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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

SEPTEMBER 3, 2021

(FRIDAY SESSION)

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Taken before Lorrie A. Schnoor, Certified Shorthand Reporter in and for the State of Texas, Registered Diplomate Reporter and Certified Realtime Reporter, reported by machine shorthand method, on the 3rd day of September 2021, between the hours of 9:00 a.m. and 5:00 p.m., via Zoom videoconference and YouTube livestream in accordance with the Supreme Court of Texas' Emergency Orders 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:

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CHAIRMAN BABCOCK: Okay. Welcome everybody. Sorry that we have to be virtual again today, but it is what it is, so we'll soldier on. And the first item on the agenda after my welcome remarks are status report from Chief Justice Hecht, so Chief Justice Hecht, take it way.

MR. ORSINGER: You're muted. There we go.

HONORABLE NATHAN HECHT: Good morning, everyone. And glad we can meet this way if not in person. And we had hoped it would be in person, and perhaps next time it can be.

We're planning on oral arguments in our court being in person in a couple of weeks, but we're kind of waiting to -- watching what happens, make sure it doesn't get any worse, and that we can really do it.

By way of update, we -- the Court cleared the docket of argued cases by the end of June for the seventh year in a row, and we beat SCOTUS again for the second year in a row, so proud of that.

We're still waiting for the Governor to appoint Justice Guzman's successor, but he's been busy with special sessions, and we think that will come before very long.

David Slayton has left the Office of Court

Administration to take what he views as a promotion as Vice President of the National Center for State Courts and is certainly a good thing for the country. So while we are still mourning David's loss to us, we're proud of his transition to the national stage, and we look forward to working with him there.

Mena Ramon, who is the long-time general counsel of the Office of Court Administration, is the interim director, and we're still in search for replacement for David.

Also, our Public Information Officer, Osler McCarthy, retired on August 31st. We're looking for a successor for him. And one of our staff attorneys, Chuck Lord, retired after only 35 years service to the Court, so we wish him well.

We rolled out an email subscription service last week -- thanks to Pauline -- and we're starting with rules advisories, but we'll be adding oral argument info and case summaries as we go along. So if you haven't signed up, please consider doing so and get the information as the Court releases it.

And also just for the appellate lawyer insiders, the Court's going to new opinion formatting starting this month, and so the opinions will look a little different as they're coming out. And Martha and

the staff attorneys have worked very hard on that.

We've issued 41 emergency orders so far. Three are still in effect. Emergency Order 39 governs the Texas Eviction Diversion Program, and it expires October the 1st but will probably be continued to at least to the end of the year when the funding has to be -- the federal funding has to be spent.

Texas really has a nationally recognized eviction diversion program, win-win-win-win program. It helps tenants in distress, it helps landlords by getting them paid, it helps the courts by getting these cases off their dockets, and it helps society by removing one more problem that the pandemic has caused for us. So really, Texas has been a leader in these programs. We've spent a hundred million dollars in the program and helped 12,000 households. So I and some other chiefs met with Attorney General Garland the other day by Zoom, and he's very supportive and trying to help us get (audio distortion) as we go along.

Emergency Order 40 is our general order that's -- it has been in place since March 13 last year, and it will probably be renewed October 1st again in some form, probably mostly the same. The order facilitates remote proceedings, and the justices of the peace tell us that they really need that authority and

the authority to modify trial and pretrial related deadlines to help with their dockets and their backlog. So other courts do as well.

And Judge Schaffer's been very helpful in consulting with us on what should be in the order as well as Judge Miskel, Judge Ferguson out in West Texas, the presiding judges have all had input into it and are continuing to have input, and we want the courts to be able to function as well as they can in these difficult circumstances.

And then we just signed Emergency Order 41, which will extend the deadline for the payment of State Bar dues, just as we did last year, to October 31st from August the 31st, so give everybody a little breathing room with respect to their bar dues.

One new emergency order relates to Operation Lone Star. You no doubt have noticed in the media that the Governor has declared a state of emergency -- a state of disaster -- sorry -- in the border states and launched Operation Lone Star to combat smuggling of people and drugs into Texas, involves arresting people who are on private property without permission for criminal trespass and processing them through the state criminal system and then releasing them to immigration authorities. They started out in

Val Verde County and then to Kinney County, and now it's three other counties, five altogether.

They started arresting about five people a day or so on average. Now it's up to about 50. And the judges in those counties need help in arraigning people who are detained, and so I've assigned judges from around the state to help with those arraignments virtually, and they've done an outstanding job. And the presiding judges help select those judges who are handling these cases.

And the emergency order that we just signed alters the red tape procedures that pertain to appointments of indigent defense counsel so that counsel can come in from out of county, for example, magistrates can appoint the counsel rather than having to go to court to do that, just sort of streamlines the process.

And this, of course, is not a comment on the operation itself. We're just trying to make sure that the courts are handling their responsibilities well in those circumstances so that everybody's constitutional and due process rights are being observed.

We've had a number of changes to rules. We have finished looking at the changes in Rule 145, which governs excusing indigents from paying costs.

It's effective September 1st, day before yesterday. And basically it creates certain categories of evidence that are prima facie proof of indigence and requires that -- I think this is a really helpful change -- requires that trial courts designate the portions of the record, Reporter's Record, for appeal. Court reporters have a legitimate complaint that oftentimes, an indigent will request the entire record in a very lengthy proceeding and when it's not needed, and so this will help minimize that burden on the court reporters in civil cases. So that's done.

Rule 199.1, also effective September 1st, ensures that court reporters can administer oaths to witnesses remotely under specified conditions.

Rule 107, the return of service rule, also effective September 1st. It shortens the time to obtain fault protective orders in family violence cases as directed by House Bill 39 in the last session.

Rule of Judicial Administration 13.1 regarding multidistrict litigation, effective last month, in August, removes some outdated language that prohibited transfers because they all involve the attorney general, and we decided there was no reason to have a special rule for cases just involving the attorney general. People can -- people should know in

those cases what the statutes require.

We finished work on TRAP 49, on motions for rehearing, and en banc reconsideration. And let me just say, I say en banc because I think it's schizophrenic and hypocritical to say voir dire in the trial court and en banc in the appellate court. I just don't -- appellate lawyers are snootier than trial lawyers, so I say en banc; but anyway, we've changed that rule to impose the same deadline for both motions consistent with the federal rules and put more information regarding the contents of the motion, clean up some confusing terminology, so you might want to take a look at those changes. We got one comment when we put them out for public comment from the State Bar Court Rules Committee, and they've raised some good issues, and we'll try to respond to those and have the rule ready October 1st.

TRAP 57 governs direct appeals to the Supreme Court. And some of you will remember, maybe one or two of you, that when we rewrote the Rules of Appellate Procedure 20-plus years ago, we wanted to make sure that lawyers knew that direct -- the Supreme Court viewed direct appeals the same way as the rest of its docket -- most of the rest of its docket, almost all the rest of its docket -- as discretionary. And even if

jurisdiction lay in the court, we might decide not to take the direct appeal and let it go to the Court of Appeals instead first to get their view of the case.

Since then, there have been a number of statutes passed that provide that the only appeal a party has is directly to the Supreme Court. And so that statement that -- taking the appeal as discretionary is at least confusing and perhaps wrong. And just, for example, in the last session, they passed a bill regarding securitization of bonds and funding for damage relating to Uri, the winter storm last -- the storm last winter, and that provides for only one avenue of appeal, and it's directly to the Supreme Court. So we don't mean to change our view that some may be discretionary, but we'll stay agnostic for now and take that out of the rule.

We've (audio distortion) rules governing admission to the Bar, which Rule 4 had required a five-year wait after a sentence for felony conviction before you could apply for readmission to the Bar, but the Board of Law Examiners' practice was to waive that delay, if asked to do so, but not all applicants knew to ask. So really, in practice, the time that someone should wait after a felony conviction is discretionary with the Board of Law Examiners, and that's the way --

we changed the rule to reflect that reality.

We made some changes in the rules of the Judicial Branch Certification Commission, and I won't take the time to tell you about those. You can look at those. They have to do with court reporters and guardianship cases.

We clarified that the Board of Disciplinary Appeals can continue to hold proceedings remotely post-pandemic, which they requested, and they've been doing without any trouble.

And then we updated the protective order registry form to -- in response to some legislation the last session, including to include sexual assault crimes, stalking, trafficking, protective orders in those kinds of cases, and to exclude information for vacated orders from public view, again, in response to legislation.

And finally, the Judicial Commission on Mental Health, which is, again, another nationally recognized organization, is holding its annual summit on October 14 and 15. Registration is open, and there will be options for virtual and we hope in-person attendance, so you might want to look into that.

The Texas Commission has been so successful that the National Center for State Courts and

the Conference of Chief Justices and the conference of the State Court Administrators is trying to do some of the same work on its own nationally and drawing on the work of the Texas Commission.

The Conference of Chief Justices will be meeting in Austin in January for their winter meeting, and one of the focuses of the meeting will be on our mental health commission, how it has been so successful and what the national folks can learn from it.

So we've been very busy with rules throughout the summer. We've had a couple of cases that you've read about in the media, so our summer has been a little busier than usual, but the Court's very strong and completely current.

One of the amazing things about the pandemic and the legal staff working almost entirely from home has been that it has not impacted our work adversely at all. And so we've learned from that and trying to -- as law firms and others -- other courts are trying to do, we're trying to figure out the best path ahead. And the situation keeps changing on us, but that's where we are.

We're very proud -- I'm especially proud -- to be able to brag nationally about how well our courts have done and especially our trial courts in

Texas and how they've just done everything possible to try to move cases in very difficult times. The Bar has been supportive of efforts to do that. So we really -- we're behind. There's no question. It's going to take some hard work to catch up, but we're working on that. And I know judges across the state are trying to try every jury trial they can without risking the health of the participants, and we just have to work through those issues.

But for now, Chip, that's my report.

CHAIRMAN BABCOCK: Well, thank you very much. Other than that, though, you haven't done anything over the summer?

HONORABLE NATHAN HECHT: No, no, we've had our feet propped up and --

CHAIRMAN BABCOCK: Yeah, on the beach.

HONORABLE NATHAN HECHT: Yeah.

CHAIRMAN BABCOCK: Thank you, Chief Justice Hecht.

Justice Bland.

HONORABLE JANE BLAND: Good morning. I have nothing to add to the Chief's comments other than to thank him for his leadership on each and every one of these initiatives that he just discussed with you and to add to his my gratitude to this committee because so

many of these rules, nearly all of them, reflect the, you know, culmination of many hours of thoughtful deliberation by this group, and we could not do it without you, so thank you.

CHAIRMAN BABCOCK: Yeah, thank you, Justice Bland.

And as a measure of how hard we've been working, I received about 30,000 pages of stuff last night, as did all of you, and I'm sure -- I stayed up late frankly reading all 30,000 pages, so I'm sure that we're going to have a meaningful discussion today.

And to kick that off, Jim Perdue from Houston, the chair of our seizure exemption rules and form, and he has organized a very informative session for us to guide us in our work.

Jim.

MR. PERDUE: Thanks, Chip. And I apologize to everybody for the document dump last night. Part of my experience this past session teaches that I think that any legislative process and any, probably, likewise rulemaking process of this ought to bring together the affected constituencies to be thought leaders and explain the issue.

I'm not a debt collection lawyer, and I -- my pro bono work has only been family law, so this was a

new area for me. And so you're not going to hear Jim Perdue on turnover and garnishment. You're going to hear people who actually do it and understand it hopefully to work through the issue.

But for whatever reason, I got entrusted with this subcommittee because of my repeated inability to stay away from Austin and see the legislative process up close. And what comes to you right now is part of the interaction of that branch of government with this.

There is -- House Bill 3774 is the omnibus courts bill. It is essentially the catch-all vehicle for kind of the noncontroversial legislative actions that would relate to the judicial branch. And so, you know, no question about creating a new county court in Hidalgo, no question about some magistrate judges in criminal proceedings, et cetera, et cetera.

It interacts with the Texas Judicial Council very closely, and kind of that bill, then, moves through session monitored by my little association to make sure there is nothing untoward buried in it; but you're looking at, like, an 85-page bill of generally agreed-to issues.

In the June referral letter that was sent to everybody, that bill is attached, but it may have been circulated twice. And I don't know that I want to

do share screen because I kind of want to jump into things with y'all, but we're looking at section -- or Article 15 of that bill, which is Page 61 of the bill. It is Page 245 of the pdf that was sent by Shiva on June 1st with the Chief's referral.

And so what we have today is something that the committee has confronted in the past, and this happens, and that is a legislative enactment that gets dumped into the Government Code, and it says the Supreme Court shall adopt rules. This is how we got expedited trial. This is how we got fee shifting. This is how we've had a couple other things that have happened over the years where they write a bill, they put it in the Government Code, and they direct the court to pass a rule.

This particular issue then essentially is a directive by the legislature, living in the Government Code now, to write a rule by May of next year relating to exemptions from seizure of property. If you read it, it's relatively simple. So the directive from the legislature in 37 -- in this article within the bill says that the court shall establish a simple and expedited procedure for a judgment debtor to assert an exemption to the seizure of personal property by a judgment creditor. Now that then references back

specifically to Section 31, turnover statute; and then you have a Subsection (b) which also talks about rules that are necessary to implement this, and then Subsection (c), a form that is necessary to implement this, in other words, kind of intended to represent a mandatory form to be issued by the court, obviously intended primarily for pro se litigants that have been subject to a judgment and are now subject to a collection action, whether it be garnishment or turnover. All of this then has to do with the exemptions.

In my quick study of this, there's a little bit of giddyup in it. It is -- this is not as clean as often the legislative process allows for in the addressing of things through rules.

First, it is kind of in a conversation about Justice Courts, but it's very clear that the bill is not bracketed to a form or rules only for Justice Court creditor proceedings.

Secondly, the form, according to the bill -- and this may be kind of the biggest issue of discussion that I picked up on very quickly, you can see on Page 62 of the bill, 246 of the pdf, in Subsection (b), it's contemplated that this rule and this form is going to list all exemptions under state and federal law

to the seizure of personal property. That's Line 19 and 20, Page 62 of the bill. That's a long list. And so to get the entire list of exempt property in a usable form in plain English, with a mandatory Spanish translation, is an interesting project as well.

So here ends the knowledge base that Perdue has and his ignorance begins. And so, therefore, I've got some much smarter people who understand this. Rich Tomlinson is here from Texas Legal Aid, and Craig Noack is here who is the, kind of, legislative affairs or chairperson for the Texas Creditors Bar Association.

I've been kind of collecting their thought leadership on this mandate and getting, at least, from both sides that I have not done my best imitation of Bob Bullock and stripped them down at a conference table in a room and make them talk to each other in person, but that may come depending on what the Chief tells me to do after today's meeting, because you'll see, I think, and hear from these presentations that they take a different approach to this. They obviously and understandably come at it from a very different perspective and a different angle, but that doesn't change the fact that the responsibility for us as the committee and then the court is to craft a rule that complies with the legislative mandate but also I think represents good

policy and best practice.

So I think the issue will be joined relatively easy for you between the presentation of Rich, on behalf of the judgment debtor's perspective, but -- obviously from Legal Aid. Craig has put some of his concerns regarding their proposal on the table in a memo that was circulated last night. Rich crafted an excellent, kind of, ten-page, high-level memo regarding the proposal that was crafted between his group and Texas Appleseed. They have kind of a full package. And, likewise, the Creditors Bar has a full package for you to review.

And I've been promised by Jackie that this is a start of the process, and I promised both of them that this is a start of the process. And I've informed both of them that this is a committee that loves to debate the number of angels on a pinhead, so we will take some time with this and we'll see what we can do to comply with the mandate and with the referral by the Chief.

So as David Evans would say, that is an extremely long-winded Perdue introduction of the issue, and I'd like to turn it over to Rich Tomlinson to talk to you about his perspective from the judgment debtors and the work that Texas Appleseed and Legal Aid has

done.

Rich.

MR. TOMLINSON: Thanks. Thanks, Jim.

Again, I'm Rich Tomlinson. I've represented debtors for most of the 41 years I've been a lawyer, and I'm very heavily involved in representing debtors in both garnishment and in turnover proceedings. There are some other mechanisms whereby judgments can be collected, but the primary ones are those two at the moment; and turnover is becoming a more significant one.

I'm part of an ad hoc group. I work at Lone Star Legal Aid in Houston. I work with also Amy Clark from Texas Rio Grande Legal Aid, Ann Baddour at Appleseed, and Professor Mary Spector at SMU Law School, and we're here from the debtors' side basically to give you our ideas about our proposal and where we think the -- where we think the rule should come out, basically, just to give you that introduction.

And so this all started, first of all, with a proposal that was made to the Judicial Council where we sought basically a passage of a resolution that would recommend legislation that would require the implementation of a rule or rules or amendment of rules that would make it easier for judgment debtors to raise exemption claims, and there's -- here's the reason why.

So there's -- the number of collection cases that have been filed in the last ten years has really grown over time. And actually I've been doing this a long time. It's actually grown a huge amount over the last 20 years. It used to be -- I'd say before 2000, you didn't see as many consumer collection cases because we don't have wage garnishment, so it's harder to collect in Texas than in other states, but that's changed.

There's been a huge amount of debt collection suits. It's now a very prominent part of the dockets of JP courts, county courts in particular, even in some district courts. And it's -- that relates to the fact that there are now tens of thousands, if not hundreds of thousands, of judgments being collected, many of them by large, publicly held debt buyers that buy debts from banks and other financial entities and seek to get judgments against people who owe debt, and then they try to collect. And what that has led to is many more garnishments against individuals, in addition, many more turnover proceedings where judgment creditors seek turnover receivers to be appointed to try to collect.

And what I have observed is that there's tons of exemptions, but there's no process by which

judgment debtors get informed about those exemptions. If they don't find a lawyer, in fact, they don't have a way to actually make their voice heard and raise their exemptions. So, you know, the exemptions can include social security, veterans' benefits, all kinds of pension benefits, workers' comp, railroad retirement, FEMA benefits, child support, that's just an example.

It is my experience that without a lawyer involved, judgment debtors don't have a chance of really effectively raising their exemptions. And that's -- the whole point of this proposal is to make it a simple procedure so that that can be done. And it's set up that way in many other states. And there's a procedure that allows people who are unrepresented to assert their exemptions to get prompt hearings and get them resolved.

So the current system, for example, with garnishment is that people do get a notice that's sent to them, purportedly as soon as practicable, which the courts have said is either 14 -- no more than 14 days or no more than 18 days, not terribly helpful; and then all it says is, "You can file a bond to get your money back," which doesn't help hardly anybody. The bond process is hardly never used. But then it also says, "You can file a motion to resolve the writ of garnishment." Well, that doesn't tell a pro se

anything. They don't understand what that means. They can then file a motion, but really the only way to effectively file one of those is if you hire a lawyer.

In turnover proceedings, there's thousands of turnover receiverships that have -- have been initiated in the last five to ten years. It's become a large industry. There's many lawyers now that that's their only practice. And I would say the vast majority of those cases involve individuals debtors, judgment debtors. And there's no process there to govern how people are informed about their right to raise exemptions. There's nothing.

And the point of this bill is, at least in these two instances, we need to make it a simple process, an expedited process, one that's user friendly for pro ses, and that's sort of -- that's the impetus behind this bill. It led to the Judicial Council passing a resolution that led to this legislation. It was considered, I would say, noncontroversial enough to pass in this bill. So that's -- I testified both before the Judicial Council and the legislature, and that's basically where we're at.

So -- and underlying this, I want to add, is that one of the reasons for pushing for this is that there's constitutional due process questions. There's a

case out of Georgia in 2015, it's a Strickland case, Strickland versus Alexander, where they found that the postjudgment garnishment system in Georgia was unconstitutional in part because they didn't have a notice that would inform judgment debtors about their exemption rights. There was nothing that told them about their exemption rights, much like our current system, and there was no clear expedited procedure that they could utilize. That led to a ruling that that system was unconstitutional. And then Georgia followed up with a new system, and it does provide really great system of notice. It also provides for expedited hearings and requires courts to rule very quickly. And I think basically what that has done is it's provided some example of the best practices around.

So going back to the statute, there's -- basically this is -- the statute requires a simple and expedited procedure to assert exemptions. It requires the court to stay proceedings to assert the exemption so that there's a way to get your money without it being distributed to the judgment creditor before you can pursue it, and then require the courts to set hearings promptly. And then related to that, there have to be forms that inform judgment debtors about their rights, and it has to be in plain language and also have to have

a Spanish language version available. And plain language is really, I think, exceedingly important here.

So as I mentioned, most postjudgment collection now occurs through two means, garnishment and turnover receiverships. And I would say that turnover receiverships are eclipsing all the other forms of collection.

And as I mentioned before, the garnishment notice is unwieldy. It's not user friendly. It just says you can file a motion. The procedure is that you can file a motion, which all those are just information that can be used by a lawyer. It's not helpful to judgment debtors that are unrepresented. And the real problem here is, you have very few judgment debtors that are represented by counsel. I know that I represent just a very small sliver of those people in Harris County. And there are other people who do that in Legal Aid, but we still only represent a small fraction of those. And so the point of this is to make sure that you pass this on; you pass on these rights to this unrepresented mass.

In terms of best practices I just mentioned, Georgia has really offered, I think, the best. It's recent -- they passed these new rules following the Strickland versus Alexander ruling. It

provides notice with a listing of the exemptions and a simple explanation of the exemptions, and it's to be given three days after service of the writ on the garnishee, which is typically a bank, and provides for a form which the judgment debtor can file and thereby ask for a prompt hearing, which has to be held within ten days, and then a decision has to be made within 48 hours by the court.

It also even allows judgment debtors to assert the claims of third parties. For example, something that comes up in our cases is that joint -- with joint bank accounts, when there's several people on an account, sometimes you have people who are listed, and including judgment debtors who may have a right to withdraw funds from those accounts, but there's a statute in the state code that says that basically title to the money in that joint account belongs to the parties that put it in that account. So among the people that have a right to withdraw it, title actually belongs to those people. And so there's case law that says those third parties are entitled to that money if there's a dispute.

And in Georgia, they're allowed -- the judgment debtors are allowed to assert the rights of those third parties. That could be, for example, when a

mother is listed on a minor bank account and they're seeking to collect, and they try to take the minor's bank account, even though it reflects their work earnings, or there's an account that an elderly mother has, and she contributes money into it and some of her children contribute money into it, and then -- but a judgment debtor is one of the children on there who has a right to withdraw money but hasn't put any money in there. This, in Georgia, would allow those third parties to be represented by the judgment debtor and could raise that claim.

Our proposal -- so we're trying to do -- we were trying to do the best we could to change the rules only as necessary. And on the turnover side, we were -- we basically took a lot from what the current garnishment rules do and applied them to turnover receiverships. But specifically what we do, we provide it for new notices that I think are in plain language that explain exemptions and a simple claim form for asserting those claims.

The way we've done it so far is it's limited to claims about funds that are exempt. We didn't deal with physical property. And if we are going to address that, I think that should be done by a separate form. In my experience, that's not a common

event that either turnover receivers seek physical property. It's not common in my experience.

And our proposal requires hearing and a ruling within ten days unless the parties agree to a delay. That's basically the current rule in garnishment, but it would also apply that to turnover receiverships. It's not actually a change. It would set up -- not in the garnishment context. It would set up a procedure to permit pro se parties to pursue exemption claims, but it will also -- would tell them in the notice that they could contact Legal Aid, which I think is helpful because sometimes -- there are many times when Legal Aid could assist people in pursuing their exemption rights.

It does provide that the burden is on the judgment debtor to prove the exemptions, and that's the law. That's our current law. We're not trying to change that. We're trying to make that clear in the process, but it does require the judgment creditor to prove compliance with required procedures. That is the law on the garnishment side. There is no such law on the turnover receivership side. We're suggesting that that should be in the proposal to make sure that the rules are complied with.

One of the things we do on the turnover

receivership side is we require strict compliance with the exemption procedures in both turnover and garnishment. The current rule is that that's the law on -- in garnishment, that is required. We're suggesting that that should also be applied in the context of turnover.

We also suggest that rulings, particularly in turnover receivership proceedings, that if there's a ruling on an exemption claim or a motion to return exempt funds that those rulings should be treated as final orders.

This is a real issue. And I think the Supreme Court has even had to work hard on figuring out which turnover orders, which are postjudgment, are actually final orders that can be appealed and which cannot, but -- and I've run into and I've gotten sort of varied responses from judges about whether or not a ruling on a motion for return of exempt funds can be appealed from JP court to county court.

We would like the court to arrange for that because we want to make sure that there's a way that people can challenge rulings that are contrary to the judgment debtor from JP court, at least from JP court to county court, if not farther up. And one way to address that is to put it in the rule itself.

There's a recent cases where the Texas Supreme Court has dealt with this. It's given some definition about when turnover orders can be subject to appeal and whatnot. Alternatively, if you don't have that, then you can do a mandamus.

My only point here is that it's in the interest of judgment debtors to have a way to at least appeal from JP court to county court. And one way to address that is to assure -- something in the rules that says these are final orders, because they really will -- typically the only real issue that the judgment debtor can raise in a postjudgment proceeding like a turnover receivership is an exemption matter. And if it's the only matter, I think it could be easily considered as a final order.

It also requires strict compliance with the procedures. That's both in the garnishment and turnover context, and that is the current rule in garnishment. We're asking that that be applied in turnover as well because really, they're very similar.

And that's basically what our proposal does in short. I mean, I've written a memo that members of our group have also contributed to; but in terms of how it affects current law, let me just briefly address that.

It basically provides a wholly new procedure in turnover receiverships. It requires notice of exemptions, a claim form, a prompt hearing. None of that is provided now. There is no explicit procedure in turnover receiverships at all to address exemptions, so that is a change in the law.

The garnishment notice under -- in Rule 663a is changed. So the big change in the garnishment side is it's going to give notice of the exemptions and give people notice of their right to make an exemption claim, and it provides a form for doing so.

The actual garnishment hearing procedures are not changed much. We include the same notice requirements, which can be three days or less if the court wants, that there has to be a ruling -- a hearing and a ruling within ten days after the motion or exemption claim is filed, and so that is not a change.

In terms of -- as I mentioned before, it adds the finality provision so that in turnover context, at least there is a way to appeal from JP court to county court. It adds strict compliance as a measure of what's required. It's already in the garnishment context, and it includes that in the turnover context.

And so the next thing is this. I saw the alternative proposal from the Texas Creditors Bar

Association yesterday. I saw it for the first time yesterday morning, and I've spent as much time as I could yesterday to review it and give you some idea where we agree and where we disagree.

I don't know that we couldn't meet and talk. We have not had that opportunity yet. I've had some dealings with Mr. Noack over time, as many other creditor lawyers. I have, actually, friendships with people in the creditor bar. I know that may be shocking to Mr. Noack, but it's true. And I'm more than happy to meet with them. I'm more than happy to try to work out as much compromise as can be worked out, but let me pose to you where I think we differ at this time and where there's a need probably for us to talk.

I think there's a few issues where we likely cannot bridge our differences, and we're going to ask you-all to make -- to conclude what the rule is going to look like.

So the first of a number of these disputes are in terms of timing of the notice. So the notice that was required in garnishment and now will be applied in turnover, it says that the notice of exemptions would be mailed, quote, as soon as practicable. That is the current rule in garnishment in 663a. And I've -- I think that's a problem because that is not consistent

with what the statute says, which is we want expedited proceedings. The courts have construed this to mean that it can be up to 14 days, and it's still considered meeting that standard. And in my view, that's too long. And, in fact, that's contrary to the Georgia practice, which is you have to do it within three days after execution of the writ of garnishment, for example, on a bank. I do not think that that's appropriate.

We asked for one day. That may not be where we end up, but I don't think that as soon as practicable is a good idea.

There's even a case from the Fort Worth Court of Appeals that upheld a notice that took 18 days after execution of the writ on the bank. And in my view, that is not as soon as practicable. And even if that is the standard, it's not clear -- it's not a clear standard. Every judge across the state could differ about what that is. And I recommend that we come up with a specific deadline that sets a number of days. It doesn't have to be one day. It could be longer. I believe that Georgia probably has the best standard, which is three days. And I think this is something where we might be able to work out a compromise. I can't promise that. I'm just saying that is possible.

You know, the real problem here is if you

allow it to be -- you allow up to 14 days or up to 18 days and then you have a -- it takes a few days for a pro se judgment debtor to review the form, fill it out, and then file it, and typically that's going to mean either mailing it or taking it down to the courthouse; and then you have a hearing, let's say, within ten days. If you put all those numbers together, that's almost a month.

And the problem is when there's a garnishment of somebody's checking account or there's a turnover receiver that sees the money in that checking account on the basis that it's purportedly nonexempt property, that takes every penny that those people have, and that means they're basically immediately destitute and they would remain so until you get a proceeding. That's the point of having a quick proceeding because if their income is truly exempt, then they shouldn't have to go through that. They shouldn't have to go a long time period without being able to get access to their funds again. So I think this timing is too -- it's too long, and it's too unclear.

Also, I think their notice of exemption that they propose is problematic. The biggest issue I would say is, it's not in plain language. Basically, it lists all of the exemptions, and it's really

impossible -- it's done using the statutory language, which even lawyers may not fully understand without reading cases to construe the language. So my point about that is, it should be closer to what Georgia does, which has columns, and it very specifically lists things in a way that I think even a pro se party could understand.

It also doesn't recognize that there can be expanded exemptions in the turnover context. So there's a provision, a subsection, of the turnover statute -- it's Subsection (f) of 31.002 of the Civil Practice & Remedies Code -- that namely says that proceeds or disbursements of once exempt funds, such as wages or, you know, money from a spendthrift trust are exempt from turnover, even if they are subject to garnishment.

So the point of it is -- of Subsection (f) is turnover is not supposed to be as broad as garnishment, and their proposal does not recognize this. This is where -- this is the one area where I'm not sure we can reach a compromise.

We think there's very clear law supporting our position. They think there's law supporting their position. I don't see that we're going to be able to -- I don't know that we're going to be able to get past

that.

The other thing that's in their claim form is, they have all of the exemptions for both funds and for physical property all in one form. I see attempts to recover physical property as a way to collect on judgments very, very rarely. I hear it talked about occasionally, but frankly I don't know that I've seen any actual attempt to collect a particular piece of physical property from an individual because our exemptions are so broad under 42.001 and 42.002 of the property code. So I propose that we have a separate form for that. And if they are seeking that kind of property, they should be getting that notice. If, on the other hand, it's funds, there should be a form like the one we had proposed, and that's going to happen, I think, 99.9 percent of the time.

So in addition, the Texas Creditors Bar Association proposal only allows ten days after the date of mailing of the notice to the judgment debtor to file an exemption claim, and then if they don't make that time period, they basically waive their exemptions. We are very strongly opposed to this, particularly the waiver provision. We suggested, consistent with the statute, that money be held, for example, by a turnover receiver for a period of time. The current garnishment

rules already provide for that. You know, basically no money can be passed on until there's a judgment in a garnishment action.

And the way to deal with it is you can file an exemption claim form in garnishment or a motion to dissolve the writ of garnishment, get a hearing, and the current rules will -- and with the minor amendments that we're suggesting, that will protect those funds from being disbursed to the judgment creditor. Can't happen till there's a judgment. But in the turnover receivership context, it doesn't work that way.

So what we're asking for, we asked for 60 days. They've offered ten days. And it may be that we can work out an agreement about what that time period should be where the funds are held before they're disbursed to the judgment creditor. It may be less than 60. It may be more than ten.

One thing that we are strongly opposed to is any waiver by the judgment debtor of their exemption rights in a short -- giving them only a short window in which to raise exemption claims. They should be able to raise it whenever -- certainly effectively at any time before the funds are disbursed. In garnishment, that doesn't happen till there's a judgment. And if you appeal it, that judgment -- from JP court to county

court, it's going to take some time.

In a turnover receivership process, we don't want that to happen immediately because we want judgment debtors who are pro se to have a sufficient time to raise their issues and have that money protected and not disbursed. So...

MR. PERDUE: Rich, you've done a great job of hitting all of the talking items that I put on your list by email yesterday. I appreciate it. As I told you, I gave Craig the exact same five issues. And what -- if you're done, what I'd say is, I'd like to have everybody hear from Craig. You're not excused. I need to keep you here for the conversation because there may be some questions posed to you, but I think it would be appropriate to let Craig go and address us, if you're finished with -- because I really appreciate, by the way, where you agree and disagree. That was very helpful.

MR. TOMLINSON: Can I just raise two more things, then I'll shut up. How's that?

MR. PERDUE: That's fair. You know, they always say, look, trial lawyers don't ever say that; but if you've only got two more things, Rich, you've got two more things.

MR. TOMLINSON: I know sometimes I'm not

as precise, concise, as I need to be, but I'm getting to it.

So there's also a provision in the Texas Creditors Bar Association proposal that would put no time limit on when a decision would be made. That is not the current rule in garnishment. It is -- and we believe that that's something that -- to assure an expedited procedure to follow the statute and to follow constitutional due process as required by Strickland that there should be a short time period for the court to make a decision.

The current rule in garnishment is the decision has to be made within ten days. I can tell you that in practice, that doesn't always happen, but the point is, courts should have a requirement to make a decision within a certain amount of time because judgment debtors who have exemptions, they are basically destitute until they get a ruling from the court. So we have a very big concern about that. That's a red line for us.

So there is also a third-party issue. As we pointed out, third parties have a claim and involves joint accounts. They can raise that as an exemption. I admit that in form, it is not an exemption, but it walks and talks. In substance it is like an exemption. And

the Georgia procedure, they allow for judgment debtors to raise those issues on behalf of third parties, for example, on behalf of their elderly mother or on behalf of their minor child.

And those are -- that's a brief idea of some of our major concerns. We have other concerns with their proposal. I'm only asking for the opportunity to have -- to respond to their proposal like Mr. Noack has already done to the one we have written. That's it, and I will end my presentation and await your further word.

MR. PERDUE: Thank you, Rich. I -- to highlight to everybody, the last one that Rich mentions there, this third-party issue, is a big difference between these two sides. That one -- very clearly, there is some different perspectives on that.

But without me kind of adding in anymore editorial, I just want to get to the creditors' perspective and allow Craig to both proactively and responsively make a presentation for us.

Craig, will you -- from the -- so Craig's, I believe, the Legislative Committee chair for the Texas Creditors Bar Association. And I know Rich didn't mean this as an insinuation, but I get it sometimes. Craig got your stuff like yesterday morning as well, so everybody's on a quick -- on a very quick turnaround

here just because of my inability to get the lines of communication open earlier; but Craig, why don't you present -- obviously, you've got the same talking points, and I really appreciate you being here for us today.

MR. NOACK: Thank you, Jim.

Just, you know, to speak for myself, even though I've been spoken at, I think, well by Rich over the last few minutes, I am Craig Noack. I am here on behalf of both the Texas Creditors Bar Association as a board member and co-chair of the Legislative Affairs Committee. I'm also here as a board member of the Texas Association of Turnover Receivers, so I have been a practicing turnover receiver for the past five years. And the Texas Association of Turnover Receivers is an organization of professional turnover receivers who act under -- and are appointed under 31.002, so this is a joint proposal by both organizations.

I believe this committee will be getting a submission later from, separately, the Texas Association of Turnover Receivers, a briefing about this topic; but for the purposes of this proposal, both the TXCBA and TATR joined forces to get something in front of the committee, although there is a lot of opportunity for enhancement and working together on this.

Just by way of -- so the committee understands my background, I spent over 11 years in-house with major publicly traded debt buyers. I have, in fact, worked with them in-house on nationwide legal collections practices, and so I have spoke with attorneys in all 50 states, Puerto Rico, South America, the United Kingdom, throughout the world, on their legal collections practices. I can tell you that it is absolutely true that Texas is a whole 'nother country when it comes to postjudgment collections, when it comes to -- when it comes to a lot of things that we do. And so that does play a role in, I think, a lot of what Rich mentioned in terms of the kind of influences in what's going on in Texas statewide over the last few years.

Personally I'm excited to talk about this topic. This isn't a subject that frankly gets a lot of -- most attorneys get to deal with. It's a niche practice, but frankly, this is a system that happens beneath the surface and it happens a lot.

And I think one of the most important things we really have to think about is that this is a process that really needs to function smoothly. We work in a capitalist society where there really has to be a functioning responsibility for judgments. If people do not respect judgments, then people don't pay and then

our interest rates go up and then access to credit dries up. So there is some real meat behind this. We really do need to get this right.

Texas is one of only four states that prohibits wage garnishment, so it lends an increasing importance to what happens with other collection practices. And I think that's really why this mandate is here. So I think one of the questions that Jim asked both Rich and me was: Why was this mandate out there?

I think it's a very natural concern when legal proceedings get to that a-ha moment, that shock moment. What I have seen time and time again in my 20 years of practice is that many people just don't want to deal with the fact that they have a judgment against them, that they have a claim against them, and they ignore it, they bury their head in the sand. It's a natural concern, whether they're afraid of public speaking, whether they're ashamed, they just don't want to deal with it. And unfortunately it gets to the point where a judge has decided in a judgment creditor's favor, and it finally gets to the point where property has to be seized. And it does happen.

I can tell Rich that he probably doesn't see it because if they have property to be seized, they probably don't qualify for legal aid; but if anybody on

the call is interested in a 2012 Kawasaki MULE with a deer feeder on the back, it is currently for sale for $5,000 pursuant to court order, but it absolutely happens all the time. But, you know, it does get to that point. And that naturally leads to conversations. It naturally leads to that shock where there is an impact to what a judge has decided. And that obviously creates a concern that their rights are protected. And I think that was obviously the conversation that happened during the legislative session.

And speaking as a turnover receiver, I can tell you that is the major concern that a turnover receiver has, and it is a natural topic of conversation when the turnover receiver is talking to the individual: What is the source of the funds in the account? Where did this property come from? Because you're trying to identify that situation.

So when the mandate came out, I think one of the reasons why it got into the omnibus bill and why it wasn't controversial was because this is a conversation that's already happening, probably not as much in the garnishment context because that's a much more heavily mediated, by-the-rules context, and it's actually a third party -- it's a three-party conversation between the bank, the judgment creditor,

and the judgment defendant. But that's actually one of the major concerns I have with Mr. Tomlinson's proposal, is it is actually trying to throttle the best process that Texas currently has for encouraging settlement between judgment plaintiffs and judgment defendants.

The garnishment process as it currently exists is absolutely horrendous for all parties concerned. It absolutely is. And anybody who's done one can tell you it is. It is costly to a judgment creditor who has already invested money in obtaining a judgment. You have to pay a new filing fee. You have to pay a deputy to serve a writ. You have to pay the bank's attorneys' fees and the bank's attorneys' fees are uncapped, and they come out of the -- they come out of the first proceeds.

So let's say you find nonexempt property of the judgment defendant, you know where they bank, and you do a writ of garnishment and you find a thousand dollars in there. If the bank's attorneys' fees are $800, that means that you're only applying $200 to the judgment. You probably spent four or $500 getting the garnishment in the first place.

If you get a judgment in garnishment -- I'm sorry I'm on the -- I'm on power saving mode -- if you spent four or $500 getting the judgment, you get a

judgment and garnishment for your cost, that means the defendant ends up owing more money than when you started the garnishment. The only person who won was the bank's attorney. The judgment creditor ends up with a greater amount due, the judgment defendant is out a thousand dollars, and only $200 went towards a judgment that only went up in balance.

A turnover receivership, on the other hand -- oh, and by the way, on a garnishment, the bank accounts -- let's walk through what happens, because it's very relevant from the exemption perspective. It's very relevant, especially as to a couple of key points where I think there are differences on the proposals and very relevant to the rules that are going to be considered.

If I'm a judgment creditor and I get the writ from the court, I'm going to send that writ to the constable or sheriff, most of the time, because there are still some banks that insist that the rules are muddled enough on nonpossessory writs that they insist on a deputy to serve the bank. So I'm going to send that to the deputy.

I do not always know when that deputy is going to serve that bank. They may not tell me. They may just send the writ back to the court, the return of

writ. So I will tell you that nine times out of ten, the first time I hear about service on a writ of garnishment is from the defendant themselves.

They call me. The reason they do that, they try to write a check, they try to swipe a debit card, they get a notice from the bank, and they say, "What is going on?" They call their bank; the bank says, "You need to call this attorney." They call the attorney. That is the first I hear that that bank has been served, and that is the trigger for me to send out my notice.

So when we think about the rationale behind the existing rule for sending out the notice as soon as practicable, I believe there's an actual rationale for that, because sometimes you just don't know. If you hit a bank account that the defendant forgot about and they don't get the notice they moved, you may not find out until you check the court's web site and you didn't -- you haven't gotten the check in the mail, or you get the answer from the bank. You don't know. But oftentimes you hear from the defendant, and that's your trigger.

My practice is always to send it out as soon as I hear from the defendant or as soon as I know, but you have to have that give because you just don't

always know. So you can't assume that the judgment creditor or the judgment creditor's attorney is going to know when service occurs. The reality is, it's just not within the judgment creditor's control.

If I'm in a turnover receivership and I mail by certified mail to the financial institution, I have no idea when that's going to be delivered. I'd much rather that notice be triggered based on the defendant calling me than me getting the green card back. That green card could get lost in the mail. But I'm not -- I can't make a presumption as to when the bank or the bank's registered agent, very likely, picked up that document, or if it's a bank -- a credit union that doesn't have a registered agent, when that bank vice president or president picked up that document. I don't know.

So that's a very key difference and something that we have to think about when we're talking about when that notice period has to start. There has to be some flexibility.

Going to kind of where there's opportunity to agree, I think there's -- no turnover receiver is going to sit on a notice for an extended period of time. Maybe there's an opportunity to say, "As soon as practicable but in no event later than." Right?

There's obviously opportunities there, but there has to be some leeway given the fact that there's imperfect knowledge.

So back to a garnishment. So we garnish the bank account. The judgment defendant calls up the creditor's attorney and says, "Oh, my gosh. I didn't realize that it could come to this point. I would like to settle with you." In a garnishment, I have to say, "That's great. I would love to work something out with you, but I can't right now." I have to wait for the bank to hire their attorney. I have to wait for that attorney to look at the account. I have to wait for that bank to then file an answer to determine their legal fees, and then and only then can I figure out what amount of fees I'm entitled to, and then we can start talking about things.

If the -- if Mr. Tomlinson is concerned about an exemption claim, they can file an exemption claim, but the bank still hasn't determined the amount of their attorneys' fees. And something this court would have to consider is, what is the bank's entitlement to attorneys' fees as and among the exemption claim.

So -- but let's think again about the practical effect of the judgment defendant, is that they

say, "Well, what about my money in the meantime," it has to remain on hold, for at least 14 days for the answer period in justice court or 20 to 27 days in county or district court.

So what is the practical effect of what the judgment defendant does in the meantime? They go and they open another bank account. So the bank hates judgment garnishments. Judgment creditors hate garnishments. Defendants hate garnishments. So, hence, the rise of turnover receiverships.

There's nothing nefarious about it. There's also the fact that federal regulations have basically stopped creditors from adopting the old practice of simply continuing to give it to a collection agency. Nowadays you can't sell a debt more than once the major banks -- you can't continue to dial and ask for the money after the statute of limitations in many instances, so it really has forced creditors to consider the legal option because you can't just keep calling after four years or six years, as applicable, so they have to go the legal route, hence the rise in the last few years of the legal option. It has simply -- regulation has created this scenario.

What has happened is the trial courts have turned -- and the state legislature in 2016, by

expanding turnover receiverships, have allowed trial courts to craft a turnover receivership remedy that really, yes, allows creditors to pursue bank accounts in a manner that is much better than bank garnishments, but it also allows a third party, the turnover receiver, to be inserted into the process, somebody who has the approval of the trial court, and who is looking for the very issues that Legal Aid and that Mr. Tomlinson are worried about.

And I can tell you, hands down, that is -- I send every defendant, within 30 minutes of talking to me, a copy of my order, a copy of the judgment, a Frequently Asked Questions form, a form to fill out and it's asking about the source of the funds, and then we're looking at documentation and we're having a conversation. It is -- and I have a conversation with every defendant about the source of the funds, what my initial determination is about the source of the funds but their opportunity to object if they want to, and then what my decision is on that and whether or not we can work out a deal.

Every order that a creditor gets me appointed on has in it language that I can negotiate a reasonable payment plan if, in my estimate, it is the best option to satisfy the judgment so long as I don't

discount the judgment. Because that's what the judge decided was due and owing, that's beyond my power. What that does, it let's me, an independent third party, look at the defendant's situation and figure things out.

So there's no real, nefarious intent behind the rise of turnover receiverships. What it really has become is an effective tool to avoid the cratering of a defendant's financial situation in response to judgment enforcement while allowing actual -- some actual judgment enforcement to occur in Texas, which, I think, you know, for many, many years, there just really wasn't an effective tool.

So I think one of the major concerns of the Creditors Bar, one of the major concerns of turnover receivers, is just not denying the only tool in the tool belt for a diligent creditor. And that's the legislative mandate behind the turnover receivership statute, is to put a reasonable tool in the hands of a diligent creditor.

And what I am -- what I fear most from Legal Aid's proposal is that it truly turns that tool into an unreasonable proposal. It is very draconian. It says you hold the funds for 60 days. It says that you -- if the slightest thing goes wrong, if you delay by one day, if you don't send that notice out in that

first day, you release all the money, even if it's nonexempt and you send it all back and everybody goes home, even if the money is purely nonexempt, if you didn't comply with any law anywhere, you release all the money. So it's a very draconian setup that is designed, and I don't think that matches the legislative mandate behind 31.002, and it goes far beyond the legislative mandate of the omnibus bill.

So what the Creditors Bar put together was a -- one rule, and I do want to talk about that. I do think what can be accomplished can be accomplished with one rule. We do have to think about the effect of what we are proposing on not just writs of garnishment and turnover receiverships. You have to think about writs of execution. You have to think about writs of execution for attachment where possession of property was awarded. You have to think about writs of turnover where you are taking possession of property. You have to think about any -- as I read the statute as passed, if a judgment creditor seeks to attach personal property, this notice has to be sent.

So from a rule perspective, what we proposed was a rule that works in complement with the other procedures. If you adopt the Legal Aid proposal, you have to go through a rewrite of every postjudgment

process, every ancillary proceeding that relates to a postjudgment process, and that's a daunting task especially by May of next year.

So I think if we work on a rule, if we want to work on plain language for the rule, I think we're absolutely open to that, but what we tried to do was find language elsewhere in the ancillary proceedings that we think could be adopted.

The rule does contemplate that you have a certain period of time to assert your exemption, and afterward the process needs to move forward. The statute says we need to give it a reasonable period of time. Elsewhere in the rules, we have quite clearly said, or the court has clearly said, what a reasonable period of time is: Ten days.

If you look elsewhere throughout the nation, you will see very similar periods of time. You will see ten days referenced in numerous states, or you will see -- unfortunately, I have asked my national organization to see if they had any summaries. I wasn't able to find anything kind of immediately. I will tell you that California has a ten-day period on bank levies. I think -- I believe Alabama has an at least five-day period on personal property seizures. I believe Virginia has a before-the-return-date of the writ of

garnishment. Colorado has a ten-day period. So ten days really is the standard. And to push it longer, to push it to 60 days, is -- I could not find any place that looks at 60 days. 60 days is outrageous when you consider that the judgment creditor by this point has already gone through so much. We need to give the judgment debtor a reasonable period of time. Can we negotiate on it? Absolutely. But ten period -- ten days really does seem to be the period that most states, at least from my brief survey yesterday, seemed to settle on, and it does accord with the court's decision on replevy periods, you know, elsewhere in the ancillary proceedings.

MR. PERDUE: And, Craig, I don't want to interrupt, but that's an important -- do you know what the rule is in Georgia?

MR. NOACK: I apologize. I did not look at that one yesterday. I'm happy to look at it, but I do not know.

So the -- so practically speaking, I think what our proposal -- what the rule proposal addresses is really kind of three things, is that both the rule and the notice need to be flexible enough to address both personal property and fund seizures.

One thing that Mr. Tomlinson said is he

thinks everything should be divvied up and we should have different notices. I have to tell you as a turnover receiver, you can seize both at the same time and in the same process.

You know, if it's a sole proprietor and you go down, you can seize funds and you can seize assets at the same time. You know, sending two notices, adopting two rules and having two processes at the same time is too much of a process to have to deal with when you can boil them down and deal with one process. And without -- I think it's really hard to do a substantial rewrite of every process when you really can, I think in our process, have one rule that handles them all.

Second, I think we are trying to address the reality that the creditor or receiver is not always immediately advised as to when the property or funds are seized. So the defendant is the first to know.

I would be delighted if we came up with some rules that gave us the ability to notify the defendant electronically. You will see in our proposal the opportunity for the defendant to elect to receive notices from the court or from us electronically to indicate that they would like to be contacted about resolving it, to indicate that they would like to participate in remote hearings. Anything we can do to

get that process resolved I think is in the best use of the court's time.

At the end of the day what really needs to happen to avoid clogging the courts is that the parties need to sit down and work it out. And that can happen very, very often. As Mr. Tomlinson said, oftentimes, the only thing that really needs to be decided at this point is the issue of the property. Right? Is it my mom's or is it mine, or is it exempt or not? That can be worked out on a phone call. It does not need to go through this process necessarily of file your exemption claim, have the court set a hearing, set up the hearing.

You know, we're already -- I listened earlier to Chief Justice Hecht talked about working through backlogs, you know, adding to that -- adding to that burden I think will have to happen with this process, but to the extent that we can mitigate that by encouraging the parties to get together, especially when a defendant is pro se, if we can add a check box that says, "Yes, contact me, I want to get this resolved," can go a long way towards getting this resolved.

If I, as a turnover receiver -- usually I hear from the defendant, but if for some reason they send me back a response that says "Please contact me. I want to get this resolved," we can usually get that off

the court's docket. At a minimum, I can get the defendant to send me documentation that will then let me show up to the hearing which may be on less than three days' notice and inform the court as to what I think is going on, which leads me to another point that I do want to mention.

Mr. Tomlinson is very insistent on saying we need a resolution within ten days. The real struggle we have with this is according to their proposal, the judge can decide this solely on affidavits, without any documentary evidence, and the court shall make a determination and the money shall be returned, and that's it. And the problem is the judgment creditor and/or the receiver is working at an absolute disadvantage. It has no knowledge of the defendant's situation.

Even if I'm a turnover receiver and I accompany my demand for turnover of assets with a demand for documentation, the bank is not going to get me those documents within two days. If the court sets a hearing on less than three days' notice, the defendant signs a declaration that says, "I swear this is my mom's money" or "These are exempt funds" but doesn't show up with bank statements, even though I've asked for the bank statements, I haven't gotten them yet, but the rule --

their rule proposes that if their statement -- if their affidavit is uncontroverted, that's the only evidence the court can consider and that the court shall decide at that hearing. There's not even any leeway for the court to say, "Well, let's wait for the documents to come in." When did the bank -- "Mr. Noack, when did the bank say that the documents would come in?" Or has happened frequently in some of my hearings, "Can you pull it up on your phone," and, you know, "If you can't pull it up on your phone, can you go over to the bank and can you get the documents and can you have them here by tomorrow?"

So what needs to happen is there needs to be some judicial discretion. There needs to be some ability for the judgment creditor or the receiver to be able to develop the facts or else that is going to be a denial of due process to the other parties in the case. You can't have an expedited process with less than three days' notice, but in any event ten days notice, where there's been no ability for discovery as to the issues at hand and then a mandate that the court issue a final appealable ruling with no discretion to continue. So that's an extremely difficult thing for us to swallow. And one of the things that I think either needs to be changed -- has to be changed -- there's got to be some

area for compromise there -- but is unacceptable to us kind of as things are.

So back to my prior point. One of the -- so the third point as to kind of what our proposal is trying to do is, again, to preserve one of the few remaining remedies that's available to the hands of -- in the hands of diligent creditors.

Mr. Tomlinson talks about this proceeds of wages argument. This is new law. There is no case so holding. If it were true, then people wouldn't be using turnover receiverships. There's one case they cite to. It wasn't a turnover receivership case. I forwarded Mr. Jeffries a article by Mike Bernstein, who's the president of the Texas Association of Turnover Receivers, that summarizes all the case law on this issue.

The property code is very clear. Current wages are exempt. The Supreme Court has opined on this, what current wages are, what they cease to be when they get to the bank account. Proceeds means sales proceeds. This is -- you know, this issue has never been held in a turnover receivership, so it's -- this is an argument that is an attempt to overturn or establish new law. And it really is an issue that is not going to find any agreement in this forum. It's an attempt to legislate

in this forum, so that's going to be a sticking point and definitely something that is probably going to remain a sticking point if it's going to be attempted to be addressed inside of a purely administrative notice form.

What you'll see in our form is, we are absolutely willing to put at the top the most important things that a court should be considering when it comes to bank funds. Social security, veterans' benefits, all these things are already protected by federal law.

One other point I want to bring out is, one of the things that courts are going to have to consider, and that this advisory committee should consider, is that exemptions lose their status over time. Homestead proceeds lose their status after six months. Distributions for retirement lose their exemption status after 60 days.

This concept that once exempt, always exempt, has never really been true under the law, and so that's something that courts are going to have to consider. And often that's going to require documentary evidence, and so we have to think about that when we think about the rules. But we also -- one of the practical realities is, one of the reasons this really isn't much of an issue day to day when it comes to

people who are living solely on social security is that federal rules, as set forth ably in Mr. Tomlinson's memo, are -- social security, veterans' benefits, all those -- are already protected by federal rule. They look back 60 days, they add everything up, and they protect funds -- the amount of those funds even if those funds happen to be nonexempt. So frequently what I see is they have a part-time job and they receive social security. Those nonexempt, part-time job proceeds, wages, that are deposited in there, they're still protected because they spent all their social security proceeds, but the Federal Register rule protects that money anyway. So there's actually a more expansive federal protection than would be allowed by state law in many circumstances.

So I'll close my comments and open myself up to questions, although I will say, just to kind of highlight other areas where I think there's opportunity for a middle ground, I would be delighted to work on plain language -- plain language rules and plain language exemption forms.

I would caution the court and caution the advisory committee, the longer you make it, the less likely it is that anybody's going to fill it out. I have seen this over and over again in other states. If

you turn -- I understand the worry about just quoting the statute, but I was the one that took the first stab at this form. So if there is faults, it really lies 99 percent with me. And it was three pages, and I tried to condense it down. If you turn it into ten pages because you're trying to make it plain English, your response rate will go down. If you can make it two pages, even if it is a little bit harder to understand but if it is two pages, that is about the extent of what people will fill out.

My receivership sheet that I have people fill out to kind of inform me about their situation, at one point I had it like four pages. I finally condensed it down to a front and back because that was about the extent of what I could get people to fill out. And so I'd encourage us to balance plain language with just kind of length.

People get very daunted with seven pages of instructions, which is what you would have to get to if you were to try and explain every single exemption form -- exemption with just kind of length.

As far as the notice period, I do think there's some opportunity there. I think what you're hearing from the creditors bar and from the receivers is that we would love to send the notice sooner, which is

kind of a strange thing to hear us say; but, you know, Mr. Tomlinson would -- their proposal says a day after service. The only thing you're hearing us say is, we just don't always know when service is. But if we set the standard with as soon as we know, or a reasonable period after we know, we're going to be fine with that. But what we can agree with is that we have perfect knowledge of when service happened.

And we also can't agree to the fact that service automatically means freezing because that absolutely is not true in today's day and age. If we serve a large bank that it doesn't have its act together, it can sometimes take three or four days for them to process that bank levy or garnishment, so we need to know that it was actually processed, so there needs to be -- there's opportunity there. There's no intent to just delay this thing to prevent people from asserting exemptions. We want to hear about it, but we need to provide some give there.

And then I think there's absolutely, if there's opportunity there, to provide the notice by electronic means if at all possible. I think we should embrace the possibility that the defendant says, "Can you email this to us so we can get it immediately and start filling it out immediately and send it back to

you?" We would love to see that. Let's expedite this process. And if we can have the defendant at the same time opt into electronic service and opt into remote participation, we'd love to see it.

Where we're not going to agree as much is traps for the defendant. What I do not want to see is somebody checking a box that says, "I'm asserting the rights of a third party," or "I'm saying I wasn't served," which is a proposal from the other side in their form, and they think -- for a pro se debtor, they think that that means that they raised it. And if they raise that in a form on garnishment or receivership issue two years after the judgment, that didn't do a darn thing. The court lost disciplinary power. It's not an appeal. It's not a restricted appeal. It has done nothing.

And so what I don't want to do is trick the defendant into thinking they asserted a right that the judge can do nothing about at the hearing. But are there opportunities there where we can think about other things? We're open to that possibility.

So with that, I'd open myself -- I'd cede the remainder of my time back to the committee. Thank you.

MR. PERDUE: You don't have anything to

cede, Craig, but thank you very much. I appreciate it.

It strikes me that we've got judges at various levels who are more familiar with this that may be worthwhile getting your weigh-in on this.

As you can see, this is not quite TTLA and TLR, but these are two sides that have very different perspectives on this issue. And I'm more than happy to continue to engage with these constituencies to work through proposals, but they're probably going to need guidance from this group as to where we want to go, Chip, what the court wants to do. That may or may not be part of the discussion today.

Obviously there are minds on this group that can either probe these two people or share their perspectives, especially -- the problem is, I've tried to learn this relatively quickly, and it still glasses me over relatively easily, but I have taken down some notes as to kind of where the divide has been, quite honestly, explained that they don't feel like there's a breach but also where there's divide that they feel like they can have a bridge, and then I have some notes about kind of the interesting -- for the pragmatics of this group, Chip, the conceptualization of how to issue a rule that complies with this mandate. For example, a single rule that discusses exemptions in all contexts

versus the project of trying to change the rules for garnishment and turnover and execution, which is a bigger project.

The differences in the forms. It's interesting -- I think Craig would probably concede, there's better -- there's better fair language in the debtor's form, but everything is listed appropriately in the creditor's form.

And, Craig, the history of this committee is we have tried to work through various forms that were supposed to be plain language. And I think this committee is not experts in plain language, but we get there eventually, but I think we would probably agree with you that two pages is ideal, if we can get there. But that's a personal editorialization on utility.

And then your point of a single form, which, as I read it, is in the bill versus the debtor's perspective, which is multiple forms distinguishing between institutional money or cash and personal property, which is a different perspective.

For the group, the substantive kind of distinction that I have now learned, turnover receivership has been kind of the primary vehicle for a judgment creditor. And garnishment, because of all of its rules, and perhaps just of the reality, is a bit of

an anachronism. And the divide, the big substantive divide between these two groups, is the debtors want to make turnover receivership look like garnishment, and that's a policy decision. Right? That's a different substantive question than the exemptions that seem to be raised in the bill because I think even Rich kind of concedes that the rule changes that have been proposed by the debtor's side that would exist in the turnover receivership rules are unapologetically designed to mirror more in line with garnishment, and that is a substantive discussion that really should live with this committee and especially the judges or those of you that are more familiar with this area because that -- from my understanding, I don't know that that policy distinction was truly discussed as far as behind this bill, but again, I defer so much more to people who know a whole lot more about where this came from and this practice and what you do.

So Chip, with that, I think it's time for me to beg out and open the floor for you to run the discussion as chair.

CHAIRMAN BABCOCK: Yeah, the -- thanks, Jim.

One preliminary question I have is, I saw that Ann -- if I'm pronouncing your last name

correctly -- Baddour of Texas Appleseed was on our agenda, and she is apparently in attendance. Did you intend on calling Ann, or does she want to make any remarks or not?

MR. PERDUE: Ann said that she wanted to be here primarily as a resource. She recognized that Rich kind of was in the lead position, and so I didn't give her the floor.

CHAIRMAN BABCOCK: Okay.

MR. PERDUE: We had 30-plus-minute conversation from both of them, and I don't want to dismiss her in any form or fashion, but she's kind of on the Rich team.

CHAIRMAN BABCOCK: Yeah, I got -- and we'll use Ann as a resource.

So my thought, Jim, if it coincides with yours, is to give Lorrie, our court reporter who's with us again replacing Dee Dee, a little break right now and then come back, and let's have a discussion and direct -- anybody who wants to direct questions to either Rich or Craig or Ann can do so, and we'll take that up, if there are things to discuss, up until noon, and then we'll have our little lunch break and then we'll turn our attention to the next agenda item, recognizing that we're going to bring this back as the

first agenda item on our October 8th meeting. That will give everyone a little bit of a chance to digest all of this material that came in in the last few days.

So if that -- does that work for you, Jim?

MR. PERDUE: Yes, sir.

CHAIRMAN BABCOCK: Okay. So it is 10:44, so why don't we break until 11:00 and give Lorrie a chance to catch her breath here. And we'll come back at 11:00 and spend an hour or so --

UNIDENTIFIED SPEAKER: Recording stopped.

CHAIRMAN BABCOCK: -- talking about this. All right. We're in recess. Thank you.

(Recess: 10:44 a.m. to 11:00 a.m.)

CHAIRMAN BABCOCK: Hey, everybody, welcome back. And we're ready to roll.

UNIDENTIFIED SPEAKER: Recording in progress.

CHAIRMAN BABCOCK: And the recording is in process. That's great. Thanks, Pauline.

And so who wants to say something, raise your electronic hand, if you can, and I should be able to see that, and will be ready to call on you from the participant list. And some of you just raised their hand, which is Professor Carlson.

Hey, Elaine. How are you doing?

PROFESSOR CARLSON: I'm doing good, Chip. I have a couple questions for Craig, if he is on.

As far as I know, there are no rules of procedure dealing with turnover. It's purely statutory. Is there any waiting time after a final judgment is signed before a turnover order can be issued like there is for a writ of execution?

MR. NOACK: Yes, ma'am. So there are currently no rules on turnover receiverships. There was a proposal for rules that was considered previously. I actually have a copy of those. I can circulate those if anybody is truly interested. I believe the turnover receivers, they go back and forth on whether or not we'd be interested in having some rules that would govern us, but typically our orders govern us depending on the circumstances. So there are no rules governing kind of our general practices. We tend to have our orders define what we do depending on how complicated the situation is or how simple the situation is.

With respect to how quickly a turnover receivership is granted, practically speaking, the -- for a turnover receivership under 31.002, there are only two elements that are required, and the first is that there is a valid and subsisting unpaid judgment. So I think in that first step is the requirement that the

judgment be essentially final. So I have never been appointed on a judgment that is not final.

And there are -- there is the possibility of Chapter 64 receiverships, which is a different animal than what we're really talking about, and those, of course, can be prejudgment; but you do not see turnover receiverships before the judgment is final. And that's very typically because most judges won't appoint a receiver -- or let's be more specific. Most creditors' attorneys will do other things before they get a turnover receiver appointed, so they'll send postjudgment discovery or something like that, and that puts you outside the 30-day or 21-day period in JP court anyway.

PROFESSOR CARLSON: But there is no prescribed waiting period? It could be the day after the judgment is signed, or you could seek --

(Simultaneous discussion)

MR. NOACK: You could apply for a turnover order, yes. And I -- so, yes, technically I believe that's possible. Practically, I don't ever see it.

PROFESSOR CARLSON: And can a turnover receiver be appointed ex parte?

MR. NOACK: It is absolutely possible. There is case law that holds that it's acceptable. And

frequently it's warranted in certain circumstances.

One of the proposals in front of the legislature in the last session was a proposal to, you know, give creditors certain entitlements to turnover receiverships if you provide notices, but that didn't pass. Creditors' practices differ. So some creditors will send the application and kind of use that as an additional trigger to engage the defendant, try and get them to call, or call in. Some creditors' attorneys will file it ex parte and get the hearing ex parte, the theory being if you know where the asset is and you're disclosing to the court the fact that you know that they have an asset, you do not want them to then copy -- you copy the defendant with the fact of the asset and have them then abscond with the asset.

So what I would tell you is from a consumer judgment perspective, that's really not the case. If they have a bank account, they're not going to turn around and run away with the bank account. And they -- you know, they don't typically understand what the application is about in the first place. But the case law is very clear that turnover receiverships may be ex parte and that that is allowable because once the judgment has been rendered and the defendant has received their notice of the judgment, that they are put

on notice that postjudgment enforcement proceedings will follow. And of course they don't get notice of an application for garnishment either, so it's the same process.

PROFESSOR CARLSON: I ask that because I've been involved in some supersedeas proceedings where the appellate lawyers think they have 30 days before they need to worry about the judgment or superseding the judgment.

What happens if you get a supersedeas and the judgment debtor? What happens to the receivership that's been appointed?

MR. NOACK: Typically -- so it doesn't happen often, but when it does happen, that suspends enforcement of a judgment, which typically means that the receivership no longer has any valid purpose. It can cause some interesting situations if there are funds on hold or something like that, but typically the receivership either pauses or there's no more point to the receivership, and so the receivership will file a motion to terminate. Again, it doesn't happen very often, but when it does happen, the parties will usually sit down and figure it out. But the posting of a valid supersedeas bond kind of eliminates the underlying basis for the purpose of the receivership.

PROFESSOR CARLSON: And how are -- is the turnover receiver paid? Through the proceeds or is it --

(Simultaneous discussion)

MR. NOACK: Yeah, so there are two major methods. So there's the traditional method and then there's kind of the more collection-oriented method.

The traditional method is, it's paid hourly as approved, and the creditor kind of pays as they go. That's more typical on your larger balance ones and, you know, more complicated ones where there's going to be some significant effort involved chasing multijurisdictionally and multiple attorneys, multiple assets, that sort of thing.

What's happened -- and this was really kind of championed many years ago out of the Harris County courts-at-law was you started seeing receivers -- turnover receivers under 31.002 appointed where they are basically paid on a contingency fee based on the amount -- on the funds that they actually seize. So the receiver is not paid if they never find anything, but if they do find something that they are paid a percentage of the fees that they get, subject to later approval by the court. It's kind of the way that the orders have developed these days.

So your typical order will say "the receiver is awarded a fee equal to" -- and the reasonable and customary fee that's fairly uniform throughout the state is 25 percent -- subject to a later determination as to reasonableness. And so that's kind of the standard for most courts. And, again, I think that came out of Harris County courts-at-law, I want to say maybe 15 or 20 years ago, and that's -- it's basically spread, and most courts adopt that process.

PROFESSOR CARLSON: Okay. One more question. You said there was -- the national norm seems to be ten days is about right to allow the debtor to file a claim of exemption. What is the trigger for the ten days? When does it start?

MR. NOACK: Well, so it's a great question. And remember that in 46 other states, you're usually talking about wage garnishment.

PROFESSOR CARLSON: Right.

MR. NOACK: And so -- and wage garnishment, I will tell you, again speaking with kind of experience with national organizations, wage garnishment is where it's at, you know. And I think that's something -- that's very important for this committee to consider, especially when you're thinking about impact on the consumer and the rights of the

consumer.

Wage garnishment is -- as much as the framers of our Constitution did not like it, they -- it was designed to avoid a catastrophic impact on the judgment defendant. Right? You can't take all of their wages. You take a portion of it. They have to live on less than they make. It obviously is not comfortable, but they can survive on it. And so most states cap that at 25 percent, but if there is an exemption, if they're taking the wrong amount, if they're making minimum wage and the state law says that, you know, they have to make more than that in order to be garnished, so it typically revolves around the response date, and the exemptions and the exemption process is really mostly aimed at that. So wage garnishment is anywhere from 75 to 90 percent of the postjudgment enforcement process in any of those states.

Bank garnishments and property seizures are just very minuscule comparatively. They still have processes to protect it, and bank garnishments are still obviously very important, but it's just -- it's just not as big a deal in those states.

When I have seen them, it's typically included either in the writ itself, so there's a copy of the writ that's served on the defendant, and the writ

will say "have the exemption claims." And remember, Texas has a wildly longer list of exemptions than in many other states. Right? So, you know, 12 head of cattle, you know, a horse, mule or -- you know, I mean, we're very unique in terms of that list. So it's often much more able to fit onto that form in those other states. There's a wildcard exemption. There's, you know, a homestead exemption that's capped. You know, and so they include it in that form. And it's just -- it doesn't seem to be as much of an issue that they can just stick it at the bottom of a writ, and so that's where you see it.

But I will tell you with 50 states, it's really hard to find kind of a common analysis for how they do it. And I can't say that I'm an expert in all 50 states, so I'm very hesitant to tell you that this is the practice everywhere, but I'll tell you -- I guess what I'd say is, what you typically see is there's a response date for the employer or for the bank and that there is a sheet that they get and that they have, you know, ten days and that there's a list, but it's hard for me to tell you anything more than that.

PROFESSOR CARLSON: All right. Thank you, Craig.

MR. NOACK: No problem.

CHAIRMAN BABCOCK: Judge Schaffer.

HONORABLE ROBERT SCHAFFER: Yeah, I have more observations than questions.

When I first got on the bench and I was handling one of the early motions for turnover, and I was kind of giving this collection lawyer a little bit of a hard time, and he announced in open court, "I don't understand you Harris County judges trying to protect these deadbeat debtors." And there was just complete silence in the courtroom. And after my mouth dropped because he was brave enough to actually say that, I said, "Well, I'm sorry, Counsel, but it's this little thing called due process that I'm supposed to follow-up on." And so we then had a semi-constructive conversation.

But really the problem that we have at the trial court level, Rich -- this is directed more to Rich than anybody else -- is that 99 percent of these cases are default judgments where the debtor has just completely either ignored or maybe they really weren't served. It's hard for me to tell, because as I'm sitting there, I'm looking at what is in the file at the time that I look at it. And granted, I don't look at as many at the district court level as the county courts do because I understand the county courts have a lot more

of these actions filed -- these collection actions filed than in the trial court. But by the time I look at it, I'm looking at it from a default perspective. And that puts your clients, Rich, in a much different position because they've -- they have ignored it in most cases. And so, you know, that's where I'm sitting when I see this.

MR. TOMLINSON: If I might just briefly respond to that. You have a -- that's a well-taken point. And there have been some studies and -- about how these debt collection cases work. And among other people, Professor Spector at SMU Law School, did a study about Dallas County, and there's a huge number of defaults. And I don't have an answer to that. That's not what we're talking about here today, but what I can tell you is what I have heard is that the fact that many hearings are being done remotely now where there's Zoom notices that actually there are fewer defaults during COVID than there were before. And I can tell you that's one thing that's changed. And if that was incorporated into procedures permanently, it might help reduce that.

And I would add that there's some judges that do require notice before they will grant turnover orders or appoint turnover receivers. And in my experience that they -- and they generally use Rule 21a,

which means they send it by, you know, either regular mail or certified mail or both. And I would say that most judgment debtors do not respond to those. I mean, occasionally they make their way to Legal Aid if they're one of our client constituencies, but my clients are generally so unsophisticated, they don't understand what the hell is going on. So they don't do anything a lot of times. We get it when they finally are subject to a seizure of their entire bank account by a turnover receiver, and that's when it becomes an issue.

Let me just add, we don't believe that there is necessarily a right to appear on the application for a turnover receiver before it's entered. I think due process would require for a postdeprivation hearing. And I think that's -- the whole point of the statute is to require a postdeprivation hearing so that it gives people a right to pursue their exemption remedies, something -- a right that doesn't occur until after judgment. So it's not a matter of wanting to refight generally whether the previous judgment was adequately rendered. It's just there's new rights that arise once you have a judgment rendered against you, and that's -- the most important thing is exemptions if you're an individual. And what we're trying to say is, there's really no procedure for assuring turnover

receivers will actually inform judgment debtors about these exemption rights.

I get it that Craig Noack looks for this and he does it, and he knows many other turnover receivers that do. I can tell you my experience is, there's lots of turnover receivers who ignore my arguments about exemption when I get involved as a lawyer and we have to go to a hearing, and I have to persuade a judge, and I have to get a judge to tell them that's, "Yes, it's exempt" before they will do so. And you can imagine that basically what that means is, for those turnover receivers dealing with pro se judgment debtors, they're not going to learn about their exemption rights. That's the impression I have from how it works.

And there are certainly lots of turnover receivers that could use rules because I think there is a need for guardrails that we don't have at the moment.

HONORABLE ROBERT SCHAFFER: Yeah, and that's probably well taken. My point really is more, it would be really helpful if people didn't ignore the process and got involved in the process a lot sooner. And it's -- there's a reasonable likelihood we wouldn't be having a lot of this discussion if that were happening, but you're right. They do have rights, and

we do need to protect them. And I'm trying to, to the greatest extent possible. So I'll pass this off onto the next question.

CHAIRMAN BABCOCK: All right. The next question is from Levi Benton. Levi.

HONORABLE LEVI BENTON: Good morning. Rich, I'm wondering --

MR. TOMLINSON: Let me just say something. I did a jury trial in front of Judge Benton a long time ago. I'm so old that everything's a long time ago, but he's still much younger than me, just so you know, but that was the best jury trial I've ever done in my entire career. It was -- I mean, there were great lawyers on all sides. There were four of us. And we had a great judge. I mean, I can't say more about what a great trial Judge Levi Benton was, just -- I want everybody to know because that was like the best trial experience I've had in my entire career.

HONORABLE LEVI BENTON: Rich, thank you very much. The wire transfer will come this afternoon.

MR. TOMLINSON: You don't need to do that.

HONORABLE LEVI BENTON: I'm teasing. I'm teasing.

MR. TOMLINSON: I feel this way. I'm being honest.

HONORABLE LEVI BENTON: I'm teasing.

I seem to -- I have a vague recollection that Mr. Noack also appeared before me, but I'm not certain.

MR. NOACK: I get around, Judge. Yeah, I'm sure that's true. I practice statewide. You know, with a creditor's attorney, I swear, I think I've even gone to Loving County, population 70, so I think so.

HONORABLE LEVI BENTON: Yeah. So thank you for all of that, guys, but here's my question. Couldn't we craft exemption rules or remedies related to exemptions just for indigent defendants, Rich? You know, so -- because I now have had the pleasure of also serving as a 3102 turnover receiver on a huge judgment. And those defendants don't need the protections that your clients need, Rich. And I wonder, you know, if maybe you and Craig might find common ground getting -- time to go down a path where you're crafting rules just for the indigent debtors. That's my question/comment. Thank you.

MR. TOMLINSON: Thank you, Judge. And I don't know if we can do that for two reasons. One, I don't think the legislation necessarily permits us to limit it to the indigent.

I also think under Strickland -- under the

Strickland precedent that talks about postjudgment garnishment, about the fact that everybody who's a judgment debtor is entitled to notice of their exemption rights. That said, I do think that there is -- I do think that there's -- there is a body of people that I think the turnover statute is really intended to direct, and it's for self-employed individuals who've gone out of their way to hide funds and assets and thereby avoid paying their just debts under judgments.

That is -- I think it's different when you're talking about people who live on either retirement checks or are wage earners, and that's where these exemption rights, I think, come into play more often. And I don't -- even if this -- even if the rule may require notice to those people who are self-employed, it's not likely to. I don't think it's likely to impact the procedures for turnover receivers in dealing with those self-employed individuals because I think, in fact, that exemptions are much less likely to apply to them, certainly in the funds area, you know.

And I have to admit, when Mr. Noack mentioned earlier that they do see physical property, that may happen. I think that's more likely in a self-employed context, which I don't see because I represent people who make no more than twice the poverty

level.

But I think -- I did -- I was in private practice a long time. When I tried a case in front of you, I was in private practice. I represented debtors there, I represented consumers, I've seen car dealers and home builders. I -- you know, I did a wide range of things.

What I can say is I think middle-class consumers who are wage earners or people who are retired, get social security or get pension payments, they should get notice of exemption rights too. That's my feeling. And I believe, as a matter of policy, it's a good thing, but I also think that's what the statute might require. And I think it's required as a matter of due process.

I don't think for the kind of case you're talking about that giving notice of exemption right is going to make a hill of beans difference for a self-employed individual, to be honest with you. Now, whether we can exempt them from that, I don't know. I mean, that's -- I mean, that's something that Mr. Noack and I could talk about.

MR. NOACK: If I could briefly comment on that. So I don't think you're going to find the Creditors Bar, you know, beating the drum on, you know,

"Hey, we need to add protections for wealthy individuals." However, the way I read the statute, I don't think you get -- I don't think we get to make that call. I don't think it says against -- it says personal property exemptions. And frankly, you can have a business collection case against an individual. In fact, as I was crafting this -- our response, I was sitting there thinking about my business turnover receiverships and thinking -- and I frequently get these, where I have a turnover receivership against a corporate defendant but also the individual who guaranteed the debt. Right? And if I go and I seize property, and frequently you have a business debtor who commingles their business property and their individual property.

And so the Kawasaki MULE that I mentioned earlier, I went out, it was a -- it was a hunting lease -- or they had property that they took people out hunting on, but they also lived on it. So does it make sense for me to send out the personal property exemption notice in that situation when I'm seizing, you know, a Kawasaki MULE that seats six when they've got, you know, two trucks sitting right next to it and there's only two people in the family, you know, versus the other things we're arguing about? No.

But remember, the judgment defendant has the right to elect the property that they decide is exempt. And if they want to exempt their Kawasaki MULE and one of the trucks and let me seize the other one, technically they're entitled to their rights. And that is one thing we need to think about. Should we be including in the notice the fact that they're entitled to elect their property, you know, because they don't technically have to elect to exercise their exemption. We're just assuming that they are, but oftentimes, they don't. So that's one piece I wanted to respond to. I really don't think we have the ability to.

I will say when we crafted our rule, you will notice that we said "against an individual," and that was really the reason why we said that. There are no exemptions against -- businesses do not have personal property exemptions. And the rationale for our rule crafting, in using the word individual, was we should not be invoking any of these rules when we are going after purely corporate assets. It doesn't make sense. We shouldn't be clogging this up.

So that is why our rule says "individuals," but I do think we're kind of constrained by the language of the statute to include this exemption form whenever we go after bank funds or personal

property that even relate to a business debt.

With respect to kind of due process concerns, one of the things I think hasn't really been mentioned enough here is that, you know, again, we are postjudgment, and there is significant cases holding that due process concerns are relaxed after you get to the judgment stage.

And there is an additional issue here, which is you do have, at least with the receiverships, a court-appointed receiver here. A receiver actually has derived judicial immunity, and the reason for that is because the court is appointing somebody, you know, that they trust to go and exercise the court's own power to do things. Sometimes they give the receiver master in chancery powers, not as frequently these days as maybe we'd seen in the past, but the receiver is frequently entrusted with these powers because they are not beholden to the creditor, and so they are entrusted to be making those kinds of decisions.

So I think a lot of the concerns that are being raised would probably be better addressed by policy decisions around: Are we comfortable letting our trial judges pick receivers? Do we want some rules and guidelines around the level of trust that judges have with the receivers? That's a great question. I would

love to sit here and talk about that. And it's a great question, and I think the association -- the Texas Association of Turnover Receivers would love to talk about that.

But, you know, with respect to the purpose of this statute, I don't think that's what this purpose is about. I think every receiver should be considering exemptions and ownership issues when they're taking possession of property. Every judge who appoints a receiver should be making sure that the receiver is thinking about those issues. There are guide rails. I have to answer to a judge with a constable next to him if I'm ever called to account to that judge, and then I'm never appointed again. So I do think there are guardrails. I do think there are opportunities for improvement.

I will tell you that when this came up in the legislature -- and, again, I was co-chair for the Legislative Affairs Committee. I did testify on the bill that this was originally included in that made it into the omnibus bill -- you know, one of the reasons we weren't concerned with this aspect was because absolutely this should be a conversation, and there should be a hearing. There should be -- if there is a concern about an exemption, the receiver should be

talking about it absolutely; but in a garnishment or a personal property execution, absolutely if it needs to get to a judge, it should get to a judge.

So I think we should -- you know, I think we should have this notice, and I think we should be particularly concerned about indigent defendants, but I think we have to recognize it's going to apply in a lot of situations.

CHAIRMAN BABCOCK: Judge Estevez.

HONORABLE ANA ESTEVEZ: Yeah, I just wanted to talk as to my experience because some of the statements that are being made I either have lacked in my due diligence or -- I don't know. It doesn't seem to be the procedure that's been in my court.

So usually what happens, we get a -- there's a default judgment from one of the large firms that take all those defaults and buys the -- all the debt from throughout the state of Texas. And then the next thing I see is a request for a turnover receiver, and they already have the receiver filled out in my proposed order.

And I've had -- years ago I had a couple of hearings, only because I required them, until someone told me there is no requirement for any type of hearing and that the statute, if I read the first paragraph,

says that they're entitled to the relief. And I don't know that any notice has ever been given to the debtor in any of those proceedings prior to me signing the application for that receiver, and I know that I've never had a hearing after that has happened. So no one has come back to court saying, "My assets are exempt."

So I don't know what happens from the time that that receiver is appointed except that I get an order later dismissing my receiver. And so when I hear that there -- and when I'm listening to both sides, I think it would be extremely helpful for these people to have the exemptions for the receivers to, you know, have to tell them about their exemptions because how else would they ever know unless the receiver decides to tell them, which they have no legal -- I mean, I don't know if they have a legal obligation to do so. I don't know that that's in my order. I think I signed one yesterday, so I can see if it says "You have the legal obligation to tell them what your exemptions are."

So I just wanted to talk about that experience because I'm not sure that everyone realizes that it's probably like that in the majority of district courts. It's probably not two people had -- the large ones, yes, so when you have the two sophisticated clients that both had -- you know, that was litigation

and then, you know, there is a $300,000 debt, but most of mine have been somewhere between 5 and 25,000, and it's credit card debt that they've recovered. And the interest is probably 35,000 and the original debt was 5,000, so we have a $40,000 judgment, and now they're going to lose whatever they're going to lose. And I don't even know if they -- if it were exempt property or not.

So we -- it's a good thing to do for the average person that's not going to hire a lawyer for a 5,000 -- original $5,000 debt that now is changed to a $40,000 debt.

And I would just say, you know, you pick the receiver when you have two sophisticated clients with two attorneys, but -- and I have done those as well, but those aren't the ones I think we're talking about here. I think we're talking about the one where it was a default, it was a credit card debt, I did get a form already filled out with that receiver. No one else ever showed up, and I never see them again.

MR. NOACK: Judge, if I could respond to that. I mean, that's absolutely correct in some courts.

I will tell you that judgment creditors often prefill out the receiver that they want to work with, primarily because they want to vet the receiver to

make sure the receiver does things the way that they want to.

I will tell you that, you know, a lot of times, especially on the kinds of cases that you're talking about, most judgment creditor law firms are representing institutions that are regulated at the federal level, that are audited regularly, the law firms are audited regularly, and they are deathly afraid of anybody going off the reservation in terms of doing something wrong.

There are also volume practitioners, and so they want a receiver who's going to, you know, adapt to their processes, talk to them, be responsive. You have some courts that will, you know, have a list of receivers and appoint off of that list, and that receiver may be, you know, still doing things with a legal pad and pen and paper and, you know, does things with fax machine and a pad, and that's fine, but that firm wants things to be emails and responses and things like that. So they're trying to ask the court to appoint a receiver that they would prefer.

Again, I think what you've heard from the TXCBA and TATR is if courts want a process whereby we're just -- the courts are reassured that they're getting this notice, it's fine. I think it's a good practice to

have. And so if there's a concern is it's not there, a judge can put it in the order.

In fact, I have a judge out in Lubbock who put in their order a specialized notice to go out to defendants on stimulus funds. Now back when there were stimulus funds, certain portions of stimulus funds were federally exempt. Certain portions were not. As a -- you know, the Supreme Court here had emergency orders last year, but then there were also federal exemptions. Obviously creditors and receivers adapted and avoided those funds to the greatest extent possible, but there were some courts that said, "I'm going to craft my order to require a disclosure." And so of course if the order says that, that's what we're going to do. So whether the order says it or whether we address it by rules, I think it's a best practice that we can do it.

But what I do want to caution against is a quiet -- in my view, the fact that a court doesn't hear anything after the appointment of a receiver means I'm doing my job. It means that I've engaged with the consumer, that I've worked something out between them and the judgment creditor, that there's a settlement, that they're paying according to their means, that I've looked at their circumstances, that I haven't imposed -- I'm not acting like a collector who's saying "I don't

care about your situation; I demand the maximum amount," I've looked at their situation, I've looked at the judgment, and I've talked to the judgment creditor and said "I don't care what your $40,000 judgment says. This person is working and they're making this much money, and they don't have it. So let's get you on a path where they can live and you can live with what this is."

And the fact that you're not hearing anything, in my experience, mostly means that that process is working, not the suspicion that their rights are being run roughshod over; but to the extent that we need to make sure that's not happening, I think that's what we're here to address.

CHAIRMAN BABCOCK: That's not a light thing, Craig. That's a timer.

Justice Christopher. You're muted, Tracy.

HONORABLE TRACY CHRISTOPHER: Yes, I would like to discuss why the creditors think we should have one rule and the debtors think, you know, every different rule should be changed.

I can understand the simplicity of having the one rule, although putting it at 717a does not seem like the best place to put it, because frankly, can I think of a single time where I've ever looked at

Section 9 of the rules, trial on the right of property? Never. Never. I mean if I am looking attachment or garnishment, I look at the specific rules. So that's number one -- number one question.

And then my second question is: You want that ten-day waiver or, you know, ten-day default. You don't get the cert within ten days, you've waived it. Is that currently the law anywhere, or what happens if a receiver takes the money and then somebody later says, "Oh, hey, that money was exempt"? What happens under current law?

MR. TOMLINSON: If I might address that just briefly and then Mr. Noack can approach it, garnishment is the place where I can give you the best examples.

Basically under current law, and it's -- the rules as they exist for garnishment, they are a response to a constitutional challenge back in the '70s. They revised the rules. And what they permit is, you can file a motion to dissolve. That's the way to raise exemptions. It doesn't tell you how to do it, but basically you can challenge the seizure or the freezing of your money, if it's exempt by that motion, and you can do so at any time prior to judgment.

If you file the motion, that stays the

proceeding which means you can't go to trial. You can't enter a judgment as the trial court judge.

With turnover receiverships, it's different. It's postjudgment as well, but it's not a separate lawsuit like garnishment. There are no rules that govern this whatsoever. And what I'm trying to say is that in garnishment, you have -- basically it takes at least a couple of months, maybe six weeks to eight weeks for a garnishment case if it's really moving rapidly to resolve.

During that entire time period, you, as a judgment debtor, have a right to raise exemptions under current law, and that's way more than ten days. So if you make it ten days, you're basically constricting the rights of pro se judgment debtors, and -- but if you retain the current Rule 663a and 664a, you're going to allow people who are -- have the benefit of hiring an attorney, they're going to have more rights.

So, you know, what I can tell you is, there's -- that's what the system permits. And ten days -- I don't think the statute was intended to constitute a waiver of exemption. I think that's a policy issue. The whole point of this law is to give a simple expedited procedure for raising exemptions.

I think that in the garnishment context,

once there's a final judgment -- and that's typically in JP court -- that's probably the end of it unless you appeal from JP court to county court, and then you have a second chance because it's de novo.

With turnover receiverships, we're just saying it shouldn't be ten days. It should be -- and maybe it shouldn't be 60, but it should be -- there should be enough time for a pro se to look at the material, to get the notice and get the material, fill it out, and have a chance to have a hearing. And I'm saying that if you do it on a ten-day basis, you're going to find that most people are waiving their rights. I mean, that's -- I just don't think that's in the best interest of judgment debtors. And it may, in fact, be depriving them of due process.

MR. NOACK: So Judge, I will fall on my sword with respect to the placement of the proposed rule on 717a. I literally looked through the rules, and I could not find a better place to put it. I looked through it and I said, "Where would I put a rule that applies equally to other ancillary proceedings?" And I discovered for the first time a Section 9, Trial of Right By Property, and said, "This is amazing. No one's ever cited this to me in 20 years," but it seems so wonderfully placed for what we're talking about. So

let's create a new revival of this section; but if there is a better spot that this rule would belong in, you will not find us opposed to it. I simply thought that if we're talking about a right to property and ancillary proceedings, it seems like we already had something that might apply. But that was purely my decision, or my proposal, and I'm open to alternatives.

HONORABLE TRACY CHRISTOPHER: Well, I'm glad to know that you also have no idea what we do with this particular section.

MR. NOACK: So, yeah. So I'm open to the 600s, certainly where we'd most often find ourselves in postjudgment.

With respect to the rest of the discussion, you know, I don't think there was a gotcha intended, and I say this as the person who did the primary draft of the rule.

The main intention that I had was that the process needs to keep flowing. If you look at the draconian draft that you hold everything for 60 days and everything's got to come to a complete stop, I will tell you that my IOLTA account and the accounting team are going to -- they're going to strangle me and the banks are going to hate it.

And by the way, whenever I freeze an

account, either through garnishment or through receivership, they actually pull the funds out -- every bank does this differently. Some put a negative charge on the defendant's account and they call me up and they go, "Why does my account say negative $7,000?" Because the levy was for nine and they had two in there. Some banks pull it out at zero, but they pull that money out and they put it in their general ledger, by and large. And that money sits there, and they hate for that money to sit in that general ledger.

Typically they want to remit that money to me as soon as possible, but in no event do they want to hold it anymore than like seven days. And so then they remit the money to me.

If I can't reach a deal with the consumer or broker a deal, they want to remit that money as quickly as possible or tell me that I need to release the funds. So if I have to sit on those funds for 60 days, it's harming the defendant, but it's also harming the entire process.

So the intent of the rule that we proposed was give them time to assert the exemption, but if they don't assert the exemption, a reasonable time, as allowed by the statute, then you need to let the process go. Is there an opportunity for us to meet and say, "If

somebody on Day 16 and before anybody files an additional motion, the exemption is received and let's have a hearing," sure. I don't want to take somebody's exempt property. I don't think you're going to actually find a creditor's attorney who wants to argue and say "Day 11, sorry, I want to take that exempt property. I want to take that social security money."

What I think we want to have, though, and I'm speaking purely as somebody who does these, if I wait the requisite period of time, then I want to be able to move on to my next step, which is a motion to authorize distributions that I copied to the defendant and say, "Here's a copy of the check that I got from the bank," and a verified motion that says, "I levied on Prosperity Bank. I got $2,000. Here's a copy of the check. I do not believe these funds to be exempt. I did not receive a claim of exemption. I would like the court to authorize that I distribute these funds," and then that process needs to move forward.

If the defendant in the meantime files their claim of exemption, stop the process; let's have the hearing.

HONORABLE TRACY CHRISTOPHER: Well, the problem with writing a rule when you put in something that says, you know, it's -- you know, it's waived or

language similar to that, it does cause problems.

You might be a reasonable receiver, and the next person may not be. So would there be a way to say as long as the exemption wasn't received before, you know, the time of the order or something like notice of hearing, you know, whatever you do, what you would trigger it by then?

MR. NOACK: I think there's an opportunity. There are some -- and, again, the problem is, you don't have a form order. Right? And so you have many orders where you actually -- the order allows the receiver to distribute immediately. Right? And so in that case, the receiver is going to start distributing immediately if you don't get a claim of exemption.

Most limited receiverships, which -- and I haven't mentioned that, but a lot of times in justice court what is developed is the idea of a limited receivership, which is only for bank accounts and financial records. Most of those require at least an initial motion to authorize distribution.

So the struggle you're going to have there is trying to craft a rule that deals with every creditor's attorney has their -- and every court, right, has maybe -- some courts have devised their -- I will

tell you that Collin County justice of the peace have their own rule that they -- or form order that they came together and said, "This is the form order that we want." Right? So it's just -- it's difficult to think through all those.

I think it's possible. I think we could, but I think you're talking about language that would say, after the tenth day, you know, the receiver or, you know, the levying officer may continue in its process; but any claim of exemption, you know, may be heard at the appropriate time. You know, we can think about that. I think it's possible.

CHAIRMAN BABCOCK: Thanks, Craig.

Roger and then Justice Bland.

MR. HUGHES: Thank you.

Two points, one is sort of an observation, but the other one's more of a question. The first one is: I'm all in favor of putting something in the rule to say that a particular ruling or decision is a final judgment and therefore may be appealed. I simply point out that once you put something like that in there, usually that triggers a deadline when the judge's power over that decision ends. And so the necessity of having a bright line that -- a clear mark so that we know it can be appealed has to be balanced in, well, do we

really want the judge to have some sort of continuing jurisdiction to modify it, or do we want to just say that's it? I leave that for your thought.

The second is, I see deadlines built into the rule. Judge shall hear something within ten days and rule within three days. So my question is: What do you want to happen when that doesn't happen? I mean, for example, under the general rules, if you file a motion for a new trial and it never gets ruled on, it's overruled after a specific period of time. That's the default. Do you want to put something like that in the rule? Because as someone noted earlier, you can have a rule that says the judge must hold a hearing within ten days. The judge must make a ruling within X number of days. But in the real word, that doesn't always happen.

So do you want a default that says if the hearing isn't held, for example, the exemptions are sustained or they're overruled? If the judge doesn't rule within three days, then they'll be deemed overruled or granted. I leave that open for discussion.

And then I'll make my -- a concluding observation that Buddy Low used to always remind me, when something gets kicked to our committee because the legislature says, "Make a rule about this," frequently, people would use that as an opportunity to make general

improvements.

And I remember Buddy would always say when people would default to arguing over what general improvements were necessary, this is what the legislature said to do, and we don't have to do anything more than that. So if all the legislature wants is the debtor to be informed about exemptions, et cetera, and we can't figure anything else, we may have to have an option that that -- that that's the rule we can agree on, but anyway that's it. That's all I have to say.

CHAIRMAN BABCOCK: All right. Thanks, Roger.

Justice Bland.

HONORABLE JANE BLAND: I'm wondering whether we need -- we could consider a form order for the appointment of the receiver. Heard, you know, numerous times we don't have a statewide form order. Sometimes these orders are very aggressive.

If we started out with a basic order -- and because we're appointing people that are, you know, an arm of the court, you know, if we started out with a basic order that set out the basic rights and obligations, and if a receiver wanted something different, they'd have to come in and explain why they needed something different. But I can see why the

judges in Collin County came up with one. I know that the Harris County judges have historically been pretty aggressive in marking up the orders that come in front of them. And it may be that an order that set out the basic rights and obligations, including the obligation to notify of exemptions, in the order appointing the receiver would have a baseline or set the default for what receivers should do in these cases, and if you wanted something special, you'd have to come in and ask for it.

MR. TOMLINSON: You know, Your Honor, I'm sorry. It's like I'm in a courtroom. I can't help myself.

I think that's a really good idea. I've looked at -- I don't know how many turnover orders I've looked at. It's a large number. I've never seen one that directed a turnover receiver to tell people about an exemption. So I don't think it even comes up in part because typically, it's almost an ex parte process even when there is notice because judgment debtors don't show up. And so the form of the order is generally prepared by the judgment creditor's attorney, and it doesn't cover this. I'm not knocking them for that. I'm just saying that to provide guardrails, it would be helpful if those orders did do that.

I think the point of having this rulemaking was to make sure that there was -- your exemption claim process and wouldn't require people like me, 68-year-old lawyers, to go represent people on motions to return exempt funds. They could do it themselves. And partly as if we put that -- impose that in the proposed order, I think that's a great thing. That doesn't mean that's the only way to approach this. I'm just saying, I think that would be a great thing.

MR. NOACK: Justice Bland, what I would say is -- and I want to be very clear -- I have no authority on that subject to speak on behalf of the Texas Creditors Bar Association or the Texas Association of Turnover Receivers. I know individual members of both who would both be strongly in favor and strongly opposed to that concept. So what I am about to say I would say solely is my personal opinion.

Personally speaking, I think it might be a very good idea if, as you say, it's conditioned upon the right of the creditor to come in and demonstrate a need for a more customized order, almost like discovery levels. Right? If it's less than a hundred thousand dollar judgment, then here's your default order, but you can get a Level 3 order if you want, but you got to come in and make a showing or something like that. That

probably would satisfy almost everybody as long as you check a lot of boxes that receivers need in order to do the things that they do.

And to Mr. Tomlinson's point, probably 95 percent of those things that receivers need to do, we could probably agree on. We have some sore subjects about what's in a bank account and, you know -- and rights on a couple of things, but in terms of the rights of the receivers and well settled law and all that kind of stuff, we could probably get there.

Now, whether or not this mandate covers that and whether or not that mandate would solve this particular issue, I don't particularly know, but I would tell you that I think a form order would go a long way toward standardizing practices because as has been mentioned, each creditor has their own forms, some courts have their own forms. And speaking personally, sometimes it's a headache to comply with each order. You know, I've got a spreadsheet in terms of what each order -- what each judge kind of tells me that I need to do and when I need to do it, and it can be difficult. So I'd personally -- I like the idea.

CHAIRMAN BABCOCK: Thank you.

Rich, let me ask you a question, and Craig too; but, Rich, on the issue of the ten days versus 60

days?

MR. TOMLINSON: Yes.

CHAIRMAN BABCOCK: Craig says ten days is standard. 60 days is outrageous. He doesn't know what Georgia does. Are there any other states that use 60 days, and do you know what Georgia uses?

MR. TOMLINSON: So the Georgia case, they have new rules that only deals with postjudgment garnishment. They follow what we do currently with garnishment, which is, you can raise an exemption claim at any time prior to judgment, final judgment in the garnishment action, so that current rule in Texas is the same thing, at any time prior to judgment in the garnishment action. Those proceedings go relatively quickly, at least particularly in JP court. They can happen in as short as six or eight weeks with things moving promptly. But then if it's in JP court, a judgment debtor, if they're involved, could appeal and get a de novo resolution and it could add a couple of months in county court.

The Georgia example basically would provide well more than ten days, is my point, is that their procedure probably would take at least between four to eight weeks to resolve in a garnishment, and you'd have that entire time before a judgment in which

to raise the exemption. And I think that's preferable certainly for a garnishment, but what I think that means is, that maybe 60 days is -- I'm not aware of other states using 60 days. I'd be the first to tell you that. I am aware that in terms of postjudgment garnishment, there's many that would allow it up until the time that there is a final judgment.

As far as turnover receivers, you can't really look to that. I've looked for other examples of that in other states, and I have to -- and Mr. Noack may know better than me, but I can't find a similar program. We don't have wage garnishment, so I don't know to what extent you want to look to wage garnishment. That takes a significant chunk of change from somebody for a long time period and people are aware of in those states that have wage garnishment, and it might be a basis for understanding for a quicker procedure.

I think that pro se judgment debtors typically can't do it quite that quickly. Now whether it should be 60 days, I agree. I started that number. I can't tell you there's another state that would require that, but we don't have turnover statutes outside of Texas to look at to compare. So turnover proceedings are different.

The current rule in garnishment, we're not

changing that. We're just saying that you can still raise exemptions through final judgment in the garnishment. And that's what Georgia does. I think that's what most states do. So we wouldn't be changing things on that.

This 60-day thing and the ten-day thing, what's important to me is, first of all, I don't want a waiver. I think a waiver of rights should not be -- especially for a short time period. Pro ses are going to miss it and -- even though they have exempt claims.

A number of my clients are not even -- they're so unsophisticated that they will not even understand this form, but they might take it to somebody and get an explanation; but in the current procedure, they don't know anything. They don't know who to go to. And a lot of them have exempt incomes, and yet they don't know how to proceed. And I think ten days will lead to a lot of waivers. I would bet well over half of the cases where people have exempt funds they will lose their exempt funds.

Does that mean it should be 60 days? No. And that's something I'm more than happy with my group to talk with Mr. Noack's group. I'm more than happy to do that.

I can't tell you there's an exact answer

to this. I can tell you that there are no turnover proceedings I know about in other states. It's sort of like a unique tool.

CHAIRMAN BABCOCK: Yeah.

MR. TOMLINSON: And it's based on the fact that we don't -- I think it's because we don't allow wage garnishment. I mean, that's the short and sweet of it.

CHAIRMAN BABCOCK: Craig, when you say ten days is the standard, are you comparing apples to apples, or are you extrapolating, Craig?

MR. NOACK: It's -- on turnover receiverships, no, because he's correct. Turnover receivership is a unique Texas institution.

I think it is apples to apples when you look both to kind of replevy periods also existing in Texas law but also when you look to personal property and seizures in other states or bank procedures.

I will say that it does look like you've got other states procedures where you have until the return date on a bank levy which may be longer than ten days, but -- and, again, I haven't done an exhaustive survey, so I do want -- I don't want to represent that I know every state or anything like that.

But here's my main -- my main point on

this, just ten seconds, is that the real danger here is you don't want to take the maximum length of time, 60 days, and make it the standard. So I think everybody can center on the fact that you give a period of time because 99 percent of the time, as it's been said before, these are default processes where we're not dealing with exempt issues. You need to let the process happen, let the reasonable period pause. If something happens after the reasonable period, I think everybody agrees, we can deal with that, but you don't pause for 30, 45, 60 days and make -- and hold up everything for the 1 percent case.

CHAIRMAN BABCOCK: Well, the difference between your two proposals is 50 days. We're going to cut that in half and we'll make it 35 days, so that solves it.

Okay. We're going to break for lunch for half an hour, so we'll be back at 12:30. And thank you very much, Craig, both you and Rich, for a really good discussion. We're not done with this obviously. We'll bring it back as the first agenda item on October 8th. And then after lunch, we will go to the next item on our agendas, which is Rule of Judicial Administration No. 7. And with that, we will be in recess until 12:30. Thanks everybody.

MR. NOACK: Thank you very much.

MR. TOMLINSON: Thank you.

UNIDENTIFIED SPEAKER: Recording stopped.

(Recess: 12:00 p.m. to 12:30 p.m.)

CHAIRMAN BABCOCK: Hello, everybody. I hope everybody had a good, albeit rather abbreviated, lunch.

UNIDENTIFIED SPEAKER: Recording in progress.

CHAIRMAN BABCOCK: And glad to know the recording is in progress.

And has Bill Boyce relocated successfully? Bill, are you around?

HONORABLE BILL BOYCE: The change of venue was successful.

CHAIRMAN BABCOCK: All right, good. Well, let's dig into Judicial Administration Rule 7.

HONORABLE BILL BOYCE: Thank you, Chip.

CHAIRMAN BABCOCK: You bet.

HONORABLE BILL BOYCE: This is a recent referral to the Judicial Administration Subcommittee that overlaps with and perhaps piggybacks on the work and recommendations of the Remote Task Force that Chief Justice Christopher and others have been working on for some months now. This is a particular issue pertaining

to a recommended tweak of the Texas Rules of Judicial Administration to more broadly define and authorize remote proceedings.

By way of background and backdrop, I think this is a reflection of the recognition of courts and litigants throughout the state that even after the exigencies of COVID have subsided and we return to the new normal, whatever that looks like, that new normal is probably going to include expanded use of remote hearings and remote proceedings. It's been done for the last year to year and a half out of necessity, but I think there's a widespread recognition that for many types of court proceedings, efficiencies are gained and access is increased by allowing remote proceedings and dispensing with the requirement for litigants or attorneys to travel all day to a far away locale for a ten-minute hearing in person.

There are a lot of aspects to this. And what the subcommittee has done is focused very specifically on the referral issue, which we'll talk about in a moment, and then also done some brainstorming because there may be some additional tweaks to the Rules of Judicial Administration and perhaps the Texas Rules of Civil Procedure. We're going to throw out some ideas as discussion starters and solicit the courts and the

committee as a whole for their guidance about whether they want to focus on just this very particular tweak to Rule 7 or whether there's room for wider discussion here.

And, again, there may be some overlap, and Chief Justice Christopher may have thoughts about the directions of this, or this may be -- some of this may already be in the works through the task force activities, but nonetheless they seemed like appropriate additional areas of inquiry following on to the specific referral.

So if you look at the tab that was distributed, the subcommittee report on Rule of Judicial Administration 7, the specific recommendation was -- or the specific request was to look at updating Rule 7 to expressly include remote proceedings.

By way of some background, if you look at the current version of Texas Rule of Judicial Administration 7(a)(6)(b), you'll see that it directs a statutory county court judge or a district judge and authorizes those judges, consistent with underlying rights, to utilize methods to expedite the disposition of cases on the docket of the court, including the use of telephone or mail in lieu of personal appearances by attorneys for motion hearings, pretrial conferences,

scheduling and the setting of trial dates.

I think we can all see that this rule is probably in need of some updating. The modes of communication in remote hearings have moved along a little bit from just telephone or mail.

The subcommittee is in agreement with what we understand the task force recommendation to be, which is to endorse the continued use of remote proceedings in appropriate circumstances consistent with the rights of all parties involved, but that raises the question: What exactly should this language look like? If use of telephone or mail is a little outmoded now, what would be appropriate updating language?

The subcommittee looked to the phraseology that the Texas Supreme Court has used in its series of COVID emergency orders dating back to spring of 2020, and the phraseology that appeared to be used repeatedly and also fit this situation referenced teleconferencing, videoconferencing, or any other means.

And so if you look at Page 2 of the memo, you'll see a redlined version of Rule 7(a)(6)(b) that proposes striking out telephone and mail and replacing it with the language that courts are authorized to utilize methods to expedite the disposition of cases on the docket of the court, including the use of

teleconferencing, comma, videoconferencing, comma, or any other means in lieu of personal appearances by attorneys for motions hearings, pretrial conferences, scheduling and the setting of dates.

This language is intended to be inclusive and not exclusive or limiting, so it doesn't preclude telephone conferences, for example, or use of the telephone, but it also is meant to be broader and encompass voice communications, visual communications like the Zoom meeting we're having right now, and so forth.

It's also intended not to be tied to any particular mode or technology of remote communication because as even lawyers can appreciate, the technology moves fast. We're all using Zoom at present, but, you know, in a year or two, we may be using a different platform or different technology. So it's -- the language is intended to be broader.

Before I turn it over to any other members of the subcommittee who want to elaborate on anything, we had a couple of questions that came up during our discussion. One was whether a reference to mail continues to have any utility or not. It wasn't clear to us whether this was referring to snail mail by hand delivery through the U.S. Postal Service, whether this

was intended to encompass emails or not. There may be some procedural questions that come up with relying on email for procedural matters in procedural rulings that potentially cause confusion about whether an actual ruling has been made, whether deadlines have started based on an indication from a court that it's going to grant the motion, but does an email like that actually grant the motion or not, and actually start timetables and so on and so forth. We flagged that because there may be sentiment on the committee as a whole to keep a reference to mail in there. We tried to address it by, again, drafting this broadly to reference any other means, and then in the day-to-day handling of cases and appeals, any questions about that can be sorted out.

So I'm going to flag a couple of these discussion points at the end, and then I'll ask any of the subcommittee members to elaborate on anything that I've glossed over or anything that I've omitted.

So we've got three bullet points for discussion at the end here on Page 2 of the memo. One is to talk about whether the language referring to motion hearings, pretrial conferences, scheduling, and the setting of trial dates is an appropriate standard to leave in place or whether that should be discussed or expanded a little more.

Judge Peeples had raised the question about whether references to motion hearings is broad enough or clear enough. You know, for example, does that encompass a hearing on a plea to the jurisdiction? Would that encompass a hearing on temporary orders in family law cases? Are those the types of proceedings that we want to have courts authorized to conduct remotely or not? This language has been in place for a while. Should we leave it or should we look at tweaking it as well to be more descriptive about the kind of proceedings that we want to encompass?

The second discussion point is that the current rule refers to personal appearances by attorneys. Is that broad enough? Does that encompass the situation involving self-represented litigants? Should language be broader than just personal appearances by attorneys?

And then the third point, and a larger one -- and, again, this may have some overlap with Chief Justice Christopher's task force -- is whether having this authorization, discussion, and rule of judicial administration, is that the right place for it, or is this really part of a broader discussion that ultimately can or should find its way into the Texas Rules of Civil Procedure about the scope of remote proceedings and

what's going to be authorized?

If you look at the current versions of the Texas Rules of Civil Procedure and the Texas Rules of Appellate Procedure, to the extent they're talking about electronic broadcasting of hearings or court proceedings, it's really more in the context of press access or public access to court hearings or appellate proceedings. So there may be some catching up that needs to happen once a decision is made about whether expanded use of remote proceedings is going to continue into the future and what types of things -- what types of proceedings we want that to cover, then perhaps an accompanying discussion is going to be how should we tweak the rules and which rules to accommodate that.

So that will conclude my introductory remarks, but Chip, before larger comments are solicited, I just want to invite anybody on the subcommittee to elaborate on anything that I glossed over.

CHAIRMAN BABCOCK: Absolutely. Any comments? Yes, Justice Gray-Beard, that's G-R-A-Y, hyphen, Beard, B-E-A-R-D.

HONORABLE TOM GRAY: Thank you, Chip. I think Bill has covered the issues and sort of where the conversation needs to go.

The issue that I guess I would like to

focus on is, the preparatory language to the part of the rule that we're tinkering with says that the trial judge shall do this, and there's really not any limitation that the -- whatever the tool is -- is available to the trial judge, and the -- I would suggest that it needs to be something that is -- we need to be careful that we don't create it as a mandatory right of the litigant, that it's at the option of the trial court of what is available to that particular trial court in that county as opposed to "Well, Judge, every other county in the state of Texas does this by Zoom and surely you must be wrong if you're not using that methodology."

I am on the side of while we're staying within our defined lane here, I think Bill is absolutely right that we need to vastly expand the other parts of this rule so that it is not limited to appearances by attorneys. It needs to include parties and witnesses, and it needs to not be limited to these particular types of proceedings. It needs to be pretty much open-ended, leave it to the trial court, and I would take out the language about the just processing of causes to expedite the disposition and just say "consistent with due process," but all of that is little gnats. Bill's got it wired with regard to the scope and what -- and more importantly to understand why we limited it to only this

very narrow recommendation while fully recognizing that we need a broader rule rather than just in this area of methodology to address these issues.

CHAIRMAN BABCOCK: Thank you, Justice Gray.

Judge Miskel.

HONORABLE EMILY MISKEL: I like everything that's here in this memorandum. I was just going to comment: The purpose of this rule in the rules of judicial administration is to encourage courts to be efficient and to consider the convenience of litigants, not just the convenience of the judge.

This rule is not what gives courts the power to hear things remotely. So I don't think we have to stress out too much about what types of motions we refer to in this rule because the rule is to encourage, not to actually grant courts the authority to do or not do things.

So, for example, you could say "the use of teleconferencing, videoconferencing, or any other available means," which would address one of the concerns about available technology, "in lieu of personal appearances for motion hearings, pretrial conferences, scheduling, and other appropriate proceedings." And I don't think you need to stress out

too much about whether one judge thinks it's appropriate to do family law temporary orders hearings that way and another judge doesn't. I think the purpose of this Rule 7 is to encourage judges to consider efficiency and convenience of litigants as a value.

CHAIRMAN BABCOCK: Thank you, Judge.

Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Yes. I just got a letter from Justice Hecht to the task force that is outlining what our role is going to be going forward. I haven't had a chance to look at it all, but a brief look at the letter indicates that he wants some rules to be looked at by the Supreme Court Advisory Committee, some rules to be looked at by the Remote Proceedings Task Force, and I believe there was a third group that was also going to be looking at rules and that we would all sort of meld them together.

My idea of changing this one, it was an easy one -- it was low-hanging fruit, and because it is not mandatory, it is a, you know, "Please consider using these other methods," that it would be an easy one to change that we could get done before we go through the whole process of trying to figure out what hearing may or may not be appropriate for remote proceedings, you know, the lawyers want to have the ability to demand it;

the judges don't want that. The lawyers want the ability to demand in person. Some of the judges don't want that, so there's a lot of bigger issues.

And this one, because it is just a laudatory, right, consider these potential issues when you're scheduling hearings, we thought would be an easy one to change without a lot of controversy.

CHAIRMAN BABCOCK: Thank you. Yeah, I hadn't thought about it in those terms, that being laudatory versus granting authority. Is there pretty much consensus that that's all that this rule does? It doesn't confer on the district judge or any judge, a county judge, power that they would not otherwise have as authorized by the rules and the statute? Does everybody -- Shiva just muted me. Why did she do that?

Anybody have any thoughts on that, whether it's just laudatory versus granting authority?

HONORABLE EMILY MISKEL: I saw all the judges nodding yes as to laudatory.

CHAIRMAN BABCOCK: Okay. Then we have consensus of nods.

Okay. Any other questions regarding this proposal and questions or thoughts about what we should do?

HONORABLE NATHAN HECHT: Chip, let me just

add, if I might.

CHAIRMAN BABCOCK: Yes.

HONORABLE NATHAN HECHT: As Chief Justice Christopher said, this is low-hanging fruit. This is an easy thing to change, we thought, but we were going to ask her task force and others to look at the whole range of proceedings in the judiciary, and a big piece of that is the 6 million criminal cases that are tried or that are handled in the municipal and justice courts, and they really have done some pioneering work in these areas. So we'll be informed a lot by their two training groups about what kind of changes they need, and then there are a whole lot of other kind of nuanced areas we would look at too.

And, in addition, as I mentioned in the update this morning, we confirmed that BODA can keep using videoconferencing, remote proceedings, as they've been doing, but the grievance process has been using it, the Bar has been using it in some other areas, so just a whole raft of things that are either in the courts or adjacent to the courts that we're going to have to look at. So this is just kind of the beginning salvo.

CHAIRMAN BABCOCK: Right. Thank you, Your Honor.

Judge Schaffer.

HONORABLE ROBERT SCHAFFER: I just want to amplify what Judge Miskel said. I agree with her completely, and I think that this change should be as broad as possible to give the trial courts and any other courts who fall under this rule the opportunity to use whatever is available, that's appropriate under the circumstances, so the broadest language possible, and I would endorse Judge Miskel's specific language on this.

CHAIRMAN BABCOCK: Thank you.

What do other people think on that topic? Everybody agree with Judge Miskel and Judge Schaffer?

(No verbal response)

CHAIRMAN BABCOCK: I don't see anybody nodding their heads one way or the other, nodding or shaking, except for Judge Schaffer.

All right. Anybody take the contrary view?

(No verbal response)

CHAIRMAN BABCOCK: All right. I think you can be guided by that, Bill.

What else do we need to talk about on this rule?

HONORABLE BILL BOYCE: I think for the narrow issues, or the narrow rule itself, I think that additional language that's been suggested can easily be

incorporated. We'll turn that around and submit that to the court for its consideration, while the larger discussions of when and how and where and so forth with respect to remote proceedings is undertaken.

CHAIRMAN BABCOCK: Okay. When you incorporate those additional concepts, Bill, into a new draft, would you send it to me and to Shiva and, of course, we'll distribute it to the entire committee.

If anybody feels strongly that the language -- that the new language is not appropriate, we can put it back on the agenda for October, but otherwise, we'll just assume the court has been satisfied with this discussion, and we'll fold this low-hanging fruit into the perhaps more complex issues it will be facing. Does that sound like an okay way to proceed?

HONORABLE BILL BOYCE: Yes.

CHAIRMAN BABCOCK: Chief, is that okay with you?

HONORABLE NATHAN HECHT: Yes, that's great.

CHAIRMAN BABCOCK: Okay. And I assume, Chief Justice Christopher, that's okay with you?

HONORABLE TRACY CHRISTOPHER: Yes.

CHAIRMAN BABCOCK: Okay. So I'm going to

say bring back only if strong dissent, and otherwise that'll be shortly transmitted to the court.

Okay. Let's go to our next item, which is Rule of Civil Procedure 199.2. Bobby is in the wilds of somewhere -- Montana, Wyoming, Colorado -- so I think he has passed the baton on to you, Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Yes. We were asked to consider a change to Rule 199.2 that the State Bar Rules Committee did. This is Tab I on the documents that have been sent out for today. And in that, we -- our memorandum shows the current rule in state court, the suggested addition by the state court rules committee, and then we have included in there the federal rule and the addition that they made in 2020 -- both of the additions are underlined -- and then the commentary for the federal -- the 2020 federal rule change which is quite long in terms of what they have suggested.

So basically what this is is for any deposition of an organization, the suggested change is to require a good faith conference about the matters for examination and documents to be produced, if any. So that is the particular request.

So in connection with that change, our committee looked at five things: Whether we had a

similar problem in state court, whether it was a good idea in general, whether good faith should be the standard, whether the requirement should apply to nonparties, and whether the requirement should apply to documents.

So as to number one, our subcommittee has not really seen similar problems in state court litigation. If you look at the commentary for the federal rule change, they say that this rule is amended to respond to problems that have emerged in some cases, particular concerns raised, have included over long or ambiguously worded lists of matters for examination, and inadequately prepared witnesses.

And our subcommittee hasn't really seen it as a big problem in state court. Occasionally a corporate witness will lack knowledge leading to another deposition, but the parties seem to be working it out without coming to court and having a bunch of motions about it. A quick review of case law did not show any mandamuses or any cases that involve this particular rule in terms of designating the appropriate witness for an organization.

So then our second question is whether a conferral is a good idea in general. The commentary to the federal rules indicates that that could be part of

your Rule 26 conference. We have discussed many times in the Supreme Court Advisory Committee the idea of having such a conference in all our cases, and it's been rejected except in the more complicated cases because of time and money. But this conferral does seem minimal, so the subcommittee is not necessarily saying it's a bad idea.

Number three was, should there be a good faith conferral. Well, we're not a hundred percent sure that good faith should be the appropriate standard. Right now good faith is used in the federal courts for some conferences. We do not have that same good faith conference in the state court rules.

Rule 191.2 contains our conference requirements. Parties and their attorneys are expected to cooperate in discovery and make any agreements reasonably necessary for the efficient disposition of the case, so slightly different from a good faith conferral.

So if we did want to make this change, would we want to use -- would we want to mirror our 199 -- 191.2 language?

Our fourth question was whether the rule should apply to nonparties. As it is written by the State Bar Court Rules Committee, it would, but it seemed

like their suggested reasons for the change dealt more with represented parties.

Our committee felt that nonparties might not understand what a good faith conferral is. We were also concerned about the scope of a conferral before the subpoena actually issued.

The federal rule does apply to nonparties. If you'll look at the language of the federal rule, it includes a separate sentence about nonparty organizations, and it says specifically that the subpoena to a nonparty organization must notify them of their duty to confer with the serving party and to designate each person who will testify. So in our mind, if we included nonparties, we would have to have some other sort of language in the rule.

And then finally we looked at whether the conferral should apply to document production. It's very interesting that the federal rule does not include conferral about documents. It only included conferral about what witnesses and what matters. We're not exactly sure why the State Bar Rules Committee wanted to add documents in, but they have. And if we do want to add documents, again, in terms of this conferral, we still have the question about whether we want that to apply to the nonparties. Generally in state court, most

of our nonparty organization subpoenas are pretty straightforward with a pretty straightforward set of document requests, but those are the issues that we have identified to discuss. Kind of at the end of the day, we were not particularly for this change, but we just had further questions that we wanted the group to consider.

And I'll be like Bill. If there's anybody else on our subcommittee that wants to weigh in first, I'll let them weigh in before we talk.

HONORABLE HARVEY BROWN: This is Harvey. I just wanted to add that on the standard whether it should be good faith or a reasonable effort consistent with the other rules, that I thought the reasonable effort was a better standard because it's an objective standard rather than subjective, and particularly if this applies to nonparties trying to determine subjective good faith might be more difficult, so I favored the reasonable effort standard.

CHAIRMAN BABCOCK: Any other members of the subcommittee want to weigh in?

HONORABLE TRACY CHRISTOPHER: I think the first issue, sort of, Chip, would be to see whether the committee as a whole has seen this to be a big problem in state court. You know, I know we don't generally

like to make changes unless we see it as a problem.

CHAIRMAN BABCOCK: Yeah. Maybe I'll start because I've had a fair amount of experience in both state and federal court with 30(b)(6) and 199.2 depositions. And I'll start with the federal first.

I think I've defended three 30(b)(6) depositions since the new rule came into being. In each of those instances, the party requesting the deposition did not appear to even know about the change in the rule much less attempt to comply with it.

And with respect to categories that I thought were either overbroad or asked for stuff that didn't relate to the lawsuit or were burdensome, I just sent, you know -- I just served an objection to those categories and nothing happened. They didn't ask about them, and we never got to court. If we had gotten to court, the judge, you know, might have said, "Hey, did you confer at your -- did you confer? It's your obligation," and they would have said, "What obligation?" But we never got that far.

In state court, you know, if I -- and I have had some burdensome -- I got one request for production that had over a hundred categories, maybe 200, and some of them I just couldn't even understand, but I called up the other side and I said, "Hey, let's

talk about this." And, you know, they were not -- you know, they'd agree on some things --

HONORABLE LEVI BENTON: All right. So --

CHAIRMAN BABCOCK: Levi, hang on for a minute, okay?

HONORABLE LEVI BENTON: Sorry. That was unintended.

CHAIRMAN BABCOCK: Okay. But in that event, I just served objections and it never got to court.

So I'm not sure that -- although the 30(b)(6) amendment, I think, is helpful in the sense that it alerts the litigants that you really ought to talk about your categories, particularly if you're going to serve a whole bunch of them. I don't know that it does much, that -- objections to the notice and then followed by, you know, a meet and confer, which is required in most districts satisfy that anyway.

So that's a long way of saying that, particularly if you've got good lawyers, it's not necessary. And even if you have scorched earth's lawyers, there are other methods of dealing with it short of changing or adding to a rule. So that's my 2 cents worth.

And Robert Levy has got his hand up, so

Robert, what about you?

MR. LEVY: Thanks, Chip. I was actually involved in the discussions related to the amendments of Rule 30(b)(6), and it was a longer process and involved some other suggestions that -- in terms of more kind of restricted duties. And I think part of the issue that arose in the 30(b)(6) context was, it is very difficult, or at least more challenging, for a party that is served with a 30(b)(6) notice to address objections and try to get them resolved. It just -- I think the state court process of raising objections makes it easier for a responding party to address those objections and bring it before the court.

And I agree with Chip. I don't think we see this issue nearly as often in the state court context versus the federal court context. And so I don't think that the rule amendment is really necessary. I don't think it's -- that there's a clear need to be addressed in terms of the meet-and-confer issue. I think that's kind of inherent in the way the objection process would work.

One other note, the reference to why the inclusion of documents. I think that in terms of 30(b)(6), 30(b)(6) itself doesn't explicitly reference a request for documents, whereas the state Rule 199.2

does. It has Subsection, I guess, (5) on that, but it's just not -- a request for documents is not spelled out in the actual rule. I think that it's probably not necessary to add that -- the reference to conferring about documents, and we have a general conferral provision in the request.

I would also note the importance of keeping in mind the nonparty and really protecting the interest of the nonparty and particularly in a 30(b)(6) context. 30(b)(6) depositions are very difficult to comply with as a corporation or an entity. They require extensive effort to try to find people who can testify to topics, and importantly, some of these topics are issues that happened way before anyone in the company was involved. So you might have a 30(b)(6) notice about events that happened in 1965 or '75 or something like that, and it -- you're doing the best that you can to try to find somebody who can learn about the topic and respond, but it is generally a tremendous burden. And I think we need to keep in mind the importance of trying to protect the nonparties who are put in the position of having to respond to one of these deposition notices.

CHAIRMAN BABCOCK: Yeah. Very true. Thank you.

Marcy.

MS. GREER: Yeah, I would echo everything that's been said by both of you-all. From the practitioner's standpoint, I really think it adds an unnecessary layer to have to go check a box because the reality is is if the 30(b)(6) is overbroad or ridiculous, you pick up the phone and call and you have a meet and confer anyway, or you file objections, like Chip was pointing out, and then, you know, you have to meet and confer before anybody files for relief from the court. So you're going to get there if it's a problem.

And I think just having a requirement to sit down and go through it all is -- it might hold up the process and just make it more difficult to reschedule and all the other things that go with a 30(b)(6) deposition. I mean, there's a lot at stake, and there is so much more involved because you have to shore up the knowledge of the company in a single individual, but all the more reason why I think it takes care of itself.

And I've had experience in federal and state courts, and I really haven't had a problem with it in federal court either. I mean, it just happens kind of organically.

CHAIRMAN BABCOCK: Okay. Thanks, Marcy.

Roger Hughes.

MR. HUGHES: Well, as Monty Python said, so now for something completely different.

My experience is quite the opposite. I deal with, I guess you might say, mid-level personal injury cases and the like. And what usually happens in state court is I get an email or a two-sentence letter saying, "Please give me dates to depose your corporate representative." And when I call to discuss it, I get a message that so-and-so is out, and they'll call you when they get back in. And then I get the corporate rep deposition notice. And so instead of solving it beforehand, I now have a notice that I must either quash or do something about and, once again, picking up the phone to call opposing counsel, maybe they'll be in or maybe I won't hear from them for a week.

So I think the confer thing would be helpful because my usual response when I get the email or the letter is to say -- shoot something back at least in an email saying, "Well, tell me what you want as a corporate rep and -- so we can discuss about it," and I never hear.

I strongly suspect there's a number of people who they're -- the corporate rep deposition notice, they just say, "Well, give me your corporate rep, and I'll tell you what questions I'm going to ask

in the deposition."

So in the sophisticated cases I've seen, you will -- yeah, I have seen people send a letter and saying, "These are the topics I want." And then when you call them up to say, "Well, let's talk about this. Let's see if we can narrow all this," the answer is like talking to a wall. "No, that's what I want. I sent you a letter what I want, so you give me dates."

Now, maybe that's conferring and maybe that's what would satisfy the federal standard, but my thought is, I think it would be helpful if there was something in the rule that says, "You have to call or talk to the person before you send out a corporate rep deposition to discuss the topics," because usually -- what I have seen in my experience is that is this is just a way of shifting the burden to the defendant, then, to make something happen instead of having -- trying to engender cooperation.

So I'm in favor of it. I don't think it's horrible. If there's going to be a problem, let's solve it before the deposition notice goes out.

And the other thing is, and maybe I shouldn't suggest this now, but I wouldn't be adverse to suggest -- to the suggestion that if people don't confer before the corporate rep notice goes out, that's grounds

for quashing it. So that's my 2 cents' worth.

CHAIRMAN BABCOCK: Thanks very much, Roger.

Rich Phillips.

MR. PHILLIPS: What I was going to ask is kind of -- (audio distortion) in the sense was, there's not an issue (audio distortion). This is a proposal from the State Bar Rules Committee. Did they identify rules or (audio distortion).

CHAIRMAN BABCOCK: Yeah, Rich -- Rich, you're -- you might try turning off your video so we can hear you better. You were pretty broken up right there.

MR. PHILLIPS: Sorry about that. Is that any better?

CHAIRMAN BABCOCK: Keep talking.

MR. PHILLIPS: Okay. So my only comment was with the State Bar requesting it, did they identify a reason for this, that there's a problem in state court, or do they just want us to be more like the federal rules? But somewhat that's mooted by Roger's comment that he has no problem, so I'd just be interested to know what the State Bar committee -- what their reasoning for (audio distortion) --

CHAIRMAN BABCOCK: Yeah, that's a great question. Anybody know the answer?

HONORABLE TRACY CHRISTOPHER: It's in the memo on Page 4, brief statement of reasons for requested amendments. It's just basically we want everybody to discuss regarding the scope of the exam. They don't specifically say we've had problems with it, but they think it would be a useful conference.

CHAIRMAN BABCOCK: And they also have the statement, don't they, that -- or subcommittee has not seen -- no, this is our subcommittee --

HONORABLE TRACY CHRISTOPHER: Right.

CHAIRMAN BABCOCK: -- has not seen similar problems. Right.

HONORABLE TRACY CHRISTOPHER: Right. No, no, no. Their reason is at the bottom of Page 4, top of Page 5, at least on my copy, the purpose of the change is to discuss and -- so we don't have motions in court interventions.

CHAIRMAN BABCOCK: Okay.

HONORABLE TRACY CHRISTOPHER: And avoid the possibility -- or the necessity of re-deposing a corporate witness.

CHAIRMAN BABCOCK: Okay. Great.

Richard Orsinger has got his hand up. Richard.

MR. ORSINGER: Yes. Thank you, Chip.

Just so happened I did some research on this back in February, and I believe the effective date of the federal rule change was December 1 of 2020, which means that the rule hasn't been operating now in federal court except for seven months. Can anyone confirm that? Okay. Well, at any rate, that's not -- that's not very much time -- I'm sorry. Go ahead, Robert.

MR. LEVY: Sorry, Richard, I think you're right in terms of the timing.

MR. ORSINGER: Okay. So --

CHAIRMAN BABCOCK: I think so.

MR. ORSINGER: -- my research indicated that this was a highly controversial proposal from the Federal Judicial Conference Committee, which initially offered a broader obligation and then got scaled back. They had 1,780 written comments and more than 80 witnesses who testified in two public forums. Ultimately it was forwarded to the Supreme Court, which adopted it. The Congress didn't overrule it. So this is a relatively new phenomenon even on the federal side.

And also, Robert, maybe you can confirm this with me, but there's a general duty under Federal Rule 26(f) for the parties to meet and confer to develop a discovery plan. Is that right?

MR. LEVY: Yeah, that's right. And, you

know, one of the issues that came up in terms of the federal rule was a discussion in the one of the original proposals was a requirement that a party producing the witness would have to designate who the individuals would be and what topics they would testify about in advance of the deposition. And that was also a focus.

And then one of the other issues was, from the producing party's point of view, a process, a clearer process, to raise objections, particularly for nonparties. They're the ones kind of stuck in the process of trying to find a court to raise objections and seek relief. So those were some of the flavors that impacted the proposed -- or the amendments to the federal rules that I think are a little bit different than Texas practice.

MR. ORSINGER: Well, so to me it seems like the question for us, number one, is, this is a fairly new change in the federal law, so we don't even really know how it's shaking out there. And the federal litigation process is more -- involves more cooperation between the lawyers as a result of the rules of procedure and the requirements of the federal judges. You don't find such a high degree of cooperation required in state court litigation in Texas.

And so to me what we have now is, issue

the notice and the subpoena, and then if it's too broad, you object and that results in the subpoena being suspended or quashed; and then people will inevitably pick up the telephone and have a fairly focused discussion about, "This was your request. This is my objection. How do we bridge the gap?"

In my family law practice, I never get an objection from a third party on subpoenas, even though I do use a lot of them, and that's maybe because I don't send overbroad ones or maybe because the issues are not so complex. But if we mandate a conversation at every single case, that means we're going to mandate a conversation between someone who's going to send a narrow request that's not going to even draw an objection from the third party.

And so which is better? To issue a notice and a subpoena and get an objection and then see the two differences and see if they can be bridged, or require everyone at all times, under all circumstances, to pick up the phone and talk to somebody they've never talked to before?

It would seem to me that we would be better to address the cases where a dispute actually arises rather than assume that every single request is going to be overbroad or that a company or third-party

entity is going to want to object to it.

So for my purpose, I'd rather go with the request and object and bridge the gap than to require a conference before there is a subpoena issued or a notice.

And I wanted, as my last thing, strongly support the idea that a good faith standard is the worst possible light to evaluate. Reasonable efforts, you know, I can show reasonable efforts. I had four phone calls, I had two meetings, or the guy on the other side never returned my phone call. But how you would measure good faith in litigation is beyond me. It's going to be subjective in every case. It's going to be held to an abuse of discretion standard on the mandamus review. I think that would be a very bad idea.

I don't know why the feds want to do it, I don't know how it's working over there, but in state court I can see all kinds of sanction motions alleging bad faith. Does that mean that the lawyer that issued the subpoena has to testify to support the good faith? How can he do that without -- he or she without violating the attorney-client privilege? There's just a lot of issues about good faith motive of lawyers that scare me. So I would rather -- if we have a standard at all, which I don't like, I would suggest reasonable

efforts. Thanks.

CHAIRMAN BABCOCK: Okay. Roger, again.

MR. HUGHES: Well, I appreciate Richard's comments and he brought to my mind something that had not occurred to me when it comes to subpoenas for third parties. In most of the lawsuits we deal with, the vast majority of depositions are depositions on written questions to get records: Medical records, X-rays, medical billing, employment records, sometimes accident investigation records, et cetera, and those are far more numerous than the actual live kind of depositions we are.

So I think we may want to consider that the conference exception might not apply for third parties or that they -- the conference can occur afterwards after the subpoena is issued.

And most of these -- in most of the DWQ cases, it's relatively straightforward and you're not going to have a lot of problems. I think probably the only problems are -- is the one that's been noted in some recent opinions, is when they subpoena the medical providers, not only their billing records but their fee agreements, their reimbursement agreements with third parties to bear on whether what they're charging the plaintiff is reasonable compared to what they charge

people who have insurance, et cetera, et cetera.

So I think those are things to think about when we talk about deposing -- sending out DWQs for -- to scarf up records because those are -- they are the major part of any personal injury case. And usually they're noncontroversial. The question is: How much is it going to cost to get the records, but they have become controversial in the sense that now providers are being asked to provide reimbursement agreements that they think are either confidential or proprietary, et cetera, et cetera. So I'll leave it at that.

CHAIRMAN BABCOCK: Thank you, Roger.

Any other comments?

(No verbal response)

HONORABLE HARVEY BROWN: This is Harvey. I have one. I wonder if it would be good to have a comment that just says that if we do this, that this rule is not intended to reach deposition on written questions. It seems like to me what this is really trying to get at is not a vehicle that is really exclusively for production of documents. It's for witnesses to testify, maybe bring documents because you want to take testimony about the documents, but it is not the vehicle that is used for obtaining medical records or employment records. That's just a deposition

on written questions. So a comment might make that clear and solve some potential problems.

CHAIRMAN BABCOCK: Good point, Harvey. Thank you.

Well, it looks like we have some people, including members of the subcommittee, that think that this requirement is not necessary under our rules of state practice, because, in part, there is no problem in the state practice; but Roger takes the other side of it and thinks it would be helpful to incorporate this in the state practice.

So we haven't taken a vote yet today on anything, and I know we all get twitchy when we don't vote, so everybody that thinks that the subcommittee is correct in that we don't need this rule -- David Jackson, you want to say something before we vote? David, you may be on mute. You are on mute.

MR. JACKSON: I am. I'm sorry.

CHAIRMAN BABCOCK: That's all right.

MR. JACKSON: No, my only comment was that the word before I think bothered me more than anything because it gave a lawyer an opportunity to slip in without giving the other side the notice, go to a third party, get to see their documents or whatever they had, before notice was even issued. And that was my problem

with it.

CHAIRMAN BABCOCK: Okay. Thanks, David.

So back to the vote. The subcommittee says it's not necessary. If you agree with the subcommittee, raise your electronic hand.

All right. If you think -- you can lower your hands now.

If you think that the rule is necessary, raise your hand.

All right. Pauline, check me on my numbers, but I have 30 voting with the subcommittee as not necessary and two saying that it is necessary.

MS. EASLEY: It would be one. Judge Yelenosky had voted that it wasn't necessary. He just lowered his hand.

HONORABLE STEPHEN YELENOSKY: Yeah, sorry about that.

CHAIRMAN BABCOCK: Okay. So 30-1 or 30-2?

MS. EASLEY: It would be 30-1.

CHAIRMAN BABCOCK: All right. Well, that is reasonably a definitive by our standards. Any other discussion about this rule?

MR. ORSINGER: Chip, Richard Orsinger here. Just in case the Supreme Court is interested in moving forward, what would you think about a vote on

whether it's good faith or reasonable efforts?

CHAIRMAN BABCOCK: Richard, you are clairvoyant because I was just about to do that.

MR. ORSINGER: Oh, I thought -- okay. I was afraid you were moving on to the next topic. Sorry.

CHAIRMAN BABCOCK: Well, yeah, had you not reminded me, I might have; but no, I was thinking about doing that.

So the subcommittee -- Justice Christopher, tell me if I'm right about this.

The subcommittee believed that good faith was not the appropriate standard, and so everybody -- if that's true, then everybody that agrees with the subcommittee, raise your hand.

HONORABLE TRACY CHRISTOPHER: We didn't actually take a vote on that point, but I think you could say that subsequently, we all decided that perhaps we should just stay with the standard we have.

CHAIRMAN BABCOCK: All right. Everybody thinks that -- you can lower your hands now.

Everybody that thinks it should be good faith, raise your hands.

Pauline, I've got a unanimous 33-0. Is that what you have?

MS. EASLEY: Yes.

CHAIRMAN BABCOCK: Okay.

MR. LEVY: Just a question out of curiosity, have we used a good faith standard language on any other types of rules, like conferral standards or --

HONORABLE TRACY CHRISTOPHER: We don't use them in conferral standards. We have good faith in connection with pleadings.

MR. LEVY: Right. Well, that's -- yeah, but that's an objective-type issue.

CHAIRMAN BABCOCK: All right. Okay. Thank you, everybody.

We're going to move on to the next item, which is Rule of Civil Procedure 226a. And Professor Carlson is the chair. I know Tom Riney has been doing work on this, so whichever -- whoever wants to take this one on, have at it.

PROFESSOR CARLSON: Take it away, Tom.

MR. RINEY: Chip, if it's okay, our committee is on here a couple times, and this -- and 226a is involved with both. But this is --

(Background noise)

CHAIRMAN BABCOCK: Hey -- go ahead. Sorry. Go ahead, Tom.

MR. ORSINGER: Tom is muted.

MR. RINEY: This specific issue relates to the recommendation of the State Bar Rules Committee on an implicit bias instruction that would go in the jury charge or the instructions to the jury. This is at Tab J. And if you will -- if you will turn to pdf Page 11 -- the pages are unnumbered, but it's pdf Page 11, you'll see Paragraph 7, and that is the proposed instruction. It is also repeated in the -- on the -- couple of pages over on Page 11, Paragraph 1.

Now, the language of the -- I mean, it's probably -- it says what it says. And then if you'll turn to the next-to-the-last page of the pdf, you'll see a brief statement of the reasons by the State Bar committee, and I think it's important that we take those into account.

They were asked to draft a implicit bias instruction, and they reviewed -- spent quite a bit of time over the year reviewing examples of implicit bias instructions from other states, from federal jurisdictions, and then they looked at some things that were being used in Travis County and in Dallas, including a pilot program in the Dallas civil district court where they actually surveyed jurors who had been given similar instructions.

94 percent of the jurors in the survey

said after the trial that they had considered the instructions in the deliberations, and 54 percent surveyed found that the instructions influenced a way that the -- they deliberated in the case.

We -- our committee thought that this was well drafted. We thought that the statement of reasons advanced by the State Bar committee was well stated and well considered, and so we have recommended that the instruction as recommended by the State Bar Rules Committee be adopted.

CHAIRMAN BABCOCK: And just -- Tom, just so we're on the same page, it is No. 7 that, at least in my copy, is in red and underlined?

MR. RINEY: Yes, that is correct. And then if you'll skip two pages over, you'll see essentially the -- you'll see a similar instruction that would -- is given to the jury in Paragraph 1 regarding how they are to answer the questions in the charge itself.

CHAIRMAN BABCOCK: Right.

Okay. Comments about this? Questions of Tom or any other member of the subcommittee?

Stephen Yelenosky.

HONORABLE STEPHEN YELENOSKY: I looked at this and I looked at the report and the study on jurors,

and I don't have a quick answer, but -- or maybe no answer at all.

And I think the language makes perfect sense and is well written for lawyers. I just don't know if it conveys anything meaningful to nonlawyers. And I don't know what would, but if you look at that survey of what jurors understood and, for that matter, what we heard from the discussion earlier about pro se litigants, I just think the level of understanding, I don't -- well, the topic itself is difficult because inherently, implicit bias is something you don't know you have and it talks about that. So I'm not sure how, you know, you really stimulate somebody to think about that and to combat it, but specifically the language -- there's repetitional language there that, you know, lawyers like to use, but I don't think repeating bias, prejudice, all those various things, stereotypes, is as clear and is as plain as we want to be.

We all know that prejudice in the legal sense is not limited to racial or gender. It's broader than that. But actually that word I think is pretty useful in there because one of the primary implicit -- the primary types of implicit bias are race and gender.

And I don't know -- you know, in contract law or in contract drafting, you know, I've heard that

it's useful to put in examples, and I'm wondering whether this is a place where an example would be appropriate. It's difficult -- we can't use an example that involves race or gender because inevitably, it's going to look like it's pushing people one way or the other; but, you know, we have biases that have nothing to do with that when we purchase things, for example, brand biases, that kind of thing, and people I think understand that.

I'm just kind of -- obviously kind of perplexed by it. I don't know that saying it does anything but -- the way we said it anyway does anything but make us feel like we've accomplished something. And it's not the subcommittee's fault. I don't know what it should say either, but I'd like us to talk about it some and think about it some more together.

CHAIRMAN BABCOCK: Yeah, thank you. I'm reminded about one of the best deposition answers I ever heard in a deposition. The witness denied three or four times making a certain statement, and the lawyer said, "Are you in denial about making this statement?" And the witness said, "If I was in denial, how would I know?" But in any event, Justice Christopher.

HONORABLE TRACY CHRISTOPHER: So I agreed with -- agree with what Stephen said, that it's very

difficult to write something that would capture what you really want to be talking about. But what -- my comment is on the fact that we have a bracket in there that says "as we discussed in jury selection," and I assume that was just sort of a, "Well, if it came out in jury selection, you can say that;" but if we're really going to talk about it, shouldn't we have something in jury selection for the judge to say? Right?

I mean, I'm looking at Part 1, which is the instructions to the venire panel, and it says, you know, "The parties can ask you about your background, experiences, and attitudes. They're trying to choose fair jurors who do not have any bias or prejudice in this particular case."

I mean, to me, if we're going to talk about bias or prejudice and explain that idea to the jurors, we ought to be talking about it at the beginning of the jury selection process. So that's just my thought on it.

CHAIRMAN BABCOCK: Great thought. Thank you.

Roger.

MR. HUGHES: Well, I have to admit that at the beginning when I read this, I was kind of indifferent. I wasn't sure what its value was, and I

thought the report at the end was very helpful, but what pushed me over the line and say "I think this is good" is that it gives counsel something to point to in voir dire and in final argument about what sympathy, bias, passion, and prejudice are and are not because often what happens is, in argument, you get lawyers going, "Oh, well, that's not sympathy or bias" or whatever, and the jury is kind of left to their own devices about what these terms mean and why they're important. And now you have a somewhat expanded instruction -- may not be perfect, but it's something the lawyers can point to to say, "These are the things that we're concerned about when we say 'Don't let sympathy, bias, et cetera' affect you." So on the whole I'm in favor of it. I mean, you can tinker with it some, but I'm in favor of it. Thank you.

CHAIRMAN BABCOCK: Thanks, Roger.

Richard Orsinger.

MR. ORSINGER: Thank you, Chip. First, I'm going to start out by apologizing that I didn't really become aware of this initiative until the end of August, so I haven't had enough time really to develop the background that I wanted to, but just so happened that I've been conducting recorded interviews on jury selection for the American Board of Trial Advocates San

Antonio chapter within the last few weeks, so I've interviewed one plaintiff's lawyer, one defense lawyer, and three jury selection experts about voir dire, particularly after COVID, particularly after the events of 2020. And I'm a little concerned at us voting on this in any final sense without the opportunity to come back later with more input.

But from my perspective based on my talking about this particular proposal among the three jury experts -- one from Dallas, one from Austin, and one from San Antonio -- jury selection experts, I'd like to just share the following perspective: There are timing questions about when you say things to the venire, and one is during voir dire, before the start of voir dire; one is immediately after the jurors are sworn, which is when this proposal would be read to the jury; one is at the end of each day of testimony during the trial; and one is after the evidence closes and right before the start of deliberations where this proposed instruction is repeated to the jury.

Now, with regard to talking to the jurors in voir dire, I started out exactly like Justice Christopher saying, "My goodness. Why wouldn't we tell them about bias, prejudice, and sympathy at the beginning of voir dire rather than after they're sworn,"

but the juror selection expert suggested to me that that would be counterproductive because you would be shaming jurors about their biases and their prejudices, which would make them less open to admitting them during voir dire.

And our legal system as well as the individual lawyers have an interest in having an unbiased jury. Well, I mean, when I pick a jury, I want as many people biased in my favor as I can have, but the other side wants the same thing, and the judicial system wants unbiased or balanced biases.

So the idea is that we probably can never talk to somebody, particularly in one little short statement, to let them understand what their biases are, much less overcome their biases. So that's probably fruitless.

The best way for us to get an unbiased jury or a jury with mixed bias is to open them up in voir dire so that they speak freely about what they believe. And we don't ask them questions like, "Are you going to vote for my side because he's a plaintiff" or "Are you going to vote against me because I represent a corporation?" Jury experts have cleverer ways of presenting questions that don't involve the specific facts but still cause people to reveal their preferences

in a way that these jury selection experts think is meaningful. So I think this is a point of discussion.

In fact, three of these people said that jury selection after 2020, including, but not limited to COVID, is different from jury selection before. And those videos will be available. If you're interested, email me, if you're not a member of the American Board of Trial Advocates, you can listen to them for no charge; but the idea is that the old demographics that we all grew up picking juries with -- minorities, gender, national origin, class, education -- none of them are predictive anymore, they all seem to agree.

And people are now reinventing how they're going to assess the ideal profile juror and the kinds of jurors they're afraid of and the kinds of jurors that they want because the predictability in the focus groups -- we're seeing it in the focus groups right now -- is that those old distinctions, those old categorizations, are no longer predictive of how people are going to vote depending on what their facts are.

So while we're dealing with this issue of implicit bias, let's talk about some other perhaps more important things that we can do to get better juries and better results, and I'm just going to list them briefly that I've written down here.

One is, we need to add to our supplemental jury questionnaires, which have been the same since I've been practicing law since 1975, and they're based on the significance of the old demographics. And they don't ask racially -- constitutionally impermissible questions, but they don't ask enough, and they don't ask stuff that's meaningful anymore given the Baby Boomers moving on and now we got Generation X'ers and Generation Zs and all these other people coming in; we have the effect of COVID; we have the effect of the election in 2020, just a lot of things, Black Lives Matter. All of this has changed the dialogue on social media. And so I think that we -- somebody, us or somebody else, ought to sit down and find out if we should broaden the questions that are in our standard jury questionnaire that we use across the state.

Second point: The jury consultants that I talked to about this proposal were very strongly in favor of a more often use of juror questionnaires, which right now, it requires the consent of the litigants to agree on the questions. Most judges will require that they be agreed upon, but questionnaires can be designed in such a way as to ferret out implicit biases that might be important in a particular case, like if an individual is suing a big corporation or if it's a

products liability case over drugs, or if it's a malpractice case against a doctor, or in a family law case, if it's a custody case between a mother and a father.

Perhaps a suggestion that I would make to be considered is to task the pattern jury charge committees, who are more or less segregated by topic, to perhaps come up with a balanced supplemental juror questionnaire that's designed in cooperation with jury selection expert psychologists and experienced trial lawyers to maybe ferret out people who have a bias that they don't realize that would be relevant to the jury selection, and that would allow both sides to take advantage of a questionnaire that might be more revealing than any individual questions in voir dire.

The other point, which I touched on briefly, is that if you ask the question -- if you talk to them about biases too early, they'll feel like it's something to be ashamed of. And the juror experts were telling me that at the voir dire stage, you want to encourage people to admit their biases with statements like "Everybody has biases and opinions. Some people -- based on their life experience, based on how they were educated; I have biases; the judge says I have biases. We all have biases. There's nothing wrong with biases.

The jury selection is the time for us to find out about what your biases may be so that we pick the very best jury." So the emphasis is to open the jurors up on voir dire by not telling them that biases are bad and then wait until they're in the box if you say that, if it has any effect at all.

Another recommendation I got from one of the juror consultants was that we could really greatly improve the quality of our juries from a standpoint of implicit bias if we didn't try to rehabilitate a juror who has expressed a bias with generic or perfunctory questions like, "Well, wouldn't you follow the law as given to you by the court," or "Wouldn't you apply the facts to the law as given to you by the court?" Those perfunctory, rehabilitated questions are a way of minimizing a jury -- a venireman's admission of a bias, and that admission of a bias is very valuable and may be very indicative that that juror should not sit either in the eyes of the court, challenge for cause, or at least for the litigants in one of their six peremptory strikes.

So this particular individual's feeling was that much more important than what we put in our instruction about not being biased, prejudiced, or based on sympathy is to take expressions of bias more

seriously when we get them and for the judges to be proactive about weeding people out if they've expressed a bias, even though they might agree, "Yes, Judge, if you gave me the law, I would follow it," which doesn't address the question of the bias at all really.

One of the things that concerned me was -- one of the case -- one of the issues I've had as a juror is jurors making up their mind too early when I'm the respondent. And some -- I'm not always a defense lawyer or always a plaintiff's lawyer. Sometimes I'm petitioner. Sometimes I'm respondent.

So it's an issue, and I think it's an issue that we should consider commenting on, which is that as a member of the jury, you should not make up your mind until you have heard all the evidence and until you have had the opportunity to hear what the other jurors think after you've deliberated because there is -- if you do studies of the psychology of humans making judgments, people make judgments too early, and then that colors the way they hear the evidence and the way they remember it -- that's in the instructions -- is that you can be biased by -- if you jump to a hasty conclusion, it can affect what you see and hear, what you remember about what you see and hear and how you make decisions, and that is well grounded in

the psychological literature.

And the danger is not that you're going to make a decision at the end after balancing all the evidence. The danger is you're going to jump to a hasty conclusion, or as this instruction says, jump to a conclusion too early, making up your mind too early, and then you don't hear the evidence; you don't hear the opposing argument.

So it seems to me that as important as these instructions here are, an equally important instruction is "Don't make up your mind until you've heard all the evidence and had a chance to deliberate," and that is the kind of instruction that you could give when you're sending the jury -- when you're swearing them in, after you've sworn them in and they're about to start the evidence.

And from my standpoint, the judge ought to do it at the end of every day: "Now, ladies and gentlemen of the jury, you have not heard all the evidence yet. Remember you're instructed not to make up your mind until you've heard all of the evidence, you've had the opportunity to hear the other jurors in deliberation." To me that is as important as implicit bias and should be considered.

Now with regard to the specifics of this

instruction, I will just note that reasonably, naturally and perhaps unavoidably, it's all based on paradigm of being in the same courtroom. I'm not sure that that paradigm will hold in all instances, so we probably need to do a version of this to use in Zoom trials that doesn't say, "Well, you are in the courtroom" or "evidence admitted in open court," "in this courtroom, open court, open court, in the courtroom."

It's -- we need to probably find a different way to say that if we're going to allow Zoom trials. And the word I'm getting, both from the high level and the low level, is that Zoom trials have proved to be very useful. The information I'm getting is that we are greatly diversifying the jury pool with Zoom jury trials, jury selection process, because people that would not otherwise be able to come downtown, don't have a car, don't want to take three transfers on the bus or whatever, are participating more in the jury selection process, and that is a blending effect.

All of these jurors are going to have implicit biases, but the broader and more diverse your jury pool is, the more of a mixture of diverse biases you're going to have, which is maybe one of the reasons why the jury result is better than just having an individual arbitrator or judge decide because you get a

lot of different perspectives, a lot of different implicit biases that all air each other out and then they arrive at a result.

So while I -- I don't have any objection to the language, but let me say one thing. The second instruction to the jury right before they're to go out to deliberate, this instruction is supposed to repeat the first instruction, which is when they first start to hear evidence, but we've left out in this description of making up your mind too early feelings, assumptions, perceptions, fears and stereotypes, in effect how we see and hear, but we eliminate or we omit how we remember what we see and hear.

At the stage of the trial when they're expected to remember what we see and hear, we drop the comment from the instruction at the beginning that they affect how we remember what we see and hear. That's probably just a typo, but clearly it deserves to be in the charge that's read to the jury right when they're going out to deliberate. So generally, I think this language is an improvement. I think that it's probably not going to make much of a difference.

And if we do make a final vote today, then, you know, just as private citizens, we have to do what we can; but if there is room for the opportunity to

consider expanding the juror questionnaires or having supplemental juror questionnaires or reinventing our approach to challenge it for cause, I think that would be beneficial.

So, Chip, thank you.

CHAIRMAN BABCOCK: Thank you, Richard.

Judge Estevez.

HONORABLE ANA ESTEVEZ: So I have one or two comments, the first one being I don't think this is going to be very helpful because of when we're giving it to them. We're talking about implicit bias, which is a bias they're unaware of. And so if you want it to be effective, it has to come before we do voir dire because they're not aware of it, so if you give them that instruction, then they'll be thinking about the questions that are asked to determine whether or not they have this bias.

And at the point that you're just giving them an instruction with no thought about it, because now they've already been picked, we don't know whether or not the attorneys went into implicit bias or not, but we do know they never heard about it until they've been seated as a juror, and they have -- no one asked a question regarding those biases that they were absolutely unaware of, which is the definition.

So I don't think this is going to be helpful at all. I don't think they're going to be listening to the evidence thinking, "Oh, I wonder if I have a bias I'm unaware of now" if you haven't given them the instruction before you started with discussing, you know, the overall case and what biases they may have. So I think that it's probably too much, too late.

The second thing, because of the placement, I don't know that it's helpful, and it just struck me -- it was very odd when I read it as the judge, because I'm the one that's reading this charge, and it says "Everyone, including me." Well, that could be helpful before voir dire because then I'm not shaming people, but at this point, they're sworn in. And I don't know -- it seemed to throw the focus off of them to me. And I don't think that there's a shaming issue at this point because they either have that bias and they're seated in the jury and they're unaware of it so they can't set it aside, or you discovered it prior because you -- prior to them being seated, so those are my two overall concerns.

And, you know, I think it's just -- if I was -- read this as a -- even as a lawyer, it's not -- it wouldn't make any difference. Either the lawyers really discuss these issues and did a good job -- I

mean, we have -- I've sat through a lot of really good voir dires, and the ones that come out and just start talking about beauty contests with five-year-olds and you're the grandparent, and they're going to pick their grandkid over everyone else, I mean, they get those type of thoughts in the juror's heads right at the beginning so that they can really start thinking and evaluating their own feelings about these specific things.

And if you don't have a lawyer that's going to do that, you're -- this is just meaningless. It's just more words that mean nothing. No one gets to explain it except at the end, which they can talk about that anyway in their closing arguments because you already have the words "Do not let sympathy, bias, or prejudice get in" -- you know, "get in your way," so those are my thoughts.

I would eliminate including me and -- unless you give them to -- ask us to give them an instruction before voir dire, I don't think it's helpful.

CHAIRMAN BABCOCK: All right. Thank you, Judge.

Kennon.

MS. WOOTEN: Thank you very much.

First I wanted to just give a little bit

more history on this proposal. It started with the Austin Bar Association Equity Committee suggesting that perhaps some amendments to the standard jury instructions to address implicit bias would be helpful. That committee also did some work to propose potential changes to the state or jury instructions, and there's communication between that committee and the State Bar Court Rules Committee, so just wanted to put that in the record.

The other thing that I thought might be helpful to put on the record is that the State Bar Court Rules Committee had a fairly significant amount of discussion about whether to use the phrase "implicit bias" in the instructions and ultimately and deliberately chose not to because that phrase sometimes can trigger strong emotions in people one way or the other even though it's a phrase used to describe something that I think we all experience everyday or almost everyday of our lives.

In that regard, in terms of timing, I don't recall there being a discussion at the State Bar Court Rules Committee level about whether to include this language before voir dire. And that could very well just be a lapse in my memory, and I can follow up with members of that committee and report back to the

court or this full committee, if that would be helpful; but for what it's worth, I agree that it makes sense to address this concept earlier in the process.

I think that saying everyone has these biases is very important. I think it should be said every time. I think people do have a reaction inside sometimes to the notion that they can't be fair or that they have these biases, and sometimes that reaction is negative even though I think there's recognition here and elsewhere that we all experience these implicit biases, and it's not a judgment of character.

In regard to the language itself, there was a lot of discussion at the State Bar Court Rules Committee about trying to write this in a way that would be easily understood; in other words, in plain language. If there was a missing of the mark, it wasn't intentional. But I will say that in the past, my recollection is that this committee, the Supreme Court Advisory Committee, has turned to people like Professor Wayne Sheathes (phonetic) who are very good at writing things in plain language and perhaps better than we are. So I don't think it's the end necessarily of the language, and there are experts out there we can turn to to facilitate the process of writing this in a way that's more easily understood and has less of that

lawyerly feel that I think Judge Yelenosky was picking up on in his comments.

The final point I just wanted to make is in regard to jury questionnaires. That wasn't, of course, part of the task at hand, but I completely agree with Richard's comments that we need to do more in that sphere than we are now. In every case I have that's complex, there is a process of crafting a jury questionnaire with the other side. It can be protracted. Sometimes it's not, but it always takes time.

And I've never had a case that's complex in nature for which the standard jury questionnaire really moved the needle much. And I think that a jury questionnaire, when crafted well, can do quite a bit of work and save time in the voir dire process in jury proceedings. Thank you.

CHAIRMAN BABCOCK: You bet. Thanks, Kennon.

Nina.

MS. CORTELL: Thanks, Chip.

I just want to make a couple comments. One, as everyone's already noted, this is a very complicated issue. I don't think anyone thinks that a couple of sentences are going to counter lifelong held

biases, if you will.

That said, I think we -- it is incumbent on us to try and not let perfection be the enemy of the good. I think both because it might have an effect, it will be certainly well intended and is needed. And I also think -- and I think we all need to think about this -- that from the viewpoint of the judicial system itself, to recognize this issue and try to find a way to address it, is a very important message that the judicial system should be sending. And as part of the arm of that process that (audio distortion), I think it is our responsibility. When and where we say it, the exact words that are going to be used, I know, will be well considered by this group and others, but I don't think simply because we don't think we can solve all the problems here that we should shirk away from our responsibility.

CHAIRMAN BABCOCK: Terrific.

Buddy Low.

Thanks, Nina.

Take yourself off mute, Buddy. It's a little button with a microphone and a line through it. There we go.

MR. LOW: Can you hear me now?

CHAIRMAN BABCOCK: Yeah, you're good now,

Buddy. Thank you.

MR. LOW: Okay. You're instructed that as a juror, you're the sole judge of the credibility of the witnesses and the weight to be given their testimony.

Now, am I prejudiced against a man that's shifty-eyed? Am I prejudiced against a man that won't answer the question directly? Am I prejudiced against somebody that keeps looking down at the floor? What -- that's the way I weigh what a person is saying, if they are direct or somebody that just spurts things out. Is that prejudice?

CHAIRMAN BABCOCK: Is that a rhetorical question?

MR. LOW: Yes. I mean, it says that, Don't let your own belief -- jump to conclusions based on personal likes, dislikes, generalizations, prejudices, sympathy, stereotypes. All those are stereotypes, people -- they look down at the floor like that. I weigh that as something.

How do you weigh the juror without considering things you consider in determining whether somebody is telling the truth or not? I've raised the question. That's all.

CHAIRMAN BABCOCK: Good questions, Buddy. Thank you.

Marcy, got any answers?

MS. GREER: Well, I think those questions go more to determining the credibility of the juror than the issue of implicit bias, which is, you know -- I mean, I'll share with you-all that I did an implicit bias thing on that Harvard -- it's a test that you do quickly that Dr. Banaji developed. And you answer a bunch of questions rapid fire, and it turns out that I'm biased against working moms, which who knew? I mean, I've fought my whole life to help working moms. I've worked my entire career, but apparently I hold an implicit bias, and it was really -- I didn't share anything about it for about a month because I was so horrified; but then I started thinking about it, and I thought what if I'm evaluating a young woman lawyer differently because she's a working mom because of this implicit bias? And you don't know where they came from.

But I think it's important to flag the issue that you could be judging the credibility of that person based on something that's beyond their control, not shifting eyes -- I mean, I agree with you, Buddy. I mean, if someone's not looking at you and doing all those things, that's totally fine, but I think this -- the instruction goes more to the concept of do you -- are you less trustworthy of -- there's actually one on

men in bow ties. If you really have an issue with people who wear bow ties, sometimes you judge their credibility.

I mean, I know that's kind of a funny one, but the reality is is a lot of people hold, you know, some bias where they're going to tend to judge somebody a certain way, maybe because it's a woman with a high-pitched voice and she seems a little too flustered or something like that or a man who's tall and apparently we think that they are better leaders for some reason. But those are all the kind of things that go into it.

And I thought Judge Estevez's point was really very well-taken, which is, this is the hook given by the judiciary, to Nina's point -- properly so, that then the good lawyers can take a hold of and bring out examples of biases that people can relate to because I do think we kind of tend to give credit to the people that we feel are most like us and then are more critical of the people that are not. And I think this is an important reminder that the judiciary can give.

And, you know, the devil's in the details, and maybe going with the language that's kind of been proven so far and continuing to learn from it is a good idea, but I think it's important that we start this

conversation and start people thinking about it, even if one or two or three jurors really think about this instruction. I thought it was really important that so many jurors -- juries had actually talked about this instruction in the cases where it was used. I can't remember who brought up that point, but I think that's something that was impressive to me.

CHAIRMAN BABCOCK: Great.

Judge Salas-Mendoza.

HONORABLE MARIA SALAS-MENDOZA: I don't think I was going to say anything new, but unless we had jurors do one of those quick Harvard tests before they came into jury selection, we don't get an implicit bias with language, for the most part. I just don't think we get there.

And then if we do that, then we're going to have those jurors that find out about an implicit bias that really surprises them. And so if it matters in a case, they're going to spend the whole trial over crediting that bias that they have, and we don't want that either. And so I think it's so complex that we can't really address it for jury selection purposes.

And I agree -- I think it was Judge Yelenosky -- or not -- Yelenosky who said, you know, when you read it -- I've read it before it came to this

committee, and I thought, "What does that address? How does this fix anything?" Right? Just seems like a whole lot of more lawyer words that really doesn't get to where we want to be. But I think some of the last few comments really sort of emphasize why it's important to me, is that it's important that it's coming from the lawyers, that it's coming from the judiciary. It might not be perfect, doesn't get it all the time, but we're saying it's important that we look at how we evaluate evidence and try to do it with a mind toward checking our bias that we may not know about.

And then I also think it gives good lawyers an important thing to think about as they do their own jury selection preparation, as they look at the juries they see, because we know that lawyers also come to their jury selection decisions with bias. But if we are saying it from the judiciary side, we're giving the cue that the judge needs to be checking their bias, the lawyers needs to be checking their bias, and those thoughtful jurors that kind of get it will give them some pause.

So I'm with Nina on this one, and I think Kennon said it too. It may not be perfect, but we've got to try, and there's no harm in trying. I think, you know, maybe there's some tweaking in the language, but

we're lawyers, so it's going to be wordy anyway, but I would say we've got to make the effort.

CHAIRMAN BABCOCK: Yeah. Thank you, Judge.

Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, we certainly got the discussion going, which is what I'd hoped we'd do.

You know, what Richard said got me thinking a lot about whether or not we're trying to get the person to recognize their bias and then avoid it or whether we're trying -- or both -- trying to simply enable attorneys to signal to jurors and be empowered to talk to jurors about this.

One other element I guess of that is to empower the jurors, some of whom -- there's a diversity of opinion that, you know, the language could empower jurors to say, "Well, I think, you know, that's a stereotype," or something like that.

I'm all for saying something but overall -- you know, for the reasons that everyone said, but it seems to me if you looked at it as are we going to really change a person, if we could change a person by having them sit in a trial for a while and get rid of a racial bias or something, then, you know, we could

solve the racial problem in the United States just by having everybody sit on a jury trial. I don't think people sit on a jury trial and come out of there, you know, without any of the biases that they came in with. So I don't think we're going to change people. And it is important, as Richard said, to be able to truly find out what biases are.

And I am concerned if you say this too early on that people will simply deny it because they don't know that they have it or they have been -- by hearing the instruction, they come to the conclusion that they shouldn't have that, and they're not going to admit to having it.

And there is a role, I think as I've heard judges, in terms of rehabilitation, that's a problem for -- that's a problem with judges sometimes because they'll allow rehabilitation, which is not really rehabilitation. And, you know, judges need to stop doing that, I guess because there aren't any magic words anymore.

So that's a roundabout way of saying I think we should work on this. I do think we should come up with some language, but I think we probably need to keep in mind the limitations that it will have in affecting the jurors in the way they think in a trial.

It's important for the profession to say it, but I think the diversity of opinion also, as Richard said, is really important. In my courtroom -- outside my courtroom in the hallway, I had a series of historical photos that I got from the courthouse, and one of them was a photo of the -- at least it claimed to be the first jury trial -- or jury in Travis County with an African American sitting on that jury, and obviously some time ago but not that long ago. Obviously having a person of a different race on a jury is going to be very significant.

And that -- you know, when we talk about these things, you know, are people shifty-eyed or whatever, you know, that's what people take into account on credibility. The problem is -- what we're really talking about is racial, gender, maybe accent, something like that; but it's really a racial and gender issue, and we're not going to say that. So I'm still perplexed by the whole thing.

CHAIRMAN BABCOCK: Thank you.

Harvey.

HONORABLE HARVEY BROWN: Well, I just want to agree with the comments that this is important for the judiciary, and I think it needs to be said.

I also think it's important that it be in

the court's charge because not only would it allow the lawyers to talk about it, but it allows the jurors to talk about it among themselves, and I think that could be valuable in particular cases.

As to what is said, my inclination is to agree with Richard's comments that doing it before voir dire will actually stifle conversation. And I think the jury consultants that I have worked with in voir dires I've done, you want as much free discussion as you can possibly get, and anything that might possibly keep that from occurring is a bad thing. So I think giving it after they're chosen is the right time.

I like the fact that it's redundant. And I know Stephen said that he didn't like the fact that it is redundant. I like it because it emphasizes it, and it says it a lot of different ways. And I think when you're making a point, sometimes you want to make that point just one time, but sometimes it's really important if you want to make it two or three times. And so I think the redundancy here has a purpose.

I think Stephen's idea of a example would be good if we can come up with one to make it come to life. None comes right immediately to mind, but I thought that might be a good idea.

I'm against the idea of giving it every

day. I think at the end of day, jurors are ready to go home. And to have to formally read something I think would actually be counter-productive.

I, at the end of the day, would give a quick reminder, you know, of something about like not discuss the case among yourselves or something, but it would be very informal, and because it was informal, they'd listen. But if I had to turn and read the same thing day after day, I think the jurors would basically start to tune it out. So I think it would hold more weight if it was given twice during the trial and left it at that.

So anyway, I think it's a real good effort. I thought it was really well written. If we want to get some plain language person to help us, that would be fine, too, but I thought it was very well written in a very plain language myself.

CHAIRMAN BABCOCK: Great. Thank you, Harvey.

Yeah, Bill.

HONORABLE BILL BOYCE: I'm in agreement with everything that Judge Brown just said.

I make this observation. One of the things I would want to think through is how does the addition of this language interact with a presumption

that the jurors follow the instructions they're given, and how, if at all, does that impact appellate review of judgment?

And in specifics, I think the concepts are appropriate and, for all the reasons that have been stated, are appropriately and necessarily put in the charge.

I think additional discussion is warranted when we talk about language, and I'm going to specifically focus on the part of the proposed revision that says, "You must not jump to conclusions based on personal likes or dislikes, generalizations, prejudices, sympathies, stereotypes or biases."

My observation would be that the broader we make this language, the more potential power we're giving a presumption on appeal that the jury follows the instructions that it is given. And so when I see a word like "generalizations", that's a very broad word. I wonder how that interacts with generalizations that are not necessarily tied to concerns about bias. I'll give you a for instance.

If there is a fight in a case where there's a corporate defendant and a generalization is made that all corporations are greedy, how does that interact with this instruction?

These proposed instructions are aimed at a specific topic. I think some care and attention to making sure that the list of language that we use, the synonyms for the terms that we were using, are appropriately encompassing the specific concerns that prompt this instruction and are not so broad that they impact other types of things that can go on at trial that perhaps become the subject of a presumption later on.

So to sum up, the concept is sound, I think -- and appropriate and necessary. I think the more additional words beyond stereotypes or biases that are referenced in the charge, the more opportunity there is for perhaps some broader reach than this instruction is intended to have.

CHAIRMAN BABCOCK: Thank you, Bill.

Roger.

MR. HUGHES: All I really want to say, I appreciate a lot of the comments earlier. And there may be a good reason for developing a different instruction to give at the beginning of voir dire. Let me say why I think that.

Most of the cases that come up for jury trial just don't warrant, and at least in a civil case, elaborate questionnaires for jurors. Judges don't want

to wait for jurors to fill out pages of interesting questions. They just want to get warm bodies up in the courtroom so that you can voir dire them and select the jury. Same thing for the jurors.

So I think an instruct -- some sort of instruction similar to this one would be a useful launching point for the lawyers and the court first to create an atmosphere where jurors understand why they're being asked these questions and it's just the lawyers just being nosy, et cetera, et cetera, creates an atmosphere they understand why they're being asked these questions and what a truthful answer would look like and that they will be respected.

The other thing I want to say is, maybe even within the committee there's something of a generation problem. When you're my age, you tend to think of biases and prejudices in terms of race, religion, et cetera. I'm being told now that the problems that people come to the courtroom have to do with fear and suspicion, fear about government officials, you know, and wanting to know whether you got a D or an R after your name, distrust of authority, et cetera. It's not just the old prejudices that the way -- the classifications when I was in my 20's and 30's, but it's suspicion about authority figures and

maybe even about the judge, which is why I suddenly like the instruction where the judge says, "even I," because we've just gone through four years where people wanted to engender distrust of the judiciary and the courtroom because of, you know, who appointed you to the bench, what party did you run with, et cetera, et cetera.

And maybe it's something to open it up to -- an instruction at the beginning to make people understand that this is the sort of things we're going to be -- we may have to talk about.

I think it would be very helpful to getting them to open up. We may not change minds, but we'll sure help lawyers and judges pick lawyer -- pick the jurors who just shouldn't sit on the jury. So I've said my piece. Thank you.

CHAIRMAN BABCOCK: Great, Roger. Thank you. And I tell you what: Your timing is pretty darn good. We're ready for our afternoon break, almost to the minute. So good timing on your part.

And there is a comment that has been -- there's some chats in the chat room, so we can look at those, but we'll be back in 15 minutes at 2:45. So we'll stand in recess for now. Thank you.

UNIDENTIFIED SPEAKER: Recording stopped.

(Recess: 2:29 p.m. to 2:45 p.m.)

UNIDENTIFIED SPEAKER: Recording in progress.

CHAIRMAN BABCOCK: So we're back -- we are back on the record. And Eduardo has his hand up.

Eduardo, do you want to contribute something.

MR. RODRIGUEZ: Yeah, I just want to tell everyone that in my experience in trying cases and in talking to jurors afterwards, they really do pay attention. And I've sat on juries. I've been in -- called to several jury panels, so I've sat out there with the people without them knowing I was a lawyer.

And, you know, people tend to complain and bitch and moan about, you know, losing a day at and going to the jury panels and so forth; but once they get on a panel, once they get in front of a judge, they really start paying attention to what's going on. And they do pay attention to what the judge tells them about the whole process and the instructions that he gives.

And so that being said, it's important to me that we continue to have language that the court gives to jurors about bias and prejudice, and I guess echoing a lot of what Richard has said; but I think it's important that we know that jurors, once they get in a panel in front of a judge, not the big jury panel, but

individual panels that are being selected for jurors in a particular trial, they really start paying attention to everything that the judge says.

And in talking to them after many trials that I've lost, they have taught me that they pay attention and do the very best that they can to follow all of the jury's instructions -- I mean, all of the instructions, including calling each other out when they're bringing up issues that might be -- where they might not be following the court's instructions on bias and prejudice. I just want to let y'all know that.

CHAIRMAN BABCOCK: Thank you. I'm just going to disagree with one thing, Eduardo. You have not lost many jury cases, so I'll dissent from that statement.

Judge Miskel.

HONORABLE EMILY MISKEL: I think just to summarize what I've heard a lot of folks saying so far is, we don't think this instruction will actually change anything, but this is an important subject and the judicial system needs to send a message about this. And so I'm just questioning whether the jury instructions are the best place for that because I think the rest of the instructions tell the jurors what to do, like, you know, don't flip a coin, don't trade your votes, don't

make up your mind first and then figure out the numbers.

I guess I'm just wondering, what is a juror going to do after reading this instruction? You know, we're telling the juror, "Don't make a decision placed on biases you don't know you have." The whole preceding voir dire process, the purpose of voir dire is to get into investigating bias and talk about -- you know, talking about bias, so I'm not sure what this particular change adds.

CHAIRMAN BABCOCK: Okay. Thanks, Judge. It's a very salient point.

Professor Carlson.

PROFESSOR CARLSON: Looking at it from a big picture, in response to what Judge Miskel just discussed, I think it's really important that we emphasize to the jury that you decide the case on the admitted evidence because I don't think a lot of jurors really think about that enough as opposed to what they bring with them as they walk in the door. That's it.

CHAIRMAN BABCOCK: All right. Thanks, Elaine.

Kennon.

MS. WOOTEN: I love following Professor Carlson because I can say I agree completely.

CHAIRMAN BABCOCK: That's what we do with

her.

MS. WOOTEN: Yes. Yes.

I'll add that we already have in the standard jury instructions language about bias and prejudice and sympathy. Right? So this isn't a novel concept. It's already there.

And part of what the goal was, underlying the additional language, is to get the jurors to think a little bit more about these things that shape our decision-making without us even being aware of it.

And I know that we're not going to solve a problem relating to implicit bias with some additional words in jury instructions, but it's amazing how powerful recognizing this thought process can be in relation to how we assess ourselves and the decisions we make. At least for me in delving into implicit biases, I've discovered things about myself that I wouldn't have had I not gone there, had I not ever thought about it.

And so I don't want to discount the power of putting some additional words in these instructions to help the jurors think a little bit more about what it means when we say, already in the instruction, "Do not let bias, prejudice, or sympathy play any part in your decision."

We get them to think a little bit more

about what we mean by that and delve a little deeper, and I don't see harm in that. I don't think it's the solution to implicit bias and what that can do in regard to our decision-making that's not ideal for juries and decision-making processes in the judicial system, but I go back to what other people have said in that this is important. And I don't want perfect to be the enemy of good in doing something more than we've done already to help jurors and potential jurors think about how implicit biases could shape their decision-making processes.

CHAIRMAN BABCOCK: Great. Thanks, Kennon.

Sorry. David -- no, Lisa Hobbs then David Jackson.

MS. HOBBS: Well, and also to follow-up on that and to sort of answer Judge Miskel's question that I think was more rhetorical than deserve an answer, but I can't find it right now as I was preparing what I wanted to say, but in the materials I read last night, there was a Dallas County pilot program that used implicit bias instruction as a pilot program, and the result -- and then they surveyed the jurors afterwards, and it was a significant number of people who -- jurors who said, "It did make me stop and think," much like what Kennon is saying this process as we've talked more

and more about implicit bias over the last few years has done for her. These jurors are saying, "I noticed that instruction, and I think it made a difference in how I deliberated in the case." And it was a pretty high number, over 50 percent. And I'm sorry, I can't find where I read that now. It may be because we got 31,000 pages of things to read in one night.

Anyway, that's my comment.

CHAIRMAN BABCOCK: Okay. Thanks, Lisa.

David Jackson.

MR. JACKSON: I just have a quick procedural question. I've noticed that we've had a lot of chats popping up on the screen. I think we need to make it clear whether we -- those chats are on the record or off the record because I don't think our court reporter has the ability to listen to what's going on and read the chats.

CHAIRMAN BABCOCK: Yeah. And that's my fault. And then currently, they are not part of the record because I have not been --

MR. JACKSON: Okay.

CHAIRMAN BABCOCK: -- reading them out as I did at the last meeting. And so I'll try to do better, but thank you for pointing that out.

MR. JACKSON: I just didn't want anybody

to think they were making a brilliant comment that never got noticed.

CHAIRMAN BABCOCK: No. Very, very apropos. And I didn't frankly notice the chats until the last break, so I'll try to do better.

Scott Stolley.

MR. STOLLEY: Thank you, Chip.

I think one way to say what we're trying to do here is to encourage jurors to engage in some self-examination. And although that may be a fool's errand, even if we can only get one juror in one trial at a time to engage in more self-examination, I think we've done something good. So I'm in favor of doing something like this.

CHAIRMAN BABCOCK: Great. Thank you, Scott.

Let's turn now to our next agenda item, which is jury rules, and the same subcommittee is responsible for this as the last one. And Professor Carlson and Tom Riney, which of the two of you is going to present on this, or is it going to be a third party?

PROFESSOR CARLSON: Tom is taking the lead.

MR. RINEY: Thank you, Chip.

CHAIRMAN BABCOCK: You bet.

MR. RINEY: We were asked by Justice Hecht to take a look at the jury rules because he said they were outdated and do not reflect common practice. And if you study those rules, you will see that that's a bit of an understatement, as we will see in just a moment.

Secondly, he asked us to consult with the Remote Proceedings Task Force to see if there's anything in the rules that would prevent a barrier to remote proceedings.

Our conclusion is that the only rule that really would have to be substantially rewritten is Rule 226a simply because it just assumes that the people are all there present. So depending on what comes up with respect to remote proceedings, we think that Rule 226a would have to be substantially revised.

Now, one of the things that we want to point out is that in addition to these Rules of Civil Procedure, there are statutes on juries in Chapter 62 of the Texas Government Code. They're also outdated in many respects.

If you look at those statutes, like the rules, they assume that the jury is actually being selected by pulling names out of -- off a jury wheel. They assume that's physically being done, that they even contemplated if there were a jury shuffle.

We talked about that on our committee, and we don't think -- we could not find -- at least no one on our committee was aware of a county that does not use computers to randomize the selection of jurors. It's allowed by statute, although, again, some of the statutes are outdated as well.

So one of the things I did was talk to one of our Texas panhandle judges who is -- has five different counties in his district, including Roberts County, with a population of 929 people, and even Roberts County uses a computer for jury selection. So unless someone else has some other information, we are going to assume that everybody now uses a computer and nobody's using the jury rules.

Before we go into any specific changes, our committee also recommended that we might want to take a look at trying to put some of these rules in plain English. I suppose that could also be said about a lot of our Rules of Civil Procedure, but we did endeavor to try to simplify some of the language. Not only do the rules talk about practices that are no longer followed, they use language that it was, in some cases, archaic and just difficult to follow.

So, Chip, if it's okay, I will go through the rules that we have changed and then just pause at

the end of each of them. Would that be acceptable?

CHAIRMAN BABCOCK: That would be terrific, Tom. Thank you.

MR. RINEY: All right. Now you'll notice that in some cases, we have combined rules, and the first place to start would be Rule 221 in your materials. And we combined Rule 221 and 222 by making a Subpart A and a Subpart B. That'll give you an idea of the method that we were using with respect to some of these. And we basically just eliminated the language about drawing names from a jury wheel.

We decided -- the rule initially said that you could challenge the array if the officer summoning the jury had not followed the legal or statutory requirements, acted corruptly, or had willfully summoned jurors. We took out "acted corruptly" simply because we would presume that if you acted corruptly, you'd not follow the legal and statutory requirements.

And then, as I mentioned, we put Rule 222 as Part B because that seemed to be part of the same topic, that is the challenge of the array and what happened with the outcome.

CHAIRMAN BABCOCK: Hey, Tom. Could I interrupt you for just two seconds?

MR. RINEY: Sure.

CHAIRMAN BABCOCK: Do you know the origin of the "acted corruptly" language?

MR. RINEY: We do not.

CHAIRMAN BABCOCK: Does anybody on the committee know the origin of that? Yeah, Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, sorry. I don't know the origin of that, but I argue that we should not take it out. And I think we need to wait and see what happens in the Brazoria County investigation. I don't know if y'all are familiar with that.

MR. RINEY: I will add that I became aware of that after the time we changed this language. And I'm not familiar with the details, but from the little that I know, Justice Christopher, I agree with you. Before we change that, perhaps we ought to pause a little bit.

CHAIRMAN BABCOCK: Yeah.

HONORABLE TRACY CHRISTOPHER: I don't know what is going on down there either, but, you know, big investigation.

MR. RINEY: Yeah.

CHAIRMAN BABCOCK: Yeah. And I don't know for sure, which is why I asked the question, but I thought that that was put in there to cover a situation

where somebody, you know, might have been following the statutory requirements and yet had a perhaps bias that was informing what they were doing, a bias that would be unconstitutional. I don't know that for sure, but anyway, I agree that I don't think it should be taken out. I think it should be left in there, so -- didn't mean to interrupt, Tom, but go ahead.

MR. RINEY: No, not at all, Chip. That's a good point.

Although I can't specifically say that the committee voted on -- subcommittee voted on this, I think we would all recommend that the legislature take a look at these statutes as well because they just definitely need some work.

CHAIRMAN BABCOCK: Yep.

MR. RINEY: All right. Let me mention next that because we have combined some rules, I don't think we've done a good job going back and renumbering them, so these rules would need to be renumbered.

Let's go now to what would be the current Rule 225 on the next page. The title of that rule is "Summoning Talesman." And I want to thank Justice Hecht. This gave me the opportunity to add to my vocabulary.

I've looked at that rule and never even

realized how to pronounce that word and had no idea what it meant but talesman, according to Black's dictionary -- in case some of you are unfamiliar as I was -- is a person who happens to be standing around the courtroom when you don't have 24 jurors, and they just grab them and say, "Okay, you're on the panel." That's a talesman.

And we don't think anybody does that, and it might not be a good idea. So we have recommended elimination of that rule.

CHAIRMAN BABCOCK: I will tell you that in certain JP courts when they don't have enough jurors, they'll go out on the street and just bring some people in, but I agree with you. That probably should be eliminated.

MR. RINEY: Okay. If there's nothing else I'll move on to 226a.

CHAIRMAN BABCOCK: Yeah.

MR. RINEY: All right. 226a, you know, we've treated these separately, implicit bias instruction and then what we needed to do to update things.

And I apologize. I did not notice until yesterday that some of the redline just did not make it onto this final copy. So the language that you have for

226a does not have the redline. Let me explain what we did differently.

If you look at the instructions to the jury panel and jury, you'll see there on the bottom of Page 3, it says before we begin, "Please turn" -- well, it doesn't say please. We added please -- "turn off all cell phones and electronic devices."

Now we updated the language. It used to say, "Don't go to social networking websites such as Facebook, Twitter or Myspace." We think it's better to refer to "Facebook, Twitter, or other social media platforms."

That same change is incorporated in -- excuse me -- Instruction No. 3 on the next page. And I'm not going to go through each of them, but every time that that language applied, we made the same changes.

Then if you'll go over to Page 5, you'll see Paragraph No. 6, "Do not investigate this case on your own." We have given some more specific information about what the jury should not do, taking into consideration the proclivity to look things up on the Internet. I mean, you know, we've heard examples of people, you know, sitting there in the jury box and they hear something, and they try to look it up on their phone immediately. And so we have tried in exhibits --

excuse me -- in Instruction 6 to go to -- to give some specific examples of what the jury should avoid.

Then we added the next paragraph about "This rule is very important." And kind of like the discussion we had a little bit go about the implicit bias instructions, you know, we think the jurors do listen to what the judge says, and sometimes something specific is helpful. So we've tried to explain why they shouldn't do that other investigation that their normal habits would cause them to do, and then we add another paragraph that says you must follow these instructions, and if you don't, it not only might have to require a new trial, the judge may also hold the juror in contempt for violating the instructions.

Now, let me pause there because I think those are some of the significant additions that we added. See if there's any discussion.

CHAIRMAN BABCOCK: Anybody have any comments about what we have so far as Tom has outlined?

Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, I do remember that the pattern jury charge put in that we might hold you in contempt of court, and the Supreme Court already took it out. So that particular thing had been brought up in the Supreme Court Advisory Committee.

I think you-all approved it. And then in the final ones that came out, the Supreme Court took it out, just -- before we go into a long discussion about that again.

CHAIRMAN BABCOCK: Yeah, but we have new members of the court now.

HONORABLE TRACY CHRISTOPHER: Well, true. True.

CHAIRMAN BABCOCK: And some of those members were on the Supreme Court Advisory Committee that recommended that.

HONORABLE TRACY CHRISTOPHER: True.

CHAIRMAN BABCOCK: Good point, though.

HONORABLE JANE BLAND: No, I was against the contempt.

CHAIRMAN BABCOCK: What else, Justice --

MR. RINEY: Justice Christopher, I think someone on our committee did bring that up. I'm sorry.

HONORABLE TRACY CHRISTOPHER: Okay. All right. I mean, I would like to bring up the shuffle again, but, you know, I know I've lost that vote many times.

CHAIRMAN BABCOCK: But always in good spirits.

Lisa Hobbs.

MS. HOBBS: Well, I'll stand with judge

Christopher if we want to revisit the shuffle. I'd like to revisit it too.

Tom, did you guys pull up the 1996 task force? It was like a Jury Selection Task Force? They did a report, and I think it was around '96.

MR. RINEY: Well, the answer is no, we did not, or I did not.

MS. HOBBS: I might pull -- actually, it was later than that. I wasn't practicing in '96, so it was -- I was rules attorney, I think, so it would have been like 2004 maybe. Justice Hecht might remember.

But some of these rules, I think it was more statutory -- like do we need statutory changes and stuff, but I do think we went through the rules too. So just -- I commend that to you as you continue to study these.

On 225a, just going back a little bit, because there doesn't seem to be a lot of conversation about that, but as I read 225, it's a randomization rule. So to the extent you do go out and grab somebody off the street, make sure you don't just add them to the end of the row here. We want you to get them randomized. Right?

So unless there's a statute prohibiting people from going out and getting people off the street,

I kind of like that rule being in there that they should be, you know, shuffled -- not to use the word shuffle because I don't want to -- you know, that's a loaded term, but they need to be randomized into the pool that came in as they were summoned. So that's just a general comment about that because it sounds like at least Chip thinks it might be happening at least in JP courts.

And then if we -- this is just -- you said something about renumbering, and I -- please don't renumber. If you -- I would rather have gaps in numbers than not be able to search 226a. From research purposes, like, please don't renumber. Just take out a rule. That's fine. It doesn't -- so those were just my general comments so far.

And just -- oh, I'm sorry, one more. For clarification, everything on Page 5 of the pdf under Paragraph 6 before "Do you understand these instructions," that whole, like, kind of three paragraphs, that's all new, even though it's not redlined as such?

MR. RINEY: Well, to be accurate, I'm going to have to look at my --

MS. HOBBS: Okay. It's okay. I can pull up my rule book too.

MR. RINEY: Okay.

MS. HOBBS: I was just curious if I -- if that was all newly drafted or if it's kind of just edited.

MR. RINEY: No. Subpart B is added.

MS. HOBBS: Okay.

MR. RINEY: And I think -- well, actually paragraph -- Subparagraph E used to talk about don't look stuff up on the Internet, and what we did was we expanded that, and then we moved it up from the bottom to the top, more or less, because we thought that it merited more attention near the top.

MS. HOBBS: And then the next two paragraphs, are those just edited or are they brand new?

MR. RINEY: Let's see. The rule -- they are edited.

MS. HOBBS: Okay. Thank you.

MR. RINEY: And the -- except for the paragraph about "each juror must obey my instructions," we added that, I believe. I know we added the part about contempt of court.

Okay. Just looking at my rules, it appears to me that's a whole new paragraph, "Each juror must obey my instructions."

MS. HOBBS: Okay. Thank you.

MR. RINEY: And that's my recollection.

And the only other significant change in Rule 226a is over -- I believe that it's on Page 7, the sentence before Paragraph 7, we're repeating this instruction about "Don't investigate the case on your own." And we added the sentence that says "if you observe any juror violating this rule, please report it to the bailiff or me immediately."

CHAIRMAN BABCOCK: Great. Does that cover it, Lisa?

MS. HOBBS: Yes, thank you.

CHAIRMAN BABCOCK: You bet.

Rich Phillips.

MR. PHILLIPS: All right. I'm going to turn my camera off so hopefully we won't have the same problem as before.

I like the change to Internet stuff, but I'm a little concerned because it -- well, first of all, Bing is going to be like Myspace, or may already be like Myspace. And Safari is not a search engine. It's a web browser.

So I think we need to be a little careful about what we -- I mean, I think it's great to tell them, "Don't use any search engines or any electronic devices," but we need to be sure that we're putting the right sort of terminology in there and not suggesting

something is a search engine that is not.

CHAIRMAN BABCOCK: Great. Thanks, Rich.

MR. RINEY: I think we would agree with you on that. We spent some time on this. We were trying to not get back into another Myspace situation, and we welcome any comments on that.

CHAIRMAN BABCOCK: Richard Orsinger. Unmute yourself, Richard.

MR. ORSINGER: Just to follow up what was just said, I did a search for search engines, and Google, in 2020, had 92.5 percent of the market; Bing, 2.44; and Yahoo, 1.64. So it's so dominant, I would suggest we say "like Google" and then stop there.

CHAIRMAN BABCOCK: To further their dominance.

MR. ORSINGER: Well, I think that if we don't put "like Google," they may wonder what we mean; but if we put "like Safari" or "like Bing" or anything else, we'll just confuse them, so --

CHAIRMAN BABCOCK: Okay. Yep.

All right, Tom, you want to keep going or --

MR. RINEY: Yeah, if that's okay.

CHAIRMAN BABCOCK: Absolutely. Let's do it.

MR. RINEY: Let's move on to 227. Now, I realize now that there's going to be some criticism of this because we've changed the rule number and moved it. So let me explain why we did it first.

Rule 227 used to be Rule 230, and we have revised the language a little bit. Let me read you current Rule 230 since I did not get that in redline. It says, "When 24 or more jurors if in the district court or 12 or more if in the county court are drawn" -- I'm sorry, wrong one -- "In examining a juror, he shall not be asked a question, the answer to which may show he has been convicted of an offense which disqualifies him or that he stands charged by some legal accusation with theft or any felony."

Now that follows the rules regarding challenges for cause. And so we thought it might make more sense to put that question prior to the time that we're talking about challenges for cause because that would seem to be where it would go logically; but, again, no real -- I don't think that's crucial.

You can see we also tried to rephrase that rule so that it is -- the language is just a little bit simpler. I don't know if we accomplished it or not, but that was our intent.

CHAIRMAN BABCOCK: I don't know if this is

the majority sentiment, but I would join those who said don't renumber the rule. Just leave blanks if we have to.

MR. RINEY: Right. I'm sympathetic to that argument, and we had not thought about that.

Okay. So what is current -- what I have now -- let's go to Rule 228, challenge -- we called it "Challenge to Juror." And what we have done there is basically, this used to be Rule 227, so we probably should keep it the same. And let me double-check, but I don't think there were any real changes -- there were no changes on that.

CHAIRMAN BABCOCK: Okay.

MR. RINEY: And then on 229, we tried to combine -- well, we broke down 229 into a Challenge for Cause, and I think we broke that out -- I think on that one, we just thought that it read better if we broke it into Subparts A and B.

Hang on, Chip, just a second. Let me make sure that's what we did. I'm sorry. My notes are not --

CHAIRMAN BABCOCK: Okay. That's fine.

MR. RINEY: Okay. Actually, what Part B does is -- yeah, it just breaks it into two parts and tries to clarify some of the language.

CHAIRMAN BABCOCK: Okay. Judge Christopher has a question at this point.

MR. RINEY: Okay.

CHAIRMAN BABCOCK: Judge, you'll have to unmute.

HONORABLE TRACY CHRISTOPHER: Sorry.

So I'm a little concerned about Rule 230 and why it was ever in there to begin with because when jurors go through the qualification process, you know, often a judge is there doing it, and one of the disqualification matters is that you've not been convicted of misdemeanor theft or a felony. So I mean, they -- jurors are asked questions to show if they've been convicted, and a person is disqualified if they have these convictions.

So I'm not sure where that rule came from or why it should be in there rather than just being rewritten. You know, and it kind of depends on in some places, the, you know, clerk asks all these questions, but the jurors are always sworn in and, you know, giving them an oath in terms of their qualifications, and you have to say you're qualified. So I don't know. I wonder why it was ever in there to begin with when, you know, we do ask people to self-disqualify themselves in open court.

MR. RINEY: We did add in our rewrite of that rule that -- about just not asking it within the hearing of the other jurors or in the presence of the other jurors.

HONORABLE TRACY CHRISTOPHER: But, I mean, you know, that happens. That happens when the, you know -- the jurors are qualified before they ever come to the courtroom. Right? So, you know -- and in some cases, the jurors are qualified in the courtroom with all the parties there before voir dire starts. Like in smaller counties, that's what'll happen. Right? But, you know, in the bigger counties the qualification happens, you know, in the jury room, and you lawyers never see it. But, I mean, they're asked in open court, and they are given an oath to, you know, identify them -- you know, I mean, is it in the courtroom? Well, kind of, and sometimes it is in the courtroom.

So I don't know. It's just an odd rule to me that I've never focused on. And before we just rewrite it, I think we ought to think about it.

CHAIRMAN BABCOCK: Thank you.

MR. RINEY: You've got a point, particularly in the smaller counties where they report to the courtroom.

HONORABLE TRACY CHRISTOPHER: Right.

MR. RINEY: Okay. All right. On Rule 231, we did -- we thought that rule really wasn't necessary because if you take a look at Rule 232 -- let me explain that. Rule 232, we've changed the language because the current rules, you know, tend to just talk about district courts and county courts, and that's no longer appropriate because some county courts-at-law in certain cases have 12 jurors. And, therefore, we tried to change the language to talk about, you know, situations where it's just either a 12-person jury or a six-person jury, whether it is a 12 or six is determined by the statutes, not the rules.

So we've tried to combine that with Rule 233 on peremptory challenges. And other than that, we really didn't make any additional changes to the existing Rule 232 -- excuse me -- 233.

There was some discussion about the motion to equalize and whether we should change the language on equalizing the number of peremptory challenges, but after quite a bit of discussion on a couple of different occasions, we decided to keep that language the same.

Our experience was that there was a lot of case law about equalizing strikes back in the '80s but that there has not been a lot of controversy since then. And so, you know, one might conclude that there is an

understanding among the Bench and the Bar as to what that terms means, and so probably we ought not to endeavor to try to change that language.

Let me also mention we added a comment to what was Rule 233. This has always been very puzzling to me. The Rules of Civil Procedure determine the number of peremptory challenge for the actual jurors, but then one has to go to the Texas Government Code if the court decides to seek alternate jurors to determine how many strikes that you get for alternate jurors, and it depends on the numbers of alternate jurors the court allows: One strike per side for one or two additional jurors -- or alternates rather -- and more if there's more alternates than that.

So we thought that it would be helpful both to the court and to practitioners to add this comment about looking at the Texas Government Code.

Any questions there?

CHAIRMAN BABCOCK: Okay. Any comments on the matters that Tom's been talking about up to this point? No hands up.

There's one. Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Sorry. So I've got a situation where, as we're going through voir dire, I keep track of challenges for cause, right, as we

go through. And I know that about, you know, two-thirds of the way through the voir dire, I don't have enough jurors. Right? So I usually stop then and bring over more jurors as opposed to waiting until the very end. So I don't know if I was doing it wrong or what, that it has to be done this way, that it has to be we have to wait till the very end and let people make peremptories when I know there's not going to be enough jurors.

It's just a question. I don't know the answer to it. No one complained, so there was no appellate ruling on my decisions.

CHAIRMAN BABCOCK: Ah.

MS. HOBBS: Yeah, then small counties sometimes you don't know -- you know you're about to bust a jury, but there's nobody waiting in the waiting room like in Harris County to even call anymore. So I've definitely had judges warn me: Y'all keep it up and you're going to bust this entire panel.

CHAIRMAN BABCOCK: Okay. Levi.

HONORABLE LEVI BENTON: There was a headline I saw I think last week from the National Center of State Courts -- I didn't read the article, just the headline, and maybe others saw it -- where Arizona has barred the peremptory strikes. And I don't know how this discussion is going to end today, but if

it's going to end -- if it's contemplated that it might end with a vote and a recommendation to the court, I'd like to see us put that off until we have the opportunity to consider what Arizona may have done based on the headline I saw.

CHAIRMAN BABCOCK: We'll follow your recommendation if you'll tell us if you're in Arizona.

HONORABLE LEVI BENTON: No, sir. I'm surprised you would have to even ask. I'm in Wakanda, Wakanda Forever.

CHAIRMAN BABCOCK: Okay. Yeah, I don't know where this is leading us, Levi, but we've got -- we got your thought in the record, so we'll keep going.

HONORABLE LEVI BENTON: Okay. Thanks.

MR. RINEY: Okay. Let me move on to the next one, which is some language change in Rule 234. We were advised that in certain courts, it's not actually the clerk that handles the challenges -- or excuse me -- handles the peremptory challenges rather, that the list may be delivered to the court's designee. That may be the clerk, it may not be. So that was the reason for that change.

And we also made the change regarding if the case required a 12-person jury and so forth. Instead it's just saying district court.

CHAIRMAN BABCOCK: Professor Carlson.

PROFESSOR CARLSON: Yeah. Tom, did you want to mention anything about Rule 233?

MR. RINEY: Yes, I think I skipped right over that. Hang on just a second.

Okay. 233. Elaine, I'm sorry. Which one? My numbering is off, so I don't have that right.

CHAIRMAN BABCOCK: C.

MR. RINEY: Okay. I'm sorry. I'm not following what you're asking me. The one on peremptory challenges?

PROFESSOR CARLSON: Sorry, Tom. No, the shuffle.

MR. RINEY: Okay. Yeah, that is the one that I overlooked, and I apologize for that. And that was one where we decided not to get into the issue on the shuffle, but we noticed that the way that the rules had been drafted -- that's 224, I think. Yeah, 223 and 224. 223, as it's currently written, talks about jury list in certain counties, and those are counties that are governed by interchangeable jury statutes. And they talk about preparing the jury list, and then it talks about the shuffle, which is mentioned -- is in Subpart C of Rule 223, but then it -- Rule 224 talks about preparing the list in those other counties that don't

have interchangeable juries.

And what we tried to do -- and, again, I recognize the problem of changing rule numbers now, we tried to put it all in one rule, and then Part C was the shuffle. The shuffle of course contemplated a mechanical shuffle, so we have now talked about random order. But also on Rule 224, in the counties without interchangeable juries, there's really no reference to a shuffle, although I know everyone's always had the practice that the shuffle would occur in any county regardless of whether there were interchangeable juries or not. So by combining them, that was our attempt to deal with that, but I do recognize the problem with changing the numbers.

PROFESSOR CARLSON: Thanks.

CHAIRMAN BABCOCK: Great.

MR. RINEY: Thank you. That went right past me.

CHAIRMAN BABCOCK: Judge Miskel.

HONORABLE EMILY MISKEL: I was just going to ask: I know one of the tasks you were doing was revising for archaic language, and I think the oaths are very archaic.

I know it says you just have to give those oaths in substance, and so I have rewritten them to be

in plain language, but I don't think there's any reason in 2021 we need to be saying that "you will true answers give," you know. I think we can put that in a little more understandable plain language.

I think 226 is a jury oath, and then there's also a jury oath 236, and I would just request those be modernized.

CHAIRMAN BABCOCK: Thank you. Thank you, Judge.

For the record, Levi Benton gives us a link to a news article in BloombergLaw.com, U.S. Law Week, Arizona Bans Use of Peremptory Strikes in State Jury Trials. And there is apparently an article at that link that would be informative, according to Levi.

HONORABLE NATHAN HECHT: If I could just add there, Chip, that is what happened. And the Arizona Supreme Court did it because they didn't think that peremptory strikes could be squared with Batson procedure.

CHAIRMAN BABCOCK: Okay.

HONORABLE LEVI BENTON: Something that some of us have been saying for at least a decade, but anyways, thank you, Chip.

CHAIRMAN BABCOCK: Yeah, you bet.

And we don't have to revisit the shuffle

that you and I agree on, Levi, with perhaps others, but --

HONORABLE LEVI BENTON: Yeah.

CHAIRMAN BABCOCK: -- we've lost that fight at least to date.

HONORABLE LEVI BENTON: Well, no -- oh, yeah, today. Right.

But just to reiterate, I do support some of the suggestions of the committee. All I ask is that before any recommendation goes to the court, maybe we might study in more depth of what Arizona has done. I don't think anyone on the committee would argue that Arizona is a bastion of liberals, so anyway, that's my comment.

CHAIRMAN BABCOCK: Thank you.

Anybody else?

Tom, back to you, I guess.

MR. RINEY: That's pretty much it, Chip.

CHAIRMAN BABCOCK: Okay. I will consult with the Court, and if there are no further comments, we'll see whether the Court is interested in more discussion on any of these issues, Arizona or any other state or foreign country that might have an interesting approach to things.

So that'll take us, I think, to the next

and last agenda item, which I think gets back to Bill Boyce, if I'm not mistaken, our oft discussed suits affecting the parent/child relationship and out-of-time appeals in parental rights termination cases.

Bill, I think you're leading the charge on this, if I'm not mistaken.

HONORABLE BILL BOYCE: Correct. Thanks, Chip.

CHAIRMAN BABCOCK: You bet.

HONORABLE BILL BOYCE: So following off on the memo that you have dated September 1 -- I'm not sure what tab that is listed as -- this is the memo addressing appeals in parental termination cases.

Part of this memo, just because it's a multifaceted discussion, recounts the steps that we've taken already towards getting to resolution of some of these recommendations.

If you want the road map, I will direct you to Page 2 of the memo, issues for discussion. We are now looking at Issue 1.b., proposals for untimely appeals and ineffective assistance of counsel claims.

Just for brief recap, going through the memo -- and Lisa helpfully identifies this as Appendix P. Thank you.

So we've started out with notice of the

right to counsel in the summons. Authority to appeal we spent a fair amount of time working through a proposed revision to Rule 306 that would specify circumstances under which an attorney is going to remain in the case or not. And, again, just to put this in context, we're talking about that subset of parental termination cases where there is a right to counsel.

I'm not going to re-plow all that old ground because we talked about it across multiple meetings and got to a recommendation that appears on Page 4 of your memo. That was the discussion that was aimed at getting this determination about whether or not the appeal is going to go forward in the realm of a procedure under Rule 306 where there's kind of a binary choice about whether it's going to go forward or not. So we're going past that stage now in addressing the next portions of the inquiry.

So if you go to bottom of Page 6 of the memo, there was a -- there's a relatively brief discussion -- this is where the new part for today starts. The first part of the new part is Subsection C, addressing motions for extension of time in these appeals.

If you think back a little bit, you may recall that we had a prior discussion about this topic

in relation to motions for extension of time to file petitions for review.

And the recommendation that came out of that discussion, which was forwarded to the Court, was, in shorthand version, basically a no-fault motion for extension of time procedure, coupled with notice of the ability to pursue the petition for review, so in other words, not requiring showing of, you know, fault or good cause, but essentially an ability to file a motion for extension of time within 90 days after the appellate court rendered judgment or the Court of Appeals' last ruling on timely filed motions for rehearing.

MS. BARON: Bill --

HONORABLE BILL BOYCE: Yeah.

MS. BARON: -- I think it might be better to call it a motion that covers a failure to timely file or extend before that. Right? So it's a late, out-of-time petition for review procedure, right, where the attorney fails to file it, is my recollection.

HONORABLE BILL BOYCE: Right. And that is a more precise way to --

MS. BARON: Okay. Thank you.

HONORABLE BILL BOYCE: -- articulate it.

And the basic recommendation with respect to timeliness for the appellate process -- for the

intermediate appellate process would be to conform that process to the process that's used in connection with an out-of-time petition for review. In other words, those procedures should sync up.

And the -- you know, we can unpack that a little bit more, you know, with the benefit of hindsight. It probably would be helpful if the prior recommendation had -- if I had attached that to this memo, but I didn't do that. So we can unpack this a little bit more, but for our purposes today, the recommendation would be to sync up those procedures so that they operate the same way, which would be the appellate court and the Texas Supreme Court.

And just by way of further background, the recommendation on the PFR process was forwarded to the Court, and the communication came back that the Court would take that up -- that recommendation for the PFR process collectively with all of these other moving parts that we've been discussing.

And so that discussion on Page C -- or Subsection C of your memo is kind of a shorthand rendition of this larger discussion.

CHAIRMAN BABCOCK: Great. Before we have discussion about that on the last topic, just for the record, there has been a chat involving Justice

Christopher, Judge Miskel, and Richard Orsinger where they are reminiscing about the old language of true verdict render, even if it's a little old-fashioned. And Richard Orsinger says there's something to say that using solemn language gives more solemnity to their duty to a true verdict rendered.

And so the record will now reflect that yearning for yesteryear, which perhaps should be retained in this year.

So sorry to interrupt. I'm trying to keep up with the chats.

HONORABLE BILL BOYCE: That's a discussion that may be going on longer than even appeals in parental termination cases.

CHAIRMAN BABCOCK: Yeah, right. Exactly.

HONORABLE BILL BOYCE: Moving to Subsection D, ineffective assistance of counsel, this has been the largest focus of the most recent discussion from the appellate subcommittee.

And, again, to put this in perspective, the House Bill 7 -- well, let me back up even a step beyond that.

So we're dealing with those subset of parental termination cases in which there's a right to counsel. If there's a right to counsel, then it follows

that there is a right to effective counsel.

The standard in this circumstance with respect to parental termination cases, following the Texas Supreme Court's decision in In re: M.S. follows the Strickland v. Washington standard from U.S. Supreme Court for criminal cases and applies it in this particular context.

To refresh your recollection, Strickland is a two-prong test that requires a showing that counsel's performance was deficient, not merely bad but deficient by showing errors so serious that counsel was not functioning as the counsel, guaranteed under the Constitution, and secondly, that the deficient performance prejudiced the litigant by showing that they were so serious that they deprived the litigant, the defendant, of a fair trial whose result is reliable.

For purposes of our discussion, I think the main point to focus on is the timing and the circumstances of how a complaint like that gets raised and decided.

In the criminal context, it is almost always done through a collateral attack, a writ asserting denial of constitutional right to effective counsel. It is rarely accomplished in the direct appeal. It's not 100 percent precluded from happening

in the direct appeal, but it is mostly precluded from happening in the direct appeal.

Primarily, I think -- without going on a long detour, I think a shorthand version is that the four corners of a record alone are, generally speaking, not going to be sufficient to satisfy the standard under Strickland. There needs to be additional factual development, circumstances involving inability of the counsel involved to address the circumstances. So there are not very many situations where -- in the criminal context where it's going to happen on a direct appeal.

And we've got an exemplar cite in the memo, but across federal or -- federal decisions or the Texas Court of Criminal Appeals, this discussion is generally channeled into a postconviction collateral litigation attack on the conviction on these grounds. So that's kind of the backdrop.

The standard is parallel, but the question really to be discussed today is whether the procedure here is going to be parallel or not. And it takes us to the House Bill 7 Task Force recommendation, which is summarized in the memo that you have starting on Page 7.

The Task Force recommendation notes this distinction in the way that circumstances are handled in the criminal context versus the parental termination

context where, as a practical matter, the parental termination litigation is probably -- or almost always goes through the direct appeal process, and that's the end of it. Where it ends up is where it ends up.

And so the question arises: What, then, is the proper vehicle or mechanism to permit consideration of a claim by a parent whose rights have been terminated, that that termination was the result of ineffective assistance of counsel.

The House Bill 7 Task Force came up -- met on this and deliberated and made a recommendation for an addition to Texas Rule of Appellate Procedure 28.4(d) -- that's shown at Page 7 of the memo that you have -- which I'm not going to read the long rule to you verbatim, but the summarized version of it is essentially an abate and remand procedure on an expedited basis to consider, during the direct appeal, whether or not there is a basis for a claim of ineffective assistance of counsel.

If you look at the proposed rule, Subsection D, it contemplates that there will be a short fuse on this, that there's a short fuse on filing it, there's a short fuse on deciding it. I'm not sure it says it 100 percent in these words, but as I understand it, and I think as the subcommittee understands it, it's

a remand for an expedited evidentiary hearing in trial court during which the appeal is abated. And the time period of the abatement does not count towards the deadline under Rule of Judicial Administration 6.2a for the expedited determination of the appeal.

So it -- there's going to be an expedited hearing with a record. That then goes up to the Court of Appeals after the abatement ends for consideration with the rest of the appeal.

And so the -- that kind of sets the table for the discussions that the subcommittee had. And, again, I'm going to offer my summary of it and then certainly invite the rest of the subcommittee members to add their observations, if there's anything that I omit or describe incompletely.

But I think it's accurate to say that the subcommittee was in general agreement with this Task Force approach to create this mechanism for the consideration of the ineffective assistance of counsel claim in the direct appeal in some circumstances, but the issue that was identified and the issue that is going to be -- that we're going to ask for the guidance of the full committee on is how to handle this in the circumstance where the same trial counsel continues as counsel for the appeal.

The discussions we've had so far have indicated that many times, there's going to be separate appellate counsel -- different appellate counsel than trial counsel, maybe most times, but I don't know that there's a requirement or an ability to have separate appellate counsel for every appeal of a parental termination decision.

And so if we're going to challenge this discussion into the direct appeal with this abatement procedure, then it's one thing to say that new appellate counsel can come in, look at the circumstances, decide whether or not there's a basis to assert ineffective assistance and then kick off that procedure, but if the same lawyer is continuing from the trial court into appeal, it seems to be untenable, in the subcommittee's view, for the same lawyer to be both pursuing the appeal and simultaneously asserting that that same lawyer was ineffective even if there's a willingness to do that. It's a difficult position in which to put the lawyer if you're in the situation where the same lawyer is continuing on the appeal.

And so the topic for discussion -- or the recommendation is for the committee, the full committee, to consider: Do we want to have a situation where there is this direct appeal with an abatement mechanism in

circumstances where a new attorney comes in for the appeal but authorize a collateral attack. Probably it would fit within the realm of a procedure like an equitable bill of review, but that could be a topic of discussion.

But as a conceptual matter, do we want to have an ability to have some level of collateral attack on a short fuse to address situations where ineffective assistance of counsel may be asserted against either an attorney who is the same attorney that handled it in the trial court and then pursues it on appeal or separately, an ineffective assistance claim involving conduct of new appellate counsel that comes in that, by definition, can't really be addressed while the appeal is ongoing. So that's one of the topics that we will solicit the committee as a whole to give us their guidance on.

A couple of additional mechanical questions or procedural questions that the subcommittee discussed, if you look at the proposed rule, House Bill 7 Task Force recommended rule, the first words of the first sentence say for good cause shown by written motion filed no later than 20 days after the record is filed, the appellate court may order a remand for the limited purpose of holding an evidentiary hearing.

So one of the points that we discussed is

whether there was any appetite to try to further define good cause, and the consensus of the subcommittee discussion was that there -- it would be very challenging and run the risk of being too limiting to try to define good cause in such a way that is sufficiently flexible to cover every possible permutation of ineffective assistance that somehow might get asserted.

Bottom line, I think the subcommittee's sense was that better to leave that undefined -- the good cause standard undefined in the rule and allow it to be addressed and developed in the ordinary course of case law development as things progress.

The related procedural or mechanical issue was whether there was any kind of additional qualification that should be put on, whether or not an appellate court may order a remand to have this evidentiary hearing -- ineffective assistance, in other words. Is this just going to be a matter that's up to the judgment of the Court of Appeals? Should there be some additional standard applied? The one that was discussed in the subcommittee was some sort of a prima facie showing with the thought that, you know, again, the big, big, big picture here is that the balance that's going on is the balance between achieving

appropriate and necessary standards to protect the parent -- the terminated parent's rights versus not prolonging the process so much that the interests of the children involved are being compromised because their living circumstances and the identification or ability of a parent to participate in their lives is being kept in limbo for prolonged period of time due to litigation.

So that's kind of the balancing of interests that we discussed in a couple of different contexts.

So in this context, the balance in question is, you know, should it really be left as this draft rule is in terms of putting it in the court's judgment whether or not a remand and abatement is appropriate, whether or not a sufficient showing has been made, or should there be some additional weight on that in terms of requiring a prima facie case or something along those lines.

Again, appellate court is not going to be constitutionally able to make any fact findings about anything, but it would be able to make a determination about whether it should be remanded to the trial court for whatever fact findings are needed to address an ineffective assistance claim.

So those are the current pieces of the

discussion that the subcommittee would ask for guidance on from the committee as a whole. But, again, Chip, before we start off that discussion, I'd like to invite anybody else on the subcommittee to elaborate on anything that they think is needed.

CHAIRMAN BABCOCK: Yep. Subcommittee, you're on.

Pam.

MS. BARON: Yeah. First, let me thank Bill for continuing to head this up. It really is very complicated because we're balancing so many interests and trying to do it in as efficient a way as possible, and it's very difficult to do all of that.

In terms of moving the process along, I guess I would add that I do think if we do go with the ability to challenge in the direct appeal that I would at least in a comment, if not as a requirement of the motion, make clear that Strickland is the standard and that the motion has to show the elements of Strickland so that the Court of Appeals has something reasoned in front of it or that at least tries to parse out those elements and explain why there has been ineffective assistance of counsel.

It's a very high standard. It's very hard to meet. Most of these motions will get denied, will

not delay the appeal; but in those rare cases where it does happen, it would help if, you know, the Court of Appeals had very clear statements in the motion that let it triage these and decide which were meritorious and deserved an abatement.

It's a very short abatement to try and move the process along, but I would definitely want to see Strickland in the rule in some way.

CHAIRMAN BABCOCK: Anybody else from the subcommittee?

Bill, you've done too good a job.

All right. Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, the way it is currently written, we have good cause concerning an allegation of IAC, and to me, those things don't necessarily go together the way it's currently written. So I don't know how to rewrite it, but to me, they're not the same.

I mean, so what are most of our IACs? Failed to object, failed to call a witness, screwed up the jury charge somehow. Right? Those are your main things. Right? Those are all objective: Failed to object to something, failed to call a witness, hopefully that's objective at that point after you've had some time to talk to your client. And, you know, you've

looked at the jury charge and it was a mess. Those are all objective things.

Now whether trial counsel had some strategy, that's unknown to the appellate lawyer, right, which is why I'm concerned about these deadlines that you have in here. That's an unknown. What was the strategy?

Failing to call witnesses. "Well, I talked to the witnesses, and they weren't going to be any good." That also is going to be unknown generally. Right?

So to me, you know, I think it's a very -- an allegation of IAC? That's easy enough to make, but to actually prove in any sort of meaningful way what I see is cannot be done, and we cannot review it on three days. I mean, you know, especially if it's, you know, "You didn't object to this critical piece of evidence." Well, that requires reading the whole record to determine whether this critical piece of evidence was really critical or not.

So I don't exactly know the best way to do it, but an allegation of IAC, that is something that we know. Whether they can actually prove it is what the trial court is for because, you know, strategy of the defendant, like failed to call a witness, "They never

told me about the witnesses." "I talked to the witnesses. They were terrible." All right.

You know, the second lawyer is not going to know that, for the most part. Right? They're not going to know the strategy. So allegation may be a -- I don't know exactly how to say it, but I wouldn't say good cause and link it to an allegation.

CHAIRMAN BABCOCK: Okay. Thanks, Judge.

Lisa.

MS. HOBBS: Okay. So I'm sensing some tension between Pam and Judge Christopher of why is this so difficult. Right? Because, you know, Pam obviously wants some substance like "Strickland is the standard. Show the court of appeals that this is meaningful and a real problem before we disrupt this whole process and abate it." And Judge Christopher is like "I can't do that in three days, like even a well-briefed motion, it's probably not going to be" -- and I sympathize with that completely.

I don't know where I fall on it because, you know, if it's really just based on an allegation, the problem is, well, everybody -- I don't mean -- I mean hopefully you have good appellate lawyers who are not going to make an allegation like this just to delay the process or, you know -- but there's a risk of that

at least.

So I was thinking more on Pam's side of that this motion would be a substantive motion that lays out probably not good -- I probably wouldn't use good cause. I probably would do prima facie or something where they recognize the standard is high, they tell you why they think it's a problem here, and then the Court of Appeals, you know, needs to say "yay" or "nay," at least, "Well, we can't review the entire record, but you showed us enough, so we're going to send it back."

But Judge Christopher, it was -- I hear you that that's really hard for the appellate courts. I probably still lean Pam and hope you don't get a lot of these, but that's -- I probably shouldn't say that to you. You probably are like, "No. Vote with the judge."

HONORABLE TRACY CHRISTOPHER: I mean, you know, I just think that there are a lot of claims of ineffective assistance of counsel. Right? I mean, lawyers forget to object to things. Lawyers have reasons they didn't call witnesses. You know, lawyers might not know about the correct way to submit a case to the jury, but, you know, you got to figure out ultimately whether, A, there was an excuse for not objecting or not calling a witness, and then, B, whether it would have made a difference at the end of the day.

MS. HOBBS: So do you think --

HONORABLE TRACY CHRISTOPHER: And making a difference at the end of the day, you know, on three days is just not doable.

MS. HOBBS: Yeah, and then I guess the third category would be jury charge issues.

HONORABLE TRACY CHRISTOPHER: And even then, you know, even if there is a jury charge issue, sometimes, you know -- well, it's very interesting.

So on the criminal side, jury charge error is almost never error. On the civil charge jury charge error is always error. So, I mean, you know, reversible error.

So, you know, it's kind of an interesting -- if we're using Strickland IAC standards and then we are imposing a civil jury charge standard, it's just going to be different.

MS. HOBBS: Okay. So I'm just sympathizing. I'm not -- and open-minded to what other people have to say on that. I have a few other comments.

I don't like that if the Court of Appeals doesn't rule on the motion for remand, it's denied by operation of law; but, again, this is one of those things like, well, it can't really be granted -- like we

need something, if they don't rule. And of the two, denied is -- but it just seems to me if this is the one time that the terminated parent has an opportunity to raise that they had ineffective assistance of counsel at trial, it's hard that it could just like fall off some conveyor belt without them ever knowing whether the Court of Appeals actually took their comment -- like that just kind of bothers me from a policy level. It might bother me even from a due process level. So I'm just pointing out things that bother me without telling you the solution or even how I would vote.

And then I noticed in the rule that, first of all, I'm not sure we need to be told that the hearing needs to be recorded, but maybe; but then "the trial court shall make findings of fact as to whether appellant was prejudiced." So why just the one prong, like why don't they need to show that it was significant error or whatever the first prong is? Like, why are we -- like, what if there's a dispute -- I don't know. I can just see -- it's a two-prong test, and we're just telling them to make findings on one prong. And it seems like I can imagine a situation -- though, when I'm put on the spot right now, I'm not imagining it -- where there could be also a factual dispute about both. So that just -- I highlighted that as I was reading through

it.

And I think that's currently my comments, although I will not promise that those will be my only comments for the rest of this discussion.

CHAIRMAN BABCOCK: Thanks, Lisa.

Bill.

HONORABLE BILL BOYCE: So to follow up on Lisa's last point, I need to confess to my inaccuracy of typing, that the proposed rule refers to findings of fact as to whether any counsel rendered deficient performance on behalf of appellant and whether appellant was prejudiced. So that -- mea culpa. That's my typing.

I wanted to follow up on -- to Justice Christopher's question because sort of the fork in the road that I think the subcommittee identified, and now we're starting to explore, is that, yeah, the short time frames are challenging. Okay? They're going to be challenging for a Court of Appeals if you went with this form of rule as is.

And so really the balancing question is: You know, are those concerns better addressed by elongating the time frames that are contained in this rule in keeping a mechanism for doing this in the context of a direct appeal. So it's not three days.

It's X number of days and an abatement is Y number of days and so on and so forth, or is it better to channel this discussion towards an equitable or other collateral attack after the direct appeal is over.

And that takes us back to the balancing of interests about whether the rules should be set up to emphasize additional time to review these claims, recognizing it's a difficult standard, while keeping the ultimate determination about the parents' rights and the children's relationship in limbo for a longer period of time, or potentially in limbo for a longer period of time.

And so that's a long-winded way of asking this question, which is: If the time frames can be adjusted to some doable, reasonable amount of time, you know, is that preferable, or is the sense of the committee that we really need to avoid trying to shoehorn that into the direct appeal and deal with it some other way? That's kind of a threshold question.

CHAIRMAN BABCOCK: Pam.

MS. BARON: Yeah, I wanted to make the correction that Bill made because that did get left out.

And my other question is, you know, this isn't an area where any of our subcommittee practices, so we're doing our best. We have been consulting with

some people who do more of this than we do.

But in terms of ineffective assistance of counsel, we are look -- this is only cases that are brought by the State to terminate the parent-child relationship or to impose some type of conservatorship, so it's a very limited class of cases.

I would assume that the jury charges are pretty standard in these cases. Lisa is shaking her head. No, they're not? Okay. So I was wondering --

MS. HOBBS: Well, no, just -- and I know I'm out of turn here, but just to answer that, the problem is this law is developing so quickly. There's been more emphasis on this area of law, and the statutes are changing, like I think they just changed last session even. So it's just sort of what I would call like radical movements of just judicial awareness of issues and also legislative awareness of issues and rights that weren't even recognized, you know, ten years ago.

So I just think that -- like we have -- Karlene Poll does a big part of our docket, are these termination appeals, and we are -- I mean, it's easy to see jury charge error and all kinds of problems, but it's just because it's just moving really quickly right now. That will pause at some point, but right now it's

moving quickly, in my opinion.

MS. BARON: Okay. That's very helpful. Thank you.

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: This is going to be sort of scatological to try to respond to some of the different comments by the different speakers. And I was going to try to not say anything at all, but -- today on this, but here I am.

One of the first questions that will need to be decided or addressed is who can file this motion because hybrid representation is a problem that refers to a litigant that is represented by appointed counsel, cannot appear and represent themselves. The situation I expect to see most often is an Anders brief filed in a termination of counsel -- in a case by counsel and then at that point, the litigant wants to complain about counsel either trial or appellate or both. And so that's going to be a problem.

As far as the Strickland standard, it definitely cannot, should not, no way-no how, apply to the motion. The motion needs to be more in the nature of a probable right of recovery or, in this context, a plausible ineffective assistance of counsel gets you the remand if that's what you choose to do and the way you

decide to approach this problem. The Strickland standard is to give the relief not to get to the hearing.

I guess one of my observations is that the most common two ineffective assistance of counsel, one, that we see argued; two, that we have actually seen in practice, is the failure to timely file the notice of appeal because they relied either on the 30-day rule and that it was a 30-day, so they missed the 20-day for accelerated appeals or they missed the -- miss it because they think one of the motions for rehearing or motion for new trial or to modify the judgment extended the time frame when, in fact, it doesn't because it is an accelerated appeal, and this won't help us there because this is -- excuse me -- because this is all on direct appeal.

If I was going to approach this problem, I would focus where Bill ended his last remark: Is this the place to do it, in the direct appeal? And I would contend that it is not. If you allowed the appeal to proceed -- let me make one other observation first.

In the criminal arena as Bill started off, we don't even get these substantive, ineffective assistance of counsel claims effectively prosecuted through a motion for new trial when they have 90 days to

present their arguments in a motion for new trial hearing. So the suggestion that you're going to be able to get this within 20 days after the record is filed I just think is not going to happen.

But I will say that if you want at least to have a procedure there that will catch the most egregious of these, I would argue that you should allow a motion for new trial to be filed in the trial court proceeding and let it continue to develop on an ineffective assistance of counsel claim while the district appeal is pending. It would almost be like an original proceeding, the -- a habeas-type proceeding -- filed in the trial court that doesn't extend the time to file the notice of appeal, but you pursue that entirely separated from the direct appeal of the merits of the case. Once you get -- and it ought to be long enough that you can actually get the record in the appeal and allow this ineffective assistance of counsel or proceeding to be pursued simultaneously with the direct appeal.

Whatever you do with regard to the timing and the methodology, you've got to remember that there's a statute out there -- it's Family Code 161.211 -- that affects the time within which a direct or collateral attack on a termination order can be effective.

And I don't know if this will cause us to bump into that or not, but it is a -- it sort of always has suggested to me that there is an opportunity for a collateral attack that could be pursued simultaneously with the direct appeal.

And I'm going to quick scan my notes real quick. And, of course, I agree wholeheartedly with Judge Christopher that the three- and seven-day and then with what Lisa said, the seven-day default to a denial, is just -- I can't gather together three judges in three days, I mean, much less try to get a ruling. So, I mean, that just is a really unworkable time frame.

Scanning my notes quickly, I think that covers most of the points I was going to try to make. And I apologize for even reengaging, but this is just not an area that -- I mean, because you're going to get into Anders cases, and that is going to be what triggers the terminated parent to say, "Wait a minute. Wait a minute. We need to talk to these witnesses that you -- "You didn't prepare the case at all." And then you go back into that whole investigation process, which is one of the big issues that is being kind of brought to the forefront in Anders cases or in criminal cases ineffective assistance of counsel now. Did you talk to this witness? Did you pursue this line of defense on

punishment?

And so trying to even get this done on a dual-track system in 180 days after the trial judge renders the order is, I will say, an impossible task, but it -- you know, we've been asked to do that before and accomplished it, so --

CHAIRMAN BABCOCK: Sure. Thank you, Judge.

Richard Orsinger.

MR. ORSINGER: Thank you, Chip. I wanted to say that -- well, first of all, to address Pam's inquiry, there's been a lot of foemen in this area recently because some Courts of Appeals in Texas ruled that it was unconstitutional to submit termination cases on broad form, and they would require that you have individual questions for each parent and each child. And that was one of the things that the task force -- House Bill 7 Task Force addressed and I think has been implemented.

Maybe things will settle down, but there's been some turmoil in the area. There was a lot of charge error waiver for a period of time. I'm not sure that isn't going to go on depending on how quickly the courts adopt it; but at any rate, for the time being, it's just been kind of an area of ferment.

I felt that we needed to have this addressed on direct appeal because we just can't effectively address it collaterally like a habeas corpus in a criminal proceeding. First of all, we don't want people bringing out-of-time collateral attacks to undo a placement, or a termination and placement, that has been affirmed by the Court of Appeals and reviewed/denied by the Supreme Court and then all of a sudden how many months later, somebody's raising ineffective assistance of counsel and undoing all of that?

I think we need to resolve the case permanently with the direct appeal, either this removal is solid and you can place the child for adoption or it's not, but we need to know that, in my opinion, at the end of the appeal.

Secondly, what would be the mechanism for the appointment of a lawyer in the collateral proceeding and someone wakes up and says, "I think I was ineffectively represented. This Court of Appeals says all my error was waived." So what do they file a motion with the trial court that doesn't have jurisdiction asking for the appointment of an attorney? Where's the money going to come from? What is -- I just don't see how there's any mechanism for a lawyer to bring -- for an indigent parent -- an out-of-time collateral attack.

On the criminal side, at least there's some private institutions and law schools that will do that pro bono, but I don't think so, not here in this area.

However, the dual tracking that Justice Gray -- Chief Justice Gray suggested is very intriguing to me -- I had never even thought of that before. We discussed on the House Bill Task Force about lengthening the motion for new trial period so that a newly appointed lawyer could investigate the claim of ineffective assistance both from the standpoint of failing to develop the case properly, which would be calling witnesses like Justice Christopher said, or just failure to object, which if you're newly appointed, you won't know that there was a failure to object until you have a transcript of the trial, the clerk's record.

So the idea of dual tracking with a lengthened period to file a motion for new trial and a lengthened period to develop the evidence with the powers, like deposition authority, for example, to take the deposition of these supposedly key witnesses that could have been called but weren't, to allow you to make your motion for new trial record and send that up while the case is already being evaluated on the normal, you know, maybe that's the best way to combine the two.

Rather than slow the direct appeal down to allow this evidentiary second look, run it in parallel and then have the court -- at the end of the day, the Court of Appeals will issue one judgment on both claims.

And there may be some scheduling problems. I know that the Court of Appeals justices, in particular -- one in particular was -- we need -- any time we add to the delay of the appeal, we need to add to their disposition period of the case because they're going to get crowded at the end. If we give them time on the front end to develop all this, they're running out of time to hand down their opinion. And so that was why the task force recommended that we add onto their six-month deadline whatever additional time we give.

So having said all that, I feel strongly against a writ of habeas corpus, out-of-time collateral review, but I'm intrigued by the idea of a dual track, where the ordinary appeal is on one track and the motion for new trial is on the other track.

Now what the criteria are to qualify for the motion for new trial? I'm inclined to say it either ought to be prima facie, showing that it believed it would be warranted, or maybe something slightly stronger but certainly not the standard by which you would ultimately rule on the complaint when you're on the

panel on the Court of Appeals. That's too much to require in a showing that -- that's that preliminary.

Thank you, Chip.

CHAIRMAN BABCOCK: You bet, Richard. Thank you.

And there has been a chat exchange between Lisa Hobbs and Justice Gray, Lisa asking what the family code provision was regarding collateral attacks, and Justice Gray indicating it's Family Code Section 161.211.

So with that, we'll go to Justice Christopher.

HONORABLE TRACY CHRISTOPHER: I like Justice Gray's two-track system because I, you know, think the three days and seven days, it's impossible to prove ineffective assistance in that period of time.

And so if the, you know, second stage, the motion for new trial would have to be filed -- based on IAC would have to be filed 20 days after the record is filed and then, you know, deadlines after that. I'm not certain I would do one, you know, final appeal, but I might track it as two different cases, you know, just because -- kind of treat it like a habeas just from a -- I don't know what I can say, just for an internal recordkeeping, I think it would be better. And plus if

the -- well, for example, if the Court of Appeals for some reason was going to reverse the regular case, we don't even have to get to the IAC. Right? So, I mean, we shouldn't be holding up the whole case on the IAC allegation that's going down a little separate track from ours.

So I think it's an intriguing idea. It would take a little bit of work. It's basically a habeas proceeding within a really short period of time.

CHAIRMAN BABCOCK: Great.

Bill.

HONORABLE BILL BOYCE: I wanted to come back to Chief Justice Gray's observation about how a lot, perhaps most, of these IAC claims are going to be triggered by the Anders brief. An Anders brief is the last stage of this discussion or the second-to-last stage, but I guess what I'm trying to figure out is how a dual-track system would work if you've got Track 1, which is the direct appeal, the main appeal, Anders brief is filed, there's no nonfrivolous basis to go forward here, and the basis for that is, you know, all the purported error was waived or whatever.

And then you've got a simultaneous track addressing ineffective assistance before the Court of Appeals decides whether or not the case is going to get

ended on Anders grounds. I'm just -- I'm getting confused about how that might work.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, I mean to me an Anders brief will say, you know, they didn't object, but they should also be, you know, thinking is that ineffective assistance of counsel, when, you know, they're going through the Anders brief.

So, I mean, we could certainly include as a requirement of an Anders brief in these cases that I found no evidence of ineffective assistance of counsel -- I mean, that's supposed to be kind of in there anyway -- that would warrant this, you know, habeas procedure. You know, I just think that would have to be a potential requirement of any Anders brief.

I do think that like -- and this is what we've done occasionally at the Fourteenth Court, if we get an Anders brief by the same lawyer who tried the case, okay, we do not accept that. We send it back and tell the judge to appoint another lawyer to look at it, right, because one of the jobs that the lawyer is supposed to do is to look for IAC. So, you know, if he's the lawyer who tried it and then the lawyer on appeal saying "Nothing to see here," we've sent it back for a new lawyer.

CHAIRMAN BABCOCK: What if you get a brief, an Anders brief, by a different lawyer, so you don't have the -- you know, somebody grading their own paper, and the Anders brief miscites the record on a critical point -- for example, it says there's no basis to reverse because the father admitted that he beat the kid every day and really didn't care much about him anyway, where the record shows that that's exactly wrong. He said, "I never beat him and I love him to death." Is that ineffective assistance, and how do you handle that?

HONORABLE TRACY CHRISTOPHER: When we review an Anders brief, we review the record. And if we see that they have missed an issue or incorrectly cited what the case is about, we again send it back for a new attorney to write a new brief. And, you know, a couple of times -- we've done it several times, but, you know -- and, I mean, that's just what has to be done because --

CHAIRMAN BABCOCK: I know, but --

HONORABLE TRACY CHRISTOPHER: -- you can't tell a lawyer, "Well, you screwed up. Now write me a good brief." It's just better to get another lawyer to write it.

CHAIRMAN BABCOCK: Is that practice

consistent in the Courts of Appeals across Texas?

HONORABLE TRACY CHRISTOPHER: I think so. I'm not sure about the if you were the lawyer who tried the case, you can't file an Anders brief. I'm not sure if that practice is consistent across the other Courts of Appeals.

CHAIRMAN BABCOCK: But the situation I described where a separate new lawyer just absolutely -- I mean, he's ineffective --

HONORABLE TRACY CHRISTOPHER: Yes.

CHAIRMAN BABCOCK: -- I mean, he messes up the appeal.

HONORABLE TRACY CHRISTOPHER: Yeah.

CHAIRMAN BABCOCK: Okay.

HONORABLE TRACY CHRISTOPHER: We send it back.

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: Well, to directly answer Bill's question about the Anders brief triggering it, I'm talking about -- and this overlaps with one of my other comments about hybrid representation.

The only time that the litigant gets to, in effect, directly address the court is when they get a chance to respond to -- well, I started to say motion to withdraw, but the Supreme Court nixed that part of the

Anders process in termination cases.

But when the appointed attorney files the brief that says "There's nothing here to see," the parent gets to file a response. The parent, that is the first time that they can officially address the court and raise these issues that they may want to say "Either my trial lawyer or my appellate lawyer were ineffective for these reasons."

Yes, in the Anders process, that gets trapped in what Tracy is talking about where we, as a court, review what the counsel did and what happens at trial to make our independent evaluation of whether or not there was a meritorious issue to raise on appeal.

But if we're going to allow at this point a ineffective assistance of claim double track, where can you move that off? And I'm not saying that it's going to necessarily arise in the Anders context only. I'm just saying that the person or lawyer raising the ineffective assistance of counsel does not need to be the trial counsel, does not need to be the existing appointed trial counsel -- excuse me -- appellate counsel.

I hadn't thought that deeply into it, but I can see the complaint about the lawyer first coming to the appellate court's attention as part of the response

by the litigant, by the parent, in that response to the Anders briefing.

CHAIRMAN BABCOCK: Okay. Thanks, Judge.

Richard Orsinger.

MR. ORSINGER: Chip, I just wanted to ask the justices on the Zoom conference: Does the Court of Appeals have the power if they spot what they believe is ineffective assistance of counsel to remand and ask for the trial court to appoint someone to brief that, and secondly, does that ever happen -- has that ever happened? Do they have the power and do they ever do it?

HONORABLE TOM GRAY: At what level? The appellate attorney or the trial counsel?

MR. ORSINGER: No, it would be the Court of Appeals is reading the brief and they can see the waiver of error or they can see the strategic or tactical mistakes and decide that this wasn't a fair trial or that wasn't due process. Does the Court of Appeals have the ability to say on their own, "We would like to remand this to the trial court to appoint a new appellate lawyer"?

CHAIRMAN BABCOCK: Sua sponte.

HONORABLE TOM GRAY: Is the appeal an Anders appeal or a merits-based appeal?

MR. ORSINGER: I guess I don't know. Do you think the Court has the power to, just sua sponte, to remand for an investigation of ineffective assistance?

HONORABLE TOM GRAY: No, but if it's an Anders case, we would.

MR. ORSINGER: Okay. But if it's a court-appointed brief, you don't have that power, you think, huh?

HONORABLE TOM GRAY: I don't think so.

MR. ORSINGER: Okay.

HONORABLE TOM GRAY: It's not an issue that's been presented to us, and we'd have to get there some other way.

CHAIRMAN BABCOCK: Just to follow up Richard's hypothetical, if you're reviewing the record and on the face of the record the trial counsel has been, beyond all shadow of a doubt, ineffective -- I mean, he's asleep; he's swearing in court; he's -- you know, he's being mean to his client on the witness stand -- you don't have the power to remand it for an ineffective assistance inquiry?

HONORABLE TRACY CHRISTOPHER: No. I mean, if the lawyer doesn't bring it up as a point on appeal, we cannot. Right? If the lawyer brings it up as a

point on appeal that there was ineffective assistance of counsel --

CHAIRMAN BABCOCK: Of course.

HONORABLE TRACY CHRISTOPHER: -- on occasion, we grant those. The vast majority of the time, we say, in our opinion, the evidence is not developed on this point, and, you know, see you later. But because in the criminal context, they have the habeas.

CHAIRMAN BABCOCK: Yeah.

HONORABLE TRACY CHRISTOPHER: Right? Where they could develop the evidence later. Here, you know, we don't have that, so that is something that you might -- that we need to think about. Right?

CHAIRMAN BABCOCK: Right.

MR. ORSINGER: And, Justice Christopher, I'm not suggesting that you would reverse on an assigned error. I'm suggesting that you might remand to the trial court with instructions to get a new appellate lawyer to raise that point of error so you can rule on it. I know that sounds convoluted, but that would comply with the rules of appellate procedure, it seems to me.

HONORABLE TRACY CHRISTOPHER: Well, you know, if a rule is written that says we can, I guess we

can. I mean, I don't think we can at this point.

HONORABLE TOM GRAY: Could we get another 80 or so appellate lawyers if we're going -- I mean, appellate judges if we're going to start being the lawyers for the parties?

HONORABLE TRACY CHRISTOPHER: I mean, we don't want to accidentally miss something. Right?

CHAIRMAN BABCOCK: We'll bring it up with the legislature.

HONORABLE TRACY CHRISTOPHER: But, I mean, because you can look at a record and see they called no witnesses, and you might think to yourself, "Oh, come on. Surely there was someone they could have called to say that this was a great mom or a dad, you know, something that they could have done," but we don't know that.

HONORABLE TOM GRAY: But bear in -- and for the rest of the people that -- not like Jane and Tracy and myself and Justice Hecht that have seen a lot of these by now, understand that in many, many of these cases, even Rusty Hardin could not have kept the termination from happening. I mean, it's going to happen folks. I mean, it is just there.

Now, I have seen one in particular that it should not have happened like it did because there was

literally no evidence introduced into the record upon which to base a termination, period, but that was not presented as an issue on appeal that I could deal with. Now, I still was in the dissent in that case, but there were other issues that -- but I'm just telling you, like Tracy said, there are times when we can see a problem, but there is not a way for us to get to it. And usually -- and I will say 999 out of a thousand times, it would not affect the result in the case.

But there was a -- there may have been malpractice, there may have been ineffective assistance, but it is not to the point that it would have affected the result in the case even if they had done what they should have done.

HONORABLE TRACY CHRISTOPHER: Yeah. And, you know, sometimes in the criminal -- on the criminal side when we have the, you know, failure to present witnesses, failure to investigate, it's almost always in the sentencing aspect that there is any sort of reversal for a new, you know, sentencing hearing.

Usually, like I was talking about, "Well, isn't there some witness that you could have called to say you were a good parent," the vast majority of the other evidence, even if you called that one witness to say, "Oh, she was really a good parent," would not meet

the Strickland standard. Right? It just would not be.

So lately we've been having trouble with clients not showing up and how lawyers are handling that in the situation, so that's an interesting question in these cases.

CHAIRMAN BABCOCK: Yep. Lisa.

MS. HOBBS: Chief Justice Gray, I really like your idea of the sort of dual track. I don't think there's anything really the House Bill 7 group looked at.

I'm kind of -- I mean, I'm -- Judge Boyce, I do think about your question too with how this works, and I think that's part of the problem. Right? It's like we're asking a trial judge to say, "Yeah, it was a big deal, they really, really, really messed up, and it's prejudicial." And sometimes we won't know if it's prejudicial because we don't know how the direct appeal is going to end up. Right?

So in your mind, Judge Gray, would the trial judge just like take a gander about, like, how this is going to come out and that it's probably going to get affirmed and not reversed and ship it on up so that they can be on parallel tracks, or would the trial court maybe have, like, some ability to abate the ineffective assistance of counsel habeas, or whatever

we're going to call it, so that we can wait and see what the appellate courts do on the direct appeal?

HONORABLE TOM GRAY: I personally would try to get the ineffective assistance of counsel case out in front of the direct appeal myself; but, you know, I would just pursue them completely -- you can't do them completely independent, but one of them's going to get to the finish line first, and I don't really think that it would matter. I mean, it's because if you get to the finish line on the direct appeal and it's an affirmance, that doesn't necessarily -- it may even help the habeas case on ineffective assistance of counsel.

MS. HOBBS: No, affirmance would, but reversal would not.

HONORABLE TOM GRAY: Well, that just -- that would just potentially moot it and hopefully the trial court wouldn't appoint the same counsel again, but at the same time, maybe the trial counsel that was ineffective the first time may know where the land mines are buried the second time. I mean, it's --

(Simultaneous discussion)

HONORABLE TRACY CHRISTOPHER: On the other side, in the habeas, the judge might say, "Okay, I'll give you a new trial."

HONORABLE TOM GRAY: Exactly, and moot the

direct appeal entirely.

HONORABLE TRACY CHRISTOPHER: Right.

HONORABLE TOM GRAY: So I would not say that one has to be pushed before the other --

MS. HOBBS: Okay.

HONORABLE TOM GRAY: -- as a matter of the rule. Just set them up as separate tracks.

I mean, the one thing you're going to need that's different than a traditional motion for new trial -- and remember that in a criminal case that to get an evidentiary hearing on a motion for new trial, you have to present in the motion that you need an evidentiary hearing. It has to be something upon which you need to develop evidence to be able to get that -- to be entitled to the hearing; but in this arena, you're going to need more time between the time that the motion for new trial is filed and the time it is overruled by operation of law because to really make that a meaningful track, you have to have the trial court record. That's the only way that makes sense. Just like normally in the criminal arena, after the direct appeal is over, then you go back and you wade through the record.

And that's why these writs for, you know, capital punishment go on for decades after the fact

because they go back through in detail everything -- re-talk to the witnesses, re-interview them, you know. You do all that two or three times, and it takes time to do that.

I'm not talking about taking that long, even though terminations have been called the death penalty of --

MS. HOBBS: No, but you've actually raised a good issue to your -- and, again, I like your idea. I'm just trying to, like -- I'm not trying to pin you down. I'm just trying to, like, decide if it's worth Judge Boyce's time to explore, but -- okay. So we need the record. We can -- so I don't know if by rule we can extend the trial court's jurisdiction. So I guess some motion would be like preemptively filed to -- maybe we can. Maybe I'm wrong on that. Maybe -- I'm just trying to think about what is the basis of plenary power --

MR. ORSINGER: I think it's Rule 329b, Lisa.

MS. HOBBS: It's just rule based?

MR. ORSINGER: I thought it was.

(Simultaneous discussion)

MS. HOBBS: That's probably right.

MR. ORSINGER: The terms of court are statutory, but -- I don't have my rule book right here,

but I've always looked at 329b as the --

(Simultaneous discussion)

MS. HOBBS: Oh, no, we all look at 329b for sure, but I'm just wondering if -- like, if 329 -- if there's a statute that supports -- like can we jack with that by rule, or was that set up by a statute or something? But if plenary power is a judicially created doctrine, then I don't see a -- I was just -- I'm sorry, I'm thinking out loud, and I probably shouldn't be doing this on advisory committee, but -- this is probably a subcommittee conversation, so I'll stop.

HONORABLE TOM GRAY: Well, as long as you're, you know, looking -- kicking the jurisdictional idea around, just remember that in (g) compels the Courts of Appeals to decide, at best, advisory decisions, or to make it at best an advisory decision, of something that might happen in the future. And that's the case that requires us to look -- to write on D or E if it is challenged as a ground for termination because it might be used at some other point with some other child in the future to terminate on another statutory ground.

HONORABLE TRACY CHRISTOPHER: I'm still bitter about that one.

HONORABLE TOM GRAY: And it's purely an

advisory opinion.

Thank you, Tracy. At least Tracy knows what I'm talking about. The rest of y'all may have no clue, but --

MS. HOBBS: No, I do. I just disagree with you, so I'm just keeping my mouth shut.

CHAIRMAN BABCOCK: At the risk of jumping into this three-way inside baseball conversation, Bill, once we are done with this, have we reached the end of the road of your work on appeals in parental termination cases, or do we have something else that we need to discuss?

HONORABLE BILL BOYCE: Oh, there's more.

CHAIRMAN BABCOCK: Okay.

HONORABLE BILL BOYCE: So specifically Anders procedures and so forth and...

CHAIRMAN BABCOCK: Yeah.

HONORABLE BILL BOYCE: Also templates for briefs and opinions.

CHAIRMAN BABCOCK: Okay. We're not going to resolve that in the next ten minutes, I assume.

HONORABLE BILL BOYCE: Doubtful.

CHAIRMAN BABCOCK: Excuse me?

HONORABLE BILL BOYCE: Doubtful.

CHAIRMAN BABCOCK: Should we put this over

to our October meeting?

HONORABLE BILL BOYCE: Pam is urgently waving, so I think maybe she should weigh in and then I'll make an observation.

CHAIRMAN BABCOCK: Yeah. Okay, Pam.

MS. BARON: I just want to say, this has been very educational for our subcommittee. And I really want to thank Justice Gray and Justice Christopher for their insights on how it works on a daily basis.

I do think -- you know, it's intriguing to think about having the sort of parallel proceedings. The problem is is it doesn't necessarily avoid an ineffective assistance of counsel claim later after the appeal is concluded either complaining about the appellate lawyers' activities or whatever. So we'll still be getting into this, and then the question is does it make sense to have two different basically sort of parallel habeas proceedings, one that is ongoing at the same time as the direct appeal and then one that's at the very end after everything is over.

So I guess if everybody would give that some thought, we are running out of time, so we probably can't discuss that today; but these are very complicated issues, and you have given us new insight. I'm not sure

that we have a perfect solution.

Bill?

HONORABLE BILL BOYCE: I guess what would, I think, help guide the subcommittee's further deliberations is whether it is the sense of the committee that it would like the subcommittee to try to see whether this dual tracking is really feasible or not. Mechanically, I'm still tripping over some stuff, but that doesn't mean, you know, the issue should be dropped.

So I don't know if I'm calling for a vote, but I've heard some expressions of enthusiasm for looking at this. We're happy to look at this, this being a dual-track proposal, but Pam's point remains salient, which is even if we were to come up with the exquisitely perfect dual-track deal to go alongside the direct appeal, that's probably not going to cover every conceivable type of IAC circumstance that could arise, and so we're still looking at some kind of post-appeal collateral attack for some circumstance. Maybe it's a narrow circumstance, but I'm -- unless I'm missing something, I'm not sure how we avoid having to do that.

CHAIRMAN BABCOCK: Yeah. Well, my own feeling, Bill, is that subject to being overruled by either Chief Justice Hecht or Justice Bland, I've heard

enough that it sounds like this could benefit from further study and discussion in our October meeting; but, as I say, I'm more than willing to be overruled by the members of the court if they've heard enough and don't want the subcommittee to expend the extra effort. So that's where I come out on it.

MS. HOBBS: Chip, if I could just -- not to interrupt before the judges say anything, but I think -- you know, I think, Bill, you're going to have to do a post-appeal process anyway because we're all working under the assumption -- mostly, not every conversation, but most of the conversation here has been a separately appointed appellate counsel, and it has not been the case of the trial counsel like handling the appeal him or herself.

So I don't know how you get around not having, you know, some kind of true-up of where you effectively represented through the whole process under any circumstances, honestly.

So I would just -- I interrupted you, Chip, only because you were asking the judges whether it's worth the time, and I just wanted to add my thought that I think that time is going to be spent, and the question is: Who falls into that procedure versus -- yeah.

CHAIRMAN BABCOCK: Yeah. And maybe I was inartful in the way I was posing the question. It did not seem to me that we could have a vote of the full committee because I don't know what we could possibly vote on that would be meaningful, so that's really what I was -- where I was trying to be helpful, so that's where I come out.

HONORABLE NATHAN HECHT: Well, for my part, I don't think we've got a solution, so I think we have to keep working.

CHAIRMAN BABCOCK: Yeah. Said in about five words what I was trying to get out.

HONORABLE NATHAN HECHT: I think --

(Simultaneous discussion)

CHAIRMAN BABCOCK: Justice Bland, would you like to dissent from the Chief there?

HONORABLE JANE BLAND: No. And I would say that what we're really talking about, whether we do it via an abatement or some other proceeding in the trial court, is sort of some sort of out-of-time evidentiary motion for new trial hearing.

And the criminal side, they allow those in cases, very rarely, but they allow them for notices -- out-of-time notices of appeal and things like that. And there was a whole series of cases called Jack where

people said, "Let's have this new trial hearing as part of the appeal," and the Court of Criminal Appeals said, "No, we're going to all do it by habeas."

But because habeas is just so problematic in these cases because it's not just the criminal defendant's rights that are at play, you know, query whether it's better to do what we're doing but do it in the context of the direct appeal, albeit with more time allotted to the trial court and the Court of Appeals to make a, you know, a reasoned determination about whether there's merit and, you know, whether there ought to be some sort of prima facie showing before you got that sort of extraordinary relief.

So I think we're all headed towards some process in the trial court. It's just a question of what triggers it, when, and how long does everybody have to complete that process.

I continue to think that collateral attacks in these kinds of cases just have a whole host of problems that, you know, if we could find a solution where we could do it inside of the appeal, it would probably be good.

CHAIRMAN BABCOCK: Thank you, Justice Bland.

So on October 8, which is still hopefully

going to be in person, we'll have seizure exemption rules and form as the number one item since we have a time deadline on that, and this matter will be our number two item on the agenda. I'm saying that for Shiva so that she and I can keep track of these things.

And I think it's been, as usual, a terrific discussion today. And the amount of work is just -- you know, that you-all put into this is mind-boggling and it's just fabulous. And in the one minute left before we recess, Pam Baron and Robert Levy can second my gratitude to the full committee.

Go ahead, Pam.

MS. BARON: Well, certainly that, but I did have a question on the October meeting. Assuming it's in person, will there be any virtual options for old people who maybe shouldn't be traveling like me?

CHAIRMAN BABCOCK: Yeah. We were exploring and with, I think, some optimism and success, a virtual option for this meeting when we decided to hold it virtually. And it's -- I was struck by the fact that if we can't do the technology for a hybrid, you know, in person and Zoom meeting at the Texas Association of Broadcasters, then where could we come up with the technology to do it. So no definitive answer but optimistic that we can. And we're going to try. So

that's -- that answers that question.

Now Robert and then Professor Carlson, in the 30 seconds you have left --

MR. LEVY: I just wanted to thank you for a great session, but really I have to know: Where is Levi Benton? Wakanda is not going to cut it.

CHAIRMAN BABCOCK: No, it's not. And it's just so wrong him being wherever he was.

HONORABLE LEVI BENTON: I'm sorry. I'm in Wakanda, but since I was called on, I have a comment or a question also on another topic.

I wonder if the Chief and/or Justice Bland were sufficiently informed and at liberty to address what Chief Justice Christopher raised earlier: What in the world is going on in Brazoria County?

CHAIRMAN BABCOCK: They're certainly welcome to comment if they're able or if they know.

HONORABLE NATHAN HECHT: No comment.

CHAIRMAN BABCOCK: So that will be a no comment, Levi. Sorry.

Elaine. Professor Carlson.

PROFESSOR CARLSON: Chip, I just want to mention: We do do hybrid at the law school. I don't know the technology, but I'm happy to ask our IT people to speak to whoever you need to coordinate with on that.

CHAIRMAN BABCOCK: That would be great.

Shiva --

MR. ORSINGER: I had a hearing two weeks ago in Comal County that was hybrid. If Comal County can do it, I'm sure that the Association of Broadcasters can do it.

CHAIRMAN BABCOCK: You would think they could. But Shiva, in lieu of going to Comal County, which is a delightful place, if we run into trouble in Austin, let's note that Elaine might have some resources for us.

All right. Well, this, once again, has been great. We've gone two minutes over -- sorry about that -- but great to see you-all even if it's virtual. And I really hope that next time we can be in person, and that night we're going to have a reception and a picture. So to the extent that people can get there, that would be great. So we're now in recess, and thank you very much.

(Adjourned)

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REPORTER'S CERTIFICATION
MEETING OF THE
SUPREME COURT ADVISORY COMMITTEE

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I, Lorrie A. Schnoor, Certified Shorthand Reporter in and for the State of Texas, Registered Diplomate Reporter and Certified Realtime Reporter, do hereby certify that I reported the above meeting of the Supreme Court Advisory Committee on the 3rd day of September, 2021, and the same was thereafter reduced to computer transcription by me.

I FURTHER CERTIFY THAT the costs for my services in the matter are $2,210.00.

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Given under my hand and seal on this 17th day of September, 2021.

Lorrie A. Schnoor

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