definition of what placement for adoption of a child is. There's -- my brother adopted a child from Taiwan, so they went to Taiwan, they picked up a baby, and they definitely need this leave. I was a foster parent, you know, and so I have stepparent adoptions where the child's lived with them for five years, and they -- they

are -- maybe they're not placed for adoption, but they get adopted after living there five years or going -- the child is going to school for the next few years, you know, and the next day. So are we talking about any type of adoption where the mother didn't adopt the child, but the father adopted the child? Are we talking about only when the placement is a baby where it will have higher needs, because if you place a child for adoption and the child is 10 and we're in a school year and we don't have COVID, then that means that child is going to school, or any other pandemic.

So I don't know if our intent is really to have it that broad, and maybe it is, because we want everybody to have that right to have that time with the child, but if the kid is the age for school, then that child's not going to be home with that parent, so it's -- it could be used, you know, without having to show any type of good cause. They just get a vacation for a few weeks, and there's nothing you can do about it, and I'm not suggesting people would do that. I just think that it would be helpful to just have a definition. I think everybody knows what a birth is, but I don't know that placement for adoption is the same in every circumstance.

CHAIRMAN BABCOCK: Great, thank you. Any other comments?

HONORABLE DAVID PEEPLES: Chip?

CHAIRMAN BABCOCK: Yeah, Judge Peeples.

HONORABLE DAVID PEEPLES: The Harris County vacation rule is something that came to us at the last minute, at least I didn't see it until just a few days ago, and I'd like to ask the Houston lawyers how that works and if it gets abused, is it hard for judges to administer. It's elegant almost in its simplicity and its clarity, but I can see a lot of -- I mean, there could be games played there. What's the experience with that?

CHAIRMAN BABCOCK: All right.

HONORABLE DAVID PEEPLES: I know the time period, the maximum is four weeks. That's a big difference, but there are some similarities, and I'd like to know how it works.

MR. LEVY: It's -- you have a deadline to submit it, but it's a process. You just pick your four weeks that -- that you don't want to be called to trial, and you don't have to have a reason for it, and, you know, you obviously don't have to go on vacation during those weeks, but you're able to block trial settings during that time. And what ends up happening, at least in my experience, is very few trials go to -- very few cases go to trial in the summer because of the vacation letters.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Yes, especially if it's a -- if it's a multiparty case, I think sometimes the lawyers get together and block out the whole summer by putting down dates, you know, to block it off, as a way to give themselves a continuance without actually asking for the continuance, but from my perspective as a trial judge, we always had plenty of cases that wanted to go to trial, and if people wanted to block it out, fine. The number of trials tends to go down in the summertime, just because people are on vacation. They, you know, want to do this or that. But there is definitely gamesmanship involved in it, but it didn't really seem to stop the wheels of justice by allowing it.

MR. HARDIN: Chip, this is Rusty on audio. I'm sorry I can't see -- I can't raise my hand, but my experience has been, to answer the question, it works pretty well really. We have a deadline to get those submissions in. I just had a recent situation to amend mine by a week or two and was able to do it, but it wasn't in connection with any trials or connection with a trip. Actually, I think most trial lawyers in Houston like the system, and I quite frankly have never heard any -- it's so engrained we never hear anybody complaining about it. Let me put it that way. And it's not something that you could do like the legislative continuance, which was

always so abused where you could do it at the last minute. It's something that you've got to apply for, looking ahead, and four quarters, you can do it throughout the year, but you're limited to the 30 days a year. I -- I think if you polled most lawyers in Houston they would think it works fine.

CHAIRMAN BABCOCK: Thanks, Rusty, and everybody should be aware that Rusty was recently voted by somebody as a legal legend in Texas.

MR. HARDIN: Yeah, well, that is -- anyway. I would ignore -- I would ignore Chip on these matters and get back to the rules, please.

CHAIRMAN BABCOCK: Absolutely true. Levi.

HONORABLE LEVI BENTON: Yeah, so, David, one, I'm kind of shocked to hear that Bexar County doesn't have such a rule, and I would add to the things that have been said. You know, Chip -- Chip Babcock, for example, could have 10 cases pending. Unless he has a case against Jim Perdue that he knows he's going to lose, he could serve his vacation letter in the case against Jim, but not assert his vacation letter in another case pending the same week. It's his right. It's an absolute right to assert, and I've never known of a Harris County trial court judge to disregard a vacation letter.

CHAIRMAN BABCOCK: Robert.

MR. LEVY: I wanted to respond to Judge Estevez's comments about needing more definitions. I think that there's so many different possibilities that are in the -- in the area that it probably would be counterproductive to try to define all the potential situations with adoption or even birth. You could have a surrogacy, a same sex couple that is working through surrogacy, or other situations, so that it would be very difficult to line out all of the possible situations, and rather I think the court just needs to evaluate the motion under its own terms to decide whether it fits the rule and is appropriate.

CHAIRMAN BABCOCK: Thank you. Frank. You have to unmute, Frank.

MS. WOOTEN: Frank is just saying how much he loves the rule.

MR. GILSTRAP: I know. Are we ready to talk about part (b)? Have we merged over into part (b) of the rule yet?

CHAIRMAN BABCOCK: Well, maybe we've slopped over a little bit, but just go ahead and say what you want to say, and then Harvey and Jim Perdue will weigh in.

MR. GILSTRAP: Well, the comments that I've heard all seem to relate to the old adage that Harris County is uninhabitable in summer, but aside from that,

(b) we talk about discretion for good cause. I'm not sure what that means. And then we have an enormous comment, I understand, and I don't know where it came from, but you know, the idea has been for years not to make the rules in the comments, and here we have this, you know, one of the longest comments I think in the rules about this, and the -- and moreover, these comments only apply to part (b). Well, in part (a) I thought that the judge had discretion to grant more than 12 weeks. Why wouldn't some of these things apply to part (a)?

The problem is, is that, you know, we -- there really isn't any need for (b). The existing rule has always handled -- we've always handled it under the existing rule just fine, but to kind of save face we have to put (b) in there to show that this is not some kind of deal just for lawyers. I really question whether (b) and the comment is a wise -- wise choice.

CHAIRMAN BABCOCK: Thank you, Frank. Harvey.

HONORABLE HARVEY BROWN: Well, I think the comment is generally very good and a good idea for the outlier judges who don't take these things into consideration that will help somebody get a continuance with that. But I wanted to talk a little bit about subpart (2)(E), the language in the brackets, quote, "but

to care for the child." I think not only should it be in there, but I think we should have an additional requirement. I could just see this being abused potentially by people who are working regular -- doing their regular job and are going to continue to work their regular job, but just want to get off for the trial setting. So I would not only require them to say that they're doing this to care for the child, but that they are not -- and I don't know exactly how to word it, but basically are not working their regular job and work hours, that they're actually taking leave from their normal job duties.

MR. PERDUE: What section was that, Harvey?

MS. WOOTEN: You're on mute. I think, though, you're referring to (a)(2)(E), correct?

HONORABLE HARVEY BROWN: Yes, (2)(E). It's on page three. It's indented, cap (E).

CHAIRMAN BABCOCK: Okay. Jim Perdue.

MR. PERDUE: Well, so I'll dovetail a bit with what Harvey was saying and go back. So, Judge Peeples, part of the elegance of the vacation letter rule for Harris County, which has been abused and does eviscerate trial dockets in July and August, and, Frank, it is unlivable here in July and August, but we do have air-conditioning and tunnels, and we make do. But the --

the -- the self-constraining aspect to my personal experience with the vacation rule is that you're talking about four weeks, so whether it be invoked, you know, outside the summer or all in the summer, there is a self-limitation on a four-week continuance that has taken away trial settings no doubt and has frustrated the heck out of me because I have seen multidefendant cases where it's used, but you do eventually get the train back on the tracks, and it can't take things over.

This rule is talking about a lot longer period of time, and I understand in concept the -- the idea and the pleasantness of tracking along with family medical leave, but when you start talking about blocking three months, that is -- that is a different event altogether on a litigation time line, and I'm trying to catch up on the language that ended up being the amended or final language in Florida and understanding how they -- they came back on this a little bit. But the -- the odd thing that seems to me the subcommittee is balancing is this idea of advanced notice that you're going to take it versus the events that qualify for taking it, which sometimes don't give you 90 days advanced notice, but the parties need some advanced notice, and then language that this is -- as to Judge Brown's point, this thing has got to get to balance somehow the idea that somebody truly is

unable to perform in the capacity of either lead or, you know, substantial role counsel, because of this responsibility, which is honored in the law, but at the same time, you know, you have the ethical responsibility that if you've undertaken to represent a client in a piece of litigation, you have to -- you have to be able to do that. And it strikes me that if you had a conflict that was taking you away from your ability to represent your client for, you know, three, four, five, six months, I don't know how in the law you build in the idea that then the lawyer has not crossed over into an area that that's -- that that kind of cessation of activity is not representation of that client.

So I'm trying to balance not from adverse -- not necessarily from an adverse counsel perspective on the rule, but if you -- if you take Judge Brown's point, which I think is important, which you truly have a conflict that prevents you from serving in the role, then how is it that you stay maintained as lead counsel for that client for six months when the case is just allowed to sit there. That's a real tension that I'm not sure I am seeing how it's balanced through in the language of this, and I don't know how they solved it in North Carolina and Florida because I'm not as well-versed in the materials that you sent. My apologies for that.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Yes, I mean, I disagree with Harvey that we should include "but to care for the child" because I do think that they're -- even if you're going to the office and working, it's very different from being in trial, which, as you know, is, you know, a 15-hour day, not an eight-hour day; and, you know, having my husband home when I was on maternity leave at 5:00 o'clock was a lot better than having him home at 10:00 o'clock; and you know, I think the men ought to be able to take that leave.

With respect to Jim's concerns, the rule does require that the client has consented to the continuance, and I do understand that under the FMLA, you know, and we've seen this at the appellate court, someone will write in and say, you know, "I've got cancer, I can't get my brief done," and, you know, you give them -- you give them three months; and then they want, you know, another six months, they want another nine months, you know; and at some point you have to say to them, you know, "Are you actually representing your, you know, client at this point?" Does your client really understand that, you know, your appeal or your trial has been abated and unable to move forward?

So to me the client's consent is important

with respect to a longer than 12 weeks. Those are my thoughts.

CHAIRMAN BABCOCK: Thank you, Justice Christopher. Justice Gray.

HONORABLE TOM GRAY: I won't repeat what I've said before about why the rule focused on the family continuance is such a small part of what we need to be addressing. I think if we need the rule at all, it's a judge training problem that really can't be solved by a rule. I would strongly suggest that we bolster the range of considerations that are discussed in (b) and have only a -- the (b) part of the rule and required judicial education on the issue like we do for ethics and family violence. I mean, there are so many factors that you as a trial judge need to consider when you're granting a continuance on the eve of trial that affect so many people's lives besides just the lawyers. The witnesses, the other litigants that are going to be forced to trial if you don't go to -- I mean, there's just a lot of moving parts in a situation like this that it's almost impossible to write a rule that is going to capture when a trial court abuses his discretion in granting or denying a rule -- or granting or denying a continuance, and these are going to come to us in mandamus proceedings because a trial court did or did not grant them. And so what I'm

asking is that you just make it clear enough that I can either know I'm going to grant it or know I'm going to deny the mandamus and have a leg to stand on because they're coming to us if they're granted or denied, and we're going to need some help.

CHAIRMAN BABCOCK: Okay. Thank you, Judge. Any more comments about this subcommittee report or the proposed rule? Anybody else have any comments? Lisa Hobbs.

MS. HOBBS: Okay. You know, as we're listening to everybody's comments, I think we're both -- I think some people want -- and to Justice Gray's comment, like be very clear, and I think what -- when you try to write into a rule like trial court discretion, right, like we want to maintain some kind of discretion, but we're giving these parameters, it's just trial court discretion -- and maybe Justice Hecht will agree with me. It's like I know when it's abused, like I don't know -- like it's just it's hard to say, and I just feel like some of the comments, just to sum up, are both that we're doing too much and we're not doing enough, and the reason why we're having these views is because it's hard to put into a rule what is the parameters of discretion when it comes to the uncertainty of medical conditions and leave and how babies are born and how mothers are responding to it and how

adoptions come about and all these things, and I just wonder if -- and I agree with the spirit of allowing a continuance for parental leave, but I wonder if there's a more streamlined way to go about it, possibly even just a comment to the continuance rule. And I'll leave it at that.

CHAIRMAN BABCOCK: Thank you, Lisa. Commissioner Sullivan.

HONORABLE KENT SULLIVAN: Yes, sir. First, I just wanted to thank Kennon for the job she did in laying this proposed rule out. I thought she did a great job. In reference, a comment or two made earlier, Judge Peeples made the really important one, and that is issues like these are hard. They really are. It's the intersection between these kinds of important considerations and the -- you know, the procedural issues that we all have to balance; and in that sense, Frank's much earlier comment weighs on me a little bit here. He was talking about, you know, you're trying to fix holes in a boat, and you realize that at some point you need to look at the entire boat and fixing it more holistically, and I do think it's something that we're going to have to take a look at.

I do think that while I suspect virtually everybody is in agreement that we should accommodate a

parental leave such as we are discussing today, there is a tendency, I think particularly for a group like ours, to underestimate the damage that is caused by procedural uncertainty, delay, and excess cost that our system can produce. Those are burdens that disproportionately fall on clients and less so on lawyers and judges. So I think at some point we really do need to step out and take a more holistic look.

I think it's always difficult when we look at these in a granular fashion. As I say, I think almost everybody is in favor conceptually of parental leave and the accommodations that ought to be made for somebody, but you can also create a list of other situations where you would probably produce a similar vote. I've seen in the courtroom the issue come up in terms of the death of a parent. I remember one case vividly in terms of someone asking for an accommodation and actually not getting much of any accommodation. What about, God forbid, the death of a child? That would be extraordinary, and the list can go on. I guess the point is, is that there are a lot of really difficult circumstances, and you do wonder to what extent you want to create inflexible rules around those.

And I finish with one other point, back to Chief Justice Hecht's earliest comments, and that is he recited I think the numbers for criminal and civil trials

in the state last year. 4,500 and 1,200 I think is what he referenced, and when you consider the size of the state and the number of cases filed, I think what we need to acknowledge is that number is extraordinarily low, and we need to acknowledge there are reasons for that and for what increasingly I think is a problem in confidence attached to the system in terms of delay, cost, certainty, and at some point we're going to have to address it. If we do this -- you know, if we deal with these sorts of procedural issues in isolation and in the abstract, we do run a risk of simply exacerbating some of the issues, but again, I say that I'm in favor of accommodations for parental leave. I suspect virtually everybody on the committee is.

CHAIRMAN BABCOCK: Thank you, Commissioner. Chief Justice Hecht, and then Roger.

HONORABLE NATHAN HECHT: Just to fill in on the number of jury trials, the civil jury trials are and have been for years a little over 4/10 of one percent of the cases filed, and on the criminal side it's about -- it runs a little less than 2 percent, about 1.5 or 6. Sometimes it goes up and down a little bit.

CHAIRMAN BABCOCK: Roger.

MR. HUGHES: Well, I'll echo what I said at the last meeting. This is an idea whose time has come.

We're going to have to figure out how to integrate this into it, and if -- and if there's a direction to go, my personal favorite is that we have a minimum amount of time off if the application is -- meets the standards, and I think it's -- part of the reason it's hard is that there's just a lot of circumstances that go on around pregnancy or adoption that until now, until the last decade or so, we didn't have to deal with. Well, now we do, and it may require acquiring information, but I think we're going to have to make that accommodation. So that's my two cents' worth. Thank you.

CHAIRMAN BABCOCK: Thank you, Roger. And you-all probably thought I was out of my mind when I said we were going to have to work until 1:30. I was off on my time zones. Sorry. I'm on the Eastern time zone. So we can take a -- we can take a break for lunch. The parental leave continuance rule, unless the Chief or Justice Bland think that -- or Jackie, would think we would benefit from more discussion about it, we'll submit that to the Court, so speak now or forever hold your peace on that. And I don't think, since we're all I think within reasonable distance of food, that we maybe need an hour, and since we can't congregate with each other and chitchat. Maybe we could come back at 1:00 o'clock. Would that be satisfactory to everybody? If anybody is against that,

raise your hand electronically. I see no hands raised, so we'll be adjourned until 1:00 p.m., and everybody will have to dial back into the meeting at that point. Thanks, everybody.

HONORABLE JANE BLAND: Thank you, Chip.

HONORABLE STEPHEN YELENOSKY: Chip, you can leave everybody on. It's probably better.

CHAIRMAN BABCOCK: That's fine, too. I'm going to dial back in, though.

(Recess from 12:23 p.m. to 1:00 p.m.)

CHAIRMAN BABCOCK: All right. This meeting is being recorded. The next item, No. 8 on the agenda, procedures to compel a ruling, and I understand Bill Boyce will lead us through the thicket of this issue.

HONORABLE BILL BOYCE: Yes. Thank you, Chip.

CHAIRMAN BABCOCK: Sure.

HONORABLE BILL BOYCE: So we are revisiting a topic that we had discussed. I don't think we reached it at the last meeting, but we discussed it at the meeting before, and I'll go through the genesis of this briefly, because what the memo for today's meeting does is present two options to address the issue, and there's not really consensus on the subcommittee about which one to follow on, or maybe there is and I'm not grasping it, but

we'll -- I will go through that here shortly.

So by way of background, this initially came as a referral from this -- this initially came as a referral from -- I'm sorry, I'm having a telephone issue here. From Justice Gray that started out as a question about efforts by pro se prisoner litigants to get rulings that would enable mandamus. We talked about it. It was sort of expanded to cover a recognition that there are civil issues as well where it's difficult to obtain a ruling and what are the procedures for doing that. We received subsequent guidance from the high courts that we should really focus on the civil aspect of circumstances to try to obtain a ruling. If you filed something but you can't necessarily establish that it has been seen or received by the trial court, just not ruled on, you could be stuck in limbo for a period of time trying to get a ruling on something. So we talked about basically two different approaches to addressing this issue.

One is creating a presumed notice or a presumed denial mechanism under the Rules of Civil Procedure that would basically allow a notice or a request to be filed, and after a set period of time it would be presumed that the trial court received and was aware of it for purposes of seeking mandamus relief solely for purposes of obtaining a ruling. That's alternative No. 2

that's contained on page four.

The other approach, which is one that was developed in the most recent subcommittee discussions was more of an administrative reporting approach, focusing on a proposed addition to Texas Rule of Judicial Administration 6 that would get at the same issue in a different way by basically requiring judges to keep up with reporting requirements that would apprise them of things that had not been ruled on. And I'm -- I'm happy to launch into discussions of these approaches further, but at this juncture it may be appropriate to ask Judge Peeples or Kennon, who were particular proponents of an administrative reporting approach, to describe more fully their thought process and why they think that's a good way to go for this issue.

CHAIRMAN BABCOCK: Thanks, Bill. Judge Peeples has already volunteered to share with us his views, and of course, if Kennon has views we would love to hear those, too. But we'll recognize Judge Peeples first.

HONORABLE DAVID PEEPLES: There are existing rules in Administrative Rule 6 enacted by the Supreme Court back when Tom Phillips was Chief Justice, which is called "Time standards for disposition of cases," but it's all about people supervising others. There's no -- there are no real teeth in it, and the proposed subsection (e) I

think would add some kind of enforcement mechanism, sort of. The problem is -- it's not widespread. I don't think this is a widespread problem, but it is very serious when it happens because it's a failure of judicial duty, and it applies only to judges who have matters that are submitted and waiting for a decision more than 90 days. Not one judge in the state has to -- under this proposal would have to report anything if he or she is current and doesn't have anything awaiting decision for 90 days or more. It doesn't apply to things that are simply filed but haven't been heard yet. It applies only to matters that have been submitted. The judge is not waiting for anything. Everybody is waiting for the judge to make a decision, which is what we're supposed to do when we hold this office.

And so (e) would add a reporting requirement for the judges, and one question would be to whom that has to be sent, and we had three choices. You could use all three of them, the Office of Court Administration or the local administrative judge or the regional presiding judge or some combination of those, maybe all three. There's no express sanction for someone who doesn't do this, but it is -- there is language in the proposed subsection (e) which points out this would be a duty of the office, and I myself think that would enable the Judicial Conduct

Commission to get involved if somebody does this, and it's bad enough. So and another thing that's sort of unspoken but in the background is the feeling I -- and I feel this way and an awful lot of people feel that lawyers shouldn't have to poke the bear or stir up the hornet's nest by reminding a judge, "Your Honor, you've had this for three months" or four or five.

I know of a case in -- well, in a medium-sized county where the jury came in with a verdict two years ago, and there's some question about what kind of judgment should be rendered on that verdict or whether a new trial ought to be granted, and the judge has not done one thing for two years. I had a recusal motion a good many years ago in which I learned during the motion that the judge in the very case had a pending motion to transfer venue in a family law case that he had had for 22 months. 22 months. And it's mandamusable after six, but he hadn't decided it for 22 months, and I was surprised in the previous discussion we had in the full committee, both informally and on the record, of how many people had their own anecdotal experiences with judges who have got the briefs, got the arguments, and simply cannot make a decision for a good long time, and I was just surprised and flabbergasted actually that so many people have experiences where judges have just not ruled.

So proposed (e), and that's alternative one, aims to get at that, and then alternative two really speaks more to Tom Gray's issue, which was the mandamus petitions they get from prisoners who have filed something and the judge hasn't even dignified it by looking at it apparently, much less ruling on it. And so these two proposals sort of come at it from different ways, and that's what is before the committee.

CHAIRMAN BABCOCK: Kennon, anything you want to add?

MS. WOOTEN: I don't think there is anything that I could say that would be better than what Judge Peeples has said, so I will stay silent.

CHAIRMAN BABCOCK: Okay. Comments? Commissioner Sullivan.

HONORABLE KENT SULLIVAN: Just a quick question. I'm curious about the administration of a reporting rule and, in particular, the extent to which we would have confidence that every county could uniformly run a report that would yield information as to what judges have matters that have been pending for 90 days with no ruling. Could we get statewide compliance with that, you know, county by county and that sort of reporting, where it's coming essentially from the clerk's office that would -- it would avoid the need for

self-reporting, which, you know, has some obvious issues associated with it? Just curious if anybody could answer that question.

CHAIRMAN BABCOCK: Judge Estevez.

HONORABLE ANA ESTEVEZ: Well, I don't -- I don't believe you need reporting after 90 days. I think there's -- there's several reasons sometimes why things don't get ruled on, and sometimes the parties are still going on, and you had your initial hearing, and there's just too many complicated reasons why things don't get ruled on after 90 days. My understanding of why we started this had to do with Justice Gray and the issues with our inmates, and I will tell you that I review those motions. Sometimes I get orders without even a motion pending. Nobody responds to the other side. Nobody ever sets it for hearing, and I know under this this isn't even triggered, but the next thing they do file a mandamus, and so I either was unaware of it or something may have happened along the way. There definitely wasn't ever a hearing.

So I think one of your proposals had to do with a denial as a matter of law after a certain period of time. I don't have a problem with that, because I think all the parties would be very interested in pushing a -- a ruling that way, explaining to the judge that in 80 -- in

two more days it's going to be a denial, in case the judge just for whatever reason was waiting on one final thing. But I don't believe the reporting is going to be helpful. I think it's going to require more from the OCA, and, you know, there's -- I mean, are you really going to have something set up for grievances and things like that for a judge when they may have legitimate reasons why they haven't ruled or just been unaware of it, and then do you really have to spend all that extra time to respond to a 90-day or 91-day ruling or a hundred-day ruling. I think it's just too much.

So that's my -- I like the idea of in any type of inmate case if you need to expand it, but if you limit it to inmate cases, I think that is the problem. Sometimes we get those motions, and we don't even understand them.

CHAIRMAN BABCOCK: Robert Levy.

HONORABLE ANA ESTEVEZ: I have the delight of serving in a prison county, so I get many. There's a big chunk of litigation that I get regarding the inmate cases. So --

MR. LEVY: I have a few comments. One is I don't see these two proposed rules as alternatives. I think they can both work together. I believe that in the federal courts they have this type of reporting where they

will report on judges who have motions that are pending. I think it's six months. And, you know, judges are somewhat accountable for that, and I think that it would be an appropriate measure of the administration of justice, not only how many cases are pending, but how many have issues that have been presented. In some situations, I think like historically in Harris County, you could file a motion and a response is filed and unless it's set for submission or set for hearing, it will just sit there. So it might be a little bit unclear as to when that clock should start running.

But another question is the issue that was raised about in some cases it might be better to simply have the motion overruled by operation of law, similar to I think a motion for new trial, that if you don't rule on it by a specific point in time then it's denied. I realize that won't work for some types of motions, but in that case you get that resolution, and that then gives you the ability to submit a mandamus, so that if you submit a notice that a ruling is needed and there's no disposition by a set period of time then it's just denied and then you can move forward with mandamus relief if appropriate, or it might just allow you to proceed with a straightforward appeal. So I do think that this rule, the approach makes sense.

CHAIRMAN BABCOCK: Thank you. Roger.

MR. HUGHES: I guess as much as I don't like poking the bear, and I like -- and I maybe think it's a good idea that you have an administrative 90-day report, but I have seen in the federal court the slowpoke yearly report about how many judges have motions pending over so many months, but here's the thing, the -- they have a very efficient clerk system and a -- usually a procedure in place that your motion is deemed submitted after a period of time, and I am sure the judge is made aware that it's pending, the federal judge, I mean.

The other thing is every time anything is filed, if it's a motion, it gets a number and the date to respond to it is calculated by the clerk for you as a matter of fact, and you can see it on the docket sheet, and I think in order to make a system where the administrative rule sort of creates this 90-day slowpoke report, it is going to put a big burden on the -- on district clerks and county clerks to figure out is this a motion that's been filed or not. Has it been set? When did it get under submission? That's a lot to ask from some clerks, especially given the high volume of civil litigation in -- in some districts. So I guess I tend to lean towards some sort of notice, even if it means poking the bear. That's my -- that's my opinion.

CHAIRMAN BABCOCK: All righty. Lisa Hobbs.

MS. HOBBS: So I want to answer Commissioner Sullivan's direct question based on my knowledge of reporting ability, whatever -- it's been more than a decade since I left the Court, even though I look so young, like how could it be that long, but they are on a county by county basis. Judges don't typically do the report themselves, as I understand it. It's county reports. I'm not sure whether it's the clerk that does it or somebody else, but I don't think at this point, absent particular courts, like maybe MDLs are done differently. I don't know, but just in general I don't think it's a judge making the report. I think it's a county report that I presume comes from the county clerk and/or the district clerk.

So you've raised a valid point about just how it interplays into the current reporting system. That said, I do think there is value in reporting, even if there's noncompliant reporting and a reporting requirement, and we've addressed on the slowpoke report in the federal court, and I do think you start to -- once that deadline starts coming up you do see federal courts sort of like, oh, we've got to get this case off this so it's not in the slowpoke report. Clerk, what's pending, you know. You just do some assessments internally of your

docket when you know something is going to be -- about to come up, but as -- as has already been said, they also have a lot more support than some of our county and district judges, so internally they probably know when those cases are due easier than our state court judges do.

But just from experience, I remember when the Legislature required the Chief Justice of the Texas Supreme Court to report on who was missing internal deadlines, which I think they still do. I don't know. I haven't looked at that rider in the budget. We don't do that anymore? Okay. Justice Hecht is saying no. But when they first came out with it, it was highly effective because no one wanted to be reported that they were missing internal deadlines, so I just saw from a firsthand experience that sometimes reporting deadlines, even if there's no remedy for curing it, just we're dealing with elected officials who don't want people to think that they're not doing their job and they're not doing their job as efficiently as they can. So there's value in reporting.

I'm a little bit nervous about ruling -- any rule that would say something is granted or denied as a matter of law after a certain time frame. We have that certainly with a motion for new trial, the Texas Supreme Court has that on a motion for rehearing after 180 days.

I still believe that's the rule, but it's just it doesn't serve justice, and it has -- it can have unintended consequences. And a motion for new trial stage, they become formulaic, like you could have super valid grounds for seeking a motion for rehearing -- I mean a motion for new trial, and you can't get it set. It's just it just becomes this preservation document that has like kind of no meaning, and I just worry about extending that idea to other motions that might be more important.

And I've gone up on mandamus for a failure to rule. Like a -- you can do it, even if they -- I mean, that is a valid ground if at some point it becomes really unreasonable, I think you can take it up and get at least temporary relief to make a ruling when it's, you know, something important enough that actually, you know, is affecting the way the litigation is going. So those are just -- sorry, that's a little snapshot. I was just taking notes as everyone was talking. So I'll shut up now.

CHAIRMAN BABCOCK: All right. Bill Boyce.

HONORABLE BILL BOYCE: Yeah, I wanted to respond to Robert's point about the having an automatic overruling as X number of days to underscore the same point that Lisa made, which is I think that there was heartburn on the subcommittee about rights being lost by

folks who didn't know for various reasons that something had happened or what they needed to do or that something would get overruled automatically. And so the second proposal on the last page of the memo that you see was drafted more narrowly to just create a presumption of notice rather than an overruling of something on the merits.

CHAIRMAN BABCOCK: Okay. Richard.

MR. ORSINGER: Thank you, Chip. I think there is some important value to having a public record of judges who don't rule reasonably quickly, especially at the chronic condition and especially with the elected judiciary, but even if we do go to an appointed judiciary. So I greatly favor a report that is available to the public and also to opponents who are looking for grounds to unseat an incumbent. So I think that the public reporting is good. I agree with the idea that it's very difficult with a clerk with thousands of filings to know when a ruling has been under submission for more than a certain period of time, so I'm attracted to the solution we use on findings of fact and conclusions of law. Under Rule 296 after a bench trial, you can request written findings and conclusions and then they're due within a certain period of time and then you file a reminder and then the deadline is extended.

We could invent a process called a certificate, a reminder of need to rule on a case, or something like that, and say if a matter has been under submission for 90 days a party can file a reminder, and we'll make up the title so that it's pretty clear what it means, and then all the clerks have to look for is the reminders. They don't have to look for motions and figure out when it was heard and how long it's been since it was heard. The clerks can just look for these reminders, and I wouldn't suggest that failure to file a reminder should be a waiver of any right. I'm just saying that the lawyers are the ones who are watching the clock. They can file the reminder. The clerk can look for the reminder, and the reminder will be the trigger for the reporting.

With regard to the issue of automatic granting or denial of a motion, I agree that I hate for people's substantive rights to be either -- either affirmed or rejected by operation of law without the intervention of a judge, after you've had a hearing and paid lawyers and done briefing. It seems to me like you're entitled to a ruling on the merits. As an alternative, we could have a provision that if a reminder is filed and the court fails to rule, and let's give a fixed deadline like 15 days or something like that, that it will be grounds for a mandamus. And that way no one's

rights are prejudiced by a ruling or denial or grant or anything else, but we're sending a signal to the judges that if you get this reminder, you've got so many days to rule or else they're going to get a mandamus against you, and then the courts of appeals need to put some muscle into it by granting mandamus. So I think my suggestions are kind of practical approaches, is let the clerks look for the reminders and let's let the appellate courts -- let the trial courts be on notice that if they wait too long they're going to get mandamused. Thank you.

CHAIRMAN BABCOCK: Thanks, Richard. Commissioner Sullivan.

HONORABLE KENT SULLIVAN: I think Richard's idea is intriguing, certainly worth some thought. I just want to circle back to the fact that I assume that the federal court report is the analog that we're using here, and I think the important consideration that I was, you know, trying to point to earlier is the fact that the federal courts clearly had the administrative infrastructure to support that uniform reporting system, and I'm curious and maybe, if I could, I'll direct this question to Judge Peeples, is I was wondering whether this proposal, which reads to some extent like a self-reporting system, if I'm reading it correctly, talks about the judge sends, you know, an explanation for anything that hadn't

been ruled on in 90 days. Is that the essence of the proposal, what would in effect be self-reporting, or was it the contemplation that there be independent reporting from the clerk's office of anything that's been pending for 90 days?

And then the separate question, I'm just curious because you've got the experience to give us, I think, you know, a good estimate of the system. Do you think that we have the infrastructure that would allow for uniform county by county reporting of these sorts of matters, if we -- we went that direction.

HONORABLE DAVID PEEPLES: Thanks for the question, Kent. I'm kind of baffled at all this talk about clerks having a duty on this. It seems to me when a judge has tried a case or has a summary judgment motion under advisement, either after an oral hearing or not, the judge ought to remember that, and if -- if a judge has so many of these that he or she can't remember them, then that means it's a real big problem that needs to be addressed. I say in all my years I never had a single thing anywhere near 90 days waiting for a decision, and I think the vast majority of judges don't. So I just don't think clerks would need to be involved in this at all, because it's something that the judge ought to know in the back of his or her mind, "I need to do this, and gosh, I

need to find time to do it," and if there's -- if I can't do it, I ought to have a reason, shouldn't I? I mean, I ought to be able to say, "I've been tied up in capital murder jury selection for three months" or whatever the reason is, if there is reason.

HONORABLE STEPHEN YELENOSKY: Chip?

HONORABLE DAVID PEEPLES: So I just think the burden on clerks or how clerks are going to do this, I don't see it that way, and that certainly is not the intent.

CHAIRMAN BABCOCK: Somebody was trying to --

HONORABLE STEPHEN YELENOSKY: Yes, it's Stephen.

CHAIRMAN BABCOCK: I didn't hear, who was that?

HONORABLE STEPHEN YELENOSKY: It's Stephen Yelenosky.

CHAIRMAN BABCOCK: Yeah, go ahead. There's a bunch of people in line, but go ahead, Stephen.

HONORABLE STEPHEN YELENOSKY: Well, I didn't see any other hands up, so I figured I would jump in. If somebody was ahead of me, go ahead.

CHAIRMAN BABCOCK: All right. Well, Justice Christopher, somebody no less prestigious than Justice Christopher was ahead of you.

HONORABLE TRACY CHRISTOPHER: Go ahead, Stephen. I'll go after you.

HONORABLE STEPHEN YELENOSKY: Sorry, I didn't see a hand there, so I thought Chip maybe just didn't see it. Just some observations. One, no, the clerks don't have the infrastructure. Two, if they did have the infrastructure, you're creating a situation in which an elected clerk is in the position of chastising an elected judge essentially. Perhaps in an election year. I don't think that's a good idea. It's a bad idea for the judge not to do things in a timely manner, but it really puts the clerk in an odd situation in continued relationships with the bad judge who won't rule.

If it's not automatic, then is it going to be used. Right now, lawyers could file mandamus, but this is the first time I've heard of lawyers actually doing that. Maybe it's one time you're in court, but lawyers who are in the same court a number of times are not going to poke the bear. So that's the second point. I don't see how it works if it's not automatic. And if it's denied by operation of law, I am concerned about it makes it too easy for the judge to punt, and again, since we're talking about judges who don't rule in a timely manner, Judge Peeples says -- said they should do this, they should do that, and they should, but some don't. That's

why there's a problem. And those same judges, if there's an automatic or operation of law, denied by operation of law, may find it easy to just punt. No, I didn't deny it, it was denied by operation of law.

And finally, none of this so far is going to address the problem with prisoners. In my experience it's very hard for prisoners to even get attention when they file things, much less get something before the court that a lawyer, even a pro se litigant who's not in jail could. So whatever of all the things being considered right now, I haven't heard anything that requires a judge who's inclined to dismiss without consideration prisoner complaints or prisoner suits, any way of addressing that. And finally, nobody has talked about the presiding -- local presiding judge perhaps having a role in this.

CHAIRMAN BABCOCK: Thanks, Stephen. Now Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, when I was a trial court judge in Harris County, I would on average have 30 motions set for submission on Monday morning per week, and then I would have probably another 20 set for oral hearing on Monday. So, Judge Peeples, it's easy to lose track of the fact that you haven't ruled on something, and sometimes the summary judgments are this big, you know, this big, and now that everything is

electronic, once again, it's easy to lose track of something. So I definitely don't think that a judge would be good at keeping track of what things were over 90 days.

I -- we have had a situation in Harris County, and we've issued maybe five mandamus opinions against the same judge for failure to rule, but it's a pretty few and far between problem, and issuing the mandamus opinion is -- is not really working well either, because it hasn't made that judge change the judge's actions. Because the judge will rule, then he'll get behind, will rule, get behind, will rule. To me the key is the regional presiding judge who could get in there and talk to the judge and take cases away from the judge, because that ultimately is what needs to be done. Right? Not automatically denying something. Get the case transferred to somebody who is going to pay attention to it and rule on it.

I mean, you know, automatically denying a summary judgment, that doesn't help people. If it's a judge who hasn't ruled on entry of judgment in two years, can't do an automatic denial of that. Automatically denying a request for discovery, you know, that's not good. What you need is administratively -- and I think it has to be the regional presiding judge, and the reason why I think that is that person is generally not up for

election. Now, I think we have like Ana is, but a lot of -- a lot of our regional presiding judges are retired now, right, and no longer up for election, so they are in a position to actually go to the trial judge and say, "You're not getting your work done, I'm taking cases away from you." The local administrative judge is also up for election, and it's difficult.

I mean, this one particular judge, we notified everybody. We notified the local -- the court of appeals did. We notified the local administrative judge. We notified the presiding judge. We notified Harris County's internal lawyers, right. They have certain lawyers that help the judges on things, to try and get the judge to move forward. To me when you have that kind of a situation where it's a systemic problem, the only way to take care of it is through moving the cases from the judge. And if it's just a, "Oh, I forgot" and you file the mandamus, people rule. Because we see that. You know, we'll file the mandamus, we'll say, okay, let's have a response, and the next thing we know the judge rules. So apparently Harris County is a big enough county that people are doing it. Maybe unlike Austin, unlike a smaller county.

HONORABLE DAVID PEEPLES: Can I ask a quick question? Tracy, how would the regional presiding judge

know that judge A has a bunch of unsubmitted matters if there's no duty to report?

HONORABLE TRACY CHRISTOPHER: Well, the regional presiding judge knows because someone has filed a mandamus, and we send the mandamus to the regional presiding judge. I think that we've got to rely on the lawyers to want to move their case. I mean, Judge Estevez is exactly right. You get -- at least in Harris County, and I'm sure it's true in many other counties. I don't see a motion unless it's properly set. Right? So it either has to be properly set for submission, or it has to be properly set for hearing. You know, I do not see every piece of paper that -- you know, that got filed in a case. I mean, we have 1,500 civil cases. On the -- on the criminal side, you know, excuse me, on the federal side, they'll have a hundred civil cases. Maybe 150. I mean, the volume that we have, you can't really look at what the federal courts do versus what we do. And in county courts, it's even higher in terms of the volume of the cases that you have on your docket.

To me you've got to wait for the lawyers to really want a ruling. I don't -- I don't mind this second proposal, this request for a ruling, but so what happens when the pro se who never set it right to begin with sends in this notice of ruling, right? Or what happens with

motions that are filed after I've clearly lost jurisdiction, right, that just gets put in a file, right, and never seen by the judge. And then the next thing you know is you get a, you know, notice of ruling that is some sort of prima facie evidence that I should be mandamused. I mean, there's just all sorts of problems with both of these things.

CHAIRMAN BABCOCK: Bill Boyce.

HONORABLE BILL BOYCE: So I'm -- I hear differing views, and I think moving forward would be aided by a vote on do we do one or the other approach or both?

CHAIRMAN BABCOCK: Okay.

MR. MUNZINGER: Chip?

CHAIRMAN BABCOCK: Yeah. Yes.

MR. MUNZINGER: This is Munzinger. Let me share a thought I have here. In state court, I don't know how a district or county clerk ever knows that a motion which has been submitted to a judge has been pending for any period of time after it has been submitted, because there is no, to my knowledge, procedure where one or the other party or even a court files a document, does anything of record, to indicate that a motion has been submitted and is now awaiting decision. We don't have that. Federal courts have all kinds of things, but we don't have that in state court. How can you have a

reporting by a clerk who doesn't know that a motion has been submitted? I don't see how that happens.

You might want to suggest a procedure where any party to a motion may file a notice of submission or something along those lines that the motion has been submitted, and if there's no objection to it, within 90 days or whatever time period you want, any party may seek mandamus relief, and that's a ground for mandamus. That doesn't mean anybody is going to. I've been victimized this way three times in my life. All three times the client told me let it pend, because nobody wants to poke the bear, as you say. But in any event, I don't know how the clerks would file a report, because they don't know when a motion has been submitted. They know it's been filed, but they don't know if it's been briefed. They don't know any of that stuff, so I don't see how you could have a clerk have any kind of automatic duty to report without something else being filed by one of the parties, and I join the chorus of those who oppose any automatic ruling that could prejudice a client because of a failure of a judge. I'm finished. Thank you.

CHAIRMAN BABCOCK: Thank you. Robert Levy, and then after Robert I'm going to drop off and hand this off to the Chief, who will continue moderating this discussion while I go visit with Judge Mazzant, and I will

be back as soon as I can, but, Robert, you're next, and then Frank.

MR. LEVY: Thank you. I wanted to go back to the question about the alternative two, and it seems to create additional, in effect, mandamus jurisdiction for the courts of appeal, and it would seem that this will potentially flood courts of appeal with mandamus petitions that will require at least a lot of process, and in the pro se cases I think that will just be grist for the mill for them, and in the situation with a case where you've got a motion that hasn't been ruled on, you're then forced to go to the expense of filing a mandamus, asking the court of appeals to make a decision to force the trial judge to rule. So the merits of the issue aren't going to be addressed. You're going to end up delaying the process for weeks or months, and obviously most of the time the courts of appeal will withhold the mandamus to suggest to the trial court you need to rule, but then, of course, you have to deal with the merits of the issue.

I think that Richard Orsinger's idea of like a process to -- to notify but then that itself is actionable and will either accomplish what I had suggested, an automatic determination. But in addressing Judge Boyce's comments, I'm not suggesting that a party would automatically lose their rights due to the operation

of this rule. My thought is that it would require a party to actually file that motion or that notice of a ruling needed to trigger the process and then let the case go forward so that it doesn't get stalled out or significantly delayed by a mandamus.

HONORABLE NATHAN HECHT: Frank Gilstrap.

MR. GILSTRAP: We started out with what seemed to be a simple problem, namely the prison cases, and we've expanded it into a much more complicated problem involving the whole judicial process, and it is a -- it is a meritorious problem, and I appreciate all of the thoughts about this, but maybe we need to eat the elephant one bite at a time. Prisoner cases are a specific kind of case. They're even recognized in law, and there's a reason there's a problem there because they're incarcerated. They can't go to the courthouse and see what's going on with their case. So why don't we start out and eat the elephant one bite at a time. Why don't we pass an automatic denial rule and limit it to prisoner cases. If we're going to go on and expand it to other type rulings, I think, again, we need to eat the elephant one bite at a time. It's one thing where a judge has had a jury case tried and hasn't ruled on it, but it's a completely different case where an experienced judge is carrying a motion for summary judgment to trial, and I've

seen that used quite well to advance litigation.

Finally, if we're going to talk about a requirement to rule, we already have requirements to rule. Rule 91a, the Citizen's Participation Act, there are other provisions -- other provisions as well where the courts have ruled saying that you have to rule. We've got to overlay this with some type of rule that applies to all cases that -- where we require a ruling in every kind of case. I just think that's a bridge too far. Let's start with a simple case. Thanks.

HONORABLE NATHAN HECHT: Alistair Dawson.

MR. DAWSON: So in my experience this is a fairly isolated issue where you have judges that either don't want to or refuse to rule. I don't remember a specific case where I've ever had a problem with it, and I fear that we are either creating unnecessary work for a lot of judges who are doing their best to rule and/or creating more mandamus, which I don't think our courts of appeals need any more mandamus filings. You know, most of the time -- like I'll give you a recent example. So we had a discovery hearing or a discovery motion that we were required to file under submission because of COVID, because the courthouse wasn't open, and we did. And as Justice Christopher pointed out, it kind of slipped through the cracks, and we needed a ruling before some

depositions. So I just told the court clerk, "I need a status conference to raise an issue with the judge having to do with an upcoming deposition," and we got an oral hearing, and we had our ruling, and he issued our ruling, and case moved on.

I am actually persuaded that we -- rather than having all of this alternative one or alternative two, why not create a mechanism whereby a litigant who hasn't gotten a ruling and feels like he or she, you know, is entitled to a ruling and their case is being jeopardized can file a motion with the regional presiding judge to have the case transferred to another judge, sort of follow along with Justice Christopher's suggestion of let the regional presiding judge address the issue. Maybe he or she talks to the judge, see if they can figure out a resolution, and as Justice Christopher points out, we do have one judge in Houston that's known for not ruling, and if regional presiding judge thinks that that's going to be a pervasive problem then he or she can transfer the case to another court. It also has the advantage of hopefully reducing the number of mandamus filings. So that's my suggestion.

CHAIRMAN BABCOCK: Jim Perdue.

MR. PERDUE: Thank you, Chief. So this is an issue that's got some odd constituencies because I'm

going to -- I think I'm hearing a little bit of a chorus that I wanted to come in on. Mandamus as the remedy for this is a dangerous slide. I know my friends who are appellate specialists love mandamus. I think mandamus is available if you can't get a ruling, especially like a judgment, and so I'm -- when I read this rule again, I was trying to figure out how it would invoke the right to mandamus any more than already exists, because I don't read the language in the proposed rule as necessarily giving you a per se right to mandamus. And I agree wholeheartedly with Alistair that the idea of taking up the failure to rule on a motion to compel or a motion for protection is a -- is an even greater slide into mandamus practice than where we are.

I've had -- the only thing I wanted to add then is I don't -- I don't know about regional administrative judges' ability to rectify what I agree with Alistair is a pretty small problem, but that solution does seem to find some compromise to what Judge Peeples has done with this reporting question, which I agree with the Commissioner has an IT element to it that I'm not sure that capacity exists within our budget, but it -- you can see how it federalizes a little bit this reporting practice, but maybe if you had the empowerment to transfer or take away the case, you get a remedy that would bypass

and find some middle ground between these two proposals.

The last thing is I think this has been a majority voice so it doesn't need mine, denial by operation of law is incongruent with what your -- what the real issue is here. If you're looking for a final judgment on a verdict that's a hundred days -- that's a hundred days old, you can't deny that by operation of law. You've got to get a judgment. If you've got competing motions to compel versus motions for protection, you can't deny both. It's not a binary situation with those examples, so while that denial by operation of law exists in very specific questions, I don't see how you could take that and put that into this situation. So just from my little old perspective agreeing with what was said, and throw it in the hopper.

HONORABLE NATHAN HECHT: Levi Benton.

HONORABLE LEVI BENTON: Let me respond to a number of things. First, I think it was Richard Munzinger who made the observation that the clerks might not know that something had been pending. I think every time a court sits on the bench to consider arguments there's going to be a clerk in the courtroom, so the clerks are able to note in the file realtime what -- and, in fact, does note, you know, did the judge take it under consideration, did the judge say matter is submitted, take

it under advisement. So there is always a calendar entry that the clerks can make, and, of course, the clerks have some control over the submission docket, and so I don't -- I don't -- I don't want to exclude the clerks from the process, if we're going to have a process, because they are, in fact, in control of -- of the calendar.

I want to add my voice to those who observed this is not -- I don't think this is a huge problem. I had never heard of it being a problem until recent issues out of Tracy's court that they had to address. But no one has really talked about what's -- what's the remedy by way of mandamus other than to take the case from the judge. You know, Tracy's court can order a judge to rule, but what if the judge still doesn't rule? Then what? So I would like to offer instead of taking the case from the judge, you know, whether it's the regional judge or the court of appeals should order that the offending judge should get no more new cases assigned to such judge until the issue is cured.

And then I really like Gilstrap's idea of one bite at a time. Maybe we really just address the prison cases first and see how that works out and see if there's a real problem with other cases outside of the prison cases or prisoner cases. That's all I've got, Chief. Thank you.

HONORABLE NATHAN HECHT: Bill, back to you, and then Presiding Judge Estevez and Presiding Judge Evans.

HONORABLE BILL BOYCE: So I heard some sentiment for take on the prisoner cases first, which was actually the genesis of Chief Justice Gray's letter that led to the referral in the first place. The guidance that we got from the Court, from the two high courts, was to -- to focus on the civil side rather than the criminal side, and so if -- if there's sentiment from the committee as a whole to take another look at the prisoner cases, I guess we can present that to the Courts and the Courts can decide if we should move forward with that, but I just want to highlight that because this started out with respect to the prisoner cases. It expanded into the civil cases, and then it focused on the civil cases, and there's some desire to go back to the criminal cases, the prisoner cases. So we just need to probably -- the subcommittee would need guidance if that's the direction we're going to go.

And I also wanted to address the point I think Jim Perdue had made in terms of encouraging more mandamus. Really, the -- I think the concern -- and Chief Justice Gray may have thoughts that he wants to articulate if I don't get this captured properly, but the point was

that the mandamuses were being filed anyway, but they were being summarily denied because of an absence of proof that the trial court had actually received and/or considered and/or not acted on a request for relief. And so to avoid that unproductive exercise, that was the genesis for a rule proposal in the first place that said if we come up with a procedure, you can at least have it established that something has been brought to the trial court's attention and not ruled on for purposes of just the narrow effort to get a ruling on something, separate from the merits. So we're kind of circling back on some topics that began at the beginning of the process, and so the -- I think the subcommittee would benefit from some guidance about go in a particular direction, because there's a lot of good ideas. There's pros and cons for all of these approaches, and I think some guidance from the committee as a whole would help to frame something for the next round, the next presentation.

HONORABLE NATHAN HECHT: Presiding Judge Estevez.

HONORABLE ANA ESTEVEZ: First of all, I'm going to go ahead and clarify some jargon that we are using, because I didn't realize that it may be unclear. An inmate case is only civil cases. So it's a civil case that a inmate that's in prison has filed against the

prison or some other entity, but they want to be heard while they're still a prisoner, so we -- they filed this lawsuit while they're an inmate in prison, not in jail. They're serving a sentence. They're going to be -- they're usually there for, in my experience, 20 to 40-year sentences, so I don't have like a practical way to get everything done in person. So they're only civil cases when -- that's what Justice Gray was bringing up, were these inmate cases.

I would like to hear from Justice Gray and any other court of appeals justice because I will say that I have -- I don't know how many mandamuses I've had filed against me over the last 14 years, but I will say for a lack of a ruling, they have only come from inmates, and in every one of those cases I never had notice that a mandamus had been filed or even that this motion may have been pending, and so usually what would happen was the first time I heard about it, I got this "Please respond," and then I said, "Respond to what?" And I look at the file, and I either then ruled at that point, and I would say I probably denied the motion a hundred percent of the time because it wasn't anything that was something I could do or something that may have needed a hearing or wherever it was, but I would suggest that the problem is not large enough that you need to address it in any other area

except in the inmate -- the inmate cases, just because this is -- it's a -- it's a common thing for them to do.

They will file something. We never get notice. You don't get notice of anything in my jurisdiction unless there's a proposed order, and then you don't -- they rarely ever try to set it for hearing. They don't request a hearing. Different things happen. I don't even -- I can't even discuss all of the ways that they don't do it correctly or don't do it in a way that would trigger any type of response, and sometimes it may be just unilateral nobody needs to respond, but I wasn't even aware of the filing. And -- and I do believe that the best way to deal with the inmate cases is go ahead and have that 90-day denial and then they can appeal it or, you know, as it goes on we can address it at another time. We can reconsider it, not even knowing about it, or whatever when the case continues to go. But we need a solution for that, and I'm going to agree with Justice Gray. This is a huge problem, because I would have rather have ruled on that motion than had to go off and then file a response, because I still had to file my response. My response was, "I've just ruled on it. I wasn't aware of it," or whatever it may have been, but, you know, all of the sudden, the same thing as the trigger of the notice would have done.

I have never had a mandamus from a party in a regular civil case that wasn't an inmate suit, and, you know, what happens if I forget or for some reason it slipped through the cracks? They call my court coordinator. My court coordinator sends me an e-mail, "Have you ruled on this? They're calling on this," and I look at it and I determine why I haven't ruled on it, or if I didn't have a reason to not -- I might ask for additional briefing. I may at that point rule on it one way or the other, but I always act on it once somebody has brought it to my attention, but I don't -- I don't think that that is -- I think that's a common thing that happens, and that's how most people address it, except for Ms. Hobbs, which is fine.

I mean, if I got it -- if she had done that, she probably did that several times and nothing happened, but I would suggest that 90 percent of the judges with that kind of, "Hey, have you ruled on this, hey, are you going to rule on this," they eventually end up ruling on it or asking for additional information if something is holding them up.

Judge Benton had said something about there's a clerk in the courtroom. Well, there's not a clerk in my courtroom or any of the judges I know. So you are the first -- and maybe it's just in Houston, but I had

no idea there were clerks in the courtrooms in other states -- or other, I'm sorry, counties.

And then, you know, if we went forward with the notice, how do I find out about the notice? I mean, so I don't know about anything that's filed. I know when I go to my hearing or I have something that's been set for submission and I get that from my court coordinator, but all of the other filings, I have no idea what's been filed everyday, and so if I get that notice, when are they sending me that? So all of the sudden if I was Justice Christopher, because I have it set up different and I was a trial judge in her time, and she did 50 -- let's say she did 50 hearings that day, because it sounded like she had 30 and then she had 20, so she had 50 of them. So does that mean a week later she gets a notice, and she gets 50 notices, and they're all on her computer, and now she's overwhelmed because she's just heard 50 more? And then she goes to the next one.

I mean, is there -- I don't -- I think that's overwhelming. I think it just -- it sounds like a nightmare, and I don't think that the judges are doing as poorly as that. I think that there are cases that are a little more difficult that judges do sit on, and they're looking for some divine revelation that may never come, but, you know, if you prod them with those e-mails I think

most of the time you'll get a ruling and you'll get a timely one.

HONORABLE NATHAN HECHT: Presiding Judge Evans.

HONORABLE DAVID EVANS: Thank you, Chief. It sounds like another pandemic from a regional judge's point of view. There's a number of duties that might be assigned as a result of this problem, but a couple of comments. Justice Christopher makes a point about regional judge adjusting caseload of a judge who is not getting their work done. I think we need to look carefully at the Government Code. I think that's still with the LAJ, but there's another way to approach it if -- I think her point is well-taken about the regional judge having some distance and being used to ruling on matters where colleagues might be offended. I would say that transferring whole loads to other industrious colleagues is going to meet with a lot of backlash, because they'll tell you you're rewarding the lazy and punishing the industrious, so I'd like you to look at that.

But what I think Justice Christopher has really said is it's a de facto ground of recusal, and if you want to make it a de facto ground -- if you want to make it an in fact ground of recusal in a case for failure to rule, then you should build in a notice that you

haven't ruled, probably a second notice that you haven't ruled, and then if it's filed, the presiding judge recuses. And I will tell you that as a trial judge and as someone who works with trial judges everyday over recusals, no one likes an adverse ruling on a recusal. It's in the file, it's public, and the grounds which were alleged are known. So if you want to look for something that has -- or Richard Orsinger that has a political impact, that does. Now, that would -- David Peeples is looking at me strongly because he drafted all of our rules of recusal, and I'm not certain I feel that comfortable with it, David, but that's what Justice Christopher is suggesting.

I don't think you're ever going to get self-reporting by trial judges on 90-day rulings or timely rulings. There are, quite frankly, just no uniform case management system in this state, much less a uniform case management docket. We had -- they're all local solutions, and the reporting by a judge themselves would be highly suspect as to accuracy. So I just raise that out there. Prisoners are the problem, more so than the litigants. It has been my experience that two motions will be ignored mostly, and that is the summary judgment motion that Justice Christopher and I are familiar with. There are days I would pray for page limits and font limits in trial

courts. Just give me a 50-page limit and a reason that I can hear a motion to expand a summary judgment past 50 pages and 2,000 exhibits, I would be a happy camper. But that's just a problem.

And then the prison font. There is nothing more challenging than reading prison font, and it has to be read step after step, and so I think that Frank Gilstrap's suggestion about addressing prisoners might have some -- I think it was Frank -- might have some merit, because they are the ones that don't understand how to get to the coordinators. They don't have the telephone access or the e-mail access to get to the coordinators for the settings, and as a consequence their motions can languish. So but obviously -- and I will say that I don't have a clerk present in the 48th District Court when I'm setting motions, and every ounce -- every bit of reporting that you've discussed has a financial impact on a county. This is more personnel on a county payroll. So that would be -- and another report through OCA, so I just point that out. Thank you.

HONORABLE NATHAN HECHT: All right. We've got Tom Riney, Nancy Rister, Justice Christopher, and Steve Yelenosky in the queue, and then we'll go back to Bill and have him lay out what he wants us to give him direction on, vote on. Tom Riney.

MR. RINEY: Thank you, Judge. Well, first of all, with respect to the clerks, I've never seen a clerk in the courtroom in the Panhandle or West Texas except during voir dire, and many times our judges will have three or four counties, and so you might have a hearing in a Hemphill County case in Wheeler County, and so, of course, the Hemphill County clerk may not even have any possible way of knowing that there's hearings being held, and I think we need to break this down into things that have been submitted.

The rule talks about being submitted, but some of the comments have been about a hearing never having been requested. Well, in terms of the hearing that never had been requested, very easy to separate that between the pro se cases and the cases where there's a lawyer, because lawyers often file motions and don't request a hearing or they request a hearing and they pull it down because things get worked out. So I don't think getting a hearing is really a problem with lawyers, but if you start running deadlines after the time a motion is filed, you know, it's a separate situation, so perhaps we could have some type of -- I know uniform case management is not practical because of the differences among our counties, but at least some kind of best practices where maybe when there is a filing by a pro se that a clerk does

have some type of trigger to warn the judge a certain time after the motion has been filed. But I think we need to be careful about treating motions when lawyers are involved versus these pro se motions, because clearly we don't need -- I don't think we need to change the whole system just because of these pro se cases.

HONORABLE NATHAN HECHT: Nancy Rister.

MS. RISTER: Yes, sir. I just wanted to do some FYI's. Our clerks don't go into the courtroom either, but our -- we do all of the OCA reports. No judge does a report at all. And I'm not about -- kind of like what Stephen said. I'm not about to tell a judge when or what to do. I'm just not going to do it. That's very inappropriate. I know my place. Now, as a medium-sized county we do have the software, if a motion is filed electronically, we could set a reminder timer. On a pro se and it's going to be paper, we can still set it as we scan it in our system and put it in as an event, there is a timer set up in there that we can offer, and, you know, we can run reports and let the judge know, but our judge has three staff, so the coordinator usually has a lot more time than we do.

In smaller counties, some of them don't even use software. Some of them are still on paper, and they do everything is in paper. They print off the electronic

filings, and that would probably be extremely burdensome for them, even though their volume probably is a whole lot less than ours. And as far as these being the inmate cases, that's district court. So misdemeanors, I just -- we don't deal with that at all. I don't -- I don't see it. And we've never set the judges' schedules. They have court coordinators that do that, at least in our size county, and I would assume in Harris County, too, they have coordinators who set the cases. In smaller counties, I don't know there. I would think that if you've got a district judge who's got several counties that he would keep up with his own schedule and not depend on all the different clerks in every county. That's -- I just kind of wanted to FYI.

HONORABLE NATHAN HECHT: Thanks, Nancy. For -- if you don't recall, Nancy is the county clerk in Williamson County. Justice Christopher.

HONORABLE TRACY CHRISTOPHER: I didn't mean to suggest that it would be an automatic recusal. I actually meant to suggest that the regional judge could counsel the judge who is not getting their work done, and, you know, if there's a reason why the judge isn't getting their work done, think about moving the cases. And David is probably right, it would probably have to be the local judge to actually move the cases. They would have to work

together to move the cases, but, no, I did not want it to be an automatic one.

I think what happens with the -- at least when we're looking at mandamuses, we tend to have the problems with the criminal -- criminal prisoners rather than the civil prisoners in Harris County because Harris County's local rule calls for a submission docket, right, but not all district judges have submission dockets, right? So if you want a ruling on something you either set it for oral hearing or you set it for written submission, and that's pretty clear on our websites, and so a person who is in prison can put their motion on the submission docket and not actually have to come in to court and, you know, have a hearing. So we don't tend to have that many civil pro se prisoner problems. We have it on the criminal side because the criminal courts don't have a submission docket.

So the -- there's nothing for the criminal prisoner who is trying to get a ruling on something to do to request a hearing other than, you know, file a bunch of letters with the clerk saying, you know, "Please ask the judge to rule." And, of course, then they never have proof that they asked the judge to rule, and you know, it's -- it's difficult. So to me -- and I don't know, Judge Estevez, whether you-all have a submission docket,

but that is a very simple way to allow someone who cannot actually come to court and present their motion to, you know, have the motion submitted, and you know, we require 10 days notice. You've got to give notice to the other side, but once that's done, it gets on the court's calendar.

HONORABLE ANA ESTEVEZ: Well, they just appear by phone, so we have them appear all the time. So we have -- I set up prisoner hearings all the time. So if they ask for a hearing, they get one in person, and they appear by phone. That's not our problem. Our problem isn't that they can't get a hearing. It's that they don't ever really request one or it's never given to my court coordinator I guess. I don't know. I don't know what the problem is, but there's a problem.

HONORABLE NATHAN HECHT: Steve Yelenosky.

HONORABLE STEPHEN YELENOSKY: Sorry, I had to unmute. Tom Riney was talking about best practices, and I think that's important here. A lot of times you can't fix things by rule, and with respect to prisoners, I think there are best practices, and I like -- I like what we do in Travis County, and briefly what that is, is prisoner communications come in the mail. They don't file electronically. What -- I don't know how it happens, but the clerk's office knows to direct those to the court

coordinator, and the court coordinator's practice is then to communicate with the judge about a hearing, some judge, and he has relationships with people in every prison, and he calls that person at the prison and says, you know, "I need to set up a call with the prisoner for a court hearing," and then that happens. I -- you can't require that of a judge, but it would be nice if judges were educated about doing that.

Having -- without that and just having an automatic denial, even if that's what would happen 99 percent of the time, to me it's a bad appearance that we're sort of shuttling aside prisoner complaints. I think it does matter how we deal with them, not just how we rule on them, and I think best practices would include something to try to get judges to give them some attention rather than just letting them go away by operation of law.

Second thing is whatever we do with regional administrative judges taking cases away from judges, respectfully, Judge Evans, I wouldn't call it recusal, and I'm not sure that you were suggesting that, but that would cross a bright line for me in terms of what we mean by recusal, because it would be requesting a recusal on the basis of something the judge has done or hasn't done in the case, and that to me blurs that quite a bit.

I also don't know as a practical matter what

it would mean if a judge hasn't ruled on some motion after the case has been in court quite a while. If the case is removed then does the new judge start over? That -- that's just a question in my mind, but whatever it's decided to be done about it, I wouldn't use the term "recusal." That's it.

HONORABLE NATHAN HECHT: All right. I said we would go to Bill, but we've got two more with their hands up. Judge Estevez.

HONORABLE ANA ESTEVEZ: I didn't want to leave the impression that our inmate cases don't get hearings and that I just deny them the relief they're requesting, because that's not what's happening, as I was trying to state to Justice Christopher. If they -- when they file their motions, if they request a hearing or if they request a hearing at any time and it's -- and we know about it, we do set it for hearing. We have relationships with our jail, and we've never had a problem not setting a hearing with any -- I didn't mean jail. With our prison, and I've never had a problem not setting it for a hearing. So I don't -- that is -- our problem isn't once I've had a hearing that the rulings don't occur. The problems are we've had motions that have been filed, and no one has requested a hearing, and I'm at no -- I'm unaware that anyone has requested a hearing, and then all of the sudden

we've had those motions filed, and I don't know -- I can't remember any because I don't have them fresh on my mind to give you specific examples, but we do hear our inmate motions all the time, motions for discovery, motions for -- motions for mediation. I've ordered mediation in the prisons before. Different things that may come up. So --

HONORABLE STEPHEN YELENOSKY: No, I heard you say that, and I didn't mean to suggest -- I know you said you heard motions. I didn't mean to suggest that you don't. I do think, though, we have to be more proactive with prisoners because they can't pick up the phone. A lawyer can pick up the phone any time. A pro se litigant can, too, even though they may not know where to go, but once a piece of mail hits us from a prisoner, I mean, we talk about sort of some modification of our rules for pro se litigants. Well, take a pro se litigant, put that person in jail, and then what do you do. If you get correspondence from a prisoner, it doesn't ask for a setting, I think we need to be proactive about that, because they can't call in, for one thing. For two, they don't know how things work, and so if you get any communication from a prisoner, I think the court coordinator ought to communicate with the judge about that and decide whether it ought to be treated as a request for

a hearing.

HONORABLE ANA ESTEVEZ: Well, then I think you need to review that and determine whether that should be a rule for everyone, because that's not what we do. When somebody files a motion with us on any other case, we don't call them and say, you know, "Set for a hearing." If I get a proposed order and it's in my queue and I look at it and I recognize it needs a hearing, then I put "set for hearing," but if it's not coming with an order, which is the only way I really know, an order has hit my queue that there's been a motion filed. We don't go looking for those. So unless --

HONORABLE STEPHEN YELENOSKY: Well, I'm not suggesting a rule. I'm along the lines of best practices. I don't -- I don't know that, you know, if all of the places have considered this, but a best practice I'm just saying would be to be a little more proactive, because think about everything lawyers can do, then put that lawyer in a jail and take their phone away.

HONORABLE NATHAN HECHT: Levi Benton. Then we'll go to Bill. You're muted, Levi. Can't hear you.

HONORABLE LEVI BENTON: Sorry about that. Again, addressing the issue that Stephen raised, recusing a judge in a case because of something he or she did or did not do, which is why I find more appealing saying to

the judge, "You may not be assigned any more cases until you address this." In the small counties, let's say it's a one -- a one judge county, the commissioners or the Supreme Court would have to assign another judge temporarily to hear the cases -- the new cases because the judge that's behind can't take the new cases, and so taxpayers grumble, "Hey, Judge, do your job so we don't have to pay for the second judge." In a multijudge county then you have the peer pressure of, "Hey, it's not fair I'm getting more cases because you're not doing your job," and so I just want to lay that out there one more time to Bill and the subcommittee because I really thought others would bite on that brilliant idea of mine, but no one did.

And then finally, this -- the beauty of this committee is that you always find out about the diversity of the state. In the 10 years that I served on the district bench I did not -- I think there was hardly not a day I went into the courtroom to hear arguments where there wasn't an assistant district clerk in the courtroom. So interesting that others don't have that practice.

HONORABLE NATHAN HECHT: All right. Bill, what can we do to give you and the subcommittee guidance?

HONORABLE BILL BOYCE: So I think I've -- let me make sure I'm unmuted. Yes, I am unmuted. I think I've got a decision tree here that I'll ask for votes, I

guess. Let me sketch it out, if I may.

HONORABLE NATHAN HECHT: Sure.

HONORABLE BILL BOYCE: And then we can refine it as needed.

HONORABLE NATHAN HECHT: Okay.

HONORABLE BILL BOYCE: The -- the genesis of this topic, I think, was prisoners seeking rulings in all cases, both civil prisoner cases and criminal prisoner cases. So I could see a first decision vote being do we want to -- whatever our approach is, do we want to limit it to prisoner cases involving civil matters, or do we want to try to bite off civil cases generally? That would be step one.

Step two, a vote or guidance on whether we have a reporting only approach, a notice of ruling needed approach, or accommodation of the both of them together. And then step three would be guidance about whether we want to involve the regional presiding judges in some way to be determined, because there's obviously a lot of very thoughtful and important considerations that go into that. So I sort of see that as step one, step two, and step three.

HONORABLE NATHAN HECHT: All right. So on step one, the question is should we limit whatever we do to prisoner -- civil cases involving prisoners? Prisoner

cases that are civil, not on the criminal side. So, yes, we would limit it to that; no, we would look at the other issues that we've talked about this afternoon. So if you think yes, I think you hold up your hand, I believe is the way it happens and then we can count them.

HONORABLE STEPHEN YELENOSKY: Judge, there is a way to raise your hand electronically for the participants down in the bottom right of the participant list so you'll actually be able to see that.

MS. HOBBS: And, Chief, this is Lisa Hobbs. Can I just get a clarification on the vote?

HONORABLE NATHAN HECHT: Yes.

MS. HOBBS: Which is, are you saying if we want to include prisoner cases, are we limiting them to civil only and not trying to go into the foray of the criminal side, or are you saying the subcommittee's task should be limited only to civil inmate cases and not whatever the problem is on getting rulings in general?

HONORABLE NATHAN HECHT: I think the latter, right, Bill?

HONORABLE BILL BOYCE: That is correct. So I'm -- by asking for this vote I'm excluding all criminal stuff completely, and so -- all criminal matters completely, and so the vote would be whatever rule or approach we use, are we addressing only civil cases

involving prisoners, or are we addressing civil cases generally. That's what I'm trying to drill down to.

MS. HOBBS: Great. Thank you for the clarification.

HONORABLE NATHAN HECHT: So vote if you haven't, please. Let's see, four, six, eight. I count two, four, six, eight, ten, twelve. 14 looks like, to limit. And now, if you'll turn your -- if you'll pull your hands down. And people who think we should look at the issue more broadly in other kinds of civil cases, now raise your hands.

MS. BARON: Can I change my vote, because I didn't quite understand it the first time? I'm sorry.

HONORABLE NATHAN HECHT: Okay.

MS. BARON: So take me off the first one and put me on the second one.

HONORABLE NATHAN HECHT: All right. So that's 11. 13 to 11 is what I show.

And then the second issue Bill wants some direction on is whether the mechanism, the correction mechanism, should be reporting only or separately giving notice the ruling is needed or both. So I guess a way to vote on that is just everybody who thinks it should be reporting only or both, vote that way, and everybody who thinks it should be notice of a ruling needed or both. Is

that right? I'm not sure that's right. No, that's not right. Pam is shaking her head.

All right. Let's just vote on the three of them. Reporting only, notice a ruling is needed, and then we'll vote on both. So first is reporting only. Hold up your hands, please. Has everybody voted? That has one.

Then notice of a ruling needed.

MS. EASLEY: Chief, I'm sorry to interrupt, but it looks like Richard had his hand raised, so I couldn't tell if it was for the first vote or for the second vote.

HONORABLE NATHAN HECHT: Richard? Second one, I think.

MR. ORSINGER: It's going to be for the third vote, not for the first vote. It's for both. I like both. So don't count me as report only.

HONORABLE NATHAN HECHT: Okay. That's 13. No, let's see. Yeah, 13. And then both, so take your hands down and vote for both. Two, four, six, so that looks like seven. So there's 1 for reporting only, 13 for filing a notice of ruling needed, 7 for both. Bill, that's --

HONORABLE BILL BOYCE: Okay.

HONORABLE NATHAN HECHT: And then the third thing Bill wants guidance on is whether we should ask the

regional presiding judges -- there are eleven of them around the state -- whether they should be involved in this by counseling the judge, assigning cases, getting somebody else to reassign the case, or should the regional presiding judges be helping to monitor this, and we have two on the committee, and I think two no votes, but if you think yes, we'll see in a minute. If you think yes --

HONORABLE DAVID PEEPLES: Can I ask a question? They already have the obligation to monitor this. It's in the comment "regional presiding judges shall determine the existence of cases tried and awaiting entry of judgment." Been there for 20 years. So what's the -- how is this different?

HONORABLE NATHAN HECHT: Bill.

HONORABLE BILL BOYCE: I guess what we're contemplating is the discussion that's occurred about whether there should be some additional affirmative steps that the presiding judge should take. Counseling, shifting cases, other to be discussed if we go down this path.

MS. HOBBS: Which, if I could just say, I -- and Judge Peeples, you obviously know your job better than I know your job, but I certainly have a hand in it. I think you can -- I think you can transfer -- I think you can certainly go to your judges already and say, "Hey,

we've noticed some mandamus proceedings being filed. What's going on? What can we do to support you?" I think you can either -- even transfer cases with or without the local administrative judge's thing. I think the regional PJ's may be able to transfer at least individual cases. I'm not sure you could say don't assign any more cases to them, but you could -- if there's some complicated cases that we're just not getting rulings on I think you could intervene, but maybe we have sort of assumed some of that in our discussion. And, Justice Hecht, I'm sorry if I'm opening the floor for a discussion after the call for the vote, but I mean, what do you think your -- what do you think a regional PJ -- some of this isn't just giving you authority, in other words. What I think is it's giving you sort of extra permission to do what you already have authority to do.

HONORABLE DAVID PEEPLES: I don't think a regional PJ has the authority to take a case away from a judge who doesn't want to give up that case. Now, recusal is different, but we're not talking about recusal here.

MS. HOBBS: No, but what about transfers? I mean, y'all take -- I mean, presumably when you get a request to transfer a case you do it without necessarily the consent of the trial judge.

HONORABLE ANA ESTEVEZ: No. Those are --

those are after we've had hearings, on a recusal.

MS. HOBBS: No, no, no. Justice Peeples, I'm talking about outside of the recusal. So I'm thinking about like -- I'm kind of thinking about maybe Rule 11, and so maybe I'm getting confused, and then ultimately Rule 13.

HONORABLE DAVID PEEPLES: MDL is totally different, Lisa, but I just don't think there's anything in the statutes that lets a regional PJ take a case or more away from a judge who doesn't want to give up that case.

MS. HOBBS: Okay. So you couldn't think for the efficient administration of your region that you could pop in to some case in Bexar County and say, "No, I think it actually should be in" -- I forget your region, but it could be in the Boerne or wherever, whatever county that is.

HONORABLE DAVID PEEPLES: I --

MS. HOBBS: Outside of Rule 11 or Rule 13.

HONORABLE DAVID PEEPLES: I'm not aware of it.

MS. HOBBS: Okay. I misunderstood. I thought y'all could transfer cases more easily, but maybe I'm just misremembering the statute.

HONORABLE DAVID PEEPLES: David Evans, are

you aware of anything like that?

HONORABLE ANA ESTEVEZ: He's on a personal emergency, so he's not on right now.

MS. HOBBS: Judge Peeples, one more question. What about within Bexar County, if you saw a problem, so you're not -- now you're not dealing with statutory or constitutional restrictions on where a case can be filed or heard, but you wouldn't intervene and move a case from a judge, even within the jurisdictional parameters of the original filing of the case?

HONORABLE DAVID PEEPLES: I think that is a correct statement.

MS. HOBBS: Okay. So then I think as we answer this question I think one of the things -- it would be easier to move it to somebody within the same county, but I think we should all remember they can't -- it would only be by statute or constitutional change that they can move it outside of the county for sure.

HONORABLE NATHAN HECHT: All right. So I show eight for extending the involvement of the regional presiding judges. If you would put your hands down.

MS. HOBBS: Hey, Chief, will you add -- will you make that nine, because I was talking instead of voting?

HONORABLE NATHAN HECHT: Yes. Yeah.

MS. HOBBS: Thank you.

HONORABLE STEPHEN YELENOSKY: Ten, please. I was listening.

MS. WOOTEN: I'm sorry, I didn't know -- I didn't realize we were calling the vote when the discussion was open, and this is Kennon, and so I'm on board, too.

HONORABLE KENT SULLIVAN: Make it 12.

MS. HOBBS: Chief, should we just redo that vote, because I think -- everybody put their hands and redo it one more time so we have an accurate vote?

HONORABLE NATHAN HECHT: All right. Let's vote again for involving the regional presiding judges, yes. Hands up, please.

HONORABLE ANA ESTEVEZ: Well, I think we could always be involved, but this is for involving them to a greater extent, right?

HONORABLE NATHAN HECHT: Right.

HONORABLE BILL BOYCE: Yes.

HONORABLE NATHAN HECHT: I show 15.

CHAIRMAN BABCOCK: 16.

HONORABLE NATHAN HECHT: 16.

CHAIRMAN BABCOCK : Oh.

HONORABLE NATHAN HECHT: No, I show 14 now.

MS. HOBBS: Chief, I took my hand down after

the vote, after you said the count, sorry.

MS. WOOTEN: I did the same thing. This is Kennon, but I put it back up.

HONORABLE NATHAN HECHT: Maybe we had 18. 17, okay. And then for not? Hands for doing it down, hands for not doing it up.

HONORABLE ANA ESTEVEZ: And Judge Evans did give me his proxy to vote, so he's voting in this vote.

HONORABLE STEPHEN YELENOSKY: Justice Hecht, I think the host can just clear out the hands, just to make sure in case somebody has forgotten to lower their hands.

HONORABLE NATHAN HECHT: Okay. Pauline may be doing that.

HONORABLE ANA ESTEVEZ: Oh, well, she just cleared me out. Let me --

HONORABLE NATHAN HECHT: So the nots are four, so that's a good clear vote. Oh, five.

HONORABLE BILL BOYCE: And so for my clarification, Chief, when we go back to the first vote, which I think you said was 13 to 11.

HONORABLE NATHAN HECHT: Yes.

HONORABLE BILL BOYCE: That means 13 in favor of dealing -- of confining whatever rule proposal we come up with to prisoner cases only involving civil

matters; is that correct?

HONORABLE NATHAN HECHT: Yes.

HONORABLE BILL BOYCE: Okay. All right.

HONORABLE NATHAN HECHT: That's the way I understood it, yes. Okay. Anything else that you need guidance on, Bill, on this?

HONORABLE BILL BOYCE: No. I think that gives us the ammunition to take another swing at it.

HONORABLE NATHAN HECHT: Okay. Well, then that takes us to the last item on the agenda, which we should be able to finish without too much trouble, so maybe we should go ahead and take a little break, and I've got a quarter to 3:00. We have a visitor. Judge -- Municipal Judge Ryan Henry is with us, so let's come back in 10 minutes at five minutes to 3:00, and finish up.

CHAIRMAN BABCOCK: And, Chief, I'm back, if you want to relinquish the reigns, but you sound like you're having fun.

HONORABLE NATHAN HECHT: No, no, no, I wouldn't call it that.

CHAIRMAN BABCOCK: I mean, I've never heard so many votes, it was awesome.

HONORABLE NATHAN HECHT: We'll take a 10-minute break.

(Recess from 2:43 p.m. to 2:54 p.m.)

CHAIRMAN BABCOCK: I think it's of all the 46 or so, 48 people, now down to 42, Judge Henry has truly Zoomed in here, if you are looking at his background. It's from somewhere in outerspace. He is --

HONORABLE RYAN HENRY: Yes.

CHAIRMAN BABCOCK: And Marti wants to know about procedures for compelling a ruling, that's going back to the subcommittee, and the parental leave continuance rule is done and going to the Court, unless somebody tells me differently.

So civil rules in municipal courts, Levi Benton is the chair. Judge Estevez is the vice-chair, and whoever wants to lead off and talk. And, Judge Henry, thank you for joining us, and thank you for your memo. It was very thoughtful. Thank you.

HONORABLE RYAN HENRY: Oh, you're welcome. And I must say, this is a fascinating process to watch. I should have popped in and saw you guys when you weren't doing it through Zoom, but it was very interesting.

CHAIRMAN BABCOCK: Yeah, well, when we do it in person there's often food fights, because there's food there, and we sometimes toss it at each other, but this is much more civilized. So, Levi, take it away.

HONORABLE LEVI BENTON: All right. Thank you, Chip. So as Chip said, Judge Henry, who serves as a

municipal court judge in San Antonio, I believe it is.

HONORABLE RYAN HENRY: Actually, it's Westlake Hills up in the Austin area.

HONORABLE LEVI BENTON: Oh, thanks for correcting me. Excuse me. Wrote the Chief maybe about a year ago, actually, and asked the Chief to take a look at this topic, and the topic is considering whether the Rules of Civil Procedure need to be made to apply to municipal courts, and so the Chief in his letter of about a year ago asked us to consider Judge Ryan's proposal. The four proposals made by Judge Ryan are laid out in the report. I won't read them, but, one, apply -- change Rule 2 to say expressly that the rules apply to municipal courts, and then the third proposal was to come up with some specialized rules like the rules in the 500 series that apply to JP courts.

The subcommittee heard from a couple of other judges besides Judge Henry, and even in the small number of judges we visited with, there wasn't unanimity. There was a judge from Dallas who had some strong objection to having the civil rules apply to municipal courts. In the final analysis, the subcommittee thought the course we should take is to suggest to the Court that we set up a committee of municipal court judges. Most of this committee remembers that when we went down this path

with the JP courts, as I recall, the project went nowhere until we got JP justices or judges involved. I think there was a special committee of about 10 justices of the peace who made some proposals, and since I know of no one on our committee who practices in the municipal courts or knows anything about municipal court rules, I think it would be challenged to come up with it, and there are over a thousand municipal courts across the state. Or about a thousand.

We thought really we should use the same model used with the justices of the peace, and that is, let's -- you know, maybe we reach out. The subcommittee didn't expressly address this, but maybe the right thing to do is either the Court or the subcommittee reach out to the municipal court's association and ask that organization to set up a committee to consider Judge Ryan's proposals. And really, that's where we left it. So I will yield to Judge Ryan or to Ana or Stephen Yelenosky, who was also on the subcommittee, to see if they would like to add anything.

HONORABLE RYAN HENRY: Judge Benton, may I go first, real quick?

HONORABLE LEVI BENTON: Absolutely.

HONORABLE ANA ESTEVEZ: I'm not going to say anything, so you just take all of my time, too.

CHAIRMAN BABCOCK: Yeah, go ahead, and I've I've been calling you Judge Henry, but maybe it's Judge Ryan. You have two last names, so --

HONORABLE RYAN HENRY: Actually, Henry is the last name, Ryan is the first name, so Judge Henry is correct, sir. First, I did want to thank the subcommittee for all of their work and for listening to me and for taking a very hard look at this particular issue, but the more you look at it and kind of the diversified nature of all the different courts and the way the Legislature has given certain courts different powers and things like that, it's a little bit bigger elephant to eat, as I heard a reference earlier on, and so dividing things up might be more appropriate.

I had reached out -- and I just recently heard, so this is something the subcommittee, I had not informed them of yet. Just recently heard back from the Texas Municipal Court Education Center. It is the training center for municipal judges and prosecutors and clerks throughout the state, and they basically offered me their certain resources that is their newsletter and their website ability to conduct surveys and actually just blast out information to all of the municipal judges, and they have to go through the TMCEC to get their judicial credit and their continuing education credit, and so they have a

kind of a list of all of them and solicit comments and things like that they can compile and actually bring back to the committee.

So as Judge Benton had mentioned, reaching out to the ones that deal with them all the time, I did get an affirmative commitment from the executive director I want to say it was Sunday night that they would be willing to do that, if that's what the subcommittee felt was appropriate. It would just be kind of what to ask them all about. My concern and the reason I brought this up was just there are -- municipal courts, especially municipal courts of record, have been given more and more civil jurisdiction to try and handle I guess an overflow and to make things more cost-effective for all the parties involved and to act and respond quicker. As Judge Benton had mentioned, that the judge in Dallas, that's Judge Acuna, and he's actually on the board for the TMCEC, or TMCA, I'm sorry. That's the association that overlooks them.

He didn't necessarily have a problem with the rules. He just wants special rules, because he recognizes all of the different nuances that kind of come up in the different counties, and I have received comments from different judges that basically said either "Thank you very much. We need this because there's no guidance

on certain issues," or "Don't do it because you're going to screw things up for us," because those courts have some specialized things that they have to deal with. Municipal courts are so diverse, I mean, if you just compare, say, Lubbock, and it's a municipal court of record, and they have, you know, quite a few civil matters that go on, with El Paso, who has a tremendous amount of civil matters that go on, but the statute expressly gives them a municipal court of appeals, and so the rules that apply with them are completely different than the rest of the state.

And I joke with -- I teased the former city attorney, but she actually is the new president-elect for the State Bar, Sylvia Firth, that, you know, I was born in El Paso, but El Paso is a different country and a different world, but they still have to follow the rules that are submitted. So I believe that the subcommittee's intent was just get more input and get them involved earlier, the judges that live and breathe in this world, as to what kind of rules they think should apply. I do know there is a certain population, myself included, that wants some guidance and because we want to do it right, but there does need to be some flexibility, but that's why we need to kind of get the comments from all the rest of the judges. So I am available for questions, but otherwise I'll shut up now.

CHAIRMAN BABCOCK: Okay. Thank you very much, Judge. Any -- anything else, Levi, or do you want to open up the questions, or tell us where you want to go.

HONORABLE LEVI BENTON: Well, I really I guess need direction. You know, I think where I personally part company with -- or differ with what Ryan just said is that I don't know that we need necessarily comments from more judges, municipal court judges. I think we need an express or formal request from the -- from the Court either to the TMCA or the other organization that he referred to asking them to draft -- draft rules and/or to expressly say as a body, "Aw, thanks, but no thanks."

CHAIRMAN BABCOCK: What did the referral letter from the Court say? Do you know, Levi, or Marti, do you know?

HONORABLE LEVI BENTON: Yeah, yes. It says to set up a process for considering the proposals submitted by Judge Ryan. Excuse me, by Judge Henry.

CHAIRMAN BABCOCK: He'll answer to either.

HONORABLE LEVI BENTON: Pardon?

CHAIRMAN BABCOCK: I said he'll answer to either, I'm sure.

HONORABLE RYAN HENRY: Yes, sir.

HONORABLE LEVI BENTON: And he'll even

answer if you don't say "Judge." He's just put me in coach.

CHAIRMAN BABCOCK: Yeah, right, right. So to set up a process to respond to that and then report to the Court, is that what --

HONORABLE LEVI BENTON: Set up a process for considering the proposal, so, Chip, circling back to where I started, you're mature enough to remember when we went down this road with the justices of the peace. Right?

CHAIRMAN BABCOCK: Yeah. Oh, I tried 20 jury trials in JP court.

HONORABLE LEVI BENTON: But didn't we have a -- just a special committee of justices of the peace? And I don't remember and I don't know whether -- I'm sure they have an analogous state association, whether that association was involved. In other words, this wasn't a top down approach, because it could never work as a top down approach. We've got to have the municipal court judges and municipal court administrators buy in that there is a need for the rules, because we already have -- well, first, like in Houston, I could get no interest amongst the judges to respond to the inquiry. We had a Dallas judge to respond whose -- who says, you know, "I'm not sure we need to do this because we don't have -- we're not set up to apply rules of discovery like other courts."

So to answer your question, Chip, we need direction.

CHAIRMAN BABCOCK: Okay. Lisa has got some historical information for us. But you'll have to unmute, Lisa.

MS. HOBBS: Hi, I moved my phone. My recollection is when we rewrote the JP rules I obviously wasn't around for the first time we did the JP rules, but when we rewrote them, which has been in the last few years, we did have a JP study group that we worked with before it came to the advisory committee. In other words, this committee is fantastic within our experience and even fantastic in kind of punching some holes in things that other people have written, but most of us haven't practiced in municipal court, so I would second Judge Benton's recommendation that this really needs to come from the municipal judges and then us assess what they're doing, and that doesn't mean no support. Maybe it means supported by the subcommittee. But I do think -- I do think there needs to be a special group of municipal judges from varying size counties to kind of assess it, for instance, and then propose something to us for review.

CHAIRMAN BABCOCK: Okay. Thank you. David Jackson. You'll have to unmute, David.

MR. JACKSON: I just would ask that Lisa go back to her computer. We could hear her perfectly this

morning. I got about half of what you said.

CHAIRMAN BABCOCK: Yeah, Lisa, you were breaking up a little bit, but -- but half of Lisa is, you know, 120 percent of most of us. So --

MS. HOBBS: I'm sorry. My computer's audio stopped working, so then I had to switch to my phone, which is why you're seeing me outdoors more often because I can -- so I apologize. I'm mostly supporting what Levi is saying, is that we need -- we need -- it needs to be ground up and not top down.

CHAIRMAN BABCOCK: Yeah. Well, I think that makes sense, and I know Professor Carlson and I served on a subcommittee a number of years ago, and we had a -- it may have been Judge Lawrence or it may have been somebody else, but, you know, it was kind of a subcommittee of one person because he's the only one that knew what was going on down there. So, Levi, unless there are more questions, we'll -- we'll take this under advisement, as they say, and I'll confer with the Court, and we'll see if more work needs to be done or a committee -- a sort of a bottom up committee needs to be formed, and if that's all right with you, unless somebody else -- Judge Henry, if you've got anything else or anybody else -- and Judge Henry has got his hand up, so you're recognized.

HONORABLE RYAN HENRY: Well, I believe Judge

Benton was trying to say something first.

HONORABLE LEVI BENTON: Yeah. Thank you, Ryan. So, Chip, and Chief, I think to say it differently, if -- if there's agreement that someone should reach out to one of these state associations that municipal courts and judges belong to, should that request or should the communication come from me, from Chip, or from the Court? And that's all I have to say.

CHAIRMAN BABCOCK: Well, I know who I would rank last and who I would rank first. I would be last and the Court I think would be first.

HONORABLE LEVI BENTON: That's what I think --

CHAIRMAN BABCOCK : Okay. All right. Well, we'll -- we'll go back then, and then, Judge Henry, did you have a comment?

HONORABLE RYAN HENRY: Yes, sir. The two groups, if you're going to reach out, and from what I'm hearing, it's essentially has the judges collect -- write the rules that they think want to control them and then bring it back to you, but when the Court asks for it. The two groups to make such a request -- and I think we can get some coordination because I know the individuals that kind of head both groups. One is the TMCEC, and the other is the State Bar section -- State Bar has a section for

municipal court, and both would be, at least in my opinion, appropriate to reach out for and to ask for some guidance with regard to, you know, proposing rules.

CHAIRMAN BABCOCK: Great. I'm writing that down. Thank you, Judge. Any other comments about this?

HONORABLE LEVI BENTON: None from me.

CHAIRMAN BABCOCK: All right. No hands are up. So that means that in record time we have gotten through a nine item agenda, so Zoom may be the way to go in the future, and Judge Henry, you can go back to Mars or wherever that planet is behind you, and everybody else can go back home, which is where probably a lot of you are. So thank you so much. I thought this meeting went very smoothly, and it was -- and it was productive, and it's a testament to all of you guys, and so thank you. And I'm very sorry I had to -- I had to duck out for a little bit this afternoon, but duty calls. So we will stand adjourned until our next meeting, which, Marti, is when? You'll have to unmute, Marti.

MS. WALKER: I did. Our next meeting, let me look at my calendar, is August 28th. Yes.

CHAIRMAN BABCOCK: Okay. We will -- we will be back together August 28th somehow, some way. Thanks, everybody. Really appreciate it.

(Adjourned)

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