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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

FEBRUARY 4, 2022

(FRIDAY SESSION)

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Taken before *Mary Carol Griffin*, Certified Shorthand Reporter in and for the State of Texas, reported by machine shorthand method, on the 4th day of February, 2022, between the hours of 9:00 a.m. and 4:42 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.

Mary Carol Griffin, CSR

INDEX OF VOTES

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

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TRAP 28.4 (d)	33280
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1 bit toward the end of that month and in this month. And
2 now I think courts pretty much are hoping to resume
3 around the middle of February. And if predictions of a
4 decrease -- a real decrease in COVID are correct, then I
5 think we'll be back in business on jury trials by the
6 end of the month and hopefully in the spring. So
7 meanwhile, we've extended our emergency order. We got a
8 little problem clearing some of our parental termination
9 cases out, but we're working through the last handful of
10 those and trying to get back on schedule on those.

11 We've also been trying to -- you've read
12 about Operation Lone Star in the press, no doubt. Our
13 role in that is to make sure that the magistration and
14 the representation of indigent defendants works like
15 it's supposed to. So we've been trying to make sure
16 that there are lawyers available to represent the people
17 who are detained in Operation Lone Star. And we
18 recently -- just a few days ago, a couple weeks ago --
19 issued an order allowing out-of-state lawyers to come in
20 and practice in Texas for the purpose of representing
21 those folks. So we're just trying to make sure that the
22 judicial side of it works as it's supposed to.

23 We gave final approval to TRAP 57
24 governing direct appeals to the Supreme Court. It's
25 effective January the 1st. We gave final approval to

1 amendments to Canon 6B of the Code of Judicial Conduct
2 to allow constitutional county court judges to act as
3 arbitrators and mediators.

4 And, lastly -- excuse me -- we amended
5 Comment 10 to the Disciplinary Rules, 7.01, effective
6 immediately to clarify that if a lawyer advertises a
7 verdict amount that was never collected, the lawyer must
8 disclose the amount actually received by the client with
9 equal prominence.

10 Then we've got the seizure rules that the
11 committee talked about through a couple of sessions, and
12 thanks to the committee for all the work that they've
13 done on that, and they're already getting some attention
14 in the press. So we'll get comments on those by the end
15 of next month and try to make them final by May the 1st.

16 And, finally, we just approved some legal
17 aid grants. Some of the money comes through our court
18 and we approved distribution of over \$1.1 million to
19 grants to four legal aid organizations for legal aid for
20 veterans. So we're -- those needs do not abate in the
21 pandemic. If anything, they grow worse, and we're
22 trying to meet them.

23 So that's my report, Chip.

24 CHAIRMAN BABCOCK: Great. Thank you, Your
25 Honor.

1 Justice Bland, comments?

2 HONORABLE JANE BLAND: No, good morning,
3 Mr. Chairman. Good morning, everybody. Good to see
4 you. No comments.

5 CHAIRMAN BABCOCK: All right. Great to
6 see you, too.

7 Well, let's go to the agenda, which is
8 full. I will tell everybody that I received a call
9 yesterday from Senator Bryan Hughes who wanted the
10 committee to know that some of the reforms for remote
11 proceedings, which had passed the House but not the
12 Senate, and that he and Senator Huffman were very
13 hostile to the type of reforms that we're considering,
14 and since that they had not passed the legislature, and
15 wanted me to let the full committee know that they're
16 interested and they would like to be involved in terms
17 of giving them notice of anything we're thinking about
18 doing.

19 And I assured him that we also -- we were
20 always keenly aware of the line between substance and
21 procedure. We thought that we had a very good working
22 relationship with the legislature over the past couple
23 of decades and would certainly take their views into
24 account. He thanked me profusely, and he used the word
25 "respectfully" a number of times, that he was

1 respectfully giving this input, not meaning to intrude
2 on what we're doing in any way, but just wanted us to be
3 aware of that.

4 So now our committee is aware of that, and
5 obviously we'll take that into account as we go forward.

6 But in the meantime, before we get to
7 remote proceedings, suits affecting the parent-child
8 relationship and out of time appeals in parental rights
9 termination cases -- and I think, Bill Boyce, that one's
10 back in your lap.

11 HONORABLE BILL BOYCE: Yes, Chip, thank
12 you.

13 So I hope today to bring you a more
14 focused discussion on a specific proposed rule.
15 Specifically pertaining to the piece of this larger
16 project that involves addressing claims of ineffective
17 assistance of counsel in a parental termination appeal
18 when you're dealing with an accelerated appeal of the
19 termination order to begin with.

20 We had a fairly wide ranging discussion
21 last time. I'm not going to recap the discussion. I'm
22 not going to recap from the discovery of fire for this
23 project. I would refer you back to the October 5, 2021
24 memo which kind of gives the background of the prior
25 steps that we've -- that we've taken so far.

1 If you want to see kind of a road map of
2 the overall project, you can look at section Roman
3 Numeral II on Page 2 of the February 3 memo that was
4 distributed. And we are wrestling with Section 1(b)
5 now. And I hope that we can get to a point for a vote
6 of a proposed rule for ineffective assistance of counsel
7 mechanism with whatever tweaks the full committee deems
8 appropriate. And you'll see that there's some bracketed
9 language that we're going to work through.

10 If you want to see the specific rule that
11 is being proposed, it's on Page 3 of the memo under
12 heading Roman Numeral IV in the middle of the page
13 there. This is a proposed addition to Texas Rule of
14 Appellate Procedure 28.4(d).

15 By way of real brief introduction, you'll
16 recall that we've had discussions about different types
17 of approaches to providing a means to raise a complaint
18 of ineffective assistance of counsel by a parent whose
19 rights have been terminated. I think the prior
20 discussions coalesced around a -- an approach that looks
21 for a way to provide a mechanism for this within the
22 ongoing appeal. And that's what this proposed rule
23 28.4(d) does.

24 I'm going to tick through some of the
25 revisions from the last version of this that you saw,

1 and then I'll ask any of the subcommittee members to
2 elaborate on any points I've glossed over or any points
3 that they wanted to highlight.

4 This is entitled: "Referral for an
5 Evidentiary Hearing." And the concept here is that once
6 the appeal of the termination order is underway, this
7 provides a mechanism for a referral back by the Court of
8 Appeals to the trial court for an evidentiary hearing.

9 We had prior discussion about whether this
10 should be a referral back for a recommendation that
11 tracks some of the current language in the Texas Rules
12 of Appellate Procedure for these circumstances, for
13 example, involving appeals from temporary injunctions.
14 The subcommittee's sense was that this would be less
15 confusing, this would be more familiar, if it was framed
16 in terms of making findings of fact and conclusions of
17 law, both for purposes of everybody having a better idea
18 of what standard of review might apply and also to avoid
19 any entanglements in terms of whether a Court of Appeals
20 was somehow being asked to make impermissible fact
21 findings in the first instance, as opposed to reviewing
22 a trial court's fact findings.

23 There's some discussion to be had around
24 the type of showing that would be required in the Court
25 of Appeals. We'll circle back to that after this

1 introduction.

2 You will see that there are a couple of
3 place holders that have been left empty in terms of a
4 proposed timeframe for doing this. Earlier proposals
5 had a relatively tight timeframe for doing this, and I
6 think there was some concern voiced that it didn't
7 really give Courts of Appeals enough time to adequately
8 address this procedure. One of the open questions that
9 I would solicit the full committee's input on is whether
10 we want to have some kind of a tolling built into this
11 for the 180-deadline under Rule of Judicial
12 Administration 6.2(a), and we can talk about that as
13 well.

14 So that's a brief recap. But I would ask
15 if there's anybody else from the subcommittee that wants
16 to add or highlight anything, to please do so before we
17 launch into a larger discussion with the committee as a
18 whole.

19 CHAIRMAN BABCOCK: There's a way to raise
20 your hand electronically, if you want to do that, or you
21 can just haul off and start talking.

22 Bill, there are no hands being raised
23 electronically or otherwise, that I can see.

24 MS. BARON: Well, let me just step in. I
25 think, Bill, it would help to just tick off the four or

1 five things we need to get resolved today. And, you
2 know, one is, what is the standard that the party has to
3 allege in the motion. Two is, when does that need to be
4 filed in conjunction with the date of the reporter or
5 trial court's record -- trial clerk's record; three, is
6 it denied by operation of law; four, how soon does the
7 trial court have to make the decision and then I think
8 fifth is, is there some kind of tolling or abatement
9 during that period.

10 Did I leave anything out?

11 HONORABLE BILL BOYCE: No. I think that
12 covers all the bolded areas in the proposed rule.

13 MS. BARON: Right. So I think that's what
14 we really want to focus and get votes on today. Right?

15 HONORABLE BILL BOYCE: Yes. That's --
16 those would be the open areas of discussion.

17 MS. BARON: Okay.

18 CHAIRMAN BABCOCK: And that was Pam Baron
19 speaking for the purposes of the record.

20 All right. Anybody else from the
21 subcommittee want to weigh in on anything?

22 (No response)

23 CHAIRMAN BABCOCK: All right. Then
24 comments from the full committee, or questions?

25 HONORABLE DAVID PEEPLES: Chip, this is

1 David Peeples.

2 On the first line or two, "Upon a showing
3 of plausible, colorable, or prima facie claim," what
4 guidance is there anywhere about what the standard of
5 care is for a lawyer or what the elements would be for a
6 prima facie case of ineffective assistance of counsel?

7 HONORABLE BILL BOYCE: I'll take a stab at
8 an initial answer to that which is, we would be applying
9 the Strickland Standard from the criminal context which
10 roughly paraphrases no reasonable lawyer would do that
11 or fail to do that in prejudice as a result.

12 So if we put it in terms of prima facie, I
13 think we're saying a prima facie claim of Strickland
14 ineffective assistance as applied in this context.

15 I think it was Chief Justice Christopher
16 had raised comments at the last meeting that this was
17 discussed in October that the original reference was
18 upon a showing of good cause. And that was, I think,
19 appropriately identified as being very broad and
20 undefined.

21 So the options that were suggested were
22 plausible or colorable or prima facie, all of which can
23 be found in the case law in various contexts -- in other
24 contexts talking about when something has been asserted
25 with sufficient substance to it to warrant going

1 forward. And so we would solicit the full committee's
2 thoughts about what is the appropriate verbal
3 formulation for that initial burden.

4 CHAIRMAN BABCOCK: Does it matter, Bill,
5 that Strickland is a criminal case and this is -- you
6 know, even though the clear and convincing standard
7 would apply in a parental termination, it's not
8 criminal. Does that matter?

9 HONORABLE BILL BOYCE: I think that based
10 on the status of the case law that the Strickland
11 Standard is already applicable for ineffective
12 assistance in this context. So we're -- I think we're
13 working within that construct.

14 CHAIRMAN BABCOCK: Great.

15 HONORABLE DAVID PEEPLES: Just to flesh
16 that out, it could be as detailed as, My lawyer didn't
17 investigate, didn't call witnesses A, B, and C, didn't
18 cross-examine on this area of -- you know, whatever it
19 is, maybe in final argument to the jury admitted some
20 things that he shouldn't have admitted, things like
21 that?

22 HONORABLE BILL BOYCE: Correct. A
23 frequent source of Strickland complaints is that the --
24 you know, there was insufficient effort undertaken to
25 find favorable witnesses, that sort of a thing, that

1 might be the type allegation.

2 HONORABLE HARVEY BROWN: This is Harvey.
3 It seems to me that you would have to assert a second
4 thing which is prejudice, and I like prima facia because
5 it talks about both elements. I do think a note or
6 comment would be helpful. I mean, the question David
7 asked I think would be a question a lot of practitioners
8 would ask immediately.

9 I'm not sure what it means in that
10 sentence to say, "Upon a showing of a claim." I mean,
11 when I hear the word "showing," I think of evidence, and
12 when I hear the word "claim," I think of just an
13 assertion. So I want "upon assertion of a prima facie
14 claim," rather than "Upon a showing."

15 CHAIRMAN BABCOCK: To your first point,
16 Harvey, when you say there ought to be some combination
17 for showing of prejudice, what sort of prejudice would
18 be sufficient? I know in the habeas context I've always
19 thought that when there's an ineffective assistance
20 claim and the Court's require prejudice that the guy's
21 in prison, has been there for 20 years, that is some
22 prejudice if there's a finding that the lawyer didn't do
23 his job.

24 But is that -- is it the habeas type of
25 prejudice you're talking about or something else? Or

1 how do you show that?

2 HONORABLE HARVEY BROWN: It's something
3 else. It's -- to oversimplify, it's kind of a causation
4 standard that, yes, you have to show they did something
5 wrong, but you have to show it would have made a
6 difference, that it somehow prejudiced their case. So
7 the lawyer making a mistake in final argument that
8 wouldn't have changed the outcome otherwise, as I
9 recall, would not do it.

10 HONORABLE BILL BOYCE: The specific
11 language from the second prong of Strickland is:
12 "Deficient performance -- performance prejudiced the
13 defense because counsel's errors were so serious as to
14 deprive the defendant of a fair trial whose result is
15 reliable." So that's -- I think that's kind of the
16 elevated standard.

17 And to address Justice Brown's
18 observation: My understanding would be that the showing
19 or the assertion of a claim for ineffective assistance
20 of counsel would encompass both prongs.

21 HONORABLE HARVEY BROWN: Right.

22 HONORABLE BILL BOYCE: And perhaps a note
23 collaborating that we're applying the Strickland
24 Standard in this context would make that clearer.

25 CHAIRMAN BABCOCK: Okay. Anybody else

1 have comments?

2 MR. HUGHES: I had a question.

3 CHAIRMAN BABCOCK: Roger.

4 MR. HUGHES: Is there any sense in the
5 subcommittee that the articulated grounds in the
6 appellate motion could find the party at the trial, in
7 other words, when you actually get your hearing, you're
8 pretty much stuck with whatever you alleged in the
9 motion and you can't show alternative grounds or
10 alternative prejudices? That's my question.

11 HONORABLE BILL BOYCE: I'll take an
12 initial swing at an answer. Other subcommittee members
13 may have other thoughts.

14 Because this would be framed, let's say
15 hypothetically in terms of a prima facie showing and
16 then it gets referred for fact finding, my personal
17 sense would be that once you overcome that initial
18 hurdle and the Court of Appeals refers it to the trial
19 court for further findings, then the record is going to
20 be what the record is going to be, and I don't know that
21 it's going to be, in my estimation, you know, strictly
22 confined to some sort of a detailed pleading standard.
23 I think this first sentence of the proposed rule
24 contemplates getting over that hurdle, and once you do
25 it, then the record is going to develop like the record

1 develops based on whatever evidence is there. That's my
2 take on it, but others may have a different take.

3 CHAIRMAN BABCOCK: Justice Christopher,
4 then Pam, and then Ricard Munzinger.

5 Justice Christopher.

6 HONORABLE TRACY CHRISTOPHER: So I was a
7 little confused by what Bill just said, actually,
8 because -- so if we're likening it to the same standard
9 that a motion for new trial based on IAC is, you know,
10 you are stuck with what's in your motion. So, you know,
11 I think that's an important part that needs to be
12 clarified. Right?

13 In terms of the standard, it's very
14 difficult for the appellate court versus a trial court
15 to figure out whether they're made, you know, a claim of
16 prejudice. Right? Because we're not -- we haven't sat
17 through the trial. We haven't read the transcript yet,
18 and, hopefully, you don't want us to have to read the
19 transcript before we rule on this motion. Right? So
20 what are typical claims? My lawyer failed to object to
21 these two pieces of evidence and it was harmful to me.

22 Well, you know, it could very well be that
23 within that record the evidence came in without
24 objection. So of course there's no harm if the -- if --
25 you know, in other parts he, you know, didn't object

1 or -- you know, my lawyer didn't call these witnesses.
2 Well, are we going to have affidavits of the witnesses
3 attached to this motion? And, again, how am I going to
4 figure out whether these witnesses were important to the
5 trial versus the trial judge who sat through the trial?

6 So, you know, I think it needs to be a low
7 standard at the appellate court before we send it back
8 because I can't answer, you know, those questions
9 without having a knowledge of the trial.

10 CHAIRMAN BABCOCK: Okay. Thanks, Judge.
11 Pam.

12 MS. BARON: Well, I was just trying to get
13 a little clarification on the prejudice standard, and I
14 think Chief Justice Christopher just gave me that
15 guidance that I was looking for because it wasn't clear
16 to me how that would be determined.

17 CHAIRMAN BABCOCK: Thank you.

18 Mr. Richard Munzinger. Richard, you've
19 got to unmute.

20 MR. MUNZINGER: Because of my technical
21 ineptitude, I don't have the language of the proposed
22 rule in front of me.

23 But does the proposed rule require
24 specificity in the pleading in the motion so that one
25 cannot plead a conclusion but must plead the specific

1 facts in the motion to allow the appellate court to make
2 a judgment on those facts?

3 HONORABLE BILL BOYCE: The current draft
4 of the proposed rule does not have a specificity
5 requirement for the appellate motion that would result
6 in the referral. As it reads now, it says, "Upon a
7 showing of a plausible or colorable or prima facie claim
8 for ineffective assistance of counsel by written
9 motion." That's as specific as it gets.

10 MR. MUNZINGER: The problem -- it seems to
11 me, the problem with that is, is that I can file
12 something with a general conclusion stated in the motion
13 and then I can prove anything that I want to prove at
14 the hearing which seems to me contrary to what the
15 discussion has been this morning.

16 And it's -- I would recommend that the
17 motion be required to set forth in factual detail the
18 claims of the person who is seeking to set aside now all
19 of this judicial effort which presumptively has been
20 done in good faith and in accordance with the law by the
21 other side at least. I do think it should be required
22 that the person set forth with specificity the facts
23 supporting the claim.

24 CHAIRMAN BABCOCK: Thanks, Richard.

25 Kent Sullivan.

1 HONORABLE KENT SULLIVAN: I don't recall
2 whether we've been down this road before, but I was
3 curious to the extent in which we've looked at what
4 history has been in other jurisdictions, what other
5 rules are out there in other states.

6 HONORABLE BILL BOYCE: If may respond
7 briefly, Chip, the short answer to Kent's question is,
8 we have not undertaken to survey whether there are
9 similar rules in other states.

10 HONORABLE KENT SULLIVAN: You know, my two
11 cents is, it's always, I think, helpful to look at who
12 has the most experience. Some states are perhaps much
13 further down the road, you know, have more experience
14 under their belt. It would be useful to get that
15 knowledge but I understand how difficult it is with
16 limited resources, but I'm a best practices guy. So
17 that's my two cents.

18 CHAIRMAN BABCOCK: Okay. Thanks, Kent.
19 Harvey.

20 HONORABLE HARVEY BROWN: To Chief Justice
21 Christopher's comments: I think her comments are right
22 on point if we're requiring a showing of a prima facie
23 case. But if we only require an assertion, it seems
24 like to me that makes it easier for the appellate court
25 to just look at the face of the document itself and not

1 try to look at whether there's any underlying evidence
2 or any contrary evidence, you're just looking at the
3 pleading itself and whether they asserted both elements
4 of the Strickland Standard.

5 So I go back to my initial comment. I
6 think the word "showing" should be replaced by
7 "assertion."

8 CHAIRMAN BABCOCK: All right. Judge
9 Mendoza.

10 HONORABLE MARIA SALAS MENDOZA: All right.
11 Also, yes, I agree. I think that that was a good point
12 starting off and it should just say, "Upon the assertion
13 of a claim." And I am agreeing, though, that there
14 ought to be some specificity requirement after that, but
15 I don't have the language.

16 But I think that's not for the appellate
17 court to review. It's the assertion of the claim, and
18 we don't have to define it and then it goes to the trial
19 court for finding.

20 But I am joining the argument that we
21 should ask for some specificity.

22 CHAIRMAN BABCOCK: Great. Rich.

23 MR. PHILLIPS: Is the sense of the
24 Committee that this specificity requirement could be
25 covered by which word we pick there, prima facie,

1 plausible, colorable? I mean, if I have to show a prima
2 facie claim for ineffective assistance, then that should
3 tell me how much specificity I need to put into my
4 pleading, enough to have a prima facie claim.

5 I'm just wondering if the word we pick
6 there might address some of the concerns about
7 specificity because it's going to set a standard of some
8 sort for what that thing needs to say.

9 CHAIRMAN BABCOCK: Okay. Thanks, Rich.
10 Bill Boyce.

11 HONORABLE BILL BOYCE: So I'm going to
12 offer these observations about the level of specificity
13 that is required. Because as you may recall from our
14 prior discussions, because of the extra-accelerated
15 nature of these proceedings, this stands in contrast to,
16 you know, the circumstance, for example, that Chip
17 described where you've got a complete state court
18 proceeding followed by a separate complete federal
19 habeas process at which potential deficiencies can be
20 ferreted out and developed at some great detail and
21 length with a complete record.

22 This is happening fast, and so I want to
23 just put that consideration out there in terms of the
24 level of specificity that's going to be required and how
25 strict of a quote, unquote, "preservation standard" is

1 going to be read into the ability to develop an
2 ineffective assistance claim if it's referred and how
3 strictly that's going to be tied to language in a
4 motion. That's one observation.

5 The second observation is this: I think
6 that part of the concept of this rule is that an
7 appellate court is going to have discretion whether or
8 not to refer this. And I think built into that
9 discretion would be the level of specificity of the
10 complaint. If the only complaint is, I received
11 ineffective assistance of counsel and I want a referral,
12 then I'm -- with zero further development or factual
13 elaboration, then I think that's probably going to get
14 perceived in one way by a Court of Appeals. Something
15 that's a little more detailed in that there were
16 witnesses X, Y and Z, that my lawyer could have called
17 who would have given the other side of the story about
18 why my rights should not be terminated and those people
19 were not contacted and were not called, then that's a
20 different circumstance. So I guess the question to be
21 considered is how much specificity are we going to
22 insist on and balance to that and how much are we going
23 to allow that to be a factor that the Court of Appeals
24 takes into consideration in deciding whether to refer.

25 CHAIRMAN BABCOCK: Yeah. Richard

1 Munzinger.

2 MR. MUNZINGER: I have two points: No. 1,
3 regarding allowing the words "prima facie" to be
4 interpreted as requiring specificity in pleadings, I
5 don't see any advantage to promulgating a rule that is
6 ambiguous and requires interpretation to reach a
7 requirement for the Court to act, and I would be against
8 it. If you're going to require specificity, you ought
9 to say so.

10 Secondly, my concern at the moment -- and
11 the reason that I say this -- is a conservation of
12 judicial resources. If I recall, Justice Gray at one of
13 our last meetings where we discussed this, spoke about
14 the time burdens on the courts of appeal. You have to
15 review the record. You've got to do this, and that, and
16 so forth, in order to reach a decision on this motion.
17 Why would you want to allow these resources to be spent
18 and to require to be spent unnecessarily.

19 If you require specificity in pleadings,
20 you at least know what you're -- have an idea of what
21 the evidence is going to be, and you can form a
22 preliminary judgment, at least, as to whether or not
23 these things are or are not sufficiently grave that they
24 amount to a deprivation of competent counsel.

25 I don't see anything to be gained by

1 ambiguity. I see nothing to be gained in terms of
2 preservation of judicial resources in not requiring the
3 person who now has -- he's gone through a trial. He's
4 had a trial. He's -- he or she has lost the trial.
5 They have had a lawyer. There has been presumptively
6 post-judgment motions all of which have been denied and
7 he is now on appeal. He may or may not have
8 participated sufficiently, I don't know. But why would
9 you waste judicial resources and not require the person
10 in this circumstance to prove that he's got a real
11 reason for being there?

12 I'm finished. Thank you.

13 CHAIRMAN BABCOCK: Thanks, Richard.

14 One question I have following Richard's
15 comments, Bill, is: When one of the options is
16 plausible, is that meant to evoke the Federal Rule
17 12(b)(6), plausibility standard and pleading or -- and
18 possibly R-91a, although there's maybe debate about
19 that, but in any event, 12(b)(6) in the federal system?

20 HONORABLE BILL BOYCE: The direct answer
21 is yes. As a more -- I won't characterize it because
22 that could lead to debate about exactly how plausible is
23 applied. But, yes, the direct answer is, that -- it
24 would be tapping into that. And plausible also appears
25 in Texas case law, as well, from time to time in terms

1 of talking about whether or not an assertion has been
2 made, you know, of sufficient substance to go forward.
3 There's -- you know, there's a number of analogues that
4 could potentially be applied here.

5 And if I may, I just want to put out one
6 other very brief observation in response to Richard's
7 observation as well, which is, I think his astute
8 observation goes to the heart of the balancing that's at
9 issue here, which is the rights that are being
10 terminated by definition in this process are
11 constitutionally protected rights. That's the genesis
12 of this whole discussion about what are we going to do
13 to provide a mechanism to make sure the constitutionally
14 protected rights are not inappropriately terminated
15 through a deficient process.

16 And so the -- practically every sentence
17 in this rule is a balancing exercise between finality of
18 the termination so that the children and the families
19 can get on with their lives versus recognizing
20 procedural protections based on the constitutional
21 nature of the rights that are being terminated, and so I
22 think a discussion about how much specificity or
23 strictness should be required is another example of the
24 balancing.

25 CHAIRMAN BABCOCK: But the plausibility

1 standard at least is more rigorous than just a noticed
2 pleading, so in that sense, it would be a higher showing
3 or demonstration or whatever pleading, I guess, than
4 otherwise -- right -- than just notice?

5 HONORABLE BILL BOYCE: Yes. In speaking
6 for myself, not for the rest of the subcommittee, I have
7 an easier time getting my mind around the concept of
8 prima facie because I think there is probably more
9 analogues to that. You know, maybe in terms of
10 dismissals or burden shifting from an employment
11 context, or things like that.

12 I personally think that a prima facie
13 standard has a little bit more of a settled meaning than
14 other words such as "plausible" or "colorable," but I'm
15 confident there is other views on that, and I'm not
16 strongly advocating that. I just make that observation.

17 CHAIRMAN BABCOCK: Great thanks. Connie.

18 MS. PFEIFFER: I wanted to echo Bill's
19 comments about, first of all, the constitutional rights
20 here, but also that at this stage, in this posture, the
21 standards should be lower, less specificity, I think a
22 lighter burden. And remember, I mean, if you've been
23 dealing with an ineffective counsel you may be all of a
24 sudden dealing with a brand-new lawyer who is just
25 coming to the file, the person could be pro se, and so I

1 think you have to look at this through the lens of, this
2 is a mechanism to get this issue out of the Court of
3 Appeals back to the trial court where the trial court is
4 very well suited to look at this through the lens of
5 having seen the entire trial, as Chief Justice
6 Christopher pointed out there. They are very well
7 equipped to look at the allegations and the evidence in
8 the context of having lived through the trial, and it's
9 a fairly quick procedure.

10 And so at the point when they're first
11 raising this, they may not have gotten evidence or
12 discovery, and they certainly wouldn't necessarily have
13 testimony from the lawyer who was ineffective, and so I
14 think -- I think we should look at this through the lens
15 of lightening the burden at this stage and so for the
16 standard, I'm in favor of either colorable or prima
17 facie because I think that just states the claim without
18 having to have sufficient evidence or specificity to try
19 to raise it to some plausibility standard.

20 CHAIRMAN BABCOCK: Thanks, Connie.

21 Justice Christopher.

22 HONORABLE TRACY CHRISTOPHER: So, you
23 know, again, so what kind of specificity are we going to
24 require in the motion? Are we going to say: "Okay,
25 he -- you know, I've looked through the record. He

1 failed to object to these two things, and it prejudiced
2 me?"

3 Well, the prejudice prong is the hard part
4 for the Court of Appeals. It's the same thing with
5 these two witnesses were available to testify and they
6 didn't call them and here's what these two witnesses
7 would have said -- all right -- and that prejudiced me.

8 Again, to determine in any way, shape, or
9 form, that there was prejudice, you have to look at the
10 entire record. Right? So I think we have to be careful
11 on our specificity.

12 Now, I would suggest that the -- that you
13 would have to say, It was these two witnesses and attach
14 an affidavit from the witnesses as to what they would
15 have said, as opposed to, "They didn't call any
16 witnesses on my behalf." That's not specific enough.

17 I think that the prejudice part can be
18 more conclusory at this stage because that ultimately is
19 for the trial judge to determine.

20 CHAIRMAN BABCOCK: Okay. Thanks, Judge.

21 Richard Orsinger.

22 MR. ORSINGER: Thank you, Chip. I think
23 the specificity and the standard of proof or the burden
24 of persuasion are different. I like prima facie because
25 that's well-defined in Texas case law. But if there's

1 no specificity requirement, just an assertion that, "My
2 lawyer was incompetent," could arguably be prima facie
3 showing of incompetency.

4 We considered the degree of specificity in
5 connection with the recusal rule and just by -- for
6 purposes of reference, Rule 18a(4)(A) requires that the
7 motions must state with detail and particularity facts
8 that are within the affiant's personal knowledge, except
9 that facts may be stated on information and belief if
10 the basis for that belief is specified sufficiently --
11 well, I can't read the last word there. But the point
12 is: We grappled with this issue on the recusal motions
13 and required detail and particularity of facts that are
14 within the affiant's personal knowledge. To me,
15 specificity has to be part of this rule or else the
16 standard of proof doesn't mean much.

17 So I would be in favor of having a very
18 general requirement of specificity, like detail and
19 particularity of facts based on personal knowledge,
20 coupled with the prima facie standard. And then if
21 you've included enough facts that if true would create
22 an issue -- a debatable issue about disqualification,
23 then you should be entitled to this process.

24 Thank you.

25 CHAIRMAN BABCOCK: Thanks very much.

1 Scott.

2 MR. STOLLEY: I want to add something to
3 the context about the constitutionality issue, which is,
4 of course, very important, but that's the - you know,
5 the other thing that we in the subcommittee had to
6 balance was the rule that says, you know, the court is
7 supposed to decide these cases within 180 days. So
8 there's this balancing between the constitutional right
9 and the need to get this done quickly and have the
10 family and the child have some kind of finality.

11 We don't have the luxury of what they have
12 in the criminal system where you can file a habeas
13 corpus years and years later. So I'm leaning towards
14 what everybody is saying about making sure the pleading
15 standard is fairly low. I like Harvey's idea of saying
16 "assertions" instead of "showing."

17 Thanks.

18 CHAIRMAN BABCOCK: You bet. Any more
19 comments? Yeah, Scott, you've just spoke, so you can
20 take your hand down.

21 Anybody else?

22 (No response)

23 CHAIRMAN BABCOCK: Seeing nobody, Bill, do
24 we need to vote on plausible, colorable or prima facie?

25 HONORABLE BILL BOYCE: Yes. And I think

1 what I would ask is, before we get there, we vote on
2 Justice Brown's suggestion regarding "assertion" instead
3 of "showing."

4 CHAIRMAN BABCOCK: Okay.

5 HONORABLE BILL BOYCE: So let's -- can we
6 start with "assertion?"

7 CHAIRMAN BABCOCK: Yes, certainly.
8 Anybody want to be heard on the "assertion, showing"
9 debate?

10 Yeah, Judge Mendoza.

11 HONORABLE MARIA SALAS MENDOZA: Yeah, so I
12 think I already said that I was in favor of that, but
13 after Mr. Orsinger, I think that's a great idea. We've
14 already grappled with the specificity thing. I think it
15 should be, "Assertion of a claim without plausible,
16 colorable, or prima facie," because then I think what
17 follows is by written motion stating with, I think he
18 said, specified details and particularity. And that's
19 enough, and given this sort of tight timeframe to give,
20 you know, information that you want more than just say,
21 "This is an IAC claim," but without sending people your
22 research, what is plausible, what is colorable, what is
23 prima facie.

24 CHAIRMAN BABCOCK: Okay. Marcy.

25 MS. GREER: So I agree with the idea of

1 "assertion" with detail, but I just want to echo what
2 Chief Justice Christopher said about prejudice being
3 very difficult to articulate for lawyers and judges,
4 much less people who just feel like something went wrong
5 in their case. To actually show how it prejudiced their
6 case may be difficult, so I would not hold that -- the
7 prejudice prong to a standard of specificity that
8 arguably can't be met by pro se -- I mean, by
9 individuals.

10 CHAIRMAN BABCOCK: Great. Thanks, Marcy.
11 Justice Gray, you had your hand up, but
12 then it looks like it came down.

13 HONORABLE TOM GRAY: I'll speak, if I may.

14 CHAIRMAN BABCOCK: Certainly. Any time.

15 HONORABLE TOM GRAY: Well, no, I don't get
16 to speak over you or Justice Hecht so not "any time."

17 CHAIRMAN BABCOCK: Oh, don't forget
18 Justice Bland.

19 (Laughter)

20 HONORABLE TOM GRAY: Well, you know, we
21 kind of came up -- never mind. I won't go there.

22 You know, to me this is kind of like
23 choosing a wine for a meal and there are just a lot of
24 moving parts to this. And to vote on this one at a
25 time, which is historically the way we have done it, is

1 somewhat complicated because, depending on what goes in
2 that next blank of how much time you have to file this
3 motion depends on what I vote for on whether or not it
4 is a showing or an allegation.

5 To me the term, "showing" would require
6 the type support that has been referred to as the
7 affidavits of the witnesses that are going to testify
8 but that were not called or were not discovered. Or in
9 other words, a showing requires -- a showing of a prima
10 facie case which would require evidence to be included
11 with the motion. The problem with that is, if it is, as
12 I think the original draft that came to us was -- and
13 I'm talking about on the referral from the legislative
14 task force -- it was, I think, three days in there or
15 something like that -- or seven days, excuse me.
16 There's no way that an appellate lawyer is going to be
17 able to get the record and make a showing of ineffective
18 assistance of counsel being both prongs of deficient
19 performance and prejudice in seven days.

20 And -- so it's hard for me to address the
21 one without the other. But am I correct, Bill, in
22 understanding that the distinction between an allegation
23 and a showing, whatever the next term is, is the
24 difference between including the evidence of the
25 ineffective assistance of counsel versus merely an

1 allegation of? And I'll stop there.

2 HONORABLE BILL BOYCE: Do you want me to
3 go ahead and respond directly?

4 CHAIRMAN BABCOCK: Yeah, go ahead, Bill,
5 yeah.

6 HONORABLE BILL BOYCE: That's my
7 understanding. I mean, to -- we're dealing with some
8 shades of gray here -- no pun intended. But I think a
9 showing has more substance to it than an assertion.

10 And so one thing that I might throw out
11 for the larger consideration is, you know, would a
12 formulation upon an assertion deal with reasonable
13 particularity of a claim for ineffective assistance of
14 counsel by written motion? Would that be an appropriate
15 balancing here?

16 It introduces the notion of particularity,
17 but it gives some flex in there -- I think going to
18 Chief Justice Christopher's point -- that it's -- an
19 appellate court may be better able to -- or have more
20 information available to it to think about whether or
21 not there's arguable, you know, failure to do something,
22 as opposed to getting into the prejudice prong of it
23 which a Court of Appeals is going to have a much harder
24 time assessing at the outset.

25 So would assertion with reasonable

1 particularity, would that formulation strike an
2 appropriate balance?

3 CHAIRMAN BABCOCK: Okay. Eduardo.

4 (No response)

5 CHAIRMAN BABCOCK: You've got to take off
6 mute. You're not off yet.

7 HONORABLE ANA ESTEVEZ: If you can't find
8 it, just hold your space bar down while you talk.

9 CHAIRMAN BABCOCK: It looks like there is
10 a mosquito on his screen that he's trying to get. There
11 he is. Now we can hear you.

12 MR. RODRIGUEZ: I didn't have a comment
13 other than when I was trying to figure out if he was
14 talking about 50 Shades of Gray or not.

15 (Laughter)

16 HONORABLE BILL BOYCE: I deeply regret
17 saying that.

18 (Laughter)

19 CHAIRMAN BABCOCK: Connie, up to you.

20 MS. PFEIFFER: So I wanted to chime in and
21 say I like "assertion," and I also like the idea of
22 taking out plausible, colorable, or prima facie claim.
23 This isn't really a claim or a cause of action. This is
24 not habeas corpus. This is a ground for reversal, and
25 so maybe we solve some of these questions that we've all

1 been grappling with by saying, "Upon an assertion" I
2 think reasonable particularity makes sense or something
3 like that -- but upon assertion of -- with reasonable
4 particularity of ineffective assistance of counsel.

5 So we may take out some of these loaded
6 words and make this a little bit more streamlined.

7 CHAIRMAN BABCOCK: Okay. Judge Evans.

8 HONORABLE DAVID EVANS: The recusal rule
9 and reasonable particularity works well, but it also has
10 an extreme to it where it becomes -- because past notice
11 pleadings and becomes evidentiary. And, of course,
12 that's because the rule requires you to be able to show
13 the grounds as though -- and they have to be sworn to,
14 so I'm not sure how far you want to go in this context
15 since you're sending it down to the trial court for an
16 evidentiary determination.

17 But the -- I will say that the reasonable
18 particularity gets us past the conclusionary problem and
19 recusal hearings very, very well, and, of course,
20 otherwise -- but it also allows us to rule on some
21 summary -- in a summary fashion on those that are
22 complaining only about rulings. So I think that's a
23 good move there.

24 I have to admit, I'm not too sure I know
25 the difference between assertion and the debate there

1 but prima facie showing and how I would apply that as a
2 trial judge, but maybe that's why I'm -- I was a trial
3 judge so...

4 (Laughter)

5 CHAIRMAN BABCOCK: No Court of Appeals for
6 you, Judge Evans.

7 HONORABLE DAVID EVANS: Obviously not.
8 I've passed that day.

9 CHAIRMAN BABCOCK: Harvey.

10 HONORABLE HARVEY BROWN: I like Bill's
11 suggestion of an assertion with reasonable
12 particularity, and I'm also fine with dropping "prima
13 facie."

14 I still think that a comment telling the
15 practitioner that this is going to be looked at through
16 the lens of the Strickland Standard is just a comment,
17 accomplishes both the direction that we want to give but
18 at the same time the flexibility that Chief Justice
19 Christopher was talking about.

20 CHAIRMAN BABCOCK: Okay. Great. Thanks,
21 Harvey.

22 So, Bill, if we had a vote, somebody might
23 be in favor of "Upon an assertion with reasonable
24 particularity of a claim." Is that the -- is that one
25 side of the vote?

1 HONORABLE BILL BOYCE: I'm building off of
2 Connie's comment. I think it would be, "Upon an
3 assertion with reasonable particularity of ineffective
4 assistance of counsel."

5 CHAIRMAN BABCOCK: Okay. So strike all
6 that other language in between.

7 So that would be one. And then the second
8 would be sort of as you have it here but with three
9 options: Plausible, colorable, or prima facie. Right?

10 HONORABLE BILL BOYCE: Yeah, I think that
11 would turn it into a binary vote.

12 CHAIRMAN BABCOCK: Okay. So let's have a
13 binary vote. I love that phrase. Because we get all
14 messed up if we have trinary votes or fourpinary votes
15 or things like that.

16 HONORABLE BILL BOYCE: I'm easily confused
17 so...

18 CHAIRMAN BABCOCK: Yeah, you know,
19 totally. Totally. But let's do binary for this one.

20 So everybody who is in favor of the
21 language, "Upon an assertion with reasonable
22 particularity of ineffective assistance of counsel"
23 raise your hand.

24 Okay. And all for the other option, the
25 other binary which is upon a showing of a plausible,

1 colorable or prima facie claim for ineffective
2 assistance. Raise your hand.

3 MS. BARON: Can you lower everybody's
4 hand?

5 CHAIRMAN BABCOCK: Yeah, lower the last
6 vote.

7 And now raise them for this vote.

8 If anybody's raised their hand, I don't
9 see it.

10 So I'll say we're a unanimous vote, 36
11 people -- the chair not voting -- raised their hand for
12 the language I first read about an assertion with
13 reasonable particularity, so that will carry the day.

14 Bill, let's go on to something else.

15 HONORABLE BILL BOYCE: So to Chief Justice
16 Gray's point, I think that standard then is going to
17 drive what we want to do about the numbers of days that
18 stuff has to happen within after we get there.

19 So I guess the first place holder is how
20 long do we want to allow for the motion to be filed
21 after the clerk's record or the reporter's record is
22 filed? So this would be the number of days within which
23 you would have to file the first piece of this in the
24 Court of Appeals.

25 CHAIRMAN BABCOCK: Do you have a

1 suggestion?

2 HONORABLE BILL BOYCE: I think if we're
3 not requiring an evidentiary showing of some kind but
4 merely reasonable particularity, then I think a shorter
5 time frame would be appropriate and I'll open the
6 bidding at seven to ten days.

7 CHAIRMAN BABCOCK: Seven to ten days.
8 Okay. I'm trying to mute my clock here in the
9 background.

10 Harvey, did you want to say something?

11 HONORABLE HARVEY BROWN: Nope, I'm good.

12 CHAIRMAN BABCOCK: Who else has a thought?
13 Justice Christopher.

14 HONORABLE TRACY CHRISTOPHER: You know, I
15 would be in favor of seven, but just because, you know,
16 you have to file your brief within 20 days of this
17 timeframe, so, you know, they need to get in there and
18 get working on it. You know, especially we haven't
19 really talked about here about what we're going to do
20 about briefing deadlines while the case is referred back
21 to the trial court.

22 CHAIRMAN BABCOCK: John Warren said seven
23 business days by message.

24 Thank you, John.

25 Justice Gray.

1 HONORABLE TOM GRAY: Again, because
2 it's -- there's a lot of moving parts here. To make an
3 informed decision on this part of it, I need to know
4 what happens in the event that the appellate counsel
5 does not get it filed within seven days. Because if
6 this is a situation where you have a right to this
7 hearing on an ineffective assistance of counsel claim
8 and you use it or lose it in your seven-day motion, then
9 seven days is not enough.

10 If you can file an ineffective assistance
11 issue in your brief 20 days later, then maybe it is,
12 maybe it isn't. Because what we're getting here
13 hopefully is a record on whether or not -- and I
14 apologize, Chip, I've got one of those clocks in the
15 background that's going to tell us it's 10:00 as well.

16 CHAIRMAN BABCOCK: That's okay.

17 HONORABLE TOM GRAY: I feel like I almost
18 have to wait for it, but I'll try not to.

19 But you've got to wait to see, you know,
20 what happens with the issue in the event this is not
21 raised in the seven days.

22 The other part that is a problem is: We
23 actually see relatively few of these ineffective
24 assistance of counsel claims raised by the appellate
25 lawyer that has been appointed to review the appointed

1 trial lawyer's conduct. There's two places that then
2 happen that would seem to be kind of caught within this
3 rule. The first is, what happens when the appellate
4 lawyer files an *Anders* brief and it is raised for the
5 first time in the response by the appellate -- by the
6 actual parent -- former parent at that point -- I'll say
7 biological parent -- that files a response of, not only
8 was my trial counsel ineffective, my appellate counsel
9 was ineffective for missing the deadline for raising the
10 ineffective assistance issue or was ineffective on other
11 grounds.

12 And then you find the situation in private
13 termination cases where you've wound up with a
14 termination and I'm not -- I tried to go back to the
15 full rule of 28.4 to see if this would capture private
16 terminations and it seemed like it would. My
17 recollection is that private terminations are still
18 governed by Rule 28.4, and so the situation there is
19 that, you know, they just don't get it done in seven
20 days. It just doesn't happen.

21 But that would be what I would need to
22 know, particularly is it a use it or lose it before I
23 would bind someone to a seven-day period. Thank you.

24 CHAIRMAN BABCOCK: You bet. Lisa.

25 MS. HOBBS: I think Chief Justice Gray

1 raises some great points there.

2 One thing I would encourage is at minimum
3 it should be a ten-day rule and not a seven-day rule.
4 This is not something we can calendar. Right? We're at
5 the mercy of when the record comes in. And as somebody
6 who -- I don't do them, but my partner Karlene does
7 these. They can come at inopportune times. Right? And
8 I just think ten days gets you a weekend on either side
9 or I was in Italy, but I came back and did it
10 immediately or whatever. But seven days is really a
11 very short timeframe given that we -- this is not
12 something we calendar. Right? This is something -- a
13 record gets filed and then we can calendar it. It's not
14 calendared from a date certain that we know in advance,
15 so that would just be my plea that it be ten instead of
16 seven at minimum.

17 CHAIRMAN BABCOCK: Okay. What about seven
18 business days like John Warren suggested?

19 MS. HOBBS: I don't like business days in
20 general because that's not the way my brain works.
21 So -- but that would be more helpful. I mean, I think
22 ten gets you mostly seven business days. And it's
23 something we're more familiar with in the context of
24 rule counting under the Rules of Civil Procedure and the
25 Rules of Appellate Procedure.

1 CHAIRMAN BABCOCK: Okay. John, note this
2 for the future. Lisa's brain does not work on business
3 day calendars, so we've got that going for us.

4 MR. WARREN: Chip, if I may, the reason I
5 said seven business days was to give that additional
6 cushion. But given that now we have the ability to do
7 things more electronically, wouldn't that actually be
8 able to get -- allow a party to get the information --
9 receive notice, get a response, and get the information
10 filed within -- I would guess that's a reasonable amount
11 of time. I mean, at some point, when we started
12 addressing calendaring, we also would have to factor in
13 the new normal, which is not necessarily sending things
14 by paper but doing more things electronically, and that
15 includes signing and notifying and even collaborating
16 with other parties.

17 CHAIRMAN BABCOCK: Yeah, good point.

18 I think Lisa is -- you know, that's a
19 really good point because Lisa's positing the situation
20 where, you know, maybe it comes in late Thursday, she's
21 taken a three -- you know, a three or four-day holiday
22 to Turkey starting on Friday, and so with seven days
23 she's already, you know, three or four days into her
24 time limit before she even checks emails, so -- right,
25 Lisa? That's how your brain is working on this?

1 MR. WARREN: That makes sense.

2 MS. HOBBS: Yeah, I guess -- I mean, I get
3 under the -- like, for instance, I do some work under
4 the Public Information Act and that statute does do
5 business days. It throws me off every time. Because
6 it's not that I can't count business days and I know it
7 happens in context, but it's just not how the rules
8 typically work in the court system so...

9 CHAIRMAN BABCOCK: Right. Thank you.

10 MR. PORTER: Chip, this is --

11 CHAIRMAN BABCOCK: Justice Craig.

12 MR. PORTER: I'm sorry, Chip. This is
13 Chris Porter. I was just going to ask --

14 CHAIRMAN BABCOCK: Yeah, Chris, go ahead.

15 MR. PORTER: All right. Just one quick
16 question: Would it be -- can this be something maybe
17 where we can build into the language or something
18 like -- and a request for an extension -- a reasonable
19 request would be, you know, not -- maybe not freely
20 given, but, you know, you can seek a reasonable request
21 and, you know, whatever the language is that suggests
22 that as long as it is something that -- it works for
23 both sides or it works for the court, and that's
24 something that would be granted.

25 I know, for instance, extensions on -- at

1 the appellate courts are typically -- you know, 30-day
2 extensions are typically agreed upon at least once or
3 twice. And I'm just wondering if we could build
4 something in here, some similar language.

5 CHAIRMAN BABCOCK: Yes, a cushion in case
6 somebody misses a deadline or is about to miss it, yeah.

7 MR. WARREN: Chip, I was just going to
8 say, based on what Christopher was just saying.
9 Attorneys file their vacation letters, so I think at
10 some point that would be kind of a place holder for any
11 action that may occur within that timeframe.

12 CHAIRMAN BABCOCK: They do in Dallas and
13 Harris Counties but not every county --

14 MR. WARREN: Yeah.

15 CHAIRMAN BABCOCK: -- do you file a
16 vacation letter, just having gone through that recently.

17 MR. WARREN: Uh-huh.

18 CHAIRMAN BABCOCK: Somebody else had their
19 hand up, but maybe they took it down again.

20 So Judge Miskel says, "We don't file
21 vacation letters in Collin County." Yeah, that's right.
22 And not in Travis County, either, I might add. So...

23 MR. WARREN: I'll withdraw that comment.
24 It was never said.

25 (Laughter)

1 CHAIRMAN BABCOCK: Yeah, pie in the face
2 on that, John.

3 Bill Boyce.

4 HONORABLE BILL BOYCE: I'll make a couple
5 of observations in response to Chief Justice Gray's
6 comments and to Lisa Hobbs' comment, which is: As I
7 understand this concept, this proposed rule would not
8 foreclose raising an ineffective assistance of counsel
9 claim even if an initial motion deadline is missed.
10 Although an ineffective assistance of counsel claim
11 without any backup evidence is not likely to go very
12 far, so I make that observation. However, that plays
13 into the timeframe.

14 No. 2, I'm sympathetic with the concerns
15 that Lisa has voiced. The constraint we have is a
16 six-month time limit for deciding these cases, and then
17 I'd also flag for your consideration the Texas Family
18 Code 161.211 puts an outside time limit on when a
19 collateral attack could be raised, also six months.

20 So normal, freely granted extensions that
21 might apply in other circumstances are not going to fit
22 well within this because the Court of Appeals is -- it
23 doesn't have the usual flexibility that would apply in
24 other circumstances.

25 And so to sum up the comments, I think ten

1 days would be reasonable. The difference between seven
2 and ten, in light of the overall six-month limit, is not
3 humongous, but I can see where it would be impactful for
4 individual attorneys.

5 CHAIRMAN BABCOCK: Great. Thanks.

6 Richard Orsinger.

7 MR. ORSINGER: I just wanted to say that
8 our whole discussion has to do with those ineffective
9 assistance of counsel issues that require a development
10 of a record, other than the record of the trial. So you
11 can still raise your ineffective assistance of counsel
12 in a brief for grounds for a reversal based on the
13 record that the court reporter has forwarded.

14 So these are situations where it's
15 something that's not in the record, which typically is
16 going to be a failure to call witnesses or a failure to
17 interview witnesses, rather than something like the
18 failure to make objections and the failure to object,
19 you know, to a defective jury charge.

20 CHAIRMAN BABCOCK: Great. Roger.

21 MR. HUGHES: Thank you. I favor the ten
22 days largely because I think the new normal has to be
23 considered in light of the fact that a lot of these
24 cases may be handled by small law firms or solo
25 practitioners. And part of the new normal is trying to

1 find, keep, and keep staff is not easy. I'm not going
2 to go into my own personal problems, but I think we've
3 all had the problem that we've seen staff decimated,
4 both by illness and by just, you know, if I can't work
5 from home, I don't want to work for you anymore, et
6 cetera, et cetera. So I favor building in some leeway,
7 I mean, the ten days.

8 The second thing of it is somebody talked
9 about extensions. And given that we are on a
10 so-to-speak, kind of a rocket-docket, we have had
11 outside constraints on time to decide the case. If
12 we're going to allow an extension, we build in something
13 like we do for TRO's, that you only get one extension
14 for a particular time period and that's it and no more
15 extensions by agreement or whatever. I mean, I don't
16 like to be draconian about this but, you know, the clock
17 is ticking on deciding the case and we don't want people
18 to use this as a way of running out the clock or
19 something.

20 So, again, if we're going to -- if we're
21 not going to allow extensions, that might be worth
22 putting in. But if we are, then I'd say -- I would
23 recommend a -- that we specify the length of the
24 extension that can be granted and only one, whether by
25 agreement -- even if it's an agreed motion, you only get

1 one. And that's my comments.

2 CHAIRMAN BABCOCK: Thanks, Roger.

3 Justice Christopher.

4 HONORABLE TRACY CHRISTOPHER: Yes, so in
5 the IAC world you almost always need a hearing, even if
6 it's something that is apparent from the record. So you
7 failed to ask for something in the jury charge. Okay?
8 That could have been the strategy of the lawyer, as
9 opposed to, you know, "Oh, I didn't think about it."
10 You know, "Why didn't you object to this? Well, I
11 didn't object to this because I wanted to get in this
12 other piece of evidence, and I knew if I didn't object
13 to this, I could get in this other piece of evidence."

14 So in the criminal concept of IAC, if
15 there is not an evidentiary hearing, we often say at the
16 appellate court there is no evidentiary hearing here.
17 We can think of a reason why the -- a plausible reason
18 why the trial judge didn't do these things and therefore
19 we deny your IAC. Because on the criminal side, you can
20 then file your habeas.

21 So, I mean, we're kind of in this weird
22 hybrid situation here. And, I mean, that's something to
23 consider, too. Because, you know, normally, you give --
24 you give the lawyer a chance to explain why he didn't do
25 something.

1 And without that -- you know, so I
2 disagree with you, Richard, on it's going to be apparent
3 from the record and it should only be something like
4 witnesses. I think -- you know, unless we have a whole
5 new standard for IAC in these cases, we're going to want
6 to -- we at the appellate court are going to want to see
7 why the trial counsel did what they did.

8 CHAIRMAN BABCOCK: Perfect. Thank you.

9 Lisa Hobbs.

10 MS. HOBBS: I agree with that. And also
11 just -- if you don't accept what the Chief just said,
12 then you're getting into where you're conflating
13 harmless error with the higher Strickland prejudice
14 standard. Because we can do harmless error on records
15 but, you know, it seems like Strickland is looking
16 for -- I don't know -- it's at least different words. I
17 assume it's a different standard, too.

18 The thing about the extensions of time as
19 somebody -- again, I don't -- my name is on these briefs
20 but these are really Karlene's appeals that we handle
21 probably monthly. We know we can't get extensions,
22 like, unless we have a really good reason. Like, the
23 courts are very good about denying even agreed motions
24 for extension in these cases or if you had COVID or
25 something really -- you know, then they may give you a

1 short extension. But I just think the Courts of
2 Appeals, just in the general termination cases, they've
3 got it down on what their comfort level is for when this
4 needs to be rolling and when you've given them a really
5 good reason to give you a few extra days. But you don't
6 get -- it's not like general appeals where you get 30
7 days if it's agreed to. It doesn't work that way, and
8 the lawyers who handle these cases generally know that
9 they're on a very short leash if they're asking for more
10 time for any part of this case.

11 CHAIRMAN BABCOCK: Justice Gray.

12 HONORABLE TOM GRAY: Well, to echo what
13 Lisa just said, we can deal with the motion for
14 extension. It doesn't have to be in here. The parties
15 know they can file one. They know that the amount of
16 the extension is going to be limited, if it's granted at
17 all.

18 Also, remember the 180-day deadline is a
19 performance measure evaluation of the Court of Appeals.
20 It doesn't affect the litigants, other than the actual
21 delay. And so, you know, we factor that in, that it
22 does affect us, but it is -- there is no result that is
23 affected by crossing the 180-day threshold. It just --
24 it is a somewhat arbitrary selection of a time period by
25 rule of judicial administration.

1 My question, though, however is more
2 fundamental in that: Why do we need to put this
3 deadline for filing this kind of motion in this rule at
4 all? Why do we need the deadline, other than it's got
5 to be filed by the time that the brief is filed? And I
6 realize that you may wind up briefing an ineffective
7 assistance of counsel issue and also trying to develop
8 the record at the same time, but I don't see that as
9 much of a problem as trying to get all the ducks in a
10 row to file the issue as part of the brief. Because you
11 may be working on the brief on the night before its due
12 and you see a really good ineffective assistance of
13 counsel issue, but you need an evidentiary record for
14 the very reason that Justice Christopher explained is
15 that we basically presume, if one can be imagined, a
16 strategic reason for doing whatever was done or not
17 doing whatever was done, if a plausible reason can be
18 imagined.

19 And so do we really need to peg it to the
20 time that the record was filed or would it be better to
21 have the drop-dead date of, you know, before -- with or
22 before the appellate's brief is filed.

23 Thank you.

24 CHAIRMAN BABCOCK: You bet. So until
25 Justice Gray spoke there, I was thinking that maybe we

1 had a consensus on ten days, but now there's another
2 element here.

3 Anybody want to be heard on that?

4 HONORABLE BILL BOYCE: Chip, can I make
5 this observation.

6 CHAIRMAN BABCOCK: Yeah, absolutely.

7 HONORABLE BILL BOYCE: While I recognize
8 that the rule of judicial administration is a
9 performance measure, I think it's one that the courts --
10 the appellate courts take seriously and try to comply
11 with. But at the end of the day, it is a performance
12 measure. I think there's also the timing consideration
13 by Section 161.211, Subsection A, which in paraphrase
14 says, The validity of an order terminating the parental
15 rights of a person who's been personally served, et
16 cetera, is not subject to collateral or direct attack
17 after the sixth month after the date the order was
18 signed.

19 And so the concern that I have is, if
20 we -- if the deadline for filing the motion is pushed
21 back or is not specified, then the Courts of Appeals are
22 still bumping up against limits, they're going to get
23 jammed up trying to deal with these motions. And as
24 Chief Justice Christopher has observed on an undeveloped
25 record these challenges are not going to go very far, in

1 all likelihood, if criminal practices are applied in
2 this context.

3 So I would advocate for a ten-day limit --
4 or a ten-day deadline for filing the motion after the
5 record is filed in the Court of Appeals, again, as
6 another example of the balancing of interest that is
7 inherent in every sentence of this rule.

8 CHAIRMAN BABCOCK: Okay.

9 Richard Orsinger.

10 MR. ORSINGER: Chip, can I ask Bill Boyce
11 to clarify?

12 Bill, are you saying that there is a rule
13 or a standard that would preclude the Court of Appeals
14 from sustaining a complaint like this at the six-month
15 period, or is it just like a goal but not a ridged
16 deadline?

17 HONORABLE BILL BOYCE: I think that the
18 rule of judicial administration is more in the nature of
19 a goal, but I'm looking at 161.211 of the Family Code
20 that I think is also setting an outside deadline here,
21 and so that's my concern.

22 And if I'm not understanding the proper
23 application of 161.211, then I ask to be educated, but
24 that's what's causing some heartburn here.

25 MR. ORSINGER: Well, certainly at the task

1 force level we believed that you could add-on days to
2 the end of the six-month period for whatever delays you
3 have built into this.

4 But your reference to that Family Code
5 rule may indicate that you cannot add on to the sixth.
6 So even under this proposed rule in brackets is you're
7 told the running of the statute or the time, no more
8 than 20 days pending referral, we may not have the
9 ability to toll at all, and if we don't, that affects
10 these decisions we're discussing.

11 CHAIRMAN BABCOCK: Fair enough. Well,
12 unless there are other comments -- and there may be.

13 Lisa, do you have something you want to
14 talk about?

15 MS. HOBBS: Well, Justice Boyce, is that
16 for asserting a collateral attack or -- I mean, not to
17 go back too far in our votes -- or is it from ruling --
18 like, do you just have to apply to collaterally attack
19 it or do you think it's like a prohibition on a judge
20 allowing a collateral attack.

21 HONORABLE EMILY MISKEL: I think it's like
22 a bill of review. I think you can file it on the 180th
23 day at 11:59 p.m.

24 MS. HOBBS: That's the way I hope it is,
25 but I was just curious of what -- I don't have the

1 statute in front of me. Sorry.

2 HONORABLE BILL BOYCE: The operative
3 language that I'm looking at is: Quote, "Is not subject
4 to collateral or direct attack after the sixth month
5 after the date the order was signed."

6 HONORABLE EMILY MISKEL: Okay. I know the
7 answer because one was appealed to the Supreme Court out
8 of my court and it was filed on the very last minute of
9 the deadline.

10 HONORABLE BILL BOYCE: Okay.

11 CHAIRMAN BABCOCK: Okay. So there we go.

12 So what about having a binary vote and,
13 Bill, see if this works. One vote would be everybody
14 who's in favor of inserting ten days in the blank here
15 on your draft rule, and everybody who wouldn't vote for
16 that would be for something else, be it seven days,
17 seven business days, or as Justice Gray says, tied to
18 some other guidepost during the process.

19 So how about that? Is that okay, Bill?
20 Can we vote that way?

21 (No response)

22 CHAIRMAN BABCOCK: Bill?

23 HONORABLE BILL BOYCE: Yes.

24 CHAIRMAN BABCOCK: Okay. All right. So
25 everybody who is in favor of ten days raise your hand.

1 Okay. Everybody put your hands down now.
2 And everybody who is against the ten days,
3 for whatever reason, raise your hand. Okay. Everybody
4 voted?

5 So ten day wins, 26 to three, the Chair
6 not voting.

7 And so we'll -- we will now take our
8 morning break and be back at 10:45. If that's all right
9 with everybody.

10 (Recess: 10:36 a.m. to 10:45 a.m.)

11 CHAIRMAN BABCOCK: So we're back on the
12 record having made tremendous progress getting through
13 the first three lines of this rule -- proposed rule, so
14 let's move forward.

15 MR. JACKSON: Chip, you might want to --
16 she's starting it up. Okay. Never mind.

17 CHAIRMAN BABCOCK: I'm sorry. What did
18 you say, David? I missed that.

19 MR. JACKSON: I'm sorry. She was starting
20 up live, the recording and that sort of thing, and you
21 were headed on down the road.

22 CHAIRMAN BABCOCK: Okay. Well, I don't
23 think recording my remarks on video is necessarily
24 something that has to happen.

25 But anyway, Bill, let's keep going.

1 HONORABLE BILL BOYCE: So I think we have
2 now moved to the next question of -- we've moved on to
3 the next question of how long the -- should there be a
4 time specification for when the appellate court must
5 rule on the motion, and do we want to build into that
6 denial by operation of law if there is no affirmative
7 action on the motion.

8 The task force draft rule had set a
9 three-day time limit, and I think Chief Justice
10 Christopher and some others had expressed concern that
11 that was really too short of a time period for the Court
12 of Appeals to give this the necessary attention.

13 So I might solicit Chief Justice
14 Christopher or Chief Justice Gray or Justice Kelly or
15 others who might have thought about what a reasonable
16 period of time for the Court of Appeals to act would be.

17 CHAIRMAN BABCOCK: Yeah. Great. And Pete
18 Schenkkan darted his hand up there maybe before you
19 started speaking and after I did.

20 Pete, did you have something preliminarily
21 to say?

22 (No response)

23 CHAIRMAN BABCOCK: You've got to go off
24 mute if you're going to talk.

25 (No response)

1 CHAIRMAN BABCOCK: Well, maybe that's an
2 inadvertent hand, you never know.

3 So, Pete, we'll get back to you, if we
4 need to, or if you want to speak again.

5 But members of the task force, Justice
6 Christopher.

7 HONORABLE TRACY CHRISTOPHER: Well, given
8 the way we've phrased the motion, I'm all right with
9 three days, but I wouldn't have an automatic denial.

10 MR. ORSINGER: Why?

11 HONORABLE TRACY CHRISTOPHER: Why wouldn't
12 I have an automatic denial? Because, you know, three
13 days is aspirational. Right? I should get it done in
14 three days, but it -- you know, if I get it in four or
15 five days, then it's okay.

16 But, I mean, I think it's good to, you
17 know, give us that. Or, you know, what if I am reading
18 the brief and realize, "Oh, yeah, okay. I should have
19 granted that motion." So I wouldn't put an automatic
20 denial in there. I think that's a bad thing.

21 CHAIRMAN BABCOCK: So you would also want
22 to change the word "must." Right?

23 HONORABLE TRACY CHRISTOPHER: No, no, no,
24 no, no. "Must" is still good. I mean, you -- we want
25 to have a deadline. We want to say, "Okay, I've got to

1 get it done in three days," but -- and we do. I mean,
2 we're very fast on motions in parental termination
3 cases, you know, when people ask for extension of time.
4 Like in my court, we usually have three judges, but if
5 this rule passes, I would go back to the option of just
6 having one judge rule on the motion, which we're allowed
7 to do under the appellate rules, you know, just to keep
8 things going. So I think the faster the better so...

9 CHAIRMAN BABCOCK: If you leave "must" in
10 there, even if you take out "otherwise, it will be
11 denied by operation of law," don't you leave open the
12 argument from somebody saying, "Well, they denied it
13 because they had to act in three days and they didn't."

14 HONORABLE TRACY CHRISTOPHER: I don't
15 think so. I don't think that's the way case law goes,
16 but I could be corrected.

17 CHAIRMAN BABCOCK: I would be hesitant to
18 correct you on case law.

19 Lisa.

20 MS. HOBBS: Thank you, Chief Justice
21 Christopher, that the three days didn't scare you. I
22 was thinking that was way short. I do agree with you,
23 that unless it says, "Denied by operation of law," that
24 is such a unique thing and very unique places that we
25 have it that the failure to rule would not be a denial

1 by operation of law in a case unless there's expressed
2 language somewhere that it is.

3 And then I guess I just would ask the same
4 Chiefs, if you deny these within three days, is there a
5 perception from the terminated parent that maybe it
6 wasn't given enough consideration. Like, if you grant
7 them and they get their hearing in the trial court,
8 they're going to applaud you and say, "Good job. You
9 did that quickly. I'm going to get my hearing."

10 But I guess that short of timeframe I
11 just -- I'm raising the issue if perhaps there is a
12 perception from the litigant, not from the lawyers, but
13 from the actual party, that it wasn't, maybe, given its
14 full consideration, particularly when it's denied, and
15 that's just my only comment with that rule -- with that
16 time proposal.

17 CHAIRMAN BABCOCK: Thank you.

18 Justice Gray.

19 HONORABLE TOM GRAY: Well, it's
20 interesting that you have three days here. And I could
21 not quickly find the rule that doesn't count weekends,
22 if there -- it's less than five days' notice or
23 something. So, you know, that might trigger a longer
24 time. But, basically, I'd flip it, and I'd say, unless
25 it's granted -- or unless it's denied in three days,

1 it's granted as a matter of law -- or deemed granted
2 because -- you know, if Tracy can get these done in
3 three days by one judge or three judges, my hat's off to
4 her. But three days as Lisa anticipated, that is a
5 tough, tough, tough deadline to meet and make a
6 meaningful decision. If you're going to glance at them
7 and say, "Yeah, let's develop the record," then why not
8 have a presumptive grant and let the trial court deal
9 with it?

10 The other more fundamental thing to me is:
11 With three days, a written motion, you're basically
12 talking about ex parte. You've provided no opportunity
13 for anyone else to file any response to this in the
14 rule. And practically with a three-day window, you've
15 denied it procedurally. I mean, maybe you give them
16 three days to file a response and seven days to rule on
17 the motion, but that -- three days to me is unreasonably
18 short unless it is a presumed grant.

19 HONORABLE TRACY CHRISTOPHER: You know, we
20 had that long discussion in the Supreme Court
21 Supervisory Committee about the fact that we have a
22 three-day notice for hearings. Right? And people are
23 like, "Well, that's ridiculous. Nobody can file a
24 response. Nobody can -- you know, we need to change it
25 to seven, we need to change it to ten," and it never

1 moved. Right? It's three-days' notice for a hearing.

2 I mean, do I want to impose three days on
3 me? No. But do I think it's a good idea? Yes. I
4 mean, we rule on emergency stay motions quickly, and to
5 me, this would have to have the same urgency as an
6 emergency stay.

7 And I also think I could look at the
8 motion and if they have an affidavit of two witnesses
9 that said, "I would have said these things. I'm going
10 to send it back." So if they just say, "My lawyer
11 didn't call any witnesses," I would say, "No." You
12 know, "You're not particular enough here." Or, you
13 know, "They didn't file a motion for continuance, and I
14 needed one."

15 You know, I mean, I just -- and Tom's
16 right that it will be a, you know, quick look through on
17 a three-day notice. But I just think, again, like Bill
18 said, you've got to balance the time limits here.

19 CHAIRMAN BABCOCK: Yeah. All right. I
20 thought you were going to point out that as Chief you
21 have control of your court but you didn't make that
22 argument so...

23 (Laughter)

24 HONORABLE TRACY CHRISTOPHER: I'll have no
25 comment on that.

1 CHAIRMAN BABCOCK: All right. Roger.

2 MR. HUGHES: Following up the query about
3 what did the rules provide about time. TRAP Rule 4.1
4 says, that in the -- The day of an act, event, or
5 default after which the period begins to run is not
6 included, et cetera, et cetera, so we have a situation
7 here where we do have a rule that tells us a little bit
8 but it's not -- and says, if the last day falls on a
9 weekend or a legal holiday, it doesn't count.

10 In other words, what I'm concerned about
11 here is that even under this rule, if the motion gets
12 filed at 5:30 or 6:00 on Friday night, we have a
13 situation where maybe it's not even going to be seen by
14 staff and considered till Monday morning and that gives
15 the Court maybe only one day to evaluate and respond.
16 Whereas, if it was filed on a Monday, there might be a
17 few more days involved. I don't know whether that is
18 enough to, say, increase it from like three to five or
19 not, but I think it might be a concern that might merit
20 some discussion.

21 That's it. Thank you.

22 CHAIRMAN BABCOCK: Great. Thanks.

23 Justice Gray, did you reraise your hand or is that from
24 the last time?

25 (No response)

1 CHAIRMAN BABCOCK: Must have been from the
2 last time. Okay.

3 HONORABLE TOM GRAY: It was a leftover
4 hand raise. Sorry about that.

5 CHAIRMAN BABCOCK: That's all right.
6 That's okay.

7 Anybody else want to talk about three days
8 versus a different period of time, and then also whether
9 denial by operation of law? Any other comments about
10 that?

11 (No response)

12 CHAIRMAN BABCOCK: All right. Well,
13 let's --

14 MR. ORSINGER: Chip, can I say --

15 CHAIRMAN BABCOCK: Yes.

16 MR. ORSINGER: If we leave out "Denial by
17 operation of law," would that permit the Court of
18 Appeals, you know, even as late as reading the appellate
19 brief to make a decision to remand for a fact finding
20 and would that be a good thing?

21 CHAIRMAN BABCOCK: I took Justice
22 Christopher's comments to suggest that the Court would
23 have that ability if you took out the "Denied by
24 operation of law" language. She can speak for herself,
25 but that's what I took her to say.

1 MR. ORSINGER: I think that would be very
2 beneficial because the initial review on a quick
3 timetable of three days -- it may be after more
4 consideration of the record and the issues raised in the
5 appeal that the panel might decide that they want to
6 give the appellate an opportunity to develop the facts.
7 And so while -- even if it's overruled by operation of
8 law, maybe they still have that power that would make me
9 inclined to not overrule by operation of law.

10 CHAIRMAN BABCOCK: Okay. Justice Gray, is
11 your hand - may be --

12 HONORABLE TOM GRAY: Yes.

13 CHAIRMAN BABCOCK: -- back up again?

14 HONORABLE TOM GRAY: Yes. Yes, it is.

15 CHAIRMAN BABCOCK: Okay.

16 HONORABLE TOM GRAY: I would change the
17 word "must" to "should" and not have the "denied by
18 operation of law" to preserve our ability to carry the
19 motion until we see the brief and the rule record. And
20 I realize that at that point the issue needed to be
21 briefed and maybe it has been, but I would want to make
22 it a nudge towards carrying a motion with the appeal for
23 a little bit longer.

24 You know, in deference to what Bill's
25 talking about, we are balancing -- we are balancing the

1 constitutional rights against rules and statutes and a
2 deadline that is imposed by the Supreme Court. We are
3 not balancing between two constitutional provisions.
4 And this is going to be hard enough to administer and
5 decide and process as it is. And with three days, I
6 would put, "should rule on it in three days" and not
7 have a default provision for denial.

8 Thank you.

9 CHAIRMAN BABCOCK: Got it.

10 Roger.

11 MR. HUGHES: Well, perhaps a compromise
12 could be that instead of saying it's "overruled by
13 operation of law," is to say that it is "deemed
14 overruled pending further consideration by the Court."

15 First, you would get the effect of a
16 ruling, so that the party will know, "Okay, it's
17 effectively resolved but the Court may reconsider
18 later," kind of like the court's plenary power after a
19 motion for new a trial is denied.

20 Second, you would at least have a ruling.
21 So if you have a -- shall we say an adventurous counsel,
22 he can file a mandamus -- at least file a mandamus -- to
23 the Supreme Court saying, "I've got an effective ruling.
24 It should have been granted in a heartbeat."

25 So perhaps that compromised language that

1 it's deemed pending further action -- further
2 consideration by the Court, would allow you the effect
3 of having a ruling but then give the Court latitude that
4 if they think about it some more and later on they
5 couldn't say, "Well, we're going to exercise our power
6 now and grant it." That's my call.

7 CHAIRMAN BABCOCK: Okay. Bill, what's
8 your reaction to that?

9 HONORABLE BILL BOYCE: I'm getting a
10 little concerned about making this complicated rule more
11 complicated. I think I'm hearing consensus building
12 around three days with room for discussion about
13 "should" versus "must" and "denied by operation of law."
14 I guess my thought would be: The Court of Appeals --
15 let me say it this way.

16 Taking out a reference to pending
17 reconsideration wouldn't change anything because the
18 Court of Appeals would already have that authority. It
19 could deny it initially, get the briefs, get the record,
20 look at it and say, "We denied it before on a -- you
21 know, without a record in front of us, but now that we
22 see, we think there's potentially something here so we
23 want to send it back."

24 So I think what I'm suggesting is: Three
25 days should rule on and leave it at that.

1 CHAIRMAN BABCOCK: Okay. I'm going to
2 hold that in the form of a motion.

3 But Professor Hoffman had a comment.

4 PROFESSOR HOFFMAN: I did. Thanks, Chip.

5 Speaking of a complicated rule -- and, you
6 know, I don't know the rules well enough, so maybe
7 somebody else could jump in and tell me if I'm wrong
8 about this. But isn't it -- all these references to
9 what the trial court must do, which essentially is like
10 the second half or more of this entire proposed rule, is
11 that common to include directives to the trial court in
12 the Texas Rules of Appellate Procedure? I would think
13 it is not, but, again, I don't know.

14 HONORABLE BILL BOYCE: I think Pam has a
15 comment.

16 CHAIRMAN BABCOCK: Pam.

17 MS. BARON: There are directives to the
18 trial court in a number of rules, including ones about
19 supersedeas, ones about orders during an interlocutory
20 appeal on temporary orders, so, no, I don't think it's
21 that crazy.

22 CHAIRMAN BABCOCK: Okay. Bill, let me see
23 if I can formulate something to vote on.

24 What if we ask people to express their
25 views on whether the appellate court should rule on the

1 motion "within three days" and strike "otherwise, it
2 will be denied by operation of law."

3 Is that -- that's what I heard you kind of
4 say a second ago.

5 HONORABLE BILL BOYCE: Yes, that's what I
6 intended to say.

7 CHAIRMAN BABCOCK: All right. So let's
8 vote on that. Everybody in favor of the rule saying,
9 "The appellate court should rule on the motion within
10 three days," period, striking the language, "Otherwise,
11 it will be denied by operation of law." Everybody in
12 favor of that, raise your hand.

13 All right. Everybody drop those hands
14 now, please.

15 And everybody opposed, raise your hand,
16 please.

17 Everybody finish voting?

18 (No response)

19 CHAIRMAN BABCOCK: All right. That passes
20 by a vote of 29 to 2, the Chair not voting. And so we
21 will move on within this rule.

22 Bill, and where do we go next?

23 HONORABLE ANA ESTEVEZ: Hey, Chip, my vote
24 was with the first one. I just didn't lower my hand
25 fast enough. Sorry. I'm the second one.

1 MS. GREER: Mine too. I think if I was
2 the second. I noticed it was still up.

3 CHAIRMAN BABCOCK: Yeah, it was the second
4 vote. So it's unanimous.

5 HONORABLE ANA ESTEVEZ: Thank you.

6 CHAIRMAN BABCOCK: 31 to 0. Thank you.

7 Glad nobody hacked into our voting
8 machines on this. All right.

9 So go ahead, Bill.

10 HONORABLE BILL BOYCE: So I think the next
11 couple of deadlines really go to the trial court
12 proceedings, and so I would solicit the trial judges'
13 views about what is an appropriate amount of time for --
14 within which to require a trial court to hold an
15 evidentiary hearing on the referral and sign an order.

16 CHAIRMAN BABCOCK: Okay. And Richard
17 Orsinger, who is to my recollection not a trial judge,
18 but thinks he is. So go for it.

19 MR. ORSINGER: I just wanted to say this.
20 I can wait until later, but I think that we need to have
21 a consistent measure of the passage of time and events.
22 And it starts out by saying, "The trial court must begin
23 the evidentiary hearing," but then findings of fact and
24 conclusions of law are due so many days after the
25 hearing is concluded. And remember that one of the

1 considerations we had was that, sometimes courts will
2 start a hearing in an artificial way by swearing in one
3 of the parties as the first witness and then recessing
4 and then not meeting any kind of deadline to conclude
5 the hearing because they started the hearing.

6 So I think we have to be alert to the fact
7 that some trial courts may begin the hearing in a
8 perfunctory way and then recess it for a period of time.

9 The trial court's obligation in the next
10 sentence is to make findings of fact and conclusions of
11 law, but in the following sentence you have a blank
12 number of days from the date of the trial court's order.

13 So I'm not clear on whether the trial
14 court on referral is merely making findings of fact and
15 conclusions of law to forward to the Court of Appeals to
16 make an order or whether the trial court is making an
17 order like the granting of a new trial.

18 So I think we need to calibrate or
19 coordinate findings of fact and the concept of an order,
20 and then at the end of this, we have an extension of the
21 six-month timetable is capped at no more than 20 days,
22 and so that's a hard cap. Even though the deadline may
23 not be a hard deadline, that's a hard cap. But because
24 the trial court can begin the evidentiary hearing
25 without a deadline on when it's concluded, that could

1 easily be more than 20 days. The trial judge could
2 stretch it out and all of a sudden now the Court of
3 Appeals is still stuck with the 20-day deadline, even if
4 it took the judge 30 or 45 days to do it.

5 So I feel like we need to coordinate the
6 deadlines with the beginning and ending. We need to
7 resolve whether the trial court is doing findings and
8 conclusions or rendering an order, and we need to be
9 sure that the internal deadlines are date periods all
10 add up and match the tolling period for the Court of
11 Appeals.

12 Thanks.

13 CHAIRMAN BABCOCK: Judge Miskel.

14 HONORABLE EMILY MISKEL: I'm going to put
15 something in the chat, which is a link to Texas Family
16 Code 109.001(b-2), and that is the provision that allows
17 the trial court to grant temporary orders pending
18 appeal. And the way that they have phrased the Court's
19 authority and time limit to do those temporary orders
20 pending appeal is: The Family Code says, The trial
21 court has jurisdiction to conduct a hearing and sign an
22 order until the 60th day after the notice of appeal has
23 been filed. So that is a complete cap on: You can have
24 the hearing on the 60th day, but you also have to sign
25 an order the same day, and there's no extending past the

1 60th day.

2 So however many days and whatever date you
3 measure if from, you could copy this approach and say,
4 "The trial court has jurisdiction to conduct the hearing
5 and sign findings of fact and conclusions of law until X
6 date after Y whatever."

7 CHAIRMAN BABCOCK: Great. Thank you.

8 Lisa, I think you're next, and then
9 Munzinger.

10 MS. HOBBS: I just want to reiterate
11 Richard's concern about how trial judges across the
12 State of Texas are actually starting hearings in some
13 fake way -- I'm going to say -- that gives them -- like
14 alleviates some of the pressure on them for statutory
15 timelines.

16 It is happening more and more frequently
17 in the cases I'm seeing on our CPS docket, and it's
18 frustrating and very problematic. So I just don't want
19 that comment to get lost of just one practitioner's
20 experience. I also am seeing that across the State.

21 And Judge Miskel's thoughts about the way
22 that the Family Code provision that she cited in the
23 comments addresses that might solve that problem. I'd
24 have to think about it a little bit more.

25 CHAIRMAN BABCOCK: Richard Munzinger.

1 MR. MUNZINGER: Both parties to the case
2 have interests in the final judgment and in the final
3 resolution of the issue, and I think it would be a
4 mistake to not have some kind of hard cutoff date
5 requiring a trial court to hold a hearing, enter its
6 order and findings of fact and conclusions of law within
7 a particular time. And the 60 days that she just
8 suggested and following that rule, seems to be a good
9 one. You can't just let this thing pend, and trial
10 judges are not all that anxious to get any of these
11 things -- there needs to be a time limit.

12 Thank you.

13 CHAIRMAN BABCOCK: You betcha.

14 Judge Mendoza.

15 HONORABLE MARIA SALAS MENDOZA: So I have
16 to preface this by saying that I don't do any family
17 law. I just handle criminal, so my experience is based
18 on how these things happen with me. And I frequently --
19 well, not frequently, I should say every once in a
20 while, have orders from the Court of Appeals that I must
21 do something by a certain date, and it's tough. It's
22 tough. I will say that.

23 So I think that in these cases where you
24 have to have an evidentiary hearing, even if you had a
25 really on-the-ball trial judge and they scheduled a

1 hearing, let's say, within ten days, I think that's
2 tough for the parties in these types of cases to line up
3 witnesses or whatever they need to present to develop
4 their IAC claim. So that's more of a concern for me,
5 that it be sufficient time for the parties to get their
6 ducks in a row for a hearing.

7 But I like Judge Miskel's suggestion, and,
8 again, I don't practice in this area, but I know we're
9 working on some really tight deadlines. I would suggest
10 we do something like the rule that Judge Miskel is
11 referencing, but I would cut it off at 30 days. Because
12 I do think while it's tough, everyone else is working on
13 real tight time tables, ten days, three days, I think it
14 would be a good thing to push the trial court at about
15 30 days. If you want to wait until the 30th day, that's
16 on you. You're going to have to do everything on that
17 day.

18 And by the way, when the Court of Appeals
19 tells me to do something, I'm usually going up until
20 that last day, having the hearing, doing the findings,
21 all on that last day.

22 So -- but I think 30 days is reasonable in
23 this area.

24 CHAIRMAN BABCOCK: Thank you, Judge.

25 Judge Schaffer.

1 HONORABLE ROBERT SCHAFFER: I think the
2 idea of having a timeframe during which the whole thing
3 needs to be completed and then let the Court do the
4 individual items that are contained within this rule
5 within that timeframe is a much better idea. Because we
6 all have to keep in mind, this isn't the only things
7 these courts are doing when these hearings are going on,
8 especially in the family court arena. Judge Miskel and
9 others can talk about that more than I can because I do
10 none of it, but I hear from my colleagues, and it's an
11 everyday process on the bench. And if you throw this
12 into the process and force them to all of a sudden have
13 to just stop everything else, that's going to create
14 other problems for these courts.

15 So I say take a -- make a deadline for
16 which everything has to be completed and then leave it
17 up to the trial court to schedule it.

18 CHAIRMAN BABCOCK: Thank you, Judge.

19 Pam.

20 MS. BARON: Well, I was going to say
21 something similar, which is just to peg both the hearing
22 date and the findings and conclusions date to the
23 referral order so that they refer back to one certain
24 date. And I think the idea may be of saying the trial
25 court will hold a hearing and issue its findings no

1 later than X days after the referral date, would give
2 the trial court that flexibility.

3 I think it has to be a shorter timeframe
4 than we've been talking about. And in terms of the
5 family law code provision, I'm not sure that would apply
6 to this because here we're not asking the trial court to
7 make an order. We're asking the trial court as an
8 adjunct of the Court of Appeals to hold a factual
9 hearing to assist the trial court in deciding a motion.
10 So it's a little bit different. It's a little bit like
11 abate and remand for making findings of fact and
12 conclusions of law. You don't look at whether or not
13 that's within the particular jurisdiction or time period
14 in which the trial court connects because it's doing
15 something basically as a referral from the Court of
16 Appeals. The Court of Appeals can do that too if there
17 are fact issues on whether the Court of Appeals has
18 jurisdiction. So there, again, the trial court is
19 acting as an adjunct to the Court of Appeals and not
20 making its own order. So I think that's sort of
21 questionable.

22 But I would say 20 days from the date of
23 the referral, the trial court has to have had its
24 hearing and made its findings. We've really got to keep
25 this train on the track, and we can't slow the Court of

1 Appeals down too long. We want to make sure that
2 everybody gets their constitutional rights protected,
3 but we've got to do it very quickly because of the
4 interest at stake.

5 CHAIRMAN BABCOCK: Okay. Thank you.
6 Judge Stryker.

7 HONORABLE CATHLEEN STRYKER: I would echo
8 everything that Judge Baron just said. I think -- I do
9 mostly family law, and I would say that if I can't get a
10 hearing scheduled in two weeks, and then give me another
11 week to do the findings of fact and conclusions of law,
12 then my train has gone off the track. So I think we can
13 do it, and I think there needs to be a sense of urgency,
14 so I would agree with -- I was going to suggest 21 days.

15 CHAIRMAN BABCOCK: All right. So you and
16 Pam are within a day of each other. Great.

17 Bill.

18 HONORABLE BILL BOYCE: So I was going to
19 say that it sounds like consensus is building around
20 setting the outside deadline, as opposed to the
21 beginning deadline. And I think Richard's and Lisa's
22 points go to that 20 or 21 days and changing order to
23 "findings and conclusions," so that there's consistency
24 throughout. I think I'm hearing consensus on those
25 points.

1 CHAIRMAN BABCOCK: Not so soon.

2 Judge Miskel wants to weigh in.

3 HONORABLE EMILY MISKEL: I was just going
4 to say that in courts that hear CPS cases, we're very
5 used to having evidentiary hearings on short deadlines
6 because every CPS removal case begins with, we have to
7 have an evidentiary hearing within 14 days of when we
8 sign the removal. So if your docket has CPS cases,
9 you're doing evidentiary hearings within 14 days of the
10 time a case pops up.

11 So if it's the 20 or 21 day deadline that
12 everyone's talking about, I think CPS courts are used to
13 having to do things that rushed.

14 CHAIRMAN BABCOCK: Great. Bill, was
15 that -- was that your hand up from previous comments or
16 do you want to say something again?

17 HONORABLE BILL BOYCE: That was me failing
18 to lower my hand.

19 CHAIRMAN BABCOCK: Well, lower your hand.
20 Orsinger, same thing with you?

21 MR. ORSINGER: No. I have a comment to
22 add.

23 CHAIRMAN BABCOCK: Okay.

24 MR. ORSINGER: Which is that, yes, I agree
25 with what Bill just said, that we're not expecting to

1 have an order from the trial court. I think we're
2 expecting to have findings and conclusions and let the
3 Court of Appeals do the order.

4 Is that agreed, Bill?

5 HONORABLE BILL BOYCE: Yes. That's what
6 I'm understanding, and that's consistent with us getting
7 away from the trial court making recommendations. The
8 trial -- what I understand us to be talking about here
9 is, the trial court is going to say, "Make findings,"
10 you know, "yes or no on ineffective assistance, yes or
11 no, you know, on prejudice."

12 MR. ORSINGER: Okay. So there's another
13 internal deadline here which is the court reporter's
14 deadline, and I want to make a suggestion about that.
15 But I also want to say, rather than having the deadline
16 that the trial court must make findings, which doesn't
17 get those findings to the Court of Appeals, so does the
18 clerk have to forward them? Does someone have to
19 request them? Can one of the lawyers file them? I
20 would suggest that the deadline not be to make the
21 findings and conclusions, but to file the findings and
22 conclusions with the Court of Appeals, and that
23 eliminates a few days' delay if the trial judge has to
24 be responsible for getting them filed.

25 With regard to the court reporter's

1 record, this court reporter's record is based on when
2 the trial court issues its order. We are -- the trial
3 court is going to issues findings and conclusions now,
4 but the hearing may have been concluded ten days before
5 the findings are ready. And it seems to me like the
6 court reporter's deadline to file the court reporter's
7 record should be when the hearing concludes and not when
8 the trial court issues its findings and conclusions.
9 There's no reason to have the trial court -- pardon
10 me -- the court reporter wasting time not preparing the
11 record when the evidence is closed.

12 CHAIRMAN BABCOCK: Justice Gray.

13 HONORABLE TOM GRAY: To follow-up on
14 Richard's point.

15 My concern here is the requirement that we
16 have written findings and conclusions. I would much
17 rather give the trial court the flexibility to dictate
18 those on the record and not require a separate document
19 that has to be filed with the clerk and then forwarded
20 to us in a supplemental record. And so I would like to
21 see the rule have that flexibility to expressly make the
22 findings on the record, and on this point I'll close. I
23 have a gnat on another point, but I'll get back to that
24 when appropriate.

25 CHAIRMAN BABCOCK: Well, I think we're --

1 nobody else's hand is up, so why don't you do your gnat
2 now? Now is that different from a nit, by the way?

3 HONORABLE TOM GRAY: I don't know what a
4 nit is. I know what a gnat is.

5 CHAIRMAN BABCOCK: Okay.

6 HONORABLE TOM GRAY: So the proposal says,
7 "After the referral order is signed." I don't know
8 exactly if that contemplates a per curiam order, which
9 is normally the way these would be done. They would not
10 be physically signed, and so I would just change that
11 phrase to "After the date of the referral order" period.

12 CHAIRMAN BABCOCK: Great. Thank you.

13 Any other comments?

14 (No response)

15 CHAIRMAN BABCOCK: Bill, do we have
16 anything to vote on? We sort of have a bunch of
17 different thoughts here, but if you think there's
18 something to vote on, do it.

19 HONORABLE BILL BOYCE: Yeah, let me see if
20 I can articulate this. So the -- let's see. I just saw
21 a helpful email that may already have crystallized this
22 so let me look at that real quick courtesy of Rich
23 Phillips.

24 The trial court shall hold a hearing and
25 file its findings of fact and conclusions of law no

1 later than 21 days after the date of the referral order.

2 I think that captures everything we've
3 talked about except for Chief Justice Gray's comment
4 about whether we're going to insist on an actual
5 document with findings and conclusions, but if we could
6 put that aside for a moment.

7 So I guess I'm making a motion for the
8 committee as a whole to vote on a revision to the
9 proposed rule that would say, "The trial court shall
10 hold a hearing and file its findings of fact and
11 conclusions of law no later than 21 days after the date
12 of the referral order."

13 CHAIRMAN BABCOCK: Okay.

14 Richard Orsinger.

15 MR. ORSINGER: Yes, so we would amend
16 that, I think, to say, "Shall make the findings of fact
17 and conclusions of law," rather than file them, so that
18 they can be done in the reporter's record.

19 But I think we're micromanaging here at
20 the end where we require the court reporter, which by
21 the way, as I said, the deadline should run from the end
22 of the hearing, not from when the findings are filed.
23 But anyway, the court reporter must file a supplemental
24 court reporter's record and the clerk must file a
25 supplemental clerk's record.

1 Do we really want all that? Do we just
2 want the court's clerk to email the findings to the
3 Court of Appeals?

4 HONORABLE BILL BOYCE: So can I carve that
5 out for a subsequent consideration because I think we're
6 dangerously close to having a short statement on what
7 the trial court has to do, and I wanted to see if we
8 could have the vote on that.

9 So with Richard's amendment, the motion
10 would be to revise the proposed rule to say, "The trial
11 court shall hold a hearing and shall make findings of
12 fact and conclusions of law no later than 21 days after
13 the date of the referral order."

14 CHAIRMAN BABCOCK: Okay. Everybody got
15 that?

16 (No response)

17 CHAIRMAN BABCOCK: Everybody in favor of
18 that, raise your hand.

19 HONORABLE EMILY MISKEL: Not to be
20 difficult, but can you read that again?

21 HONORABLE BILL BOYCE: Potentially. The
22 trial court shall hold a hearing and make its findings
23 of fact and conclusions of law no later than 21 days
24 after the date of the referral order.

25 CHAIRMAN BABCOCK: Okay. Everybody voted

1 in favor of that that wants to vote in favor of it, so
2 lower your hands now please?

3 And anybody who is against that after all
4 the hands are lowered.

5 Okay. I have two people voting against
6 it, Judge Wallace and Tom Riney. Is that accurate?

7 Do you guys want to vote against that?

8 HONORABLE R.H. WALLACE: No, I just forgot
9 to lower my hand.

10 CHAIRMAN BABCOCK: All right. That's what
11 I thought.

12 MR. RINEY: And I was just slow lowering
13 mine.

14 CHAIRMAN BABCOCK: All right. The vote is
15 unanimous. 32 to nothing.

16 And so, Bill, let's keep rolling here.
17 We're on a roll.

18 HONORABLE BILL BOYCE: So, then, could we
19 take up the question of what specific deadlines, if any,
20 do we want to impose on the court reporter after the
21 trial court takes this required action within 21 days?

22 CHAIRMAN BABCOCK: Okay. Let's take that
23 up right now. Tom, do you want to say something or are
24 you still voting? No, he doesn't know how to take his
25 hand down. All right. He's one of those gunners,

1 Justice Christopher, that was always in the front row in
2 law school -- right -- had their hand up the whole time.

3 Justice Christopher.

4 HONORABLE TRACY CHRISTOPHER: Well, I like
5 Richard's idea of, you know, why do we have to go
6 through this whole process of, you know, the district
7 clerk's office and, you know, everything like that.
8 It's how we do everything at the appellate court. And
9 every time we refer a matter down to the trial court, we
10 include this kind of language in our orders. Because,
11 like, if somebody just files a record with our court, we
12 don't consider it the record until it's, you know, gone
13 through the appropriate processes of, you know, coming
14 from the court reporter, coming from the district clerk,
15 so I would hate to change that procedure. I don't
16 really have a good feel on how many days, but that's why
17 we have it that way. Because the official record comes
18 from the district clerk, and the official record comes
19 straight from the court reporter getting filed at the,
20 you know, the court reporter's portal, as opposed to
21 somebody else doing it.

22 CHAIRMAN BABCOCK: Thank you, Judge.

23 Bill, what do you think? How many days?

24 HONORABLE BILL BOYCE: I'll go with my
25 standby, you know, seven to ten days. Let's --

1 CHAIRMAN BABCOCK: Pick one.

2 HONORABLE BILL BOYCE: I'll say seven
3 days.

4 CHAIRMAN BABCOCK: Seven days.

5 David Jackson, what do you think about
6 seven days?

7 MR. JACKSON: Well, when we originally
8 started talking about these cases, gosh, years ago,
9 parental termination rights, it was basically a drop
10 everything and get these cases taken care of, and I
11 certainly understand that. You're talking about the
12 rights of a parent.

13 With us, it depends on how long this
14 hearing is for the effective assistance of counsel. If
15 it's like 50 pages, we can do it in a day. If it's 300
16 pages, I mean, it's all based on volume and just how
17 long and complicated these hearings are. So if the
18 judge is willing to work, you know, together with the
19 court reporter to help them get these records out, it
20 would help a lot to get that time limit lowered as low
21 as we can get it. This is going to require the judge
22 and the court reporter to work together. The judge
23 can't set a four week trial the day after.

24 CHAIRMAN BABCOCK: Yeah. But in a vacuum
25 here, seven days is okay with you, David?

1 MR. JACKSON: I think so.

2 CHAIRMAN BABCOCK: Okay. Great.

3 Judge Stryker.

4 HONORABLE CATHLEEN STRYKER: Are we saying
5 seven days from the conclusion of the hearing or seven
6 days from the Court's conclusions -- or findings of fact
7 and conclusions of law? I just wanted to clarify.

8 HONORABLE BILL BOYCE: I think it's
9 conclusion of the hearing.

10 HONORABLE CATHLEEN STRYKER: That would
11 make more sense because that will give them more time.
12 The reality is: The hearing is going to end and the
13 judge is going to take a couple of days to do findings
14 of fact and conclusions of law. So if it's after the
15 hearing, that would give them probably a couple more
16 days on top of the seven, if you do it the other way --
17 if you do it the other way.

18 CHAIRMAN BABCOCK: If you do it the other
19 way.

20 HONORABLE CATHLEEN STRYKER: Right.

21 CHAIRMAN BABCOCK: So the way this is
22 drafted, it's seven days from the date of the trial
23 court's order so that -- that's not from the date of the
24 hearing. So you think that's preferable -- right --
25 Judge?

1 HONORABLE CATHLEEN STRYKER: Well, I think
2 if we're going to do a short amount of time, it
3 should -- the clock should start ticking after the
4 hearing -- I mean, excuse me -- if we're going to give a
5 longer amount of time. If we're going to give it a
6 short time, then, you know, they can buy a couple of
7 days by it being after the order is filed.

8 CHAIRMAN BABCOCK: Yeah, okay. Got it.
9 All right. Other comments about that?

10 (No response)

11 CHAIRMAN BABCOCK: Anybody opposed to
12 seven days with the language we have here?

13 (No response)

14 CHAIRMAN BABCOCK: Okay. So I think we've
15 got...

16 HONORABLE BILL BOYCE: I've lost the
17 thread a little bit because there had been some
18 discussion about having the seven days tied to the date
19 of an order -- contemplating a signed order.

20 I think Chief Justice Gray had raised the
21 possibility of the findings just being dictated. We've
22 gone with language, "Shall make findings and conclusions
23 of law." So I think we probably want to tie it to the
24 conclusion of the hearing to avoid confusion. And then
25 whatever number of days is reasonable for that is the

1 number of days we should have.

2 CHAIRMAN BABCOCK: So you want the days
3 from -- not from the trial court's order, but from the
4 conclusion of the hearing? Is that what you're saying?

5 HONORABLE BILL BOYCE: Yes, I think that
6 will be less confusing.

7 CHAIRMAN BABCOCK: Okay.

8 HONORABLE BILL BOYCE: Or more certain.

9 CHAIRMAN BABCOCK: Judge Stryker, is that
10 okay with you? She says, yes.

11 Pam's got her hand up.

12 MS. BARON: Yeah, I agree with that. I
13 think it has to be tied to the hearing. Seven days --
14 if David says is good -- is good, and the trial court is
15 not making an order. So if we're going with that
16 language, we would need to change it.

17 CHAIRMAN BABCOCK: Right. Right.

18 Richard.

19 MR. ORSINGER: If the judge decides to
20 file written findings and conclusions, that would be
21 filed with the clerk of the court. So it seems to me
22 that the duty on the court reporter should reference the
23 closing of the hearing, but the duty of the clerk should
24 be to forward the findings and conclusions immediately
25 to the appellate court. There's no reason that the

1 clerk has to wait three days or seven days to forward
2 written findings.

3 CHAIRMAN BABCOCK: Yeah, that makes sense.
4 Justice Gray.

5 HONORABLE TOM GRAY: There may be no
6 written findings or the more problematic for the
7 proposal is that there are written findings and they're
8 not filed until four days after the conclusion of the
9 hearing in which case the court reporter suddenly has,
10 you know, three days -- well, yeah, the clerk suddenly
11 has no days to do -- to forward the findings.

12 So the problem is, if they do written
13 findings after the date of the hearing concludes, you've
14 got -- you're losing days in there that the party's
15 responsible for filing an amended record or a
16 supplemental record with the Court of Appeals, they
17 don't have any control of how long it takes the trial --
18 the court to get those findings prepared and filed if
19 they do written findings.

20 CHAIRMAN BABCOCK: Right.

21 David Jackson.

22 MR. JACKSON: Are we presupposing that all
23 of these hearings on ineffective assistance of counsel
24 will be transcribed? I mean, you know, a lot of times
25 hearings aren't -- I mean, aren't transcribed. So are

1 we just taking it upon ourselves to start working on
2 these the minute the case is over as the court reporter?

3 HONORABLE BILL BOYCE: I think the answer
4 is yes.

5 MR. JACKSON: Okay. But so --

6 HONORABLE BILL BOYCE: To make the record
7 capable of being reviewed.

8 MR. JACKSON: Right.

9 CHAIRMAN BABCOCK: Yeah. Okay. Any other
10 comments?

11 (No response)

12 CHAIRMAN BABCOCK: Okay. So, Bill -- go
13 ahead.

14 HONORABLE BILL BOYCE: So I'm trying to
15 sync up the language with respect to what the court
16 reporter can do. I think we're approaching consensus on
17 seven days from the conclusion of the hearing, but I'm
18 trying to sync that up also with Chief Justice Gray's
19 comment about district clerk filing the supplemental
20 clerk's record containing written findings of fact and
21 conclusions of law, if they get separately made.

22 CHAIRMAN BABCOCK: Well, isn't that the
23 answer to it, Bill, if they get separately made?

24 HONORABLE TOM GRAY: That's where you
25 could use the universal catch phrase "if any" period.

1 HONORABLE TRACY CHRISTOPHER: Well, I
2 think what you should say, "If not made on the record at
3 the hearing."

4 CHAIRMAN BABCOCK: Yeah, that's a good
5 one.

6 HONORABLE TRACY CHRISTOPHER: So that
7 people will understand what we're talking about here.

8 CHAIRMAN BABCOCK: Yeah.

9 Judge Stryker.

10 HONORABLE CATHLEEN STRYKER: So if they're
11 made on the record during the hearing, that means the
12 court reporter has to prepare the transcript? Or else
13 how is everybody going to have this ruling to start at
14 least timelines if the court reporter doesn't prepare
15 the transcript for another seven days?

16 I feel like they should be in writing by
17 the judge so that the times are specific and everybody
18 knows that they're made. That's just me. I just feel
19 like it could lead to confusion if there's any delay
20 with that record.

21 CHAIRMAN BABCOCK: Okay. Bill, any
22 thoughts about the Judge's comments?

23 HONORABLE BILL BOYCE: I guess a way to
24 address that is to require separate written findings and
25 conclusions, you know, which I think is within the ambit

1 of what, you know, a rule could require. I guess I'm
2 soliciting thoughts from the trial judges and the
3 appellate judges in the Zoom room about how onerous that
4 is, that being requiring written findings and not just
5 allowing them to be recited on the record at a hearing.

6 CHAIRMAN BABCOCK: Justice Gray.

7 HONORABLE TOM GRAY: Chip, I don't see
8 the -- anything that is pegged to a deadline once we get
9 those findings in a supplemental record. Whether it's a
10 clerk's record or the reporter's record, once we get
11 those findings then we reinstate the appeal and go
12 forward. The trial court has done their job. The
13 reporter has done their job. If there are written
14 findings, then we know that that's going to come in a
15 supplemental clerk's record. And so we've got what we
16 need at that point and the rule doesn't have any further
17 deadline then.

18 So I'll be candid. I'm confused by where
19 Judge Stryker thinks that would be a problem. So if
20 Judge Stryker could help me out, I would appreciate it.

21 HONORABLE CATHLEEN STRYKER: So I'm just
22 trying to figure out if you make those on the record,
23 which is going to be the very last, you know, 20 lines
24 or whatever it is, and then the court reporter files it
25 when they're going to file it, nobody's going to know

1 that ruling unless you happen to be at the hearing --
2 right -- until the court reporter's record is filed.
3 And previously we were talking about getting the court
4 reporter's record after the findings. So I guess we're
5 adding another -- they're going to have to transcribe
6 the whole thing and file it before anybody's going to
7 know the ruling. And I guess we'll require the
8 attorneys to order the record. Is that what I'm
9 hearing?

10 HONORABLE TOM GRAY: No, I think the rule
11 contemplates -- as Bill said while ago, the record will
12 be prepared and filed. Nobody's got to ask for it.
13 It's going to come to us. It's going to be to us under
14 the rule within seven days, unless the reporter asks for
15 an extension. And everybody's going to -- like you
16 said, everybody that's at the hearing is going to know
17 what the ruling is, if they're made on the record. If
18 they're not made on the record, then we know that the
19 judge is going to have to file written findings.

20 And I do have to agree with Richard on his
21 comment about, if we get written findings filed with the
22 clerk, the clerk seldom takes seven days, maybe we need
23 to leave that at seven days, but the clerk seldom takes
24 seven days to file a supplemental record after one of
25 these hearings.

1 But we're not going to move forward until
2 we either get the findings from the clerk or the full
3 record from the reporter, which under either scenario is
4 going to be seven days after the conclusion of the
5 hearing, if it's in the reporter's record or seven days
6 after the trial judge makes the findings and conclusions
7 if they're in writing so...

8 HONORABLE CATHLEEN STRYKER: Yeah, I
9 understand your point. I get it.

10 HONORABLE TOM GRAY: Okay.

11 CHAIRMAN BABCOCK: Justice Estevez.

12 HONORABLE ANA ESTEVEZ: I'm just speaking
13 because Justice Boyce wanted some input from some of the
14 trial judges. So I'm going to give you the overall -- I
15 get a lot of requests for findings of fact and
16 conclusions of law, more from the Court of Criminal
17 Appeals some from the Court of Appeals when they remand
18 for my criminal part of my docket. So I don't have a
19 lot of experience in other areas. But I will say that
20 90 percent of the time everyone's at the hearing, I make
21 some of the findings on the record that are important,
22 so that way the attorneys know what they're drafting in
23 the next hour.

24 So, I mean, practically what happens is
25 when we have this hearing, the attorneys are going to

1 turn around and put those findings of fact and
2 conclusions of law in writing and then send it to
3 everyone. Someone will request maybe an additional one
4 or two, and then I'll just be signing it. So it's not a
5 burden necessarily on the Court. The hardest part is
6 just getting the hearing. We usually make our decision
7 then at that time, most of the time. And I would guess
8 that if it's the same trial judge that already heard
9 that underlying case, then there isn't anything that --
10 they don't have to read any type of transcription from
11 the court reporter because they were there and they
12 ruled on everything and they can have an idea of whether
13 or not it was ineffective. They probably believe they
14 were ineffective anyway, and they're relieved that
15 someone is doing this, if that's how they feel, or they
16 know what happened and why because they had some
17 additional hearings outside the presence of the jury or
18 whatever they did to know why they weren't doing certain
19 things or why things were excluded.

20 So I would practically say that it is
21 probably not -- and I will say that probably 10 percent
22 of the time I have had to draft my own findings of fact
23 and conclusions of law. But, you know, those are --
24 they're a lot shorter than some of the ones that the
25 parties are going to want put in. The parties are going

1 to want to put in every single fact, and they're going
2 to want a record before, so it has to be from the date
3 of the hearing because they're going to be asking for an
4 expedited hearing so they can draft those findings of
5 fact and conclusions of law because they want a very
6 specific record, and they want to be able to do that and
7 so we need the seven days.

8 As far as the filing goes, I mean, I think
9 my deadline when I have to make conclusions of law and
10 findings of fact, I have to file it that day. I mean,
11 that's the whole point. I mean, when we tell someone,
12 "Hey, you have a deadline," it doesn't mean that they
13 got to finish it at home. They were supposed to send it
14 to me.

15 So the filing and the making is the same
16 deadline. It means the same thing to us. It doesn't
17 matter if we made it if we didn't -- if I signed the
18 order and I didn't send it to the Court of Appeals -- or
19 at least the clerk's office and the clerk's office feels
20 the same way, they have an order that says they have to
21 immediately send it.

22 Now, I don't know because I'm not in a
23 huge jurisdiction. But in the smaller jurisdictions
24 that clerk is going to do it that day. I mean, unless I
25 did it at 6:00 p.m. that night, they'll do it in the

1 morning. But we don't have a three or four day delay to
2 the Court of Appeals. So that's practically not really
3 an issue, but I'll let the clerks talk to that in those
4 bigger jurisdictions. It's not an issue here. You
5 know, everybody has their own clerk. We file something.
6 It says, this goes to the Court of Appeals, they'll do
7 it immediately.

8 So that's the trial -- that's from one
9 trial court judge's opinion, so I -- you know,
10 practically seven days isn't going to be enough for a
11 long hearing for a court reporter, so the reality is,
12 there's probably going to be a request for an extension.
13 That's just the reality.

14 CHAIRMAN BABCOCK: Well, Judge Miskel,
15 what's your thoughts?

16 HONORABLE EMILY MISKEL: I don't have any
17 issue with a requirement that the findings of fact and
18 conclusions of law have to be in writing and not made on
19 the record. That's how we do it in civil cases, so I
20 don't think that's going to be a problem. I think it's
21 probably more confusing for everyone to try to orally
22 make them on the record, but anyway just my two cents.

23 I did have a question: In counties that
24 use like a centralized docket, like Travis County and I
25 think Bexar County, would this trial -- would these

1 ineffective assistance of counsel hearings go back to
2 the same judge that heard the trial or would it just be
3 assigned randomly?

4 HONORABLE CATHLEEN STRYKER: In Bexar, it
5 would go back to the same judge.

6 HONORABLE EMILY MISKEL: Would that be
7 just under local policy, like y'all would just probably
8 do it that way, or is there something that automatically
9 makes it happen that way?

10 HONORABLE CATHLEEN STRYKER: Well, I think
11 it would be kind of -- not exactly but akin to a motion
12 to reconsideration which never goes to a different
13 judge, under local rules has to go to the same judge.
14 And to me, that's kind of what this is. I mean, it's
15 reevaluating something that you've already heard. And
16 so I think it would automatically go back to the same
17 judge in Bexar County.

18 MS. HOBBS: As a Travis County
19 practitioner, that would likely be what happened too,
20 but it's more a matter of local protocol. There's
21 nothing in the rules -- the local rules that would
22 require that to happen as I understand the rules in
23 different context about when cases come back.

24 CHAIRMAN BABCOCK: Thank you.
25 Harvey.

1 HONORABLE HARVEY BROWN: I originally was
2 thinking that I liked the idea of the oral ruling,
3 flexibility for the judge who is busy, but the more I've
4 thought about it, I'm at least concerned about that
5 because I think there could be some confusion.

6 Let's just say the judge at the end of the
7 hearing says, "Well I don't think there was ineffective
8 assistance of counsel." Well, did the judge just make
9 the findings of fact and conclusions of law? Does that
10 start the dates? You'd have a debate about that maybe.
11 So it seems like to me it might be cleaner to require
12 the written ruling, which is not that difficult usually.

13 And I also think it would be better for
14 the Court of Appeals. They could find it readily. They
15 can refer to it easily, so I think that I'm kind of in
16 favor of the written findings.

17 CHAIRMAN BABCOCK: Okay.

18 Pam.

19 MS. BARON: Well, I was also going to say
20 that. I think they should be in writing. And if
21 they're not, then we get into an issue that we could
22 bust our 21-day requirement. If the hearing is held on
23 the 21st day, the judge makes findings from the bench,
24 and then the court reporter has a week to get that up to
25 the Court, we're at 28 days and we're slowing everything

1 down. So written is more definitive. We understand how
2 it works. The Court could get the findings and
3 conclusions first, record to follow. That would be
4 fine.

5 CHAIRMAN BABCOCK: Judge Evans.

6 HONORABLE DAVID EVANS: I'm trying to
7 think of what would be different about what I might say
8 about the written findings, but I very much encourage
9 you only to go with written findings. I know of no
10 other situation where a trial judge makes oral findings
11 on a record. Given the nature of advocacy, an oral
12 finding invariably leads you to believe that as a trial
13 judge that you don't know how to speak clearly because
14 they ask you to clarify, and did you mean, and that's
15 not a good process, and it's more reflective.

16 This is a serious issue when you're going
17 to make this finding of ineffective counsel, and I think
18 it ought to be in a -- it could either be incorporated
19 in the order, I would assume, since it just comes from
20 the Court of Appeals and as Justice Christopher just
21 noted, you just make the findings, and you just put that
22 in writing -- in the chat portion I was reading from
23 her.

24 So I encourage you only to go with written
25 findings.

1 CHAIRMAN BABCOCK: Great. Thanks, Judge.

2 HONORABLE TRACY CHRISTOPHER: I put some
3 language in the chat, which actually combines the time
4 to hold the hearing and the time to get the record up
5 into one order. This comes from our orders.

6 Okay. First, you say you've got to hold
7 the hearing -- right -- and then -- I'll read it out for
8 the record: The Court is directed to reduce its
9 findings to writing and to have a supplemental clerk's
10 record containing those findings filed with the clerk of
11 this court, together with a reporter's record from the
12 hearing within 30 days of the date of this order.

13 So we have combined everything. We don't
14 say 21 days to get your hearings and your findings done.
15 We say 30 days, get your hearings, get your record, get
16 your findings done. So that's one way to do it.

17 CHAIRMAN BABCOCK: Okay.

18 John Warren.

19 MR. WARREN: Thank you. I see I'm joined
20 in agreement by Sharena Gilliland, the District Clerk
21 from Parker County.

22 We both agree that what -- I'll just speak
23 from an urban county's perspective. We have dedicated
24 staff that handles appeals in my office, as well as
25 Ms. Felicia Pitre, the District Clerk, but also the

1 Court of Appeals -- the Fifth Court of Appeals uses a
2 system called TAMES that allows the Court of Appeals to
3 upload the clerk's record automatically. But if there
4 is a supplement, we -- just like Sharena says, we'll get
5 it there timely. I'm not quite sure that's an issue. I
6 think from a clerk's perspective. We just need to know
7 the date that the -- the deadline for when that record
8 needs to be in the Court of Appeals.

9 CHAIRMAN BABCOCK: Thank you, John.

10 Bill Boyce.

11 HONORABLE BILL BOYCE: So I think the path
12 forward may be to revisit our prior vote, as much as I
13 hate to say that.

14 If we go with Chief Justice Christopher's
15 proposal, then what we're saying is that the trial court
16 must hold a hearing and make its findings of fact and
17 conclusions of law in writing no later than 30 days
18 after the date of the referral order. And then we would
19 have a date for filing a court reporter's record and a
20 supplemental clerk's record X number of days after that
21 30 days. I think that's the logic of it, isn't it?

22 We require the findings to be in writing,
23 so we're not going to get a disconnect between
24 potentially how they get made is -- I think that's where
25 we are.

1 CHAIRMAN BABCOCK: I think so.

2 MS. BARON: Well, maybe I'm
3 misunderstanding. But I thought Chief Justice
4 Christopher's language that she read us set an outside
5 limit for everything to have happened. So you would
6 have to have all the record -- the clerk's record, the
7 reporter's record, everything there within 30 days.
8 You're saying that you want to break that into two
9 pieces.

10 HONORABLE BILL BOYCE: Let me look at --

11 MS. BARON: And anytime we do this, we're
12 moving beyond that 21 days that we had talked about.

13 HONORABLE TRACY CHRISTOPHER: So my draft
14 that I sent everybody in the chat that I've emailed Bill
15 is everything all at once.

16 HONORABLE BILL BOYCE: Okay. Okay. All
17 right.

18 HONORABLE TRACY CHRISTOPHER: So it's not
19 21 days plus other days. It's 30 days total.

20 HONORABLE BILL BOYCE: Okay.

21 HONORABLE TRACY CHRISTOPHER: And I did
22 see Judge Stryker was a little worried about the court
23 reporter having time to get it done, and I see David
24 nodding on that. Also, if the judge waited until the
25 30th day to get it done, but I think that's the kind of

1 thing where the judge and the court reporter have to
2 work together. I mean, we really -- this is our
3 standard language that we use in all of our remands for
4 like a missing record or a withdrawal of trial counsel,
5 et cetera. And we really haven't had problems with it
6 in terms of, you know, getting it.

7 And, like I said, you know, if the court
8 reporter's record comes up a couple of days later, you
9 know, we take it, so -- but I think it's kind of a neat
10 way to make just one package. Everything has to be done
11 by this time period.

12 CHAIRMAN BABCOCK: Yep.

13 Judge Mendoza.

14 HONORABLE MARIA SALAS MENDOZA: So I just
15 wanted to say that's where I started. Right? Having
16 said that this is not an area that I practice, I started
17 with the idea that I thought Judge Miskel's suggestion
18 was good, not because I was arguing jurisdiction in the
19 trial court or whatever. I just said a drop dead
20 deadline. And Justice Christopher is right, if I'm not
21 a nice judge, I'm waiting until that 30th day and then
22 my court reporter is stuck because she's got to file it
23 that day.

24 But a good judge is going to take into
25 account it's 30 days period. So have your hearing, make

1 sure you give enough time for your court reporter to do
2 what they need to do. But that was sort of where I
3 started, and I defer to those judges that do handle
4 these cases that we're looking at 20, 21 days.

5 But I think this is the way to go, just a
6 drop dead, and I have said 30, too, not 32, but 30,
7 also. And then I was just going to say -- and I know
8 that -- this is not the best practice, not something I
9 do, but we do have findings and conclusions on the
10 record sometimes, and it's motions to suppress. It's a
11 short hearing. It's really quick, and you can make your
12 findings and conclusions that day right on the record.

13 Anything complicated, obviously, the best
14 practice is to make the written findings. I'm not
15 arguing that we change that. But there are hearings
16 where trial judges make findings and conclusions at the
17 time of the hearing on the record, and it's nice for
18 judges that are busy and can make a decision on the spot
19 and then move on.

20 CHAIRMAN BABCOCK: Great. Thank you,
21 Judge.

22 David.

23 MR. JACKSON: The 21 days would be very
24 helpful, especially if it's clear that these are going
25 to be transcribed because that becomes the issue right

1 after these hearings are over, are we going to have to
2 make a record, who is going to pay for it, how are we --
3 you know, where do they want it sent. But if it's clear
4 that we're going to start transcribing these as soon as
5 they're over, then the 21 days is very helpful. And,
6 you know, we can just take off from there and get it
7 done.

8 HONORABLE BILL BOYCE: So, Chip, can I
9 call for a vote on one thing --

10 CHAIRMAN BABCOCK: Yeah.

11 HONORABLE BILL BOYCE: -- to kind of move
12 this along?

13 How about a vote on whether the findings
14 and conclusions need to be contained in a separate
15 document, as a threshold matter, and then that will
16 drive the next vote.

17 CHAIRMAN BABCOCK: Okay. Let's do it. So
18 frame the vote. The first vote we're going take is...

19 HONORABLE BILL BOYCE: The motion would be
20 that the rule requires findings of fact and conclusions
21 of law upon referral that the trial court make those in
22 writing as a separate document.

23 CHAIRMAN BABCOCK: Okay. Everybody in
24 favor of that?

25 HONORABLE TRACY CHRISTOPHER: And let me

1 just -- can I give an anecdotal? It's pretty funny. So
2 judge did all of their findings on the record and they
3 just got the court reporter to type it up and sign it.
4 So it was the court reporter's transcript with the
5 judge's signature on it.

6 CHAIRMAN BABCOCK: All right. Everybody
7 put their hands down.

8 Anybody opposed to this?

9 Professor Hoffman, Judge Stryker, are you
10 opposed?

11 HONORABLE CATHLEEN STRYKER: (Shaking
12 head)

13 CHAIRMAN BABCOCK: Judge Mendoza, are you
14 opposed?

15 HONORABLE MARIA SALAS MENDOZA: (Nodding
16 head)

17 CHAIRMAN BABCOCK: Justice Gray, you
18 opposed?

19 HONORABLE TOM GRAY: Yes.

20 CHAIRMAN BABCOCK: Roger, opposed?

21 MR. HUGHES: (Shaking head)

22 CHAIRMAN BABCOCK: Richard, opposed?

23 MR. ORSINGER: (Thumbs up)

24 CHAIRMAN BABCOCK: So the vote is 30 to 4
25 in favor. Chair not voting.

1 Okay. Bill, what next do you want to vote
2 on, if anything?

3 HONORABLE BILL BOYCE: So I think the next
4 vote would be a motion based on Chief Justice
5 Christopher's proposal, and I'm looking at the email
6 here that: The trial court shall reduce its -- the
7 trial court shall hold a hearing and reduce its findings
8 of fact and conclusions of law to writing and cause a
9 supplemental clerk's record containing those findings to
10 be filed with the clerk of the Court of Appeals,
11 together with the reporter's record from the hearing,
12 not later than 30 days from the date of the referral
13 order. So that combines everything all in one.

14 CHAIRMAN BABCOCK: Right.

15 Richard.

16 MR. ORSINGER: Chip, I think that there's
17 much to say for the simplicity of Chief Justice's
18 recommendations; however, my concern is the judges are
19 going to wait until the last day for the hearing, which
20 is going to require the court reporters to apply for an
21 extension. And so even though we may have an overall
22 cap of 30 days, because we can't force the trial judges
23 to do it sooner, we -- it's possible they'll do it on
24 the last day and we're going to be looking at another
25 seven-day deadline request to the Court of Appeals for

1 the court reporter to transcribe it.

2 And I think that there's some virtue in
3 forcing the trial judges to get their job done three
4 weeks into this so the reporter can do their job in the
5 next seven days and we'll end up with 28 days or 30
6 days. But if we leave it to the trial court, I'm afraid
7 our 30 days is always going to be 37 days.

8 CHAIRMAN BABCOCK: All right. Judge
9 Estevez.

10 Thank you, Richard.

11 HONORABLE ANA ESTEVEZ: I agree with
12 Richard. And then I'd like to add some things to that.

13 So I like both ideas. I would like a
14 30-day everything has to be done, but the hearing has to
15 be done in 21 days. It's not because the trial judge
16 doesn't -- I don't mean to defend all trial judges --
17 but it's not because the trial judge doesn't want to do
18 it within the 30 days. Sometimes there's witnesses, or
19 the lawyers are busy and they don't want to change their
20 schedules, or whatever it may be -- or it just sneaks up
21 on them, and then all of a sudden it's day 28 and, you
22 know, we're in the middle of a jury trial and they're
23 saying we've got to have this hearing. Well, whatever
24 it may be, let's not just put fault on the lazy trial
25 judge.

1 Let's say that definite dates are always
2 helpful, and the reality is that we have such a shortage
3 of court reporters right now we don't need to put the
4 extra strain on them. So if we had the hearing at day
5 21, they'll have nine days to get that record. They'll
6 probably still need an extension because they're going
7 to be needed more to try to catch up in the backlog that
8 we have from the COVID cases. So we're putting a lot of
9 strain on those court reporters, and I'm just -- I guess
10 I'm the advocate for my court reporter who is already
11 overworked and now we're going to give her more
12 pressure. And if we -- we will do it on day 22 or 25.
13 I mean, it'll -- that happens to us. And sometimes it's
14 just because the lawyers can't get it done either.

15 CHAIRMAN BABCOCK: All right. Any other
16 comments? Looks like Pam has got her hand up.

17 Pam.

18 MS. BARON: Well, maybe, you know, after
19 all of this we do break it up into two piles. One would
20 require the trial court to hold the hearing and make
21 findings within 21 days, which is what we originally
22 were looking at, and then to require the court reporter
23 ought to prepare and file the record within seven days
24 of the conclusion of the hearing.

25 CHAIRMAN BABCOCK: Okay. John Kim said we

1 ought to recognize the reality of the court reporter's
2 life. I think seconding what Judge Estevez was talking
3 about. That's on a chat.

4 All right. Anything else from anybody?
5 Do you still have your hand up, Judge
6 Estevez?

7 HONORABLE ANA ESTEVEZ: No, this is a new
8 one. I don't think the findings should be required
9 until 30 days. I think if you have a hearing at 21
10 days, that'll give the parties a little time to get
11 together what those -- I mean, the reality is, that
12 usually when we do these hearings, we tell the lawyers
13 at that point what our findings are going to be and we
14 make findings on the record, but then they fill in the
15 gaps with whatever transcription and they can ask for
16 specific testimony.

17 So I think it's helpful to have a 21-day
18 hearing deadline and then 30-day everything's due. Our
19 findings are due, the transcription is due, everything
20 else is due.

21 CHAIRMAN BABCOCK: Great. Thank you,
22 Judge.

23 Richard.

24 MR. ORSINGER: Chip, I just want to make
25 clear on the record that I have the greatest admiration

1 for our trial judges, how dedicated they are,
2 particularly the ones that are on this committee, and I
3 didn't mean to insinuate that judges were lazy and would
4 wait until the last minute. But it's always a question
5 of priorities on the district bench, because our judges
6 are overwhelmed. And so they have to go with the
7 closest deadline. That's my point. And I didn't mean
8 to disparage the judiciary at large, or particularly the
9 members of this committee.

10 CHAIRMAN BABCOCK: All right. You're
11 covered up now. We got it on the record. You can point
12 to that if anybody charges you with defaming our judges.

13 All right. Bill, do you want to frame
14 a -- I'm sorry.

15 Judge Mendoza, do you want to respond to
16 Orsinger there? I wouldn't blame you a bit.

17 HONORABLE MARIA SALAS MENDOZA: Kind of.
18 We're all defending the trial judges. I think I'm a
19 pretty good judge. I'm telling you, if you give me 30
20 days, sometimes it's going to get there, so I think all
21 these suggestions are fair and we don't have to malign
22 anyone. But it's tough -- I will tell you -- to get
23 those deadlines, and I don't think I'm a slacker. I
24 mean just like Judge Estevez was telling you, things
25 come up, it could be witness availability or I could be

1 in trial. I mean, there's a lot of reasons why we push
2 it up until the very last moment.

3 So I, too, would support the idea of a
4 21-day deadline -- 21 days for having the hearing and
5 then -- but wrapping it all up, every single piece, the
6 reporter's record, the court's records, the supplemental
7 record, I mean, within the 30 days because I think
8 that's long in these cases, but I think reasonable. And
9 I don't take issue with the criticism.

10 CHAIRMAN BABCOCK: I don't think he was
11 criticizing you.

12 MR. ORSINGER: There was no criticism.
13 There was no criticism.

14 (Laughter)

15 CHAIRMAN BABCOCK: All right. Bill, frame
16 a vote for us for those in favor of X.

17 HONORABLE BILL BOYCE: All right. So this
18 is going to be a motion to approve what I understand to
19 be the friendly amendment to the Judge Christopher
20 proposal as follows. The motion would be that "The rule
21 will provide that the trial court will hold a hearing
22 within 21 days of the date of the referral order," part
23 one.

24 Part two, then, is that "The trial court
25 shall reduce its findings of fact and conclusions of law

1 to writing and cause a supplemental clerk's record
2 containing those findings to be filed with the clerk of
3 the Court of Appeals, together with the reporter's
4 record from the hearing, not later than 30 days from the
5 date of the referral order." Period.

6 CHAIRMAN BABCOCK: All right. Second.

7 HONORABLE TRACY CHRISTOPHER: Can I make
8 one friendly amendment? You want to say, "Conclude the
9 hearing by 21 days," not "hold the hearing."

10 CHAIRMAN BABCOCK: Yeah. That's a good
11 point.

12 HONORABLE BILL BOYCE: With that
13 additional friendly amendment, I would move for that --
14 for the full committee to vote on that proposal.

15 CHAIRMAN BABCOCK: Yeah. Second. A lot
16 of hands up, but do you all really want to -- everybody
17 is raising their hand because they're voting for it.
18 Okay. Good. I was thinking "Whoa." All right. Keep
19 them up for a minute.

20 Okay. Anybody opposed? Lower the hands
21 for the ones that are in favor.

22 Okay. Judge Wallace, your hand is up. Do
23 you oppose or is it an inadvertent hand?

24 HONORABLE R.H. WALLACE: No. It's up.

25 CHAIRMAN BABCOCK: Okay. So we almost got

1 unanimity, but not quite because Judge Wallace voted
2 against it.

3 So we're 35 to 1. It passes. And we're
4 going to take our lunch break right now, and we'll be
5 back at 12:45.

6 And when we come back, Bill, do we still
7 have to talk about this tolling portion of the rule or
8 are we done?

9 HONORABLE BILL BOYCE: That's the last
10 piece of this, which would be, I think, an up or down
11 vote on whether or not the committee as a whole wants to
12 build in any kind of tolling into the six-month limit
13 under the rule of judicial administrative.

14 CHAIRMAN BABCOCK: Okay. Well, think
15 about that over lunch. We'll come back and have a
16 discussion, if we need one. But if we don't need one,
17 then we'll just -- we'll vote on it and get on to the
18 next agenda item.

19 So we'll be in recess until 12:45.

20 Thanks everybody.

21 (Recess: 12:11 p.m. to 12:45 p.m.)

22 CHAIRMAN BABCOCK: Rule 6.2(a) and it
23 could be an up or down vote, but people may want to talk
24 about it so.

25 Anybody that's got comments, fire away.

1 Richard Orsinger.

2 MR. ORSINGER: Thanks, Chip. At the task
3 force level, Chief Justice Sandee Marion of the Fourth
4 Court of Appeals was very concerned about two extensions
5 or delays in the process leaving inadequate time for the
6 Court of Appeals to do its job. And it seems to me that
7 the 20 days, which probably now should be 30 days should
8 say, "30 days, plus extensions." If you don't, then
9 you're kind of pitting the Court of Appeals deadline
10 against the court reporter's deadline and it's really
11 unnecessary. So it would seem to me that it would be
12 most advisable that this deadline under Rule 6.2(a) is
13 tolled for no more than 30 days, plus extensions granted
14 to the lower court, or something of that nature.

15 Thank you.

16 CHAIRMAN BABCOCK: Thanks, Richard. Any
17 other comments?

18 (No response)

19 CHAIRMAN BABCOCK: Bill, what do you think
20 about moving it from 20 to 30 days plus extensions --
21 plus any extensions.

22 HONORABLE BILL BOYCE: Personally, I think
23 that that is an appropriate -- that extending the
24 180-day deadline or tolling it is an appropriate step to
25 take so that time needed to develop these claims is not

1 counting against the Court of Appeals or otherwise
2 putting the Court of Appeals in a difficult position.

3 CHAIRMAN BABCOCK: Okay. Richard, is that
4 your hand up from before or is it renewed?

5 MR. ORSINGER: I apologize, Chip. I
6 forgot to take it down.

7 CHAIRMAN BABCOCK: That's all right.
8 Justice Christopher.

9 HONORABLE TRACY CHRISTOPHER: I would not
10 put in the extension language. I would just say the 30
11 days. That will give everyone incentives to keep going.
12 So I would just say 30 days and not add extensions.
13 Like, if the court reporter is late, the case can still
14 move forward with briefing, and that hopefully is the
15 only delay we would have on the matter.

16 CHAIRMAN BABCOCK: Thank you.
17 Justice Gray.

18 HONORABLE TOM GRAY: This is kind of one
19 of those things that is outside our bailiwick, but we
20 may want to check to see before we write it into a rule
21 whether OCA's programming on this actually will allow it
22 to be tolled in the way we think it's going to be
23 tolled. But that's an offline kind of thing that needs
24 to be checked before we put it into the rule.

25 CHAIRMAN BABCOCK: Okay.

1 HONORABLE TOM GRAY: It's an odd thing the
2 way they do it. Unlike all the other performance
3 measures, this is a 180 days. It's not the end of the
4 month in which the 180 days runs. It really is odd
5 because if you issue the opinion on the 181st day, it's
6 late, even if you -- you know, if there was 15 days left
7 in the month, unlike all of the other performance
8 measures.

9 CHAIRMAN BABCOCK: Okay. Anybody else
10 have any comments about the tolling under 6.2(a), 30
11 days?

12 (No response)

13 CHAIRMAN BABCOCK: All right.
14 Is there any opposition to having this
15 30-day period tolling? Anybody against it? If you are,
16 speak now.

17 (No response)

18 CHAIRMAN BABCOCK: Okay. Nobody against
19 it, Bill, so I think we can move on from this.

20 Is there any other issues -- are there any
21 other issues relating to this Rule 28.4(d) that we need
22 to talk about?

23 HONORABLE BILL BOYCE: No. That covers
24 everything for today. The subcommittee's next task will
25 be to move on to subsequent parts of this involving

1 Anders brief procedures and so on and so forth. But
2 that's a discussion for a future meeting.

3 CHAIRMAN BABCOCK: Okay. Do you want that
4 at the next meeting or do you want to skip a meeting?

5 HONORABLE BILL BOYCE: I will respectfully
6 move for an extension of time until the meeting after
7 next.

8 CHAIRMAN BABCOCK: All right. Well,
9 you've been working hard. The extension is granted.
10 I'm just making a note of that. All right. Great.

11 Well, now Remote Proceedings Rules --
12 Proposed Changes to TRCP 21D, 500.2(G), TRCP 18C, 21,
13 176 and 500.8, and TRAP Rules 14, 39, 59, and Judicial
14 Administration Rule 12. No hill for a climber, with
15 Kennon, Lisa, Tracy Christopher, and a guest speaker,
16 that being Quentin Smith. I don't know if Quentin is
17 here or not, but if he is, we'll be happy to hear from
18 him.

19 And, Kennon, you may not have been here at
20 the start of our meeting where I mentioned a call from
21 Senator Hughes conveying to me both his and Senator
22 Huffman's concerns about modifying rules relating to
23 remote proceedings, in light of the fact that the Senate
24 had not agreed to a house bill that did some of the same
25 things that we're talking about.

1 So with that, Kennon, are you leading or
2 is Lisa leading this or who?

3 HONORABLE TRACY CHRISTOPHER: Can I start
4 out, Chip?

5 CHAIRMAN BABCOCK: Certainly.

6 HONORABLE TRACY CHRISTOPHER: Okay. So I
7 just want to give everyone a little bit of background
8 about the -- our task force. And what we did last year
9 during the legislative session was to identify statutes
10 and rules that might need to be changed to accommodate
11 for remote proceedings.

12 As the Senator said, there was some
13 statutory language passed by the House, but it failed in
14 the Senate. We -- Judge Miskel, Judge Roy Ferguson, on
15 our task force worked a lot with the legislature on this
16 issue. And if it's all right with you, I'm going to let
17 Judge Miskel talk a little bit about what some of the
18 concerns were. Primarily, I think -- and I might be
19 stepping on your toes -- but primarily I think there was
20 a lot of concern about -- in the criminal arena, and,
21 you know, that is not in these proposed rule changes.
22 These are all with respect to civil proceedings. So I
23 think that that will allay a lot of their fears about
24 our proposed rule.

25 But if I could get Judge Miskel to say a

1 little bit about what went on in the legislative
2 session, just so that the committee has some background.

3 HONORABLE EMILY MISKEL: Sure. And I have
4 not talked to Senator Hughes specifically about this,
5 but I've talked to several senators and other people
6 that were involved in all that, so I'm not going to put
7 names to any of it, but I'll just give you kind of the
8 highlights of the things that I heard most often as
9 concerns.

10 So number one is just sort of an icky
11 feeling about it, so I would categorize that as the
12 dignity of the court or tradition or it just seems
13 wrong. Right? And so you ask for follow-up and, "Well,
14 what are you concerned about? Well, it just feels
15 wrong." Okay? So that's one thing. And I don't mean
16 to minimize that. I heard that a lot, actually.

17 Secondly, some of the legislators who are
18 lawyers -- who are civil lawyers just don't like it
19 because they think they do better in the courtroom.

20 Thirdly, I actually heard from several
21 people that, "These judges just need to get back to
22 work." So there's a belief that if you're not forcing
23 your judges to show -- well, and, again, our current
24 system doesn't actually force our judges to show up in
25 person, by the way. But there's a sense that if you

1 prohibit remote hearings, you will make your judges work
2 harder because they will have to come in person and that
3 means they're doing something.

4 One thing I heard, so for redistricting
5 the legislature held some committee hearings online and
6 took public comment virtually for some of those, and
7 what they experienced was a lot of people showing up to
8 read the same script and the sense that those people
9 would not have put forth the effort to show up in
10 person. And so there was a concern that our courts and
11 other government functions are allowed to be done on
12 Zoom that there will be more participation from
13 low-effort folks that don't really have skin in the game
14 or clog the system.

15 And then I will say the final thing I just
16 heard over and over again was jury trials, jury trials.
17 And so, again, I think when I looked at our civil trial
18 numbers, I think 0.6 percent of civil cases are resolved
19 by a jury trial. So if that's the thing that bothers
20 everyone the most, I think we can focus our efforts on
21 the 99.4 percent other cases that are not resolved by
22 jury trials.

23 So anyway, I'll just conclude the summary
24 there. But that's generally the categories of responses
25 I heard from legislators and other folks that were

1 anti-court hearings by Zoom.

2 HONORABLE TRACY CHRISTOPHER: So after the
3 legislation failed, the Supreme Court asked our task
4 force to proceed forward with respect to changes to the
5 Rules of Civil Procedure to accommodate remote
6 proceedings, and so that's what we did.

7 We had a lot of input from members of the
8 Bar. We had input from the State Bar Rules Committee,
9 as well. I think Cynthia was on the Zoom earlier. And
10 we had members from the State Bar Rules Committee come
11 and weigh in on some of these rules also.

12 So we are not dealing with trials -- jury
13 trials -- at all. The only thing that could possibly
14 affect a jury trial is whether or not the judge allows a
15 witness to appear remotely in a jury trial. One of our
16 rules would allow, you know, a witness to appear
17 remotely in a hearing or a trial.

18 Most of us that were trial judges --
19 especially civil trial judges -- where you had to sit
20 through depositions of doctors or depositions of
21 somebody, would much prefer to have those witnesses
22 appear remotely than to have to sit and listen to a
23 deposition. So, I mean, when you think about, "Well,
24 what's a remote proceeding?" I mean, depositions are
25 essentially remote proceedings that then get played in a

1 trial.

2 So I think people shouldn't be afraid of
3 some of these changes that we're hoping to have made.
4 So with that, I'm going to ask Kennon to take over.
5 Because even though she's Subcommittee 2 on our report,
6 we think it would be better for her to start and kind of
7 lay the groundwork for those rules, then we'll move to
8 Lisa Hobbs to do those rules, and finally, we'll get to
9 Quentin on subpoenas. So Quentin knows he might be here
10 for a while. We'll start with Kennon.

11 MS. WOOTEN: Thank you so much.

12 CHAIRMAN BABCOCK: All right. Kennon.
13 Thanks.

14 MS. WOOTEN: Thank you so much, Chief
15 Justice Christopher.

16 And before I get into the substance of my
17 explanation of the work of Subcommittee 2, I did want to
18 share with the full Supreme Court Advisory Committee
19 that the State Bar Board of Directors recently issued a
20 resolution that I have included in the chatbox in
21 support of work being done in regards to remote
22 proceedings. And in the conversation at the State Bar
23 Board level, there was some discussion about how this
24 will impact people who want to continue to appear in
25 person for various proceedings, including trials.

1 Ultimately, the resolution that came from
2 the State Bar Board of Directors is not focused on the
3 substance of the recommendations of the Remote
4 Proceedings Task Force but instead on the work being
5 done in regard to rules pertaining to remote
6 proceedings, and just more generally, rules that might
7 need to be amended to remove the impediments to remote
8 proceedings.

9 In that regard, for the record, I will
10 read the portion of the resolution that is, in fact, the
11 resolution. It states: Therefore, be it resolved that
12 the Board of Directors at the State Bar of Texas
13 supports the efforts of the Supreme Court of Texas and
14 the task force to remove impediments to remote
15 proceedings and supports the Supreme Court of Texas
16 adopting and implementing rule amendments removing
17 impediments to remote proceedings.

18 So with that backdrop in mind, I'll go to
19 the subcommittee's memo that's included in the materials
20 for today's meeting. I believe it begins on Page 39 of
21 the pdf, if you're reviewing things electronically.

22 In the memo from the committee there is an
23 explanation, if you will, of the flow of work at the
24 subcommittee level. In addition, just to put some
25 context around the work that we've done, we've included

1 some background information. For example, Exhibit 1 to
2 the memo is a letter from Chief Justice Hecht dated
3 September 2, 2021 to Chief Justice Christopher with a
4 request that the task force begin drafting rule
5 amendments to remove impediments to and support the use
6 of remote proceedings, starting with the Texas Rules of
7 Civil Procedure. Exhibit 2, to the memo -- again, just
8 to give you all context and background information -- is
9 from Chief Justice Christopher, the chair of the task
10 force where she laid out the subcommittee assignments
11 that she referenced earlier today.

12 Exhibit 3 to the memo is proposed
13 amendments to Texas Rules of Civil Procedure for the
14 civil and district courts and Exhibit 4 to the memo is a
15 proposed amendments to Texas Rules of Civil Procedure
16 relating to justice courts.

17 So just pulling back a little bit and
18 giving you all some additional background information.
19 The way we did things in our subcommittee was to go
20 ahead at the forefront and work with members of the
21 Justice Support Working Group, that entity was also
22 tasked with rule amendments, specifically for the
23 justice courts, but because there was quite a bit of
24 overlap in substance, the head of that working group,
25 Judge Nick Chu and I, decided that we would combine our

1 groups at the forefront because we thought that that
2 would lead to a more thoughtful process and perhaps less
3 disagreement at the end of the day in regard to the
4 substance of the proposals.

5 Schedule C in the memo that I've been
6 referencing, I've laid out all the members of the
7 drafting team, which I've referred to as the combined
8 team, and also mentioned the participation of a member
9 of the State Bar Court Rules Committee, Chad Baruch, at
10 the prompting of Cindy Timms.

11 As Chief Justice Christopher mentioned
12 earlier, Cindy Timms got together with the leadership
13 team and got involvement of the Supreme Court -- I'm
14 sorry -- the State Bar's Court of Rules Committee. So
15 that combined team did work on these proposals, and I
16 think it's important to give everyone credit who
17 participated in the process. And to that end, the third
18 paragraph of the memo identifies all members of the
19 drafting team.

20 Some big picture points, as laid out
21 starting on Page 2 of the memo is that we had a robust
22 discussion about whether the trial court judges or the
23 participants should be able to determine whether a
24 proceeding is conducted remotely or in person. And at
25 the end of the day, at Judge Miskel's good suggestion,

1 we thought, "Why don't we follow the approach taken in
2 the emergency orders" that have been working throughout
3 the pandemic. And this was great because normally
4 you're drafting rules and you're wondering how might
5 this work in the real world. But we have, if you will,
6 a pilot program that's been operating successfully for a
7 long time through these emergency orders and how court
8 proceedings have been conducted during the pandemic,
9 including remotely.

10 So the language that you see in the
11 proposed rules in Exhibits 3 and 4 is really kind of, if
12 you will, building off of the language that's been in
13 the emergency orders from the Supreme Court of Texas,
14 and that is to give the trial courts discretion to
15 require or allow proceedings to be conducting remotely
16 or in person. However, there is also recognition that
17 there's no one-size-fits-all approach for any court
18 proceeding, so the rules lay out a procedure for
19 objecting to the court's chosen method of appearance and
20 providing good cause for that objection.

21 As explained in the memo, we have some
22 examples of good cause in proposed comments to the
23 proposed rules. The approach there is akin to what's
24 been done for good cause examples in the context of
25 expedited proceedings with this court -- the Texas

1 Supreme Court having a history of laying out examples of
2 what good cause may be in comments to the rules.

3 I think it's important to note that the
4 good cause examples are just that, they're examples.
5 They're intentionally not exhaustive in the explanation
6 and the comment. Another thing that I should point out
7 about the rules, particularly in light of what I heard
8 at the beginning of the meeting and then again from Chip
9 about legislature interest, there was acknowledgment at
10 the drafting level that there are statutes in place that
11 may not allow certain proceedings to be conducted
12 remotely. And so in the rules as proposed you'll see
13 that after the statement regarding what a court can do
14 in terms of requiring or allowing the proceedings to be
15 conducted remotely or in person, there's recognition
16 that if statutes explicitly provide otherwise that the
17 proceeding might have to be conducted in person. So
18 recognition, again, there that the legislators may have
19 chosen certain proceedings to be conducted in person
20 alone. In that case, the rule would not give the trial
21 court discretion to have a remote proceeding.

22 Another thing that we talked about a lot
23 at the combined team level was how we need to give
24 notice of court proceedings, not just remote
25 proceedings, but also in-person proceedings and whether

1 there should be some additional meat put on the bones,
2 if you will, of what's in the rule now, specifically
3 Rule 21(b) of the Texas Rules of Civil Procedure.

4 And you'll see in the proposed amendments
5 to that rule that there is now some language about what
6 a notice must contain. Specifically must contain all
7 information needed to participate in the proceeding, and
8 then there is a nonexhaustive list of what that might
9 be. Specifically it states that the notice now has to
10 include the location of the proceedings or instructions
11 for joining the proceeding remotely. The court's
12 designated contact information and instructions for
13 submitting evidence to be considered in the proceeding.

14 I think it's important to also point out
15 that the proposed comment to that amended rule makes
16 clear that the court should post or otherwise provide
17 the information needed for notices of the proceedings.
18 I think we've probably all seen that different courts
19 have different ways of going about these notices for
20 remote proceedings and probably notices for in-person as
21 well. By way of example, in Travis County district
22 courts, there is a very specific sample notice for
23 remote hearings. And I don't think that's in place in
24 every single county, but to the extent that courts have
25 specific preferences and also just feel like people

1 should be doing certain things in the notices or stating
2 certain things in the notices, there is encouragement
3 that additional guidance beyond what's in the text of
4 the rule proper be provided by the courts.

5 Another thing that I should say at the
6 forefront is that in figuring out what examples of good
7 cause for getting out of a particular type of
8 proceeding, whether it be remote or in person, and
9 figuring out which types of examples to include. I want
10 to tip my hat, if you will, to the people from the Texas
11 Access to Justice Commission who participated in these
12 discussions because you'll see that one of the examples
13 of good cause is about people being unable to get the
14 language access services they need. Additional examples
15 are the inability to appear remotely, perhaps because
16 you don't have the technology that you need, or don't
17 have the proficiency in that technology that's required.
18 And then for a good cause of not coming in person, one
19 example is that being there in person might compromise
20 health or safety.

21 I think the final thing to just point out
22 so people are aware of it, the justice court rules that
23 are provided in Exhibit 4 largely track the proposed
24 rules for district courts and county courts laid out in
25 Exhibit 3. There are just a few exceptions, and I'll go

1 over those very quickly.

2 One, in the justice rules there are
3 definitions for a lot of things that we don't see
4 definitions for in the other rules. And in keeping with
5 the tradition of providing definitions, there is a
6 proposed definition of court proceeding in Exhibit 4
7 that you will see.

8 In addition, I believe from what I've
9 heard and then what was reported in the memo, there was
10 a thought that some additional content would be helpful
11 in terms of communication with parties involved in the
12 justice court proceedings, in part, because a lot of
13 these individuals have never had any prior contact with
14 the court and may need a little bit more guidance, if
15 you will, than in some other settings. And so there
16 are, like I said, just a few variations between these
17 two sets of rules, but primarily that they're very
18 similar in nature.

19 With that explanation, I will turn it
20 over -- if it's okay -- to Judge Miskel to fill any gaps
21 that I may have left inadvertently because she was
22 certainly an integral part of the team and a co-drafter,
23 and I want to give her an opportunity to speak to these
24 proposals, if that's okay, before we open the floor.

25 CHAIRMAN BABCOCK: Absolutely. Go ahead,

1 Judge.

2 HONORABLE EMILY MISKEL: Sure. I just
3 wanted to circle back that, like, the bulk of our time
4 as a subcommittee was spent trying to figure out, "How
5 do you define a remote hearing." And I was the stick in
6 the mud on all of that because every time someone came
7 up with a good idea, I was like, "Well, what if only the
8 court reporter is remote" or "What if, you know, one
9 side has an attorney remote, but everyone else is in
10 person?" And so, you know, thanks to the committee for
11 putting up with my relentless counter-examples.

12 But what we ended up going with was just
13 talking about remote appearance -- right -- because the
14 judge might be remote or the court reporter might be
15 remote or the language interpreter might be remote or
16 everyone else might be in person or some combination.
17 And so it's sort of very difficult to define what a
18 remote proceeding is, much more streamlined to define
19 what a remote appearance is.

20 I will say my big concern about this is:
21 For 100 years -- more than 100 years courts have had the
22 discretion, and it's the judge's decision, to allow
23 anyone to participate by telephone, and it's also been
24 the case that someone can ask for it, that someone can
25 object to it. But at the end of the day, the judge can

1 allow anyone to appear by telephone, could allow a
2 witness to appear by telephone in a jury trial. I mean,
3 so we've had this flexibility for telephone appearances
4 for 100 years, and I don't want to do something in our
5 rules and in our interfacing with the legislature where
6 now since we're talking about remote appearance it all
7 gets banned and a power that we already have is taken
8 away.

9 So as we look at these rules, please be
10 conscientious of -- let's not throw any babies out with
11 any bath water and remember that we have been -- as
12 Tracy Christopher said -- doing things via remote
13 "stuff" for a long time. So that's all I need to add
14 really and we can get to the discussion.

15 MS. WOOTEN: And if I may, I'll just tack
16 on and say that part of what we were considering at the
17 subcommittee level is the information we've received
18 indicating that participation in court proceedings has
19 gone up when they've been conducted remotely, and what
20 does that tell us? It suggests there's been an increase
21 of access to justice, and I think that's a laudable
22 goal.

23 In regard to the comments made about
24 additional people come to these legislative processes
25 and they're not prepared and they're not giving us

1 anything new, this is a completely different setting.
2 Right? This is about whether participants in litigation
3 and other proceedings are actively engaged with it, are
4 getting meaningful access to the justice courts, to the
5 civil district courts, the county courts, et cetera. So
6 I think that increased participation is a very good
7 thing in court proceedings.

8 And the final thing I should say, just to
9 ensure that there's no confusion going forward, I think
10 the way the rule is written it could include juries. It
11 does not speak solely to hearings and so that is
12 something that I want people to be aware of when we have
13 these conversations because I think the way it's
14 written, like I said, it's not limited to hearings
15 alone.

16 CHAIRMAN BABCOCK: Yeah. Robert's got his
17 hand up, but I wanted to ask Judge Miskel a question.

18 No doubts that the judges have had the
19 authority to allow telephone hearings, telephone
20 depositions, or all sorts of things. How often is that
21 used in your experience?

22 HONORABLE EMILY MISKEL: So prior to the
23 pandemic it was not used not infrequently. I mean,
24 somebody would be out-of-state or somebody had a
25 conflict or whatever, we didn't like to use it because

1 it's -- you lose a lot of information to have something
2 be telephonic instead of video. And the solutions for
3 having video weren't easy before the pandemic. So
4 technically, I had CourtCall available, but it costs \$90
5 and the parties had to set it up in advance, so I
6 couldn't use CourtCall for anyone that didn't have \$90,
7 which is a lot of my docket.

8 So pre-pandemic, video was just
9 functionally hard to do, and then we didn't prefer to
10 have anyone testify telephonically because we would
11 always rather them be in person so we can see them. But
12 I think that with the increased ease of the video
13 solutions we have now, a lot of times a video is just as
14 good as in person for certain types of people, be that a
15 witness or the court reporter. Like, for example, my
16 court reporter had COVID and was out for two weeks and
17 when we're finding court reporters now there is a
18 shortage, but we can get court reporters from outside
19 our area, which is the only way we were able to keep
20 going.

21 So we not infrequently used telephonic
22 appearances. I think it was artificially low because
23 given the choice, I was like, "No, I don't want to
24 listen to a disembodied voice for an hour" or what --
25 "You know, they need to come in person." But now that I

1 can do video, I'm happy to have them testify by video
2 for an hour. That's fine.

3 CHAIRMAN BABCOCK: Tell everybody a little
4 bit about CourtCall. My understanding is: I know in
5 California it's been used for at least 15, maybe more
6 years. And in California many, many hearings
7 pre-pandemic were done by CourtCall. But as you say,
8 it's not video. But it allows you --

9 HONORABLE EMILY MISKEL: CourtCall does
10 video, yes.

11 CHAIRMAN BABCOCK: Yeah, but in California
12 they rarely do video. It's almost always telephonic.
13 What is CourtCall?

14 HONORABLE EMILY MISKEL: Yeah, so I
15 wouldn't use CourtCall for just telephonic because I
16 have the ability to do conference calls directly from my
17 bench, so there's no reason to pay a third party under
18 our technology to do a telephone call.

19 What CourtCall would do is they -- before
20 the pandemic -- set me up with a web cam, and then when
21 you make a reservation through CourtCall, they actually
22 have an in-person operator sitting there making sure
23 everyone's connected, moving people to where they need
24 to be moved. Now, with Zoom effectively I do that --
25 right -- so we don't need to pay CourtCall's operator

1 \$90. We have someone on the court team doing it.

2 But when I used CourtCall, it was video,
3 but it was really limited to the people that can afford
4 video and known how to set it up in advance. Whereas
5 with the solutions we have now like Zoom, you don't have
6 to worry that there's a cost to set it up, and it's easy
7 enough that almost everybody can figure it out with some
8 help from me.

9 CHAIRMAN BABCOCK: Yeah, but CourtCall is
10 a third-party vendor. Right?

11 HONORABLE EMILY MISKEL: Correct. Yes.

12 CHAIRMAN BABCOCK: And it's been around
13 for how long? 15, 20 years or do you know?

14 HONORABLE EMILY MISKEL: I don't know. I
15 mean, we used it in my court as far back as 2015 and
16 that's all the experience I have.

17 CHAIRMAN BABCOCK: Okay. I've had
18 experience with it for at least 15 years, maybe longer,
19 not in Texas so much, but in other states. And some
20 people will say that this remote -- you know, even
21 though you had the power -- it was rarely used and that
22 may be true from jurisdiction to jurisdiction but
23 there's some places where it's been done a lot for a
24 long period of time.

25 HONORABLE EMILY MISKEL: Oh, yeah.

1 Absolutely. When CourtCall came and did their sales
2 pitch, you know, there's jurisdictions where they do
3 whole dockets how -- well, it was similar to what we did
4 during the pandemic, half day court dockets, hundreds of
5 participants on CourtCall or whatever it might be. So
6 very similar to what we were doing, the only reason it
7 wasn't as widely used as Zoom is because it wasn't as
8 easy. There was a lot of friction in setting it up and
9 using it. And Zoom is essentially the same thing with
10 much less friction and cost, and so it ends up getting
11 used more.

12 CHAIRMAN BABCOCK: Yeah. Thanks, Judge.
13 Sorry, Robert, I didn't mean to jump the
14 line on you.

15 MR. LEVY: No problem.

16 CHAIRMAN BABCOCK: You've got the floor.

17 MR. LEVY: So I wanted to comment and
18 express really deep reservations about what I think are
19 two things. One is both the rush to pursue rule changes
20 of such a significant nature literally while we're in
21 the middle of the pandemic. And, secondly, in terms of
22 the overall kind of suggestion that the rule changes
23 would make, which would be that there's no preference to
24 either an in-person or a remote hearing based upon the
25 way the task force presented the proposed rule. And as

1 Kennon noted of a significant concern that it would, at
2 least as drafted, cover jury trials, as well as nonjury
3 trials and evidentiary proceedings.

4 The challenge that we're facing is,
5 obviously we're in the middle of a dynamic, which is an
6 exigency, that has caused significant disruption and has
7 certainly validated the value of having remote
8 proceedings to be able to continue to have our justice
9 system function, and it certainly has functioned well in
10 that respect. But that doesn't mean it's the optimal
11 approach, and the approach that should be the default.

12 You know, as we've noted a couple of
13 times, it's been our preference as a committee to meet
14 in person and that's what we hope to get back to. And
15 similarly being in court, being in person, sitting --
16 you know, standing before a judge, having their
17 undivided attention, having witnesses there before the
18 judge, whose credibility can be determined, making sure
19 that you are seeing their environment that they're there
20 and understanding the importance and the significance of
21 the legal proceeding, are important. And that the idea
22 that we would simply choose to go remote -- and some
23 judges based upon the rule would have the choice of
24 having all their proceedings remote -- again, I don't
25 think is the optimal way that we should proceed.

1 Another issue is that we are literally in
2 the middle of an experiment. We have been working this
3 dynamic now for just under two years, and obviously the
4 prevalence of Zoom as a feature or remote proceedings is
5 even less experienced, and that there are significant
6 lessons that are being learned and will be learned.

7 And Kennon made a note about participation
8 being up. That's an anecdote. It very well might be
9 true, but we don't know whether it's true. We don't
10 know what the impacts are. We don't know about how well
11 depositions are functioning remotely versus the model of
12 having all the parties being there. There's certainly
13 pluses and minuses.

14 But I think we should be very reluctant to
15 make a significant rule change while we're still trying
16 to understand the impact and the consequence of doing
17 things remotely. And I know that studies are being
18 conducted and people are looking at it, trying to
19 understand what the impacts have been and will be, what
20 are some of the disadvantages that might be addressed in
21 both types of proceedings, but particularly in having
22 remote proceedings.

23 And, you know, I think Judge Miskel
24 pointed out that she's gotten a lot of objections, and I
25 really think they shouldn't be minimized. They're very

1 significant, particularly from people that have
2 practiced for many years in courts and, you know,
3 questioned jurors, questioned witnesses and been able to
4 cross-examine them and the dynamic's very different and
5 I think they are understandably concerned about the
6 changes that the rule would make.

7 And the issues also -- I mean, the types
8 of issues and the rule itself as proposed, again, as I
9 pointed out, the rule does not give any preference to
10 remote or in-person, which I think that alone is a
11 problem. And then it provides a basis for a good cause,
12 but without any indication of what could constitute good
13 cause. For example, does my right to cross-examine a
14 witness in front of the witness constitute good cause?
15 I think there arguably is a fundamental right to do
16 that, to confront your witnesses, to question them. But
17 is that good cause? Is the fact that that's my
18 preference enough? Or does the judge have full
19 discretion to minimize that, if the judge doesn't want
20 to be there?

21 There are of number of other issues, and
22 I'll defer on that until maybe we get further on about
23 issues about notice and the ability to basically
24 subpoena a witness from anywhere in the State without
25 regard to the 150-mile rule, even though that still can

1 present significant issues, particularly when the
2 witness might want to have their lawyer present with
3 them for a deposition or to appear at trial.

4 Many, many issues that I think we are
5 really not fully understanding as we press forward, and
6 I think rush forward to talk about a major rule change.

7 CHAIRMAN BABCOCK: Thanks, Robert.

8 John, I'll get to you in two seconds.

9 But a question for Robert: It goes
10 without saying, but I am going to say it for the sake of
11 the record: We're all here in our individual capacities
12 providing our views to the court, but it's no secret we
13 all work -- most of us work -- for others, and do you
14 have a sense, Robert, I know you're speaking for
15 yourself, but whether -- whether starting with your very
16 large company that consumes many legal services, going
17 all the way into other big businesses, do you think they
18 share your thoughts that we ought to go slowly on this
19 or you don't -- you don't have any data on that?

20 MR. LEVY: I am actually seeking more data
21 on that. But, yes, initially when these issues first
22 came up, we did -- we have had some concerns as an
23 entity about being forced to proceed remotely. We've
24 had some experience with it in trials and arbitrations,
25 as well as in court proceedings. And I will point out,

1 while some of the concerns haven't been fully realized,
2 we still remain very wary and concerned that our rights
3 as a litigant are going to be altered by the push to go
4 remotely, and I think we've got a lot of trepidation
5 about that.

6 But I will point out that the comment that
7 I made earlier was based upon my personal perspective,
8 and I appreciate your noting that.

9 CHAIRMAN BABCOCK: Yeah, well, I mean, it
10 goes without saying, but this is a pretty big issue.
11 And do you have any sense -- I know you're going to look
12 at it, but any sense of whether other large corporate --
13 corporations who are in the justice system a lot have
14 similar views?

15 MR. LEVY: We've had discussions in
16 organizations that I'm a part of that have -- we've
17 started to see other dynamics in other states and that
18 similar concerns have been raised. Some companies are
19 probably a little bit more comfortable with it than
20 others, but we are concerned about the impact that it
21 will have on the prior process -- the in-person process
22 and the impact that might have on the rights of some of
23 the litigants.

24 CHAIRMAN BABCOCK: Okay. Great. Thanks
25 so much, Robert.

1 John, I'm sorry to hop over you but I
2 wanted to ask Robert those questions while I had it, you
3 know, fresh in mind. So the floor is yours now, John.

4 MR. WARREN: Thank you, Chip.

5 You know, for the record, I want to go on
6 record as saying I am all in favor of virtual processes
7 as of three years ago. But I agree with everything that
8 Robert has said, and I also agree with everything that
9 Justice Miskel has said.

10 I see in the chat that Alex Albright has
11 said that Dallas County uses CourtCall. It's clunkier
12 than Zoom, in my opinion. He's absolutely right.

13 Dallas, we rolled out -- I actually
14 purchased the CourtCall licenses and the kiosks, and we
15 were using them primarily in our criminal courts, but
16 actually for our criminal courts, but we have used the
17 kiosk in our jails is how we're able to maintain the low
18 jail population. With the advantage of using CourtCall,
19 it gives you the ability to do virtual proceedings, as
20 well as signing documents. The problem is, what we
21 had -- when we rolled this out -- we rolled this out
22 just as the pandemic was getting the -- hit and we
23 didn't have the opportunity to vet the process fully.

24 That said, we have taken a lot of lessons
25 learned from the rollout of our CourtCall kiosk and the

1 licenses. I'm actually in the process of purchasing, I
2 think, 20 more licenses for our judges to use on the
3 bench.

4 I think that's necessary for where courts
5 will be -- not be in 2022 -- I doubt very seriously in
6 2023, but in 2024. I believe the approach should be is
7 that we have participants who actually vet the process
8 so that we have a template of how virtual court's --
9 virtual court proceedings and even virtual trials should
10 proceed going forward when that is necessary. We also
11 have to take into consideration that we don't want to
12 exclude those who don't have access to Internet or any
13 type of virtual technology.

14 So I think while everything that we're
15 saying is absolutely correct, some I'm in favor of, some
16 that I'm not in favor of, that that I'm not in favor of,
17 is because there is no history for us. There is no data
18 there for us to use.

19 And so I think we should look at -- so, in
20 essence, we should -- Chip, we should slow this down,
21 look at what it takes to actually be effective in
22 rolling out remote proceedings so that we are doing it
23 the right way so that all the questions, whether it's
24 from members of the legislature who are attorneys who
25 do -- who still practice law so that we are making rules

1 so that those proceedings are actually more effective
2 than not.

3 And so I think the best approach is to
4 have a group who is actually working with, whether it's
5 a software provider -- we could use CourtCall or we can
6 use -- I've also purchased collaboration units for our
7 probate courts who didn't have any technology in their
8 courts at all. And the collaboration unit is basically
9 a 90-inch computer with Webcam so that -- and it also
10 has the ability for the judges to sign documents.

11 And so I think there should be a
12 collaboration between local -- at the local level with
13 the clerks, the judges, and with some vendors so that we
14 can actually formulate what it takes -- what is a
15 virtual process, and what it should be so that we
16 document -- and we document all of those steps as a best
17 practices, lessons learned from the pandemic, as well as
18 everything technology -- what technology is available to
19 us so that we can in the most knowledgeable way approach
20 virtual processes.

21 CHAIRMAN BABCOCK: Great. Thank you so
22 much, John.

23 Richard Munzinger.

24 MR. MUNZINGER: I want to join Robert's
25 cautionary words to everybody. We have to remember that

1 the rules that we propose and that the Court ultimately
2 adopts are rules that are designed to facilitate
3 justice, and justice is based upon truth. How can a
4 judge conduct a nonjury trial remotely and make a fair,
5 honest judgment regarding the credibility of the
6 witness?

7 I go back to my -- the first case I ever
8 tried. I was a young lawyer. I got out and got my
9 license and a partner came in and handed me a file and
10 said, "Go try the case and try it nonjury." And it was
11 a collection case. Well, it didn't involve much, but I
12 went and I tried the case in front of a judge who I
13 later learned was probably one of the best judges I ever
14 worked in front of in my life, Jorge Rodriguez, Sr. He
15 was as fair and as good a judge as I ever worked in
16 front of in my life. But in this case, he sat on the
17 bench and the witness sat below him to his left.

18 I look at the judges who are speaking
19 today and I look in their courtrooms and I see where the
20 witnesses sit generally below and to the side of the
21 judge who doesn't have a look at their face. How can
22 you make a judgment regarding the credibility of a
23 witness without looking them in the eyes and the face
24 when they testify? You really can't. You can't judge
25 their demeanor. Can you be certain that someone isn't

1 whispering or shoving papers to them or something else?
2 Bear in mind, the rules that we are adopting are based
3 on justice.

4 People -- the rights that are litigated in
5 court don't come from Government, they don't come from
6 anybody. They come from God, according to our system.
7 We hold these truths to be self evident. This is where
8 our rights come from. So when we adopt these rules that
9 we're adopting, so often it's done in the name of
10 efficiency. We're clearing dockets. We're
11 accomplishing results. We're moving. We're doing what
12 we're supposed to be doing.

13 Robert's point about doing this in the
14 pandemic and in the middle of a pandemic is correct, in
15 my opinion. This is an unusual time, unprecedented in
16 my 83 years. I've practiced law 56 years, and I have
17 never seen anything like this in my life. We haven't
18 had a jury trial in El Paso -- well, that's not true.
19 We have had jury trials. But we were told the other
20 day, we won't have any jury trials most probably in
21 2022. We haven't had -- how many people are languishing
22 in jails? How many contracts -- what problems are
23 there, and so we're going to hurry up and make rules to
24 accommodate this situation? I don't want to take too
25 much more time.

1 I just want to say to everybody: It's one
2 thing to resolve a motion for continuance, a motion in
3 limine or whatever a motion might be remotely because
4 the concepts and the law and the cases and what have you
5 can be argued. It is a totally different thing to
6 resolve somebody's rights based upon sworn testimony in
7 a nonjury trial. And a jury trial -- to believe that
8 you could conduct a jury trial remotely, good, God, I've
9 got a bridge I'll sell you. Are you kidding me? Are
10 you kidding me? You're going to have 12 lay persons who
11 are sitting there watching a television, six of them
12 mothers with two-year old children who are tugging at
13 their arms and hands and they're going to decide my
14 case? My rights? My sacred honor? My fortune? That's
15 crazy. That's literally crazy. And we need to be very
16 careful about adopting rules that do not make the
17 distinctions between resolving factual issues and having
18 judges hear motions and what have you.

19 Again, I'll be quiet except to just say,
20 boy, we need to be very, very, very, very careful about
21 what we do here.

22 To go back to that trial I tried as a
23 young man, that judge ruled against me. Had he watched
24 that witness testify in front of him, the defendant in
25 the case, he would have known at once this fellow was

1 lying. It was so patently apparent to everybody in the
2 courtroom. The judge couldn't see him -- couldn't see
3 his face. And these are problems. These are the
4 realities of trials.

5 This -- we have appellate rules, "Well,
6 the judge made the decision regarding who he was going
7 to believe or who she was going to believe," and so we
8 have to respect that finding. "It was the judge who
9 heard the testimony. Well, did the judge really hear
10 the testimony or did the judge look at a TV set?"

11 You know, we need to be really careful and
12 remember what we are doing here. This is a republic in
13 which the citizens have the rights. They don't work,
14 live to serve the Government. They're supposed to be
15 free and do the things that they do, and when you take
16 their rights away from them, this is not something that
17 should be done quickly or heedlessly.

18 Thank you.

19 CHAIRMAN BABCOCK: Yeah, thanks, Richard.
20 I did not realize that bridge in Brooklyn was for sale,
21 but let's talk after this meeting. Okay?

22 (Laughter)

23 MR. MUNZINGER: Okay.

24 CHAIRMAN BABCOCK: Tom Riney.

25 (No response)

1 CHAIRMAN BABCOCK: Yeah, I'm sure it's
2 very eloquent, Tom, but you've got to unmute yourself.

3 MR. RINEY: Thank you, Chip.

4 First of all, let me say: I recognize
5 that we've had to do things during the pandemic, and
6 it's been difficult for the courts, and I applaud the
7 efforts that they have, and also to the people that were
8 on the committees and the subcommittees. You were given
9 a charge. I know you did a lot of work, but what this
10 rule proposes is a fundamental change in our civil
11 justice system, and we need to recognize that. To use a
12 currently popular adjective, it's transformational. And
13 I'm grateful that you all talked to the Access on
14 Commission -- Commission on Access to Justice, but I
15 think we need to go way beyond that if we're going to
16 make fundamental changes to our civil justice system.

17 We need to talk to the Texas Trial Lawyers
18 Association. We need to talk to the Texas Association
19 of Defense Counsel. We need to talk to TEX-ABOTA. We
20 need to talk to the American College of Trial Lawyers.

21 This committee has had representatives of
22 the American College come and speak to us before about
23 things. The American College has put out position
24 statements on interim measures for virtual court
25 proceedings. That should be consulted. The National

1 Institute of Trial Advocacy has put out a paper strongly
2 condemning taking away the rights of in-person court
3 proceedings. We need to talk to the litigation section
4 of the State Bar, all of those types of -- and other
5 similar organizations need to be consulted before we
6 make this type of dramatic change.

7 Now, I didn't hear Chip mention the
8 comment about Senator Hughes this morning because I was
9 on a Zoom hearing on a motion for summary judgment which
10 was fine. I don't know that it would be appropriate in
11 every summary judgment motion if it's real complicated.
12 But it was fine. Nobody objected. That was fine. I've
13 participated in numerous depositions by Zoom. Some are
14 appropriate. Some were totally inappropriate and
15 unsuccessful. I have not participated in a jury trial
16 by Zoom, but I have just out of interest as a trial
17 lawyer kind of kept track of some of the articles about
18 that over the last year or so. Here's one headline:
19 Zoom Jury Trials: The Idea that Vastly Exceeds the
20 Technology. Another headline: Potential Jurors
21 Exercised on Elliptical trainers, curled up on bed
22 during virtual voir dire. Others talk about jurors that
23 were sleeping, that were involved in other activities.
24 That leads me to a comment about some of the criticisms
25 that have been made about resistance to moving away from

1 in-person proceedings. And, again, I'm not against them
2 at all times, but before we make this huge jump, let's
3 consider some of those.

4 A statement was made about, there were
5 some icky feelings and had to do with dignity of the
6 court. I think we ought not to put dignity of the
7 courtroom in the same category as icky. Let me explain:
8 I've tried a lot of cases, and most of the time if I had
9 the opportunity and my client or an important witness
10 has not testified in a courtroom before, I take them
11 over to the courtroom, put them in the witness chair,
12 and go through some things. And without exception, that
13 witness/client will say, "I am so glad we did that
14 because that's not the situation I'm used to being in"
15 because our courtrooms are built with the judge up
16 higher. That's for a reason. It's to show the respect
17 that we give the judge and the judge's role. The
18 courtrooms are built -- they are dignified for a reason
19 and people are going to behave differently. They're not
20 going to be vaping. They're not going to be curling up
21 to take a nap because that's not the atmosphere that a
22 courtroom fosters.

23 So before we're willing to throw that out,
24 we need to think what is a trial like if everything is
25 virtual? And I would suggest to you that at least as

1 far as jury trials are concerned, the record is not very
2 good very far. The argument is made, "Well, only less
3 than 1 percent of cases are resolved by jury trials." I
4 suspect that's probably true. But the other civil cases
5 that are filed, take a look at what's likely going to
6 happen in a jury trial and what those results are in
7 determining how the case should be resolved, either by
8 settlement discussions, by mediation, or perhaps some
9 other circumstances.

10 I don't want to get into details, but the
11 statement made was that civil trial lawyers well some of
12 them say, "Well, I can do better in a courtroom." I'm
13 one of them that says that. But it makes no difference
14 whether I care if I do a better job or not, but it can
15 make a difference to my client. And my client and your
16 client each have the right to be effectively
17 represented.

18 You know, Rule 1 of our civil procedure
19 rule says: The proper objective of Rules of Civil
20 Procedure is to obtain a just, fair, equitable, and
21 impartial adjudication of the rights of litigants under
22 established principles of substantive law. Now, I don't
23 think Zoom -- this particular rule moving to remote
24 proceedings meets what that rule commands us to do with
25 the Rules of Civil Procedure.

1 I agree with almost everything that has
2 been said about urging us to move slowly, and I think we
3 need to really get a lot more people involved and really
4 understand from people who are in the pits -- in the
5 trenches -- what the impact of such a rule would be.

6 CHAIRMAN BABCOCK: Tom, I can't help but
7 wonder if you would answer a question. Do you think
8 this is a generational thing with Millennials, like
9 Justice Christopher and Kennon on the side of using more
10 remote-type access, and then the old guys like you and
11 me and Munzinger resisting it?

12 MR. RINEY: You know, I thought a lot
13 about that, Chip, as I was thinking about this meeting
14 because I don't want to be that way. Well, we've always
15 done it this way, and that's the way that it should be
16 done.

17 But a lot of what we do in the courtroom
18 is -- it's developed slowly and it's developed because
19 we found that it's been effective to meet these
20 objectives that we have. So I'm not against change.
21 I've already said I don't -- by the way, I think anytime
22 parties want to do it by agreement, I think it probably
23 should be allowed. But it's when it's left to the
24 discretion of the judge, which leads me to another
25 point, Chip -- and I certainly don't mean this with

1 respect to any of the judges on this committee. But any
2 of us can just pick up an article at any time and read
3 about the disappearing jury trial. Yes, we have
4 statistics showing there's very few cases going to jury
5 trial. What is the impact of that? If we're having a
6 hard time getting young lawyers to get significant jury
7 experience, that means that we've got a lot of people
8 coming on the bench who don't have a lot of experience
9 with jury trials and yet we're going to give them the
10 discretion as to whether or not there's, quote, "Good
11 cause" to allow a jury trial or not.

12 So in answer to your question, I think we
13 have to think about that. Is it just resistance to
14 change, or are we giving up some practices that have
15 been based upon many, many years of experience and have
16 some validity to them? Can they be changed? Yes, of
17 course, some probably should. But I urge caution.

18 CHAIRMAN BABCOCK: Thanks, Tom.

19 Judge Mendoza.

20 HONORABLE MARIA SALAS MENDOZA: So there's
21 been a lot said. I just want to share. My perspective
22 as a trial judge is that this is exhausting. Zoom is
23 exhausting. Even this meeting for this length of time
24 is much more tiring than had we been in person. Right?
25 If we're in person, we can look around. We can move and

1 the -- you know, I don't know how close you are to your
2 computer, but I'm pretty close. And so I would like to
3 think that I'm with the Millennials, but perhaps, I'm
4 with the older crowd because I think that there's some
5 issues with Zoom.

6 My concerns are the following: That
7 implicit in some of the criticisms of remote proceedings
8 is that somehow the judge isn't there or the judge is
9 calling it in. And I have to tell you that remote
10 proceedings are not easy, and we're working. We're just
11 at a different place and it is not easier, you know,
12 especially in the civil proceedings. How many of you
13 heard that if the judge isn't in the courtroom, nothing
14 is going on? The civil docket is slower, and you're not
15 on the bench that much. And I always took issue with
16 that criticism. I have a criminal docket, so, yeah, I'm
17 on the bench a lot, but that didn't mean I was working
18 any more than the courts that only had civil dockets.

19 And so, you know, I take issue with those
20 criticisms of trial judges that we're not working, that
21 we're calling it in, that we want to do remote because
22 it's somehow easier. I don't think it is.

23 I also think we had some -- you know,
24 we've had some limitations. We were talking about
25 remote proceedings in civil cases. But everyone can see

1 and argues -- right -- that it's going to slide into the
2 criminal realm and that it's going to slide into jury
3 trials. So even if we take it out, that's going to be
4 the concern and that's what people are going to -- you
5 know, assume it is going to happen. But I think that's
6 one good way. That if we could be clear about the fact
7 that it's not for jury trials -- and then let me say
8 that I am opposed to a justice system that's different
9 for civil cases and criminal cases. I would think
10 either it's just or it's not just and so I think it
11 should be the same. So having said that, that would be
12 one way to be clear.

13 The other thing I think that Justice
14 Miskel mentioned is that judges always had the ability
15 to hold hearings how they wanted to. No one ever
16 questioned it. We could do phone. We could do any
17 number of things. And so I'll tell you that I had a
18 beautiful script that I read every time before a hearing
19 that I was having these remote proceedings pursuant to
20 the emergency orders of the Supreme Court and the orders
21 of the OCA, and I stopped doing that a few months ago
22 because I thought the suggestion that I could only do it
23 because of the emergency orders or the guidance of OCA
24 was incorrect because I could always have done it. I
25 always had that power and no one was going to question

1 it, except when we have these orders suggesting that I
2 had to have permission.

3 So I think that we ought to also protect
4 the judge's ability to decide in what proceedings remote
5 options would be available, and it wouldn't be in every
6 case. And I'm one of those judges and I've told lawyers
7 that I'm not interested in having Zoom trials. Having
8 said that, the folks who have actually done it -- just
9 like all these anecdotes about jurors vaping and being
10 on the elliptical, the anecdotal information on the
11 other side is that you have a more diverse jury pool.
12 That mom with two kids isn't going to be a juror in your
13 in-person trial because they can't do it, but you can
14 get them virtual. You can get older people. You can
15 get more diverse jurors. It's all anecdotal. Not
16 enough information is available. But pros and cons are
17 available on both sides.

18 And I think the access to justice question
19 is important for us to address, and I also think that
20 that ought to be part of the intro when we -- we think
21 we want to have in-person hearings whenever possible.
22 We also want to make sure that we are addressing access
23 to justice. Those are important things as a body that
24 we ought to promote.

25 And what I saw in these rules is not, you

1 should do this, and everybody should do it. But if
2 you're going to do it, here are the rules for providing
3 notice. Here are the rules for how you subpoena. You
4 know, that's the stuff I saw in the rules. So anyway,
5 we can all go on and on.

6 Thanks.

7 CHAIRMAN BABCOCK: Thanks, Judge.

8 Marsha Greer.

9 MS. GREER: So I just wanted to speak to
10 the Access to Justice piece. Because -- and maybe what
11 we need to do is think about treating trials a little
12 differently. I mean, that seems to be where the real
13 issue is.

14 But in the CPS cases, which are so
15 important, I'm hearing from judges and court
16 administrators that participation by all of the parties
17 has gone way up in those cases, which I think is really
18 important. Parents who may lose their kids or are
19 trying to get them back, the CASA workers that are not
20 getting paid. You know, all the people who need to be
21 there are able to show up, teachers, people are able to
22 participate and really be beneficial to the child's
23 progress and these hearings aren't having to get
24 continued. They actually take place because the parent
25 can step out of work and, you know, get on a Zoom call,

1 and so I think that there's a lot that we need to keep.

2 And, again, we have to be careful about --
3 to Judge Miskel's comment -- not throwing babies out
4 with the bath water, but also just the importance of the
5 incredible increase of access to justice. You know,
6 like you all -- I am a Baby Boomer technically, but I'd
7 like to think I'm a Millennial. I love being in the
8 courtroom. It's not the same being on Zoom. I get it.
9 But I also appreciate the value that it brings, and I
10 want to make sure that we keep that in mind and come up
11 with rules to make it work. You know, none of us really
12 thought we could go to this place two years ago and
13 we've adapted fairly well, and I think there are ways to
14 do it. And it may be just learning some of the tricks.

15 Like, I know when we first started having
16 Zoom depositions, people were like, "Oh, this is great.
17 I'll sit in the room with my client and coach them" and
18 so then, you know, you have to figure out how to avoid
19 that. And so there are ways to work around some of
20 those issues of attentiveness, et cetera, and we just
21 need to be creative. But I really want to make sure we
22 don't focus solely on the trials and lose the benefit
23 for everything else.

24 And maybe if there is serious concern
25 about the Zoom trials, especially -- I think bench

1 trials can be done by Zoom. We've been doing
2 evidentiary hearings and bench trials, the same thing.
3 It's really the jury issue, and I've been doing a lot of
4 work with the ABA on this as well, so I would include
5 the ABA resources in the guide of looking at this. But
6 let's think about the jury trials in a little bit
7 different category about how that can best be done and
8 not lose the value of virtual appearances for everything
9 else.

10 CHAIRMAN BABCOCK: Great. Thank you,
11 Marcy.

12 Roger.

13 MR. HUGHES: Well, I feel like by now --

14 CHAIRMAN BABCOCK: You need to turn up the
15 volume, Roger.

16 MR. HUGHES: Just a second.

17 MS. GREER: Can't hear.

18 CHAIRMAN BABCOCK: We can't hear you.

19 MR. HUGHES: I was going to say, by now I
20 feel like I'm just going to be an echo. But I favor
21 that we do a kind of step-wise progression, that is
22 moving from what proceedings remotes will be available
23 for or not, and then which ones it's going to be
24 mandatory or not, and I have a couple of reasons for
25 saying that.

1 In the past two years, I think courts
2 across the State have been dragged literally into
3 upgrading their hardware and their software so they can
4 do this. I'm surprised at the number of rural counties
5 I go to where they can at least figure out in some way
6 to do something on Zoom.

7 And I will also say, just as, you know, 20
8 years ago or so the attorneys fresh out of law school
9 were all eager to drag us into the era of audio/visuals
10 in the courtroom. I think soon we will have a whole
11 crop of new young lawyers waiting to drag us into how
12 you use Zoom to do what you used to do live. And it's
13 produced some good things. For example, when people
14 started finally figuring out how you do exhibits and
15 show witnesses things on Zoom, they found out the best
16 way to do that was not only through share screen but by
17 sending the exhibits to the court reporter in advance.
18 And some courts I now see are asking, you know, if you
19 want to use an exhibit during a hearing, send it to the
20 court reporter the day before. What a concept. Sharing
21 exhibits the day before the hearing.

22 That said, as I think we've all learned in
23 the past couple of years, Texas' infrastructure to
24 support wifi, broadband, and all that, well, it's just
25 not like the east coast or the west coast, folks, and I

1 can tell you from experience, it's one thing when the
2 lawyers show up because they're going to have the
3 routers and the hardware and all that in their office so
4 they can have a good connection with the court. Not so
5 with ordinary people. If they have to step outside and
6 get on their phone, maybe they're in an area that is not
7 such good reception for their phone, and we have to be
8 aware of that.

9 The other thing of it is -- I hate to say
10 it: Weather. I was on a Zoom hearing yesterday and the
11 folks in Dallas were fading in and out on the Zoom
12 hearing because of the weather-related problems.
13 Weather affects all those wonderful cell towers and
14 electricity. So, like I said, I think maybe we're
15 getting there, but we're not there that the
16 infrastructure exists throughout.

17 Now, talking about -- a little while ago
18 about whether the larger and institutional clients like
19 this or not. I think they're schizophrenic right now.
20 When it comes to pretrial hearings, they love the fact
21 that the lawyer doesn't charge them for the time to
22 travel to the courthouse and wait in the courtroom for
23 an hour to be called for a five-minute hearing. They
24 love that, and they think that's wonderful.

25 On the other hand, when you talk about

1 making them try the case virtually with either the
2 lawyers not in the courtroom or the jurors not in the
3 courtroom, they start sounding like Richard Munzinger.

4 CHAIRMAN BABCOCK: Eloquent. Right?

5 MR. HUGHES: Yes. Eloquent. Passionate.
6 But the thing of it is, as was said earlier by almost
7 everybody, most of this is anecdotal, whether these
8 trials work well or don't work well, whether they're a
9 travesty or whether they're the wave of the future
10 really depends on what happened in your last jury trial
11 by -- done remotely, or your partner's last remote
12 trial. It's all anecdotal.

13 But there's one more thing that troubles
14 me, which is why I say maybe go slow and do it step
15 wise, and that's not how lawyers behave in remote
16 proceedings but how ordinary members of the public act
17 in these things. I don't think the -- I've seen a
18 tendency when you have witnesses or parties show up it's
19 like, I'm not really in the courthouse. I'm on TV. And
20 then they tend to act like they see people act on TV,
21 and this really -- I have seen people do the most
22 disrespectful things to judges and attorneys in these
23 Zoom hearings, and it's just -- I really think it's
24 because they don't think they're in court or they're
25 part of the -- my daughter's generation -- my youngest

1 daughter's generation -- that grew up thinking that
2 what's online or on TV is an alternate universe. It's
3 not the real world. And so when they are in the court
4 when they're online and they see this person in a robe
5 and they see these men and women in suits and ties who
6 call themselves lawyers, they think they're just
7 characters in a story and they treat them that way. And
8 so I worry that maybe we need to kind of work this out a
9 little longer until members of the public realize that
10 just because you're talking to a cell phone does not
11 mean you're not in court. And it also doesn't mean that
12 if you curse the judge, some sheriff -- some deputy
13 won't come out and knock on your door.

14 So any way, get back to what I said: I
15 urge that we maybe ought to work this out in steps
16 rather than wholesale all at once.

17 Thank you very much.

18 CHAIRMAN BABCOCK: Thank you, Roger. And,
19 you know, I just put on a cat face when I'm in hearings
20 remotely so that's my solution to it.

21 (Laughter)

22 MR. HUGHES: Yeah, you think that -- you
23 laugh, but if you -- if the judge knew that that's what
24 the witness was doing while they're appearing remotely,
25 that although you all think you're just fine, he thinks

1 he's looking at a panda face because he can do that with
2 his phone, it might be a little disturbing.

3 CHAIRMAN BABCOCK: Absolutely.

4 Judge Miskel.

5 HONORABLE EMILY MISKEL: I think one of
6 the most important things -- and I'm sorry if I didn't
7 say it well enough at the beginning. My personal
8 preference -- and I won't speak on behalf of the
9 committee -- but my personal preference is to take jury
10 trials off the table. So nobody likes doing jury trials
11 on Zoom. Judges don't want to. Parties don't want to.
12 It's such a small number of the things that we are
13 capable of doing on Zoom. I'd be happy to make the rule
14 explicitly say that petit jurors cannot appear remotely
15 except by agreement. I have no problem with that.
16 So -- because 90 percent of the objections have to do
17 with jury trials. And, like, realistically, I don't
18 think anyone even wants to do jury trials on Zoom.

19 So to shortcut the discussion on all of
20 that, I would propose that we can just expressly say,
21 petit jurors cannot appear remotely without agreement.
22 Totally fine with that.

23 The second thing I would say is: In our
24 work, what we wanted to do was, we wanted to leave the
25 decision with the people closest to the case, closest to

1 the facts, the people who have the information, like, is
2 this a super-complicated case where the parties aren't
3 very tech savvy? Yeah, that may not be the best
4 candidate for Zoom. Let's not do it that way. Is this
5 a case where several of the witnesses are in India,
6 maybe that's the one where we want to let the witnesses
7 testify by Zoom.

8 So I think we strove to have sort of -- as
9 we would describe it -- local control over the decision,
10 the people closest to the case making the decision.
11 Because for certain case types, for example, inmates are
12 participating a lot more. So previously inmates would
13 really never participate in their civil case because we
14 would look at the file and say, "Did the inmate request
15 to be bench warranted over? No. Okay. It's a
16 default." And now with Zoom, most of the county's jails
17 will let them be on Zoom and so now inmates are
18 participating in their divorce cases or their other
19 civil cases, so that's a plus. Right?

20 And that may not affect the big firms and
21 the people on this call, but, like, there's not an
22 insignificant number of inmates that we deal with. Same
23 with CPS. Right? I am keeping my CPS docket on Zoom
24 forever because the parents actually participate. The
25 foster parents participate. It is just such a wonderful

1 step forward because previously our system was in --
2 excluding all these people who don't have cars, and now
3 just because you don't have a car you don't lose your
4 kids. Right? So I think that's wonderful.

5 But you can't make a rule that parses it
6 down to these case types and those case types. You have
7 to leave it to the people closest to the case, such as
8 the attorneys, such as the judge who is hearing that
9 particular case.

10 So I'm not disagreeing with any of the
11 things that the wonderful, you know, lawyers on this
12 call are saying. If it's a great case where in-person
13 oration by a talented attorney is going to make a
14 difference, everyone would enjoy watching that in
15 person. Right? But most of my cases -- so I've done,
16 for example, over 300 bench trials on Zoom because those
17 are family law cases, half those participants are pro
18 se, the average length of those trials is an hour and a
19 half or less per side. And so for an example
20 yesterday -- I'm in the north Texas area -- and
21 yesterday our county government closed all of our county
22 buildings because of ice because no one can get on a
23 road. But there was a divorce case that really wanted
24 to go, so we switched over to Zoom and we were able to
25 do our less than an hour per side divorce trial on Zoom

1 yesterday despite the fact that the county was closed
2 due to ice. And if I had had to reset that trial, it
3 would have been, like, June. So that was a great
4 example of a good tool. Right?

5 So anyway my two proposals are: Number
6 one, go ahead and make the rule expressly say petit
7 jurors cannot appear remotely without agreement. That's
8 fine. And then, number two, let's just remember that
9 not all cases are the same. And so for some cases,
10 everybody might be more than happy that we have Zoom as
11 an option, and in other cases that -- it might not be
12 right for that case.

13 CHAIRMAN BABCOCK: Thank you, Judge.

14 Judge Evans.

15 HONORABLE DAVID EVANS: The line that I
16 drew personally and still do draw is that if there's
17 going to be live testimony that's going to be disputed,
18 then I prefer to do it in person and would only do it by
19 agreement on Zoom, and even then, I might disagree
20 because I want to be closer to the witness. Now, I
21 don't know how you draw that into the rule, but quite
22 frankly, I don't know any colleague that doesn't follow
23 that rule right now.

24 I want to add one other situation, and
25 it's where this rule is needed. If you don't have a

1 rule on remote hearings when the emergency is over,
2 there's going to be a lot of tiff gouging that goes on.

3 At this point, I would like to insert
4 Richard's comments about the judges except substitute
5 the word "lawyers" on this call. But there's a lot of
6 other lawyers that don't meet those comments. And you
7 can test my credibility and Richard's later on. But
8 here we go. 25 percent of the cases that were filed in
9 my civil court in Tarrant County were from lawyers who
10 officed in Tarrant County. Now, it's as far from Collin
11 County to Tarrant County as it is to drive up from
12 Austin.

13 The bar that handles civil cases, travels
14 all day long just to get in to these counties. So if
15 it's only by agreement, believe me, Richard and Tom,
16 you're going to be flying from out at Amarillo and
17 El Paso on a nothing hearing all day long just to get
18 there. That's not good. That costs money and it wastes
19 time.

20 Pretrial work in civil courts rarely
21 involves disputed testimony. I agree it does come up,
22 but pretrial work is almost all by submission -- I mean,
23 submitted evidence in advance attached to pleadings.
24 And, yes, there are times when you would like to have
25 argument in person, and certainly I agree with Judge

1 Miskel about that.

2 But for the most part, the only time you
3 really need lawyers and pretrial work together in a
4 courtroom is when they can't work out a discovery
5 dispute and you have to put them in a room together to
6 make them work on something. Now, I'll just give you
7 that idea. So I don't know how you draw a rule around
8 that or not.

9 The other thing is: There's another area
10 besides CPS. Zoom hearings apply to child support work
11 by the Title IV-D judges. If you force a wage earner to
12 spend all day waiting to get a hearing and an obligor
13 and obligee, as they like to say, you just take two
14 people that don't have any money anyway, and we have
15 greater participation in child support right now and we
16 have -- we're moving our caseload all through this and
17 we haven't had complaints about not being able to do
18 that in person.

19 So it's not the same thing as a major
20 dispute over expert discovery or perhaps a serious
21 challenge on an expert witness, but you've got to leave
22 this in the hands of the judge to make a decision, at
23 least on pretrial. And I don't have any problem with
24 bench trials and/or jury trials not being included in
25 the rule.

1 Now finally -- and please stop me, Chip,
2 if I'm past the scope -- I read the task force report
3 and I thought it was great. I am concerned about the
4 records custodian for these recordings, and I hope the
5 court will -- I know we're not discussing specific
6 rules. But if a judge decides they're going to record,
7 then there has to be a standard that they're going to
8 record all the hearings or they're going to delete all
9 the hearings. There's got to be use restrictions, not
10 to use them for political purposes. Because that's
11 what's going on right now. They have -- some judges
12 have their own private YouTube channel. They're off the
13 platform of the OCA and they retain what they want and
14 don't retain other matters -- a few but they are out
15 there.

16 And finally, who -- if they're going to be
17 retained, who keeps them? The clerk or the reporter or
18 the judge and for how long? And, of course, I'd like to
19 see a policy that they're just deleted because I think
20 they're going to be Exhibit No. 1 in every recusal
21 hearing I'll see in the future once somebody starts
22 recording. Because that'll be the issue. We've always
23 replied -- I know you've written it into the reporter's
24 record but the argument always is, is the demeanor
25 changes the words, and maybe that's the way it should

1 be.

2 But that is my concern, and I know you
3 made an amendment to Rule 12 and you're going to say
4 it's not a judicial record. But under Rule 12, it is a
5 case record and that's -- those two cites are Opinion
6 003 and 004, so I'm sorry I didn't email that earlier
7 but that does concern me.

8 That's all my comments.

9 CHAIRMAN BABCOCK: Great. Thank you,
10 Judge.

11 Kennon.

12 MS. WOOTEN: I have a few thoughts.
13 First, I want to echo what Judge Miskel said about the
14 focus being on discretion, if you will, being given to
15 the people who are closest to the case and who can
16 assess what is and is not available in terms of
17 technology and otherwise. And so I think there is value
18 to giving the trial courts discretion as the judges are
19 sharing they each have their individual experiences with
20 remote proceedings and have conducted many remote
21 proceedings successfully during the pandemic. I don't
22 think we should characterize all the data collected, all
23 the statements, as simply anecdotal and brush it away.
24 I do think that there were some efforts by the Office of
25 Court Administration to gather actual data about remote

1 proceedings, and I seem to recall there being some
2 statements, Chief Justice Hecht, that you've made before
3 about remote trials occurring. And so I believe there
4 is data. Of course, it's always good to have more data,
5 but I don't know when it's time to say we have enough
6 data. Let's make this remote option something that we
7 address formally in the rules.

8 In terms of what Judge Miskel said, I just
9 want to echo, too, that speaking for myself
10 individually, not for the subcommittee, the combined
11 team or the Remote Proceedings Task Force, I, too, have
12 no problem treating jury trials differently. The task
13 that we were given is remove impediments to remote
14 proceedings, and that's what we did.

15 But jury trials are different from bench
16 trials and different from other proceedings. And I
17 think in terms of just what I'm hearing in the legal
18 community the greatest resistance to change is in
19 relation to the jury trials. So I think there's value
20 with this committee, perhaps the subcommittee level
21 first, looking at whether jury trials should be
22 approached differently.

23 I also just want to share that my own
24 experience as a litigator during the pandemic has been
25 that my clients have saved a lot of money because of

1 remote proceedings and because of remote depositions,
2 because of Zoom. And so I have seen and lived firsthand
3 client savings that are significant because we can do
4 things remotely. And I have heard from people who are
5 in the trenches, boots on the ground, that people who
6 cannot participate at all in court proceedings have been
7 able to participate and I don't think that should be
8 minimized. I don't think we should ever forget about
9 the people who can't go and sit in a courtroom for hours
10 waiting for their case to be heard or that we should
11 ever forget about the people who simply cannot take off
12 time at all because they have to work two, three, jobs
13 in order get by. These are people who don't have access
14 to our court system if the only way that can get there
15 is in person.

16 And so while I appreciate completely the
17 concerns about mandating the remote proceedings, I, too,
18 have Fortune 500 clients, very sophisticated clients who
19 for some cases don't want to be remote, but I also
20 represent people pro bono. And the only way they can go
21 to some proceedings is remotely, and I don't want to
22 minimize that or lose sight of it in these
23 conversations, and I don't want us to underestimate the
24 fear of -- you know, the resistance to change that we're
25 all going to feel. And for the people who say you can

1 never do this, it's crazy to think you could. I would
2 say, Well, it has been done, so it's not crazy to think
3 that you could have even jury trials conducted remotely.
4 I think we have seen many successful examples of it.

5 With that, I'll stop. I'm certainly not
6 trying to advocate aggressively for any of the remote
7 proceedings' proposals. This is just one option. I
8 think that more data and more discussion will be good.

9 CHAIRMAN BABCOCK: Okay. Thank you,
10 Kennon.

11 Richard Orsinger.

12 MR. ORSINGER: Thank you, Chip. In my
13 view of this, we -- our choices that we were asked to
14 make recommendations on fall into four categories, so
15 I'm going to talk about them as separate categories.

16 One, is by the consent of all the parties,
17 and I wouldn't be surprised if there's not unanimity on
18 this committee when we get to a vote, that if the
19 parties' consent, they should be allowed to have a
20 hearing or a witness or a trial remotely. To me, the
21 tough question is, if the parties agree they want a
22 remote trial, can the judge force a live trial? Can the
23 judge override the parties' agreement? Or if the judge
24 has ordered that it's going to be a remote trial, can
25 the parties -- going to be a live trial, can the parties

1 override the judge? In other words, if there's consent
2 of the parties, can the judge override the consent? Can
3 the consenting parties override the judge? That's, I
4 think, an issue we need to discuss.

5 The second issue is: Witnesses testifying
6 remotely. Now, what is the difference between a witness
7 testifying remotely on a screen and a video deposition
8 of the witness testifying remotely in the past on a
9 screen? It's the same thing. It's the functional
10 equivalent, except that you're probably going to get a
11 better direct and cross-examination to have the witness
12 testifying remotely live than if you have the witness
13 testifying remotely by deposition taken before the trial
14 starts. So, again, I would expect that we'll
15 probably -- could have a lot of agreement on the
16 category of witnesses testifying remotely as a
17 substitute for live.

18 The third category is pretrial versus
19 trial. And there's a lot more complication to trying a
20 case on the merits than there is to having a pretrial
21 hearing. And my experience has been like Kennon's and
22 many others, that it has incredibly reduced the cost of
23 litigation to be able to conduct pretrial hearings
24 remotely. It not only eliminates the travel time, and
25 it not only eliminates some of the waiting time, but

1 I've talked to lawyers who have dockets that make them
2 go to the rural counties surrounding the urban centers
3 and they save days -- half days or entire days by being
4 able to have remote hearings instead of getting in their
5 car and driving 35 to 60 miles just in order to have a
6 hearing.

7 With regard to trials: You have nonjury
8 trials and you have jury trials. The nonjury trial is
9 much more amenable to remote access because you don't
10 have to contend with all of the jury selection process
11 and with the jurors. And then the question becomes, you
12 know, can a trial judge require that it be in person or
13 can a trial judge require that it be remote?

14 In any event, I think that a nonjury trial
15 has probably got more support for us to allow the judge
16 to force it or to allow the parties to override the
17 judge's requirement of being in person than if it's a
18 jury trial.

19 Now, then I've had the opportunity to
20 conduct some video interviews for the San Antonio
21 Chapter of the American Board of Trial Advocates and the
22 first series we did was on Zoom jury trials. And I had
23 about a 30-minute interview with the Chief Jury Clerk of
24 Bexar County, and the surprising thing to me now is what
25 Kennon has been repeatedly saying, is that there's been

1 tremendously increased participation by members of the
2 community in the Zoom jury trials that never showed up
3 for the in-person jury trials. So that's an important
4 factor for us to think about. But, again, probably the
5 thing that would be most resisted is to force remote
6 jury trials on a judge that doesn't want it or on a
7 party that doesn't want it.

8 So in my view, there's no question remote
9 can reduce cost of litigation and increase
10 participation. And to me, the dynamic here is, can you
11 force something on an unwilling party? Can you force
12 something -- can a judge force something on two parties
13 that agree but differ from the judge, and can the
14 parties force themselves on the judge? To me, those are
15 questions we need to discuss still.

16 Thanks.

17 CHAIRMAN BABCOCK: Thanks, Richard.

18 Jim Perdue. Jim, would you turn your
19 camera off for a second? This is Jim Perdue before
20 COVID. Now you can put it back on, Jim. This is Jim
21 Perdue after COVID. Now, you may go ahead.

22 (Laughter)

23 MR. PERDUE: It's been a very, very long
24 two years. So since there's been some suggestion that
25 the old guys are the ones that are having all the

1 objection and then I grow this beard out to age myself
2 and put myself in the Riney camp, even though I am
3 officially Gen-X and not a Millennial, although I only
4 can aspire to be Tom Gray.

5 Let me -- I was going to ask a question,
6 Kennon. Did the subcommittee look at language to
7 address excluding jury trials or at least getting
8 language that would, as Richard just mentioned, having
9 the jury trial portion of what is considered a
10 proceeding to be only by agreement?

11 MS. WOOTEN: I don't recall having that
12 precise discussion, though there was conversation about
13 jury trials and how they are different from hearings.
14 But we didn't put pen to paper to try to draft out
15 provisions to address jury trials and require agreement
16 on that front.

17 Judge Miskel, do you have any recollection
18 or remarks?

19 HONORABLE EMILY MISKEL: I recall that we
20 did not anticipate applying this to jury trials and that
21 everybody realized that jury trials would be the huge
22 sticking point and none of us are trying to force Zoom
23 jury trials on anyone. And so I think I can speak for
24 the subcommittee, at least on that part. No part of the
25 subcommittee's work involved us thinking we're forcing

1 jury trials on anyone by remote appearance.

2 MR. PERDUE: I think the problem -- and I
3 think Kennon conceded it, both when she laid it out, and
4 in the chat, is that the language in this new 21(d)
5 doesn't make that clear. And in addition, you've got
6 this new (G) for the JP courts that clarifies that court
7 proceeding includes trial, and you can easily see how
8 that could be grafted on because this concept of court
9 proceeding, this language which is replacing the term
10 "hearing" that you're just -- you're deleting the word
11 "hearing" and you're calling it a court proceeding and
12 then in another change you're clarifying for the JP
13 rules that a court proceeding is a trial, is going to
14 cause a lot of consternation amongst the bar. And I --
15 regardless of the age, I suggest that that is a real
16 problem.

17 HONORABLE EMILY MISKEL: One of the --
18 sorry. Not to interrupt. But one of the things we did
19 talk about is definition. So in family law, people call
20 things final hearings. We'll have a final hearing on
21 your protective order. We'll have a final hearing on
22 your custody modification. Okay. Those are trials.
23 Certain of them are not allowed to be in front of a jury
24 so that's why we tried to work with the word
25 "proceeding." Because when we got right down to it,

1 people were not real clear on what is a hearing and what
2 is a trial.

3 But I'm fine, again, excluding petit
4 jurors from appearing remotely. What I don't want to
5 exclude is: Can a witness testify by telephone in a
6 jury trial? Have been able to for 100 years. I don't
7 think we're meaning to repeal that with this one. But
8 I'm sorry to interrupt. Please keep going.

9 MR. PERDUE: No, no. I appreciate that,
10 Judge.

11 But, I mean -- so for the Senator to pick
12 up the phone and call Chip before this, having spent a
13 little bit of time in Austin this past year, I want to
14 share with the committee something that's sometimes
15 flippantly kind of joked at -- and I know is never
16 flippant. But you're taking the notice rule, Rule 21,
17 and a thing that addressed filings and notice of
18 hearings and creating a new rule that is a massive
19 substantive change to the law that is unavoidably in
20 conflict with the terms of the Government Code.

21 The Government Code, being a creation of
22 the Texas legislature, that says, Courts shall sit in
23 the county seat of the county in which it's created in
24 Chapter 24 of the Government Code which creates all the
25 district courts of the State of Texas, which, I think,

1 the legislature appropriately is somewhat proprietary
2 of, and you are eviscerating the idea of a jurisdiction
3 or presence in the community of those courts by saying
4 that everything becomes a computer screen.

5 And I do not pretend at all to speak for
6 Senator Hughes or any other member, but the history here
7 is there was language that OCA brought to the
8 legislature in 2021 to try to do this, and it was not
9 only rejected, but there was, then, language in the
10 omnibus court bill that would have prohibited doing
11 contested evidentiary hearings or jury trials without
12 agreement of the parties.

13 That language did not get over the finish
14 line in the final omnibus bill because there was a
15 little bit of conflict between the Senate and the House,
16 on bail and some other issues, and it was collateral
17 damage. But I don't think it's smart for this committee
18 to be dismissive of the legislature's concerns that
19 either this committee or the court via rule is going to
20 substantively veto the clear language of the Government
21 Code regarding where court proceedings are conducted and
22 how, and this rule would do that.

23 I noticed in the appellate rule, you
24 basically have a provision in the appellate rule that
25 stands in conflict to the 22-200 series regarding the

1 Courts of Appeals, and then in the third section of the
2 rule -- and this may underscore somebody like Mr. Levy's
3 concern -- underlying all of this, that is that you have
4 a remote appearance, and I don't, again, pretend to
5 speak for the Plaintiff's Bar, and I certainly would
6 love to hear from my colleagues and friends on the other
7 side, you've got a proposal to essentially eviscerate
8 the jurisdictional realm of subpoena power so that you
9 have a statewide subpoena to get people to appear. That
10 is a big substantive change. One that I perhaps, as a
11 plaintiff's lawyer, might welcome, but there might be
12 some people that have some pretty big concerns about
13 that.

14 So I would tell the whole committee that
15 the legislative concerns that are behind some of this
16 are going to be very real and if the committee thinks
17 that it can go down this road to essentially eliminate
18 the presence of courts in the jurisdictions to which
19 they are supposed to be accountable to the voters via
20 the Government Code, this will -- this will get visited.
21 So I don't think that the resolution of the State Bar
22 was contemplating that this was a conversation about
23 jury trials, but rather a lowering the barrier, which is
24 primarily a cost saver for all parties, and all parties
25 I think on both sides of the bar are in favor of cost

1 savings. But not all of us have the credibility of
2 Jackson Walker and Rusty Hardin at the Texas Supreme
3 Court when a court is trying to force down a jury trial
4 via remotely to get that decision eviscerated.

5 So you -- by creating this 21D, under the
6 language that has been brought to this whole committee
7 from the subcommittee, recognized that according to A
8 and B, as Robert Levy said appropriately, you are
9 creating a rule that by default puts the court in total
10 control of forcing the parties to have either the
11 proceeding where the witness is remotely. That is a "C"
12 change to practice, not necessarily bad in some
13 proceedings, perhaps bad in others. But it will create
14 some legislative scrutiny for doing it, given the way
15 our system of judges works and the jurisdictional
16 parameters of the individual district courts in the
17 State.

18 So I just wanted to kind of second
19 Mr. Riney's point regarding jury trials. But on a
20 bigger basis, understand that this 21D is from my
21 perspective extremely substantive, and it stands as a
22 substantive change in the law in contrast to legislative
23 action of the State of Texas. And so when you talk
24 about local control -- and I trust Robert Evans for
25 local control -- but there are instances where local

1 governments, whether it be camping or police, are not
2 given local control.

3 So justices -- judges in different
4 jurisdictions may view their authority under this rule
5 differently. And without a little more guidance
6 regarding the objection, or as Richard, I thought,
7 brilliantly laid out a construct of breaking down the
8 different areas where you have parties agreeing to
9 certain things, different classifications, if you're --
10 if you go down this road in 21D, which is an odd place
11 to put such a massive substantive change, in my opinion,
12 I think that it would be worthwhile to spend a little
13 more time with all constituencies and the bar to
14 consider how there could be a little more guidance so
15 that everybody knows the ground we stand on and
16 consideration of the way the Government Code works and
17 the empowerment of our district courts, JP courts, and
18 Courts of Appeals.

19 CHAIRMAN BABCOCK: Thanks very much, Jim.
20 Judge Schaffer, were yow waving to jump
21 the line?

22 HONORABLE ROBERT SCHAFFER: (Shaking head)

23 CHAIRMAN BABCOCK: Okay. Then John Kim is
24 next.

25 MR. KIM: Thank you, Chip. So apparently

1 I'm the 2022 President of the National Foundation for
2 the American Board of Trial Advocates, which is an
3 organization of about 7,600 trial layers across the
4 country by invite only, and I think that our working
5 group with respect to this has mured some of the
6 discussion that we've heard today.

7 But I want to start by saying that, you
8 know, I believe in that old adage that "bad facts make
9 bad law." And just as in this circumstance, I'm
10 concerned that we're letting an exceptional
11 circumstance, this pandemic, drive wholesale substantive
12 changes that will affect the 7th Amendment and the
13 ability to have been given the responsibility of judging
14 the facts and the credibility, the opportunity to do so.
15 Those comments saying taking jury trials off the table,
16 but I think the problem is more broad than that because
17 I think it affects bench trials and I think it affects
18 evidentiary hearings.

19 And as an aside, let me say that I think
20 that Zoom and remote proceedings by consent are
21 remarkably effective for the vast, vast majority of
22 pretrial issues that we have, and it increases the
23 access to justice. But when you get down to the fact
24 finding and the resolution of it, the credibility of the
25 presentation is so much more important. And I would

1 submit that it is impossible to properly judge the
2 credibility of a witness, unless it's in person.

3 It is impossible for a court in a bench
4 proceeding to properly judge the credibility of a
5 witness, unless they can see the totality of that person
6 in person. Because as you look across the screen right
7 now, you don't know what -- who's nervous, who's
8 twitching, you don't see the whole person and the body
9 language, which goes -- as scientists have told us.
10 There's a whole body of science that tells us that is
11 equally part of the credibility task for the
12 persuasiveness test or frankly the ability to properly
13 and rightfully advocate as you wish on behalf of your
14 client.

15 I'm also concerned that we're letting --
16 look, if you -- I mean, this is an august group. I have
17 tremendous respect for all the names and the people on
18 this group, but we don't represent the majority of the
19 bar or the practitioners out there. And I would submit
20 that, to some extent, we're allowing an academic or
21 theoretical discussion kind of put a cover on reality
22 because I've worked both sides of the bar. I represent
23 the disenfranchised, as well as Fortune 50 companies.
24 But the reality of what's happening out there is
25 gamesmanship. And so -- if we were taking depositions

1 or something against each other, there would be no
2 problem, but the system is fraught with misconduct.
3 There is witness tampering. There is witness coaching.
4 There is obfuscation. I was in a deposition the other
5 day where we caught them putting up an imposter for
6 depo -- for deposition that you couldn't tell because of
7 the Zoom process all sorts of identifying traits that
8 would have made it helpful. You have people doing Zoom
9 depositions in which the lawyer for the deponent is
10 across from the camera where he can't be seen who has
11 flashcards putting up the answers that the witness
12 should talk about, and that's just something that
13 doesn't occur when you're talking about an in-person
14 proceeding.

15 I would also submit that civility
16 decreases the more and more you utilize Zoom because
17 it's just like the telephone. It's just like when we
18 tell our kids, pick up the phone, call somebody instead
19 of text somebody. You won't be as bold or brash or
20 speak out of turn. Same thing with respect to Zoom.
21 The filter -- and the respect and the dignity that that
22 courtroom demands is diminished with respect to that.

23 If we don't really assess the importance
24 of credibility in an in-person proceeding, then picture
25 this: You will have circumstances where you will never

1 see the bad witnesses again. They're going to
2 disappear, and you had your chance at deposition or
3 they'll appear by Zoom, and it's just not the same and
4 just not as effective when you know I have a bad person.

5 I would submit that it is not the same to
6 put a video deposition up because it affects strategy.
7 Because so many of us know, especially in the larger
8 commercial cases, your depositions are not trial
9 depositions. And you don't want to take a trial
10 deposition because you don't want to give up your trial
11 position at that point in time. But many of those
12 depositions by video are setups in which you have them
13 committing to take a position in which you will cross
14 them and affect their credibility, one hopes, during an
15 in-person proceeding or a fact finding in front of
16 either the court or a jury.

17 So the last thing I want to say with
18 respect to that is -- well, I'm not going to say it, if
19 we've all agreed that we're taking the jury off the
20 table. So that's all I've got to say.

21 Thank you.

22 CHAIRMAN BABCOCK: John, thanks so much.

23 Judge Wallace.

24 HONORABLE R.H. WALLACE: Thank you, Chip.

25 I want to address something Richard

1 Orsinger brought up. One of his first comments was if
2 the parties consent to remote hearings, should the judge
3 have the authority or the discretion to say, "No, we're
4 going to do it in person."

5 There are some very few limited
6 circumstances, but I think the judge ought to retain
7 that ability to do that because there may be something
8 about the case that the judge wants to hear in person,
9 either the lawyers -- first of all, to me, there's a
10 pretty bright litmus test as to when a Zoom hearing is
11 appropriate and when it's not. If it's an evidentiary
12 hearing, I'd like to do it in court. If it's a
13 nonevidentiary hearing, then probably Zoom is okay.

14 But one thing that I have noticed during
15 the Zoom hearings, even though I've been sitting as a
16 visiting judge -- by assignment, I've been doing it a
17 lot -- I see more discovery disputes than I used to and
18 the reason is pretty simple really. Why spend an hour
19 or two talking to an opposing law -- this is -- not
20 everyone does this, but there are a few. Rather than
21 having to drive from Dallas or wherever or Tarrant
22 County, let's just have a quick Zoom hearing and let the
23 judge decide it. And I have -- I think that is a flip
24 side and a disadvantage to these hearings being more
25 cost effective. I agree with that. They certainly are,

1 but it also sometimes, I think, encourages lawyers to be
2 a little bit lazy and try to -- not even try to work out
3 a compromise or an agreement before they put it on the
4 judge's lap.

5 So I would advocate that whatever rule we
6 have, leave the judge with all the discretion to decide
7 whether it's going to be in person or not because I
8 think they're in the best position to decide this.
9 There's never going to be a one-size-fits-all situation.

10 That's all I have.

11 Oh, and let me say this also: Another
12 kind of axe I have to grind is minor prove-ups. In
13 situations where there's a settlement involving a
14 minor -- and my practice is only civil -- those are
15 atrocious sometimes because you'll have the parent in
16 one place on a cell phone and you'll have the two
17 lawyers on different places and you'll have the ad litem
18 another place and almost always they end up being a
19 disaster and having to be reset when everybody can get
20 their act together. So, you know, if there's money
21 involved and if there's enough money involved to take up
22 the court's time with it, I kind of think normally
23 there's enough involved for them to come to the
24 courthouse so you can see and hear the attorneys and the
25 ad litem and the parent.

1 That's all I have.

2 Thank you.

3 CHAIRMAN BABCOCK: Thank you very much,
4 Judge.

5 Judge Estevez.

6 HONORABLE ANA ESTEVEZ: Well, I just think
7 that this change has been fabulous for the court system.
8 I mean, it was -- it may have been driven by need in the
9 pandemic, but the changes that have happened, there are
10 some things we need to fix and we need to tweak and --
11 but I don't think we should pretend like it never
12 happened when we go back to normal, whatever our new
13 normal will be.

14 I will tell you when Richard Orsinger was
15 talking I thought he read my mind. I was gone for 30
16 minutes, so hopefully I'm not saying anything -- or
17 something was already addressed. But I was gone, and I
18 got three criminal jail time -- jail pleas done in less
19 time that it would have taken me to drive to the
20 courthouse and drive back, I got all the pleas done. So
21 not only did the jail not have to worry about any
22 security issues by transporting them, and didn't have to
23 worry about the money, the defense attorney got to get
24 off of mine and go to a different county in three
25 minutes and do another plea for someone else. So the

1 efficiency, it has been amazing. And when I told them I
2 was in a meeting and that I needed to -- you know, I was
3 going to not do any chitchatting, they asked if we could
4 let you guys know that they wanted an increased capacity
5 of being able to use Zoom or remote proceedings. And I
6 let them know we're doing civil proceedings today, not
7 criminal, so they were disappointed. But their comment
8 was, "Well, we're the ones that are always in the
9 courtroom."

10 So I disagree that the credibility is hard
11 to determine. I see you closer right now than I would
12 if we were in person. Now, I love seeing you guys in
13 person, but I see all of you. I see your facial
14 expressions. I know more about you because I also see
15 what you've chosen to use as your background. I see
16 somebody walk behind you, and I see how you address
17 those people. I see so much more than I ever have seen
18 before with these remote proceedings.

19 And I totally respect the fact that
20 there's cheating going on. I personally -- I hear the
21 voices coming and telling them that I don't know where
22 they came from for the answers during these remote
23 proceedings. So somebody may ask them a question and
24 all of a sudden you hear a little whisper and so -- and
25 then they repeat it and then you go, "Who's in the

1 room?" and "You need to identify them. Who just gave
2 you that answer?" So we know that's going on. But at
3 the same time, a lot of the time we can address whether
4 or not those are significant questions. You know, I
5 mean, if the question was: Did that happen Tuesday or
6 Wednesday, and it really doesn't matter what day it
7 happened, then are we dealing with a huge credibility
8 issue? I mean, usually the fact issues that we have --
9 and sometimes assuming everybody's telling the truth, we
10 still get to the same answer.

11 I absolutely agree with everyone, we
12 should not even try to force any type of jury trials to
13 be remote. I haven't done one. I know that some of you
14 may have participated in that. I don't necessarily feel
15 comfortable starting it if I didn't need to. So unless
16 the -- something happens and that's the only way we can
17 do a jury trial, I personally will not be going out just
18 in order to have that experience at this time, unless
19 I'm required to.

20 I totally agree with Judge Wallace
21 regarding retaining the ability on whether or not it's
22 appropriate. I know there's judges that still do not
23 even feel comfortable conducting remote proceedings, and
24 I don't think that they should be forced into doing --
25 or conducting any type of remote hearing if they are not

1 comfortable doing so, for whatever reason, whether
2 that's the technology or a hearing inability or they
3 don't feel like they can judge the credibility of the
4 witnesses in the same way. So I would say that the
5 judge would have the ultimate -- would be the ultimate
6 decision-maker.

7 Before I got off for that short period of
8 time, I was -- this may seem an odd question or someone
9 else may have addressed it -- but I wanted to ask Robert
10 because Robert had spoken just a few times, maybe four
11 or five people before I got to go. But I wanted to know
12 if he personally used video depositions in jury trials
13 or bench trials, and, if so, was his issue that he can't
14 confront them personally as a lawyer or is it how the
15 jury sees it? So is it because he wants to have that
16 opportunity with that witness to confront him at -- and
17 maybe surprise him that he doesn't feel like if he can
18 do if it was a live witness or -- but he could take care
19 of that if it was a live deposition?

20 MR. LEVY: I have not had the experience
21 in terms of my practice. But talking to my colleagues
22 the issues relate -- their are a myriad of issues. One
23 of them frankly is: When you're presenting a witness,
24 you want to be there with them and be able to have that
25 dialogue and discussion. And it's -- in the remote

1 proceeding issue, it's not always practical or feasible
2 to do that, in fact, it might be a problem if you're
3 sitting there with the witness instead of being on your
4 own separate Zoom session.

5 And part of this also relates to the
6 parties and what they want to do. As John Perdue was
7 saying, you know, why should this not be a choice of
8 everyone. You know, I have a choice if I want a jury
9 trial or not, I can choose it, but, you know, why should
10 I be forced into a dynamic that I don't prefer and be
11 forced to go to a remote proceeding if I don't think
12 that's right for me or the issues or my client or the
13 witnesses, all of the factors that are tied into that
14 process. That's part of, I think, the resistance is:
15 We're being forced into a dynamic that we're not -- we
16 don't believe is necessarily the best way to achieve
17 justice.

18 HONORABLE ANA ESTEVEZ: So just -- have
19 you used the video depositions in jury trials before?

20 MR. LEVY: Oh, I'm sorry. Video
21 depositions, yes. Yes, I have done that. Yeah,
22 absolutely.

23 HONORABLE ANA ESTEVEZ: And did you
24 feel -- do you feel like the issue is that you don't get
25 to confront the opposing witness? Because, I mean, as

1 far as your witness goes, I mean, you can decide where
2 that witness is.

3 MR. LEVY: I'm not -- yeah, I mean --

4 HONORABLE ANA ESTEVEZ: Lots of lawyers
5 that bring them all in their office --

6 MR. LEVY: Right. Right.

7 HONORABLE ANA ESTEVEZ: -- or a room that
8 they put them in.

9 MR. LEVY: That's right. In the old days,
10 yeah, I could bring in my witness or I could -- you
11 know, depending on, you know, if it was State or Federal
12 if I wanted them to testify. But in State court, yeah,
13 I could choose to let the witness testify by deposition.
14 Sometimes I would ask questions if it was my witness and
15 as cross, so that I could present that at trial.
16 Sometimes I chose to bring them in live. And most of
17 the time, I would prefer to have them live.

18 And as a party, you know, when the other
19 side had a witness, generally I prefer the opportunity
20 to have them live, but sometimes I would prefer the
21 video deposition because I was comfortable with their
22 answers and I feel like I got good answers. And rather
23 than impeaching them with that testimony, I think it's
24 more effective just to let the prior testimony stand.

25 HONORABLE ANA ESTEVEZ: You know, and then

1 I think, Judge Miskel, I -- you know, I've got a lot of
2 the in-camera -- that used to be just with our children
3 when we're doing a custody case, and they seem to love
4 Zoom. They feel more comfortable. They talk to me
5 more. I think it's because they're used to technology
6 more. I don't know if that's your experience, but when
7 we're doing these family law temporary hearings and they
8 ask to have us speak with the children, they may be at
9 the school and they go to the counselor's office and
10 they didn't lose a whole day while I was listening to
11 the testimony. And they -- I've never had one say they
12 were uncomfortable being on Zoom. I don't know if
13 that's been your experience or not.

14 But I think there's just so many good
15 things about the remote proceedings, and I'm more
16 concerned that we won't keep the good that has increased
17 the value and the access to justice, and we'll end up
18 decreasing it at the end.

19 HONORABLE EMILY MISKEL: One of the -- and
20 I'm sorry to cut in line. But one of the wackier ideas
21 that we kicked around in subcommittee and didn't really
22 go seriously anywhere with it was: What if we put,
23 like, a dollar value cap on it? Like cases less than
24 whatever, don't require agreement. Because I think the
25 bulk of the cases that this room seems to be concerned

1 about are complex, civil cases with big dollars. And
2 the bulk of the places we've seen the vast improvement
3 that we're all excited about are people that struggle
4 and that don't have transportation and inmates and all
5 these children and I wish there were a way to
6 confidently address both types.

7 CHAIRMAN BABCOCK: Thank you, Judge.

8 Okay. Judge Schaffer.

9 Rusty you're in line. You're behind
10 Justice Christopher, Alex Albright, and then you.

11 And, Richard, before we get to you for
12 your second round, we're going to take a break.

13 Judge Schaffer.

14 HONORABLE ROBERT SCHAFFER: Thank you.

15 I guess y'all are probably tired of
16 listening to all of this by now. Is anybody still
17 awake?

18 CHAIRMAN BABCOCK: I think it's
19 fascinating myself. I really do. I think it's great.

20 HONORABLE ROBERT SCHAFFER: I'm going to
21 try not to be repetitious. I agree with most of what
22 Judge Miskel, Judge Wallace, Judge Evans, and Judge
23 Estevez have said about having this as a discretionary
24 thing and having the Zoom or the remote proceedings is
25 something in our quiver, so-to-speak, to be able to move

1 cases along. It's been really helpful. I'm still doing
2 most of my regular docket on Zoom. If you want an
3 in-person hearing, all you've got to do is ask for it.
4 People aren't asking for in-person hearings and so it
5 seems to be working well.

6 I don't -- I haven't given a single
7 thought to a jury trial on Zoom. There's 86 trial
8 courts, including criminal courts, in Harris County, two
9 of them, two civil courts, have had Zoom trials and only
10 one of them is still doing it. I don't think that's
11 going to be a real issue, at least not in my experience.

12 It is a huge savings for the clients and
13 the lawyers and the parties and so forth to be able to
14 conduct some of these proceedings without having to
15 spend three hours down at the courthouse, or as Roy
16 Ferguson in west Texas has said, "People can call in and
17 Zoom in and they don't have to travel across the country
18 for a speeding ticket." So it's very cost conscious and
19 saves on resources.

20 And I want to emphasize also: My
21 colleagues have told me that more of -- more default
22 judgments are not becoming default judgments because
23 people show up who otherwise wouldn't show up for
24 hearings. All the family court judges who have spoken
25 have talked about a higher level of participation

1 because people who would not otherwise be able to come
2 downtown and skip work have been able to do that. I
3 just think it's a good thing to have. It should be
4 discretionary.

5 One area I would disagree with somebody
6 that it should be an agreement amongst everyone. You
7 know, I know y'all are going to be surprised by this,
8 but sometimes there's gamesmanship between the lawyers.
9 And, Robert, I know you wouldn't do this, but I feel
10 certain that there are people out here, even in Houston,
11 that would make some Dallas lawyer come down to Houston
12 for a hearing and not agree to conduct that hearing on
13 Zoom, and I don't think that's right.

14 Now, the other side of that coin is,
15 people say, Well, you've chosen as your business model
16 to practice in Houston if you're from Dallas or in
17 Austin if you're from Fort Worth and so forth. True.
18 That is part of your business model. But be that as it
19 may, if you can find a way to save the resources and not
20 make litigation cost so much, I think it's a good thing.

21 So I think what this committee has done is
22 really good. I think it needs to be tweaked a little
23 bit so that we do take the jury trial out of it, but I
24 don't think there's any argument. Not one person on
25 this call has said they wanted to do remote jury trials.

1 How could you after listening to Richard Munzinger's
2 closing argument about an hour-and-a-half ago.

3 So with that, I pass this witness on back
4 to you, Chip, and I thank you for the forum to discuss
5 all these matters.

6 CHAIRMAN BABCOCK: You bet, Judge. Thank
7 you.

8 And now to our favorite Millennial,
9 Justice Christopher.

10 HONORABLE TRACY CHRISTOPHER: I'm so glad
11 to be in that category instead of a Baby Boomer. As my
12 children love to say, "Okay, Boomer" whenever they don't
13 agree with something that I've said. I've told them
14 that's a micro-aggression and they need to stop, so
15 we're working our way through that.

16 What I wanted to ask Jim was why he
17 thought this rule ran into trouble with the Government
18 Code. And if you want to just tell me later, that's
19 fine, but is it because the judge is not in the
20 courtroom holding the proceeding or because there's --
21 you know, the idea behind it is: We're not affecting
22 the open courts. Everyone is going to see what's going
23 on in the trial, so I was just a little concerned with
24 your statement there on that. But if you want to talk
25 to me about it later, that's fine.

1 CHAIRMAN BABCOCK: No, I think it should
2 be on the record, Judge. But maybe we could talk about
3 it after the break. I'm worried that poor Carol's been
4 going for two hours now. I wanted to get through our
5 first round, though.

6 HONORABLE TRACY CHRISTOPHER: Okay. Could
7 I say one other thing to follow up?

8 CHAIRMAN BABCOCK: Sure.

9 HONORABLE TRACY CHRISTOPHER: We have had
10 a lot of experience with remote trials and remote
11 hearings. Maybe you haven't. Maybe the kind of cases
12 that you've worked with have not. And, again, what we
13 can do with that respect perhaps, you know, as Judge
14 Miskel said, Okay, well one of the things that we can
15 put in our objection is that, you know, the size or the
16 complexity of the case requires in-person. You know, I
17 mean, there are ways to tweak it without just saying,
18 "Oh, no, we can't make any changes."

19 Thank you.

20 CHAIRMAN BABCOCK: Thanks, Judge. We'll
21 come back around to you and Jim Perdue after the break.

22 But, Professor Albright, thanks for
23 jumping back on. We need to hear what you have to say,
24 which you only said in the chat.

25 PROFESSOR ALBRIGHT: Yes, that's what I

1 was going to say is, I was asked to say this. I had put
2 it in the chat.

3 I just wanted to go on the record as a
4 proud Baby Boomer and 30-year veteran of this committee,
5 so I, now, think I get to qualify myself as one of the
6 "old guys" or maybe "old girls."

7 I think this is great work, and I think
8 we -- you know, we need to work on the hard questions of
9 it. I think having a discussion about whether we're
10 going to allow remote proceedings or not, it reminds me
11 of the discussion this committee had back in the '90s
12 when there was -- we talked for hours about whether to
13 allow fax service because there people who didn't like
14 all the paper coming through a machine and they weren't
15 sure their secretary would find it. And, you know, it's
16 just a -- I think this committee tends to not want to
17 adopt technology.

18 I agree with what Judge Christopher just
19 said. This is not like it's brand-new technology that
20 we haven't tried. We've done this for two years. We
21 are here. People have used it for two years. They are
22 not going back. You can tell from what the judges have
23 said. The judges aren't going back. The people of
24 Texas aren't going to go back because this is so much
25 more efficient. There is so much more access to

1 justice. There's more open courts because people can
2 watch proceedings. I have watched hearings on the
3 computer that I would never have gone down to the
4 courthouse for, and I think that's important. So I
5 think that helps our open courts as well.

6 I think we do have some hard questions
7 that we need to discuss and answer, like Richard and
8 Judge Evans and other people have -- Jim Perdue and
9 others have pointed out, and that's what we need to
10 spend our time on.

11 So I think it is important that we keep
12 this going and have good rules in place so that it
13 does -- so that we do it the right way. And I also
14 think open court -- I mean, I think that provision about
15 being in the county, I think that just applies to
16 trials, but I'm happy to look at that as well.

17 CHAIRMAN BABCOCK: Thanks very much, Alex.
18 And now the last speaker before the break, another
19 Millennial, Rusty Hardin.

20 MR. HARDIN: Well, you know, once we make
21 it an age factor, it puts some of us in a very small
22 minority, so I regret that part of it.

23 But look, everybody agrees that it's an
24 advance to have some remote hearings. I think people
25 like John and Jim and I and others -- I missed some of

1 Robert's comments but -- because I have a jury trial
2 scheduled Monday, and I had meetings that I couldn't
3 change for the earlier portion.

4 I think that where a lot of us come down
5 is compelled adversarial hearings. And if I -- whether
6 we're talking about a jury trial, whether we are talking
7 about depositions, whether we are talking about any
8 other type of proceeding, I've been in so many
9 situations where the reaction in the actual courtroom to
10 compare -- or in the actual deposition compared to
11 reaction of others, is very, very different. There is
12 something about the atmosphere of in-person proceedings
13 that I think lend a whole different perspective. And a
14 lot of it -- some of you may know, I can now practice in
15 multiple areas so -- because we both do -- we do both
16 civil and criminal and we get in the way of people in
17 probate court, as well as civil courts and criminal
18 courts. Monday's trial is a civil case. In other cases
19 we've got going on right now we're arguing about
20 in-person, we made it part of the agreed docket control
21 order that the depositions had to be in-person if the
22 person chose. We didn't say it couldn't be remote if
23 the two sides agree.

24 But if I go back -- for just as an
25 example. If what happens -- this happens in assessing

1 credibility and I think we just cannot discount what
2 John Kim is saying about credibility concerns. First,
3 it's just an informal poll, but when Roger Clemens
4 testified before Congress, he, live on TV, looked like a
5 horrible witness. 85 percent of the American public
6 that were polled 90 percent thought he was lying. There
7 was a whole different reaction within the very crowded
8 hearing room. There was like maybe 50/50, people came
9 down on both sides and it's because the in-person
10 experience of watching and listening and understanding
11 the dynamics of what was going on was entirely different
12 than the reaction of people watching on TV.

13 I've been sort of a throw-down opponent to
14 cameras in the courtroom, not for appellate arguments,
15 but for anything contested where you had witnesses and
16 jurors exposed to it because I really do believe it's a
17 different experience live in person than there is
18 before. I've got depositions going on right now where I
19 know that the reaction is -- would be entirely different
20 of the witness remotely. We do remote depositions in
21 certain circumstances. It depends on how adversarial it
22 is or whether it's just information gathering. If it's
23 information gathering, it's not such a bad experience to
24 have remote proceedings.

25 But I moan the loss of the way the system

1 continues and continues to pick proceedings for
2 efficiency or cost that demeans and starts to lower the
3 art of advocacy.

4 And I truly believe that if we start
5 making everything mandatory -- I hear the tone is sort
6 of "take the jury out" just as Judge Schaffer just said,
7 take the jury out. That's not going to be compelled.
8 But when you compel other proceedings, you also
9 undermine the ability of the advocate for the person.
10 It doesn't matter whether it's criminal or civil. The
11 advocacy and the ability to challenge what that witness
12 is saying in such a way that calls into question,
13 perhaps, what at first blush sounded very self evident.

14 And the same thing is true with the
15 depositions. I hate to see us compel these proceedings.
16 There are a lot of hearings. I've had hearings before
17 Judge Schaffer where the -- you know, there was no
18 evidence. It was the two sides arguing. That's a whole
19 different thing. I can't imagine anybody who is opposed
20 to remote proceedings before trial judges over issues
21 that could not have involved witnesses in which they
22 were questioned adversarialy. But once you move into
23 the adversarial process with people, it's a whole
24 different world and I think it changes the nature of the
25 trial. It changes the nature of the hearing, and I

1 think it changes the nature of the truth-seeking
2 process.

3 CHAIRMAN BABCOCK: Okay. Great. Rusty,
4 thank you very much.

5 We'll come back and tag Justice
6 Christopher and Jim to finish off that Q and A, and then
7 we'll go to Richard Orsinger, and see what happens after
8 that.

9 So we'll be in recess until 3:20. See you
10 at 3:20.

11 Thank you.

12 (Recess: 3:03 p.m. to 3:20 p.m.)

13 CHAIRMAN BABCOCK: We are back on the
14 record. Whoever wants to start recording our telegenic
15 faces, please do so.

16 And I think the way we set it up was that
17 Justice Christopher and Jim Perdue were going to duke it
18 out on the Government Code, which, frankly, is going to
19 be the highlight of my week.

20 HONORABLE TRACY CHRISTOPHER: Yeah, I just
21 asked a question. I'm not ready to duke it out,
22 although Lisa is on the appellate one. So she's ready.

23 CHAIRMAN BABCOCK: All right. Jim, you
24 around?

25 MR. PERDUE: I'm feared to say who I'm

1 more afraid of.

2 So I wasn't elegant, Justice Christopher.
3 I would say that all I was trying to explain is that
4 while we were navigating some language that had to do
5 with remote proceedings in the Omnibus Court Bill 3774,
6 I just think it's important when Chip tells the
7 committee that we took a call from the chair of
8 jurisprudence in the Senate and I worked with the chair
9 and the JCJ, if you look at the language of the
10 Government Code regarding trial court shall sit in the
11 county seat for jury trials, and it may sit elsewhere in
12 the county for nonjury trials, there -- I want to be
13 real careful about this because I don't speak for the
14 legislature. But the -- and the policy discussion that
15 we're having here, I unfortunately suffer the reality
16 that politics touches everything, given the time with
17 the legislature. And it is political component that is
18 worth at least putting on the record. That there are
19 members of the legislature who view the language of the
20 Government Code that says court shall sit as being a
21 tool that provides for a responsiveness and
22 accountability for their judges to the community.

23 And if you create a substantive rule that
24 substantively says those judges need not sit in their
25 county to make determinations relevant to the citizens

1 of their county, there is a political component to that,
2 and that's all I was trying to point out.

3 So I can read the Government Code. You
4 can, too. It says that. What does that mean when you
5 say that there's remote access via Zoom? I don't know.

6 HONORABLE TRACY CHRISTOPHER: Okay. So, I
7 mean, what I -- but you were a little stronger than that
8 earlier, and I hate to put you on the spot, but I am
9 going to because, you know, we were very careful not to,
10 in our opinion, violate the Government Code because we
11 do understand the importance of it. So I just want to
12 know if it's your position that the judge -- a trial
13 judge has to sit in the courtroom for every hearing, you
14 know. Because we're carving out jury trials. We don't
15 have to worry about that. We'll get that changed. I
16 never thought this rule applied to jury trials anyway
17 but -- so Kennon and I disagreed on that.

18 But I just -- I want to understand what
19 you think the Senator's position is.

20 MR. PERDUE: Well, I don't know. So let
21 me be real clear. I do not know what the Senator's
22 position is.

23 HONORABLE TRACY CHRISTOPHER: Right.

24 MR. PERDUE: And I would not speak for any
25 individual member of the legislature. I do feel like I

1 heard that the effort -- the initial effort of OCA to
2 have, kind of, this being something that could be done
3 despite objection by the parties was not well received
4 because of the belief that court's are supposed to sit
5 in the jurisdiction according to the Government Code.

6 Now, you know, the interpretation of what
7 the Government Code means is to people like yourself and
8 higher than me, so I can't say that the language in the
9 Government Code says you've got to physically be in that
10 position. But there -- I don't want to sound Trumpian.
11 There are some people who say -- I've heard it said that
12 that is -- that is their belief.

13 And I think one of the frustrations that I
14 will share with those -- with some of those thoughts is:
15 All of this -- all of this rule, all of this law, comes
16 out of the emergency authority of the Governor to
17 declare state of emergency that, then, under, again, the
18 statutes of the State of Texas gives the court the
19 ability to issue the orders that it has been writing.
20 There was a whole lot of debate about the Governor's
21 authority to declare this pandemic a state of emergency
22 for perpetuity and there is a political discussion
23 around that. Are we going to have a state of emergency
24 forever?

25 You just have to be -- I just wanted to be

1 on the record to say there is a political component of
2 this that will question whether this is a substantive
3 touch upon the Government Code.

4 Was that a political enough answer for
5 you? That was an answer/nonanswer?

6 HONORABLE TRACY CHRISTOPHER: Well, we
7 know for sure in the appellate court that we have the
8 authority to do this, even at the intermediate courts.
9 And then the real question -- and we have thought about
10 it. We did think about it is, you know, does a judge
11 have to physically be sitting in the courtroom to
12 conduct business? Right? And that does actually not
13 preclude remote proceedings. Because I know, for
14 example, Judge Schaffer sits in the courtroom the vast
15 majority of the time when he's conducting remote
16 proceedings. And a lot of judges down there do that,
17 and it's a way to avoid the -- sort of, worries about,
18 you know, everyone's business going out on YouTube,
19 which, you know, we'll get to later, maybe. You know,
20 which we've tried to address in our task force work.

21 So, you know, if you have heard, that
22 would be something that would be interesting and, you
23 know, we would like to know that. Because that's
24 something that can be done really that -- you know, the
25 judge has to sit there. Now, you know, that wouldn't

1 help Judge Estevez, who, you know, was able to do her,
2 you know, jury dockets that way without -- I suppose if
3 you were sitting in your courtroom, you could.

4 MR. PERDUE: I think litigation --

5 HONORABLE ANA ESTEVEZ: I've done it both
6 ways, but I will say that in our criminal ones, we
7 put -- make them sign a waiver that also waives where
8 I'm sitting. So they're waiving the fact of -- they're
9 not complaining about where they are. They're not
10 complaining about where I am. They're not going to
11 complain about where the lawyer is. We make sure we
12 waived everything.

13 HONORABLE TRACY CHRISTOPHER: If it's a
14 concern, it can be addressed. So that is why I wanted
15 to know because we don't want to run afoul of the
16 Government Code. We don't want to run afoul of
17 accountability for our elected judges and judges sitting
18 in certain areas and all of that. We do not want to do
19 that so...

20 CHAIRMAN BABCOCK: Justice Christopher,
21 you said that Jim came on quite a bit stronger earlier
22 on when he first made his remarks.

23 HONORABLE TRACY CHRISTOPHER: It seemed to
24 me that he did. Perhaps I was just -- took it the wrong
25 way.

1 CHAIRMAN BABCOCK: If we had just been in
2 person, you would have seen how nuanced his presentation
3 was.

4 (Laughter)

5 MR. HARDIN: Amen. Amen. Amen.

6 CHAIRMAN BABCOCK: All right. I think
7 we're back to Orsinger who is -- and by the way, there
8 is no filibuster rule here, so get after it, Richard.

9 MR. ORSINGER: Okay, Chip. Thank you.

10 So to touch on -- I feel like we're not
11 making a sufficient record for the Supreme Court on what
12 I consider to be the core issue, which is who makes the
13 final decision, so I want to return to that briefly.

14 I doubt that few people would argue that a
15 trial judge can force a litigant to call a witness live
16 when they've done a videotaped deposition and want to
17 play the videotaped deposition in the trial. Maybe
18 somebody would, but I don't think anybody would. I
19 think that a party has the right to call a witness by
20 deposition in which event you're not going to be able to
21 see and touch and feel and smell the witness while
22 they're on the witness stand.

23 I have a hard time understanding what's
24 the difference between playing a video deposition and
25 having live testimony of a witness remotely. In fact, I

1 would argue that remote, live testimony is better than
2 videotaped testimony in terms of subjecting the witness
3 to examination for credibility and things of that
4 nature.

5 So while I think probably few would
6 advocate that a trial judge can force a party to call a
7 witness live when they want to play a video depo, I have
8 to ask the question of why should a judge be able to
9 force a party to call a witness live when they want to
10 have them testify live remotely? And if you'll agree
11 that a party should have the right to call a witness
12 live remotely, what is a trial but a succession of
13 witnesses? A Zoom trial is a succession of live remote
14 testimony. If remote testimony is tantamount to
15 deposition video testimony, I don't get it why the trial
16 judge could order a party to -- or require a party to
17 present the testimony by a live witness on the witness
18 stand instead of remote testimony.

19 So I think one of the questions to answer
20 here is: Does a party have a right to call a witness
21 live remote regardless of the judge's desire or does the
22 judge have the right to force that the testimony be
23 live? And that's true for one witness, and that's true
24 for a succession of witnesses.

25 Now, then the next question is: Can a

1 trial court force on an objecting party the requirement
2 to be in the courtroom for the trial. To conduct a live
3 proceeding where everything occurs in the courtroom, can
4 the court force that on an objecting party that wants to
5 do it remotely?

6 The next question is, can a court force it
7 when all the parties agree that it's going to be one way
8 and the judge wants it the other way? If all of the
9 parties agree that they want to be live and in the
10 courtroom, can the trial judge override them and force
11 them to try the case remotely? If all of them want to
12 try the case remotely, can the judge override them and
13 force them to try the case live?

14 In other words, ultimately, we have to
15 discuss and decide when -- or who has the final say and
16 whether one objecting party can kill it for everyone or
17 whether two parties in agreement can override the judge
18 or whether the judge can override everyone, including
19 two parties that are in agreement. To me, that's a
20 really, really important discussion that we need to be
21 having.

22 Now, then putting that aside it's possible
23 that we can relieve some of the pressure on making the
24 decision right now by having tiers. We had tiers in
25 discovery, Level 1 and Level 2, and Level 1 cases under

1 Rule 190.2 are \$50,000 or less. So that's one possible
2 cutoff where we've already compromised some of the due
3 process based on the amount in dispute.

4 We also have Rule 169 on expedited
5 actions, which requires consent were everybody has to
6 agree that they're not seeking damages over \$250,000.
7 But there in a consent environment, we've allowed due
8 process to be altered -- I would argue compromised.

9 In the family law arena, I would say an
10 area where we should probably mandate it no matter what
11 anybody wants is the prove-up of uncontested divorces
12 with no children. I mean, I could see you could justify
13 a rule that all judges must abide by that uncontested
14 prove-ups of divorces with no children have to be remote
15 for anyone who wishes to be remote.

16 So I feel like we have -- we can reduce
17 some pressure on our decision by initially limiting it
18 to a dispute or initially limiting it to consent from
19 both sides, initially not trying to force it on a jury
20 trial, initially not trying to force it on a nonjury
21 trial. But it does seem to me that if both parties want
22 to try it remotely, even though the judges that -- we
23 were talking during the break -- all agreed that the
24 judge should have the final say-so, I don't ascribe to
25 that. I think that the parties' views should be

1 considered to be very important, if not as important, or
2 perhaps even more important than the judge's preference
3 about live versus remote.

4 So anyway, Chip, thank you for allowing me
5 for the 10th or 12th time.

6 CHAIRMAN BABCOCK: Always love to hear
7 from you, Richard.

8 Roger, you're next.

9 MR. HUGHES: I wanted to go back to what
10 we were talking about that -- the potential political
11 overlay about so-to-speak not trying a case in the
12 county seat or wherever it was.

13 You know, the whole purpose, I think,
14 historically, in fact, going back thousands of years of
15 having a court sit in a particular locale was as a
16 convenience to the local population. Just like in --
17 back when the King traveled around in England, that's
18 wherever the Court was. You had to go run down the
19 King, and he might be on the other side of the channel
20 fighting in France. He might be in London. He might be
21 in some other city, and so we had judges meet in a
22 particular place and they could dispense justice.

23 And so now we count on each county to fund
24 phenomenal amounts of money, and then every four years
25 we have very expensive elections where all kinds of

1 money, large sums of money, are raised in order to elect
2 this or that judge. And now, all of a sudden, is this
3 judge really going to preside over this community?

4 My point is: That on one hand the -- we
5 may have laws now that allow incredible flexibility to
6 the local judge about where proceedings are being held,
7 when they're being held remotely, do I have to be in the
8 courtroom? Can I be out in my fishing lodge, my fishing
9 cabin on the bay, whatever.

10 But the point is, there is a legislature
11 looking over our shoulder and there's the local -- and
12 there are the local people who talk to their
13 legislators. And we may be able to persuade the Supreme
14 Court to enact some of these rules, but they're going --
15 but there may well be pushback and we have to think
16 about that. And it's part of the value -- or I think
17 the purpose of having local courts set in a particular
18 locale is not just so that people will know where to go
19 find them, but to feel like these judges have a
20 connection to the community. If all they are is talking
21 heads on a TV, how do we know they have any connection
22 to our community? Why should we support them?

23 And, you know, it's not been in the
24 distant past when we've had arguments to create special
25 courts with statewide jurisdiction to handle particular

1 classes of civil cases in order take certain kinds of
2 civil cases away from, you know, local courts, which
3 they are selected under our venue laws, and instead
4 transfer them to a high-powered court in -- let's just
5 say Austin. And that didn't go over very well.

6 I could see possibly that if we really
7 want to push this to the limit, we could centralize all
8 the district courts in Texas in one particular county
9 because that's where we have the supercomputers that can
10 handle all of the server loads, et cetera, et cetera,
11 and all the district judges will have to run district --
12 will have to run statewide elections in which basically
13 few people will know anything about the district judges
14 who are going to be sitting on their cases, except that
15 they're in this distant place called -- I don't know
16 Travis County, Harris County, wherever the big
17 courthouse is and we could -- and that might be very,
18 very efficient. And it might make certain classes of
19 cases easier to try and make certain classes of
20 litigants feel more confident in their decisions, but
21 I'm not sure the public will go for it. And they may
22 not feel their tax dollars are being spent as wisely.

23 And now the other thing of it is, it was
24 thrown out earlier, that in terms of deciding the
25 judge's power to override a litigant's decision about

1 whether to have remote or Zoom jury trials, we do it by
2 classification of amounts involved or by subject matter
3 or types of cases. All I can say is that that is going
4 to feel -- make certain litigants feel they are second
5 class. In other words, I'm sorry, your case is not
6 worth more \$100,000, so you don't get real trials. You
7 get TV trials. And the public may begin to feel like
8 justice is only for people with big money, who have big
9 sums of money to gamble with at the courthouse. I
10 sympathize with certain other types like family law, et
11 cetera, will be carved out and they will always get --
12 override the judge. But there's still the problem that
13 at the moment we start saying, certain types of people
14 get real trials, the deluxo Cadillac or Mercedes-Benz of
15 trial work, and the rest of you, I'm sorry, your case is
16 under so many dollars, you only get a TV trial. I think
17 you can imagine what the public is going to think of us.

18 So I'm sorry. I've said my piece. Thank
19 you much.

20 CHAIRMAN BABCOCK: The public is going to
21 say, "You mean I get to be on TV?"

22 John.

23 MR. KIM: Just two quick points because
24 part of the first part that I talked about was, there's
25 a difference in this academic theoretical discussion

1 versus reality. And to address the issue of deposition
2 and witnesses, it happens all the time where judges
3 force you to bring the witness live. There's a rule on
4 it in Federal Court. It's called the -- what it is, the
5 federal definition of unavailability of the witness.
6 And the reason for that is because credibility is better
7 determined in person with an actual face-to-face by
8 confrontation -- of confrontation. That's in the
9 Federal Civil Rules of Procedure's notes concerning the
10 adversarial right of a cross-examination in civil cases.

11 And so I think it's really important
12 because I don't think you will find a single social
13 scientist or a single jury scientist who will sit and
14 tell you that the ability to see someone's face clear on
15 a screen is the best means for determining a witness or
16 a party or an attorney's credibility, and so it is that
17 entire experience that we are trying to preserve.

18 And we're going down a slippery slope with
19 this with respect to advocacy and really 7th Amendment
20 principles. But I want to underscore everything I just
21 said before and now that I do think for the vast
22 majority of proceedings, Zoom is fine. It's only when
23 you have a situation, bench trials, evidentiary
24 hearings, juries, jury trials where credibility of
25 witnesses and testimony is important, that I think we

1 have to be very, very careful.

2 Thanks.

3 CHAIRMAN BABCOCK: Thank you, John.

4 Judge Miskel.

5 HONORABLE EMILY MISKEL: One of the things
6 I wanted to center our discussion back on is this is why
7 in our subcommittee discussions we got away from talking
8 about remote proceeding and talked about remote
9 appearances because it's like a Ship of Theseus problem
10 to say when does an in-person proceeding convert into a
11 remote proceeding? How many participants have to be
12 remote before it's remote?

13 If we take our time machine back to 2019,
14 I could allow a witness to testify by phone or by video.
15 If a party objected, the judge could overrule it and
16 allow it anyway or the judge could deny it and say the
17 witness could not testify by phone or video. An
18 attorney could request to make an appearance by phone or
19 by video and the Court had the power to allow it or not
20 allow it. The Court didn't need a permission slip from
21 the Governor. The Court didn't need emergency orders
22 from the Supreme Court to allow a witness to appear
23 remotely or to allow an attorney to appear remotely, and
24 the parties never had to have the power in 100 years
25 since 1914 when the first cases on the telephone came

1 through the system. The parties did not have the power
2 to control the judge's outcomes. So I don't know that
3 this is any different, what we're talking about now,
4 than the Court's inherent power to always have allowed
5 that or denied it. I don't see that anything about an
6 emergency order from the Governor or the Supreme Court
7 has changed the fact that that was always held to be
8 within the Court's inherent power.

9 So I'll just leave it at that.

10 CHAIRMAN BABCOCK: Yeah, just to comment
11 about that, Judge. To me, it's -- part of it's the
12 frequency it's being used now. I mean, I know it was
13 used a lot to certain degrees, but the frequency now.
14 But also, you know, we're coming off two years of being,
15 you know, couped up and masked up and there's all this
16 frustration about being separated and taken apart,
17 pulled apart from each other, you know, this meeting
18 being a good example of not -- you know, we were going
19 to be in person and now all of a sudden we're not and I
20 think there's all that frustration that is bubbling over
21 into this discussion. Not to denigrate anybody's
22 position on either side of this question. I just think,
23 you know, the place we find ourselves right now is
24 influencing a lot what people think about this issue.

25 HONORABLE EMILY MISKEL: Absolutely. And

1 my main point is: As I said at the very beginning, I
2 don't want to throw out things that have already been
3 inherent in our system when we try to change something
4 for Zoom and act like some things we haven't already
5 been doing the whole time.

6 I'll just tell you how I do things.
7 People think I'm a Zoom zealot and I'll tell you I'm
8 not. I'm setting all my trials and contested
9 evidentiary things in person and the reason for it is,
10 people settle their cases more when you make them come
11 down to the courthouse. I totally agree with the judge
12 that said, when you allow people to do things on Zoom,
13 it's too convenient and they won't settle their case.
14 They'll just say, "Let's talk to the judge. Let's take
15 a swing at it."

16 So anyway, I'm setting stuff in person,
17 but I will tell you every single day there's some reason
18 somebody needs to participate remotely. "Judge, I'm set
19 in another county, can I participate remotely? Yes. My
20 witness has been exposed to COVID. Can they participate
21 remotely? Yes. My witness is out-of-state. Can they
22 participate remotely? Yes." So even though I fully
23 intend to have my 9:00 a.m. docket every morning be a
24 fully in-person docket, I will tell you every single day
25 there's like three or four non-in-person people. So I

1 think that is the world that we're going to.

2 And I understand if people don't think now
3 is the time to address it with rules. I also don't want
4 to steamroll over it and not be cautious. I
5 1,000 percent agree with all the people that said we
6 need to slow down and think about the complexities.
7 Absolutely.

8 Our subcommittee came up with a starting
9 point to spark a discussion and we obviously
10 successfully did that because our discussion has been
11 sparked and everyone is interested and I think it's
12 great that we are focusing on how can we bring more
13 justice to our vulnerable Texans that lack access to our
14 in-person courts? How can we protect the types of
15 trials that benefit from fabulous high paid lawyers and
16 their fabulous jury arguments and all of that, that's
17 wonderful. Let's have a system that works for everyone
18 at all ends. And I agree, though, the reason it didn't
19 go anywhere in our subcommittee, it looks terrible, even
20 though we say we're helping those low-dollar cases
21 because those are the ones who can't come to court and
22 those are the ones that are best served by Zoom, it
23 looks terrible like we're relegating them to some kind
24 of lesser justice. So I don't believe that is a
25 realistic option, but I do think we need some way to

1 protect our vulnerable Texans that have been excluded by
2 our in-person system.

3 CHAIRMAN BABCOCK: Yeah, yeah. Very well
4 said. Thank you, Judge.

5 Harvey.

6 (No response)

7 CHAIRMAN BABCOCK: You're muted, Buddy.

8 HONORABLE HARVEY BROWN: Thank you.

9 Sorry.

10 Richard asked the question earlier as to
11 who should be the decision-maker, and I wanted to
12 address that for just a minute.

13 I don't think it can be the lawyers for
14 reasons that have been already stated, and thought Judge
15 Schaffer's example about the Houston lawyer that would
16 demand that the Dallas lawyer come down here every time
17 was exactly on point. There are lawyers who will try to
18 exact a cost from the other side by making them come
19 down to hearings, whether it be in the same city or
20 elsewhere. Or somebody is just going to say, "I want to
21 drive up the cost. I want to force them to settle. Do
22 everything you can to drive up the cost," and that does
23 happen.

24 And I think the other example was the
25 prisoners who couldn't appear before. So a lawyer in

1 that case might say, "No, I don't want anybody to appear
2 live -- I mean, remotely. I want everybody to have to
3 appear live." So I just think the only disinterested
4 person on that decision is the judge, so the judge
5 should make that call. And I do think that the judge
6 should also be able to override the lawyers for reasons
7 that are kind of unique to the judge's position.

8 First, I just had a hearing about a month
9 or two ago where a lawyer -- it was remote -- obviously
10 I'm not a judge, but I was an arbitrator -- and the
11 lawyer starts screaming at me. And, you know, I put my
12 hand up. I tried to stop them, et cetera, et cetera. I
13 had a really hard time gaining control of that hearing.
14 And after he finally calmed down and, you know, the
15 hearing had gotten back on track, I said, if we were in
16 the courtroom, you would never have spoken to me this
17 way with my bailiff here or in an open proceeding. And
18 it's just an example. Sometimes things happen on Zoom
19 that a judge just doesn't have quite the control that
20 they would have in the courtroom, and I think the judges
21 need to have that ability to control.

22 I also think some judges just aren't as
23 comfortable with that. The first few Zoom hearings I
24 did as an arbitrator, I just didn't like it as much.
25 And I'm sure that there's some judges who still feel

1 that way today and just feel like they do a better job.
2 And if they feel like they're doing a better job, I
3 don't think we should say, You're not. We're going to
4 force you to do something you think that makes you less
5 than your best.

6 I also think we've talked a lot about
7 credibility of witnesses. As a judge, sometimes I want
8 to look the litigant in the eye. I need to look at
9 credibility of the lawyers sometimes, too. Lawyer
10 credibility is also important for judges, and so
11 sometimes you want the lawyers in front of you for that.

12 And finally, the phrase was used earlier
13 about not making it too convenient. I remember when I
14 was a judge there was a case that was having difficulty,
15 so I scheduled them a hearing every Friday. Well, guess
16 what happened: The number of motions that got filed
17 just tripled. And a wise more experienced judge said,
18 "You've made it too convenient. You made it too easy.
19 They're going to fight over everything." And I learned
20 a valuable lesson about that. And I do think that
21 having a little bit of skin in the game, a little bit of
22 cost, is something the judges can use wisely sometimes
23 and say, "I'm going to make them come down to the
24 courthouse if they really want to fight over these
25 issues."

1 CHAIRMAN BABCOCK: Thanks, Harvey.

2 Robert.

3 MR. LEVY: I just wanted to follow-up on a
4 couple of items. And what -- one of the questions that
5 I would have for Kennon and Judge Christopher is: Why
6 not make this issue presumptive that in-person trials or
7 in-person proceedings, in-person participation, would be
8 the norm and that if there is a reason for having
9 somebody remote, and, you know, whether it's a
10 participant or the actual proceeding itself, a good
11 cause to go remote, then why not do it that way.
12 Because what the proposed rule suggests is there is no
13 preference either way. I put that to Kennon, I guess.

14 MS. WOOTEN: And that's certainly an
15 option. But I think it's important for us to dig a
16 little deeper and consider that in some of these cases,
17 for example, the CPS cases that have been cited
18 repeatedly, the child support cases, the uncontested
19 prove-ups of divorces, the presumption that in-person is
20 better may be faulty. So that's something I think, you
21 know, when you start to dig beneath the surface there if
22 you are going to make that the presumption that it's
23 better, you would have to think about it seriously and
24 ask the question, Is it really better in all types of
25 cases?

1 MR. LEVY: So this is my issue with that.
2 You're changing, you know, 200 years of jurisprudence
3 and practice and making a presumption that remote is
4 just as good as in-person without any real foundational
5 basis, other than two years of experience. We've had
6 obviously two years of experience. We certainly know
7 what the numbers are, but we don't yet, as far as I
8 know, have any perspective from academicians or studies
9 to understand, is it better, or is it worse? Or is it
10 better in these types of cases, but not better in other
11 types of cases? What are the consequences? What are
12 the long-term impacts?

13 Obviously, sitting here, we can give our
14 own perspectives, but they're not worth that much.
15 Obviously the judges who have had hundreds or thousands
16 of proceedings remotely have a strong factual
17 perspective, but it doesn't count as evidence. It
18 certainly wouldn't be evidence that would be admissible
19 as expert testimony, and yet we're talking about a
20 gargantuan change without knowing, is it good or could
21 it actually have a long-term negative consequence on our
22 system? And it's just not jury trials. Judge Miskel
23 said 90 percent or 80 percent of the complaints are
24 related to jury trials. That's not the case. It is
25 much broader than that.

1 And one other point: I wanted to
2 elaborate on Jim Perdue's comment. Yes, the legislature
3 feels very strong about this, particularly when that
4 bill hit the Senate. And if we're thinking about making
5 a change that gives a judge total discretion on remote
6 trials, I think it's very likely the legislature will
7 step in and do what they almost did, which would be to
8 prohibit them, which is not what we want either with
9 remote proceedings. Because I think we want the option.
10 We want the flexibility. We want judges to be able to
11 do it if there is a good reason. But I strongly suggest
12 that it would be wrong to make it an either/or option,
13 just whatever the judge felt like doing. Because that
14 would be such a massive change that would be very
15 disruptive.

16 MS. WOOTEN: Just a couple points in
17 response. I think, you know, you said I'm making the
18 presumption it's better. I'm not. The rule is drafted
19 to be neutral and give the trial court judge --

20 MR. LEVY: Well, how do you reach that
21 conclusion --

22 MS. WOOTEN: If I can finish, please.

23 MR. LEVY: Yeah.

24 MS. WOOTEN: It's drafted to give the
25 trial court judge the final call to exercise discretion.

1 And I think, you know, the question you posed was: Why
2 not make the presumption that in-person is better? And
3 the question I'm asking in return is, whether that's
4 true in all types of cases. So going back to the rule,
5 I think if you're going to presume one is better than
6 the other, I think the full exercise and thought process
7 has to be is: Is in-person better for certain types of
8 cases? Is remote better for other types of cases?

9 MR. LEVY: Oh, I can make an argument that
10 having a nonjury trial is better than a jury trial.
11 It's more efficient. It's less disruptive. It's
12 less -- it's more likely to result in a consistent
13 finding. But obviously, that's not how our system
14 works, and we're not going to change that, and I'm not
15 suggesting we ever would. But you don't change an
16 established precedent and say, "Let's do it differently
17 because it's worked sort-of for the past two years
18 because we had no other choice, so let's make that
19 fundamental change without even knowing that the
20 evidence and studies show that it's actually equal."

21 And, yeah, there might be proceedings that
22 are absolutely better being remote. I don't deny that.
23 And by the way, I deal with technology, so while I am a
24 Baby Boomer, I am strongly supportive of use of
25 technology. But it doesn't mean that just because it

1 has succeeded because we didn't have a choice in the
2 last two years doesn't mean that we should fundamentally
3 change presumptions, which are, in my view, that a
4 jury -- or in-person proceedings would happen unless
5 there's a reason not to.

6 MS. WOOTEN: And that's certainly one way
7 to approach the rule, Robert. It's just something I
8 question is: Are we looking through the lens of the way
9 it's been without these technological tools available to
10 us a little too much? Because, you know, we talk about
11 how it's been for all this time. Yes, it was in-person
12 for all that time because Zoom wasn't even possible.
13 Right? And what we've learned during the pandemic is we
14 can do a lot more remotely than we ever thought we
15 could. I mean, at the beginning, I spoke with many
16 people who said, "No way, no how, you can take a
17 deposition via Zoom." We had lawyers in my firm saying,
18 we need to write motions saying, "No way, no how we can
19 take this deposition via Zoom." And those same lawyers
20 took multiple depositions via Zoom and said, "Hey, we
21 can do this, and we've saved clients money by doing it
22 this way."

23 So I want to just open our minds to the
24 possibility that we can do more than we thought we could
25 before and we have technological advancements that have

1 occurred that give us the ability to change our ways,
2 and in doing so, we can increase access to justice.

3 MR. LEVY: I totally support that concept,
4 and I'm not saying we have to stick to the old ways
5 because they're the old ways. But I am suggesting that
6 we need to be a lot more hesitant to make the type of
7 fundamental change that the task force recommended
8 because it's not -- it is presuming everything is going
9 to be just as good or better, and I don't think we know
10 enough to make that judgment.

11 We know, yes, you can do it. We know
12 there are problems and limitations. There are also
13 problems with in-person proceedings, but we know
14 in-person proceedings do function and they have a
15 long-term history of functioning. And until, I think,
16 we have a lot more of a track record, we shouldn't just
17 automatically say we can do either and depending on what
18 the judge wants.

19 MS. WOOTEN: And one question I have for
20 perhaps Chip is whether it might be worthwhile at some
21 point to take a vote on whether jury trials are carved
22 out. Because it's a little difficult to ascertain -- at
23 least for me -- how much of the resistance here is about
24 the concept or possibility of jury trials going forward
25 remotely as opposed to other types of proceedings. So I

1 want to be sure that the debate we're having is as
2 productive as it can be at this point and it might be
3 enlightening to figure out whether if we took out the
4 jury trials it would change the views of some of the
5 people of this committee.

6 HONORABLE TRACY CHRISTOPHER: Can I point
7 out that as Kennon noted on the JP Rules, they're
8 specifically talking about trials. I guess they don't
9 do jury -- well, they can do jury trials.

10 CHAIRMAN BABCOCK: Yeah, sure.

11 HONORABLE TRACY CHRISTOPHER: And, you
12 know, that working group wants jury trials included, and
13 if we changed it for civil, you know, it would kind of
14 on a dollar value, sort of issue, but, you know, we can
15 do it.

16 CHAIRMAN BABCOCK: When I had the JP
17 docket for Jackson Walker, I always demanded a jury in
18 JP court, and I got about 20 jury trials before I was a
19 third-year associate. They weren't very long.

20 All right. Back to John Warren.

21 MR. WARREN: I was almost at the point
22 where I forgot my comment. This has actually been
23 really wonderful dialogue, but it actually goes back to
24 my original statement where I said I wish we could have
25 done this three years ago, but the pandemic prevented us

1 from doing it -- and I'm talking about me and the things
2 that I was working with a couple of the judges in Dallas
3 County.

4 I have a criminal court judge who uses
5 CourtCall. She has not been to the courthouse since
6 March of 2020, but she is one of the most phenomenal in
7 that she is able to embrace the technology and using
8 CourtCall to do her docket solely virtually. And she
9 has done a lot more cases than anyone else, but that's
10 because she embraced the technology. At some point, we
11 need to get there.

12 With everything that I have heard, it goes
13 back to what I was saying as it relates to everything
14 that we need to actually put on paper as it relates to
15 pros and cons, point, counterpoint, if you will, as it
16 relates to how the direction that we're going to. But
17 at the end of the day it comes back to President Kennedy
18 when he said: "We go to the moon not because it's easy
19 but because it's hard."

20 At some point, virtual processes has got
21 to be part of what we do. And it's -- I said virtual
22 processes -- I didn't say trials -- virtual proceedings.
23 Because at some point I actually don't think a jury
24 trial will fit in this category. Because as it relates
25 to what Tom Riney said, how can a young lawyer who wants

1 to aspire to be a judge have the ability to understand
2 how to preside over a jury trial if you don't understand
3 that concept. I think a jury trial is absolutely
4 essential to mold and groom young lawyers so that they
5 can at some point become a jurist.

6 But at some point, it goes back to how do
7 we manage a docket? How do we get things going? Chief
8 Justice Hecht said it's going to take approximately
9 three years in order to get rid of the backlog. At some
10 point, we have to start thinking outside of the box.
11 Virtual processes is outside of the box.

12 I applaud Judge Miskel and Kennon Wooten
13 for their efforts. I am a Baby Boomer, but I'm one of
14 those Baby Boomers who are more like a Generation X, Y,
15 Z, or whatever. I love technology. I embrace
16 technology because that's the direction we're going.
17 Otherwise, we may as well put phone booths back on the
18 corner.

19 People don't understand technology. And
20 the things that we're doing as it relates to Zoom and
21 all the other things, that's nothing more than shopping
22 on your phone. The way we are doing business -- I mean,
23 and it's good to have this argument because at the end
24 of the day when we present something, whether it's with
25 the legislature with a change in how the rules are

1 written, we have to be able to say with all the things
2 that people will say as it relates to, "Did you take
3 this into consideration? Yes, we did. We've taken that
4 into consideration. That's where we are going." This
5 has got to happen. It has to happen.

6 I said I wish it would have happened three
7 years ago, but as you know with the pandemic -- and I
8 believe I think it was Judge Miskel said -- I mean, what
9 we've learned as it relates to changing processes in the
10 middle of pandemic. I always say in Dallas County,
11 we've had to change the tire while the car is in motion.
12 That's a requirement because we cannot slow it down.
13 It's necessary. It's important. And we've all got to
14 get there.

15 I think all the dialogue that I've heard
16 as it relates to the things that we need to take into
17 consideration, we need to document those things so that
18 we can take those into consideration when we actually
19 come up with what is best practices for virtual
20 proceedings.

21 And, Chip, while I loved everything that
22 everybody said, I think we've beat the hell out of this
23 horse, and it's time for us to move on as it relates to
24 what we need to do.

25 And actually, no offense to Roger and Lisa

1 Hobbs and the Tarrant County Judge David Evans, I
2 actually work for David Evans in Dallas County so -- but
3 I think we actually need to say, "Okay. These are the
4 pros and cons. These are the things that we need to
5 take into consideration or have you considered this,"
6 and that's what we actually document so that Ms. Wooten
7 and Judge Miskel and the rest of the members of the
8 committee can go down the road and they can put what we
9 hope -- what's new in Texas. Because I can imagine
10 these conversations are taking place in California,
11 Illinois, New York, Florida even. But does Texas always
12 have to come in last? We need to get there and we need
13 to figure out how we're going to get there.

14 CHAIRMAN BABCOCK: Well, some would say
15 that we've come in first on a number of different rule
16 proposals over the years but --

17 MR. WARREN: Yeah.

18 CHAIRMAN BABCOCK: John, as a rookie to
19 this committee, we haven't begun to beat this horse to
20 death. I mean, this horse is going to be well beaten by
21 the time we're done with this.

22 (Laughter)

23 Roger, you're next.

24 (No response)

25 CHAIRMAN BABCOCK: Thanks, Roger. But

1 you're on mute.

2 MR. HUGHES: Well, I don't want to
3 continue to say it like I'm sounding dystopian or
4 whatever that's going to be, but I think one thing that
5 argues in favor of proceedings step wise and not making
6 big steps, et cetera, is something I said earlier and
7 that is -- sorry about my clock -- and that is, we may
8 find out that this technology was not as wonderful as we
9 thought. That it is not the great leap forward.

10 I'm old enough to remember when everybody
11 embraced videotaped depositions. It was the wave of the
12 future. That's how we're going to try cases. We're
13 going to have everything videotaped and it'll all be in
14 the can when we walk in the courtroom. We just put it
15 in the VCR -- some of you may remember what a VCR is --
16 and just play it for the jury. And then we found out
17 that after 15 or 20 minutes, jurors went to sleep. And
18 so all of a sudden you had to learn that maybe a
19 videotaped deposition was not a wave of the future. It
20 had a use. It had a purpose, but it could blow up in
21 your face, or it could just not be as wonderful as you
22 thought. It wouldn't do that.

23 And then there was the audio/visual
24 generation. The people who wanted everything in video
25 displays, video charts, video graphs, animatronic,

1 animation to present, that was the wave of the future
2 and we brought in the projectors and the screens and
3 the -- everything was on, pushed the button and you got
4 a magnificent CGI display. And then once again, we
5 found out, no, that was not going take over trials
6 either. It had a use. It had a small purpose. And we
7 didn't have to wholesale -- but unfortunately we didn't
8 have to do a wholesale revision, a massive sea change of
9 the rules of procedure to make it work. And then, of
10 course, I won't even talk about, you know, electronic
11 discovery or electronic data. We'd be here for the next
12 week.

13 The point is -- what I think is: Is that
14 if we -- we have had two years where we have been forced
15 to make great sacrifices and to do these things as a
16 crutch as a make-do and now it's here and we might be
17 able to use it. But I don't think it's going to turn
18 out to be the be-all-and-end-all and the wave of the
19 future.

20 And that's why I don't mean to sound
21 dystopian about it. I think what we're going to find if
22 we take it -- take it slowly is that it has a place. It
23 can be useful, and if we don't rush headlong into it, we
24 soon will be able to trust a judge to say, "Nope, you're
25 going to have to do it live. Nope, you're going to have

1 to do it remotely," and will not even develop -- after
2 we develop that level of trust, we may be able to
3 articulate a standard when the judge may or may not have
4 abused his or her discretion on a matter. But that's
5 not going to happen if we just take -- just pass a rule
6 and jump. And so that's my comment.

7 Thank you.

8 CHAIRMAN BABCOCK: Okay. Thank you,
9 Roger.

10 Lisa.

11 MS. HOBBS: Well, I was kind of thinking I
12 might be able to say, Well, Roger, should support this
13 rule until like the last little trail-off.

14 I just want to emphasize that this rule is
15 not compelling remote proceedings even in nonjury trial
16 cases, which I think we might have all agreed that we're
17 pushing off. This rule authorizes remote proceedings
18 within a trial court's discretion. And I think I agree
19 with other judges who've spoken today who said I think I
20 would have had the discretion even without a rule. But
21 the fact is, we had these emergency orders. We had
22 clear authorization from the Supreme Court that said,
23 "You can hold this stuff remotely."

24 And now we're -- as the pandemic dwindles
25 and our emergency power might end at some point, these

1 rules are just saying, "Hey, you, trial judge, have full
2 authority to hold a hearing remotely." And we can
3 debate what Richard Orsinger has been asking us to
4 debate. He might want to jump up and down one more time
5 and say, "Can we really get to the big issues here,"
6 when a trial judge can do that and when a trial judge
7 can't and under what circumstances with the parties or
8 not.

9 But ultimately, if you stand up here and
10 tell this committee that the Supreme Court is compelling
11 remote hearings, you are talking past the subcommittee's
12 work because what we were trying to do is authorize
13 committee hearings. And you can disagree with us on
14 when it should be authorized, but no one is standing up
15 here saying we are compelling remote hearings by trial
16 court. That is not on the table at all, so please stop
17 saying that.

18 And if you don't want -- if you think it
19 should not be authorized, then that's a very different
20 discussion and it's not like what I'm hearing today.
21 You're basically saying it should be prohibited, unless
22 the parties agree. And if you want to make that
23 argument, that's fair and great. But that's not what --
24 you're kind of playing this middle role, and you're
25 saying the subcommittee recommendation is doing

1 something more than the subcommittee recommendation is
2 doing, and then you're not addressing -- you're not
3 proposing, okay, Well, let's hear how you would word it.
4 Would you say that unless party's agree you have to have
5 in-person in every case or not every case, but in these
6 cases?

7 But let's come to the table fair and have
8 the same conversation because some of the conversations
9 that are being had right now are not in relation to the
10 subcommittee's report, and no one is proposing them.
11 And so, you know, that was my point. This is an
12 authorization. We know the Supreme Court -- well, no
13 one has challenged so far the Supreme Court's
14 authorization to do what they did during the pandemic.
15 A lot of people like it. We want to authorize it. We
16 want it to be within the trial court's discretion. No
17 one is compelling it in every case in every time, and
18 we're trusting the judges because honestly that's the
19 rule that we thought was best from the subcommittee
20 perspective.

21 If you have a better rule of how to rein
22 in the trial court's discretion, propose it. But we
23 decided that we want to authorize it and we only know
24 how to give it to their discretion. We trust our trial
25 judges and so that's the rule that the subcommittee is

1 proposing.

2 CHAIRMAN BABCOCK: Thanks, Lisa.

3 From my perspective, nobody's attacking
4 the subcommittee's work or its rule. That's for next
5 meeting. We'll do that, then. This is all therapy.
6 We're just all having therapy here on this go-round.

7 HONORABLE TRACY CHRISTOPHER: This is
8 therapy?

9 (Laughter)

10 MS. HOBBS: I don't think Kennon and I
11 feel -- I feel like Kennon and I need therapy after
12 this.

13 CHAIRMAN BABCOCK: I'm going to get my
14 buddy Dr. Phil and he's going to fly out and see you
15 guys. It'll all be fine.

16 MS. WOOTEN: I'm just glad I'm not paying
17 for this therapy. I'll say that.

18 HONORABLE TRACY CHRISTOPHER: If we were
19 in person, we would be drinking.

20 (Laughter)

21 CHAIRMAN BABCOCK: Well, that's true. In
22 a few minutes, if not before. So, yeah, don't worry,
23 Lisa. We're going to come back and we're going to have
24 a good discussion about the specifics.

25 MS. HOBBS: No, no, I just really - I

1 mean, my point is not that we feel attacked. We don't.
2 We all have thick skin. Kennon and I have been talking
3 on the breaks and by text every time you guys are
4 proposing something. We're not thick-skinned -- I mean,
5 we're not thin-skinned, trust me.

6 MS. WOOTEN: No.

7 MS. HOBBS: But my point really is: Just
8 talk about like actually what we're proposing, which is
9 not compelling remote proceedings. It is -- it is
10 actually giving trial courts discretion to decide in
11 each particular case whether they're going to have
12 remote proceedings or not.

13 CHAIRMAN BABCOCK: Yeah.

14 MS. HOBBS: And I feel like sometimes the
15 conversation is going way off into not that.

16 CHAIRMAN BABCOCK: Yeah. For the first
17 time ever in this committee, we've wandered off point.
18 Incredible.

19 MS. WOOTEN: It's shocking.

20 (Laughter)

21 CHAIRMAN BABCOCK: It's shocking. And
22 nobody, thinks by the way that either you or Kennon have
23 thin-skin. We know that you have, you know, reptile
24 thick skin and next meeting we're going to try to
25 penetrate it and see if we can get to you, but not this

1 time.

2 So, Judge Evans, you're up. And don't say
3 anything mean about Lisa or Kennon. Okay?

4 HONORABLE DAVID EVANS: Just say, Boomer,
5 be quiet when you're ready for me to be quiet.

6 I support allowing hybrid or remote
7 proceedings, but I think that in the proposed rule when
8 I read it I wanted to share this because it relates to
9 the standards, the discretion, and the abuse of
10 discretion. When I read the proposed rule -- I think
11 it's 18C -- it said the rule and any standards adopted
12 by the Supreme Court, and I thought, Well, how are we
13 going to do this without the Supreme Court adopting
14 standards for when you allow somebody to appear remotely
15 or don't -- or guidelines? And here's the problem that
16 I think that the judges and the committee needs to keep
17 in mind from the trial lawyers, if this is an abuse of
18 discretion standard, what are the guiding principles and
19 would there ever be an appeal that would have a harm
20 analysis that would lead to reversal?

21 So I think why the trial lawyers are
22 uneasy about this is not the rogue judge -- and, yes,
23 they do it -- it's just that how do they get relief when
24 they think that decision is bad? And I'm not inviting
25 interlocutory appeal so, Justice Christopher, do not

1 send in lightning darts toward me. I'm just -- you and
2 I both know we're talking about mandamus.

3 Now interestingly enough, 25 minutes ago I
4 received an appeal from a lawyer in my region asking me
5 to intervene with a trial judge because the lawyer wants
6 an 81-year-old witness in California to appear in a
7 proceeding. Now, I don't have the authority anymore on
8 that so, you know, I'll probably do The Best Little
9 Whorehouse in Texas, dance to the left and dance to the
10 right, which I wanted to send to you, Jim, a few minutes
11 ago, but anyway -- but I thought I would just send that
12 out -- and, John, why would you compare me to David
13 Evans in Dallas? I mean, golly.

14 That's all I have.

15 The problem is abuse of discretion where
16 do they get relief, and it's got to be standards written
17 by the court.

18 CHAIRMAN BABCOCK: Yeah, it sure does.

19 HONORABLE DAVID EVANS: I think that's got
20 to happen.

21 MR. WARREN: Chip, I'm sorry. I've got to
22 respond to that.

23 CHAIRMAN BABCOCK: Yeah, I would think you
24 would want to.

25 MR. WARREN: Judge Evans, I can tell you

1 that Judge David Evans, who is in the 193rd District
2 Court in Dallas County.

3 HONORABLE DAVID EVANS: I'm Judge David
4 Evans. He's David W. Evans. I'm David L. Evans.

5 MR. WARRENT: Actually, I remember when
6 you ran, everybody was confused because they said, Did
7 he move to Tarrant County -- Did Judge Evans move to
8 Tarrant County to run? And so we have to --

9 HONORABLE DAVID EVANS: The truth is they
10 said, "Is that that bad-tempered judge over in Dallas --
11 or in Fort Worth or the nice guy in Dallas? I know what
12 they said."

13 (Laughter)

14 MR. WARREN: No, actually, David Evans, he
15 was phenomenal. He actually fostered my passion for
16 courts and technology, so -- and he always challenged me
17 so -- and I'm assuming you're doing the same thing over
18 in Tarrant County because you're on this committee. And
19 based on everything that I'm hearing from you, there is
20 very little difference between the two of you.

21 CHAIRMAN BABCOCK: All right. You guys go
22 get in your cars and drive to Grand Prairie and hug it
23 out. Okay?

24 Rusty.

25 HONORABLE DAVID EVANS: I'm just joking

1 with you.

2 MR. HARDIN: I think all of us embrace
3 technology, even if those like me don't know how to use
4 it. All right. So I don't think the argument is
5 against technology. I don't think the argument is
6 against having remote proceedings.

7 As it comes down, it sounds to me like
8 we're back where Richard was: Who makes the decision,
9 and -- at the end of the day. I think what Judge Evans
10 is saying is, if you leave it in the discretion
11 completely of the court you are having basically
12 compelled remote proceedings because the judge can
13 compel it and the litigants can't. So you're really
14 talking about, can the judges always compel it or are
15 there going to be such procedures that have certain
16 presumptions that have to be overcome to do it?

17 But, you know, you are taking it out of
18 the hands of the lawyer. So the irony of my feelings
19 and sort of impulse here is it runs counter to what I've
20 been saying since I've been on this committee which
21 hasn't been anywhere near as long as most of you. But
22 I've always been a champion of discretion of the judges
23 and I've always believed that when we couldn't decide
24 what the hell happened or should happen, that I was more
25 comfortable with judges having the discretion.

1 But something like this takes total
2 control of the litigants if we're not careful. That's
3 my only concern. If I can be always compelled to be
4 remote on whatever the proceeding is -- let's assume
5 from my comments and everybody else's we take jury
6 trials out of it -- but if I can be compelled to be
7 remote that is just a matter of that judge's decision as
8 to whether I am going to be, then I am losing the
9 opportunity to quite frankly effectively -- as
10 effectively as I want to believe is appropriate
11 represent my client. If we talk about cost proceedings,
12 I've always assumed that the lawyers want to solve cost
13 proceedings for their clients, too. And if it's a
14 matter of cost in remote proceedings in this situation
15 would be to the client's advantage economically, then
16 it's hard for me to imagine situations where one lawyer
17 is going to say -- there are -- there are lawyers who
18 are going to run you into the ground maybe financially,
19 but most of the time lawyers are going to choose, I
20 think, a remote proceeding if it doesn't have them give
21 up the interest of their client by being able to
22 in-person address the opposing party and the witnesses,
23 they will agree to them.

24 I think everybody knows that we benefit in
25 a lot of ways from remote proceedings. The issue is

1 going to be, what's a remote proceeding and who makes
2 the decision. And then if you're going to leave it with
3 judges to where we don't get to -- I have a hard time
4 imagining what's wrong with letting the lawyers agree?
5 I mean, is it really that bad? I mean, most judges will
6 say that if the lawyers agreed to something, unless it's
7 something unethical or improper, I'm going to usually
8 endorse that.

9 And I just really think that it's unfair
10 to the litigants at the end of the day to be compelled
11 to do something remote. Voluntarily, I think you'll
12 find that just most trial lawyers are more than happy to
13 do a lot of things remotely. They're going to be
14 interested if it's a contingent -- we do both plaintiffs
15 and defense on the civil side. Contingency lawyer
16 doesn't want to run up the cost. That's money out of
17 his pocket.

18 And so I think that when it is appropriate
19 and a more efficient way, most of the time the litigants
20 will choose to do it remotely. The issue is, should
21 they be compelled to when they believe that is against
22 the best interest of their client. And if they are,
23 what are the standards the judge's going to be guided by
24 so that as Judge Evans says is, if we want to challenge
25 it, what is our likelihood of success on the deal?

1 You know, in all deference to every judge
2 on this committee, there are some judges that are going
3 to compel people because of convenience.

4 And let's face it, what I noticed when I
5 started out in practice and became friends with people
6 who then were practicing long enough to become judges, I
7 would watch them talk about -- I know we're taking jury
8 trials out, but the principle's the same for presiding
9 over other matters, too -- the biggest champion of trial
10 lawyers -- of the jury trial and jury selection were the
11 trial lawyers who then, I think, unfairly that Jim was
12 accused of being -- of having changed his position a
13 little bit I've said out -- I think unfairly. I think
14 you and Lisa could get together on these things, Jim. I
15 think both of you have been unfairly treated. But I
16 will say this: That all of these people that became
17 judges the first day as a judge. They no longer -- they
18 hated jury selection. They wanted to cut it. They
19 wanted to cut this -- the trial needed to be
20 streamlined. They were people one week before that were
21 (audio distortion) -- and the need for lawyers to be in
22 control of jury selection, et cetera.

23 So a lot of judges are going to make
24 connivence decisions, in all due respect. And we
25 litigants and our clients -- it's not about us. It

1 should be about the clients -- we think it's not to
2 their advantage. So if we take jury trials out of it,
3 as been suggested, if I can, and then let's talk in
4 terms of this, maybe through a vote or whatever, Chip,
5 you decide to do on it. At the end of the day, we're
6 going to have to face this issue, who gets the absolute
7 right to make the decision? And if it remains judges,
8 how do we get to be able to challenge that where we have
9 a decent chance of success if we're right?

10 That's it.

11 CHAIRMAN BABCOCK: Thank you, Rusty.

12 Justice Christopher.

13 HONORABLE TRACY CHRISTOPHER: Yes, what I
14 think would be useful is if we could articulate in
15 writing what we would think would be good cause under
16 this 21(d). Right? 21(d) says the Court may allow or
17 require a participant to appear remotely. Okay.

18 The committee report on good cause is
19 limited. And what I'm hearing from a lot of lawyers in
20 the group is they want the good cause to be more -- to
21 give examples of a more expansive good cause. Right?
22 So good cause can exist if the parties agree to a
23 different manner of presentation. Good cause can exist
24 if the size of the case or the complexity of the case
25 requires an in-person proceeding. You know, so those

1 are the kind of specifics that we could -- which I
2 understand Rusty's concern of, you know, how do I get
3 relief, to be more specific.

4 So we've talked about if the parties
5 agree. We've talked about it's a really complicated
6 case, and, you know, we just need to be in person.
7 We've talked about the other side's a liar, and I know
8 they've been cheating on depositions, so, you know,
9 please don't let them cheat by having a remote hearing
10 or proceeding. What other sort of things that we could
11 put in just to flesh out the idea of good cause? I'm
12 not opposed to that. I think that's a good idea.

13 CHAIRMAN BABCOCK: Great. Thanks, Judge.
14 Judge Miskel.

15 HONORABLE EMILY MISKEL: I just wanted to
16 respond on the reasonable lawyers will agree in advance.

17 One of the -- one of the people that
18 remote trials help the most are our pro se litigants.
19 So on my docket it's about -- a third of my cases are
20 pro se on both sides, a third of my cases are pro se on
21 one side, and about a third of my cases have lawyers on
22 both sides. And with the pro ses, you just don't have
23 communication with them in advance of the trial. We
24 send out a notice and they show up or don't.

25 And so one of the best ways I would like

1 to use the tool is to help those litigants not be
2 default judgments, help them to be able to participate
3 by setting their case for trial remotely. But if it
4 requires agreement, I will not be able to do that
5 because we don't have two-way communication with them in
6 advance of trial. Those will just be set in person and
7 become default judgments, which I don't think is as
8 helpful as we could be in helping the litigants that our
9 system is supposed to be serving.

10 CHAIRMAN BABCOCK: Great. Thanks, Judge.
11 Rich.

12 MR. PHILLIPS: Just to echo a little bit
13 from the lawyer's side. I live in Dallas but for some
14 reason I have had a ton of cases in Hidalgo County.
15 Getting from Dallas down there is not easy. If I have a
16 30-minute hearing at 9:00 one morning, it's a two-day
17 process for me. I have to fly to Austin or Houston and
18 then catch the flight to Harlingen and then come back.
19 If I have to wait on my opposing counsel who lives in
20 Hidalgo County and can drive to the courthouse in 15
21 minutes to agree that I can appear virtually and instead
22 they want to impose that cost on me, then there's no
23 incentive on them to agree for me to be able to do that.
24 And so I think that's where the problem comes in to
25 Rusty's thing about the idea that they're not going to

1 impose costs on themselves, sure, they're not. But if
2 they can make the out-of-town lawyer have a hard time
3 getting there for a 30-minute hearing and the judge has
4 no ability to say, Listen, we're going to do this one
5 remote, that's the problem.

6 So I do think the judge has got to have
7 some discretion but I also agree we've got to figure
8 out -- I think the biggest hangup is how do we cabin
9 that discretion and what can this committee, if
10 anything, do to try to kind of lay out some guidelines
11 for deciding how the court can exercise a discretion on
12 that.

13 But if we say we're going to leave it to
14 the parties, it's going to turn into gamesmanship faster
15 than -- I don't know -- just fast.

16 CHAIRMAN BABCOCK: Yeah.

17 John.

18 MR. WARREN: I think the judge as the
19 arbiter -- or the referee of court proceedings should be
20 the one who determines -- who makes that determination.
21 But I think based on what Rich Phillips just said -- and
22 I think he should be -- Judge Miskel and -- I think he
23 should be part of the committee as it relates to how we
24 actually fold or create this -- the process or the
25 criteria for virtual proceedings.

1 But I think that's it. We just have to
2 establish that criteria and the judge actually just
3 makes sure that that's what's enforced.

4 CHAIRMAN BABCOCK: Judge Mendoza.

5 HONORABLE MARIA SALAS MENDOZA: I've said
6 repeatedly that I really think that these decisions --
7 and Judge Miskel said this, too -- the judge has always
8 had the ability to do it. I really think the decision
9 should be -- remain with the judge.

10 That being said, so having said all --
11 remember all that stuff I said before -- one of the
12 things that I've seen trial judges do, which has
13 bothered me and I've tried to address with my
14 colleagues. I've had colleagues in El Paso that say, If
15 you're in Dallas and you want to practice in El Paso,
16 you're going to come in for that hearing and they've
17 made them. This was pre-pandemic. And I say, "That's
18 ridiculous. Why would you make them do that for a
19 pretrial or, you know, whatever?"

20 So when we address the rules and the good
21 cause, we've also got to address that situation. I
22 really think most judges don't do that, but we do need
23 to protect the litigants when you have these --
24 El Paso's not rural, but it's way out here -- and you do
25 have some trial judges that have those opinions. And

1 we've had, you know, some grievances because trial
2 judges have refused to grant continuances when people
3 are not permitted to fly, for example. So we need to
4 address those things in those good cause provisions as
5 well.

6 CHAIRMAN BABCOCK: Yeah.

7 Judge Evans.

8 HONORABLE DAVID EVANS: I think, Judge
9 Christopher, that it's factors that need to be
10 considered maybe as opposed to specific situations and
11 how you articulate factors that would lead up to
12 specific situations.

13 While I was still on the bench, we had a
14 witness that they wanted to bring remotely, and I didn't
15 allow it until they had been able to get a deposition
16 that was satisfactory -- in-person deposition before
17 allowing the witness to appear remotely so that the
18 opposition could do it. Now this person was out of
19 state and then we had a cost issue that had to be
20 assessed. But there's going to be convenience issues,
21 health issues, has there been discovery that's been
22 taken, you know, and then when you get to -- and I'm
23 just talking about remote witnesses, as opposed to a
24 remote, everybody's remote.

25 But that's where I thought that language

1 that you would put in the rule about any standards
2 adopted by the court, I wasn't sure if we would write it
3 into the rule or you would write it into a separate set
4 of standards and guidelines. But it needs something,
5 and it needs something to take up here Mr. Phillips'
6 issue. It's just -- and what Judge Mendoza just said.
7 There's just no sense in dragging somebody to Fort Worth
8 just because you've got the authority to do so over
9 establishing what is simply a motion for summary
10 judgment now, I digress where somebody is just going to
11 regurgitate what they wrote and what you have to read --
12 and what you have to read and rule on. I mean, that
13 just doesn't make sense.

14 Sorry. Okay. That's Cowtown David --
15 that's Fort Worth David Evans, and I'll mute myself.

16 CHAIRMAN BABCOCK: Somebody invited
17 Quentin Smith to speak here today. Quentin is a partner
18 at Vinson Elkins.

19 And, Quentin, I don't know if you know who
20 invited you, but I can't believe they made you sit
21 through this beat down. And if you've got something to
22 speak about, you have earned it. Let me tell you. So
23 fire away, if you've got anything to say about this
24 topic or anything really.

25 HONORABLE TRACY CHRISTOPHER: Chip,

1 Quentin wrote -- was the subcommittee chair on the
2 subpoena issue, and I told him to come on about noon so
3 that he could present the subpoena issue, but we're not
4 ready to present the subpoena issue. I don't think.

5 CHAIRMAN BABCOCK: So you're the culprit?

6 HONORABLE TRACY CHRISTOPHER: It's my
7 fault.

8 CHAIRMAN BABCOCK: No, we're not ready to
9 take up the subpoena issue.

10 HONORABLE TRACY CHRISTOPHER: It's my
11 fault and I would hate to put Quentin in the hot seat at
12 this point in time.

13 CHAIRMAN BABCOCK: Yeah, we got an angry
14 crowd here, don't we?

15 So, Quentin, as the chair of this
16 committee, I will extend my personal apologies to you
17 for this beat down. Although, frankly, you know, maybe
18 it's just because I'm a geek, I found this
19 extraordinarily interesting. And I think it's a very,
20 very important topic for our State and for our justice
21 system, so I don't think it's a waste of time at all.

22 But I think we've talked it out for today.
23 And I think we can come back next meeting and get more
24 into the specifics, including, Kennon, whether we're
25 going to take jury trials off the table. And then, you

1 know, if we get rid of that issue, then we can inform
2 ourselves with that not a part of the discussion.

3 And I'm disappointed that we did not get
4 to talk about the Problems With Existing Local Rules
5 Approval Process.

6 But, Kennon, were you going to present on
7 that or was Nina.

8 MS. WOOTEN: I think that Justice Boyce
9 was going to present, although I would be happy to chime
10 in and take the lead, if need be, at any point.

11 CHAIRMAN BABCOCK: Okay.

12 MS. WOOTEN: And I, too, am disappointed
13 that we're not talking about local rules today. I share
14 that disappointment.

15 CHAIRMAN BABCOCK: Well, I knew you're
16 probably going to go out and start drinking immediately
17 because of that.

18 (Laughter)

19 CHAIRMAN BABCOCK: Bill, I apologize to
20 the extent that you had to prepare for that and we
21 didn't get to it. We usually --

22 HONORABLE BILL BOYCE: We're perfectly
23 fine. Thank you.

24 CHAIRMAN BABCOCK: You bet.

25 MS. WOOTEN: He really wishes he could

1 talk more today.

2 CHAIRMAN BABCOCK: Well, I don't know what
3 else to do today other than to say the motion to drink
4 is granted, and so we can all go about our business.

5 And, Shiva, where are you? Are you
6 around?

7 MS. ZAMEN: Yeah, I'm here.

8 CHAIRMAN BABCOCK: Where is our next
9 meeting and when is it?

10 MS. ZAMEN: It's in San Antonio. St.
11 Mary's College is going to host us and it's set for
12 March 25th.

13 CHAIRMAN BABCOCK: Okay. And we're going
14 to do it in person, and there's no discretion about
15 remote on that, even though Judge Miskel would love to
16 grant the remote motion, we're not going to let her.

17 MR. HARDIN: Hey, Chip, can I ask
18 everybody to look at the picture of Shiva and the look
19 on her face which shows to me what she really thinks of
20 this entire proceeding. So I think she's recognized all
21 the different realities of the afternoon. Anyway.
22 Excuse me.

23 (Laughter)

24 CHAIRMAN BABCOCK: That says it all,
25 doesn't it, Rusty?

1 MR. HARDIN: It really does.

2 CHAIRMAN BABCOCK: And, Quentin, sorry to
3 make you sit through all of this, but thanks --

4 MR. SMITH: No problem at all. I enjoyed
5 it. I just wish I would have brought my popcorn.

6 (Laughter)

7 CHAIRMAN BABCOCK: Yeah, right. All
8 right, guys, well, we will see you in March, and thanks
9 for everything. And I thought it was a terrific
10 discussion and, you know, we didn't attack Lisa as much
11 as we should have but we've got time for that.

12 MS. HOBBS: There's always March.

13 CHAIRMAN BABCOCK: There's always March.
14 There's always next time. And, Chief, are you in
15 El Paso by any chance?

16 (No response)

17 CHAIRMAN BABCOCK: You're on mute.

18 CHIEF JUSTICE HECHT: No.

19 CHAIRMAN BABCOCK: Did anybody get to
20 El Paso?

21 CHIEF JUSTICE HECHT: Well, Tom tried to
22 shame me into going, but the weather was just so bad
23 here last night and today that we even had to have
24 argument by Zoom on Thursday because people couldn't get
25 to the courthouse.

1 CHAIRMAN BABCOCK: Well, I had a flight.

2 HONORABLE MARIA SALAS MENDOZA: It's cold
3 here, too. You don't want to be here either.

4 CHAIRMAN BABCOCK: Well, my flight got
5 canceled, there was no way I could get there.

6 So anyway, thank you everybody.

7 (Adjourned)

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REPORTER'S CERTIFICATION
MEETING OF THE
SUPREME COURT ADVISORY COMMITTEE

* * * * *

I, MARY CAROL GRIFFIN, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above meeting of the Supreme Court Advisory Committee on the 4th day of February, 2022, and he same was thereafter reduced to computer transcription by me.

I further certify that the costs for my services in the matter are \$2,173.00.

Charged to: The State Bar of Texas

Given under my hand and seal of office on this the 19th day of February, 2022.

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