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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

DECEMBER 2, 2022

(FRIDAY SESSION)

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 Taken before *D'Lois L. Jones*, Certified
Shorthand Reporter in and for the State of Texas, reported
by machine shorthand method, on the 2nd day of December,
2022, between the hours of 9:00 a.m. and 3:58 p.m., at the
Texas Association of Broadcasters, 502 E. 11th Street,
Suite 200, Austin, Texas 78701.

1 clarify that, probably in the next order, and the concern
2 being that while it's good for lawyers and parties and
3 witnesses and other participants in proceedings to be able
4 to participate remotely, generally the centerpiece of the
5 system needs to kind of be in the courthouse for staff
6 purposes and lots of other purposes, so anyway, that's
7 ongoing.

8 The eviction diversion program order is
9 still in effect. We're still expecting some more money
10 from the feds. The feds have regarded the Texas program
11 as outstanding, so we've gotten a lot of extra funding
12 from states that remitted theirs because they didn't use
13 it, and we're putting ours to pretty good use, and we're
14 in partnership with the executive branch, the Governor's
15 office on that, and the Governor has been very supportive
16 of all of this, and that helps to have made it a great
17 program.

18 You know we have remote participation rules
19 in the field and almost out of the field here before long.
20 The committee gave birth to those rules after only about
21 25 months or so intense gestation and lots of study, but
22 the general comments so far are pretty good, and the
23 bottom line is that you can use remote proceedings, except
24 in the district and county courts not in jury trials
25 unless the parties agree and not testimony unless

1 agreement -- the parties agree or there's good cause, and
2 there's some examples in the proposed rule about good
3 cause.

4 We've spoken to some legislators about the
5 proposed rules, and generally the comments have been
6 either entirely positive or positive with suggestions that
7 I personally regard as positive, so I think we're in a
8 position to finish up on those by the end of the calendar
9 year. We wanted to do that to be sure that the
10 Legislature had in mind our full consideration in case
11 that there are issues that they want to consider during
12 the session. We didn't want that to -- we did not want
13 our work to be still ongoing where they couldn't come in
14 and take a look at it and see what they finally thought.

15 The Court has approved a final bilingual
16 form of statement of inability to afford costs on appeal
17 bond. We've been working on that for several months. The
18 bilingual part is hard. It's hard to put it in another
19 language and keep it simple in English and then also
20 simple in Spanish, so I think the work on that is pretty
21 well complete, but we're receiving comments on that.

22 We've put out orders this week approving two
23 sets of rules for juvenile proceedings in response to
24 legislation. Rules that you-all have talked about
25 regarding restraints on juveniles during court

1 proceedings, which we discussed the last meeting, and
2 expedited appeals of orders certifying juveniles to stand
3 trial as adults, so all of those are out, subject to
4 comments, and we hope that they will be final by May the
5 1st.

6 We've issued preliminary orders on forms for
7 wills, cyberbullying, and parental notification, again,
8 rules that the committee has talked about, and the
9 comments are due, I think they were due yesterday, so we
10 are hoping that those rules will be ready and -- in the
11 near future.

12 The local rules process that we discussed
13 has now moved to a website maintained by OCA. That site
14 is available to judges, not the public yet, but in a month
15 it will be available to the public, and under the new
16 rules, courts must post local rules on the website in
17 order for them to be effective, and then we'll look at a
18 process going forward when lawyers and users have comments
19 or judges have comments about the rules as they -- as they
20 play out.

21 And then finally, the Court has asked the
22 Access to Justice Commission to look at the use of
23 licensed paralegals in -- in limited practice roles in
24 legal aid cases, so this is a discussion that's going on
25 around the country. It began in Utah and Arizona, a lot

1 of other states are looking at it, Michigan is pretty far
2 along on theirs. This is a response to the continued
3 absolute critical need for access to justice for the poor,
4 and this would be a way to let people whose charges,
5 who -- charges for their work are generally less than
6 lawyers to be available to help with the legal aid cases.

7 The commission will get input from
8 everybody. They're putting together a -- a working group
9 to look at this. Justice Busby on our court is the
10 liaison to it. It will have representatives from
11 throughout the bar as well as the legal aid community and
12 others, so if you have any input in that, any interest in
13 it, you're absolutely welcome to follow along, but the
14 commission, the Access to Justice Commission is where the
15 work is headquartered, and we hope they'll come up with
16 some ideas in the spring or within a few weeks or months.

17 If they come up with rules changes, those,
18 of course, will come back to this committee to take a look
19 at before the Court decides what to do. So that's kind of
20 an update of what we're doing, Chip.

21 CHAIRMAN BABCOCK: Great. Chief, thank you
22 very much. We are -- we're honored today to have the
23 other chief with us, Sharon Keller, the presiding judge of
24 the Texas Court of Criminal Appeals, and she has some
25 comments that she's going to share with us now.

1 Judge Keller.

2 HONORABLE SHARON KELLER: Thank you, Chip.
3 Our friend and colleague, Chief Justice Hecht, is going to
4 retire at the end of his current term, and that means that
5 this may be the last time we officially have the benefit
6 of his deep thoughts, so we decided this was a good time
7 to talk about what remarkable contributions he's made to
8 the law. I want to be brief, so I will just mention one
9 aspect of his work that I think is a good example of what
10 kind of person he is. It's not very often that a person
11 who is busy or very busy with his own sphere of concerns
12 will take the time to consider broader aspects of the law,
13 and that's usually fine, but Chief Justice Hecht is
14 vice-chair of the Texas Indigent Defense Commission, and
15 of course, his main concern's primarily on civil matters.
16 But in the past few years, Chief Justice Hecht is -- has
17 turned his attention to criminal law matters, too, and
18 he -- in trying to improve various aspects of the criminal
19 law. If he sees something that he thinks needs fixing, he
20 just goes to work on it, and he's done that very
21 diligently, and I really appreciate his efforts to improve
22 the criminal law. And I think that's typical of a lot of
23 what Chief Justice Hecht has done.

24 He's done so much in his life that he could
25 have retired years ago and been content to know that he

1 had done more in his life for the law than most people do
2 in a lifetime, but he never seems to want to rest on his
3 laurels, and if there's an opportunity to contribute his
4 time and talents to the improvement of any aspect of the
5 law, he does it, and he never seems to lose his good humor
6 while he's doing it, too, no matter how many things he's
7 trying to juggle at the same time.

8 He's devoted himself to the law for a very
9 long time, and we are really going to miss him when he
10 goes, which we hope won't be for a while. So on behalf of
11 our Court, thank you, Chief Justice Hecht.

12 (Applause)

13 HONORABLE NATHAN HECHT: Thank you, Judge.
14 This was a complete --

15 CHAIRMAN BABCOCK: You want a response?

16 HONORABLE NATHAN HECHT: -- a complete
17 setup.

18 CHAIRMAN BABCOCK: Correct.

19 HONORABLE NATHAN HECHT: But I hope Judge
20 Keller will come to more of our meetings.

21 CHAIRMAN BABCOCK: It was a setup, but she
22 very much wanted to do it, and there will be more of that
23 type of thing over the next two years, so there you have
24 it.

25 Justice Bland, there's a hard act to follow.

1 HONORABLE JANE BLAND: Well, and even right
2 now there will be more of that.

3 CHAIRMAN BABCOCK: Oh.

4 HONORABLE JANE BLAND: Because, as you know,
5 the Chief is always noting for this group the
6 accomplishments and recognitions that its members receive
7 sort of around the state and even around the country, and
8 I noticed there was something missing from his remarks
9 this morning. So founded in 1780 by John Adams and John
10 Hancock and some other patriots, the American Academy of
11 Arts and Sciences convenes leaders from every field of
12 human endeavor to examine new ideas and address issues of
13 importance to the nation and the world. Now, given its
14 mission, it boasts remarkably few Texans, most of them
15 sort of at the Nobel laureate variety, and of course, even
16 fewer Texas lawyers, but an acknowledgement of the
17 extraordinary service that Chief Justice Hecht has -- has
18 given to our state and to the nation, it really couldn't
19 overlook -- overlook that, and they've added him to their
20 ranks in a ceremony that happened in September.

21 The academy recognized him for his stalwart
22 advancement of access to justice, both within Texas and in
23 his role -- his leadership role in access to justice
24 issues across the country. He joins other Texas legal
25 luminaries like Secretary James Baker, Senator Kay Bailey

1 Hutchison, and Judge Lee Rosenthal, each of whom model the
2 academy's core values, upholding democratic ideals,
3 preserving independence, and fostering deliberative
4 discourse. And because this is such a high honor and one
5 that he really didn't tell anybody about, and some of you
6 at the Hemphill dinner heard about it, but I know not all
7 of you could be there, and I wanted to congratulate him
8 and let you all know of this really wonderful recognition,
9 and more work, I think, associated with the job that Chief
10 Justice Hecht has just recently began.

11 (Applause)

12 CHAIRMAN BABCOCK: Thank you, Justice Bland.
13 Well, that was not a setup. I didn't know that this was
14 going to happen. Any response to that?

15 HONORABLE NATHAN HECHT: No, it's -- we can
16 adjourn now if you want.

17 CHAIRMAN BABCOCK: Well, the accolades may
18 almost be over, but Justice Young has honored us here. As
19 most of the people on the committee know, but not some of
20 our visitors may know, Justice Hecht has been the liaison
21 to this committee for over 30 years, and Justice Bland has
22 become the vice-liaison or the co --

23 HONORABLE JANE BLAND: Deputy.

24 CHAIRMAN BABCOCK: The deputy liaison, so
25 she attends our meetings. And then Justice Young, who is

1 at the end of the table, was a long-time member of this
2 committee before the Governor appointed him to the Supreme
3 Court, but, Justice Young, any comments off-the-cuff or
4 setup-wise or otherwise?

5 MR. YOUNG: Well, I could go on at great
6 length about the Chief, but the Chief would fire me if I
7 did, so I instead will say this to the members of this
8 group, that I always wondered when I was sitting here
9 whether or not all of the blood and sweat and toil and
10 tears, whether it really made much of a difference in the
11 Court, and so I thought that I owed it to you to come and
12 tell you that now, having been there for about a year,
13 that it really does, and that the work this committee does
14 so tirelessly makes the work of the Court doable. I just
15 don't know how we could possibly handle the administrative
16 part of the work of the Court without it, so the fact that
17 the Chief always comes and spends a precious day with this
18 group should be evidence enough of how important it is,
19 but I can now tell you from the inside that it honestly is
20 a true Godsend, so I'm glad to be back today. I've really
21 missed being here and look forward to hearing the deep
22 thoughts.

23 CHAIRMAN BABCOCK: Well, we miss having you
24 here, too, and I think I looked, and maybe a majority of
25 the Court was on this committee at one point in time, so

1 we can make anything happen we want.

2 HONORABLE JANE BLAND: We didn't all agree
3 when we were on this committee.

4 CHAIRMAN BABCOCK: Well, that's true.
5 That's a problem I forgot about.

6 Putting this agenda together has been -- has
7 been not the simplest thing I've ever done, and our next
8 speaker is from the Governor's office, and his schedule
9 today is a mess, so he's -- we tried to slot him -- James
10 Sullivan, I'm talking about, the general counsel to the
11 Governor. That's his seat right there. When he comes,
12 we'll fit him in as best we can. He thought he would be
13 available right about now, but obviously not.

14 So we're going to go to something that I'm
15 really looking forward to, and that is a conversation with
16 my good friend Phil McGraw, who used to go by just old
17 Phil, but now he goes by Dr. Phil, and I told him I was
18 going to tell them a war story -- tell you a war story
19 about him, and so here it is.

20 There is a case that was decided by the
21 Supreme Court called *Turner vs. Dolcefino*. Sylvester
22 Turner is the current mayor of Houston, as many of you
23 know, and Wayne Dolcefino was an investigative reporter
24 for KTRK, Channel 13, in Houston, and he wrote -- or he
25 published a broadcast about Mayor Turner a few days before

1 the 1991 election for mayor where Turner was running
2 against Bob Lanier, and it was very critical of Sylvester
3 Turner -- and, James, you're right down here, so come on
4 in. And I'm going to suspend my war story, to be
5 continued.

6 DR. PHIL MCGRAW: No need to continue.

7 CHAIRMAN BABCOCK: You don't even know where
8 it's going. But I will pick it up in a minute after we
9 hear from James Sullivan. And your timing is just almost
10 spot on, because we had gotten to you in the program here,
11 and I know you have come from --

12 MR. JAMES SULLIVAN: Two whole blocks. I
13 had to do what I could to upstage Dr. Phil. I'm sorry I'm
14 late, everybody.

15 CHAIRMAN BABCOCK: That's okay. We sent out
16 to everybody biographies of all of our speakers today, and
17 so I'm not going to spend time repeating all of that,
18 other than to identify, you know, who they are and if I
19 have a war story, yeah, tell it, but, James, we would love
20 to hear your comments now. I know you're on a ridiculous
21 schedule today, so thank you for coming.

22 MR. JAMES SULLIVAN: My pleasure. Thank
23 you. Am I up right now?

24 CHAIRMAN BABCOCK: You're up.

25 MR. JAMES SULLIVAN: Wow, that was really

1 good timing. Gosh, okay. Well, I hope I don't repeat
2 anything anybody else said, I apologize.

3 CHAIRMAN BABCOCK: Just don't bad mouth the
4 Chief.

5 MR. JAMES SULLIVAN: Oh, no, no, no, no.

6 CHAIRMAN BABCOCK: We've had enough of that.

7 MR. JAMES SULLIVAN: Okay, I won't. I'll
8 cut all of my Hecht material.

9 CHAIRMAN BABCOCK: Right.

10 MR. JAMES SULLIVAN: Well, it's really an
11 honor to be here today in front of this group and to
12 represent the executive branch alongside the legislative
13 branch, judicial branch, and the Dr. Phil branch, and
14 really an honor to be here. The -- you know, the job that
15 I have as general counsel to Governor Abbott is really an
16 exciting one for -- for any lawyer. You know, my friends
17 who served under Governor Bush in this job or, you know,
18 Governor Perry in this job, always a very exciting one,
19 but it's particularly exciting for somebody with a
20 background of Judge Abbott and then Justice Abbott and
21 then Attorney General Abbott and now Governor Abbott, with
22 the work that he has done in all of those different
23 branches, and so it's an honor to be here today and to say
24 a little bit and hopefully hear a lot up from the other
25 branches and from the professoriate and from titans of the

1 Texas bar about today's topic about improving the justice
2 system in Texas.

3 One of my illustrious predecessors in the GC
4 chair for Governor Abbott, Justice Blacklock, I know that
5 he heard the same thing when he got that job the first day
6 that I heard the first day I got the job from Governor
7 Abbott, and it's a straightforward and important command,
8 follow the law. That is a lot of work, and especially
9 when you are pretty much always at the podium with a
10 former justice who is going to have very tough questions
11 sometimes about what the law requires or forbids or
12 allows. It's kind of like when I was a real lawyer, an
13 appellate lawyer, but I'm on the podium pretty much 24/7,
14 so it's a very exciting opportunity that extends to things
15 like, you know, advising the Governor when there are
16 vacancies that require judicial appointment with Senate
17 confirmation, and also, of course, the process of
18 bicameralism and presentment to the Governor.

19 And so as we're going into the 88th
20 Legislature session, on January 10th, 2023, but who's
21 counting, the -- you know, so we're excited to see all of
22 the different things and work with the branches to advise
23 the Governor when it comes time for him to play his role.
24 But today's topic, given that special background for
25 Governor Abbott with his experience in the judicial

1 branch, today's topic is one that is particularly
2 important to Governor Abbott, and so we're really -- I'm
3 really excited to be here on behalf of the Office of the
4 Governor and as I say, hopefully hear a lot about how we
5 can improve the justice system in Texas and to maybe just,
6 you know, flag two important priorities for the Governor
7 about improving the justice system in Texas. You know, we
8 look forward in the Office of the Governor to working with
9 Chief Justice Hecht and to working with the Lieutenant
10 Governor and the Speaker to see the ways that we can, you
11 know, do more and help the courts succeed in promoting the
12 rule of law in Texas.

13 So today, because I'm the only thing
14 standing between you and Dr. Phil unless the program
15 changed and I missed that, and hopefully between hearing
16 from our friends in the legislative branch, I want to flag
17 two things that are not new priorities for Governor Abbott
18 for improving the justice system in Texas, but they're
19 important ones, and they bear reiterating because there's
20 more work to be done on both of them. And those two
21 things are bail reform and business courts.

22 On bail reform, the government's first duty,
23 whatever branch we're in, whether we're at the state or
24 the local level, our first duty is to keep Texans safe,
25 and bail reform, of course, is a very important part of

1 that process. So, you know, that was why, you know, it
2 took the Governor, you know, in word and in deed to make
3 that happen in the 87th Legislature.

4 You know, we had to -- the Governor had to
5 call a few special sessions, but the Legislature
6 ultimately succeeded in sending to the Governor's office
7 the Damon Allen Act; and the Governor, of course, was very
8 proud to sign the Damon Allen Act into law, but if you --
9 you know, if you -- the problem is only getting worse if
10 you look at, you know, statistics in recent years, if you
11 look at the trends for Houston Crime Stoppers' numbers,
12 things of that nature. It was very helpful to receive
13 from the Office of Court Administration, Megan was very
14 helpful last night to send all of the hard work that has
15 been done on the reports to the Legislature the Damon
16 Allen Act requires, and the recommendations for the things
17 that can be done to put those important reforms in
18 practice to keep Texans safe and also to make sure that
19 individualized consideration is being given to -- to the
20 facts and circumstances for each criminal defendant.

21 It is, of course, very important that
22 dangerous criminals are not being quickly released back
23 onto the streets to do more of the same and to terrorize
24 our fellow Texans; and at the same time, it's important
25 that the facts and circumstances be given individualized

1 consideration based on all of the tools and the PSR's,
2 and, you know, about what danger to law enforcement and to
3 Texans might be posed by somebody getting back on the
4 streets; but also to make sure that, you know, the
5 hypothetical, you know, the young mother that has been
6 picked up, poses no danger to anybody except the child
7 that -- you know, that she might need to help her husband
8 take care of, and, you know, maintain a job; and so there
9 are important interests, of course, on both sides that
10 have to be served, but more has to be done to keep Texans
11 safe.

12 And so the Office of the Governor is very
13 excited to, you know, in addition to what we received from
14 OCA, from the judicial branch, we're also excited to hear
15 anything today or as the conversation goes forward in the
16 88th legislative session. You know, the people of Texas
17 are going to send their elected representatives to that
18 pink building up the street, and they're sending some very
19 good lawyers and -- because I keep looking at my notes, I
20 haven't seen whether we were also graced with two of the
21 very good lawyers that the people of the Senate District 1
22 and House District 67 are sending to that pink building in
23 Chairman Hughes of Senate State Affairs and Chairman Leach
24 in House Judiciary and also the important interim
25 committees on which he is serving.

1 And so we look forward to hearing more about
2 what the -- what the details are going to be about what
3 more can be done, but more must be done in the view of the
4 Governor, and so we look forward to continuing the
5 conversation with the judicial branch and with the
6 legislative branch on -- on doing what must be done.

7 On the subject of business courts, Justice
8 Young and I, you know, have had the honor of a
9 multi-session strategy dating back to the 2015 when we
10 were both in private practice and I could use his first
11 name in front of all of you friends. Everybody can still
12 use mine, of course, or Sully or whatever else, but, you
13 know, since 2015, business courts' bills have received
14 thorough, very thorough consideration in the House and the
15 Senate, and it is an important issue and one that Governor
16 Abbott has -- has championed over a number of sessions,
17 and he's done that for a number of reasons. And because
18 we're here today, I didn't come up with any deep thoughts,
19 and I apologize for that.

20 CHAIRMAN BABCOCK: Shallow thoughts are
21 okay.

22 MR. JAMES SULLIVAN: But shallow thoughts,
23 you know, are the best I can do, and you get what you pay
24 for with a government lawyer, but when we're talking about
25 ways to improve the justice system in Texas, the thought

1 on having some specialized business courts in Texas, they
2 are all about promoting judicial excellence, and one of
3 the criticisms that we've heard and that I would be
4 honored to continue the conversation with our friends from
5 the judicial branch, but at some of the hearings in the
6 pink building, one of the things that we've heard is, you
7 know, "The business courts bill, this is a dumb judges
8 bill," and I didn't hobble down the street here to come
9 and tell anybody here in attendance that we have any dumb
10 judges in the state of Texas. We don't.

11 But I also wouldn't say that when the United
12 States Congress passed the Federal Courts Improvement Act
13 of I think 1981 or something like that, when they created
14 the U.S. Court of Appeals for the federal circuit, a
15 specialized court that hears patent disputes and claims
16 court proceedings, they didn't do that because they
17 thought that circuit Judge Posner on the Seventh Circuit
18 or circuit Judge Jones on the Fifth Circuit, they didn't
19 think that they were dumb. Far from it. That's obviously
20 not true, and that's obviously not the implication of
21 creating the federal circuit. There are certain types of
22 cases in which being a repeat player and having a docket
23 that -- that centralizes and then routes to specialized
24 judges that in their day-to-day activities are working on
25 and working pure the law of Texas or in the federal system

1 these specialized, high stakes, very important, very time
2 and labor-intensive cases where hearing cases, you know,
3 of a particular type becomes old hat instead of something
4 new.

5 I had an experience when I was a real lawyer
6 where I would be talking slower than I am today because I
7 used to get paid by the hour, where in private practice I
8 was representing a corporate client in a shareholder
9 derivative action where some of the shareholders were not
10 happy that a -- kind of a save the company, you know, deal
11 had been reached. My corporate client was in danger of
12 bankruptcy, it was imminent, and they found some -- a
13 corporate partner to acquire them. It was going to save
14 the day, save Christmas and everything else, and the
15 client said, you know, you've got to make this happen, but
16 some of the shareholders are saying that they speak for
17 the corporate forum here, they speak for this corporate
18 entity, and they don't like this deal, they want a better
19 deal or a different deal.

20 The corporate charter for the client at the
21 time said -- and everybody had voted on it, it had a forum
22 selection provision, where, you know, everybody had said,
23 we are going to incorporate under the laws of Delaware,
24 and any disputes about the meaning of this charter or
25 about who shall speak for the corporation, those shall

1 proceed in the Delaware chancery court, and those are
2 provisions that the Delaware chancery court, because they
3 centralized those things there, they -- they've said quite
4 a bit about in the past 10 years or so, and that is legal
5 under the laws of Delaware, and it's something that --
6 that many, you know, deal lawyers and corporate lawyers
7 write into the -- their corporate charters, so that even
8 for companies that are headquartered in the number one
9 state for business in Texas, they still want those
10 disputes sent to a specialized court. And I don't think
11 anybody up there thinks that the other Delaware district
12 court judges are dumb or that the Delaware Supreme Court
13 is dumb, and indeed, in addition to the Delaware court of
14 chancery, there is also a Delaware state district court
15 also for specialized business disputes, and I don't think
16 that anybody thinks that the Delaware chancellors are
17 dumb, but what they do think and what now, by a pretty
18 substantial margin, a majority of sister states have all
19 decided is that having specialized business courts is a
20 way to remain competitive to have corporate charters, and
21 it's the reason that I'm sure that the Delaware Porsche
22 dealership is very, very nice in comparison to Porsche
23 North Houston compared to what you might expect, given how
24 big their state is and how big ours is.

25 And so the -- to keep up with the Joneses

1 and to ensure that Texas remains the greatest state to do
2 business in the greatest country in the world, we have
3 supported for a number of sessions the business courts'
4 bill that will allow us to keep pace and allow us to
5 remain competitive, not only for headquartering, but also
6 for corporate charters. The Legislature has done
7 remarkable work in the past, you know, decade or two to
8 modernize and improve the Texas Business Organizations
9 Code, but when Texas headquartered businesses -- and they
10 keep coming, and we're very happy about that. It's great
11 news for U-Haul rates coming from California and bad news
12 for U-Haul rates going to California. We want that to
13 continue, but we also think that it is important that the
14 Legislature and that our courts, all of this feeding up,
15 of course, to the Texas Supreme Court, that -- that the
16 decisions that the people of Texas make about how
17 corporate law ought to work for people doing -- or
18 companies doing business here, that will get a chance to
19 tee it up with specialized judges in the first instance,
20 that will give Chief Justice Hecht and his colleagues a
21 good record on appeal and a carefully written, you know,
22 explanation of those specialized judges' thoughts on how
23 best to -- how best to make business law work here and --
24 and so then the hope is that doing these things, you are
25 going to promote judicial excellence in the State of

1 Texas, not by, you know, getting smart judges for the
2 first time, but rather by taking some of the smart judges
3 that we've got and giving them a docket that will let
4 smart judges that we have write smart opinions about an
5 important topic that will ensure that Texas remains open
6 for business.

7 And so with that, Dr. Phil, thank you very
8 much, and I look forward to hearing everything else.

9 CHAIRMAN BABCOCK: Not so quickly.

10 Anybody -- anybody --

11 MR. JAMES SULLIVAN: Oh, no.

12 CHAIRMAN BABCOCK: -- have any questions of
13 James about either the bail reform or business courts?

14 HONORABLE NATHAN HECHT: I may have one
15 thing.

16 CHAIRMAN BABCOCK: Yeah, Justice Hecht.

17 HONORABLE NATHAN HECHT: So on bail reform,
18 Presiding Judge Keller and I held a press conference in
19 the Supreme courtroom in the -- during the 2017 session on
20 an idea that was pretty simple, which is if a defendant is
21 not a threat to society, release them; if they are a
22 threat to society, detain them under appropriate
23 conditions.

24 MR. JAMES SULLIVAN: What an idea. Inspired
25 leadership by the great Chief Justice Hecht.

1 HONORABLE NATHAN HECHT: And figure out a
2 way to figure out which is which, because we viewed bail
3 schedules for so long that the idea that you'd actually
4 operate on information was sort of foreign, but Senate
5 Bill 6 makes a lot of progress to that, and it's the
6 branches working together on those things that have gotten
7 us as far as we've been.

8 And then on specialized courts, this started
9 about 40 years ago and Texas was a little late to the --
10 to the party, but we've already had drug courts and
11 veterans courts and opioid courts, and now we've got
12 eviction courts, more or less, specialized dockets. We're
13 working on debt collection dockets because that's 30
14 percent of our case load, and this idea is not peculiar to
15 Texas. It's a national idea that these cases have
16 peculiar needs and processes and they ought to be handled
17 as efficiently within that as they can, and that's kind of
18 a work in progress as well. But I've worked with several
19 Governors, and they've all been great to work with.

20 I tell people around the country about how
21 well our branches work together in Texas for the most
22 part, and they are always astonished because there's a lot
23 of places where that doesn't happen, but I can't let it
24 pass without saying for the third branch, what a -- what a
25 great working relationship we have with the other two

1 branches in Texas on institutional things, certainly not
2 cases or anything like that, but to try to make the
3 judiciary work better, and former Justice Abbott, you
4 might think has a dog in that hunt since he's a graduate
5 of our group, but he's also very much a Governor and takes
6 very much an executive position, and it's just great to
7 have the branches function as well as they do.

8 CHAIRMAN BABCOCK: Okay.

9 MR. JAMES SULLIVAN: I see my red light is
10 on, but if I could respond, I was remiss in not thanking
11 Chief Justice Hecht and Justice Jenn Caughey and Zina Bash
12 and everybody else on the Texas Judicial Council for the
13 2022 Civil Justice Committee, the recommendation about
14 business courts for a pilot program, we certainly hope
15 that the Legislature will consider doing the things
16 that -- that they have the power to do to make business
17 courts a reality in Texas, but the recommendation about a
18 pilot program that the Judicial Council has promulgated
19 was very welcome news for all of the members of the
20 business community, you know, see sweet types and the
21 in-house counsel types, everybody was really thrilled to
22 see that.

23 I -- again, when I used to make money, I --
24 I had a case in the -- I think it was the metro Atlanta
25 specialized business court, and I believe that was a

1 judicial pilot program. Again, one of those sister states
2 that somehow is getting ahead of us on business
3 development, economic development. It was a very
4 professional operation. It had limited geographic scope,
5 but in Georgia maybe it's not that hard to know exactly
6 where to draw the pilot program, but we look forward to
7 working with you, Chief, and with the council to do what
8 we can if there's anything we can do in the executive
9 branch to make that pilot program a success.

10 Again, as Justice Young and I now well know,
11 it is a multi-session strategy, and so, but we think that
12 the recommendation here will give proof of concept and
13 hopefully also will stand for our friends in the
14 Legislature as a signal that -- that the judicial branch
15 understands that this can be done and is something that
16 they really ought to be able to get behind, so thank you
17 very much.

18 CHAIRMAN BABCOCK: Levi, and then Justice
19 Kelly.

20 HONORABLE LEVI BENTON: James, good to see
21 you again. Remind us why the business court bill failed
22 in the last session?

23 MR. JAMES SULLIVAN: Well, if you've seen
24 the Schoolhouse Rock thing, you know, there's a million
25 ways that --

1 HONORABLE LEVI BENTON: Well, the short
2 version.

3 MR. JAMES SULLIVAN: The short version,
4 which of the million ways this time? So, you know, going
5 back, in 2015 when Representative Villalba introduced a
6 kind of a predecessor version, not the same version, and
7 it's gotten better since then and it's not a chancery
8 court, the Legislature made very, very clear that the --
9 you know, the people's representatives extends to jury
10 service, and there's nothing in the more recent business
11 court bills that have been filed in every session since
12 that would do anything to jeopardize the constitutionally
13 protected right to a jury trial. And so, you know, in
14 2021, the business court bill got -- it got closer than it
15 ever did, and, you know, in some of the previous sessions,
16 you know, I won't give all a million of the different
17 reasons. In 2021, though, honestly, it was -- it was a
18 matter of running out of time. It was -- it was, you
19 know, this must be what, you know, sports betters feel
20 like.

21 I had on the -- there's kind of a magic day,
22 you know, under the House's rules. The business courts
23 bill made it out of, I believe, Chairman Leach's
24 committee. It made it into the House calendars committee.
25 It got out of the House calendars committee, which is a

1 huge step, under Chairman Burrows and made it to the floor
2 of the House, but it made it onto that list of the bills
3 that are on the floor of the House where under their rules
4 the clock is ticking, and you know that when the clock --
5 I think it's midnight, but I'll say it's that because it
6 sounds cooler, but you have a printed out list, and you're
7 going to get that list and it's many, many pages. And if
8 you're number one on the list, then you know that someone
9 up there loves you, and if you're last on the list, you
10 know that you've got a courtesy, hey, we put you on the
11 last day.

12 And the business courts bill was in the --
13 it was kind of in the -- it was in the splash zone. There
14 was a very, very real chance that we were going to get
15 there, but as the members are working through issues of
16 parliamentary procedure, some of which may be --
17 intentionally take a lot of time on the back mic, and the
18 parliamentarian is working hard to resolve points of order
19 on bills that have nothing to do with business courts,
20 that might have had to do with any of the million issues
21 you could think of that our elected representatives would
22 care about. And so, you know, tuning in, you know,
23 because it goes very late into the night and I wouldn't
24 look this professional at, you know, 11:59 p.m. We were
25 watching very eagerly as they slowly, slowly made their

1 way down the list, and I -- I didn't bring it over because
2 I didn't want it to get rained on because it's a cherished
3 keepsake that I'm going to look back on when the business
4 courts bill does reach the Governor's desk and he does
5 sign it into law. This will be a keepsake of, you know,
6 the value of perseverance. We made it to the page that
7 had the business courts bill from last session. I had it
8 highlighted in green here, and we were -- we were there,
9 there, and the clock struck midnight, and it turned into a
10 pumpkin for another two years.

11 And so, honestly, that's what happened with
12 that one, and so that's why I'm glad to get to filibuster
13 everybody here to tell you why we think it's important and
14 how we think we can get past any challenges, get it -- get
15 it onto the floor in the House and the Senate just a
16 little bit quicker next time so that we can get it -- you
17 know, we always get almost all of them within that last
18 little period where they all go into the veto period, but
19 you know, this one is not on the, you know, veto watch
20 list. This one would be one that would be, you know, very
21 near to sign. So honestly, that was kind of the problem,
22 just ran out of time, but we can just keep plugging away.

23 CHAIRMAN BABCOCK: Thanks, James.

24 Justice Kelly.

25 HONORABLE PETER KELLY: This strikes me as a

1 solution in search of a problem. You know, first, I'm old
2 enough to remember when Delaware adopted its very generous
3 or very flexible laws that it was congratulated for
4 winning the race to the bottom, and I don't understand why
5 Texas wants to hurl itself to the bottom along with
6 Delaware. And it does seem a little bit disingenuous to
7 compare it to -- say it's not a dumb judges bill because
8 of the federal court court of claims and the federal
9 circuit. I mean, that was done to maintain uniformity
10 across the nation for rules -- for cases involving the
11 federal government in patent courts.

12 Now, the very point of Delaware corporate
13 system, corporate structure, is to allow flexibility, so
14 you really -- you don't have repeat players because every
15 corporation is set up separately, same way Texas now has
16 the LLC's and adopted, you know, business organizations
17 law that pretty much modeled after the Delaware code. It
18 allows flexibility so you don't have repetition of the
19 same issues.

20 Third, I'm not aware of any study being done
21 or any individual examples of a corporation being denied
22 justice because it was denied or a shareholder denied
23 justice because the appeal went to or it was tried by a
24 duly elected Texas judge under the current system, and
25 there's all of this talk of the theory it will be more

1 efficient. Where -- has there been a single miscarriage
2 of justice?

3 MR. JAMES SULLIVAN: Well, Justice Kelly,
4 I'll give you one from my personal experience, and I
5 appreciate this opportunity to respond. The case that I
6 mentioned, the kind of the bet the company, save the
7 company case, there was a -- there was a Delaware forum
8 selection provision in the corporate charter, and so --
9 and the bankruptcy was imminent, if the transaction did
10 not go through bankruptcy, and so they -- they said, but
11 we're headquartered in San Antonio, and they have a
12 rotating docket there, and you need to get down there
13 because they're asking for a TRO and a preliminary
14 injunction to stop this merger and acquisition, and if
15 they stop the merger and acquisition, you're fired because
16 we're bankrupt, and we're done.

17 And so I appeared at the rotating docket,
18 and the case was assigned to a conscientious,
19 hard-working, smart district judge, elected by the people
20 of Bexar County. It was also a judge whose background
21 entailed long expertise in other matters that did not have
22 to do with corporate charters and forum selection
23 provisions and preliminary injunctions that might lead to
24 a bankruptcy. And what we -- we briefed it up very
25 thoroughly at the high cost that tall tower lawyers

1 charge, and the law that the people that had formed this
2 corporation when they had incorporated under Delaware law,
3 the law was quite clear that they were entitled to
4 dismissal of the TRO and the preliminary injunction motion
5 and the complaint, because those people in amassing their
6 assets to maximize profit, that they wanted their disputes
7 heard not only under Delaware law, but in the Delaware
8 chancery court.

9 And so we -- we found out which courtroom we
10 were to go into, and we appeared and made our arguments in
11 front of this hard-working, conscientious, smart criminal
12 law expert district judge elected by the people of Bexar
13 County, and the judge gave us a fair hearing. The judge
14 listened intently. The judge clearly had not had the time
15 to read hundreds of pages of dense Delaware law, and at
16 the end of the hearing, she said this has been very
17 interesting and very helpful to me. I applaud counsel
18 from both sides for -- for giving everything that would be
19 needed here to -- to make this decision, but I just have
20 to say that this is the first time I've ever seen anything
21 like this, forum selection provision and corporate
22 charter, I've never seen anything like this. It's just
23 never come across my desk. It never came across my desk
24 in the career as a practicing lawyer that led the people
25 of Bexar County to put me on this bench and serve them.

1 And so I appreciate both sides, and, Mr. Sullivan, you've
2 made what sound like some very persuasive arguments, and
3 it sounds like the client paid a lot and hopefully got
4 their money's worth, but I came in here, my practice in a
5 matter like this was that I'm going to grant the TRO and
6 grant the preliminary injunction, because I've just never
7 seen anything like this, and that's what I'm going to do.
8 It is so ordered. My client went bankrupt, so that's
9 anecdotal. And I concede that.

10 HONORABLE PETER KELLY: And you were
11 advocating for a client. You feel like you lost. I mean,
12 let's just talk about who the narrator is in that
13 narrative.

14 MR. JAMES SULLIVAN: Oh, yeah, absolutely.

15 HONORABLE PETER KELLY: So you feel justice
16 was not done, and the other side, I could talk to the
17 other lawyer and they might say justice was done.

18 MR. JAMES SULLIVAN: Well, and I'm sure that
19 my friends in opposition in that case did feel like
20 justice was done, but it's not just litigators or former
21 litigators like me that have a say in this fight. It's
22 also the in-house counsel or the corporate lawyers, you
23 know, the guys that don't go to the podium, and what are
24 they telling their clients? Clients for corporations that
25 want to headquarter and do business in Texas, are they

1 telling their clients, if you would just get somebody
2 better than Sullivan then you would be able to win
3 something like this? No, that's not what they're saying.
4 What they say instead is under no circumstances should you
5 avail yourself of the Texas Business Organizations Code
6 because the judicial system in Texas, unlike a majority of
7 sister states, does not have a specialized docket for
8 dealing with time-sensitive, resource-intensive
9 expertise-necessitating cases that are bet the company.

10 You know, we got a fair shake and I lost,
11 and my win-loss record has a ton of L's on it, Justice
12 Kelly, and it will get more if anybody ever hires me again
13 to stand at any podium, but I think that the idea that by
14 trying to -- to do what Delaware is doing, to describe
15 that as a race to the bottom, I just I don't -- look at
16 their courthouse in Delaware. Delaware is the size --
17 it's smaller than some counties of the 254 that we have in
18 this state, and everybody here that wears a robe would eat
19 their livers to go up and look at that courthouse and see
20 this gleaming beautiful thing that they have built
21 because -- and what all of the lawyers are parking in the
22 parking lot there, because every in-house counsel that
23 doesn't want a malpractice suit is telling their Texas
24 headquartered corporate clients, you should incorporate
25 under the law of Nevada or Delaware or some other state

1 that in addition to whatever the substance is and whatever
2 justice you're going to feel.

3 Because in all of these business disputes,
4 it's business on both sides, so there's a business that
5 feels like they got a fair shake and there's the business
6 I represented, and I'm telling you as a biased, you know,
7 very partial observer that it wasn't the right way from a
8 process standpoint here, but if everybody can agree --
9 because the same -- you can be on the plaintiff or the
10 defendant side in any of these big business disputes, but
11 if nobody wants to litigate them in our courts here in
12 Texas, that, to me, is the problem, and if -- it seems to
13 me like a race to the top, but, Justice Kelly, I'll give
14 you my card because I would love to consider this
15 conversation and get another L on my record here.

16 HONORABLE PETER KELLY: I've looked at this
17 for a while, and I just don't see any statistics that say
18 that justice is not being done or that it does anything
19 other than benefit Texas lawyers or a particular Texas
20 courthouse.

21 MR. JAMES SULLIVAN: That's fair. I think
22 it does benefit Texas lawyers, and that's why I hope that
23 our friends in the bar on the plaintiff's side and the
24 defendant's side will support this, but the -- in terms
25 of, you know, on the where's the data point, I don't think

1 that it's a matter of how many people feel like they --
2 they didn't -- you know, that there was an injustice done
3 in their case. Every judge here knows that when they have
4 to run for election they disappoint one side in every
5 single case, because there's a loser, but they do try to
6 give a fair shake, but if -- if everybody, you know, wants
7 to do them down here, it seems to me like that's to the
8 good.

9 CHAIRMAN BABCOCK: The good news is, the
10 really good news is, none of us are going to have to eat
11 our livers --

12 MR. JAMES SULLIVAN: Because we can eat
13 lunch.

14 CHAIRMAN BABCOCK: -- by going to Delaware
15 to see their gleaming courthouse, because I've had a very
16 intense case there this last year, and they are totally
17 shut down and remote, and so you don't get there at all.

18 One more comment, and James has got a tight
19 schedule. One more last comment, Roger.

20 MR. HUGHES: More of a question about the
21 proposed legislation. I'm interested to know how are
22 these judges going to be selected? Will they be
23 appointed, or will they be elected? Because if they're
24 elected, I think one of the things we've seen, that there
25 is a cycle of judges associated with one party, regardless

1 of their acumen, experience, and intelligence, get turned
2 out on the street simply because of their party
3 affiliation. And then second, I'm interested to know what
4 the territorial jurisdiction of these business courts are
5 going to be, whether they will be set up by counties or
6 whether we're going to have super districts which
7 consolidate all of the litigation in certain cities.

8 CHAIRMAN BABCOCK: James will answer those
9 questions for you, Roger, but not right now.

10 MR. JAMES SULLIVAN: It is so ordered.
11 Thank you. Yeah, I'll get with you, Roger.

12 CHAIRMAN BABCOCK: Because we're on a
13 schedule, like I said, we have a bunch of puzzle pieces to
14 fit together here, but it's a legitimate question, Roger,
15 and it was certainly asked the last session, as were
16 Justice Kelly's and Levi's concerns, so we'll leave it
17 there, but thank you very much for joining us. And now
18 we'll get back -- and stay as long as you want or leave
19 when you need to, James, but thank you again.

20 MR. JAMES SULLIVAN: Sorry, I can't get here
21 late and leave early.

22 CHAIRMAN BABCOCK: Well, that's -- there you
23 go. So we were in the middle of a very insightful war
24 story when you walked in.

25 MR. JAMES SULLIVAN: And then I had a less

1 interesting one, I'm sorry.

2 CHAIRMAN BABCOCK: I know, it was a
3 juxtaposition of the two was terrible, but Phil McGraw
4 used to be a trial consultant. His -- the person who
5 trained under him you will hear from later, Jason Bloom,
6 is in the house and over to my right, but this was before
7 Jason's time, and it was the *Turner vs. Dolcefino* libel
8 case in Harris County, and Phil was there to help us pick
9 a jury, and there were two things that he did that stick
10 out in my mind even now. One is that he calls this jury
11 science, and after this experience I figured it must be
12 voodoo, but we got a lengthy jury questionnaire, and we
13 got it -- we got it completed by all of the jurors,
14 prospective jurors, the day before, so he and his people
15 had time to look at it.

16 The next day they had ranked every
17 prospective juror as either an A, as somebody we really,
18 really wanted, or a D. That was somebody we really,
19 really didn't want, or a C, somebody in the middle that
20 would take more voir dire to figure out where they were
21 coming from. And at the end of the day there was one
22 woman who was an A, and I could see no reason whatsoever
23 for her to be an A, or a D, for that matter. I mean, she
24 was just one of those jurors that doesn't stand out, and
25 because she was one of our A's, I didn't ask her a lot of

1 questions because I didn't want the other side thinking
2 that we really liked that person and so -- so not a lot of
3 questions asked by me or the other person, so when it came
4 down to making our strikes, back in the room with Phil,
5 and I said -- and I won't say her name on the record, but
6 I remember it, and I said, "Why have you ranked this
7 person an A?" And he just smiled his enigmatic smile,
8 which you'll maybe see later. See, he's doing it right
9 now, and he said, "Just trust me on this." I said,
10 "Okay." So we didn't -- we didn't cut her, and she turns
11 out to be our absolute leader in the jury room, and the
12 jury was out eight days, and she never waivered. We lost
13 the case 10 to 2, but she was an A juror for us, and
14 afterwards I said, okay, how did you spot this woman, and
15 the more enigmatic smile, and, you know, it's jury
16 science. Well, Phil --

17 DR. PHIL MCGRAW: It was my Aunt Carol.

18 CHAIRMAN BABCOCK: So now it comes out
19 finally. And the other thing was more substantive. The
20 other side made a Batson challenge against us, and we made
21 a Batson challenge against them, and we're up at the bench
22 and arguing back and forth, and Phil pulls out a juror
23 questionnaire of a black juror, prospective juror, and
24 they had been arguing that the reason they're cutting all
25 of the white jurors is because they could never see their

1 way to award punitive damages. And here's a black juror
2 who said, "I could never award punitive damages," and the
3 judge threw up her hands and said, "Okay, I'm denying both
4 motions," which was the proper -- proper ruling at the
5 time, but, you know, I never would have thought to pick
6 that up, and eagle eye here got it, and this came out of
7 this company, this amazing company that he developed
8 called Courtroom Sciences, CSI, before there was a popular
9 CSI, and they had an amazing facility in Las Colinas with
10 two courtrooms, one a replica federal courtroom, big huge
11 high ceilings and the federal seal, and another smaller
12 state court. And they just ran so many mock trials and
13 jury prep, and it was a science that this man to my right
14 largely created, so he is not coming to us as somebody who
15 has been introduced to Oprah Winfrey by me and made a lot
16 of money on television.

17 And, Phil, I don't know if you know this,
18 but your accountants have yet to send me my royalty checks
19 for that introduction.

20 But he is one of the smartest people I've
21 ever met on general topics, but particularly on what we do
22 when we relate with our citizens and ask them to resolve
23 our disputes. So I created the title in consultation with
24 Phil, but "How the pandemic, the internet, and social
25 media have affected the legal system, including the civil

1 and criminal jury," it covers a lot of ground, but he's
2 got a lot to say, and my partner, Joel Glover, in the back
3 and Phil and I talked this through last night for several
4 hours, and I know you're going to be interested in his
5 comments, so with that introduction, there you go.

6 DR. PHIL McGRAW: Well, if Texas had
7 business courts you could get those royalties heard.

8 MR. JAMES SULLIVAN: Thank you, Dr. Phil. I
9 rest.

10 DR. PHIL McGRAW: He says I'm the smartest
11 person he's ever met --

12 CHAIRMAN BABCOCK: I said one of the
13 smartest. The Chief.

14 DR. PHIL McGRAW: One of the smartest, okay.
15 I think he says that because I've been married 46 years,
16 and you've got to be smart to be married 46 years. I
17 figured out when my wife says "What?" it's not that she
18 didn't hear me. She's giving me a chance to change what I
19 said. So I'm 46 and counting. Maybe that's my claim to
20 fame.

21 But, Chief, thank you for allowing me to be
22 here. Chip, thank you for asking me to talk about this.
23 I have a great passion for this, and I am a Texas
24 resident, even though I shoot in California, and one of
25 the things that I've really been paying a lot of attention

1 to is the impact of all of this advent of the internet and
2 social media and all on our society in particular and the
3 justice system specifically, because I've been on the air
4 for 21 years with the Dr. Phil show, five with Oprah
5 before that, and then 21 now, so 26 years, and I was
6 thinking this morning, when I launched the first season of
7 Dr. Phil, the first text message had never been sent.
8 There was no Facebook, there was no Twitter, there
9 certainly was no TikTok. None of those things existed,
10 and so all of these problems have changed since I got on
11 the air and have had to deal with these issues based on
12 what we get tens of thousands of e-mails a week coming in
13 from people.

14 And I have an advisory board that I'm able
15 to lean on in helping prepare for these. We have the top
16 minds in psychiatry, psychology, medicine, nursing, even
17 theology and some of the other disciplines, from the top
18 learning centers in the country. They're from Harvard,
19 Columbia, Stanford, University of Texas, and I can send
20 them the cases that we're dealing with, and a lot of them
21 are editors of peer review journals with an 18-month lag,
22 so we get beyond cutting edge information to share with
23 people, and we've had to deal with cyber bullying, and all
24 sorts of things that didn't even exist.

25 Something happened to this country in about

1 2008, and it was like big airplanes flew over the country
2 and dropped smart phones on the country. That's when it
3 happened. It was like '08. And think about this, the day
4 before that happened, people were walking around like
5 this. (Indicating)

6 The day after it happened, everybody was
7 walking around like this. (Indicating) And now you walk
8 in anywhere, any mall, any store, any street, and people
9 are like this. And it has been as big a change, I think,
10 as we've seen in society since the Industrial Revolution.
11 There is as much power in this iPad, more power than we
12 had when we put a man on the moon.

13 There were big buildings, you've got that
14 much power right here, and it has changed the way people
15 live, and I bring this up because it impacts how people
16 are getting information and how they're searching out
17 information. When I say to kids the word "library," they
18 look at me like what? I tell them it's a big building
19 with books, because they just go to a search engine and
20 get what they need. It changed so much so fast, and when
21 the pandemic hit, we started working from home, right? We
22 closed the schools and we went to remote learning. And
23 now there is a question of whether or not remote trials
24 are a reasonable alternative, right? Does that -- does
25 that work? And is that something that we should talk

1 about here?

2 And so it really boils down to where, based
3 on this advent of technology, is there a material
4 difference between in-person trials or remote trials,
5 particularly when you're talking about a jury. And I did
6 spend most of my professional career in the litigation
7 arena and assisting in trial strategy and jury deselection
8 and mirror juries in the courtroom and debriefing jurors
9 and venue studies and all sorts of things, and so the
10 question is, you know, is there a material difference?
11 And so I guess the first question becomes are jurors
12 required to learn in order to make a competent decision on
13 a fact pattern in a case? And, of course, the answer is
14 yes.

15 Everybody would agree with that, right, they
16 have to learn from both sides in order to weigh at
17 whatever standard it is, whether it's preponderance or
18 whatever the particular standard is for the cause of
19 action. And so you have to say, well, you know, how does
20 remote learning work? And there is a huge body of
21 literature that has addressed that, whether remote
22 learning works, and that huge body of literature by a
23 broad range of researchers indicates that it is a very
24 inefficient way of gaining information. The research
25 suggests that first, second, and third graders, for

1 example, the learning at the end of an academic year
2 averaged zero. Zero. And it was particularly difficult
3 in communities of color and low socioeconomic standard,
4 because in those communities, the Wi-Fi connections, the
5 instrumentation they had, the computers, the iPads or
6 whatever, were either not there or poor quality, and these
7 were parents that had to work outside the home, they
8 couldn't do their job from home, and so, I mean, it was
9 zero.

10 And for those that were higher up in the
11 grades, it was some better, but not much. The estimates
12 are that we lost somewhere between nine months and 15
13 months of learning in reading and math and science for
14 these students. Now, we're not talking about school here,
15 but I am talking about the efficiency with which -- with
16 which they learned; and this is a big deal, because the
17 judicial system is a pillar of this society; and if
18 something happens to undermine our country's confidence in
19 the judicial system, that will be a terrible, terrible
20 thing. Because we have a lot of problems right now with
21 people and confidence, in their confidence in this country
22 and its institutions right now, but not in the judicial
23 system. That ranks really high right now comparatively.

24 And this -- this -- when I said it was like
25 they came over and dumped all of these smart phones on

1 everybody, it had a profound effect on our society. That
2 generation where those phones were dropped and they
3 started becoming dependent on those devices, there was a
4 quantum shift in how they live. They get their driver's
5 licenses later, they start dating later, they -- socially
6 their evolution is slower in everything they do
7 interactively. They have fewer friends. Their
8 participation in the world, basically what they're doing
9 is they're watching people live their lives instead of
10 living their own, and the ones they're watching are
11 fiction, these influencers, these -- some of these people
12 take an average of 1,100 pictures before they post one,
13 and so, look, it's a complex question. I get that. This
14 is chess, not checkers.

15 I understand about having to move docket
16 along and getting people what they need, but it's like
17 working from home. That was the shiny new toy, right?
18 That's what everybody wanted to do, and along with
19 Dr. John White, the chief medical officer at WebMD, who is
20 very obviously tech dependent, because they're a huge
21 website, and they love technology, we published an op-ed
22 recently about work-from-home, that that was the shiny new
23 toy and everybody loved that originally because look at
24 all of the positives, right? They save the commute. That
25 means they save the gas, fewer deaths on the highway, more

1 time to actually work instead of drive, and all of those
2 good things, and so all of the sudden you see these empty
3 office buildings, people working from home. But a year on
4 we start seeing people experience depression, isolation,
5 loneliness, being siloed and not having the team
6 interaction that sparks creativity within companies. You
7 start seeing problems with all of that.

8 And I'm a tech fan. My son and I launched
9 Doctor On Demand, the number one telemedicine company in
10 the country where people can see a doctor within 90
11 seconds rather than 21-day average to get a doctor's
12 appointment to go sit in a room full of sick people to
13 wait to see a doctor. Shameless plug. So it's a great
14 thing. We have a fintech company called Chime, which is a
15 huge fintech company. We love technology, but it has its
16 downside, and there are side effects that come back. So I
17 think you have to think about that, and if you make the
18 presumption that jurors have to learn to do their job, you
19 have to look at remote learning and recognize it is not
20 good. It's just simply not good. And an associate and
21 friend of mine, Dr. Dimitri Christakis, who is a pediatric
22 epidemiologist, has created a model, and he published it
23 in *Journal of the American Medical Association*, and they
24 estimate that remote learning will result in the loss of
25 13.8 million years of life lost because of the lower

1 educational attainment of these kids.

2 Now, how is that? Well, you -- first off,
3 if you're not reading on grade level at the end of third
4 grade, the dropout rate is four to six times higher than
5 if you are, because in years one through three you're
6 learning to read, and from grade four on, you're reading
7 to learn. So if you didn't learn to read, now you can't
8 read to learn and you just fall further and further
9 behind, and so your educational attainment is less. With
10 less educational attainment, you get less of a job, and
11 there are more blue collar jobs, which means you might be
12 working around machinery or construction where you get
13 injured. You're going to have less insurance coverage,
14 slower diagnosis of disease, less coverage for treatment.
15 So diseases advance further before they detect -- they're
16 detected, et cetera, and you -- it just takes those years
17 of life.

18 We've got 50 million kids in the educational
19 system. You spread that over the -- over them, it doesn't
20 take that many months or years shaved off of someone's
21 life because of those things not being there to add up to
22 those years of life being lost. And had the schools
23 remained open during the first wave, they estimate there
24 would have been 4.4 million years of life lost versus
25 13.8.

1 So now you think, well, we're not talking
2 about kids, we're talking about adults. Ingrid Haynes
3 Taylor, the director of the National Literacy Institute,
4 has -- they've done a lot of study about this, and their
5 findings are that 130 million adults in America are unable
6 to read a simple story to their children at the end of the
7 night, that 130 million Americans can't read the label on
8 a prescription that gives you the instruction "take this
9 with food," and so they're calling back saying, "I took my
10 medicine and I'm really sick." Well, did you read the
11 label? Well, no. They're just not able to read. Their
12 estimate is that 45 million are just functionally
13 illiterate and that 21 percent of adults in America in
14 2022 are fully illiterate.

15 So these are people that we're going to have
16 dealing with the technology that they have to deal with in
17 order to participate, and I think right now we're at a
18 point in this country where our jury pool needs more
19 management and more supervision, not less. Since 2010
20 we've had a 62 percent increase in depression for older
21 teens, 189 percent increase for preteens; a 70 percent
22 increase in suicide for older teens, 151 percent for
23 preteens. 151 percent increase. So -- and if -- and
24 we're seeing this play out.

25 This is kind of a maybe an off-the-wall

1 fact, but we all see on the news these events on airplanes
2 where people become unruly. There were more events in
3 2021 than in the history of aviation. More in one year.
4 From 2011 to 2020, the average was 157 a year, and '21
5 there were 1,866. People are pissed. They're anxious,
6 they're stressed, they're frustrated. That's the
7 populous, and by the way, 2020 is on track. And we've got
8 169 million people age 70 to 41 -- age 7 to 41, and we've
9 got 124 million, 46 to 76, so that's your striation for
10 the jury pools. You've got lack of jury attentiveness,
11 technological limitations where you have audio fallout.
12 You really don't know what they're doing. You know, they
13 can be sitting there, and you see their -- their picture.
14 They could have an ear bud in one ear away from the camera
15 watching Dr. Phil on a second screen.

16 CHAIRMAN BABCOCK: Is that a good thing?

17 DR. PHIL McGRAW: It's all timing, and when
18 it comes to deliberations, what's the dynamic in
19 deliberations? If you see what people say when they're
20 typing up -- I call them keyboard bullies. I testified
21 before a bipartisan committee in DC about this. People
22 will say things on the internet. They'll type things to
23 you, I get them all the time, that they wouldn't say to
24 you in an elevator. You know, they'll call you names,
25 they'll get violent, they'll -- violent, aggressive

1 language. It's the same thing in road rage. People are
2 in their car, you cut them off, "You no good rat bastard,
3 I'll get you." If you stepped in front of them on the
4 escalator, you think they would say that to you? I don't
5 think so. Maybe. Maybe we're getting to that point. But
6 it's a different dynamic when you're on a keyboard instead
7 of in person. So -- and you give up a lot of data.

8 The American Psychological Association has
9 said teletherapy is as effective as in-person therapy.
10 They say there are trade-offs. You lose data. As a
11 therapist you lose data. I can't read your body language.
12 I don't get that information. The positives are people
13 cancel less because they don't have to get dressed and go,
14 and they're more forthcoming because they feel less
15 conspicuous in front of someone, so they say the tradeoffs
16 are it's about the same. But it is a different -- it is a
17 different dynamic, and I think it -- I think it really
18 changes, and I think depriving someone of life changing
19 money in a civil suit, depriving someone of their liberty
20 in America is a very high standard, and it should be.
21 Depriving someone of their life, capital cases, very high
22 standard, and it should be. And I can tell you from a
23 psychological standpoint and a technology standpoint
24 interacting with the psycho-social aspects, I think there
25 is very likely going to be a real backlash across time

1 that we're starting to see with the shiny new toy
2 substituting for what we've been doing in different ways.

3 Now, you know, if it's a hearing of some
4 sort or whatever, a lot of these you could do on the
5 phone, doesn't make any difference, but when it comes down
6 to outcome determinative proceedings, I think it's fraught
7 with danger, and I think there's huge backlash associated
8 with it, and having spent year after year after year in
9 trial with juries, watching juries, reading juries,
10 debriefing juries after trials and stuff, I think it's bad
11 for lawyers in that they can't read if their case has
12 landed or they need to put up another expert. I think
13 jurors give up data in reading whether a witness is
14 truthful or not truthful, making up their mind about that.
15 I just think there are -- there are problems with that,
16 and I've thrown out some statistics for you here, and I
17 haven't burdened you with a lot of citations and studies,
18 but I will make all of those available to you in writing
19 so you can look at them for yourself about the remote
20 learning and the gaps and that sort of thing and send it
21 to you, Chip, and you can distribute it as you want to,
22 because I've got researchers that put all of this together
23 for us.

24 So I'm a -- I'm not in favor of -- I'm less
25 and less in favor of remote trials as you -- as the stakes

1 get higher. If it's a hearing that -- some of those you
2 can do on the phone, but as the stakes get higher and
3 become outcome determinative with life-changing impact, I
4 become less and less in favor of that. So I'll answer
5 questions, if somebody wants to talk about it some.

6 CHAIRMAN BABCOCK: Okay. Judge Yelenosky.

7 HONORABLE STEPHEN YELENOSKY: Thanks for
8 coming, appreciate what you said, learned a lot. I know
9 your topic is to address virtual versus in-person. What I
10 took from the problems you identified is that whether it's
11 in-person or virtual is more -- the harm there comes more
12 from predicates to the actual trial. People can't read,
13 people are depressed, people are unable to communicate,
14 and people are just changed a lot from 2008 that has
15 nothing to do with whether something is virtual or not.

16 In other words, it sounds to me like if you
17 took somebody from 2008 and you put them coming forward
18 and they were in a virtual trial now, that person -- take
19 somebody who didn't experience the whole thing that
20 happened in 2008, what would be more important is that
21 experience than whether they happened to be in a virtual
22 trial or not, and I know you want to address solutions to
23 that, but the solutions seem to be the predicate problems,
24 people aren't educated. And one of the things you
25 mentioned was social media, which people don't -- not only

1 don't get information they should get, but they get
2 misinformation that then carries forward into their
3 participation in the judicial system. And that was a
4 topic that has also been addressed elsewhere, but I wanted
5 your thoughts on what I just said.

6 DR. PHIL McGRAW: Well, thank you, and
7 that's a great question, and it lets me finish out a
8 thought. There's a difference between education and
9 intelligence, and I certainly don't mean to imply that if
10 someone doesn't have educational attainment that they're
11 not intelligent, because they certainly can be, and I
12 think that what I'm saying here is if -- you mentioned
13 predicate, if a predicate to our equation here is that
14 jurors need to learn information about a case in order to
15 render an informed decision, remote presentation is not
16 the most efficacious way to impart that information to
17 them, no matter who they are, whether they're an MBA in
18 the Eastern District of Virginia or English is their
19 second language in South Texas. It doesn't matter.
20 Remote is not an efficient way to impart that information
21 to them, and that's before you get into problems with poor
22 Wi-Fi, audio dropouts, distractions in the home where they
23 are, lawyers' and witnesses' ability to connect with the
24 trier of fact, all of those things.

25 So I think that educational attainment

1 aside, assume that we have a bell curve of intelligence in
2 our jury pools, so you've got intelligent people there no
3 matter how device dependent they may have become or not,
4 remote presentation is a poor substitute for in-person
5 engagement where somebody is sitting there and they're
6 looking somebody in the eye and reading everything that
7 they're reading. So even if someone didn't fall victim to
8 device dependency, and by the way, all of the statistics
9 that I shared with you about the increase in depression
10 and anxiety and suicidal ideation and attempts, et cetera,
11 that all began before the pandemic, by the way. It was
12 just the pandemic just exacerbated it, but that really
13 started spiking in 2010, 2011, so it's not pandemic
14 driven, but it certainly was exacerbated by the isolation
15 that people went through in the pandemic. Yes, sir.

16 HONORABLE LEVI BENTON: Dr. Phil, you've
17 heard the expression if you have to skate to where the
18 puck is headed or something like that, right?

19 CHAIRMAN BABCOCK: Levi, could you speak up
20 a little?

21 HONORABLE LEVI BENTON: Yeah. You've heard
22 the expression you have to skate to where puck is headed,
23 right?

24 DR. PHIL MCGRAW: Right.

25 HONORABLE LEVI BENTON: You've heard that

1 expression, so while I agree and appreciate and respect
2 everything you've said, I don't -- I think, respectfully,
3 it might be of no consequence, might be irrelevant to your
4 great grandkids when they go to law school. I think we're
5 headed to an increasing number of remote proceedings.
6 Before this meeting started, Judge Evans was commenting,
7 and this is true all over Texas, you know, people don't
8 want to -- don't want to vote for bonds to build any more
9 courthouses to house juries. So who's the Dr. Phil
10 that's -- or maybe it's your son, that is teaching the
11 future law student how to make it efficient to impart the
12 information to teach the jurors what they need to make
13 these decisions? Because that's where the puck is headed.

14 DR. PHIL MCGRAW: You may be right, and I
15 don't think you're disagreeing with me at all.

16 HONORABLE LEVI BENTON: No, no, I'm not. I
17 agree with everything you said.

18 DR. PHIL MCGRAW: Because what I'm talking
19 about is where we are today. And I do think that
20 technology is going to increase, and you're going to
21 have -- I mean, you know, hell, 10 years from now, we may
22 be doing trials with holograms where you actually do see
23 all of the nonverbal communications of a witness or
24 whatever. That may be the case, and we may not need to
25 have all of these concerns, but I am concerned that --

1 about accessibility with low socioeconomic and in
2 communities of color that don't have the infrastructure,
3 and I think if you cut out those jurors, you're cutting
4 out quality -- I mean, really solid qualified jurors that
5 could render really valid, solid opinions because they
6 don't have accessibility to the technology necessary to
7 participate and/or are intimidated by that technology; and
8 research suggests you can look at studies from Verizon and
9 AT&T and the different carriers about what the coverage is
10 in like rural areas and some of the urban areas and, you
11 know, what's streaming into some of the buildings and
12 stuff, it's -- and I think that's what really hurt the
13 remote learning, is some of them it would freeze up, they
14 can't get it going again, and, you know, so they wander
15 off and go do something else.

16 Now, we're talking about adult jurors, and
17 they're less likely to do that than a child, but hopefully
18 it's not going to be too long before we've got fiberoptics
19 flowing everywhere and available to everyone with the
20 speed necessary if you're playing video during a trial or
21 you're having to zoom in on a document or whatever.

22 CHAIRMAN BABCOCK: Judge Wallace.

23 HONORABLE R. H. WALLACE: I guess in just
24 about every court the first thing the judge does when a
25 jury panel comes in is tells them to turn off their phone,

1 and I read an article sometime back that said jurors --
2 they were hypothesizing at least, that some jurors, that
3 creates such anxiety that they can't have access to their
4 phone that it's really counterproductive. Do you have any
5 thoughts -- in other words, that they ought to be able to
6 look at their phone every now and then.

7 DR. PHIL MCGRAW: I mean, you're quite
8 right. Some find it really anxiety inducing, and there
9 have been studies where they keep people away from their
10 phones for a period of time and they stretch it out from
11 hours to eight hours, then twelve, and they start showing
12 visible signs of panic attacks, and, you know, what are
13 they going to miss, like, you know, what are you doing,
14 where are you going, what did you eat for lunch? I mean,
15 when you go look -- they then went and looked at the
16 messages and they weren't earth-shattering, but they've
17 become dependent on it because those are their -- that's
18 their life, those are their connections; and they've
19 confused clicks with connections, likes with real sorts of
20 interpersonal interactions. And that's really very sad,
21 but that's the generation that we have at this point, so I
22 am -- I'm just kind of describing where we are and -- and
23 that generation that I'm talking about, those that have
24 gone to college and all, these are smart kids. They use
25 this to learn, and, man, they're smart, but they're not

1 worldly, and that's a problem.

2 CHAIRMAN BABCOCK: Judge Miskel, then John,
3 and then Velva. And then Scott.

4 HONORABLE EMILY MISKEL: This is not a
5 comment, this is actually a question, and I really do want
6 some help with this. You mentioned confidence in our
7 judicial system, and so I have a question about our
8 in-person participants. You mentioned the unruly people
9 on the airplanes, and I'm observing that dynamic in the
10 people that come into the courthouse. The litigants and
11 their family members are more angry, they're more
12 suspicious, they're amped up already when they come in the
13 door, and the data is starting to show that trust and
14 confidence in our judicial branch is decreasing. And I
15 don't know if there's much I can do as the judge sitting
16 on the bench, but my theory is that they -- that the
17 social media has been so toxic during the pandemic they
18 come in with all of these ideas about what's about to
19 happen to them, and they're just so anxious and keyed up.

20 What, if anything, can I do about this
21 dynamic? Are you seeing the same thing with social media
22 getting people amped up and like distrust in our
23 government institutions, and is there a solution or
24 anything that can be done to help?

25 DR. PHIL MCGRAW: Yes, yes, and yes. I am

1 seeing it, and we see it in the rhetoric that we get in
2 the mail that we get, for example, which is I'm saying
3 thousands and thousands. The language is more aggressive,
4 and that doesn't necessarily translate into action, but it
5 is more aggressive, and the solution I can tell you that
6 has proven to be the best is transparency. Right now
7 people are really afraid of the unknown because they've
8 got all of this conspiracy stuff flying around the
9 internet and all, but with transparency it's real hard
10 for -- it's harder for people to maintain that paranoia,
11 that suspiciousness.

12 So when they come into the jury room and
13 they say, well, just go have a seat and we'll get to you
14 in the next 48 days, they don't know and they're wondering
15 what's going on. They're having private meetings, they're
16 not -- everything that can be done for transparency really
17 diffuses that with people. Here's what's going on now
18 while you're in here, here's what's going to happen with
19 you. Transparency really diffuses that suspiciousness in
20 the minds of those people. You know, they can -- those
21 that are really out there can, you know, question even
22 that, but it really does help if everything is a picture
23 window.

24 CHAIRMAN BABCOCK: John.

25 MR. WARREN: Thank you. Dr. Phil, and I

1 guess this is for everyone. I'm not really big on social
2 media to a degree. I think social media should come with
3 kind of like the warning like used to be on a pack of
4 cigarettes, too much of this is harmful to your mental
5 health, but as it relates to -- we are talking about deep
6 thoughts as it relates to courts and the judicial system,
7 and we hear -- and I've heard a number of times this
8 morning where people talk where they've mentioned that we
9 have the greatest country in the world, and that is
10 absolutely true. We have the greatest country in the
11 world, because of the judicial system that we have.

12 People make decisions, whether it's business
13 decisions, based on liability. People -- as it relates to
14 a lot of things, they take that into consideration, and so
15 as it relates to jury trials or virtual proceedings, I
16 think that is absolutely a no-no, if we're going to be
17 including John and Jane Q. Public, understanding that a
18 purchase retention rate has to make sure that you're
19 paying attention is a very short span. So if you have
20 someone on social media and then, of course, you have --
21 they're supposed to be looking this way, but if they're
22 looking down, you know that you really don't have their
23 attention, and so now they're standing up their devices so
24 that it will appear that they're paying attention when
25 they're really not.

1 But also, as it relates to those
2 individuals, you know, I always tell my staff, and so I'll
3 use this as an example, I have one division that has 10
4 employees, and so I'll ask the manager, I'll say, "How
5 many employees do you have in your division?"

6 "I have 10." I said, "No, you have 20."

7 "No, no, no, Mr. Warren, we have 10." I
8 said, "No, you have to understand that a person's
9 personality is defined by the time they're five years old.
10 A person's character is defined over the course of things
11 that they experience in their life, and both of those two
12 ingredients live in an individual, and you don't know when
13 you're going to be dealing with them." And so when you're
14 dealing with a trial and you're having someone who's
15 basically using a social media as their form of education
16 and then you have a lot of cyberbullies, and we have more
17 now than ever, and everybody has courage behind a computer
18 screen, but when you're in person, moving away from social
19 gatherings, it isolates us. But then just like I tell my
20 son who sits in a room and texts with his friend who's
21 sitting five feet away, I said you kids are going to be
22 born without vocal cords.

23 And so at some point we have to get back to
24 what's best to keep America the greatest country in the
25 world, and it's making sure that the tectonic plates that

1 the judicial system sits on does not change but actually
2 expands so that we can continue to keep America the
3 greatest country in the world by having a judicial system
4 that actually brings sanity to chaos.

5 MR. JAMES SULLIVAN: Here, here.

6 DR. PHIL MCGRAW: I'm reluctant to tamper
7 with what's worked by going to the technology, and look,
8 as I said, as the stakes go up, what you just said becomes
9 amplified, right. If you have certain kinds of hearings,
10 you do them all the time, that you can actually do on the
11 phone, right? And that's expeditious, it saves everybody
12 time and money; but as the stakes go up, now you're
13 talking about something that's outcome determinative, this
14 is going to determine the rest of your life in some cases,
15 I can tell you, taking a position where if both parties
16 agree you can do this virtually, are both parties informed
17 enough? Have they done a deep dive into this literature?
18 Do they really know the magnitude of the decisions they're
19 making? And I think they need to be really informed about
20 this before they make that decision. I'm not sure that
21 both parties agreeing is a standard that we should give
22 them that power.

23 MR. WARREN: I don't want to interrupt you,
24 but and us, one of the things I said, I would not rely on
25 John and Jane Q. Public. If you have attorneys, you're

1 advocating on behalf of your client, and you have that
2 level of maturity, and I think it's okay, that platform,
3 that technology platform is okay in that environment, but
4 when you have someone that relies on social media as their
5 form of education, then that's out -- I don't find very
6 much trust in that.

7 DR. PHIL MCGRAW: Yeah. I'm -- I always
8 tell people you look something up on the internet and
9 there are facts there, and usually the name of the website
10 is exactly opposite from what they're -- I mean, if you
11 look up "should you stay together for the kids," you need
12 to know if that website is published by the Mormon church
13 or if it is published by a university that's giving you
14 just the data on how those kids turned out, because one
15 has an agenda and the other doesn't, and it's no
16 commentary on the Mormon church. You can say Baptist
17 church, Catholic church, but if they have an agenda, and I
18 don't think that people necessarily drill down on that,
19 and I worry -- I hear people tell me all the time, "Well,
20 I saw it on the internet," well, hell, who am I to
21 question that?

22 CHAIRMAN BABCOCK: Velma Price, who is the
23 district clerk of Tarrant County.

24 MS. PRICE: Travis County.

25 CHAIRMAN BABCOCK: Travis County.

1 MS. PRICE: Yeah, where we are. So I'm just
2 going to present a different point of view. In Travis
3 County we have done over 30 virtual trials, and our
4 reports have indicated that -- and what we have done to
5 deal with the technology issue is the judges have
6 purchased over a hundred iPads, and the iPads do not have
7 any access to the internet, and they have Mi-Fi, so that
8 deals with the connection issue, and I also think it works
9 on access to justice. We have the jurors -- the iPads are
10 either delivered to them or they pick it up, and we pay
11 for that as if they're doing -- like they're doing jury
12 duty. And we haven't done a study of it yet, and we're
13 working on it with Southwest Texas, the attendance is
14 phenomenal. Sometimes we have a hundred percent
15 attendance on virtual trials, and the diversity is more
16 than in-person. That's just basically what we've heard
17 from the judges who have done the virtual trials. I just
18 want to put that out there as some information.

19 DR. PHIL MCGRAW: Well, I can tell you based
20 on what we do, those are giant steps in the right
21 direction if you're going to do what you're going to do.
22 You've got to get them the devices, you've got to give
23 them the access, and you've got to show them how to use
24 them. And that helps fight a lot of those problems. If
25 I'm going to have a guest -- I had to do a full season

1 virtually because Paramount shut down. They said you
2 don't have to do the season or you can do this virtually,
3 and we had to ship computers and lights and stuff to
4 people and all of that, and we tried it with their
5 equipment, and it was like, you know, you're seeing
6 laundry in the background and the dog -- the dog is there
7 and they're half off of the screen and there's -- but when
8 we send them everything and gave them the information and
9 walked them through it ahead of time, completely different
10 world, so to the extent you can help with that makes a
11 huge difference. However, you're still giving up a lot of
12 data by not being in the room, not seeing everything like
13 we are here. I could have popped up here virtually today
14 instead of being here, I said, no, I don't want to do
15 that. I'd much rather be here so you can see my shiny
16 face.

17 CHAIRMAN BABCOCK: Scott, then Eduardo.

18 MR. STOLLEY: What is the role of
19 confirmation bias in jury decision making, and is that
20 becoming a bigger thing now with the technology and the
21 other things we have going on in our society?

22 DR. PHIL MCGRAW: Oh, God, how much time
23 have we got? I think it's one of our biggest challenges
24 in America right now, and I've been in this profession for
25 over 45 years, and I've never seen it more entrenched than

1 I am seeing it in the last four or five years, and the
2 thing about confirmation bias is in -- you know, everybody
3 knows that when you suffer from confirmation bias, you
4 close your data window. You know, it's like I got my
5 answers, don't need anything else, but if you can get them
6 to open that window and you bring them empirical evidence
7 to the contrary of that belief, the net result is they
8 deepen their belief. They don't -- I can say, look, I
9 know what you think, but here's some information you may
10 not have, solid, irrefutable science, they dig their heels
11 in more and entrench their confirmation bias even deeper
12 than it was before. So it's a real challenge, and -- and
13 yet you see that with juries always, and I really fear
14 what's going to happen with that now.

15 When people are undecided, that's painful.
16 You know, I don't like to be here. Like I've said this
17 before, it's like, you know, we're all in Texas here, and
18 if you're like me when you were growing up, you run around
19 barefooted and you make the mistake sometimes of starting
20 across an asphalt road in August and you get about half
21 way across and you go, oh, my God, and you're just about
22 to burst into flame, and what are you going to do? You're
23 either going to run back or run across to the other side
24 really fast instead of stand there and watch your feet
25 melt, and once you get to one side or the other, getting

1 that person to come back out onto that hot highway to come
2 back across to the other side is really difficult, and --
3 and that's -- that's what I really fear if you can't read
4 those people and know do I need to call another expert, do
5 I need to do this, do I need to know that, because they
6 resolve that painful dissonance, get to one side, and sit
7 in that confirmation bias, and that's really tough.

8 CHAIRMAN BABCOCK: Eduardo.

9 MR. RODRIGUEZ: So this question doesn't
10 have anything to do with the topic, but --

11 CHAIRMAN BABCOCK: You looking down at your
12 phone?

13 MR. RODRIGUEZ: You mentioned about the use
14 of technology by kids. How is -- how is our education
15 system adapting to kids having instant access to questions
16 and answers, and are we doing a good job in that regard?
17 Do we need to improve in that regard? I'm concerned about
18 how it's going to affect my grandkids. Is there -- I've
19 got grandkids from fifth grade through a sophomore in
20 college, and I'm just wondering how it's going to affect
21 kids in the education system going forward.

22 DR. PHIL MCGRAW: Well, I can tell you that
23 we've worked with a lot of teachers unions and teachers
24 alike, and in terms of them having their phones in class,
25 they're pretty vigilant about them not having their phones

1 in class, but you know, these kids are pretty smart and
2 these phones are pretty small, so they -- they are doing
3 what they can, but one of the shifts we're seeing
4 personality-wise is -- and I think it's part of what
5 you're asking about is instant gratification, that they
6 can -- I mean, you want to know the answer to the
7 question, you just ask Siri and she gives it to you
8 instantaneously, and there's not a lot of fact checking,
9 there's not a lot of going back and forth that we would
10 ordinarily do because there is an algorithm that's going
11 to give you information, and nobody understands this
12 algorithm and that really worries me, because the
13 algorithm learns you based on what you've clicked on
14 before, may be irrelevant to the topic that you're now
15 searching, and it shades what it feeds you in some
16 mystical unknown way.

17 I just did a three-part series on Jeffrey
18 Dahmer because I had interviewed his parents previous to
19 this Netflix series that came out, and the families that
20 were impacted and two men that had survived him were
21 really upset about the way he was depicted in this Netflix
22 series, and they wanted to come on and tell the real
23 story, and some of those clips were posted on YouTube by
24 us, and the algorithm took them down because it was like
25 serial killer, sexual exploitation, some of these

1 buzzwords hit, and so it took them down, thinking that
2 this was some kind of bad site information. And so we
3 called them and said, hey, this is -- this isn't some
4 porno thing or sadomasochistic thing, this is a research
5 show from Dr. Phil. The guy said, "Oh, my God, sorry,"
6 he'll go in -- they put them back up. They were back down
7 in an hour.

8 The humans kept putting them back up and the
9 algorithm kept taking them down, and this went on for like
10 seven days until they found some way to defeat the
11 algorithm on those things. That algorithm does things --
12 not even YouTube understands the artificial intelligence
13 that triggers what it triggers. I mean, maybe at some
14 level they do, but the people we were talking to didn't,
15 and so that does worry me, yeah, about how they're getting
16 the information and what's being fed to them.

17 CHAIRMAN BABCOCK: I'm going to take the
18 opportunity to, as the chair, to ask the final question,
19 and that is this, the Court is in the next few weeks going
20 to have to make a decision, which I think is important,
21 maybe fundamental in a way, about how our courts are going
22 to treat remote proceedings where evidence, oral
23 testimony, is taken; and the draft rule that is out for
24 comment right now, as I understand it, and, Justice Bland,
25 if I've misunderstood, you jump on me, but as I understand

1 it, the judge cannot allow a remote proceeding, electronic
2 proceeding, if oral testimony is going to be taken,
3 except -- and there are two exceptions. One, if the
4 parties have agreed, and you've already spoken a little
5 bit about that; and two, if there's good cause, and there
6 are nine good cause factors, some of which could be argued
7 either way. Some of the good cause factors could be, say,
8 yeah, we ought to have remote because it's a big case, we
9 have loads of people from Switzerland and from LA and from
10 New York, so we've got to do this remotely, and you could
11 argue the other side, of course.

12 So if our Court decides that that is the
13 standard, in other words, if we make the statement that,
14 yes, you do it live if oral testimony is being taken, but
15 there are two -- not loopholes, but there are two ways to
16 get around that, absent these two things, either good
17 cause or agreement of the parties. Is that what our Court
18 should do?

19 HONORABLE EMILY MISKEL: And specifically
20 for nonjury.

21 HONORABLE JANE BLAND: Right. The one thing
22 I would add, Chip, is that not jury trials.

23 CHAIRMAN BABCOCK: Not jury trials.

24 MS. WOOTEN: That's agreements only.

25 CHAIRMAN BABCOCK: Right. So nonjury.

1 HONORABLE JANE BLAND: Jury trials are off
2 the table.

3 CHAIRMAN BABCOCK: So nonjury.

4 DR. PHIL MCGRAW: Yeah. I think it's a big
5 difference if it's nonjury. Because I think you've got --
6 you're talking about bench trials?

7 CHAIRMAN BABCOCK: Yeah.

8 DR. PHIL MCGRAW: And even if it's the
9 actual trial and not some lead-up to it.

10 CHAIRMAN BABCOCK: Or an injunction.

11 DR. PHIL MCGRAW: Yeah. I think you've got
12 sophisticated triers of fact there that have seen enough,
13 heard enough, know enough to filter that out, and they're
14 not going to be watching Dr. Phil on a second screen while
15 the parties are doing it, and I feel completely different
16 about that, but when it comes -- when you involve the
17 jury, I think that we need to do the most efficient way of
18 imparting information to the jury.

19 And, you know, I want to conclude by saying
20 two things and underlining these. You know, I talked
21 about the fact that -- about remote learning, and it
22 really doesn't matter how somebody feels about this. I
23 don't care how somebody feels about this. I barely care
24 how I feel about it. What I care is what the research
25 tells us. There is a large body of literature about this

1 that's scientific, it's really well done by quality
2 researchers, and so I would just encourage people to
3 follow the science, not the political science, the
4 science. And pay attention to that in making your
5 decision, because remote trials are remote learning, and
6 that's why I've talked about that a lot. You just have to
7 pay attention to that.

8 And the second thing is, I don't want
9 anybody to take anything I've said to imply that Americans
10 are dumb. That's not the point. It doesn't matter how
11 smart you are or not or how educated you are or not. This
12 is -- the breakdown here is in the conveyance of the
13 information, the accessibility, the breakdown problems,
14 the distractions, the engagement of the learner.

15 You know, even there are criticisms of --
16 I've been a pilot since I was a teenager, so I've been
17 involved in aviation a lot. There are criticisms of these
18 glass cockpits, because they don't engage the pilot
19 enough. You know, everything is done, you don't have
20 to -- they don't engage the pilot enough. That's one of
21 the criticisms of those things. And I think we want to
22 engage people as much as we can, and you do that by having
23 them there, where they take it seriously, they come in and
24 they see these courtrooms, and it gets people's attention.
25 And I've been in so many courtrooms, and I don't care how

1 many times I've been in it, if it was the hundredth or
2 200th time I've walked in that door, there's a certain
3 reverence when you walk in that courtroom, you take it
4 seriously.

5 And so I don't want anybody to think that I
6 think this doesn't work because a lot of Americans can't
7 read or have had problems in that way. That doesn't mean
8 they don't have wisdom and intuition. In fact, I'm saying
9 quite the contrary. They do, and that's why they need all
10 of this data. That's why they need to be there to read
11 you, to read that witness, to read that lawyer, to see all
12 of that, to use their instincts and their wisdom, and you
13 give up too much data with a remote trial, so the higher
14 the stakes, the less fan I am of remote trials

15 CHAIRMAN BABCOCK: Well, join me in thanking
16 Dr. Phil for taking time out of his busy schedule to be
17 here.

18 (Applause)

19 CHAIRMAN BABCOCK: The only thing -- that
20 was terrific, thanks, and the only thing that mitigates it
21 is he's got his own plane. So we're going to take our
22 morning break. Five minutes, though, because Ms. Price is
23 next up, and she's got a conflict pretty soon.

24 MS. PRICE: Yes, we're having a ribbon
25 cutting at our new courthouse, our new court facility.

1 (Applause)

2 CHAIRMAN BABCOCK: We'll be gone for five
3 minutes.

4 (Recess from 11:04 a.m. to 11:22 a.m.)

5 CHAIRMAN BABCOCK: All right, come on, let's
6 go. Scott, round those people up back there, will you?

7 All right, we're back on the record, my
8 five-minute recess didn't quite -- it doesn't quite always
9 take five minutes, sorry about that. So now our next item
10 is a panel discussion among two members of our committee,
11 John Warren and Sharena Gilliland, and then Velva Price,
12 who has been so gracious to join us. She is the district
13 clerk of Travis, not Tarrant, County. And we thought it
14 would be interesting to talk about response rates on
15 summoned jurors, so the topic is "If you summon them, will
16 they come, response rates of summoned jurors in three
17 Texas counties." Velva, if you've got a time constraint
18 or anything, you know, you just say so, and I don't know
19 if you three have talked about how you want to organize
20 this, but whoever wants to speak first.

21 MS. PRICE: Well, I'll go first since I may
22 have to leave, but first of all, thank you for allowing me
23 to come and speak about jury attendance. I'm pretty proud
24 of it in Travis County. We are now celebrating our 20th
25 year of using an internet jury system that was created

1 in-house, and to this day we are still using it, and I
2 think it really reflects on our, you know -- Sharena is
3 going to talk about the particular of what we mean by jury
4 attendance, but I'm just going to talk about the way
5 our -- our internal IJury system works. Basically we do
6 prequalifications, so people get a summons notice and they
7 are told to get on the internet. They don't have to.
8 They can also come in, they can call us, so there are ways
9 to deal with people that don't have access to the
10 internet, but I will tell you about 95 percent get online,
11 and they get qualified that way.

12 Once they go through the qualification
13 system, they then get a calendar. This is, I think, what
14 I really wanted to emphasize to this committee, where it
15 has 75 days where the juror puts in the dates they are not
16 available, and once they put that in, then our system has
17 pretty much a jury -- jury dates of jury trials set for a
18 whole year. Our district judges give us a whole year, or
19 our county court at law judges, both civil and criminal,
20 give us their schedule for a whole year. Our JPs tell us
21 a couple of days ahead of time when they want a jury
22 trial, so we slip that in, and so based on what the jurors
23 tell us, then the system assigns them to a specific court,
24 and they are told as soon as the system works what date,
25 what court, the address, about where they are assigned.

1 And so I'm -- I think I Jury bends towards the juror, and I
2 think that's what we need to focus on, how do we make the
3 juror -- how do we accommodate them more than what we have
4 in the past?

5 And so generally, as I was telling
6 Mr. Babcock, on the day of jury service we either have a
7 hundred percent attendance or we have two or three people
8 who after they've called and, of course, people are still
9 going to call and try to get out, even after they've been
10 prequalified. But we have two or three people who have
11 not been excused who don't attend, and I think that's a
12 pretty good attendance rate for a county like Travis. But
13 I think the biggest thing is that we work with the juror's
14 schedule, and I think that -- that is what helps us get
15 the jurors to the trial. We also send reminder e-mails.
16 We also have technology that texts them, granted it was --
17 anyway, I'm not going to tell you about sometimes how
18 technology dies in the middle of the time when you need
19 it, but it did, and took us a while to get it back, but,
20 you know, we informed them ahead of time or that morning
21 or the night before as a reminder about the trial dates,
22 and so I think those are the reasons why we have pretty
23 good attendance here in Travis.

24 CHAIRMAN BABCOCK: Velva, what -- Travis
25 County is the fourth largest in Texas?

1 MS. PRICE: Fifth largest.

2 CHAIRMAN BABCOCK: Fifth largest. Okay, all
3 right. Okay. So who's next?

4 MS. GILLILAND: I know that there's a big
5 concern about are people coming to jury duty, are they
6 not, and I think it's important that we talk about what
7 appearance rate definition we want to use. So if we send
8 out a thousand summons and you only have 40 percent in the
9 courtroom, you say, well, that's a terrible show-up rate,
10 but if you look at it -- and I think this is where a lot
11 of clerks look at it, we're making contact with about 80
12 percent of all of the summons that we send out. So what
13 you see on a jury day is significantly less than all of
14 the summons that we sent out, but we have been excusing
15 people, deferring people, and there's disqualifications,
16 and we're really only seeing 10 to 20-ish percent of just
17 we never hear from them, just plain never hear from them.

18 We have recently gone onto a system that
19 allows us to send text messages, and I think that's
20 helping with our day of show-up rates. I think most
21 people have the best of intentions. We get the phone
22 calls, "Oh, it was on my refrigerator. I completely
23 forgot, got the kids off to school." And so when you get
24 that text message the night before or the morning of,
25 we're seeing more people actually show up, and so as a

1 clerk, I don't have a fear that people are just blowing
2 off their summons. I think there's a lot of ways that we
3 can improve getting the message out of how important this
4 is, but from the judge's perspective or the litigants'
5 perspective, once you see you sent out how many summons
6 and there's only this many people in the courtroom, there
7 are some other statistics that go along with that, but it
8 wasn't just a societal disregard for a jury summons, that
9 we've actually accounted for a lot of those folks.

10 CHAIRMAN BABCOCK: Okay. And, Sharena,
11 you're the -- just for the record, you're the district
12 clerk of Parker County.

13 MS. GILLILAND: Parker County, yes.

14 CHAIRMAN BABCOCK: Which is just south of
15 Dallas, right?

16 MS. GILLILAND: Just west of Tarrant County.

17 CHAIRMAN BABCOCK: West of Fort Worth,
18 right.

19 MS. GILLILAND: Yes, west of Fort Worth.

20 CHAIRMAN BABCOCK: And you have what,
21 150,000 people in the county or something like that?

22 MS. GILLILAND: Yes. Yes.

23 CHAIRMAN BABCOCK: Okay. So as between the
24 two people, one on your right, one on your left, you're
25 much smaller.

1 MS. GILLILAND: We think of ourselves as
2 big, but comparatively, no, we're much smaller.

3 CHAIRMAN BABCOCK: Okay. And then just
4 last, but not least, John Warren, who is the district
5 clerk of Dallas County. What --

6 MR. WARREN: Well, I'm not a district clerk,
7 but I play one on TV. I'm county clerk. It's interesting
8 hearing what both Velva and Sharena has to say, with
9 Dallas County being the second largest county in the
10 State, and so we have -- of course, we have more
11 population to pull from and we have more courts to serve.

12 I think for 2021, our jury services
13 department sent out over 16,000 jury summons. Of that
14 16,000, and Sharena was talking about the show rate, we
15 had an average of 4,000 to 3,200 that actually showed up.
16 So if -- but we don't know -- but like I said, if you --
17 like she said, if you look at those individuals that are
18 actually in the jury room where they all gather, if you
19 may think that it's a -- it may be a pretty decent number,
20 but if you look at the number of summons that went out,
21 like I said, the 16,000, some of that -- with some of
22 those individuals that were a no show, that they were not
23 there, have already been addressed as it relates to
24 scheduling issues. Some actually say it's work related,
25 but I'm not quite sure they're work related, given that

1 you're excused from work for jury service, but I'm not
2 quite sure. So the question for me, and it may be for
3 everybody else, of those individuals who want to be
4 excused as it relates to work, is it due to work travel,
5 or are those individuals self-employed? So that's --

6 MS. GILLILAND: What I can tell you
7 anecdotally, on the day of we have people who show up and
8 want to be excused because they work for themselves, and
9 today and today only they're entering into a
10 million-dollar contract, and they're the only one that can
11 do it.

12 MR. WARREN: Yeah.

13 MS. GILLILAND: And that's probably the most
14 common work excuse.

15 MR. WARREN: Yeah.

16 MS. GILLILAND: There are some genuine
17 sympathetic work excuses that we have to defer to the
18 judges with respect to --

19 MR. WARREN: Yeah.

20 MS. GILLILAND: -- you know, somebody is
21 providing for their family and financial situations, but
22 we do hear a lot of the inflated excuses.

23 MR. WARREN: And some of the others are
24 prescheduled vacations and, of course, doctor's
25 appointments, but studying this --

1 CHAIRMAN BABCOCK: But does that allow you
2 to not show up?

3 MR. WARREN: Excuse me?

4 CHAIRMAN BABCOCK: I mean, if you've got a
5 vacation or an important work item, I mean, does that
6 excuse you from showing up?

7 MR. WARREN: Yes.

8 MS. GILLILAND: You can be deferred one
9 time.

10 CHAIRMAN BABCOCK: But they call in?

11 MR. WARREN: Yeah, it basically -- basically
12 you're actually rescheduled for another time.

13 MS. PRICE: You get rescheduled.

14 CHAIRMAN BABCOCK: But I thought you were
15 saying you sent out 16,000 summons and only 4,000 show up.

16 MR. WARREN: No.

17 CHAIRMAN BABCOCK: How many people just
18 don't respond? How many people --

19 MR. WARREN: And so that's the anomaly that
20 we don't have. Based on those that didn't respond, we
21 already addressed some to a degree, but I don't know what
22 that percentage will be, as it relates to those that have
23 conflicts. As it relates to work, doctor's appointments,
24 or preplanned vacations, those are rescheduled, so we
25 actually take those out, but you still have that 16,000

1 that were actually summoned, and 4,000 to 3,200 that
2 actually showed up without the excuses, so I'm not quite
3 sure what --

4 CHAIRMAN BABCOCK: Yeah, okay.

5 MR. WARREN: -- category those would be in.
6 I kind of liken jury service to the airline industry. You
7 plan for them to show up. You know, an airline don't want
8 to take off with only five people on a plane, so you want
9 to fill it up, so based on what Dallas County is doing to
10 ensure that we can proceed with a jury trial, we basically
11 do prescheduling, where they will send the summons out,
12 they will actually coordinate with those jurors to make
13 sure that, yes, you are going to be here this day, and
14 that's similar to me as a scheduled flight on an American
15 airline or Delta. And then so you're going to fill the
16 plane, you're going to take off, you're going to go
17 through your jury selection process. So I kind of equated
18 that to, okay, you're going to schedule and then you've
19 got to make sure that you have a full flight in order to
20 reach your destination.

21 One of the things that I was also concerned
22 about was, given that we're in the COVID environment,
23 what's the response rate, are people -- are jurors
24 apprehensive as it relates to not wanting to be around
25 large groups of people and isolation. That has not been

1 the case, so COVID really doesn't have an impact on those
2 that are actually showing up. There is no fear, no
3 concern as it relates to being in large groups and
4 actually serving on a panel.

5 CHAIRMAN BABCOCK: Do you agree with that,
6 Sharena and Velva?

7 MS. GILLILAND: (Moving head up and down)

8 CHAIRMAN BABCOCK: Velva, is there COVID
9 concerns for people showing up?

10 MS. PRICE: We saw COVID concerns in Travis
11 County significantly, but we also had a significant
12 reduction in the number of trials. I'm going to give the
13 numbers. In 2019, prepandemic, we sent out 16,000 summons
14 per month, 4,000 to 5,000 per week. We had a response
15 rate of -- and then you have to take out people who --
16 where we couldn't deliver the summons because of bad
17 addresses. That's always unfortunately very significant,
18 which was 31,000, over 32,000 people, but we had about
19 28,000 out of 164,000 who didn't respond, but then that's
20 a pretty high percentage of people who --

21 MR. WARREN: What was the number?

22 MS. PRICE: About 28,109 who didn't respond
23 at all.

24 CHAIRMAN BABCOCK: Are you currently -- do
25 you have a COVID reaction? Do people say they don't want

1 to be around a lot of people?

2 MS. PRICE: So Travis County, once the COVID
3 hit, we put in a COVID questionnaire, and so we have a lot
4 of people filling that out. We have just removed that as
5 of the next jury summons that we send out, so we did see a
6 significant decrease, yeah.

7 CHAIRMAN BABCOCK: Okay. Do you-all --
8 you-all get your jury lists from driver's license; is that
9 right?

10 MS. GILLILAND: We get lists from the
11 Secretary of State once a year, and there are some clerks,
12 typically in smaller counties, that they pull directly
13 from the Secretary of State's database. When you get to
14 your mid-size and larger counties, they usually have some
15 type of jury management software. We take that list from
16 the Secretary of State, dump that into our software, and
17 that's -- that's how we are able to kind of keep stats and
18 keep records or whatever.

19 I think that there's a real opportunity,
20 while we're looking at juries, to make sure all of our
21 counties and all of our state agencies that have
22 information that dump into that list are accurate.

23 MS. PRICE: Yeah.

24 MS. GILLILAND: Anecdotally, my
25 father-in-law lived in Parker County. He died in 2012. I

1 sent a jury summons to him in 2020, and so what that says
2 -- and we followed everything we're supposed to. We
3 probated, death certificate, you know. That means
4 somewhere along the way information broke down to get to
5 that master list that comes into our county list, and he
6 was our control for a long time. We didn't mark him as
7 absent or anything. That was my control to see when does
8 he finally fall off of the list that we get from the
9 State, and that's happened in 2022, I think, that he
10 finally showed as not available to receive a summons.

11 So I think with the best of intentions, you
12 have counties reporting, you have state agencies
13 reporting, but I think maybe that needs a second look of
14 is everybody reporting timely and accurately; and with the
15 focus on elections, hopefully we have better addresses for
16 folks coming from elections administrators that can help
17 compile that list with better information.

18 MR. WARREN: If I can add, part of that
19 process is that we pull from voter registration file as
20 well as driver's license, and those should merge; however,
21 as it relates to the voter -- to the voter registration
22 file, as a county clerk we send to the -- to our elections
23 department what we refer to as our death list, and that's
24 all of the people who are now deceased who should be taken
25 off, and so I think it's a matter as it relates to that

1 because we have that issue also with people being deceased
2 or people being pulled twice. I was just there last week.
3 Okay, there wasn't a complete merger of the driver's
4 license file and the voter file, but as it relates to the
5 voter file, the State needs to update that based on the
6 death file that we send to the elections administrator,
7 who should be forwarding that to the Secretary of State
8 perhaps. So those are some of the issues that we have as
9 it relates to sending summons or someone who, like, who's
10 deceased, or sending summons to someone who was just there
11 two weeks ago.

12 CHAIRMAN BABCOCK: What percentage of your
13 no shows without an excuse? In other words, a no show who
14 was summoned, but they call in, they say, "Hey, I've got a
15 trip" or whatever, and you say, "Fine, we'll reset you,"
16 but what about the people that don't call in that just
17 don't show up? What percentage of that is resulting from
18 bad addresses?

19 MR. WARREN: I think it was probably about
20 20, 25 percent. That number is actually going up
21 considering we have this influx in population, and you
22 have more multi-family housing than you have single family
23 housing, so when people move around based on rent going up
24 and they need to move to another location, so I think
25 that's about 25 percent, but I think that number may

1 eventually go up.

2 MS. GILLILAND: Ours is actually the
3 opposite. We're seeing less than five percent of mail
4 returned as undeliverable because we run all of the
5 addresses through the national change of address registry,
6 so the undeliverable could be that the forwarding address
7 has expired or there's no longer an actual mailbox there
8 or something. Of the folks that we think the summons made
9 it to the right place and we just plain don't hear from
10 them, that's about 15 to 20 percent of just we don't know
11 why we didn't hear from them.

12 CHAIRMAN BABCOCK: Okay.

13 MS. PRICE: I'm just going to add that we've
14 just made a recent change. We do the same thing as
15 Sharena. We send out the notices and then it goes through
16 the national NCOA.

17 MS. GILLILAND: Yes.

18 MS. PRICE: Where they then forward it to
19 their new address, but what we've done is we've told our
20 vendor to only send it to the zip codes in Travis County,
21 because then sometimes people have moved to another state
22 and, boy, do they get mad and yell at us, and so we're
23 trying to avoid that kind of trauma to my staff. So we're
24 trying to make it better so that we only deal with the
25 people that are going to be impacted with jury duty. I

1 would like to have Judge Yelenosky, because he was --
2 participated in a big part of IJury, talk about the
3 attendance once they get assigned to a court whether or
4 not they just don't show up because they're --

5 CHAIRMAN BABCOCK: We're very familiar with
6 Judge Yelenosky on this committee.

7 HONORABLE STEPHEN YELENOSKY: I told Velva
8 actually I didn't have a lot to add, but since then I've
9 thought of something.

10 CHAIRMAN BABCOCK: Judge.

11 HONORABLE STEPHEN YELENOSKY: Yeah, IJury is
12 great. But I think it's different from the others --

13 MS. PRICE: Yes.

14 HONORABLE STEPHEN YELENOSKY: -- not just
15 that it's on computer, but there really are two steps; is
16 that right?

17 MS. PRICE: Yes.

18 HONORABLE STEPHEN YELENOSKY: Because you
19 get summoned, then you're supposed to go on the computer
20 and sign up. So the first question is, well, how many of
21 those summoned go to the computer like they're supposed
22 to, and the second step is once they go to the computer
23 and get assigned to a court, do they show up? The latter
24 is great with IJury. The former is a question of
25 enforcing summons when somebody actually is served and

1 doesn't come, and that's the part I'm concerned about,
2 because I think there's a bias in terms of socioeconomic
3 status; and when they get to court, you say, well, they
4 get off -- get off of work, but \$40 a day, you know, so
5 we've got that problem, too.

6 MR. WARREN: Also, it's -- Dallas County, we
7 use Tyler's jury management system, and they're all -- we
8 all have automated systems, but the systems are only as
9 good as the information that -- the data that's put into
10 those systems.

11 CHAIRMAN BABCOCK: Does everybody use Tyler?

12 MS. PRICE: No.

13 CHAIRMAN BABCOCK: Whoa.

14 MS. GILLILAND: I think that's the --

15 CHAIRMAN BABCOCK: Sorry.

16 MS. WOOTEN: And there's a reason.

17 MS. GILLILAND: In the jury software world,
18 Tyler is probably the biggest player. There are more and
19 more software companies coming online offering a lot of
20 different options and just I'm starting to hear more and
21 more clerks getting different or more updated jury
22 management software systems. I think, what we see, kind
23 of the baby boomer and some of Gen X, they're like jury
24 duty is important, please don't come arrest me, I promise
25 I'll be there, and THEN some of the younger generation, we

1 had one caller say, "Well, do I win a prize? What is
2 this? I don't understand."

3 CHAIRMAN BABCOCK: You get a cell phone.

4 MS. GILLILAND: And I think there's a real
5 opportunity, and I don't know whether that's through the
6 bar association or who, but I think there's a real
7 opportunity to have kind of a PSA about why jury duty is
8 so important and not just yeah, yeah, yeah, jury duty, but
9 the real historical reasons or the real impact that you
10 have in making decisions in people's lives and why this is
11 important, even though the jury pay is \$6 for the first
12 day and \$40 after that.

13 CHAIRMAN BABCOCK: Yeah. Okay. Yeah, who
14 has got their hand up? Professor Albright.

15 PROFESSOR ALBRIGHT: Yeah, I have a
16 question. So as a resident of Travis County, the IJury is
17 fabulous. You know, I remember having to go to the big
18 arena --

19 MS. PRICE: To the big room, yeah, and be
20 there all day.

21 PROFESSOR ALBRIGHT: -- and then you'd get
22 assigned a different day and all of that, and this
23 gives -- I don't know if you-all really can tell how
24 flexible this is. You get how many, 30 days?

25 MS. PRICE: 75 days. 75 days.

1 PROFESSOR ALBRIGHT: 75 days now, where you
2 can pick what's the most convenient for you.

3 MS. PRICE: No, no, no, no. You pick the
4 dates that you are not available.

5 PROFESSOR ALBRIGHT: Not available.

6 HONORABLE STEPHEN YELENOSKY: And don't pick
7 75.

8 MS. PRICE: Yes, right.

9 PROFESSOR ALBRIGHT: And so when I was
10 teaching it was amazing, because I knew I couldn't
11 teach -- I couldn't go these three days, and I could go
12 these two days, and then we had spring break or whatever.
13 So I think from a juror's perspective, it was really
14 wonderful. What I'm wondering is why other counties
15 haven't adopted it, and in those counties do you-all still
16 make people go to the arena and then get assigned?

17 MR. WARREN: I'd like to respond to that.
18 It's pretty interesting because I have conversations with
19 colleagues all the time as it relates to adopting systems,
20 and while that may be a unique system for Travis County --
21 of course, everybody have their own philosophical beliefs
22 as it relates to what their business process will be, but
23 in a lot of small counties they don't have the technical
24 resources. I was talking to the district clerk in Medina
25 County, which is just southwest of Bexar County, and they

1 rely on someone from the sheriff's department to serve as
2 their desktop support and in everything technical in
3 Medina County, so it depends on the resources that are
4 available. That dictates what a county -- whether it's a
5 county clerk, district clerk, or any other department in
6 the county. That dictates what they're able to do, what
7 they're able to do as it relates to launching and
8 implementing technology.

9 MS. GILLILAND: And like everything,
10 personalities are a part of it, of this is how we've
11 always done it and we like it.

12 PROFESSOR ALBRIGHT: Yeah.

13 MS. GILLILAND: They're going to continue to
14 do it. Facilities are an issue. Like, for example, in
15 Parker County, as big as we are, we don't have a central
16 jury room, so you are being summoned to that courtroom.

17 PROFESSOR ALBRIGHT: You're summoned to a
18 courtroom, okay.

19 MS. GILLILAND: So it just you can kind of
20 get 254 answers on that, depending on what -- what the
21 personalities are, what the technological capabilities
22 are, and what the facilities currently allow for.

23 MR. WARREN: And with Dallas County, the
24 volume that we do, technology is required because we don't
25 have the manpower to do that, and of course, we have two

1 central jury rooms; but, of course, we also have this
2 prescheduling so you already know where you're going to
3 go, and that's to the courtroom. The average jury panel
4 that our courts have is about 40 to 55 jurors on each
5 panel. So you get that group, and they'll go to their
6 pool. The majority sits in the gallery, and then if you
7 have any overflow that won't fit in the gallery, they'll
8 sit in the jury box, and that's where the jury -- where
9 the attorneys actually conduct their voir dire.

10 Interestingly enough, and I'm not quite sure
11 if these two ladies, if their counties are the same, if
12 during the course of the jury assembling to a particular
13 court -- and, of course, a lot of times you get a lot of
14 cases that will settle during the course of showing up and
15 then getting ready to go to trial, so those jury panels
16 are basically repurposed and sent to another court.

17 MS. PRICE: We do not do that. We generally
18 don't do that. We generally dismiss them, which explains
19 why we send out 165,000 notices, but if it settles, we can
20 tell the jurors, "Thank you, but you don't have to come,"
21 and they celebrate.

22 MS. GILLILAND: I can tell you we've had a
23 couple of our JPs try to recycle and reuse, and nobody
24 will say it in front of a judge, but the jurors do not
25 like that --

1 MS. PRICE: Yes.

2 MS. GILLILAND: -- at all. So we try to --

3 MS. PRICE: They always tell us how they
4 feel.

5 MS. GILLILAND: Yes. If you really want to
6 know what the jurors are saying, they will tell us.

7 MS. PRICE: Yes.

8 MS. GILLILAND: And so I think, at least on
9 the clerk's side, I think a lot of the clerks are trying
10 to not reuse those pools.

11 CHAIRMAN BABCOCK: Do you-all do anything to
12 proselytize or to do PR for jury service and try to tell
13 the prospective jurors how important jury service is to
14 our system of government to try to drive those numbers
15 down, the no shows without excuse, to drive that down?

16 MR. WARREN: You know, someone mentioned
17 when Dr. Phil was here, someone mentioned -- and it may
18 have been Dr. Phil -- Schoolhouse Rock, and so while I am
19 opposed to social media as an individual, well, certain
20 portions. I don't know what TikTok is for and all of that
21 other stuff, but -- but one of the things that we do, once
22 we get a panel, we let them know ahead of time how
23 important -- we thank them for their service and their
24 willingness to come down, but we also let them know then
25 that you may be going to this particular court, you may --

1 in the event that that doesn't go through, we still need
2 your service. It's important, so we go to -- you go to
3 another -- you may go to another courtroom. I think y'all
4 may want to try that so you don't get the complaints.

5 But I think at some point we have to use
6 like those little Schoolhouse Rock videos to show during
7 the course of it if you have a central jury room so that
8 they'll understand and also post that type of Schoolhouse
9 Rock jury service is important on your county's website.

10 MS. PRICE: Well, I will say that when you
11 send the summons, I'm not sure there's a way to emphasize
12 that, because, you know, but what we do tell them, of
13 course, is if they don't respond there is some penalties,
14 and I think sometimes that gets people to respond. And we
15 also have video on our website about the importance of
16 jury service, and then when they finally go through the
17 process, I send all of the letters thanking them very much
18 for their time and service and how much it is appreciated.

19 CHAIRMAN BABCOCK: Yeah. Okay. I've --
20 I've got a little speech that I give when I'm selecting a
21 jury, when I'm addressing the panel, and it basically is
22 premised on this. There are criticisms of juries, I mean,
23 you -- you know, people who are defendants frequently will
24 be mad at runaway juries and everything, and then on the
25 other side, you know, people will think that juries are

1 too stingy with awarding damages in appropriate cases, and
2 I always make -- try to make the point that if you are a
3 critic of the jury system, you better not be trying to get
4 off the jury, either by not showing up or -- you know,
5 we've all seen it, you have got somebody there, their hand
6 will be up every two seconds, "Oh, yeah, I don't feel" --
7 "I feel very strongly about this," you know, hoping to get
8 excused. That's not right. And Judge Yelenosky had his
9 hand up, so you're excused.

10 HONORABLE STEPHEN YELENOSKY: Just to make a
11 suggestion, I think the State ought to do that. The State
12 did a Don't Mess With Texas that was very successful, and
13 showing up for jury service is a statewide issue, and
14 these little counties shouldn't be expected to do TV or
15 whatever. So I think it's a State's duty, and that's my
16 suggestion.

17 CHAIRMAN BABCOCK: Yeah. Yeah.

18 HONORABLE LEVI BENTON: Well, just because
19 he said this, I remember 18 years ago Judge Peeples and I
20 served on a Supreme Court special committee related to
21 jury service and summons, and since we have Senator Hughes
22 and Representative Leach here, it sure would be nice if we
23 had statutes mandating a uniform way to summons people, at
24 least in the metropolitan counties and then one for the
25 rural counties. I'm a little bit unnerved by all of these

1 disparate ways we have of getting people to the
2 courthouse, and so we ought to have a uniform way to do it
3 and a state PSA to encourage people to do it. Thank you
4 very much.

5 CHAIRMAN BABCOCK: You're welcome. Any
6 other questions of our panel? Yeah, Professor Carlson.

7 PROFESSOR CARLSON: So I would ask the three
8 of you, are you satisfied with the jury response that you
9 feel like it's not a problem?

10 MS. PRICE: Oh, I'm not. I'm not. I think
11 there's always room for improvement. I especially believe
12 that we need to focus on trying to get people of color to
13 respond even more, but I think, you know, the economic
14 impact of them -- that's why I like -- I really want to
15 emphasize in a way, a small way, about virtual jury
16 trials, to ask them to take a whole day off, drive down to
17 the courthouse, find parking, go in and wait, and then
18 either say it's settled and then they have missed a half a
19 day, I think we really need to explore how that impacts
20 people economically and why -- I think that's one reason
21 why they do not respond at all and just pray that they're
22 not going to get a warrant issued out for them.

23 PROFESSOR CARLSON: I guess that was my
24 follow-up question to the other, was do you see economics
25 play a role in people who aren't participating? Because

1 you mentioned \$6 a day for the first day and \$40
2 thereafter. Well, in Houston \$40 might get you the
3 parking.

4 MS. PRICE: Yeah.

5 PROFESSOR CARLSON: Yeah, I don't know, and
6 I don't know, McDonald's.

7 MS. PRICE: So I'm focused on for our next
8 budget year to increase our first day to 20. I hope I --
9 I forgot, it's in writing. Anyway, I'm focused. I'm
10 going to push for an increase in Travis County to increase
11 our first day, and then I'm not sure we can judge the
12 people who don't respond.

13 PROFESSOR CARLSON: Yeah.

14 MS. PRICE: Because they don't respond, and
15 so I don't know if we need to send them a letter and then,
16 you know, probably very few of them will respond, so
17 that's the --

18 HONORABLE STEPHEN YELENOSKY: Unsure.

19 PROFESSOR CARLSON: How about the other
20 clerks?

21 CHAIRMAN BABCOCK: Yeah, Jason Bloom, who is
22 going to speak to us after lunch. Jason is a trial
23 consultant, has a very successful business. Jason, you
24 had a question?

25 MR. BLOOM: Yeah, Professor, did you have

1 another one?

2 PROFESSOR CARLSON: No, I just didn't know
3 if that would include Ms. Gilliland.

4 MS. GILLILAND: Just briefly, I don't feel
5 like we have a crisis in Parker County. What I hear from
6 other midsize to small counties, I don't think there's a
7 crisis in attendance, but when you have 15 to 20 percent
8 that just don't respond, I think there's a lot of room for
9 improvement on that number.

10 MR. BLOOM: So there's some other counties
11 around the United States that experiment with doing the
12 jury selection, the first day online virtually, and the
13 response rate's really, really high, and that way they
14 don't have to drive down and sit around all day. There
15 was a jury two days ago in Dallas that sat around the
16 entire day as the judge was doing hardships in the jury
17 assembly room, then came back and went into a very hot
18 courtroom, and everyone was just saying everything they
19 could to get out of jury service, so the judge had to punt
20 the trial because she was going to bust the panel, but I'm
21 just wondering if either of your venues have thought about
22 experimenting with letting you do the jury selection
23 process virtually?

24 MS. GILLILAND: When you say "jury
25 selection," if you mean claim an exemption or

1 disqualification by statute --

2 MR. WARREN: No, so you're actually talking
3 about they actually did a voir dire.

4 MS. PRICE: Yeah, the voir dire, virtual
5 voir dire.

6 MR. WARREN: I don't know. That's something
7 that we would have to get the -- our judiciary involved
8 in --

9 MR. BLOOM: Sure.

10 MR. WARREN: -- and maybe have those
11 discussions.

12 MR. BLOOM: I've heard it's very successful
13 toward solving the first day show-up rate. And when they
14 get selected, then they come down to the courthouse. Now,
15 they were doing that recently in Seattle, because it's too
16 dangerous to go to the courthouse in Seattle, not because
17 of COVID, but it's too dangerous.

18 MR. WARREN: That's actually something I'm
19 going to take back to tell my judges, but I have to let
20 you know as a disclaimer, I'm going to say it was my idea.

21 MR. BLOOM: That's fine. That's fine.

22 MS. PRICE: I will say on behalf of Travis
23 County, we have seen almost a hundred percent show-up rate
24 in regards to virtual online for voir dire.

25 MR. BLOOM: That's --

1 CHAIRMAN BABCOCK: Justice Kelly.

2 HONORABLE PETER KELLY: We heard Dr. Phil
3 say that, what, 13, 15 million functionally illiterate
4 adults, and I'm wondering how much of that plays into the
5 lack of response. I'm getting 15 to 20 percent not
6 responding, maybe they just can't read -- I mean, they're
7 not real easy to follow. I mean, my wife just got one a
8 couple of weeks ago. You've got to know where to look to
9 see what you're going to do. Maybe it's a communication
10 problem and not just not desire to serve.

11 MS. GILLILAND: So one of the things that
12 ours, you know, it says real big, "Official Jury Summons,"
13 but we put QR codes on them, and so if you don't want to
14 read through all of the legal-sized stuff that we've got
15 on here, you can use the QR and go straight to the website
16 and just prompt through the different questions.

17 MS. PRICE: And far -- we've improved our
18 online to where it's basically just drop down menus
19 instead of having people type in all of the information,
20 which used to happen. And so I think there's always a
21 continuous way to make it easier for jurors to respond,
22 especially if they're doing it online.

23 MR. WARREN: I would add that one of the
24 things that we have to take into consideration is that a
25 lot of people, they now are doing their bills online, so

1 the only thing that they are getting at their homes is
2 junk mail, and those are the things that they don't go
3 through. And there are also those individuals who get a
4 lot of mail, and they'll set the jury summons aside.
5 They'll get tomorrow's mail, they'll put it on top of the
6 jury summons. They'll find the jury summons three months
7 later. Oh, I forgot the jury, and so there's a lot of --
8 it's all based on how societal norms, on how they actually
9 respond. True enough there is a degree of people just
10 "I'm not going to do that."

11 HONORABLE PETER KELLY: It's like what you
12 held up that the juror gets, I mean, I got something like
13 that that said I have to renew my auto warranty.

14 MS. GILLILAND: Right.

15 HONORABLE PETER KELLY: And, you know, how
16 do you differentiate it from junk mail?

17 MS. PRICE: Well, we put the sheriff on it.

18 HONORABLE PETER KELLY: That probably gets
19 his attention.

20 MS. PRICE: This is from our sheriff.
21 That's, I think, how we get a little bit more attention on
22 our mail that we send out.

23 CHAIRMAN BABCOCK: Great. Well, thank you
24 very much. Was there another question? Sorry. Justice
25 Gray.

1 HONORABLE TOM GRAY: It really wasn't a
2 question, as I'm prone to do. It was just a veiled effort
3 at humor, but I just can see my 94-year-old father or my
4 91-year-old mother holding their, you know, corded
5 telephone over one of these QR codes.

6 MS. PRICE: Well, I do want to point out
7 that generally you can be exempted after 70, so --

8 HONORABLE TOM GRAY: They're not going to
9 exempt themselves, I assure you of that.

10 MS. PRICE: Oh, okay.

11 MS. GILLILAND: We do have a phone number
12 they can call.

13 MS. PRICE: Yes, they can call or they can,
14 you know, drive down.

15 CHAIRMAN BABCOCK: Yeah, Judge Miskel.

16 HONORABLE EMILY MISKEL: So this is the big
17 idea meeting. One option would be I've heard from many
18 sources that adding a text reminder is a huge shift in
19 making people show up.

20 MS. PRICE: Yep.

21 HONORABLE EMILY MISKEL: And so I wonder,
22 big idea, I don't know if this exists now or not, could it
23 be that after you mail the summons, is there a database
24 that exists that links cell phones and addresses?

25 MS. PRICE: Huh-uh.

1 HONORABLE EMILY MISKEL: If not, is it
2 possible under state law to get addresses from phone
3 companies, or is that prohibited by federal law? I have
4 no idea, but if you had the ability to have cell phone
5 numbers of billing addresses in your zip codes to be able
6 to send a follow-up text reminder to your jury summons, do
7 you think that would affect response rates?

8 MS. GILLILAND: I would like to talk to my
9 jury clerk about that, and she said it would be wonderful
10 if the lists that we get included phone numbers because
11 you could even pretext somebody and say, "Hey, a summons
12 is coming, watch out, it's real" --

13 HONORABLE EMILY MISKEL: Yeah.

14 MS. GILLILAND: -- you know, even if it
15 doesn't have any other follow-up information, but just
16 watch your mail, a summons is coming, might just get
17 people to not treat it as junk mail, to be on the lookout,
18 but it's a real and serious thing. I don't know where we
19 would get those or how that could work, but that would be
20 a huge tool to be able to communicate with people
21 beforehand.

22 MS. PRICE: And -- actually, I'm sorry,
23 John. I'm actually going to -- that's a great idea, and I
24 think we're going to try to see if we can do it. Because
25 if they can get my text number to ask me if I can sell my

1 house, then I think there is some kind of vendor out there
2 that it's just going to be what is the cost to connect the
3 name and can we merge them all together. That's going to
4 be -- but that's a great idea, and I think it's a project
5 that I would like to take on.

6 HONORABLE TOM GRAY: Judge Miskel, if I
7 start getting that kind of notice on my cell phone, I'm
8 going to be wanting to have a conversation with you.

9 HONORABLE EMILY MISKEL: There will be a
10 link to the jury TikTok right on there.

11 MR. WARREN: That actually, what he just
12 said, actually as a prelude to my response, the only
13 way -- if you -- the only way -- I mentioned earlier
14 systems are only as good as the information -- as the data
15 that goes in. The only way you're going to actually get
16 the phone number of someone who wants to receive and open
17 that are the ones who don't have an issue serving. As it
18 relates to what Velva was saying about the phone calls
19 from somebody wanting to sell their house, they're getting
20 that data from your -- from the -- from the title company
21 that sold your house to begin with. That's where they're
22 getting that information from.

23 HONORABLE EMILY MISKEL: My suggestion was,
24 like, could Texas pass a state law, I don't know the
25 answer to this, that cell phone companies provide billing

1 addresses and phone numbers to jury --

2 MR. WARREN: That information -- it's my
3 number, so a phone company can't do that because I'm under
4 contract with them, and so you can't give my information
5 unless I authorize it.

6 HONORABLE EMILY MISKEL: I mean, people
7 printed phone books for a long time, and they got the
8 information somehow, so --

9 MR. WARREN: Yeah.

10 CHAIRMAN BABCOCK: All right. Well, listen,
11 thank you so much for doing this for us, especially
12 Ms. Price who had a --

13 MS. PRICE: I apologize, thank you very
14 much.

15 CHAIRMAN BABCOCK: No, go dedicate that
16 courthouse, we can't wait. And thank you. So nice job by
17 the panel.

18 (Applause)

19 CHAIRMAN BABCOCK: And before -- before we
20 get to -- to Senator Hughes and Representative Leach, I
21 want to direct your attention back to the door where Oscar
22 Rodriguez, the executive director of the TAB which has
23 hosted us for so many years, and, Oscar, thank you again,
24 once again, for letting us use your wonderful facilities.

25 MR. OSCAR RODRIGUEZ: It's always a

1 pleasure, always a pleasure to have all of you.

2 (Applause)

3 CHAIRMAN BABCOCK: All right. So now we
4 will turn our attention to the legislative branch, and I
5 happen to know from dealing with Representative Leach over
6 a number of sessions what a terrific leader of the
7 judiciary committee he is. He has been -- and you can
8 usually tell from my vantage point if people are
9 dissatisfied because I will hear complaints from clients
10 and in some cases constituents of yours.

11 HONORABLE JEFF LEACH: Yeah.

12 CHAIRMAN BABCOCK: So why don't you -- why
13 don't you lead off and let us know what you're thinking?

14 HONORABLE JEFF LEACH: So the Senator and I
15 are arguing about who should go first. Normally he goes
16 first. You want me to or --

17 CHAIRMAN BABCOCK: You know, I don't want to
18 reveal my criterion, but now you forced me to, the better
19 looking, more handsome --

20 HONORABLE JEFF LEACH: Okay, then I'll go
21 first.

22 MR. JAMES SULLIVAN: That's why I went
23 first.

24 CHAIRMAN BABCOCK: That's why Sullivan has
25 already been here.

1 HONORABLE JEFF LEACH: I'll keep my remarks
2 very brief, and I know I'm -- Senator, we're the only
3 thing standing between them and lunch.

4 HONORABLE BRYAN HUGHES: Yeah.

5 HONORABLE JEFF LEACH: So we'll keep this
6 short and sweet. But many of you do know, if you don't
7 already, that Senator Hughes is a newly married Senator
8 Hughes, just in the past two weeks.

9 (Applause)

10 HONORABLE JEFF LEACH: So he's all tan and,
11 you know, I saw some honeymoon pictures, all appropriate,
12 posted on social media, so very happy for you, and proud
13 to serve with the Senator, and thank you for having me
14 today. I'm very proud to serve two terms as chairman of
15 the House Judiciary Committee and look forward to
16 continuing our work next session to make sure that our
17 Texas judicial system is a beacon for the rest of the
18 country. I love this conversation that I just jumped in
19 and did a cannonball in and just listened to you guys
20 discuss, because this is actually something that I'm
21 working on when it comes to elevating jury service across
22 the state, addressing some of the issues and challenges
23 that you've talked about. We're working on legislation
24 right now to very specifically address some of the
25 exemptions that currently exist under Texas law, and so I

1 look forward to this. This is a big ideas meeting.

2 What's it called, deep -- what is it?

3 MULTIPLE COMMITTEE MEMBERS: Deep thoughts.

4 HONORABLE JEFF LEACH: Deep thoughts. So I
5 welcome your feedback and your input and your counsel as
6 we work on that bill and many other bills. You'll be
7 happy to know that we're working on an additional judicial
8 compensation bill.

9 HONORABLE TOM GRAY: Hoo-ah.

10 HONORABLE JEFF LEACH: And we -- you can
11 applaud that if you want. I was very proud of the work
12 that we accomplished in 2019 to increase our judicial
13 compensation, but we have much more to do, as you know, to
14 bring us into line and make us more competitive with other
15 states, and -- and I look forward to working with you on
16 that. I fully believe that this session that we will pass
17 a substantive and meaningful and hopefully lasting
18 judicial compensation increase and framework that will
19 really elevate the bench, and you deserve it, and that we,
20 as the Legislature, need to deliver. And so I look
21 forward to working with you on any and all issues that we
22 can find common ground on and even those that we can't.

23 In 2019, we passed a number -- my first term
24 as chairman we passed a number of landmark provisions that
25 I'm very proud of that actually brought -- if you would

1 have told me back when I first started that I was going to
2 be able to bring TLR and the trial lawyers together where
3 their lobbyists were talking about vacationing together
4 after the session, I would have said, well, that's a big
5 achievement, and it was. We've been able to be real
6 collaborative and get people in a room and talk about the
7 right public policy for the State of Texas, and that's --
8 as long as I'm going to continue to serve as chairman of
9 the House Judiciary Committee, that's the way I'm going to
10 continue to operate things, is to work collaboratively, to
11 open my office, open the legislative process to the people
12 of Texas and to you, and I look forward to working with
13 you next session to make it a great, great success and
14 look forward to working with my colleague on the -- in the
15 lower chamber.

16 HONORABLE BRYAN HUGHES: I used to call it
17 that, too.

18 HONORABLE JEFF LEACH: Yeah, on other side
19 of the building, and we have a great relationship, and
20 we'll be working closely on these issues, Senator.

21 CHAIRMAN BABCOCK: All right. Senator
22 Hughes.

23 HONORABLE BRYAN HUGHES: Thank you. My name
24 is Bryan Hughes. Many of us have met before, and the
25 great news, unless the -- in case it's not already

1 apparent, the Legislature is not in session. Relax, enjoy
2 the afternoon. Our founders wisely gave us this part-time
3 Legislature, part-time citizen Legislature. It's a neat
4 system, and Representative Leach and I worked together
5 over in the House before.

6 HONORABLE JEFF LEACH: Are we part-time now?

7 HONORABLE BRYAN HUGHES: Yeah, the \$600 a
8 month that I made when I was in the House, I make the same
9 thing now that I'm in the Senate. I knew that. I'm not
10 complaining.

11 HONORABLE JEFF LEACH: Got it.

12 HONORABLE BRYAN HUGHES: I know y'all are
13 volunteers for your work here. And so we get to work
14 together on a lot of things, and we see everything just
15 about the same, which is nice, too, but I don't have any
16 good stories. I became a politician too soon, kind of
17 stunted my growth as a lawyer. But I've got to tell you a
18 jury story. Please forgive me, it's someone else's story,
19 but it's so good. A judge, a state district judge, told
20 me this about his -- when he was a practicing attorney, in
21 a trial practice in the Eastern District of Texas, he
22 swears this is a true story. They were trying a case. I
23 think it was Judge Folson's court in Texarkana Federal
24 Court, Eastern District, and so a three or four-day trial.
25 Second day of the trial, we're underway and everything is

1 fine, and one of the lawyers notices that one of the
2 jurors looks different. It's a lady, similar complexion,
3 similar hair, similar build, sitting in the right place,
4 but he asked co-counsel and they start looking and they
5 asked the judge if they can approach, and sure enough this
6 lady on the front row is not the same lady who was there
7 the day before. Have y'all ever had this happened? He
8 swears this is true, this happened. So the judge called
9 her up and her friend had a hair appointment that day, she
10 couldn't reschedule, so she asked me to come, and she
11 asked me to come in her place, but she told me to take
12 good notes. He swears that really happened, and I haven't
13 looked.

14 Anyway, so lawyers in the Legislature,
15 everybody thinks we have a bunch of lawyers, and we don't
16 have near enough, believe it or not. It's funny,
17 especially on the Republican side, and the judge is
18 nodding his head, for some reason, our primary voters just
19 don't love lawyers. I don't know why that is. I think if
20 they got to know us better, I don't know if it would help,
21 but anyway. In the Texas Senate, we have -- and I'll
22 break this down along partisan lines just for -- just for
23 discussion purposes. There are 18 Republican members,
24 only three law degrees. Chairman Huffman is a very
25 accomplished former prosecutor, judge. Chairman Brandon

1 Creighton is very sharp, real estate developer, business
2 guy, does a little law practice, but not actively. I'm
3 the closest thing to a practicing lawyer we have on the
4 Republican side, which ought to make you pretty nervous,
5 but -- and then on the Democratic side, 13 members, five
6 of those have law degrees, but only a couple of actively
7 practicing lawyers.

8 And so, now, in the Senate, I believe each
9 member of the Senate has at least one attorney on their
10 staff so that helps, but it is -- it does affect policy,
11 it affects how things go. We were talking about the
12 judiciary. So many of our colleagues see, without even
13 thinking twice, they see the judiciary as an agency. Oh,
14 yeah, the agencies are coming in today, this is funding
15 for the agency. And of course, they're not an agency, you
16 know this. They're, of course, a separate political
17 branch, you know that, and so we always have to work there
18 to raise awareness and to try to advocate for that
19 important branch and the work that's done. And again,
20 each of you members of the bench, practicing lawyers,
21 community members, thank you guys for doing this. I know
22 it's a lot of work.

23 And, Chairman, how long have you been doing
24 this? I've been doing this --

25 CHAIRMAN BABCOCK: This is my 23rd year as

1 chair, seven years before that on the committee.

2 HONORABLE BRYAN HUGHES: That's what I
3 thought, and, of course, Mr. Chief Justice, thank you for
4 your kindness and all that you bring to this and the
5 historical framework you have. You get to know him and
6 you get to hear him. We were at the -- we were at the Bob
7 Bullock Museum for the Texas Independence Day celebration
8 three or four years ago, and the Chief Justice gave a
9 little historic -- a little historical and historic
10 reference to Thomas Jefferson and Texas. I wasn't told I
11 couldn't record it so I recorded it on my phone. I went
12 home and transcribed it. Judge, I have plagiarized you
13 almost word for word. It was so good and so interesting,
14 not the first time I've done that, but again, your
15 scholarly approach to things and your care for people and
16 just your service for so long, we appreciate you. And so
17 I'll just say a couple of things. It's all been covered
18 very well.

19 In the rule-making process, I know one
20 matter that we've all wrestled with is remote proceedings.
21 We were talking about that. They came up a little bit
22 maybe, but the possibility of expanding them to voir dire.
23 We talked about technology, and I know you've put hours
24 and hours into this, and we thank you for that, and
25 looking back to what prompted this, I guess, back in March

1 of 2020, it was pretty scary, it was for me. Back then a
2 lot of us, most of us were concerned. We were
3 disoriented, and the Court did a heroic job since that
4 time of keeping us going, keeping the courts moving,
5 keeping justice going, but now we're on the Governor's
6 40th disaster declaration, I guess the 57th Emergency
7 COVID order from the Court. And again, I appreciate the
8 fact that the committee has worked on rules. I know
9 Representative Leach has worked hard on this as well. We
10 know there are benefits, tremendous benefits.

11 Over on the Senate side, we do have some
12 concerns with going as far into remote proceedings as the
13 committee is proposing, and so again, I'm just one vote,
14 I'm just one voice, and the process is going to work. I
15 just want to enter into this discussion with you, a deep
16 respect, and share with you what some of our discussions
17 have been over there. This is no secret that this has
18 been discussed in public hearings. I've spoken about it.
19 Chairman Huffman, who chairs the finance committee as well
20 as the jurisprudence committee has also made her position
21 clear on this, and the House has taken a more -- a more --
22 probably a more -- probably a better approach. We're a
23 little bit slower in the Senate, a little bit more stodgy,
24 I guess, actually.

25 HONORABLE JEFF LEACH: I agree.

1 HONORABLE BRYAN HUGHES: You agree? I think
2 so, too. And so we are concerned. We are concerned with
3 a couple of fundamental matters in the proposed rule. We
4 believe -- I'm going to say "I," I believe that the judge
5 should be present in the courtroom. I realize that's
6 addressed to an extent in the proposed rules, but at both
7 the justice level and the court of record level, my
8 goodness, I was talking to the judge about this not long
9 ago, and think about these credit card collection cases,
10 which sadly, we're going to see, we are seeing, and we'll
11 see more of perhaps, with folks who are relying on credit
12 cards more and abusing them. You know, some guy gets a
13 notice that he's got to go to court, and maybe he's not
14 that technology advanced and shows up at the courthouse.
15 If he shows up at the courthouse, there needs to be an
16 unlocked courtroom with a judge with proceedings there at
17 the courthouse. Even if proceedings are taking place
18 remotely, the judge respectfully should be on the bench at
19 the courthouse the taxpayers have paid for, we believe,
20 for those proceedings, absent really good circumstances.
21 And beyond that, for those matters that require
22 examination of witnesses, introduction of evidence, some
23 of us in the Senate are not comfortable with allowing
24 those to be conducted without the consent of the parties.
25 So just as this process goes, we're going to

1 participate in the process, work with everyone, but just
2 be aware that on the Senate side, the lawyers in the
3 Senate, many lawyers feel strongly about this, and so the
4 process is going to work. We're going to work with you.
5 We're thankful for you and the work you do, but I owe it
6 to you to make sure you know where we are. And
7 Representative Leach had a bill last session, Senator
8 Zaffirini has a companion bill. She's a great
9 forward-thinking member of the Senate, not a lawyer, but
10 very active on judicial matters. On access to justice,
11 she's been awarded for her work there. She respects the
12 judiciary. She's a wonderful member of the Senate, and
13 y'all had companion bills, I guess.

14 HONORABLE JEFF LEACH: We did, yes.

15 HONORABLE BRYAN HUGHES: That's somewhat
16 similar to what the advisory committee has come up with.
17 Over in the Senate those weren't received as warmly, and
18 again, this is just a different viewpoint. It's not about
19 personalities or relationships, so just be aware that that
20 conflict or that different viewpoint, those different
21 viewpoints, will still be there next year as we flesh out
22 this issue, so just be aware of that. We're not fussing
23 at you. We're thankful for the work you do, and we
24 recognize there's a separation of powers issue here. The
25 Legislature has delegated to the courts, to the Supreme

1 Court, this rule-making authority, and that's important,
2 and there's a reason for that.

3 And, in fact, the Chief Justice educated me
4 on some of the history behind that, because sometimes
5 these rules have to be changed, and we're not in session,
6 and it's hard to get consensus on things, and so it's
7 important that this be a nimble process and a thoughtful,
8 deliberative process, which is what y'all do. We're
9 thankful for that, and we recognize that we have this
10 unique delegation where by statute, the Supreme Court,
11 with your help, can make rules that contradict procedural
12 law and the rules trump. That's the law today, and so the
13 courts and the committee and the Legislature have always
14 worked together to make sure we're moving in tandem, and
15 so we're going to do our part to keep doing that. We are
16 concerned about the proposed rule on remote proceedings.

17 Beyond that, there are going to be a lot of
18 stuff we're going to work on. Representative Leach
19 mentioned judicial compensation. It's just got to be
20 done. There's no getting around it. For some time, you
21 know this, in urban and suburban areas it's been
22 challenging for attorneys to leave law practice and make
23 that sacrifice. That's true, even in rural Texas now. We
24 know this, and my goodness, even before this inflation
25 that everyone is dealing with. So I'm optimistic, too,

1 we're going to get that done, and I think I'm going to be
2 carrying your bill, with your permission.

3 HONORABLE JEFF LEACH: Yes, sir.

4 HONORABLE BRYAN HUGHES: We've looked at it,
5 and we've talked to the judges about it, and then I know
6 there was a discussion about business courts. That's an
7 issue also, and bound up with all of this is judicial
8 redistricting, appellate redistricting. That's a
9 difficult process, and a bill began moving through the
10 Texas Senate last session, didn't even get -- it got out
11 of committee. That was as far as it got, and I think the
12 statute says that we are supposed to redraw legislative
13 districts in the first -- the '01 year after the census
14 and appellate court districts in that three years. We
15 haven't done that in 30 or 40 years. We've done some
16 little tweaks here and there, but it's hard. It's a tough
17 issue, and so I don't know if that's going to come back.

18 If judicial redistricting at the appellate
19 level does not come back, at the very least, I think we'll
20 see discussion about business courts and also the
21 discussion about a Texas court of appeals, somewhat like
22 the federal circuit, so when a statute is being
23 challenged, when an agency determination is being
24 challenged, rather than those being handled by the court
25 of appeals here in Austin just based on geography, since

1 those have a statewide -- tremendous statewide
2 implications, obviously, there's a discussion about a
3 statewide Texas court of appeals to handle only those
4 cases.

5 So all of this is out there. Many of these
6 bills have been filed. I filed the business courts bill a
7 couple of sessions ago, and I'm sure those things are
8 going to be coming back. One more issue that is really a
9 vexing one for all of us, came up when the Court of
10 Criminal Appeals ruled based on the Constitution that the
11 attorney general's office cannot intervene in election
12 integrity cases, and the same would apply to human
13 trafficking cases. Generally that the attorney general
14 office, pardon me, the AG's office cannot come into a
15 county without the invitation of the district attorney.
16 And it makes sense. You know, we're all for local control
17 until we're not, and so this is a tough -- this is a tough
18 one.

19 So if I'm the DA, if I'm the elected DA,
20 I've got to have discretion. I know the conscience of the
21 community. I know my resources. I know what I can
22 pursue, what I can't, and I've got to have discretion, but
23 if I'm the DA and I announce publicly, "I will not
24 prosecute law X, Y, and Z," that's been passed by the
25 Legislature and signed by the Governor. That's a problem.

1 I don't know the solution, but that's a problem, and so
2 historically, again the attorney general's office has been
3 able to come in, in certain cases, statutorily, but that's
4 been -- you know, the Court of Criminal Appeals ruled
5 based on the Constitution, based on a fair reading of the
6 Constitution says you can't do that unless the DA invites
7 the AG in. Obviously if the DA has decided I'm not going
8 to prosecute these cases, he's also not going to invite
9 the AG in to do that.

10 So that's got to be addressed, and we're not
11 sure exactly how. It may be that we by statute give
12 adjoining county district attorneys jurisdiction in cases
13 like that, but again, this is the ultimate two-edged
14 sword. Everybody wants their AG from their party coming
15 in when the district attorney from the other party does
16 something they don't like, but there are obviously two
17 sides to that coin. So we're going to be wrestling with
18 these things and getting your input, maybe not formally as
19 the advisory group, but maybe so, but certainly as Texans,
20 as judges, as practitioners is concerned and as
21 civic-minded citizens. So those are the things that I see
22 coming up.

23 Over in the Senate we -- the committee
24 jurisdiction gets shifted around. The state affairs
25 committee, which I've been privileged to chair, generally

1 handles judicial matters. Sometimes those are broken out
2 and put back in. We have a judiciary committee now made
3 up pretty much of just the lawyers in the Senate, and that
4 may change back now that Senator Huffman is doing finance,
5 but in any case, I'm going to be involved in these things,
6 and, hey, I'm just one vote. I'm sure not here to lecture
7 you or to dictate to you, but it's a joy for me to get to
8 work on these things. It's important for me to get to
9 work on these things, and certainly with Representative
10 Leach, so I'm thankful for you.

11 One more story then I'll shut up. One more
12 story. This is an Ann Richards story, so I'm a bipartisan
13 guy, so I heard this from Ann Richards at the Baylor Law
14 day about 20 years ago. We might have been there
15 together, so Governor Richards was talking about Charles
16 Barrow, y'all remember Judge Barrow? So being at Baylor
17 Law and, of course, a respected judge, as told by Governor
18 Richards. Justice Hecht, you know this story, too. As
19 told by Governor Richards, she says that Judge Barrow, not
20 then Judge Barrow, Attorney Barrow in his first race for
21 the court of appeals was campaigning and never ran a race
22 before. I think he was running for the San Antonio Court
23 of Appeals, so -- thank you, thank you.

24 So he's running for the court of appeals,
25 and his political mentor told him, well, you get your

1 campaign posters and then drive to a -- when you come to a
2 gas station, a service station, of course, fill up with
3 gas and after you've bought some gas, ask the proprietor
4 if you can put your poster, your campaign poster, in their
5 window. And so Lawyer Barrow does this, drives up and
6 he's all ready to go, and he buys gas, and he goes in,
7 having paid, and says, "Sir, I'm running for the court of
8 appeals and I'd like to put my campaign poster up in your
9 window," and the proprietor said to him, "Well, son, who
10 are you running against?" And Barrow says, "Well, I'm
11 running against two lawyers. I have two opponents. One's
12 a lawyer from San Antonio, one's a lawyer from Kerrville,"
13 and the proprietor interrupted him, he said, "Son, that's
14 all I need to hear. If you're running against two
15 lawyers, you've got my support."

16 That's supposed to be a true story, but
17 lawyers do come in handy when you need them, y'all know
18 that, and we are so very thankful for this system, for
19 these branches and how they work and how they balance, and
20 we're going to do our part in working with you to keep
21 that balancee and keep things humming along. It's a real
22 joy to be with you. Thank you, Mr. Chairman. Thank you,
23 Chief Justice.

24 CHAIRMAN BABCOCK: Chief Justice Hecht.

25 HONORABLE NATHAN HECHT: Let me just add,

1 this committee is 80 years old, and for a long time it was
2 decades that kind of dealt with mostly the arcane workings
3 of moving the federal rules into the Texas procedure, but
4 the institution, the judiciary, began to get so
5 complicated in the Eighties and Nineties that there were
6 more interworkings between our branch and the Legislature,
7 and in 2003, which was Representative Hughes' first
8 session, the Legislature gave this committee its current
9 portfolio, which was -- our deal was if you come up with
10 policy that you want to see implemented, but the
11 implementation is detailed enough that you don't want to
12 take a chance that it can be done in the helter-skelter of
13 the legislative session when people can't focus on all
14 kinds of things throughout the session to its completion,
15 and you want to see a group like this, who knows
16 everything about how the judicial system works, carry out
17 that policy. It wasn't a question of we'll tell you we
18 think you're wrong. It's you tell us what policy you
19 think the judiciary should have on these issues, and we'll
20 get it done for you.

21 And if you remember in 2003, the Legislature
22 gave us 11, count them, charges, to do most of them by
23 September 1st, after the end of May adjournment, and I
24 think that was more than the whole decade before,
25 Professor Carlson, that we had gotten, and we got them all

1 done, and since then it's been a routine between the two
2 branches that they would continue to do this, and of
3 course, we get them all the time, and we give them
4 priorities, and we try to make sure they're right, and
5 then we kind of circle around to make sure that this is
6 what they wanted done.

7 So I just view that as a very successful
8 interworking of the branches and use of this committee.
9 And then -- and Representative and Senator Hughes have
10 just been always there on access to justice and the things
11 that are important to the branch, and so we appreciate
12 that.

13 And then Chairman Leach, I know comparisons
14 are odious, and comparisons in the Legislature are not
15 only odious, but dangerous, but in my experience, let me
16 just say, I haven't found a better House chair of the
17 judiciary than Jeff Leach.

18 HONORABLE JEFF LEACH: Thank you.

19 HONORABLE NATHAN HECHT: And that's just on
20 every single subject that comes up, so these two fellows
21 are really mainstays of the third branch in Texas in my
22 view.

23 CHAIRMAN BABCOCK: Yep. Here, here.

24 (Applause)

25 CHAIRMAN BABCOCK: You're not going to get

1 out of here without questions, so put your piece of paper
2 down. But, Marcy, you'll be the first, but wait a minute.
3 I think we made news today because I heard that the
4 judicial compensation bill is being carried by these two,
5 and James is in favor of it, so I think it's going to get
6 done, right? So that's --

7 (Applause)

8 CHAIRMAN BABCOCK: The judges are clapping.
9 So, Marcy, go ahead.

10 MS. GREER: So I just -- Senator Hughes, if
11 you could just clarify, you had said that there was a
12 concern about holding proceedings without both parties
13 being agreeable to it. Did you mean jury trials, did you
14 mean hearings, what did you mean by that?

15 HONORABLE BRYAN HUGHES: Thank you. I
16 should have been more precise. I didn't want to drone on
17 too much, but the proposal that we came up with in the
18 Senate on the committee side was no jury trials ever, but
19 with the consent of parties, pretty much anything else,
20 but only with the consent of both parties, and so -- well,
21 four of those matters that would require examination of
22 witnesses, presentation of evidence, obviously in the
23 preCOVID days, hearings, telephone hearings, were pretty
24 common, and my goodness, if you're presenting an
25 uncontested matter, proving up a settlement, that sort of

1 thing, things like that, but anything that's contested or
2 requiring examination of witnesses, we're concerned about
3 that being done remotely without the consent of all
4 parties. Over on the -- at least over on the Senate
5 committee side. That's -- sorry, I was not precise about
6 that issue.

7 MS. GREER: Thank you.

8 CHAIRMAN BABCOCK: Yeah. Justice Gray.

9 HONORABLE TOM GRAY: Chairman Hughes and
10 Chairman Leach, thank you for your service. We appreciate
11 that. This morning one of the issues that the Governor's
12 office, Counselor Sullivan, presented was a bail -- need
13 to continue with the bail reform, and it caused me --
14 because Presiding Judge Keller was here this morning, and
15 you've just gone through a fairly extensive discussion
16 about the way that it's the statutorily delegated to the
17 Supreme Court to write rules. I serve on a companion
18 committee that is much smaller than this one, the Court of
19 Criminal Appeals Rules Advisory Committee, and we
20 frequently run into the roadblock of we do not have that
21 statutory delegation to deal with Code of Criminal
22 Procedure issues, and it really handcuffs our ability to
23 address things like bail reform. How can we implement and
24 do what the Legislature wants done because we can deal
25 with some of it by Rules of Judicial Administration, which

1 this committee deals with, and then we can deal with it in
2 the Rules of Appellate Procedure, but in the
3 implementation of rules in the trial court like we deal
4 with here for civil cases, we cannot do that in criminal
5 cases. Has any thought ever been given to that type of
6 delegation in the criminal context to facilitate that same
7 type of working relationship with the Legislature for
8 implementation of policy?

9 HONORABLE BRYAN HUGHES: Well, from my part,
10 Your Honor, I'll say that -- Mr. Chairman, you want to --

11 HONORABLE JEFF LEACH: No, go ahead.

12 HONORABLE BRYAN HUGHES: So the Government
13 Code provision that says the one that applies on the civil
14 side so that the Supreme Court has full rule-making power
15 in legislative actions, a rule adopted by the Supreme
16 Court repeals all conflicting laws and parts of laws
17 governing practice and procedure in civil actions, but
18 substantive law is not repealed. At the time the Supreme
19 Court files a rule, the Court shall file with the
20 Secretary of State a list of each article or section of
21 general law or each part of an article or section of
22 general law that's repealed or modified.

23 Anyway, that's the provision, and, Your
24 Honor, from my part, to answer your question, I've not
25 heard any discussion. Most members of the Legislature

1 don't know that's there. May I confess I didn't know that
2 was there the whole time I was in the House. Only in the
3 last couple of sessions have I seen that, and that
4 language on its face is pretty jarring, no -- not because
5 of the people here or on the Court, but that language is
6 pretty jarring from a separation of powers standpoint.

7 Again, we know why it's done. There's
8 always been a good working relationship, so to answer your
9 question, I've never heard it proposed, but most members
10 don't even know that's there. Well, that's there, and I
11 didn't know it was there. I'm not the smartest guy, but I
12 don't think most people even know it's there. And so we
13 obviously trust you, and we should have that discussion to
14 the extent, you know, we need to do something like that,
15 but we would have to really sell, have to sell it, make
16 sure people realize this has always been respected, we
17 work together, that sort of thing.

18 HONORABLE TOM GRAY: Well, in full candor,
19 when, not then Chief Justice, but Justice Hecht called me
20 in 2003 to ask me to serve on this committee, I said,
21 "Now, Justice Hecht, you know that I'm against the
22 rule-making authority" and he said, "We had heard that,
23 and that's why we want you on this committee," so I am
24 not -- that was all done with a caveat that I have
25 concerns about that whole delegation.

1 HONORABLE BRYAN HUGHES: You and I have
2 talked about this I know, but go ahead.

3 HONORABLE TOM GRAY: But there it is.

4 HONORABLE BRYAN HUGHES: Thank you.

5 CHAIRMAN BABCOCK: Great. Any other
6 questions? Yes. Justice Kelly.

7 HONORABLE PETER KELLY: Because I have a
8 professional interest in the question, the -- you talked
9 about the attorney general being able to bring criminal
10 prosecutions, and the case the CCA decided was limited to
11 the election law context.

12 HONORABLE BRYAN HUGHES: Yes, sir.

13 HONORABLE PETER KELLY: And is the idea that
14 the AG could intervene and bring criminal prosecutions in
15 any context and not just Election Code context?

16 HONORABLE BRYAN HUGHES: Your Honor, I
17 haven't looked at the case recently, but that's how a lot
18 of us read it. Again, its holding was limited, but its
19 reasoning and the constitutional provisions on which it
20 relied seem to apply equally. And again, forgive me, I
21 did not study it, and I would love to see what you think
22 about that.

23 HONORABLE PETER KELLY: Well, You can read
24 it in Westlaw. It's already there.

25 HONORABLE BRYAN HUGHES: But if it were not

1 -- I think the concern has been that it would apply in a
2 broader context, if those other statutes were challenged,
3 and when they expect them to be challenged based on that
4 rule. That's just a couple of lawyers' opinions.

5 HONORABLE JEFF LEACH: One of the most
6 unexpected and substantial fights I've had on the floor of
7 the Texas House was back in 2019 when I brought to the
8 floor a bill that would have allowed the concurrent
9 jurisdiction for the attorney general on human trafficking
10 cases.

11 HONORABLE BRYAN HUGHES: Yeah.

12 HONORABLE JEFF LEACH: And it was very
13 specific relating to human trafficking. We had created
14 this new division in the office of the attorney general
15 and funded it substantially and believed very strongly
16 that the attorney general and his staff, his team of
17 attorneys, could and should come in and prosecute human
18 trafficking cases, especially where local district
19 attorneys didn't have the resources to do so, and man, I
20 thought that bill was going to sail through, and it
21 fought -- it got fierce opposition from prosecutors and
22 from across the state. We ultimately did not pass it, and
23 just that the turf war issue, the relationship between
24 local, you know, prosecutors and the attorney general's
25 office is -- it's a sticky wicket, but at the end of the

1 day we want our laws enforced. We expect them to be
2 enforced. I don't really care who enforces them. I just
3 want them to be enforced. When the Legislature speaks and
4 puts forth a law, we expect those laws to be followed and
5 prosecuted to the fullest extent, but it's a nuance, and
6 we'll continue to have that conversation.

7 CHAIRMAN BABCOCK: James Sullivan.

8 MR. JAMES SULLIVAN: Mr. Chairman, if I
9 could just follow up on what Chairman Leach was just
10 saying, that's my understanding of it from our branch, is
11 that, you know, the -- it has long been the tradition that
12 when the Legislature, as it has for decades, and my
13 understanding is as the Supreme Court of Texas had said
14 they had the constitutional authority to do, the
15 Legislature could, but jealously guarded the prerogative
16 to enact legislation that would, again, rare instances
17 that made sense because maybe you don't want the people
18 that -- that they're trying to catch in responsible for
19 catching the people, but in those rare instances where it
20 made sense and this deliberative body heard from the
21 locals and, you know, you guys have your locals that you
22 have to deal with, but sometimes that power would be
23 conferred by the Legislature, you know, it would hit the
24 Governor's desk and he would sign it or he would veto it.
25 And then in those limited circumstances, our Constitution

1 of 1876 would allow that.

2 The CCA's Zena Stephens' opinion reads
3 Article V differently than that and maybe differently from
4 what the Supreme Court says, and so I think that in
5 response to Justice Kelly's question, I think if what he's
6 asking is are you saying that OAG should be able to
7 parachute in all the time? I wouldn't think that that
8 would be what you would be sending to our desk.

9 HONORABLE JEFF LEACH: That's not what I'm
10 saying.

11 MR. JAMES SULLIVAN: Rather, the ones that
12 you've -- the few that you've done over the past however
13 many decades and maybe a few more like on something like
14 human trafficking would be something that if it can get
15 through that very, very challenging process at the
16 people's house and in the Senate and then get to our desk,
17 then in those limited circumstances, no, we don't think
18 the people that ratified Article V in 1876 didn't want
19 that happening.

20 HONORABLE JEFF LEACH: Sure.

21 MR. JAMES SULLIVAN: That's my
22 understanding.

23 HONORABLE JEFF LEACH: Well, we want to
24 protect the foundational principle of prosecutorial
25 discretion. That is something that we agree on and, but

1 that that -- from my perspective is a case-by-case basis
2 based on the facts and the law and that prosecutor's
3 discretion. But as we've seen across the state, and the
4 speaker actually about a year ago appointed me chairman of
5 the House Criminal Justice Reform Committee when we talked
6 about -- one of the issues we talked about is these
7 blanket statements from a few prosecutors across the state
8 that takes an entire class of crimes and says "We will not
9 in our county prosecute this entire class of crimes." So
10 they're essentially thumbing their nose at the Legislature
11 saying "We disagree with you and we're therefore not going
12 to enforce or prosecute this entire class of crimes," and
13 not only that, they're issuing public statements and press
14 releases saying it, and that's a problem. That's a big
15 problem. And in those -- that's, I think, going to be
16 something that we this legislative session will address
17 and will crack down on.

18 MR. JAMES SULLIVAN: We look forward to
19 working with you on that.

20 CHAIRMAN BABCOCK: Professor Carlson. Last
21 word. Last question.

22 PROFESSOR CARLSON: More of a statement.
23 Senator Hughes, my understanding of the sense of this
24 committee, which is just recommending it as no kind of
25 authority, but was there was grave concern about remote

1 proceedings insofar as jury trials, and I believe when we
2 addressed the matter those were carved out.

3 HONORABLE BRYAN HUGHES: I believe so.

4 PROFESSOR CARLSON: Correct me if I'm wrong,
5 Chairman Babcock. Judge Miskel.

6 HONORABLE EMILY MISKEL: Right.

7 CHAIRMAN BABCOCK: Great. Well, you-all
8 were not here when Phil McGraw, Dr. Phil, gave a really I
9 thought interesting speech, but one of the things he said
10 resonated with me. I never thought about it before, but
11 he said, and I wrote it down, quote, "More supervision of
12 jury pools, not less," and we're going to have a speaker
13 this afternoon if she gets here, she's in the air right
14 now, who is going to talk about -- about jury lists and
15 what goes into them and the source of jurors, and I think
16 Dr. Phil was talking about it in terms of qualifications
17 and quality, and that's -- that's a subject that is
18 really -- that is a deep thought that I had not thought
19 about previously.

20 HONORABLE JEFF LEACH: Yeah. Yeah. Well,
21 thank you for having us today. I want to --

22 CHAIRMAN BABCOCK: Thank you so much, both
23 of you.

24 HONORABLE JEFF LEACH: And this time of
25 year, I just want to stop, and I know the Senator will

1 agree, just to stop and thank all of you for your service
2 to the people of Texas, and you deserve all of the support
3 from the Legislative branch, and you're going to get it
4 next session, and we're going to be at the forefront of
5 making sure you feel supported and empowered and look
6 forward to working with you to do that.

7 HONORABLE BRYAN HUGHES: Amen to that. And
8 while we will jealously guard our jurisdiction in the
9 Legislature, because the people of Texas have asked us to
10 do that, we revere and respect and will fight to protect
11 an independent judiciary. We're for that. We've got to
12 have that. Got to have that.

13 CHAIRMAN BABCOCK: Thank you.

14 (Applause)

15 CHAIRMAN BABCOCK: And the words everybody
16 has been waiting to hear, we're in recess for lunch. Back
17 in an hour. Back at 1:38.

18 (Recess from 12:38 p.m. to 1:34 p.m.)

19 CHAIRMAN BABCOCK: All right, we're going
20 to -- we're going to start this afternoon session with a
21 talk from a disciple of Dr. Phil. Jason Bloom was
22 actually at CSI after he got out of his master's program
23 in forensic psychology, and he is setting up and is going
24 to talk to us about "Getting back to trial, new jury
25 trends." Jason, you should know, picks juries all over

1 the United States, and I think he picked 300 juries last
2 year.

3 MR. BLOOM: 300?

4 CHAIRMAN BABCOCK: And he does mock trials
5 and just has a thriving business, and he's got slides,
6 maybe.

7 MR. BLOOM: Yes. I definitely do.

8 CHAIRMAN BABCOCK: You're not connected
9 anymore, you know.

10 MR. BLOOM: It's this ClipShare thing.

11 CHAIRMAN BABCOCK: All right. So take it
12 away, Jason.

13 MR. BLOOM: Thank you, Chip. Thank you,
14 guys, it's nice to be here. I think I've spoke to this
15 committee maybe about 10 years ago or something on a
16 totally different topic, but what's hot now is what's
17 happening with juries as we start to open the courts back
18 up, as we start to see more verdicts and more trials
19 taking place, and we start to be surprised by what's going
20 on. Whether it is a defense verdict or a very, very large
21 plaintiff verdict, we've got to get our minds -- ourselves
22 into the minds of the new type of juror, because I think
23 everyone's changed. I think every one of us has changed
24 as a result of the last three years, and I think it's fair
25 to say all of our jurors have changed, too. In other

1 words, what is important to them now just might be
2 different than what was important to them in 2019, and
3 that may be the same for you. How they go about making
4 their decisions just might be different now than it was in
5 2019, but if we can understand the sandbox we're playing
6 in, we can be more successful in that sandbox as trial
7 advocates.

8 So before we dive into what actually
9 happened, let's back it up and go back to jury
10 decision-making basics. The first is the trial lawyer's
11 fallacy. This is the trial lawyer in the courtroom
12 thinking to him or herself, if I just say it to the jury,
13 if I just show it to the jury, they'll get it, they'll
14 understand it, they'll see the world the same way that I
15 do, they'll see the world the same way that my client
16 does, they'll understand it, they'll agree with it.
17 That's not true. Jurors only hear what they understand,
18 and, guys, that's a lot different than saying they
19 understand what they hear. We've got to appreciate the
20 difference if we want to communicate with this type of
21 voter. I call jurors voters now, because the way they
22 make decisions is exactly like voters. It's oppositional
23 in nature. I'm not voting for someone, I'm voting against
24 someone. I will talk a little bit more about that through
25 this presentation.

1 The second basic element of jury
2 decision-making is to move away from the black box theory.
3 Lots of lawyers that I meet, they fall prey to the black
4 box theory because lawyers and people in the legal
5 community are living in a bubble. I'm sorry, but you guys
6 are all living in a bubble. The problems that these
7 voters are dealing with are not the same problems you are
8 dealing with. The experience these decision-makers and
9 voters have had are not the same experiences as you, but
10 the black box theory of jury decision-making, which is
11 totally false, suggests that, again, if I show this to the
12 jury and I say this to the jury and I put this into
13 evidence and I put that into evidence and I shake it up
14 like it's in a black box, the jury will see the world the
15 same way that I do and the same way that my client does.
16 That's not even almost the truth.

17 People, decision-makers, voters, are like
18 candles. You have to light them. You have to inspire
19 them to see the world the same way that your client does
20 or that you do. I can explain to you how the treadmill
21 works. I can give you a lot of information about a
22 treadmill, but that's not going to persuade you to get on
23 there and run or even walk. So I've always thought that
24 jurors and human beings, quite frankly, are like icebergs.
25 What you see above the water are the demographics, the

1 age, the gender, the ethnicity, but what's below the water
2 and is a larger part of the iceberg and, quite frankly, is
3 what sunk the Titanic are life experiences, predisposed
4 beliefs, and personalities, which are a lot more
5 correlated with verdict orientation than someone's age,
6 gender, or color of their skin.

7 Because of the last three years, we add
8 something else to it. We add something else to it, and
9 that is the impact of 2020 to 2021, which you arguably
10 could expand into 2022. So what happened? Let's take us
11 back to March 2020. Dr. Phil talked about how something
12 happened in 2008 with the cell phones. I totally agree,
13 but something monumental happened in March 2020. We had
14 this pandemic thing, and what did we all do, you guys
15 included, what did we do? We looked to the government.
16 We looked to our leaders. We looked to our trusted
17 officials and experts, and we said what the heck is going
18 on? What do we need to do? And we didn't get a lot of
19 answers, and that changed the way we saw the world. We
20 got bad answers, we got incorrect information, we got
21 inconsistent information, or we got no information at all,
22 and that scared us. We did not like that, and again, that
23 changed our perception of a lot of institutions here in
24 this particular country.

25 How did we get that information? Well, this

1 little thing, right? This is how we get our information,
2 as Phil said before. We're scrolling through this stuff.
3 The average voter out there is scrolling through this
4 stuff. They just want to be entertained. You want to
5 analyze things, you want to think about things. They just
6 want to be entertained. That's why you've got Facebook is
7 so hot and Instagram is so hot, but they're scrolling
8 through things, and they're learning this information by
9 scrolling. The market research professionals out there
10 will tell you the average person spends three seconds on a
11 post, three seconds. You can't learn a lot in three
12 seconds, but you think you can. You think you can, and it
13 just becomes headlines to you, right?

14 So what did this produce? A desperate need
15 for but a huge lack of certainty. We looked to the
16 officials, and they could not give us certainty. Am I
17 going to get sick? If I'm going to get sick, am I going
18 to die? Do I have to wear a mask here? Do I have to wear
19 a mask there? No one knows. We all saw the
20 inconsistencies between the county level, the state level,
21 and the federal level when it came to rules. You guys
22 might think that that's normal. You guys might see
23 federal and state officials butt heads, but to the rest of
24 us out there, that's no bueno. We also saw a lack of
25 compassion. No one cared. No one cared, no one was doing

1 anything, no one was doing anything fast enough.

2 And then we saw a lack of accountability
3 over the last three years with a lot of the events that
4 transpired in the last four years, and we saw the death of
5 expertise, and I'll talk about why that happened in a
6 moment, but what changed these preexisting beliefs in the
7 last few years? Yeah, we had this pandemic, but there are
8 a lot of other huge events, a lot of other huge events
9 that we hadn't seen in our history that we were learning
10 about on our device at a clip of three seconds at a time.
11 That's not a very deep dive.

12 We had COVID, we had the Black Lives Matter
13 rallies. Do you guys remember that? It was over two
14 years ago, right? We had the 2020 election. You guys
15 know what that was about. We had the media coverage
16 around the election. We had whatever you want to label
17 January 6th as. Then we had Delta, and we've had more
18 things afterwards, but it's adjusted our preexisting
19 beliefs, and our preexisting beliefs are the foundation of
20 our decision-making, including jurors. So how we felt
21 about fairness in business has changed. How we felt about
22 big corporations and their lack of accountability has
23 changed. How we felt about the government has certainly
24 changed. We expected the government to do this, and they
25 didn't do it. They failed us.

1 Confidential information, how people feel
2 about that has changed. Conspiracies, the rise of the
3 conspiracy theory to fill in the gaps of things we do not
4 understand, and then broken promises. These are what have
5 changed because of the last few years.

6 So how did it affect our world views? Well,
7 what we see now is political polarization. You used to
8 see jurors vote based on facts, then you saw them vote
9 based on their opinions. Now you see them vote based on
10 their politics. That's just the sandbox we're playing in,
11 guys. Fake news, that's still around. It's infected
12 everything, and think about all of the information and the
13 amount of information and the speed that we are getting.
14 It's too much. Something might happen really, really big
15 in the news yesterday that gets eclipsed or overshadowed
16 by what happens on Friday, and we kind of forget about it,
17 you know. Social media becomes an echo chamber. There's
18 no consequences for being wrong. There's no consequences
19 for having an opinion. There's no consequences to
20 believing a conspiracy, and you go online and you find
21 people that agree with you about it, and then those
22 thoughts get hardened as we heard about this morning.

23 There's a desire for certainty in uncertain
24 times. All of you wanted certainty in 2020. Some of you
25 might still want certainty, but the average person showing

1 up for jury service wants more certainty than they're
2 getting, wants more certainty than they are getting from
3 lawyers and wants more certainty than they are getting
4 from fact witnesses and more certainty from expert
5 witnesses. So just because you say it, doesn't mean
6 anyone believes it. You've got to say it with certainty.
7 Rise of conspiracy theories to fill in these blanks. The
8 financial hardships of the pandemic have created us versus
9 them mentality.

10 We also have into the mix, the Trump effect.
11 I used to talk about this a lot. It could be an entire
12 presentation, but bottom line, here it is. And it doesn't
13 matter where you are on the political spectrum. Here's
14 what happened. Donald Trump did an excellent job. Can we
15 go off the record? I've always wanted to say that to a
16 court reporter. No, I'm sorry. Donald Trump did an
17 excellent job of turning conservative people into victims,
18 to planting a victim mentality into conservative people,
19 and that's why we are seeing verdicts that are very, very
20 large in extremely conservative venues around the state of
21 Texas. That's why. He's turned them into victims.
22 They're harboring victim mentality. The world is against
23 me, the world is unjust. I am now a disaffected person.
24 And historically, people who harbor unjust world mentality
25 or who are otherwise disaffected are excellent plaintiff

1 jurors, excellent, high damage plaintiff jurors.

2 So what's really going on? We're back to
3 2010, guys. Occupy Wall Street. You remember that? The
4 99 percent versus the one percent. We're right back
5 there. We don't have people camping out on Wall Street or
6 in Battery Park. You might have some along the lake here,
7 but we don't have people camping out to do that, but
8 that's the psychology that it's produced. It's us versus
9 them, and people perceive -- most people perceive
10 themselves to be part of the 99 percent. Most people
11 perceive plaintiffs, individuals, to be part of the 99
12 percent. Most people see the rich and the big
13 corporations as part of the one percent, and maybe they
14 are, maybe they're not, but there's a resentment there.
15 There's a tension there. I'm not going to help him
16 because he's in the one percent. I'm not going to help
17 him because's in the 99 percent. It's the same thing we
18 were seeing when we were doing mock jury studies in 2010
19 and 2011 when occupy Wall Street was on everyone's mind.
20 It's the same thing, guys. It's class warfare.

21 Now, no one is going to raise their hand and
22 admit it, but if you study the verdicts and you study the
23 rationales behind them, all roads lead to class warfare.
24 It's back. Say hello to it. We've also arrived at a
25 crisis of the truth. Here is a little thing that may not

1 be funny, but it says, "I'm sorry, Jeannie, your answer
2 was correct, but Kevin shouted his incorrect answer over
3 yours, so he gets the points," right? Whoever is loudest,
4 whoever's more forceful.

5 Why is this happening? Is there some
6 psychology behind it? Absolutely, there's a lot of
7 psychology behind it. There's a tremendous amount of
8 psychology in the courtroom. If you know it, you can
9 capitalize on it. If you don't know it, you might still
10 be okay, but what's going on?

11 Whoa, this is prominent, naive realism, the
12 feeling that one's personal perception of the world is the
13 truth. I've got my own reality, and what are you going to
14 do about it? Nothing. You're not going to change it.
15 I'm entitled to it. It's my right. Just like the Bill of
16 Rights and the Constitution, and the Constitution that
17 everyone is talking about on social media, yet no one has
18 actually read, except a few people in this room, I'm sure.

19 What else? Most people don't really want
20 the truth. I'm not interested in that. I just want
21 reassurance that what I believe is the truth. Pat me on
22 the back. Make me feel good about what I'm thinking. We
23 have backward reasoning. This is where you guys live in a
24 bubble, because you guys use forward reasoning. You
25 determine the conclusion based on the evidence. What most

1 other people do is they check the evidence to see if it
2 complies with or comports with their preexisting beliefs,
3 and that's how they go about making decisions, which comes
4 to confirmation bias, which is what you asked about
5 earlier today. The tendency to believe information that
6 comports with existing attitudes, beliefs, and experiences
7 and discount information that does not, right?

8 So what always happens, and you know this
9 when you study jury decision-making through focus groups
10 and mock trials, is jurors start to, at the very outset,
11 go in one direction, and so do you when you make decisions
12 in your life, even if it's just what are you going to
13 order for lunch. You start to go in one direction, and
14 then you start to adopt and pay attention to things that
15 keep you pointed in that direction, and it's very, very
16 difficult, no matter what type of expert you might show to
17 this juror, to get them to back the truck up and go in the
18 opposite direction. This is where human decision-making
19 and the legal procedure and legal principles butt heads.
20 People don't think that way.

21 You can think about burden of proof. You
22 don't make a decision about a car, a house, a job, or what
23 you're going to order off of a menu by any of those three
24 standards or four standards. And if some -- a waiter
25 asked you, do you want the steak by the preponderance of

1 the evidence or by clear and convincing evidence, they
2 would think you're crazy, because no one knows the
3 difference. It's completely academic in nature, right?

4 Also, your brain can't tell the difference
5 between a fact and an opinion you agree with. That's why
6 there's all of this craziness out there. You don't know
7 the difference, and maybe some of us don't want to know
8 the difference. So my new favorite word which you will
9 never find in Wordle because it's too long. I got any
10 Wordle players here? Just a few of you? Come on, guys,
11 get with the Wordle thing. Ultracrepidarian. Anyone ever
12 hear that word before today? Be honest. You didn't learn
13 this in law school? Got any law school professors here?
14 Just kidding.

15 This is a person who offers opinions beyond
16 their own knowledge. The word is used in situations where
17 someone is speaking out of their you know what. They
18 are -- don't write that down either. Speaking as an
19 authority on a subject matter which they only have limited
20 knowledge. Anyone talk to a client like that lately? How
21 about this morning, right? That's what's going on. But
22 I'm entitled to do that. So we've got a society, we've
23 got a jury pool, filled with ultracrepidarians. I think I
24 know what's right, and you're not going to change my mind.
25 I don't care if you've got a Ph.D. and an M.D. and you

1 teach up at Harvard, doesn't matter to me. I know better.
2 Now, why do I know better? This is the interesting part,
3 because I read it right here for three seconds. Because I
4 read it right here for three seconds, and I believed it.
5 That's it. That's it.

6 So what's the impact? Well, we could do
7 some compare and contrast. Before the pandemic, people
8 talked about how do I get out of jury service? They'd
9 call me, they'd call their local lawyer. I don't know,
10 maybe they would go to the bail bondsman. I don't know,
11 but they wanted to get out. I don't want to do this. I
12 was sort of keeping tabs of this, and I've got a national
13 practice. Most of my work is in Texas, but it's just one
14 of these nerdy things that I would do just for kind of
15 giggles, is keep track of how many people try to get out
16 for hardship.

17 I run a dry cleaners, I can't be here for
18 three days, everything will go south, or some other
19 excuse. I've got a paid business trip next week that's
20 nonrefundable. You and I both know there's a lot of
21 refundable tickets out there, and I've never seen a judge
22 ask for proof of that ticket. The business ticket or the
23 vacation ticket. I've never seen a judge ask for that
24 proof. But what was happening before the pandemic is we
25 were getting about -- I was logging it, about 20 to 25

1 percent of the people in the jury pool, when they get up
2 to the courtroom, not down there at the jury assembly room
3 where they're eating donuts, but when they get up to the
4 courtroom, about 20 to 25 percent raising their hand
5 trying to get out. And it's extremely interesting to me
6 that this particular prospective juror could be excused
7 from jury service in this courtroom, but when we go to the
8 courtroom next door, she is not.

9 But today they want to sit on a jury. It's
10 more like five percent. I've been involved in jury
11 selections where not one person in a panel of 30 to 50
12 people has raised their hand to tell the court that a
13 two-week jury trial is some sort of a financial hardship.
14 Why is that? We've got a lot of social justice seekers.
15 Why else is that? The pandemic caused everyone, including
16 yourselves, to be frustrated, be frustrated by what was
17 going on around you in your community and your society.

18 Okay, great. We've named it. What's the
19 solution? What can you do about the fact that you don't
20 like what's going on in your community or society? Not a
21 whole lot. You can vote in November, or you can sit on a
22 jury. What else can you really do? So they see this as
23 now I've got power, and think about it, guys, these juries
24 have more power over the conduct of the defendant
25 corporation than the President of the United States,

1 right? They really do. They've got more power than the
2 President of the United States, because they can render a
3 verdict. They can let the defendant off with zero dollars
4 or \$7 billion, like Spectrum got hit with in Dallas. I'm
5 sure that's going to cross your desk sometime soon.

6 What about frivolous lawsuits? Yeah,
7 everyone used to be all of these tort reformers. I can't
8 find anyone that knows what that means anymore, at least
9 at the jury level. It's not as hot, but a lot of people
10 before the pandemic thought about frivolous lawsuits.
11 That was a popular buzz term. Nowadays corporations have
12 all of the money and they can do whatever they want and I
13 don't like it. There's less frivolous lawsuits out there.
14 And what's really scary for corporations is these jurors
15 want to change their policies. The corporation can argue
16 all day long that, hey, my employee, he complied with the
17 policy, check that box. He did this, check that box; he
18 did that, check that box; but if the voter, the
19 decision-maker, looks at that policy and says that policy
20 needs to be changed, then that defendant is going to lose.

21 Then the defendant follows policies and they
22 would win. Now, the defendant should change the policy,
23 they will lose. The dangerous jurors out there, the
24 plaintiff jurors, the high damage plaintiff jurors are the
25 social justice seekers, and there's a lot more of them out

1 there than there were in 2019, which is why you really
2 can't compare 2017, 2018, 2019 verdicts, to predict what's
3 going to happen in 2022, 2023, and 2024. People have
4 changed. Back then, experts were for real. Wow, that guy
5 is really, really smart. We had this guru effect going
6 on, and what I mean by that is you can present expert
7 testimony to a juror, and they may not understand it.
8 There's no way they can understand it at the same level
9 that the expert does, especially when they're just off to
10 the side watching a conversation between a lawyer and an
11 expert about a subject they know nothing about.
12 Especially when this expert is testifying and the actual
13 voter decision-maker is thinking about other things, such
14 as what's going on back at the office, which some of you
15 might have thought about during my presentation, which is
16 okay.

17 How is my aunt doing in the hospital? Who's
18 going to pick up Johnny from soccer practice if I've got
19 to be here until 5:00 o'clock? What's going on back at
20 the office? So these experts aren't getting the full
21 attention span they wish they were getting, but what used
22 to happen was this guru effect. I don't know what he's
23 talking about, but man, he looks like he believes himself,
24 so I believe him. How do we get -- how do jurors believe
25 experts? How do jurors believe witnesses? How do jurors

1 -- what causes jurors to believe lawyers? What causes you
2 to believe people? Well, the juror looks back at the
3 expert, the juror looks back at the fact witness, the
4 juror looks back at the lawyer during the opening or the
5 closing and says does he or she believe what they're
6 saying; and if he or she believes it, then I'm going to
7 believe it; but if he or she does not believe it, what he
8 or she is saying, then I won't either. That's how it
9 works.

10 Anyone ever tried to buy a used car? Same
11 way. But now we've got the death of the expert. One's
12 own beliefs are more powerful and meaningful than
13 another's expertise. It's the fabric of the personality
14 now. It's the fabric of how they see the world, and
15 again, my own beliefs are coming from three seconds of
16 scrolling through this little device here, that I can do
17 it every time. And Phil was right, we used to look like
18 this. Now we look like croissants, you know what I'm
19 saying? We look like a buttered croissant.

20 Then the damages ingredients. There's a
21 very well-known plaintiff lawyer who's no longer with us,
22 some of you may know him. He used to say in order to get
23 high damages you've got to make them mad and then make
24 them sad. Guys know who I'm talking about? Okay.

25 Now there's a third ingredient, hold them

1 accountable. So now when I listen to jurors in mock jury
2 studies talk about why they're awarding high damages or
3 even damages at all, this word "accountable" always creeps
4 into the dialogue. I didn't see this word in 2019 and
5 2018. I heard sympathy. I heard "I'm pissed off." I
6 heard things like that. Now I am hearing this word. It
7 might be the most common word I hear when jurors are
8 describing elevated damages. We've got to hold them
9 accountable. Where is this coming from? Well, remember,
10 2020 to 2021, a lot of bad stuff was going on. No matter
11 what side of the political aisle you're on, you thought
12 the Democrats should be held accountable for something and
13 you thought the Republicans should be held accountable for
14 something, and no one was held accountable for anything,
15 including all of the confusion that the pandemic produced.
16 No one was held the accountable. I, the juror, this is my
17 chance, man. This is my chance to hold someone
18 accountable. That's what's going on. I want to hold them
19 accountable, so that's a big theme. It's a very big
20 theme.

21 Then what does the defense have to say about
22 money? I've talked to several of you in this room who
23 I've consulted with on trials about calling damages
24 experts, especially if you're on the defense side, and I
25 know you guys always -- you practice on the defense side,

1 you've got to give out a number, right? You've got to
2 give out a number. That's conventional wisdom, isn't it?
3 I've always thought about conventional wisdom. I thought
4 this about it, and that is if everyone follows
5 conventional wisdom, no one ever loses, right? But then
6 they always wanted to know what does the defense have to
7 say about it? Now, a defendant offering an alternative
8 damages calculation is an admission of wrongdoing. "Yeah,
9 but, ladies and gentlemen of the jury, you know, we don't
10 think the damages should be anything, but if you do find
11 liability against my client, you should only award a
12 million dollars instead of 10."

13 Well, the signal to the decision-maker is
14 not the perception you were trying to create. You're
15 trying to say, "I've just got to do this out of civil
16 procedure," but they call your bluff on that and they say,
17 "He really thinks it's a million dollars." It's an
18 admission of guilt. It's an admission of liability. You
19 might not see it that way, but that's the sandbox we're
20 in. So you've got to wonder as a practitioner, do I
21 actually call a damages expert on the defense side?
22 Because I think there's a lot more value to a corporate
23 defendant in a civil lawsuit of cross-examining the
24 plaintiff's economist, the plaintiff's damages expert, as
25 opposed to the direct examination of the defense damages

1 expert which happens two weeks later and there's a whole
2 bunch of confirmation bias in between.

3 I've got some video clips of a focus group
4 because I knew you wouldn't believe me. Let me see if I
5 can get this, if we've got any audio here.

6 No audio, okay. I basically do this, this
7 is me running a focus group. That's me down there. I've
8 still got a face for radio, but I'm running a focus group,
9 and what these guys are basically telling me is I asked
10 them does the fact that the defendant -- in this mock jury
11 study, in their presentation, the fact that they offered a
12 number that was an alternative to the plaintiff, does that
13 make it seem like they're guilty or admitting liability,
14 and all of these hands go up. I did it a second time
15 because I didn't think anyone would believe me, but I
16 can't play the video. Bottom line, chances for jury
17 nullification are elevated and dangerous.

18 We've always been encumbered by or burdened
19 by this tyranny of the shoulds, right? Jurors are always
20 making decisions based on duties. They make up their own
21 duties. The duties they are making up now are different,
22 but they compare the defendant's conduct against those
23 fictional duties. For example, you might think just like
24 I do, when you're in an elevator with a female, you always
25 let her out first. I happen to go that way. There's no

1 law that says that, there's no policy that says that,
2 there's no Legislature that says that or anything like
3 that, but as a juror, I might think that that's the rule.
4 And when these guys don't let females out first, they're
5 violating the rule, and I'm going to punish them for it.
6 That's this jury nullification. That's this tyranny of
7 the shoulds. The company should change its policy, the
8 company should do better training, the company should do
9 more supervision, but the company's following its
10 policies. Yeah, I don't like those policies. Change
11 them. Someone got hurt, change your policies. But these
12 policies have been in existence forever. Doesn't matter.
13 Change them. I don't like them. Everything is up for
14 grabs.

15 So what kinds of cases are most impacted?
16 I'm seeing it on the employment side. I'm seeing it on
17 the patent and trade secret side. I'm seeing it on the
18 negligence side, and I'm seeing it on the defamation and
19 the media side.

20 Here's some recent Texas verdicts. Some of
21 these may have crossed some of the justices' desks here,
22 but some of these things are coming from extremely
23 conservative venues. I thought my entire life Fort Bend,
24 Texas, was one of the most conservative venues in this
25 entire state. Same with Bell, same with Tyler, same with

1 Plano, right? Same with Fort Worth, but these things are
2 pretty big, and they're coming from it's too easy to
3 trigger these jurors. It's too easy to trigger them, when
4 we don't show certainty, compassion and expertise and
5 accountability. That's what they're looking for, that's
6 what they expect, that's what they need. The job of the
7 trial lawyer is to meet the needs and expectations of the
8 voter, of the decision-maker. Those are the needs and
9 expectations.

10 So what can we do about it? How does it
11 impact my themes? Talk about accountability. It's a big,
12 big deal, and you can talk about accountability from
13 either side of the bar, but again, that's the buzzword
14 now, accountability, not sympathy. It's replaced it, and
15 again, just like in our elections, voting, juror
16 decision-making, jury verdicts, are oppositional in
17 nature. I didn't vote for Trump, I voted against Hillary.
18 I didn't vote for Hillary, I voted against Trump. That's
19 going to keep happening. That's what happens with jurors.
20 It's oppositional in nature.

21 How does it impact damages? We're seeing
22 larger damages. 99 percent against the one percent. I
23 resent those big corporations that are doing okay when I'm
24 not doing okay. Again, you guys are in a bubble, though.
25 You know, the rest of them out there, they're still

1 struggling in a lot of places around the United States.
2 This is their chance. This is their chance to get some
3 revenge against someone who is not struggling.

4 We also see wealth bias. You've got a
5 wealthy defendant or you've got a wealthy plaintiff,
6 you're not going to help out the one percent, no matter
7 what side they're on. Again, it's class warfare. They're
8 not going to say that to you. You can't flush them out in
9 jury selection. How many of you are part of the one
10 percent? You're not going to get that, but it's going on
11 in their mind.

12 Jury selection, this is my favorite one to
13 talk about. So Chip had mentioned this earlier. I think
14 that 2020 has created a sociological shift in the jury
15 panel that I will never see and you will never see again
16 in your life. So to back up on what we heard about
17 earlier is you can take every prospective juror and you
18 can bucket them in one of these rankings. I just like to
19 use three, keeping these agreeable or A, dangerous or D,
20 or persuadable. I think Chip may have called it C, but
21 persuadable is what I say, sometimes questionable. Okay?
22 That's how you divide them up.

23 Well, what we used to see is that the
24 initial verdict orientation was like a bell curve, just
25 like you would in school. You're going to have a few

1 people get A's, a lot of B's and C's and a little bit of
2 D's, and you know the guys that are D's, you want to get
3 rid of them, and usually you can do that with six, seven,
4 or eight strikes, right? Now it's different. Now it's
5 changed. There's a net reduction in the people in the
6 middle. Everyone has gone to a corner. Everyone has gone
7 to a corner, so it's a lot easier to find the acceptable
8 juror if you're allowed to ask the right questions, and
9 it's a lot easier to find the dangerous, and you know
10 there's a lot less in between because everyone is taking a
11 position. Sometimes it's with their politics.

12 So it's making jury selection easier to find
13 the dangerous people, but at the same time jury selection
14 has become harder because we've got to be able to ask the
15 predictive questions, not the old questions we've always
16 been asking, but those that actually arm the litigants,
17 both sides to the lawsuit, with the information they need
18 that's predictive of who's going to be good or bad,
19 otherwise just take the first 12, you know.

20 Now, coming out of mock jury studies, here's
21 some of these questions that are more predictive, and you
22 don't really -- you don't see this on the Texas juror ID
23 card, which is fine. It's totally fine, but lawyers have
24 got to start asking more predictive things, and some of
25 these things weren't even being asked in 2018, 2019, at

1 least in the circles I was running. And you want to be
2 able to use these Likert scales. So Likert scale is a
3 strongly agree to a strongly disagree, rather than a yes
4 or no. It's Likert, L-i-k-e-r-t, some social scientist.

5 "If given the chance to lie or cheat, most
6 people would." So you're looking for the ones on the
7 extreme, the strongly disagrees or the strongly agrees.
8 The agrees or disagrees you can say someone is going to
9 say one of those for sure. I just want to get rid of the
10 extremes, depending on which side of the bar I'm on.

11 "Lawsuits are necessary to keep companies
12 honest when doing business." This one is really getting
13 predictive, and again, it's a strongly agree or a strongly
14 disagree that I really care about. I don't really care
15 about these right here.

16 "Are you more guided by the spirit of the
17 law or the letter of the law?" The spirit of the law
18 people are the social justice seekers. I want to change
19 the world. You've given me more power than the President
20 of the United States to change how this company is doing
21 business. Yeah, I'm going to do it. I'm going to do it.
22 I'm a spirit of the law guy, or I'm a letter of the law
23 guy. Hey, the law has been like this, I'm just going to
24 keep it right where it's at. It says exactly what it
25 says. It's not open to interpretation, close book.

1 "Detail-oriented or big picture thinker?"
2 That's another good one that's becoming more -- having
3 more predictive power than it did as well, or "Do you feel
4 like you are someone who worries a great deal about
5 getting taken advantage of?" Well, there's a lot more
6 people who are on the agree and strongly agree side than
7 I've ever seen before. And again, this is coming from
8 this mistrust, this lack of expertise, this lack of
9 compassion. No one trusts anyone anymore but themselves,
10 and what they know and what they believe about the world
11 comes from this at three seconds at a time. Again, that's
12 the sandbox we're playing in.

13 "Do you believe that individuals or small
14 businesses have little chance of protecting interests when
15 they conflict with large corporations?" Guy has got no
16 shot. He's in the 99 percent, they're in the one percent,
17 I'm in the 99 percent. I don't care what anyone says, I'm
18 siding with my man over here. That's what they're saying.

19 How about witness preparation? Big deal
20 here. We need certainty. They need witnesses to have
21 certainty. There is a lack of certainty. What do I mean
22 by that? That's not putting disclaimers over answers like
23 "Well, I believe so," or "I might have to say the answer
24 to your question is yes." They need certainty. Yes, no,
25 something like that. They expect certainty, yes, no.

1 Think about it, you do, too. What if you went to the
2 doctor, your arm was hurt. Pretend I'm the orthopedic
3 doctor, which I'm not, but pretend I am for a second
4 because you're entitled to your own opinion and your own
5 reality. You come to me with my arm hurt, say, "Jason, my
6 arm hurts."

7 I say, "Fantastic, you're in the right
8 place." I look at your arm, which you expect me to do. I
9 feel your arm, which you expect me to do. I x-ray your
10 arm, which you expect me to do, although you might not
11 like the price, and then I come back into the examination
12 room, having read your x-ray, and you say, "Jason, is my
13 arm broken?" Guys, that's a yes or no question. Come on.
14 And I say it back to you, "It's possible that it is. I
15 might have to say that it is. It could be. My guess is
16 that it is." Are any of you going to allow me to operate
17 on your arm and put it in a cast for six months so you
18 can't do the Snapchat thing? No way. No way. Why? I'm
19 the doctor. I know more about the arm than you, because
20 you expected -- and I wasn't certain. You expected me to
21 say "Yes, it's broken," "No, it's not broken," or "I don't
22 know, I need to perform an MRI."

23 Anything else destroys my credibility and
24 violates your expectations and needs. So if you're
25 working with witnesses, get them to be certain.

1 Certainty. You can call it confidence, but confidence is
2 more of a nonverbal thing. Certainty is more of a verbal
3 thing. That is getting rid of these disclaimers like "I
4 believe so" or "I think that." Also, no one is interested
5 in listening to all of this rhetoric from these witnesses.
6 There's a huge fallacy in the business world and the legal
7 world, and that is the more I say, quantitatively 50 words
8 instead of 20, the more I say, the more I'm believed.
9 That's not even almost true.

10 The media figured this out a long, long time
11 ago. You see these tickers running across the screen,
12 absolutely. They figured out that the less you say, the
13 more power or impact is ascribed to your words. So you've
14 got to teach your witnesses to get to the point because
15 when they're getting evasive answers or the questions are
16 being dodged, they're thinking all the way back to when
17 they were dealing with the pandemic and they weren't
18 getting straight answers. There weren't any straight
19 shooters out of the government or the leadership or the
20 officials that should be giving straight shooting.

21 Right after the political debates, remember
22 the political debates leading up to the presidential
23 election? You could watch it or not, but there was a ton
24 of people, talking heads, giving their opinions about what
25 the candidates did. Remember all of that? And what did

1 they talk about? What was the number one thing they
2 talked about or commented on, because everyone was
3 critical of everyone? It was their inability to actually
4 answer the question. Did you see how the guy with the
5 gray hair and the fly on his head evaded the question?
6 Did you see how she dodged the question and wouldn't
7 answer it? And that taught all of us that the way that we
8 judge people and their communications towards us is with
9 are they answering the question or are they not? All of
10 the talking heads criticize people for being evasive, and
11 we learned now how to evaluate people and how they talk to
12 us, including witnesses.

13 So in summary, what have we got? We've got
14 fewer questionable jurors. Again, it's a lot easier to
15 figure out are they good or are they bad as long as we're
16 given permission to ask those questions. There's
17 different degrees of the truth. The credibility of the
18 messenger is key. That's coming from certainty.
19 Certainty plus composure equals credibility. That's the
20 quadratic formula. There's an increased desire for jurors
21 to figure it out on their own.

22 What do I mean by that? There's a lot more
23 questions coming out. There's a lot more questions coming
24 out that are clearly answered by the judge when they read
25 the PJC's or the attorneys when they give their closing

1 argument. I get them on a weekly basis. The trial teams
2 send me, here's the note from the juror. We're all like
3 wait a sec, you told them that. Or that's written right
4 there in the judicial instructions. They don't read these
5 instructions. I wish they would.

6 I was in a mock jury study last week, and
7 they were reading the PJC's about preponderance of the
8 evidence, and, you know, it says something like you need
9 to decide this case based on a preponderance of the
10 evidence. And then the next sentence defines a
11 preponderance of the evidence. Forget what the definition
12 is, but these mock jurors and this mock jury panel said --
13 she just looked up and she goes, "Preponderance of the
14 evidence, what does that mean?" And the dude on the other
15 side of the table says, "Well, 'ponder' means to think,
16 'pre' means before, so this must mean before we think."
17 That's what they did. You can't make this stuff up. But,
18 again, this is all about what should the law be, what
19 should these instructions say more so than what they
20 actually do say, because it's a free-for-all.

21 I can change the legal system. I've got
22 more power as a juror than the President of the United
23 States. Increased desire to serve on the jury, which is
24 great, I think that's great. I have noticed a higher
25 educational attainment across jury panels. I don't know

1 about the entire pool that's showing up to the jury
2 assembly room, but at least when they get up to the
3 courtroom, it's a lot higher than it used to be. There's
4 been some venues where I've seen 80 percent having a
5 college education or higher, even in Texas, so I think
6 that's really, really good.

7 The new hot theme is accountability. That's
8 the buzzword, guys.

9 And so what kind of a buzz kill did I just
10 create for you? Well, depending on what side of the bar
11 you're on, this is just a temporary advantage for
12 plaintiffs in certain cases. Why do I say it's temporary?
13 Because what was going on in 2010, 2011 when we had the
14 class warfare, when the class warfare crept into jury
15 decision-making, it was only temporary.

16 What's the same? There's one key thing the
17 same that I want to leave you with, and that is this,
18 we're still in a world of note card justice. What do I
19 mean by that? I mean the rationale for any jury verdict,
20 guilty, not guilty, liable, not liable, negligent, not
21 negligent, patent infringement, not patent infringement,
22 can fit on one side of a three-by-five index card. That's
23 half of one of these things. So as you're thinking about
24 your next case, for those of you who are practitioners,
25 start with that. Take out one of these three-by-five

1 index cards and write down "I voted for the defendant" or
2 "I voted for the plaintiff" or "I voted for the
3 prosecution, because," and fit it in this small spot
4 there, and then work backwards and say how do I get these
5 decision-makers who are now playing in this new sandbox to
6 say that? Because that's the goal. They're not going to
7 tell you why they voted, why their verdicts became what
8 they did using paragraphs. They're going to do it using
9 small phrases and sound bites. It's headline justice.

10 Thank you.

11 (Applause)

12 MR. BLOOM: I'm happy to take questions if
13 you have time, if not --

14 CHAIRMAN BABCOCK: Yeah, we do have time,
15 and I bet people have questions. So anybody that has a
16 question, fire away. Yeah, Chris.

17 MR. PORTER: Hi. I thought it was very
18 interesting the comment about fake news. I've wondered
19 this myself. I mean, normally in the case of someone who
20 sees a document or someone who hears his own testimony,
21 you normally think that the juror -- and they're
22 believable. Now we think the jury is going to believe
23 him. Are you now saying that depending upon where that
24 particular juror falls on, you know, the spectrum left,
25 right, or whatever, they may think to themselves, yes,

1 even though they showed me this document, even though they
2 showed me this clear and convincing evidence, it's fake
3 and I'm not going to buy it, and they just disregard it.
4 Is that right?

5 MR. BLOOM: I don't want to believe it;
6 therefore, I don't have to. Another really interesting
7 thing I'm doing, and this might seem a little bit trivial
8 to you, but it's really, really insightful to me, is in
9 focus groups I'm asking people, "Is there anyone here who
10 does not believe we landed on the moon?" And I'm usually
11 getting about 20 to 25 percent of people raising their
12 hands. I didn't see that before. I used to see like one
13 or two people, and I'm seeing four or five people. So
14 just know everyone is questioning everything now, and
15 you're entitled to your own reality.

16 MR. PORTER: Is that a questioning of
17 government, or did people always hold those beliefs but
18 they just didn't want to raise their hands?

19 MR. BLOOM: That's a good question. I think
20 it's hard to tell, but I think it is a distrust of
21 government and a lot of other things at the same time.
22 They only trust themselves, and I think what we saw with
23 the lack of expertise, the lack of leadership, on whatever
24 level, in whatever county, is causing that. You've got to
25 earn the trust back with certainty.

1 CHAIRMAN BABCOCK: Any other questions?

2 Yeah, Roger.

3 MR. HUGHES: Going back to your statement
4 that producing damage witnesses is an admission of guilt.
5 In personal injury cases the tactic du jour is to have the
6 medical treaters say, "This is what we charge and this is
7 what the plaintiff is going to have to pay me, win, lose,
8 or draw at the end of the case." This creates a fair
9 amount of sympathy that this person is going to have to
10 pay a lot of money at the end of the case, which then
11 drives liability. Is there any way out of that to simply
12 say you're just going to have to let the doctor get on the
13 stand, say his piece and be done and hope
14 cross-examination?

15 MR. BLOOM: It's really, really hard because
16 everyone thinks that these plaintiffs are out-of-pocket
17 for these medical expenses when in reality they could be
18 paid for by health insurance, workers' comp, something
19 like that, but, you know, we can't tell them that. And
20 yeah, out-of-pocket expenses, especially if they're
21 sizable, that would drive liability. Hey, I just want to
22 get him reimbursed for his visit to the emergency room.
23 If that means I have to say that the defendant was
24 negligent, so be it.

25 CHAIRMAN BABCOCK: Skip.

1 MR. WATSON: Sir, would it do any good to do
2 two things, one would be pretrial in the motion in limine
3 phase to limine out in the liability and damages phase any
4 mention of teach them a lesson, accountability, all of the
5 punishment rhetoric that you've talked about; and second,
6 -- and enforcement, and save that for the punitive phase,
7 or should we. Second, to in the jury instructions go
8 beyond our usual kind of Pavlov instructions that we've
9 given for all of my career, probably generations before,
10 and specifically say, for example, in the damages phase,
11 the damages exist solely for the purpose of attempting to
12 compensate for actual harm this plaintiff caused this
13 defendant, do not use these damages to punish, send a
14 message, or any other purpose other than compensating
15 actual harm done. If you want to punish, there's another
16 phase in which you can do that.

17 MR. BLOOM: Yeah.

18 MR. WATSON: In other words, we've so
19 carefully avoided that, and particularly, we're urging to
20 get to punitive, you see.

21 MR. BLOOM: Yeah.

22 MR. WATSON: But would it make sense just to
23 say, we are cabining you, you know, we are putting bar
24 ditches on each side of your deliberations and focusing
25 you and confining you, or do they even read it? You're

1 getting me very depressed here.

2 MR. BLOOM: Thank you. There's medicine for
3 that and alcohol, but I will say this, and this is really
4 fascinating about jury decision-making and especially
5 applicable to these jury instructions, and that is the
6 voter doesn't learn, the juror doesn't learn, what
7 questions they need to answer nor the definitions of those
8 questions and the legal instructions that surround them
9 until the end of the trial, and we know they've already
10 made up their mind about who's right and who's wrong by
11 that point in time.

12 MR. WATSON: But my question is, would it do
13 any good, or do I just slit my wrists?

14 MR. BLOOM: No, don't slit your wrists. I
15 don't want to be responsible for that, especially since
16 I'm on the record, but if you're going to put it on the
17 instructions, you've got to talk about it very slowly in
18 the closing arguments.

19 MR. WATSON: Oh, of course.

20 MR. BLOOM: That would be the only way. But
21 I just don't -- I wish I did. I just don't have a lot of
22 faith in those instructions just because human nature is
23 to make up your mind as soon as possible, and sometimes if
24 these instructions are going to go against what you're
25 already thinking should happen, you're going to ignore

1 them by way of confirmation bias. It's just where
2 decision-making and legal procedures butt heads. That's
3 all.

4 CHAIRMAN BABCOCK: John.

5 MR. WARREN: I -- you mentioned the Trump
6 factor as it relates to jurors and how they perceive
7 damages, and you also mentioned the -- I think it was a
8 5 billion-dollar case against Spectrum.

9 MR. BLOOM: Seven. That happened in your
10 house.

11 MR. WARREN: Yes, even though in Dallas
12 County the county courts at law have the same jurisdiction
13 as our district courts, so do you think that the jury
14 awarded seven billion because they saw the negligence in
15 Spectrum? So that everybody understands, there was this
16 guy who had mental health issues, and Spectrum was -- it
17 was his last day at work, and he had gone out to --

18 MR. BLOOM: He was the cable guy.

19 MR. WARREN: Yeah, he was the cable guy, and
20 so he goes out and he's on his second visit to this lady's
21 house, and he -- she catches him stealing her credit cards
22 and some other information, so he kills her, and so --

23 CHAIRMAN BABCOCK: Hey, John. That case may
24 be under submission, and so --

25 MR. WARREN: Okay. All right. Well, so --

1 CHAIRMAN BABCOCK: -- we probably ought not
2 to talk about that.

3 MR. WARREN: Do you think that the jury's
4 award was solely based on the fact that this was an
5 elderly woman and that Spectrum should have been more
6 cautious of --

7 MR. BLOOM: I don't know. I don't have --

8 CHAIRMAN BABCOCK: Not only that, I'm going
9 to instruct you not to answer.

10 MR. WARREN: And I say that because I
11 think --

12 MR. BLOOM: I can talk to you offline about
13 that.

14 MR. WARREN: Okay. Well --

15 CHAIRMAN BABCOCK: That would be better.
16 All right.

17 MR. WARREN: I apologize for that.

18 CHAIRMAN BABCOCK: Any other questions of
19 Dr. Bloom here? When are we going to call you Dr. Jason?
20 Actually, you know, Phil created a television show called
21 Bull, and the character was Jason Bull. Could be Jason
22 Bloom, Jason Bull. I'm not sure. All I know is that I
23 suggested to Phil that his show was very anti-lawyer. You
24 know, the lawyers were buffoons and the jury consultant
25 came in and saved the day and that he should write a

1 script for a lawyer that looked good and that lawyer ought
2 to be me. And he did write such a script, but it was
3 never produced, and -- and I think the reason is because
4 he asked me who I wanted to play me, and I said Hugh
5 Jackman, and I guess they couldn't sign him.

6 So, Jason, thanks so much.

7 MR. BLOOM: Thank you guys.

8 CHAIRMAN BABCOCK: That's great. Okay. We
9 see that Paula has arrived. Hi, Paula. We'll get to you
10 in a minute, don't be anxious. But right now we have a
11 really interesting talk, and David McCraw from -- Deputy
12 General Counsel of the New York Times Company has come a
13 long way to be with us and has sat through what may or may
14 not be interesting to him all day, but David is a lawyer.
15 Don't hold that against him, based on Jason's comments,
16 and he does a lot of access work for the *New York Times*;
17 that is, access to government information. So he's sort
18 of on the ground floor, in addition to managing litigation
19 and a whole bunch of other things.

20 And then we have Kelley Shannon, who is the
21 CEO, or president, I'm not sure what the difference is in
22 title, of the Freedom of Information Foundation of Texas,
23 which is a group that was organized many, many years ago
24 to try to protect access to government information in
25 Texas.

1 We had a third panelist, who has ran into a
2 personal family situation in Dallas today and can't be
3 with us, so it's just David and Kelley. And, David, in a
4 tribute to how far you've come and how much older you are
5 than Kelley, why don't you start?

6 MR. DAVID McCRAW: Well, and now that I
7 realize that I'm probably -- is it ultracrepidarian? You
8 know, I'm happy to do it. So thank you all for -- as I
9 told Chip earlier, it's fascinating to see these issues
10 being discussed here, which play out very differently in
11 the dysfunctional state of New York. That's on the
12 record. So I just want to say a few words and then I'm
13 happy to take questions about it. In support of the idea
14 of how important transparency is, not just for us who are
15 trying to cover it, but I think also for you who are at
16 the front lines of justice and also for the citizens who
17 depend on us and on you, different roles, but to play an
18 important part in those things that make people believe
19 that we live in a country that has, as we do, a really
20 first class judicial system that is capable of doing the
21 kind of things that we would want them to do.

22 Let me begin with a story, since that
23 appeared to be the order of the day.

24 CHAIRMAN BABCOCK: Yeah.

25 MR. DAVID McCRAW: Several years ago I was

1 at one of these things that we have occasionally in New
2 York, and you may have it here where press lawyers sit
3 down with judges, and we talk about how things might work
4 out a little better, you know, privately we're talking
5 about what we don't like about each other, but it's
6 usually a good and productive discussion. And one of
7 these, which was held at Columbia University, one of the
8 judges from the Eastern District of New York, Judge Block
9 was talking about how he, of course, believed that it's
10 very important what the press does and the press should,
11 of course, be present, but, you know, his docket is busy,
12 and how is he supposed to extend this courtesy when a
13 party wanted to close the courtroom for a period of time
14 for some reason, some good reason, was he supposed to stop
15 everything and notify the press, that while he would like
16 to be able to extend that courtesy, didn't make much
17 sense.

18 I, younger and more foolish, but still an
19 ultracrepidarian in those days, immediately rose up and
20 suggested that it wasn't a courtesy, it was a
21 constitutional right, and that I was very happy I was
22 never going to appear in front of him again, which changed
23 dramatically two weeks later when a reporter called me
24 from his courtroom saying that Judge Block wanted somebody
25 to appear and discuss about closing a courtroom.

1 I suggest -- and it was an interesting case,
2 because it was a case involving Peter Gotti, who was a
3 second tier mobster after his brother John, and he was
4 being tried for murder. And what had happened in that
5 case is that they were moving towards sentencing; and
6 Peter Gotti's mistress had written a letter to the judge,
7 directly to the judge, saying what a wonderful man Peter
8 was, and so he killed a couple of people, you know, you
9 don't understand, he's just a great man, you should make
10 sure you shouldn't send him to jail, everything should be
11 fine. Well, Mrs. Gotti found out about this and then she
12 filed what you might say was a dissenting opinion to that,
13 which was that the judge should lock him up and throw away
14 the key. So the question was were those letters public?

15 And so I said to the reporter, that's not
16 really our story. We're the *New York Times*, you know.
17 You know, can't the lawyer for the *New York Post* come do
18 it? Can't the lawyer for the *New York Daily News* come do
19 it? And he said, well, the tabloid lawyers say they won't
20 do it because they have been so, so over the top in their
21 coverage that they'll get killed, so it falls to you. So
22 I wrote a letter of sorts. I jumped on the subway. I
23 went over to Brooklyn. I appeared at the duly appointed
24 time in front of Judge Block and started to make my pitch
25 for why these letters should be public, and he stopped me

1 and he said, "You know, Mr. McCraw, I know you're here
2 from the *New York Times*, so I know this is a matter of
3 principle." And I'm going, I used to work at the *Daily*
4 *News*. I'm going I like working for the *New York Times*,
5 this is a matter of principle. No, I really wanted to see
6 the letters as it turned out, but I took his point, which
7 is that even in something like that -- and if you read
8 that decision where he mentions me kindly as he rejects my
9 argument and about whether there is a right of access to a
10 letter written directly to the judge, but there is a
11 principle there. No matter how much the tabloids may or
12 how much even the *New York Times* may make or
13 sensationalize it or do things that make you uncomfortable
14 as judges and lawyers, there is a principle there that's
15 important, and I just wanted to underscore that a little
16 bit here.

17 One of the things that is so interesting to
18 me when I look at the rules in Texas is how far along
19 you-all are compared to so many states in putting into
20 writing in Rule 76a the stuff that we still fight over in
21 other states, that you have actually done the hard work of
22 saying, you know what, transparency is important, that you
23 have to have a good reason, that the press can intervene,
24 if they lose they can appeal, and that we're not going to
25 in the normal course of business like some plaintiffs'

1 lawyers used to like to do is seal everything so that the
2 dangerous products that are hurting the public will never
3 get to that jury that Jason was talking about. And
4 it's -- I think you should take great pride in that
5 commitment that you've shown. It's not unusual in New
6 York for me to show up and have to argue about the right
7 to intervene or whether I'm an amicus or what is my role
8 exactly being there, and to have judges who, you know,
9 sort of question the basic premise that -- that the press
10 has -- should have and does have the right to say
11 something important about -- about openness.

12 I thought Dr. Phil hit the point exactly
13 right, though, when he was asked about conspiracy theories
14 and about distrust of the courts and the tax on the court,
15 and that is one of the important antedates to that is
16 transparency. One of the important things that happens
17 that makes people trust and makes people believe, that
18 makes people see that even if they don't like the outcome
19 that there was a fair proceeding is transparency. There's
20 nothing new in that.

21 After I graduated from law school, I clerked
22 for Judge Richard Simons on the New York State Court of
23 Appeals, and when Judge Simons retired a few years later
24 in 1997, he took it upon himself -- he was a Republican
25 judge. He took it upon himself to take on a Republican

1 governor and tell him to stop criticizing the courts, that
2 this broad brush attack on the courts as courts and the
3 courts were behind the rising crime or whatever, that that
4 just wasn't acceptable, and I always thought that that was
5 a brave thing to do at that point, and but more than that
6 it was an appeal for being as public as possible.

7 Two last points I want to make. One of the
8 things I'm seeing in arguing around the country for
9 openness is an understandable concern by judges about what
10 social media will do, that social media or social media
11 are going to take this evidence and blow it up all over
12 the internet, and that's going to -- that's going to
13 mislead people, it's going to embarrass parties in front
14 of the court, and concerns about that. And that is
15 understandable, but I don't think we should be changing
16 our rules as court systems and our commitment to having an
17 open public justice system because of the possible dangers
18 of social media, that as much as those things are a
19 concern and, look, I really understand the danger of
20 social media. If you are a female reporter at the *New*
21 *York Times*, part of what you sign up for now is to be
22 attacked online for doing your job.

23 I get that. It is poisonous. It is toxic.
24 When I see social media posts that attack not just
25 reporters, but talk about where their children go to

1 school, you know, I get all of that, but that is a
2 problem, and we need to address it. I don't think when it
3 comes to courts we should address that through the rules
4 about transparency, that we still go back to the basic
5 things, and this is embodied in your own rules, that when
6 there's a time to close courts, when there are times to
7 seal files, it should be narrowly done. It should be for
8 compelling reasons, and it should be done because of a
9 need to have a fair trial or jury safety or something of
10 that level and not just because there could be toxic
11 coverage on social media.

12 Hard to resist that when you have a visceral
13 reaction, as I do, to what goes on on social media, but I
14 think we need to remember that not only those interests in
15 a fair trial, but those interests in juror safety and
16 similar concerns. They're important, but they still have
17 to be balanced against the need for transparency, no
18 matter what the media environment looks like.

19 The last thing I'm just going to mention is
20 what I hear a lot of about concerns about how the press
21 covers cases. I spent a big part of the earlier part of
22 this year sitting through and working with our outside
23 counsel on defending Sarah Palin's libel case against the
24 *New York Times*, which was heard in the Southern District
25 in New York in February, and I remember after two days of

1 coverage there was -- or two days of trial, there was a
2 story that was so at odds with what I saw. You know, I
3 was reading the story, and is this just me, but I sat in
4 court all day and it didn't sound anything like this, and
5 I have to say that a reporter, not from the *New York Times*
6 but from another national newspaper, then texted me and
7 goes, were we at the same place as this guy, sending me
8 the story?

9 And I came to appreciate that reporters
10 don't look at -- don't look at trials and court cases the
11 way we do as lawyers. Their coverage inevitably is going
12 to be much more personality driven, it's going to be much
13 more narrative driven, and it's going to be -- and it's
14 not going to be law driven, where we can sit there and
15 hear that testimony and say, well, that was really
16 entertaining and interesting, but it didn't have anything
17 to do with the law. That's likely to be the focus of the
18 story, and I think it's a fair comment that many times
19 reporters don't understand complexity of some legal
20 issues.

21 The *New York Times* had a really interesting
22 coverage, though, the other day that's a counterpoint to
23 that about the -- as you know, the Trump organization is
24 being prosecuted criminally in New York County. We did a
25 whole story on what the words "on behalf of" meant, "on

1 behalf of." That's the crucial part of the jury charge of
2 whether the actions of the accountant were done on behalf
3 of the company or for his own reasons, and it was
4 interesting to see that level of the detail, which was
5 unusual. But I think that the -- one of the things I say
6 about that when other attorneys complain about the way
7 their case got covered is that lawyers need to do a better
8 job of talking to the press, especially on the defense
9 side. You know, there is a temptation to -- you know, the
10 plaintiffs usually don't have a problem talking to the
11 press, and that's one of the reasons the coverage comes
12 out the way it does.

13 Defense attorneys many times will say, "Oh,
14 you know, I'm afraid that if I say something or my client
15 says something that it will be used against me." And that
16 is a risk, but, you know, it's no different than preparing
17 a witness. Your client should be able to capture the
18 points you want to make, and it just helps clarify so
19 often for the reporter, especially on complicated issues,
20 that just because somebody put it in a complaint doesn't
21 make it true and here's what the defense has to say.

22 I actually spent a fair amount of time at
23 the Palin trial talking to the reporters, not to sell the
24 *New York Times* story. I thought our case was strong
25 enough I didn't need to do that, but to help reporters who

1 were struggling with concepts like actual malice, what
2 exactly does that mean? How does that actually work?
3 Well, and it was a term, of course, that neither word
4 helps you out understanding it's neither malice nor
5 actual. So it -- and I found from that exercise that it
6 helped not particularly to get more favorable coverage but
7 to at least get coverage that was more faithful to the
8 legal issues that were there.

9 So the last thing that I would say is that
10 -- which is going back to where I started, which is how
11 important transparency is and what a tribute it is to this
12 country and to the state judiciary as well as the federal.
13 I spent a lot of time three or four years ago dealing with
14 a case in Australia where Cardinal Pell, the highest
15 ranking member of the Catholic clergy was -- faced two
16 trials for sexual misconduct aimed at children, and the
17 judge in the first trial banned any coverage of how the
18 trial turned out, among other things, and so when Cardinal
19 Pell was found guilty, nobody in Australia who wasn't in
20 the courtroom was allowed to know that and on the theory
21 that that would prejudice the next trial coming up. And
22 until you've kind of been through that regime in a country
23 that looks a lot like ours and has a lot of the same
24 values, legal values as we do, until you've been through
25 that, you just don't realize how toxic that is to not have

1 that sort of openness.

2 Twenty-three Australian newspapers were
3 found to be in contempt because most of them -- I think in
4 every -- they did not actually report the verdict, but
5 they would run white space on the front of the paper, or
6 they would say, "You can't guess what happened in a really
7 big case, which we wish we could tell you about," all of
8 which the judge found not only not amusing, but
9 contemptuous. And so again, even when I'm in front of
10 courts like yours complaining about a lack of openness, I
11 do keep in mind that we actually have a system that works
12 really well, and transparency is important. I'm just
13 there to push to make sure that we're getting as much
14 transparency as possible.

15 CHAIRMAN BABCOCK: Great. Thanks, David.
16 We'll have questions in a minute, but your point about
17 lawyers representing clients and being able to talk
18 effectively to the press, I think there are some members
19 of our committee that really need lessons in that. I
20 think Rusty Hardin really has problems, so if you could
21 talk to him afterwards.

22 MR. DAVID McCRAW: He should be running a
23 master class on that. It could be Dr. Rusty, you know.

24 CHAIRMAN BABCOCK: Okay. So Kelley
25 Shannon has graciously agreed to be with us today, and

1 she's on the ground of these issues in Texas, so, Kelley,
2 give us the Texas view of this situation.

3 MS. SHANNON: Sure, and it's great to hear
4 David talk as well as Jason, two hard acts to follow. Can
5 you hear me all okay? I have a bit of an allergy thing
6 going on. Great. And it's not COVID.

7 MR. HARDIN: I was moving so they could see
8 you, not to get away from you.

9 MS. SHANNON: No problems. At any rate, I
10 am the Executive Director of the Freedom of Information
11 Foundation of Texas, and as Chip mentioned, it was formed
12 many years ago in the late Seventies by a group of
13 journalists, but it's not just meant to help journalists.
14 We are there for all citizens who want to understand open
15 government laws, use open government laws, and exercise
16 their First Amendment rights. We protect the First
17 Amendment rights of free speech and free press, and in our
18 view access to information goes hand-in-hand with those
19 two things. You really can't adequately exercise your
20 First Amendment right of free speech if you don't have the
21 information you need to speak out about your government.
22 So that's one thing I emphasize in a lot of the talks I do
23 with groups and classes and whatnot.

24 We do a lot of training. We do an annual
25 conference. We get involved in amicus briefs that we feel

1 are of a case of widespread importance dealing with
2 transparency or free speech. We also do advocacy at the
3 Legislature, and that's where a lot of our attention is
4 focused right this moment because of the coming
5 legislative session. So I could go in a number of
6 directions with this talk about, you know, deep thoughts
7 and access to justice information, which some of these
8 examples and details I have may be useful as we get into
9 some Q and A, but I liked hearing what Jason had to say
10 about the accountability, that accountability being such a
11 buzzword now, and it really is.

12 We see more and more awareness around the
13 state just among regular people of our open government
14 laws, the Texas Public Information Act, the Texas Open
15 Meetings Act, their right to access court records and see
16 what's going on in the courts. We have people calling us
17 at an increasing level, and a word and a thought that
18 often comes up is I'm holding my government
19 accountability. It's my government, and I found out about
20 these laws, and I want to find out more, and what can I do
21 in my community? It might be something as simple as a
22 little, you know, zoning or construction permit issue. It
23 might be something like watching your school district
24 budget.

25 One thing that is really prevalent at the

1 moment for various reasons is access to, you know, the
2 very basics of the justice records, which is police
3 records and law enforcement records, and we're dealing
4 with that on several levels, but, you know, we all know
5 about the Uvalde shooting situation, and we have been
6 super busy this year along with many others in trying to
7 ensure accountability about what happened with that
8 tragedy and making sure that the public's right to know
9 is, you know, out there, out front, you know, that we can
10 all find out what happened so that accountability can be
11 done, but we can learn from it. We can hopefully prevent
12 things from happening this way in the future.

13 Just this very day there was a story, I
14 don't know if any of you saw it in the *Statesman, Austin*
15 *American-Statesman* or on KVUE, but about, you know, a
16 number of lawmakers have entered into nondisclosure
17 agreements so that they can see the case file from DPS,
18 but they have to agree that they're not going to tell
19 their constituents or the public about it. And our view
20 is, you know, that's some game playing with information
21 that doesn't need to be happening. Let's put the
22 information out there for all Texans to know what
23 transpired.

24 But on other levels with the police and law
25 enforcement information, I get examples all over the state

1 from people that work with us on a continuing basis or
2 just call us up, but things like, oh, just basic police
3 information that someone is trying to get from a city
4 being sent to the attorney general's office for a ruling,
5 just when it's supposed to be provided, basic -- we're not
6 talking about the narratives or things that are still
7 under investigation, but we are talking about, you know,
8 where the crime occurred, you know, what time of day it
9 was, what -- the various things this -- and this is -- it
10 not only goes against what should be happening based on
11 our laws, but it's a waste of taxpayer time and money, yet
12 the attorney general's office does about 34,000 letter
13 rulings a year, last time I checked. It's probably up
14 from that a bit even now, but that's not what they should
15 be spending their time doing when they just have to turn
16 right around and tell governments, no, you've got to
17 release this information.

18 This is the public's information, so we have
19 other examples, too, like not being able to get timely
20 access to probable cause affidavits, body cam footage. It
21 goes on and on, but those are just some of the examples.
22 I'd also thought -- and we could talk about this more in
23 detail if you'd like, but I thought something important to
24 bring up to this group would be some of the concerns I
25 hear around the state of access to looking at court

1 records or court case status online in different counties.
2 We kind of have a patchwork system, you know, and you-all
3 know in some counties it's very efficient and the public
4 can get in and at least look up a case very easily and see
5 where it's at, see if it's been dismissed, see whether
6 it's going to trial, what have you.

7 In other places, it's not a good system, and
8 some of these online systems are just down and can't even
9 be utilized, so we have a real spotty, you know, patchwork
10 system about public access to court case information that
11 I think if we're talking about deep thoughts, you know, we
12 should give some thought to, you know, how to rectify
13 this, and so this just seemed like a good group to bring
14 it up with. I know in the past y'all have dealt with the
15 Re:SearchTX, I believe it is, the online case access
16 program. I don't know where that stands at this time, but
17 I know you-all have dealt with the issue in the past, and
18 that -- so this is something I've just heard about
19 recently, and in some of my just kind of spot checks
20 around the state I see that, you know, we have some
21 counties where, you know, things are very good and we can
22 get the information easily. In other counties, even large
23 counties, not so much.

24 So those are a couple of key things, and
25 then I also have plenty else, but I thought I would just

1 stop right there and then if you have some questions or
2 something else you want to talk about.

3 CHAIRMAN BABCOCK: Great. Thanks, Kelley.
4 Questions for either David or Kelley? Yeah, Justice Gray.

5 HONORABLE TOM GRAY: As David, in
6 particular, noted, one of the collateral consequences of
7 social media is that it finds its way into evidence in the
8 form of pictures and texts and it's of and about the
9 victims of both crime as well as torts. And we recently
10 had a wide ranging conversation in this group about whose
11 duty it is to implement the presumption of openness of --
12 and I'm going to use court records, but not in the form or
13 not by the definition of Rule 12 in Texas. I'm going
14 to -- that's records as in the appellate record. And I
15 argued that as a judge in an adversarial system that until
16 called upon by someone to make a ruling, I had no duty to
17 implement the process, the openness, and I think there
18 must have been someone listening to that conversation,
19 because within a very short period of time, like 60 days
20 after that meeting, I had already suffered four sealed
21 complete appellate records in both criminal and civil
22 cases by different judges.

23 It wasn't the same judge that was doing all
24 of this, and I was wondering if you would give us the
25 benefit of your views on the Court's duty to implement sua

1 sponte the question of sealed records.

2 MR. DAVID McCRAW: Yeah. It's a really
3 interesting good question. What I'm seeing in some of the
4 federal courts by judges that I think have this right, is
5 that in their rules they are essentially setting out what
6 a protective order can say about court records, put aside
7 discovery, what it can say, and that -- and how sealing
8 for the filing in court has been handled so that the
9 lawyers are put on notice that they need to meet those --
10 those terms, that -- so it sort of reinforces the
11 presumption. I don't know if that exactly deals with the
12 kind of cases you're talking about, but that the idea is
13 that -- that prior to doing that sealed filing, there is a
14 rule in place and that there is a trigger that that
15 sealing is going to come undone unless the party in favor
16 of sealing comes in and affirms, makes the case for why it
17 should take place, that I guess in very simple terms it
18 shouldn't just be a default, that if I file -- if I file
19 this sealed, nothing is going to happen unless the other
20 side objects or an intervenor appears on their rights and
21 says something about it that there should be an
22 affirmative duty to justify that sealing at some point.

23 CHAIRMAN BABCOCK: Kelley, do you have any
24 thoughts on that?

25 MS. SHANNON: I think I'll leave it be.

1 CHAIRMAN BABCOCK: You'll defer to that?

2 MS. SHANNON: I'll defer to the attorney.

3 CHAIRMAN BABCOCK: Well, we talked about it
4 in this committee, and, Justice Gray, I thought the
5 concern you had was either colluding with each other or
6 just taking the path of least resistance. The appellant
7 and the appellee say, hey, let's file this record under
8 seal, and so they sort of agree to it.

9 MR. DAVID McCRAW: Yeah.

10 CHAIRMAN BABCOCK: And so it gets up there,
11 and Justice Gray looks at it, and he says this shouldn't
12 be sealed, but on the other hand, maybe there's something
13 I don't know, or -- and I'm busy, and maybe I don't want
14 to be meddling in this thing. So does a judge in that
15 circumstance have an affirmative duty to do something, to
16 say to the clerk, you know, find out why they sealed it or
17 enter an order saying, hey, justify -- show cause why this
18 was sealed. Or, you know, since he's got everything he
19 needs to make an opinion, to make a ruling, he just sits
20 back. Is that a fair summary of --

21 HONORABLE TOM GRAY: Yeah. Very good,
22 actually, because there's two different ways it can get
23 sealed, and the one that kind of I think we were all
24 thinking about is where the parties agree.

25 CHAIRMAN BABCOCK: Yeah.

1 HONORABLE TOM GRAY: And they submit it
2 sealed in the trial court. What happened in these four
3 cases is the trial court ordered the appellate record
4 sealed, and so the whole record came to us sealed. Now, I
5 mean, so that you sort of understand, I mean, there are
6 some -- one of them, it's an assault on a -- with a minor
7 victim, and there are some very graphic images in the
8 record that the victim was required to make. Not
9 participate in, but be the photographer of, and then
10 the -- some of the text exchanges and they get very
11 graphic in the testimony of the events; and so you've got,
12 as Chip described, where the parties agree that something
13 should be sealed, and then -- and further, where the
14 court, trial court, might sua sponte seal it; and so I'm
15 sitting there as the appellate judge going, this is a
16 public record, public forum, but nobody is asking me to
17 unseal anything.

18 MR. DAVID McCRAW: Right. Yeah, and I see
19 that. Sometimes I see some judges who will in that
20 circumstance just say to the parties "This record has come
21 up sealed by the trial court. I don't see the basis for
22 that."

23 HONORABLE TOM GRAY: We did that.

24 MR. DAVID McCRAW: Okay, right. And then if
25 you -- if you want it to continue to be sealed, you should

1 make the case. I also know of judges who will issue an
2 order that says, "Does anybody out there, *New York Times*,
3 does anybody out there believe that this -- that they want
4 to take on this sealing? I will entertain motions from
5 the parties, intervenors," or anybody else who wants to
6 show up, and we appreciate that because we understand, you
7 know, this is one more burden on the judge if the judge is
8 going to essentially be the adversary to the sealing.
9 It's much easier if we're coming in and making the case.
10 But I do think that those kind of things help, especially
11 in high profile cases, to push the cause for transparency.

12 I do think -- this is just a beat off topic,
13 but related to this idea of the parties agreeing. No one
14 is naive in this room. Plaintiffs want to --

15 CHAIRMAN BABCOCK: Well, I don't know about
16 that.

17 MR. DAVID McCRAW: Can we stipulate to that,
18 Mr. Chairman?

19 CHAIRMAN BABCOCK: No, no, I object to that
20 stipulation.

21 MR. DAVID McCRAW: Plaintiffs come to
22 reporters to say "I have sued big bad corporation X, and
23 you guys should come in here and get all of these records
24 and look at this stuff, but it's under seal," and it's
25 obvious that they're hoping that our story will -- and

1 stories in other news organizations will drive settlement,
2 will drive to a very lucrative settlement for them. And
3 inevitably the reporter will call me and say, "Can we do
4 something about this," and of course, the plaintiff has
5 agreed to the protective order. The plaintiff has signed
6 off on it, right, and don't be coming to my -- if you
7 really believe in these things, you should have been
8 fighting it at that level. If you had come to me when the
9 protective order was being debated, I would have shown up,
10 but it really becomes a little bit absurd for us to now
11 come in and try to advance the case for unsealing when the
12 parties have already agreed to it, even the one that's now
13 advocating for coverage.

14 CHAIRMAN BABCOCK: Okay. Great. Well,
15 there are lots of ways for government information,
16 creative ways, to get sealed and shut off. Y'all remember
17 Cullen Davis, who was tried for murder? Some of the
18 people who have been around for a while remember this. He
19 was -- he was represented by a famous criminal defense
20 lawyer, not as famous as Rusty Hardin, but almost,
21 Racehorse Haynes, and they were trying the case in
22 Houston, and the *Dallas Times Herald* was covering the
23 case, and the prosecutor didn't like the coverage he was
24 getting from the *Times Herald* reporter, so toward the end
25 of the case, I think right before the last witness, he

1 subpoenaed the reporter and invoked the Rule and said she
2 couldn't be in the courtroom to hear the last part of the
3 trial. Clever way to get rid of the reporter, right?

4 So I went down and went down to the
5 courthouse and made this impassioned argument about how
6 this is totally improper, she doesn't have anything to say
7 relevant to the case, and even if she does, she's a
8 journalist and First Amendment, Article 1, Section 8. And
9 I worked myself up into a good little lather and I said,
10 "And, Your Honor, by this action the prosecutor has cut
11 off all information flowing from this case," and the judge
12 looked at me and said, "That's the best news I've heard
13 all day." But he granted my motion to quash.

14 So we'll take our afternoon break after
15 thanking Kelley and David so much.

16 (Applause)

17 CHAIRMAN BABCOCK: Let's keep it to 10
18 minutes because Paula can't wait to come talk to us and
19 then get out of town again to the airport, so we'll take
20 10 minutes, which means we'll be back at 3:15.

21 (Recess from 3:05 p.m. to 3:16 p.m.)

22 CHAIRMAN BABCOCK: Well, we're back on the
23 record, guys. Orsinger. We're back on the record, and
24 we're very pleased to have Paula Hannaford-Agor from the
25 National Center for State Courts. She is the director of

1 the Center for Jury Studies, and she's done a really
2 terrific important paper that you all got with your
3 materials, and I hope you've had a chance to look at it,
4 but if not, she's going to present it to us. Again, we've
5 got a bio of everybody that we put together so as not to
6 have to take time on that, but everybody has got your bio,
7 so take it away.

8 MS. HANNAFORD-AGOR: Okay. Thank you, Chip.
9 And good afternoon, everyone. I'm so delighted I could be
10 here. I'm sorry I'm joining late because I saw your
11 agenda. It was so exciting. It was like, oh, it's my
12 people and my topics, it's all about juries. So I was --
13 I enjoyed listening to Jason and talk about sort of the
14 jury decision-making. This afternoon I actually would
15 like to talk to you a little bit about kind of the more
16 inside baseball jury system management. You know, the
17 focus I think has been on how the -- what you actually
18 have live jurors that are in a jury box and listening to
19 evidence and deliberating.

20 My bread and butter, where I spend most of
21 my time working at the National Center for State Courts,
22 is on the upstream piece of it of how -- what is the
23 process for actually getting live, warm bodies walking up
24 courthouse steps on a Monday morning that are available to
25 be able to select juries. And it's a -- it's a more

1 complex process, I think, than many people believe.

2 I actually -- I did some work in Idaho a few
3 years ago where they were working on their rules around
4 sort of that whole jury selection process and jury
5 management. They were putting in place a new automation,
6 and I did a one-day workshop with the task force that was
7 sort of thinking about how do they need to change their
8 rules and procedures and statutes to get the biggest bang
9 for the buck out of the automation that they were doing.
10 And I had a new magistrate judge who had only been on the
11 bench for about a year or so, and at the end of this
12 workshop we were sort of talking, and she said, "I had no
13 idea it was that complex. I just always thought that the
14 jury manager was sort of the -- they were the jury fairy
15 and they just waved their wand and people magically
16 appeared." So I've always had fun with court
17 administrators and clerks of court and jury managers.
18 Like, oh, yeah, you-all are the jury managers, but you
19 also know that this -- it's a lot more complex.

20 The work that Chip was talking about that he
21 asked me to come and talk to you about is actually the
22 very first step in that jury -- jury selection process,
23 and that is the creation and maintenance of the master
24 jury list. This is the list of all of the names of
25 prospective jurors that the court puts together from which

1 they randomly select names to send to jury summons, to
2 send a qualification questionnaire, to find out who was
3 actually statutorily qualified for service and available
4 to serve as a trial juror in any particular case to come
5 in. And the process probably about 40, 50 years ago went
6 through major changes. In the 1960's and 1970's, I
7 don't -- there's a few sort of grayer hairs in the room
8 that may remember the term the key-man system. Any names?
9 Actually, I actually feel good actually that there are a
10 few people that don't recognize that.

11 In the mid-1960's, up until the 1960's, one
12 of the most common jobs for a jury commissioner, a local
13 jury commissioner, who would be a locally elected or
14 appointed position, was to actually vet and create the
15 pool of jurors, and it was a very subjective process. It
16 usually meant going out to the local community and talking
17 to clergy and businessmen and local government leaders and
18 getting their nominations for people who were of good
19 moral character and educated and who could reflect the
20 values of the community. This was sort of this idea that
21 there were key men, and they were always men, key men in
22 the community that you could actually bring together. You
23 could probably imagine that this was highly subjective
24 and, as it turned out, was highly discriminatory either
25 because people of color and women were intentionally

1 excluded from the jury system or just because the jury
2 commissioners and the people that they were going to
3 actually didn't know who people of color that might be
4 qualified for jury service.

5 So in the 1960's with the civil rights
6 movement, we actually saw a movement away from this
7 key-man system to this idea of like instead of doing this
8 why don't we just do random selection from broad-based
9 lists. It's usually the voters lists, but this takes away
10 all of that subjectivity of, well, how do you define
11 well-educated, how do you define upstanding and moral and
12 well respected? And so it just went to some very
13 objective criteria. Are you a U.S. citizen? Are you a
14 resident of the jurisdiction? Are you over the age of 18?
15 Are you not a convicted felon? Do you speak and
16 understand English? So these are very objective criteria,
17 and this is where the idea that the courts actually
18 started with a master jury list of some type. At that
19 time for most state courts this was the voters list,
20 primarily because the qualifications for voting and for
21 jury service were really identical in most jurisdictions,
22 in terms of age, in terms of U.S. citizenship, in terms of
23 lack of felony conviction, and it was just very easy,
24 here's your list and you can go ahead and use that.

25 Still some problems, and so we saw during

1 the -- especially in the 1970's and the 1980's a lot of
2 complaints about relying exclusively on the voter list,
3 mainly because it tended to underrepresent people of
4 color. And so you were, you know, by virtue of the fact
5 that you were restricting yourself just to the voter list,
6 that meant that your jury pools by definition would
7 certainly be no better in terms of representation than the
8 voters lists. And so we saw in the 1970's and 1980's some
9 movement toward adding supplemental lists, usually the
10 drivers list was the one, and so bringing those two lists
11 together, going through and merging them, identifying
12 duplicate records, and to get the inclusiveness and the
13 representativeness of the jury pools up, to just to try
14 and do a little bit better job. And so during this time
15 really came to sort of three major objectives or
16 characteristics of what a good master jury list would be.

17 First of all, it needed to be broadly
18 inclusive of the adult population. Between the ABA and
19 the National Center basically said at least 85 percent of
20 the adult population should be included on the master jury
21 list. Two things, one, because as you get closer and
22 closer to a hundred percent inclusive, if you could
23 actually get everybody who is qualified for jury service
24 on your master jury list, by definition it would be
25 perfectly representative. It's hard to do because some

1 people don't either vote or drive, and so sort of looking
2 at that, but you were trying to at least get as close as
3 you could.

4 It also means when you're working with a
5 broadly inclusive list that you're distributing the burden
6 of jury service more equitable across the entire
7 population as opposed to when you've just got a small
8 proportion of people that get called over and over again.
9 So part of it is just treating jurors and making sure that
10 jury service, it's a privilege, it's a right, but it is --
11 also can be quite burdensome sometimes. And it's never
12 convenient. That's certainly true.

13 And so there was some studies that were done
14 at this time of sort of looking through and developing,
15 but there has not been a lot of movement and a lot of
16 really critical look at how the master jury lists are put
17 together, really for the last 40 to 50 years was the last
18 time that there was a very deliberate look at what kind of
19 lists are the best lists, what kind of technology, what is
20 your matching criteria for deciding what is a -- an
21 unrecognized duplicate.

22 So at the National Center what we did was
23 said it's time to look at this, particularly after 2020
24 and George Floyd and much greater interest in especially
25 racial justice generally, but particularly in the criminal

1 justice and in jury pools of how do we make sure that our
2 jury pools are really representing a fair cross-section of
3 the community. So we got a grant and worked with three
4 states to just look at their process and look at the
5 quality and quantity of information as they were putting
6 them together.

7 So we worked with Missouri and New Jersey
8 and Tennessee. All three of them use their drivers list
9 and state identification card holders because the agencies
10 there use those. Missouri and New Jersey also include
11 their voter list, and New Jersey was one of the states
12 that also uses state income tax, which is -- a lot of
13 states had looked at that primarily because, again, it's a
14 broad based lists, but one of the concerns that we've been
15 hearing about with these lists was the accuracy of the
16 records.

17 And so with voters lists, you know, people
18 vote, you know, maybe every two years to four years, but
19 sort of, you know, some people vote more infrequently. So
20 people move and they don't necessarily update their
21 address, or it doesn't get communicated if you go from
22 Dallas to Houston of how quickly that information gets
23 transferred, or from Houston to California, something like
24 that. So there was some concerns about just the accuracy
25 of the records. State income tax, you do that every year,

1 and if you don't, they come looking for you.

2 CHAIRMAN BABCOCK: Well, some of us don't.

3 HONORABLE JANE BLAND: We don't have a state
4 income tax.

5 MS. HANNAFORD-AGOR: You don't have state
6 income tax?

7 CHAIRMAN BABCOCK: No.

8 MR. ORSINGER: This is Texas.

9 MS. HANNAFORD-AGOR: So at least in New
10 Jersey they do have a state income tax. So but some of
11 the questions that we wanted to answer was, you know, what
12 did the master jury list look like today? Are they
13 inclusive, are they representative, are they accurate?
14 What are the best source lists to use? There's been a lot
15 of discussion in courts about, well, you know, is it --
16 should it just be voter and driver? Some states have
17 state income tax. Some states are using unemployment
18 compensation, public welfare lists, mainly with the idea
19 that they will disproportionately involve, you know,
20 people at the lower socioeconomic status that may be
21 actually harder to reach and disproportionately people of
22 color. So how do you actually reach those? Public
23 utility lists, things of that nature.

24 The most common combination is voter and
25 driver, and I think that's what it is here in Texas as

1 well. But there's certainly some -- you know, some
2 concerns because the lists that your Secretary of State or
3 your Department of Motor Vehicles, they do not create
4 those lists for the purpose of jury service. They create
5 it for the mission of those government agencies, for the
6 integrity of the voting process. You know, where do you
7 live so where are you actually eligible to vote, what
8 precinct. Are you actually licensed to drive a vehicle,
9 and if so, you know, what conditions are on there. Do you
10 have to be wearing glasses, can you drive a commercial
11 vehicle, can you drive a motorcycle? So the information
12 that is collected and maintained by those agencies differs
13 tremendously from state to state and is not necessarily
14 put together in a way that is conducive for the courts,
15 and so there's a lot of work that's involved in putting
16 the list together.

17 We sort of went in with some questions about
18 how inclusive, how representative are they. I will say
19 that I was very -- I personally was surprised by the
20 answers that we found, with all three lists; and this was
21 that in all three states we found that the lists were not
22 only not underinclusive, but, in fact, were substantially
23 overinclusive. Some counties in Texas had 200 -- more
24 than 250 percent more records on the list in a county than
25 adults living there, which raises a whole bunch of --

1 CHAIRMAN BABCOCK: Did you mean Texas or
2 Tennessee?

3 MS. HANNAFORD-AGOR: This was Missouri.

4 CHAIRMAN BABCOCK: Oh, okay.

5 MS. HANNAFORD-AGOR: This was in Missouri.
6 Texas wasn't one of ours. So I --

7 CHAIRMAN BABCOCK: I thought I heard you say
8 Texas, but maybe I didn't.

9 MS. HANNAFORD-AGOR: Yeah, Tennessee was one
10 of our states.

11 CHAIRMAN BABCOCK: But where you found the
12 overinclusive was not Texas?

13 MS. HANNAFORD-AGOR: It was not Texas. I
14 haven't looked in Texas.

15 CHAIRMAN BABCOCK: Yeah, well, John was
16 having a heart attack down there.

17 MS. HANNAFORD-AGOR: I'm sorry, I didn't
18 mean for you to have a heart attack. But this was across
19 all three states that were, you know, substantially
20 overinclusive, and so as we looked into it, what we found
21 was really two things that were contributing to them. One
22 is the problem of unrecognized duplicates, so if you have
23 somebody who both has a driver's license and is registered
24 to vote, and in New Jersey also pays taxes, they're sort
25 of coming in together; and so the how you actually match

1 up the names and the addresses to see whether or not this
2 is one person or, in fact, they are three unique people,
3 it's actually really important. It's one of the
4 definitions of random selection is that every person on
5 the list has an equal probability of being selected, and
6 so if somebody is on the list three times, that violates
7 random selection because they would be three times more
8 likely to be selected than a person whose name is only
9 showing up once.

10 So the matching criteria of how you do that
11 -- and we discovered as we looked at it that the lack of
12 formatting, of inconsistent formatting, from list to list
13 is really a great problem. We're talking about, you know,
14 you could have the same name of John Smith, Jr., living at
15 this address and John Smith, II, living at the address;
16 and any person who was looking at this would say, well, of
17 course, that's the same person; but computer algorithms
18 that are doing this matching are going like, no, Jr. and
19 Roman numeral II are different, and so the default is to
20 do this.

21 Lots of problems with standardization. Lots
22 of problems with missing data. So if you're trying to
23 match on date of birth and you have date of birth for one
24 record but not for the other, which was fairly, fairly
25 common, they would immediately say, well, we can't assume

1 that they're the same person.

2 The courts generally, sort of the approach
3 has been when in doubt leave the record on, but I think as
4 this has gone on that it actually has contributed greatly
5 to this overinclusiveness. The other piece of it is just
6 stale addresses. People move, and so when we looked at
7 the accuracy, we actually went to the U.S. Postal Service
8 to vendors that actually do updating of where forwarding
9 addresses. We found across all six of the source lists in
10 these three states that about 10 percent of the records
11 were stale addresses that would have been returned to the
12 court undeliverable.

13 So there's issues around the quality of the
14 list, certainly in terms of its effectiveness and its
15 efficiency. If you're mailing out lots of -- you know, in
16 some cases if you're in a large urban area, you could be
17 mailing out hundreds of thousands of qualification
18 questionnaires a year, so just the printing and the
19 postage and staff time that is involved in that process.
20 When you're mailing things to people multiple times or if
21 it's ending up coming back to the court as undeliverable,
22 so it's really, you know, just wasted; or if it's going to
23 people it does get forwarded, and it gets forwarded to
24 people who have moved to California, which doesn't
25 necessarily help you if you are in Texas and trying to get

1 somebody because they're no longer qualified for service.

2 So these were the problems that we were
3 dealing with. The other thing that we found, though, and
4 this was -- I've heard from a number of courts that have
5 faced jury challenges, with the argument that, well, white
6 people are more likely to be on multiple lists, and so if
7 you're not doing a good job of merging the lists and doing
8 the duplicate identification and merging, what that's
9 going to mean is that you are going to have a
10 disproportionately high number of white people relative to
11 people of color. And so we looked at sort of the trends
12 there. In Tennessee we actually had self-reported data
13 because their DMV actually has race data and ethnicity
14 data which is part of the record, which is wonderful.

15 We used some other techniques to infer race
16 and ethnicity using the other two states, and what we
17 discovered was that it was not consistent across states.
18 In Missouri, in the counties that had the highest level of
19 inclusiveness, overinclusiveness, what we found was that
20 Hispanic representation was disproportionately high. In
21 Tennessee, overinclusiveness corresponded with high
22 African American, and in New Jersey overinclusiveness
23 corresponded with high levels of whites; and so it really
24 complicates the process of trying to even figure out
25 whether or not you're starting from a good place on your

1 lists, because if you are not getting a good picture,
2 because of like what we sort of euphemistically referred
3 to as shadows and ghosts. Shadows were unrecognized
4 duplicates that sort of were left on there, so you've got
5 sort of shadows of real people. Ghosts are people who no
6 longer live there, so these are the people that have
7 moved, that are stale, stale records.

8 And so it could either mean that, in fact,
9 you have a real problem with a fair cross-section and
10 underrepresentation particularly of people of color, but
11 it's being masked because you have shadows and ghosts on
12 your list. Or the inverse, that it looks like you have a
13 real problem with their cross-section, but, in fact, you
14 really don't, because these are shadows and ghosts that
15 are sort of creating this perception of it.

16 So it becomes very, very challenging, I
17 think, for courts to even think about at that front end,
18 and then if you're not starting from a good place with
19 your master jury list, typically in most courts as you
20 sort of go through the qualification process and summoning
21 and bringing people in and who's excused and who's
22 qualified that their cross-section usually does not get
23 better than it is at the very beginning, so it's a real
24 concern.

25 We ended up with some -- you know, sort of

1 some concrete recommendations for courts. We would have
2 liked to have said, you know, use this list and use this
3 list. I think it is very state specific. What we found
4 was that, you know, the Tennessee Department of Motor
5 Vehicles actually does a pretty good job of maintaining
6 their lists compared to the other two states. So when
7 we're talking about what kind of list you should use I
8 think requires courts to actually do a much better job of
9 actually looking at the quality of the source lists that
10 they're bringing together. When it's a question of how
11 many lists, probably quantity is not as important as
12 quality.

13 What you would like to do is get your master
14 jury list as close to a hundred percent inclusive as
15 possible without going over and then just work on the
16 quality to make sure that it's representative and that
17 you're working with accurate addresses, and there's some
18 techniques with, you know, working with NCOA, the U.S.
19 Postal Service vendors, to update those and to update them
20 on a more timely basis. I think most states now do sort
21 of their upgrade about every year. But there are still
22 some holdouts there that are every two years or every
23 three years, which gives a lot of time for the addresses
24 to get very stale.

25 And I think that the last thing that we were

1 recommending is just, I think, courts need to actually get
2 much smarter about what they're using for matching
3 criteria. There's some very, very sophisticated methods
4 that are now being used in terms of standardization, but
5 also fuzzy logic, particularly around Hispanic surnames,
6 hyphenated names. I'm Hannaford-Agor. I'm one of the
7 ones, so if, you know, I show up as Hannaford on one and
8 Agor in another, what do you do with that and how do you
9 list that? So I think there's some techniques that we
10 need to get much more sophisticated and careful about our
11 matching so that we can start to address some of these, if
12 we can address them on the front end, that's going to just
13 help in terms of the integrity and the effectiveness of
14 the jury system downstream.

15 And I'll take questions, if --

16 CHAIRMAN BABCOCK: Great. How about
17 questions? Yeah, Justice Gray.

18 HONORABLE TOM GRAY: You know I've got
19 something. You know, I always do and --

20 CHAIRMAN BABCOCK: We can always count on
21 you, Your Honor.

22 HONORABLE TOM GRAY: In reading your paper,
23 I noticed a conspicuous absence of reliance upon any
24 federal information, no census data, no federal income tax
25 data. Why is that not used?

1 MS. HANNAFORD-AGOR: Mainly because it's not
2 available. I mean, the Census Bureau has privacy, they
3 don't release, you know, individual data at all for this
4 purpose. Same thing with federal income tax, is not
5 available. And I --

6 HONORABLE TOM GRAY: Well, where do the feds
7 pull their jury lists from?

8 MS. HANNAFORD-AGOR: From state voter
9 registration and state department of motor vehicles. Even
10 the feds do not use that.

11 CHAIRMAN BABCOCK: Yeah. Just one second,
12 Pete. Isn't it true, Chief Justice Hecht, that the
13 federal courts in Dallas for a while were pulling on voter
14 and state was pulling on driver's license, or was it the
15 other way around?

16 HONORABLE NATHAN HECHT: I don't remember.

17 CHAIRMAN BABCOCK: But I think there was a
18 difference at one point.

19 HONORABLE NATHAN HECHT: Yeah, I think so.

20 CHAIRMAN BABCOCK: Yeah. Sorry, Pete, go
21 ahead.

22 MR. SCHENKKAN: In addition to shadows,
23 multiple versions of the same person, and ghosts, people
24 who are no longer there, which might help account for the
25 10 percent of the returns undeliverable, you have people

1 who have moved to your state or inside your state from one
2 city to another who don't appear to be labeled in any
3 colorful way, but I would expect in a state like Texas
4 that it is as much of a destination nationally and as
5 mobile internally inside the state as any one you can
6 imagine.

7 MS. HANNAFORD-AGOR: Uh-huh.

8 MR. SCHENKKAN: Wouldn't the NCOA be the
9 only source of data available for that, and what do you do
10 with that? I would be more concerned for John about not
11 picking up the what might be 10 percent in two years of
12 people who have moved into Harris County but weren't there
13 the last time we were doing an election, and therefore,
14 not in the voter registration database; and apparently if
15 you move obviously inside Texas, you still have to have
16 your driver's license in Texas. I don't know what the
17 rules are or what the enforcement is if you've moved here
18 from earth and how long you have before you have to get a
19 Texas driver's license.

20 MS. HANNAFORD-AGOR: Yeah. Well, I think
21 you're absolutely right that there -- the courts are
22 really dependent on whatever the source lists are. I
23 don't know of any state that can go -- you know, New
24 Jersey does not go to New York State or to Connecticut or
25 to Rhode Island and say, you know, "We want to get all of

1 your lists to find out who has moved to New Jersey." It
2 just doesn't work that way, and I think it would be -- it
3 would be immensely complicated and all sorts of issues of
4 interstate comity, and I don't want to -- I don't want to
5 put too many -- too many more burdens on court people for
6 doing this.

7 So that is part of the reason why you want
8 to actually go for a minimum of an annual update so that
9 you're creating your lists annually so that people who
10 have moved, they register to vote, they get their Texas
11 driver's license, if they don't do that and they're just
12 kind of living there under the -- you know, literally in
13 the shadows, but not on lists, they are not going to be on
14 your jury list, unless you're pulling them in from
15 somewhere else.

16 MR. SCHENKKAN: We have a general rule
17 against follow-up questions, but I am going to ask --

18 CHAIRMAN BABCOCK: No, we don't.

19 MR. SCHENKKAN: Oh, we don't.

20 CHAIRMAN BABCOCK: We have a general rule
21 against people asking permission. Usually people just do
22 it.

23 MR. SCHENKKAN: I'm sorry for violating the
24 rule, Your Honor. If the -- if my primitive understanding
25 of the NCOA system has any credibility and if they are the

1 only source of let's get those people who have moved into
2 Texas --

3 MS. HANNAFORD-AGOR: Uh-huh.

4 MR. SCHENKKAN: -- and may not have gotten a
5 new driver's license yet, and we want those, do you have
6 any feel at all for the cost of that, incrementally to
7 bring your -- you know, you up one percent from 89 percent
8 to 90 percent inclusiveness, what you have to pay the
9 vendors of NCOA to get that done?

10 MS. HANNAFORD-AGOR: The NCOA process, so
11 the U.S. Postal Service has authorized licensed vendors
12 that can access this database that where people put their
13 forwarding address, and it goes back basically up to 48
14 months is how long they keep those. And when you -- just
15 basically you can take a list and send it to a vendor, and
16 typically within 24 hours they will run it through NCOA
17 and send it back to you with "Here are all of the updated
18 addresses." Many of the vendors can do other stuff as
19 well. So do you know, this is actually -- yes, this is an
20 address but it's a vacant lot, or this is not actually a
21 valid address, and will, you know, point those out for you
22 as well.

23 I literally just this week just published --
24 and I'll send it to you, Chip. We did a follow-up on the
25 costs, and we basically did a request for information to

1 all of these vendors. We got responses back from 13 of
2 them asking them for, you know, costs and what kind of
3 supplemental, with different criteria, you know, what are
4 you looking at if you're doing it with 25,000 records as
5 opposed to half a million records as opposed to statewide
6 doing 10 million records. So for a rural court that's
7 doing it, that is not doing it, it's actually relatively
8 inexpensive. It's like a hundred bucks a year to do an
9 annual update, you know, for 25,000 records. If you're
10 doing it on 10 million records, it's closer to about
11 18,000. But again, if you are -- you know, if you can
12 reduce, you know, your undeliverable rate and actually get
13 the jury summons to the person that you have randomly
14 selected from your list and get it to their mailbox,
15 that's actually a really worthwhile --

16 MR. SCHENKKAN: Okay. One last question
17 then on the -- since I don't have to ask permission. Is
18 there a -- an institution that is in charge of best
19 practices for the people who actually have to do this job,
20 which in Texas is the county clerks? I don't believe I
21 know anything about how it's done in any of the other 49
22 states, never mind all of them. So it would be your
23 organization? That's who you would call and say, "I'm a
24 clerk in Travis County. We want to do a better job
25 cutting our returned undeliverable and we want to do a

1 better job catching the movers, not, you know, two years
2 after they've moved here and they've finally gotten a
3 Texas driver's license, but as soon as they move here"?
4 Is that who you would see?

5 MS. HANNAFORD-AGOR: Yeah, I mean, I think I
6 can claim that, yeah, people go to the National Center for
7 State Courts and Center for Jury Studies for best
8 practices around this, so --

9 MR. SCHENKKAN: Terrific.

10 HONORABLE NATHAN HECHT: And there's nothing
11 else like it in the country.

12 MR. SCHENKKAN: And at those prices, it
13 seems to me there's a potential to make a lot better list
14 a lot faster with not very much money.

15 MS. HANNAFORD-AGOR: It's supposed to sort
16 of do it on the front end, but also there's some courts
17 that do it continually on a quarterly basis just to sort
18 of keep it up so as they're catching people who are moving
19 throughout the year, and if you do that, you actually get
20 a break on your postage rates. So it's like 40, 45 cents
21 now instead of the 61 or whatever it is for first class
22 mail, so it makes a really big difference.

23 MR. SCHENKKAN: Thank you.

24 CHAIRMAN BABCOCK: Skip.

25 MR. WATSON: I'm sorry, I missed what effect

1 or how effective trying things like food stamps or aid to
2 dependent children or, you know, I think what you referred
3 to as welfare rolls might have on picking up people who
4 either are not registered to vote or don't have a driver's
5 license.

6 MS. HANNAFORD-AGOR: The issue is are
7 there -- there's two issues. One is that you may actually
8 get unique people that are not registered to vote, but
9 there's going to be relatively few of them. Connecticut
10 actually did a study of this. They used driver, voter,
11 unemployment, and state income tax, and we were talking
12 about like a fraction of a percent of like unique names
13 that were coming from their unemployment compensation
14 group. What the benefit that you get from them is really
15 good addresses, because people who are on -- you know, at
16 least -- and this is dating it. When people actually got
17 checks in the mail, they wanted to make sure to get it.
18 I'm not sure that that's true anymore because of
19 electronic deposits, so that's not something that we had
20 an opportunity to look at; but that would certainly be one
21 that, you know, people on unemployment compensation,
22 whatever communication that they were having with the --
23 while they were on unemployment in terms of regularly
24 reporting, you know, their employment status are probably
25 more likely to keep that up to date just so that they

1 don't jeopardize their unemployment compensation.

2 Interestingly enough, I mean, that whole
3 issue of sort of where are your unique names coming from
4 that contribute to your inclusiveness, Indiana a few years
5 ago looked at -- they were using voter, driver and state
6 income tax, and they looked at the quality of each list
7 and basically did away with their voter list because they
8 said that the actual number of people who vote but don't
9 have a driver's license or don't pay state income tax was
10 so negligible that it was just creating extra white noise
11 and more shadows on the list. So they actually
12 statutorily got rid of the voters list and just do a state
13 income tax and driver now.

14 And so I think that's kind of the thought
15 that we're talking about now, is actually work with the
16 quality of your list to make sure that it's inclusive and
17 representative and accurate as opposed to just trying to
18 like throw on as many lists as possible and hope that, you
19 know, you eventually will get everyone there.

20 CHAIRMAN BABCOCK: Great. Yeah, Sharena.

21 MS. GILLILAND: We get our lists once a year
22 from the Secretary of State, and we're currently using the
23 NCOA, but more of a weed out who we're sending summons to,
24 so we get ready to summons, and before we mail them out we
25 run it through that and we say, oh, that address is not in

1 Parker County, don't even bother to send them one. We do
2 not use the NCOA to be more inclusive in our lists.

3 MR. SCHENKKAN: And is that a policy
4 decision based on some other considerations, or is it just
5 you haven't?

6 MS. GILLILAND: I don't want to speak for
7 254 counties, but I really don't think anybody is doing
8 that. Kind of how are you going to go about that? The
9 software that's out there is set up more for once you have
10 your pool and these are the people who we want to send the
11 summons to, then it's going out to see if they still live
12 there so you're not wasting postage. It's not really been
13 use to beef up our lists because we get a new list every
14 year. So, you know, coming up in the end of the month
15 we're going to reconstitute our wheel, so if somebody
16 moves to Parker County in January, they're not going to be
17 in our wheel for a whole year because they weren't in that
18 wheel when we updated it on that day. So it's probably,
19 you know, could be about a year behind.

20 We hear from people that say, "Well, I moved
21 10 years ago and, yes, I've updated my driver's license,"
22 but they're still in our system for some reason. If there
23 was a way to make the agencies that the list comes from,
24 those agencies capture the same information and in the
25 same format, that would make things a lot easier. We see

1 an older generation on the voter registration. Social
2 Security numbers weren't captured, and so sometimes in
3 that age group we see some duplicates that we're pretty
4 sure it's the same person, they've got the same date of
5 birth, some other things that match, but one record has a
6 social and one doesn't. And if those agencies were all
7 capturing, especially socials, driver's license, and date
8 of birth, those things could be matched a lot easier to
9 not have those duplicates in there.

10 CHAIRMAN BABCOCK: Great. Thanks, Sharena.
11 Paula, thank you so much for making the effort to get
12 here. I know there was a lot of travel involved. She was
13 on a plane for a long time today. So a great
14 presentation, great paper, and thanks very much.

15 (Applause)

16 MS. HANNAFORD-AGOR: Thank you.

17 CHAIRMAN BABCOCK: All right. The last item
18 on our list is a panel discussion, "Three chiefs on trends
19 in other jurisdictions," and you will see that we only
20 have one Chief here, and he's from our jurisdiction, and
21 the other three Chiefs weren't able to make it, and that's
22 why it says on there "tentative." So the good news is for
23 us -- you're not a chief. What?

24 HONORABLE LEVI BENTON: Could I please
25 correct the record? Chief Justice Tom Gray is a Chief

1 and, at least last I checked, and there might be other
2 Chiefs here, but I just wanted to correct the record about
3 it.

4 CHAIRMAN BABCOCK: Okay. So we have one
5 other Chief here, but he's from this jurisdiction as well.

6 HONORABLE LEVI BENTON: A state Chief, a
7 statewide Chief, excuse me, is what you meant.

8 CHAIRMAN BABCOCK: Anyway, they're not here,
9 which and happily for us that means we are at the end of
10 our agenda, and we can -- we can take a recess,
11 adjournment here at 4:00 o'clock. Shiva and I will get
12 out the schedule for next year this month after we
13 negotiate with the various entities we have to negotiate
14 with, and I think Justice Bland and I believe that this
15 may be the end of our second year of our three-year term,
16 and so next year will be the third year, and it promises
17 to be a fun-filled year, depending on what the Legislature
18 does to us.

19 So thank you so much for being here. I
20 think it was a fun and informative and interesting day.
21 So thank you. We're going to recess.

22 MR. ORSINGER: Here, here.

23 (Adjourned)

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REPORTER'S CERTIFICATION
MEETING OF THE
SUPREME COURT ADVISORY COMMITTEE

* * * * *

I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above meeting of the Supreme Court Advisory Committee on the 2nd day of December, 2022, and the same was thereafter reduced to computer transcription by me.

I further certify that the costs for my services in the matter are \$ 1,635.00.

Charged to: The State Bar of Texas.

Given under my hand and seal of office on this the 19th day of December, 2022.

/s/D'Lois L. Jones
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