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**MEETING OF THE SUPREME COURT ADVISORY COMMITTEE**

AUGUST 19, 2023

(SATURDAY 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 19th day of August,  
2023, between the hours of 9:00 a.m. and 10:24 a.m., at  
the State Bar of Texas, 1414 Colorado Street, Austin,  
Texas 78701.

**INDEX OF VOTES**

No votes were taken by the Supreme Court Advisory  
Committee during this session.

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CHAIRMAN BABCOCK: All right. We are on the record, and Elaine has retreated all the way down to the end of table thinking that I won't spot her.

PROFESSOR CARLSON: Good morning, Chip.

CHAIRMAN BABCOCK: Good morning, Elaine. And she has done what she always does, which is to be extremely diligent and looked at all of the forms and has detailed comments about all of them. Am I right about that?

PROFESSOR CARLSON: Yeah, trust me, they're good.

CHAIRMAN BABCOCK: Huh?

PROFESSOR CARLSON: Trust me, they're good.

CHAIRMAN BABCOCK: They're good, okay.

MR. ORSINGER: I vote we trust her. I vote we trust her.

CHAIRMAN BABCOCK: Okay. Has anybody got any comments about these -- about these forms? Yeah, Pete.

MR. SCHENKKAN: I apologize, because I -- by even taking the committee's time to say that I do because I wasn't there for any previous discussion, and I gather since the start of this seven years ago there may have been quite a bit, but it would help me to understand very

1 briefly how many people we think are our customers here  
2 and how are these things going to get before their  
3 eyeballs.

4           Is this only going to be something that they  
5 get if they are sitting and a family member has died and  
6 they don't know what to do, and they go online, and they  
7 somehow find their way to something on the Supreme Court's  
8 website, or how are we getting the word out to these  
9 people?

10           CHAIRMAN BABCOCK: Well, I don't know that  
11 there was anticipated to be a publicity campaign about  
12 this, but it raises, frankly, some of the same issues that  
13 the family law forms raised, just that the probate lawyers  
14 don't have a lobbyist.

15           MR. SCHENKKAN: Probate lawyers don't have a  
16 lobbyist, and I don't know that the probate lawyers have  
17 anything like the same interest that the family law  
18 section has, I understand, with your direction either in  
19 terms of the big fray of taking away business.

20           CHAIRMAN BABCOCK: Why wouldn't they?

21           MR. SCHENKKAN: Well, \$75,000 or less, and  
22 it doesn't seem likely to be worth their while very often.  
23 And on the other hand, I don't know very much about the  
24 probate lawyer involvement in pro bono services to such  
25 people, but I know that my very longtime partner Kevin

1 Holcomb has been, you know, a multiple time winner of most  
2 pro bono cases sort of thing, so I'm guessing that that's  
3 one of the mechanisms by which some people might find  
4 their way to these.

5                   The reason I'm asking is I think this is a  
6 -- on the small estate forms, not the muniment of title,  
7 which I don't even understand what it is, so I can't go  
8 there.

9                   CHAIRMAN BABCOCK: Yeah.

10                  MR. SCHENKKAN: But we've got, let's see, 49  
11 pages worth of paper here.

12                  CHAIRMAN BABCOCK: Right.

13                  MR. SCHENKKAN: And it comes in five  
14 packages, the longest of which is in effect stuck together  
15 into one document, two or three packages and different  
16 kinds of things, and it begins with instructions for --  
17 and included with the instructions here are all of these  
18 other things that are in here. Read them carefully, these  
19 are not legal advice and they're not a substitute and then  
20 it goes into the check offs of the circumstances in which  
21 unless you can check "yes" to all of them, you can't -- I  
22 mean if you check any of these -- I'm sorry. If you don't  
23 check all of these things you can't do this. Instead of  
24 saying this stuff is for you if you are -- and I'm making  
25 these words up -- a member of a family and another member

1 of your family has died and as far as you know there's no  
2 will and there is some property and you want to know what  
3 you do to follow the law as to who gets it, or something  
4 like that, and that kind of thing, what the something like  
5 that is depends in part on how these things are going to  
6 get to people.

7                   So maybe this is really not a comment so  
8 much about the forms themselves as a comment about the  
9 importance of thinking about the -- your choice of words  
10 was campaign, and that's one part of it, but it's really  
11 an entire system of making this information available to  
12 people and providing them or linking them to people who  
13 might help them if they think, well, I think maybe I could  
14 use this stuff, but, boy, 41 pages of legalese is pretty  
15 daunting, and I'm afraid I'm going to get stuck. So  
16 that's the reason for this introductory comment.

17                   I'm going to have some kinds of format and  
18 specific discussions that will make it somewhat easier for  
19 someone who has gotten that far by themselves to actually  
20 use the materials, and that should be done, too, but  
21 really the first question is how are we going to get this  
22 stuff usefully to the people who will use it and how are  
23 we going to, without misleading them into thinking it's  
24 going to be easier than it is, indicate to them what  
25 resource it might be.

1                   CHAIRMAN BABCOCK: Yeah. Pete, if you  
2 could, to drown out the pounding behind you, if you could  
3 speak a little louder because the people down at that end  
4 can't hear your booming voice over the construction behind  
5 you.

6                   MR. SCHENKKAN: Should I start over? That  
7 was an awful lot of words have gone by.

8                   CHAIRMAN BABCOCK: Why don't you summarize  
9 what you just said?

10                  MR. SCHENKKAN: What I think is we've got a  
11 bad problem here. This is very complicated. This is an  
12 awful lot of words, and our audience presumptively are  
13 people who have a family member who died. As far as they  
14 know they don't have a will, think there was no will.  
15 They don't know this is the rule, but there is some  
16 property, and there are special rules about what happens  
17 in that case, and they want to follow the law and within  
18 the law get to the right answer, but they don't even know  
19 that's what they want when they get started.

20                  CHAIRMAN BABCOCK: Yeah.

21                  MR. SCHENKKAN: And so a lot of attention  
22 needs to be given to making this more user-friendly, and  
23 that's a point that, Kent, I suppose with your experience  
24 as Commissioner of the Texas Department of Insurance,  
25 you're familiar with the problem of putting legalese into

1 plain language, but it's partly plain language, but it's  
2 also partly the distribution system for getting the  
3 information to people and the information resources to the  
4 users when they get a word or a second look at this thing  
5 and say, "I don't know what I read. I've read it twice,  
6 and I have no idea what I'm supposed to do."

7 CHAIRMAN BABCOCK: Kent.

8 HONORABLE KENT SULLIVAN: I was just going  
9 to echo the points that Pete is making and would suggest  
10 that there may be a best practices answer, and that is --  
11 I mean, one thing that occurs to me is to try and use more  
12 of a multimedia approach as opposed to trying to write  
13 everything down. That is very limiting. It's very  
14 one-dimensional, so maybe a video to explain this would be  
15 more helpful. I mean, that would give more of an  
16 interactive feel. There are better ways to explain it,  
17 but the most component of trying to approach an issue in  
18 that way is then test. Test to determine whether or not  
19 your intended audience is actually able to comprehend  
20 this, and you can adapt and end up with an end product  
21 that is effective because you can prove that it's  
22 effective. Or not. But those things are -- I mean, those  
23 are knowable things. You can do iterative testing to  
24 determine whether the intended audience with the  
25 background that you anticipate you're trying to reach,



1 whether they can understand and use the work product  
2 you're offering.

3 CHAIRMAN BABCOCK: Yeah. Richard.

4 MR. ORSINGER: So going back to the early  
5 years of my practice, what I noticed was that people that  
6 were at the lower end of the economic scale, when there  
7 was a death there would be two things that they wouldn't  
8 take care of. One was they wouldn't pass title to the  
9 car, and two, they wouldn't pass title to the house that  
10 the grandparents lived in. And clients would come in to  
11 me, had been living in the house for 10 or 15 years, and  
12 title was still in the name of one or both of their  
13 grandparents or parents.

14 This estate packet is probating an estate.  
15 What people really need to do is pass title to the family  
16 home and the vehicles. Now, there are kind of the counter  
17 purposes because creditors have a claim in an estate, too,  
18 and part of I think the complexity here is we're trying to  
19 gather the net estate compared to the debt and pay the  
20 debt, recognize the creditors and all of that. Maybe what  
21 we ought to do as an alternative to this is offer an  
22 affidavit of heirship, which is the way that you verify  
23 the ownership and the inheritance of title and some  
24 vehicle for -- some document for the transfer of a vehicle  
25 that belonged to the decedent and offer that as an

1 alternative.

2                   Because I agree with Peter. If I was  
3 uninformed -- I mean, I'm sitting here, I've been  
4 practicing law 48 years, and I'm looking at virtually  
5 every definition I needed to pass the bar exam, and I just  
6 don't see how the average person is going to be able to  
7 navigate this. They'll give up I think, and we'll have  
8 nothing, but an alternative is to just help them pass  
9 title to cars and real estate and let the rest of it just  
10 be untreated.

11                   MR. SCHENKKAN: If I may just --

12                   CHAIRMAN BABCOCK: Keep your voice up so it  
13 will travel just a little bit further.

14                   MR. SCHENKKAN: Sorry. If I may follow up  
15 just a little bit further with the -- with the pair of  
16 ideas that we -- we need to present it in a format that is  
17 accessible to an ordinary person, and a video nowadays is  
18 -- you know, when I get stuck when I get a box of delivery  
19 of a piece of furniture or some object and the  
20 instructions are written by someone whose first language  
21 is not English, what I do is I go online and I look for a  
22 YouTube video --

23                   HONORABLE KENT SULLIVAN: Right.

24                   MR. SCHENKKAN: -- that says how to assemble  
25 the damn thing, and I think that's a fairly common

1 reaction, fairly common for people younger than me. It  
2 took me a while to realize that even I could follow the  
3 YouTube video. So we want to do that.

4 MR. HARDIN: You don't have grandchildren  
5 that can explain all of this to you?

6 MR. SCHENKKAN: My oldest grandchild is  
7 nine, and he can explain a lot of things to me, and I do  
8 use his help, and I also use the seven -- I've got three  
9 seven-year-old grandchildren, and they can help me, too,  
10 but not yet as much as perhaps yours can.

11 And then I really think that what Richard  
12 has done is put his finger precisely on one of the  
13 practical ways that we deal with this problem, and the  
14 reason I started with who are we trying to reach and how  
15 do we know who they are and where are we going to reach  
16 them, which is if the real practical problem in most cases  
17 is, look, there's a car and a house and you or one of --  
18 or another family member who is interested in this needs  
19 to take care of these two things, if you do nothing else.  
20 And then here, if we want to, then here's some  
21 instructions for how you can deal with more if there's  
22 more.

23 And so that would be a good example, and  
24 then what I want to get back to was to say that I really  
25 think at the next critical step and the next -- far and

1 away the next most important thing we do, not minimizing  
2 the importance of all of the enormous amount of work  
3 that's gone into these 43 pages and their potential  
4 usefulness for somebody who does get into it, but the most  
5 other important thing we can do is tell them how to get  
6 more help, and I vaguely recall from the family law forms  
7 or maybe it was some other thing, that some county clerks  
8 have people in the county clerk's office who are  
9 available. Some Legal Aid society resources may be  
10 available. The volunteer legal services of at least  
11 Central Texas occasionally hold -- what are they called,  
12 where you have a special invited session, anybody who  
13 wants to come get help on things.

14 MR. WARREN: Legal clinics or seminars.

15 MR. SCHENKKAN: Yeah, clinics, and say and  
16 then try to advertise those in places where there are  
17 people who might be interested in partaking in one. Maybe  
18 all of the retirement homes in Central Texas, say if you  
19 want to come learn about the will situation come to this  
20 clinic. If you want to come to the situation where there  
21 is no will come to this one, and round up some probate and  
22 other lawyers to be there to provide services.

23 And then question to the Court, is it  
24 possible to find the resources to have somebody responding  
25 on a chat function online, which is the other way lots of

1 the, you know, vendors of products and services try to  
2 minimize the resource problem of providing crucial  
3 information? I don't have any idea what that costs,  
4 whether it's at all feasible for the Court to do or  
5 whether we could get through the Access to Justice  
6 Foundation or Appleaseed or somebody to, you know, fund it.

7 CHAIRMAN BABCOCK: Class action settlements.

8 MR. SCHENKKAN: Yeah. Yeah.

9 CHAIRMAN BABCOCK: Justice Bland wants to  
10 say something.

11 HONORABLE JANE BLAND: So as you all know,  
12 this is an ongoing project of the probate bar task force,  
13 and the first project that they completed was a simple  
14 will forms, and if you take a look at the forms that were  
15 ultimately completed and ordered by the Supreme Court to  
16 be made available to the public, they look quite a bit  
17 different than the forms that the probate task force  
18 initially proposed, and that has to do with making them  
19 user-friendly.

20 Jackie and Vernis both have been to a long,  
21 multiweek course for the National Center for State Courts  
22 called "Forms Boot Camp," which is intended to guide the  
23 courts into making forms more user-friendly. So it might  
24 be worth this group's discussion of comments about the  
25 forms and then with the understanding that there is a

1 recognition that more work will have to be done to put  
2 them in any kind of shape for the use by any member of the  
3 public.

4           And finally, this project, of course, was  
5 required by the Legislature, and this particular piece of  
6 the project, which is small estate affidavit, assistance  
7 with probating a small estate, was specifically set out in  
8 the statute as one of the projects that we were to  
9 accomplish, so it's an express legislative directive to do  
10 this.

11           CHAIRMAN BABCOCK: Accomplished by when?

12           HONORABLE JANE BLAND: No deadline.

13           CHAIRMAN BABCOCK: Huh? By the deadline?

14           HONORABLE JANE BLAND: Unlike some other of  
15 the matters they have sent our way, this one does not have  
16 a deadline, but of course, we're reporting steady  
17 progress, so because it was quite a project. It's been  
18 quite a project, and we're very grateful to the probate  
19 bar task force that has done a ton of work and continues  
20 to do a ton of work, because after this we will have forms  
21 for muniment of title and the stuff that Richard was  
22 referencing about passing -- transfer of deed on death.  
23 Those forms, there are a version of those forms already  
24 out there, but the probate task force is working on that  
25 as well. So this is part two of probably a three-part

1 project.

2 CHAIRMAN BABCOCK: Okay. John had his hand  
3 up, and then Scott.

4 MR. WARREN: As the clerk of a probate court  
5 I tell you the clerk's office is the first stop for anyone  
6 who doesn't have an attorney. A lot of people don't  
7 understand that if it's me and a brother and a sister, I  
8 can't represent my brothers and sisters and you have to  
9 have an attorney. If it's only me, then I can represent  
10 the case as it relates to resolving a parent's or  
11 grandparent's estate.

12 I agree, and I should have raised my hand  
13 first because I thought about the YouTube videos when I  
14 first got this. That's the way you present this  
15 information to John and Jane Q. Public, but I do want to  
16 go back to our December meeting with Dr. Phil, and he's  
17 blown me away as it relates to how I actually provide  
18 information on my website. When he talked about those  
19 functional literate -- functionally literate jurors, those  
20 are the same individuals who will be coming into our  
21 offices wanting to get assistance, and we cannot give  
22 legal advice. And so if we are able to, we want to create  
23 those YouTube videos for each one of those categories,  
24 whether it's a small estate affidavit, muniment of title,  
25 or all those others, that we provide that information.

1           And also you can actually -- if you look at  
2 -- if you're doing some forms online it has the little --  
3 the little question mark bubble that can give you  
4 explanations, kind of incorporate those into the forms so  
5 that they'll understand exactly what information should be  
6 going into those specific sections, I think that's going  
7 to be a big help. But also one of the things that we  
8 should be doing and it should be kind of a requirement is  
9 that clerks actually publish this or the counties actually  
10 publish this on their website. That's what I do. If you  
11 look at my -- I dump as much information as I can on there  
12 so that people can be more prepared before they come down  
13 to the court than they would coming down looking for  
14 information. If they have it ahead of time, then that's  
15 less time that they'll have to take off work to conduct  
16 business, and we also publish forms on our website as  
17 well.

18                   CHAIRMAN BABCOCK: Good. Scott.

19                   MR. STOLLEY: Speaking of the simple will  
20 forms, I won't bore you with the details, but I recently  
21 had to hurriedly do two new wills for my elderly parents,  
22 and those forms came in very handily. They helped a lot.

23                           On these particular forms the things I'm  
24 going to raise, maybe they've already discussed because I  
25 know a lot of work has gone into this, but just for



1 example, the first form says "Application for Probate of  
2 Will as Muniment of Title." Well, probably the people who  
3 are using this aren't going to understand, well, what does  
4 it mean, probate of will, and they're really not going to  
5 know what means muniment of title.

6           So I think those kinds of things need to be  
7 simplified and like even the next line it says "To the  
8 Honorable Judge of said Court." What is "said Court"? It  
9 just needs to say "To the Court." There's another one  
10 here, "Testimony by subscribing witness." These people  
11 aren't going to know what "subscribing witness" means. So  
12 I think for all of the work they've done, they've got to  
13 figure out -- look for those land mines and simplify them.

14           CHAIRMAN BABCOCK: Okay. Kent.

15           HONORABLE KENT SULLIVAN: I just wanted to  
16 echo Scott's points. There is no substitute for user  
17 input, and if you went line-by-line with even just an  
18 informal focus group of people who had the background,  
19 educational level, and other characteristics of the  
20 desired user group, you would find everything that Scott  
21 is saying, in my view. I mean, Richard made a great point  
22 saying there may be two overriding points that  
23 consistently come up and are the most -- the greatest  
24 priorities for something like this, but if you listen to  
25 your user group, you might find out -- and while I think

1 Richard is on target, but you might find out there's a  
2 number three and a number four that, you know, we in our  
3 collective experience would never identify, so there's  
4 just absolutely no substitute for that and for the use of  
5 plain language.

6           One very quick war story. I remember with  
7 respect to this group, Tracy Christopher and various  
8 others of us -- I think, Mr. Chairman, you were involved  
9 in it, too, a little exercise many years ago about  
10 standard admonitory instructions for jurors, and I'll  
11 always remember one comment when they were instructed  
12 about the burden of proof being a preponderance of the  
13 evidence, and somebody came back and said, "Why would we  
14 want to preponder the evidence when we could ponder it  
15 later? There's no need to preponder it." And that goes  
16 to Scott's point. The language you choose is critical,  
17 and people who are in a particular profession or niche  
18 tend to choose their language, not language that's  
19 user-friendly, and we ought to be conscious about that.  
20 Enough said.

21           CHAIRMAN BABCOCK: Good point. Jackie, you  
22 and I had a discussion about this, and you didn't think we  
23 needed to send it to a subcommittee. We're not sure which  
24 subcommittee would have gotten it anyway, but do you or  
25 Justice Bland think the Court is looking for the kind of

1 scrutiny, the kind of input that -- that we usually give  
2 to rules or --

3 HONORABLE JANE BLAND: Well, I think that  
4 we're always interested in this committee's take on  
5 anything that we refer to it for its review. There has  
6 been a lot of work done on this. There is already, I  
7 think, going to be a sincere effort to adopt plain  
8 language, which this work does not reflect, and if you --  
9 and it was good to hear, Scott, that you thought that the  
10 will forms, which are -- have been through that process  
11 and were helpful. So I wouldn't focus so much on trying  
12 to as a committee convert these into plain language  
13 because I think we could be here all weekend, given the  
14 number of places where the forms could potentially be  
15 simplified, but if there are comments about specific areas  
16 that, of course, we would be interested in hearing that.

17 CHAIRMAN BABCOCK: Yeah, and I don't know  
18 where the task force is, but in the past when there's been  
19 a task force that has come up with work product and then  
20 we review it, we've had a representative or  
21 representatives of the task force here to interact with  
22 us, and a lot of times, you know, we'll have a reaction to  
23 something, and they'll say, "No, no, no, that's not at all  
24 what we intended" and then we work on language to get it  
25 right. So I don't know if -- we'll keep getting any

1 further comments today, but is the timing such that we  
2 should do that in our next meeting or not?

3 HONORABLE JANE BLAND: If we -- I mean, I  
4 think for the will forms we brought somebody from the  
5 probate task force, Trish McAllister, but there really  
6 weren't -- there wasn't any of that kind of discussion  
7 with that. If there are issues that this committee raises  
8 that we think could benefit from further discussion and a  
9 member of the task force coming, we can do that in  
10 October.

11 CHAIRMAN BABCOCK: Okay. Well, yeah,  
12 Richard.

13 MR. ORSINGER: I wanted to follow up on  
14 Pete's suggestion about clinics and lawyers assisting the  
15 public through this process. The family lawyers have been  
16 sensitive to the problem of people that can't afford a  
17 lawyer going through the breakup of a marriage, the  
18 children, the property and things, and I'm not much  
19 involved in the probate section, but I know that the  
20 probate section and the real estate section I think are  
21 together. They were at one time. I think they still are.  
22 I'm not sure, but maybe we ought to find out if there is  
23 an outreach going on from the probate lawyers bar to the  
24 communities, and if they're not, maybe we could assemble  
25 it, and I can tell that you the family lawyers have for

1 decades attempted to create statewide effort to get local  
2 lawyers to participate in pro bono or near pro bono work,  
3 and one of the things we did was to offer free CLE for  
4 lawyers that were living in a locale that were willing to  
5 come to like a day-long clinic of lawyers.

6 I mean, I'm not talking about  
7 self-represented individuals. I'm talking about family  
8 lawyers from Dallas, Houston, San Antonio, Austin, going  
9 into a smaller community with a group of 10 or 12 lawyers  
10 with one day of free CLE if they promised to handle so  
11 many hours of pro bono representation. So there's a model  
12 there. I just don't know if the probate lawyers are doing  
13 it, because they're not litigators most of them. They're  
14 mostly doing office practice, and so maybe some conscious  
15 effort should be given through the Supreme Court or  
16 through the bar to see if we can get a program going,  
17 because I can see the -- with forms like this, if you had  
18 a clinic and people showed up, a few lawyers, six lawyers,  
19 could really walk a lot of people through this process and  
20 get a lot of good done. So I just wanted to echo what  
21 Pete says.

22 CHAIRMAN BABCOCK: Yeah, okay. Anybody  
23 else? Justice Gray is using his hands again for -- to  
24 communicate. Pete.

25 MR. SCHENKKAN: I want to take up the

1 invitation to make a few comments then recognizing that  
2 you've got people who have been to boot camp on plain  
3 language and try to minimize it and hold the time down and  
4 want to be told I'm guessing wrong, I'm spending too much  
5 time doing something they already know how to do and we're  
6 not being useful, so stop being useful. The most  
7 important thing in the written document to the extent  
8 we're using the written documents at all, and some of the  
9 time we are, is the first page. We have to say on the  
10 first page you should be reading this if a member of your  
11 family has died and you feel like -- and they don't have a  
12 will and you feel like you are or may be responsible for  
13 trying to make sure the law is followed as to what happens  
14 to the property. We're trying to help you. This is a  
15 complicated legal area. We are going to try to make it as  
16 simple as possible. We're going to have definitions of  
17 terms when you need them. We're going to have frequently  
18 asked questions, but there are some forms you're going to  
19 have to fill out.

20                   We are also going to try to link you to  
21 other ways you can get information about how this is to be  
22 done and have all of that on the first page, including the  
23 links to the YouTube video, to the counties where people  
24 are doing it the way you're doing it, John, so they can go  
25 get help from the people who actually have to process this

1 thing, and if we have succeeded at all in working with  
2 members of the probate bar to get them some volunteer pro  
3 bono --

4 CHAIRMAN BABCOCK: Can you hear down there?

5 MR. SCHENKKAN: -- as lawyers. So I think  
6 that first -- that first page is crucial. I think we  
7 ought to move the -- I'm working from page 1 of 20 on  
8 instructions for small estate affidavit thinking this is  
9 at the moment where you begin, and so we don't want to  
10 start out with instructions, including with these  
11 instructions are a whole bunch of other things. We want  
12 to start out with a paragraph something like what I just  
13 described. Then I don't think we want to scare them off  
14 by then going on the same page to when to use the small  
15 affidavit, which is actually when you can't use it, but we  
16 do want to provide that fairly soon.

17 When we do it, at the moment we've got a  
18 little bit more than a page and probably would be only a  
19 page if it was its own page on these things to be checked  
20 off, but several of the things that you have to check as  
21 being true -- and all of them have to be true if you're  
22 going to use this -- have some subsidiary information that  
23 is just going to scare people away. The sentence, "The  
24 total value of decedent's assets, homestead, excluding  
25 homestead or exempt personal property not more than

1 75,000," that's daunting enough, but you don't need the  
2 three bullet points underneath now. Those are details.  
3           And for each of the six points that they do  
4 have to -- you need to tell them fairly early on if you  
5 can't check all six of these you can't go forward with  
6 this approach. We're using all of these terms like  
7 "decedent" and even some that you would think people might  
8 think they know what they mean, but maybe their thinking  
9 isn't right, like "married," to say nothing of "assets"  
10 and "homestead" and "exempt personal property." I think  
11 for every one of those terms that's a legal term that  
12 people might not know what it means, we need to say in the  
13 very first page we're going to use a lot of legal terms.  
14 Every time we use one of those, if it's one we've defined  
15 somewhere or given you frequently asked questions about,  
16 they're going to be in bold red. So you see one of these  
17 terms, you know there's help available as to what this  
18 thing means. It's in the batch. But we're going to start  
19 by just clicking in there with those terms. So  
20 "decedent," "married," "assets," "homestead," exempt  
21 personal property," "debts," a few things like that. And  
22 then put the help forward to know and the frequently asked  
23 questions in the separate documents for later  
24 cross-reference. I guess this is mostly going to be by  
25 link, different links for people to get them help.



1 I probably need to step back and look back  
2 and try to find, see if there's anything else that I could  
3 offer now that's even worth doing that on, but those are  
4 the front end big picture ones.

5 CHAIRMAN BABCOCK: So Pete is going back at  
6 you, Justice Gray.

7 MR. SCHENKKAN: No, no, no, I'm looking for  
8 all the help I can get. I think we all are. I mean, this  
9 is an important thing to do. This is the kind of service  
10 that the legal system needs to deliver to people who don't  
11 have access to it. We are doing the Lord's work here, and  
12 I'm really glad we're doing it, and I'm glad we've had a  
13 bunch of experts in this area do their best to get it  
14 right, and it may be that not most of us around this table  
15 can't contribute very much of getting it from here to the  
16 finish line, but --

17 CHAIRMAN BABCOCK: Richard.

18 MR. ORSINGER: So Pete's comments made me  
19 realize that if this was an electronic form that had links  
20 and that if you had a word like "sibling" and you didn't  
21 know what it was, but it was red, you could pass your  
22 cursor or your window would open up and say "a sibling is  
23 a brother or a sister," and you could do that all the way  
24 through this form, it would be much more manageable than  
25 to try to do it all on documents where you're looking at

1 different pages. So it may be that the most effective  
2 thing we can do is develop an electronic online form to  
3 help people more conveniently and it's something they're  
4 more familiar with, which is links and definitions and  
5 things popping up on the page.

6 MR. WARREN: I agree. The forms I use  
7 online on my website, they're all fillable PDFs.

8 MR. ORSINGER: Oh, do they have little  
9 windows that pop up?

10 MR. WARREN: No, they don't have the  
11 windows. One of the problems with using free forms is  
12 that you can't understand is that an E or is that an A or  
13 is that an O, so by making them fillable PDFs it's easier  
14 to understand the handwriting.

15 CHAIRMAN BABCOCK: Good. Somebody got their  
16 hand up? Rich.

17 MR. PHILLIPS: So the one thing that I spent  
18 some time looking at is these charts they tried to come up  
19 with to explain asset distribution, which you can tell  
20 they spent a huge amount of time on that. This would have  
21 been really helpful when I was studying for the bar exam,  
22 a while back, by the way, but there's some things in there  
23 where there's some inconsistencies that probably need to  
24 be looked at or even some things to explain. Like in the  
25 chart about married and no will, it would probably be

1 helpful to tell somebody, because further up we ask about  
2 siblings and parents, but in the section that says, "If  
3 there are children," maybe just a comment that says if  
4 they were married and had kids, their parents and their  
5 siblings get nothing. You don't have to worry about that.  
6 And it does say in the form above to skip the section  
7 about parent, but it doesn't explain why. So I think it  
8 would be useful for people to understand that if the  
9 person was married and had kids then the parents and  
10 siblings, you don't have to worry about them, they're not  
11 getting anything.

12                   And the other thing is just sometimes it  
13 says, a "half share," "half interest." Sometimes it says  
14 "get." Sometimes it says "inherit," so it looks like they  
15 were trying to plain language it. They just didn't quite  
16 get it plain languaged all the way through. So I think as  
17 you guys are doing that process, this is one place that's  
18 really going to need some help. And then I'm reminded why  
19 I'm a lawyer. I don't want to do math because halves and  
20 thirds and sixths and eighths.

21                   CHAIRMAN BABCOCK: Any other comments?  
22 Yeah, Justice Gray.

23                   HONORABLE TOM GRAY: I've attempted to do  
24 this in a number of places, venues, reasons, the one I  
25 advocated the strongest for it was when I was on a

1 subcommittee to do felony judgments in criminal cases.  
2 There is nothing that will make this sing better than a  
3 TurboTax questionnaire, and they go through and they  
4 answer questions and then it will populate the ultimate  
5 document. You go through what Rich just explained about  
6 why you don't need to go to the ancestral lineage of your  
7 parents, brother and sisters, and your nieces and nephews,  
8 and you don't even get there through a TurboTax form  
9 because you've already checked the box that says, "I'm  
10 married or was married at the time of death and have  
11 children."

12                   You don't even have to go put names in for  
13 parents, and it -- I realize that there is a different  
14 matrix here for the costing of this, but if you are one --  
15 one of the problems of printing out a instruction  
16 questionnaire like what the -- Richard and Pete have  
17 talked about, the -- or John, where you've got printed  
18 colors, when it's printed it's usually all in black and  
19 white, so you've got all kind of problems if you are  
20 depending upon the folks to use the computer. That is the  
21 same type problem that they have if they're doing a  
22 TurboTax type questionnaire online, but you can do that  
23 same questionnaire to some extent hard copy, answering --  
24 with fill-in-the-blank questions and then like many tax  
25 forms ultimately do, it instructs you what line to put

1 those in in your affidavit, and it's -- it's a format that  
2 while people may find cumbersome, it does work, but -- and  
3 the only other thing I'd say specifically to Pete, if his  
4 longtime law partner has repeatedly won the pro bono  
5 award, you might want to consider for profitability  
6 purposes getting you another law partner.

7 MR. SCHENKKAN: I assure you that this law  
8 partner has done wonderful, wonderful work for paying  
9 clients. He does both.

10 CHAIRMAN BABCOCK: Good. Justice Kelly, and  
11 then Elaine.

12 HONORABLE PETER KELLY: I just have a  
13 general question. We were talking about family law a  
14 number of years ago. There already were private vendor  
15 family law forms. Are there private vendor forms for this  
16 available right now?

17 HONORABLE JANE BLAND: Yes. If you want to  
18 see the current will forms that have already been through  
19 this process, they're at [texaslawhelp.org](http://texaslawhelp.org). But if you  
20 Google, you know, "will forms in Texas," there will be  
21 paid ads for three or four or five different providers.  
22 But if you want to take a look --

23 HONORABLE PETER KELLY: Are they proper  
24 or --

25 HONORABLE JANE BLAND: -- at what the forms

1 that have been through the process look like, you can look  
2 at Texas Law Help and see them.

3 HONORABLE PETER KELLY: Are they perceived  
4 to be inadequate or incorrect or --

5 HONORABLE JANE BLAND: They're relatively  
6 new, so I wouldn't say that we have lots of data to point  
7 to to know if there's any issue with them, but we haven't  
8 had any reports. There was one article in the *Houston*  
9 *Chronicle* by a trust and a estate lawyer that said, well,  
10 they are misleading in the sense that if you have anything  
11 complicated you shouldn't be using them. But that is --  
12 you know, that's written at the top of the form, so --

13 HONORABLE PETER KELLY: I remember asking  
14 Justice Guzman a few years ago about was anyone using the  
15 family law forms. She said, no, everyone is just using  
16 the private ones anyway, even after the Court went through  
17 the effort of promulgating the forms, and it just makes  
18 you wonder if the Court's getting into the forms business,  
19 is it -- is there already strong competition from others  
20 that may make it futile.

21 CHAIRMAN BABCOCK: Well, it sounds like the  
22 Legislature voted that the Court get into this business,  
23 at least in this area.

24 HONORABLE PETER KELLY: Yes. You've got the  
25 tension between the policy and the willingness to fund it.

1                   CHAIRMAN BABCOCK: Yeah. Elaine, and then  
2 Marcy, and then Richard.

3                   PROFESSOR CARLSON: Yeah, I just wanted to  
4 mention that I don't know what other law schools are  
5 doing, but we have at South Texas an annual tax clinic,  
6 for example, for -- I don't know how they cutoff income or  
7 how it's assessed, but we have 18 different clinics. They  
8 may be doing this as well, so don't rule out the use of  
9 free labor through a law professor and many bright  
10 students to assist as well.

11                   And we're a little bit -- to me, having  
12 grown up in Chicago, it's a little bit different here in  
13 our libraries. Where I grew up the librarians would have  
14 things like this, and they actually would be trained. So  
15 I don't know if that's a source that people just don't use  
16 anymore because everything is online, but I have the  
17 utmost respect for the intelligence of librarians and  
18 their commitment to the public, so that's kind of an  
19 underutilized, I think, resource in our state.

20                   CHAIRMAN BABCOCK: Yep. Marcy.

21                   MS. GREER: I was just going to say that my  
22 law partner, Amy Warr, came up with the brilliant idea of  
23 bringing all of our 20-something kids in and doing a kind  
24 of will fest and have them using -- and what prompted it  
25 was the forms online. So we're -- I think there is a use

1 for it. We're excited, we're going to bring in someone  
2 who does the financial side, someone who is a tax  
3 accountant as well, just to kind of advise -- and a  
4 probate lawyer to advise them, but they're going to sit  
5 down, and my new son-in-law and daughter will fill out  
6 their wills and as well as -- I mean, I think it's a great  
7 idea. We're going to invite whoever wants to come from  
8 the law school or wherever, but that's what prompted it,  
9 and I think there is a need for that and knowing that it's  
10 coming from the official Supreme Court of Texas makes a  
11 difference.

12 CHAIRMAN BABCOCK: Richard.

13 MR. ORSINGER: I was just going to say in  
14 following up on Peter's comment, if the Supreme Court  
15 fulfills its mandate from the Legislature to put these  
16 forms online, the commercial people will buy Google ads on  
17 the same page as these forms and then the users can choose  
18 between our officially sanctioned forms or the commercial  
19 forms and let the best man win, as they used to say.

20 CHAIRMAN BABCOCK: Okay. Any other -- yeah.  
21 Judge.

22 HONORABLE MARIA SALAS MENDOZA: I just want  
23 to add that I started practice in California, and what I  
24 did the entire time that I was there was lead clinics for  
25 paupers or pro ses, and all we did was help with forms.



1 So the forms were already promulgated, but you still  
2 needed help, and I would train lawyers, and I would train  
3 law students that would help the paupers fill out the  
4 forms. And it was a long time ago, so you still had blue  
5 backing and all kinds of crazy stuff, but whenever you  
6 have forms, that doesn't mean that the form is ready to go  
7 for someone who doesn't have legal advice. I think that  
8 it's a good, I think, segue from yesterday's conversation  
9 about why we need to support access to justice issues  
10 because it is Legal Aid, it is those organizations that  
11 help support legal clinics to help with forms. Because  
12 even when you have simplified forms you can't get away  
13 from all of the legal language and all of the requirements  
14 to do this stuff. And so I applaud the will clinics and  
15 all of those things. That's the way these forms are  
16 helpful.

17 I don't disagree with the comments that have  
18 been made about the TurboTax forms and all of that, but as  
19 a Legal Aid lawyer, the folks who are needing my help with  
20 this stuff weren't the folks on computers. So I still  
21 think we need the forms that could be used, and I think  
22 what was said is you use both, right. You still have to  
23 have the printout forms, and maybe that's helpful, too,  
24 but I think that we need to recognize that it is helpful  
25 to us. I think I, too, have looked at the will form, so

1 even when you have forms that we intend for particular  
2 audiences, the simplified forms are even helpful to  
3 lawyers, so -- and I just want to mention that clerks  
4 provide the forms.

5 I think we have legal help centers, the law  
6 libraries, we have people there that will point people to  
7 the forms and provide some help and tell them where to go.  
8 So all of these resources are needed, and like I said, I  
9 don't disagree with what folks have said. I do think that  
10 different ways of reaching the audience are important.

11 But I have a question, and Megan is not here  
12 today because I would have asked OCA. How many of these  
13 are filed, and, you know, are we worried too much about a  
14 huge campaign when there are not a lot of them? Because I  
15 think Richard started out with the folks that came to me,  
16 there were two things, house and car, and so I don't know  
17 how much of this small estate affidavit is the biggest  
18 need that we need to kind of bring out all of the bells  
19 and whistles for, or if it's all of the stuff and then  
20 kind of approach it the same way, which is understanding  
21 that there's different ways for lawyers to help people who  
22 are going to be unrepresented in using these forms.

23 CHAIRMAN BABCOCK: Yeah. Thank you, Judge.  
24 Yeah, Kent.

25 HONORABLE KENT SULLIVAN: Just one other

1 quick comment, and that is while I always -- you know,  
2 while I agree that it's always better to have access to a  
3 lawyer than not, I think that our model should always be  
4 to try and come up with an approach that would be adequate  
5 without access. That's one reason I love Justice Gray's  
6 analogy to TurboTax, because the reality is, is that  
7 that's a classic best practices solution. In other words,  
8 you look for other people that have occupied a space  
9 that's either identical or very similar and solved the  
10 problem and then candidly steal they're idea. Next best  
11 practices is the essence of it, and what could be more  
12 complicated than the Internal Revenue Code, but they have  
13 apparently come up with a solution where you can answer  
14 plain language questions and then for perhaps an enormous  
15 percentage of the population it populates the form in some  
16 appropriate way and gives you the correct answer. I don't  
17 know whether it would work here. To me it's just a  
18 classic idea that ought to be explored.

19 CHAIRMAN BABCOCK: Okay. Anything else?

20 MR. WARREN: For Justice Bland, you said the  
21 forms are found on what website?

22 HONORABLE JANE BLAND: Texaslawhelp.org. If  
23 you -- if you Google -- if you do a Google search for  
24 "Texas will help" and then it will probably populate, but  
25 it will be below some paid advertisers.

1                   CHAIRMAN BABCOCK:  There you go.  Okay.  Do  
2 you want us to bring this back in October, or do you want  
3 us to wait until you-all have -- the task force has gotten  
4 further along?

5                   HONORABLE JANE BLAND:  I think we're good on  
6 this piece of it.

7                   CHAIRMAN BABCOCK:  Okay.  All right.  So  
8 take care of that.  So now we're onto Rule 509, Texas  
9 Rules of Evidence 509, and, Harvey, are you the --

10                  HONORABLE HARVEY BROWN:  Yes.

11                  CHAIRMAN BABCOCK:  -- designated hitter?

12                  HONORABLE HARVEY BROWN:  I am.

13                  CHAIRMAN BABCOCK:  All right.

14                  HONORABLE HARVEY BROWN:  So Buddy Low asked  
15 me to convey his apologies that he could not be here.  I  
16 don't know that if y'all know, Buddy is now 90 years old,  
17 and he's having a couple of little health issues, and he  
18 hopes to make our next meeting.  So we talked about Rule  
19 509 last meeting, and unfortunately I wasn't here, and  
20 there was some good comments.

21                         We looked at those comments as a committee.  
22 We also provided the transcript to AREC, the State Bar  
23 evidence committee, communicated with them, and we met.  
24 And then last week we got communication from AREC that  
25 they had a change in their recommendation, and they gave

1 us an informal memo, and I asked them to put it into a  
2 formal memo, and I got that memo yesterday. So I revised  
3 my memo to the Court and got it to the Court yesterday, so  
4 y'all probably have not had much time to look at it.

5           So the way I would propose to proceed is  
6 that we'll break this into three categories, and at the  
7 end of the day while I sent this informal memo from AREC  
8 to our committee, we didn't actually get to meet about it.  
9 I asked everybody if they didn't like the idea from AREC  
10 to tell me. No one objected. That does not necessarily  
11 mean they agreed, as we all know, but I have two committee  
12 members here today, and I asked them to make sure they  
13 looked that overnight so if they have any comments -- or  
14 three committee members, so if they have any comments  
15 hopefully they'll jump in.

16           So probably the easiest way to do this I  
17 think would be if you would take the memo from our  
18 committee and turn to page four. It's the memo that is  
19 dated August 17th, 2023, yesterday morning. In the haste  
20 to get it out I found a couple of typos, but they're not  
21 material. So if you would turn to page four of that, and  
22 this is in the materials here. And under "conclusion,"  
23 this is not our actual recommendation here, but it's the  
24 easiest way to read this. So what I'm going to do is I'm  
25 going to go through two points on recommendations that I

1 think are not highly controversial based on the last  
2 committee meeting and then we'll do another point and then  
3 a third point at the end.

4           So I think the first two are fairly easy.  
5 So subpart (e)(1)(B) is the recommendation from AREC  
6 before, still their recommendation, still our  
7 recommendation, to delete the provision that the privilege  
8 does not apply to licensed revocation proceedings. The  
9 reason for that is that's an administrative proceeding.  
10 The Rules of Evidence say they govern rules in court, not  
11 in administrative proceedings. There are rules in some  
12 administrative proceedings. I found three at least that  
13 say we're applying the Rules of Evidence, but there's no  
14 need to say the Rules of Evidence don't apply or do apply  
15 to administrative proceedings, because they're doing that  
16 on their own. And we also conferred with Professor Goode  
17 about that, and he, frankly, cannot even remember why this  
18 was even put in there to begin with and thinks it should  
19 be taken out and that it's confusing. Additionally, the  
20 comments that were written in the 2015 restyling say the  
21 rules do not apply in administrative proceedings, so it  
22 just seems confusing to have that in here, so all of us  
23 recommend removing that.

24           Similarly, subsection (5), the disciplinary  
25 investigation or proceedings is an investigation or

1 proceeding against a doctor or nurse in an administrative  
2 proceeding, so the same rationale would apply to that;  
3 i.e., they have their own separate rules. We don't need  
4 to put this in the rules, and it confuses the purpose of  
5 the rules, which is to govern trials, not to govern  
6 administrative proceedings. So everybody is in agreement  
7 from AREC, from us, and from Professor Goode that that  
8 should also be deleted.

9           There were some that last time about the  
10 nursing provision. Professor Goode had a question about  
11 that. We looked at that a little further and found that  
12 they have some pretty detailed rules on privilege for the  
13 nurses proceedings, and so it just seemed, again,  
14 unnecessary for that to be in the rules themselves. So  
15 that would be the first of the three, and I would propose,  
16 Chip, that we do these one at a time. I think it would be  
17 more efficient than jumping around back and forth with all  
18 three.

19           CHAIRMAN BABCOCK: Yeah. You bet. Well, is  
20 there any --

21           HONORABLE HARVEY BROWN: Roger I think has a  
22 comment he wanted to add.

23           CHAIRMAN BABCOCK: Oh, Roger.

24           HONORABLE HARVEY BROWN: And he's on our  
25 committee.

1 MR. HUGHES: On 509, yeah, to me, I think  
2 the exception for when a party relies on a patient's  
3 condition as part of a claim or defense and that -- and  
4 the record is relevant pretty much swallows every civil  
5 proceeding. I'm not sure we need to go any further than  
6 that.

7 HONORABLE HARVEY BROWN: Well, are you  
8 saying we should take out more?

9 MR. HUGHES: I'll go as -- I mean, I would  
10 go as far as the memo, but that's just my opinion. I  
11 think that that -- if all of the other proceedings about  
12 the disciplinary, involunatry civil commitment, et cetera,  
13 I think that either we say that they don't apply to an  
14 administrative proceeding and then rely on the claim or  
15 defense exception. But, you know, that's all I have to  
16 say about that.

17 CHAIRMAN BABCOCK: Okay. Just so I'm clear,  
18 is there any disagreement or discussion about deleting  
19 (e) (1) (B) and the comment and then (e) (5) as indicated by  
20 Harvey? Anybody disagree with that? Yeah, Pete.

21 MR. SCHENKKAN: I don't know that it's  
22 disagreement, and again, I apologize because I apparently  
23 was not here for the meetings in which this was discussed.  
24 But I've done administrative law all of my legal career  
25 basically, regulatory administration, and the statement



1 that it's a correct statement that the APA and the organic  
2 statutes of each of the different agencies that have power  
3 to adjudicate matters as opposed to or in addition to the  
4 power to make rules, they cover the extent to which and  
5 the exceptions, if any, to the general law of evidence  
6 that's applicable in courts and privileges. It is not  
7 true that they provide a uniform answer.

8 HONORABLE HARVEY BROWN: Right.

9 MR. SCHENKKAN: So, for example, we're  
10 talking there's frequent references here to what the APA  
11 says about contested cases. Contested cases is a defined  
12 term in the APA. Some things that you and I would think  
13 are contested cases in the sense of they are adjudications  
14 of individuals' rights and duties that are going to be  
15 binding, subject to appeal, that sounds like a contested  
16 case, but it doesn't meet the APA definition of a  
17 contested case, and so what the APA says about the Rules  
18 of Evidence isn't, in fact, what happens in those  
19 administrative agency adjudications.

20 I don't know whether there's some place in  
21 which we've already said this that's taking care of this  
22 problem or whether -- if not, whether it could be just put  
23 in the comment, but the correct answer is the APA and the  
24 statutes of the various agencies will determine whether  
25 and to what extent the Rules of Evidence and the laws of

1 privilege apply in particular agency adjudications.  
2 That's the actual state of the law, and that's all we need  
3 to say, because whatever those laws say will be -- will  
4 determine the extent to which what we're saying about this  
5 aspect of the Rules of Evidence will or will not apply.

6                   CHAIRMAN BABCOCK: So having said what you  
7 just said, do you suggest that we take a different course?

8                   MR. SCHENKKAN: It's not clear enough to me  
9 to what we -- what I've seen here is taking out some  
10 certain things. I don't know what's still in there and  
11 what's left, because that wasn't part of my package, so I  
12 don't know whether this is covered appropriately or not is  
13 what I'm saying. If we say somewhere if you want to know  
14 whether any of this applies in your administrative agency  
15 you need to go look at the administrative -- the statutes  
16 that govern that agency's proceedings, that's the correct  
17 answer.

18                   CHAIRMAN BABCOCK: So you think in this rule  
19 there should be a statement that this doesn't apply to  
20 administrative proceedings?

21                   MR. SCHENKKAN: It should not say it doesn't  
22 apply. It should say the extent to which it applies is  
23 governed by the APA and the laws of the applicable agency.  
24 Because that's precisely the point. It's not true that it  
25 doesn't apply. It often does apply, much more often than

1 not it does, but you can't be certain that it does.

2 HONORABLE HARVEY BROWN: It only applies by  
3 virtue of that agency or administrative proceeding  
4 saying --

5 MR. SCHENKKAN: First to the APA and then  
6 the APA carves out in and of itself some exceptions from  
7 itself, and it's subject to override by the more specific  
8 statute applicable to a particular agency.

9 HONORABLE HARVEY BROWN: Right.

10 MR. SCHENKKAN: And within the statute's  
11 applicable to particular agencies there are often  
12 subprovisions that say for these proceedings the Rules of  
13 Evidence apply, but for these they don't to this extent  
14 and then it says the extent to which they don't.

15 HONORABLE HARVEY BROWN: May I read to you  
16 from the comment that's already --

17 MR. SCHENKKAN: Please do. That's what I'm  
18 hoping -- I guess you're about to read me something. I  
19 guess I missed it.

20 HONORABLE HARVEY BROWN: "By their own terms  
21 the Rules of Evidence govern only proceedings in Texas  
22 courts. See Rule 101(b). To the extent the rules apply  
23 in administrative proceedings it is because the  
24 Administrative Procedure Act mandates their applicability"  
25 and then it quotes the statute.

1 MR. SCHENKKAN: I don't think that's a fair  
2 enough statement because it's to the extent that the APA  
3 and/or the organic statutes of the relevant administrative  
4 agency provide then the Rules of Evidence will apply, and  
5 the privileges, privilege law will apply.

6 HONORABLE PETER KELLY: Can we just say "any  
7 other law"?

8 MR. SCHENKKAN: I think we -- we may want to  
9 say it "any other law," but we really want to say first  
10 because this is what if you're confronted with this  
11 question of whether the Rules of Evidence apply to your  
12 particular adjudicative proceeding of a particular type at  
13 a particular agency, you better not stop with the words of  
14 the APA, because that may not be the right answer once you  
15 go look at the Department of Health and Human Services  
16 statute and implementing rules that govern some particular  
17 subset of proceedings that that agency has, or --

18 HONORABLE HARVEY BROWN: May I suggest --

19 MR. SCHENKKAN: -- the medical board or  
20 whatever.

21 HONORABLE HARVEY BROWN: May I suggest that  
22 at the break Pete and I will look at this, and if he's got  
23 some tweak to the existing comment we can look at that?

24 CHAIRMAN BABCOCK: Yeah, great. Yeah,  
25 because right now he's giving everybody a headache.

1 MR. SCHENKKAN: Just protecting my  
2 intellectual property.

3 CHAIRMAN BABCOCK: Whoa, Pete's brain.

4 HONORABLE HARVEY BROWN: That takes us to  
5 the second change that all of us on our committee and AREC  
6 and Professor Goode agreed with, which is on page four,  
7 the red addition for involuntary civil commitment or  
8 similar proceedings that there be a provision for civil  
9 commitment of sexually violent predators. So this seemed  
10 pretty straightforward to us.

11 CHAIRMAN BABCOCK: Yeah. Any comments on  
12 that? Hearing none --

13 HONORABLE HARVEY BROWN: Okay. The harder  
14 part was part (f) and part (2) in the existing form. So  
15 part (2) you'll see is struck out on page four, and that's  
16 the consent provision that if you consent to waiving your  
17 privilege then obviously the privilege doesn't apply, and  
18 then (f) that's set forth, how do you consent, and this is  
19 the one that there was a flip by AREC and that we had --  
20 we didn't agree with AREC's original recommendation. We  
21 came up with a middle ground, and now they've recommended  
22 doing away with it, and I think they've made a good point  
23 here and would agree that both the consent and (f) should  
24 come out entirely now.

25 So the original thought on this was that

1 "consent" was the wrong word because consent comes from  
2 the Texas Occupation Code, and the Texas Occupation Code  
3 is trumped by federal law, HIPAA, which has the word  
4 "authorization" rather than "consent." So the word should  
5 be the word of the statute, "authorization." So they  
6 wanted to change that to "authorization," and that was  
7 also going to require a change in (f) to say  
8 "authorization." And then we made some recommendations  
9 for tweaking (f) to reference specifically HIPAA and the  
10 Texas Medical Records Privacy Act and then we read the  
11 debate here and thought about the debate here, and we've  
12 all come to the conclusions that the whole provision (f)  
13 should come out and the whole consent should come out.

14           The main reason for this being that once  
15 AREC got some health care practitioners looking at this  
16 more they realized there's some conflicts between the  
17 federal statute and the state statute, and so the form  
18 right now is closer to the state form than the federal  
19 form, and they said rather than trying to get into the  
20 weeds of trying to, you know, navigate between these two  
21 forms and the laws that are different between the two,  
22 it's best just to take it out.

23           Secondly, they said this is a rule of  
24 privilege. It's not a rule that's designed to tell you  
25 how to obtain records. Our evidence rules don't tell you

1 how to obtain records. That's kind of discovery. So this  
2 really does not belong in the Rules of Evidence was their  
3 argument, and I thought between those two arguments about  
4 the conflict between the rules, of course, those laws can  
5 always be changing, so our forms would have to change, the  
6 rule would have to change, and trying to figure out to  
7 navigate between the two as well as the fact that it's  
8 contrary to the purposes of the Rules of Evidence, I  
9 thought they had a good argument, so we've agreed, at  
10 least sub silentio in our committee with that change, to  
11 just take out (f) completely and (2) completely.

12 CHAIRMAN BABCOCK: Okay. Any comments about  
13 that? Yeah, Richard.

14 MR. ORSINGER: Question, are we -- is (f) on  
15 page five, or in electronic it's the page -- PDF page 183,  
16 (f), authorization, is that to substitute for all of the  
17 consent stuff that's being taken out?

18 HONORABLE HARVEY BROWN: No. The (f) on  
19 page five that has the multi-colored on my computer?

20 MR. ORSINGER: Yeah. Yeah.

21 HONORABLE HARVEY BROWN: That's what we  
22 recommended instead of what AREC did the first time.

23 MR. ORSINGER: So (f) is coming out.

24 HONORABLE HARVEY BROWN: Now we say don't  
25 even have an (f). (f) is gone completely. Don't have a

1 consent, don't have an authorization at all. (f) is gone.  
2 That's what we're recommending now.

3 MR. ORSINGER: Okay. So does that leave us  
4 in a situation where there is no way for a patient to  
5 allow the medical records to be used in evidence? You  
6 take consent and authorization out, there is no way left,  
7 right?

8 HONORABLE HARVEY BROWN: No. Because this  
9 was an authorization that was used as a format, if you  
10 will, for getting this. But waiver is covered by Rule  
11 511. So if the records -- if I order records from a  
12 medical records service and I get them through their form,  
13 there's then a waiver in 511 and will mean it can be used  
14 in evidence. 511 is the rule that governs the waiver,  
15 which is part of the reason this was a little confusing,  
16 is why do you have the consent in 509, which is the  
17 creation of the privilege, not an exception. So that was  
18 part of the thinking as well. So we don't want to put  
19 into the Rules of Evidence how do you get documents. The  
20 Rules of Evidence should govern is the evidence  
21 admissible.

22 MR. ORSINGER: Yes. Well, the last time  
23 that we discussed this, Harvey, my concern was that it was  
24 dominated by the rules that govern acquiring medical  
25 records, and yet we're talking about a court proceeding in



1 which witnesses are on the witness stand and someone has  
2 asked a question and then there's the possibility that  
3 someone might assert privilege, and that has nothing to do  
4 with acquiring records or HIPAA or anything else.

5           We're talking now about the doctor-patient  
6 privilege or the mental health privilege, and the concern  
7 I had about completely eliminating consent at the time was  
8 the consent had to be in writing and had to comply with  
9 all of these document related things and nothing to do  
10 with a witness on the witness stand. If we take consent  
11 out and authorization out completely and all we've got is  
12 511 waiver, Rule 511 waiver, can -- can this all happen  
13 orally in the courtroom with somebody on the witness  
14 stand?

15           HONORABLE HARVEY BROWN: I think it can  
16 because of subpart (3) that Roger was talking about  
17 earlier, which is party relies on patient's condition. So  
18 if you're a defendant and you want to talk about their  
19 medical condition, because they're seeking damages, you  
20 get to talk about that. In a proceeding regarding  
21 somebody's mental health, you would get to talk about  
22 that, because of that provision. That provision is very  
23 broad and is the most commonly used provision.

24           MR. ORSINGER: Okay. So basically I think  
25 Roger's comment was that (3) is broad enough to really

1 supplant all of this detailed consent and authorization.

2 HONORABLE HARVEY BROWN: Yeah, I don't know  
3 about that. I just have to think about -- we haven't  
4 talked about that, but I do think it covers your situation  
5 of --

6 MR. ORSINGER: Yeah.

7 HONORABLE HARVEY BROWN: -- somebody on the  
8 stand in the middle of trial.

9 MR. ORSINGER: Thank you for that  
10 clarification.

11 CHAIRMAN BABCOCK: Any other comments?  
12 Harvey, I think you got it.

13 HONORABLE HARVEY BROWN: Okay. Great.

14 MR. ORSINGER: Can I also ask, we have a  
15 companion Rule 510 on the Mental Health Code, which is  
16 virtually identical --

17 HONORABLE HARVEY BROWN: We're getting ready  
18 to do 510 next.

19 MR. ORSINGER: Very good, thank you.

20 CHAIRMAN BABCOCK: Now we're on to 510.

21 MR. HUGHES: Okay. That's mine, and last  
22 time the -- my memo is the last one at Tab S, and at the  
23 meeting when they talked about 510 I wasn't here, so I  
24 only know what I read, was that at that time the AREC had  
25 proposed only amending professionals to include TLAP

1 people, and as I understood the vote they wanted --  
2 whether -- the vote was to create a general peer  
3 assistance program privilege and not just limit it to  
4 TLAP, and in that discussion there was, of course, several  
5 things.

6           First, there were comments that we should  
7 encourage risk-free exchange of information. It was also  
8 observed -- and I think this is true, we haven't had a  
9 problem with anybody ever trying to get TLAP records. So  
10 really we're just offering what was described as  
11 institutional support for a fear of what might happen.  
12 Someone also wanted to know if there had been any  
13 multistate survey of what other states were doing, and  
14 I'll come back to that in a moment. There was also  
15 concern that just the phrase "peer assistance" or "peer  
16 assistance program" might be too broad, and then there was  
17 a question of how it was going to apply to civil  
18 commitment.

19           First, thanks to a clerk, or Justice Kelly,  
20 there was a multistate survey, and what -- when I looked  
21 through it what I had observed was this, is most of them  
22 have some form of confidentiality for peer assistance  
23 programs within the bar. They have a program like our  
24 TLAP. They have -- there's going to be confidentiality,  
25 but the question is where do they put it? Most of them

1 either rely on statutes or administrative regulations. A  
2 few actually have it in their Rules of Civil Procedure or  
3 what we would probably call the Rules of Judicial  
4 Administration, because they -- their impaired attorney  
5 programs are managed by their state Supreme Court. We  
6 would be the first or one of the few that would put it as  
7 a formal Rule of Evidence.

8           Now, what we came up with was on -- if  
9 you'll look at paragraph Arabic (3), and it's in red in  
10 the memo. In the definition of professionals we would  
11 include "a person acting as an employee, member, agent of  
12 an approved peer assistance program authorized by  
13 law." And I think this narrows it down so we don't have  
14 problems with ad hoc or informally created administered  
15 programs. First, it would limit it to programs that are  
16 authorized by some sort of law via the state statute or  
17 federal statute or a state administrative evidence --  
18 pardon me, administrative regulation.

19           So we start with there's going to -- you're  
20 going to have to point to some sort of law, regulation, or  
21 statute that authorizes or creates a program. Second,  
22 when we say "approved peer assistance program," that means  
23 the body that's charged by law to either create the  
24 program or supervise it has, in fact, done so. So we  
25 don't have people going, "Oh, I think I'll just be a peer

1 assistance counselor." No. You have to do it pursuant to  
2 some formal body's program, and you would have to be an  
3 employee, agent, or member of it.

4           Then the question came up about involuntary  
5 commitments, and I looked at those both from mental  
6 health, drug and alcohol commitment, and even sexually  
7 violent predator commitments, and it seemed to me that we  
8 already have a Rule 510(d)(5), which "If a party relies on  
9 a patient's physical, mental, or emotional condition as  
10 part of a claim or defense and the communication or record  
11 is relevant to that condition." Well, I think to the  
12 extent we need to exclude involuntary commitment  
13 procedures, whatever type they are, I think that (d)(5)  
14 will pick it up. Maybe it's because I don't do these  
15 often enough, but pretty much it seems to me that in any  
16 involuntary civil proceeding in a law court, the only  
17 issue is going to be the person's physical, mental, or  
18 emotional health, and that's going -- and obviously these  
19 records would presumably be relevant unless they're just  
20 totally unconnected with the reason the person's being  
21 brought for a commitment proceeding.

22           So I didn't see a particular need then to do  
23 what has been done for Rule 509, because Rule 509 has a  
24 number of proceedings for which the -- for which there are  
25 exceptions, and it occurred to me -- which is what I put

1 at the end of the memo, that maybe we should have -- that  
2 they should be parallel, that the -- that whatever were  
3 the exceptions on 509(e) should also become exceptions  
4 under 510(d). I didn't see the necessity for it  
5 personally. I was just worried somebody might raise a  
6 question of why is this proceeding excepted from 509 but  
7 not 510 where you probably would have the same problems.

8 AREC, we kicked it over to AREC, and of  
9 course, they said we have no problem with your suggestion  
10 on the peer review privilege, and we have no particular  
11 problem about ending -- amending the exceptions to make  
12 them follow a suit, follow form, or whatever you want of  
13 509. At this point, since we're thinking about changing  
14 509(e) on what are the exceptions, I still favor that we  
15 not amend 510(d) on proceedings that are excepted in which  
16 the privilege -- privilege doesn't apply. I -- I didn't  
17 see the need in the first place, and since we're  
18 rethinking what exceptions we should have for 509, I don't  
19 think we have a good reason to do that yet. If there are  
20 any questions --

21 CHAIRMAN BABCOCK: Okay. Any questions?  
22 Comments? If there are not, we're going to end early.

23 MR. PERDUE: I thought we were just talking  
24 about adding this TLAP thing at 510.

25 MR. HUGHES: And I'd like to address that.

1 When I wrote the memo I simply said there was a possible  
2 concern. The thing is, is that having raised the issue  
3 and we went over to AREC, they said they would have no  
4 problem going further and amending 510(d), but I still  
5 don't think it's necessary, and I don't recommend it.

6 MR. PERDUE: That is the recommendation on  
7 the peer assistance program?

8 MR. HUGHES: No. No. I'd still do that.  
9 That would be amending 510(a) to add TLAP people as a  
10 professional.

11 MR. PERDUE: Right.

12 MR. HUGHES: But the idea then of amending  
13 510(d) listing when the privilege doesn't apply to make it  
14 conform or like 509, I don't see a particular need to do  
15 that, especially now since we're --

16 MR. PERDUE: I agree. Okay.

17 MR. HUGHES: We're amending what will be  
18 excepted from 509.

19 CHAIRMAN BABCOCK: All right.

20 MR. PERDUE: Big fan of ending early. Big  
21 fan.

22 MR. HARDIN: I think Richard has a motion to  
23 not adjourn early.

24 CHAIRMAN BABCOCK: He does. Yeah. And, in  
25 fact, I think Richard can probably take up the rest of the

1 time.

2 MR. ORSINGER: I'm feeling a lot of peer  
3 pressure. So just to be clear, Roger, the (d)(2)  
4 exception on 510, written waiver of a person or patient,  
5 person authorized to act on the patient's behalf waives  
6 the privilege in writing, that would remain in?

7 MR. HUGHES: Well, the committee didn't  
8 discuss changing it, but there -- it seems to me that  
9 HIPAA is going to apply, and if we're changing 509 to make  
10 it conform to, as they say, modern practice in the light  
11 of HIPAA, it would seem advisable to do the same for 510.

12 MR. ORSINGER: Well, this is very simple  
13 and --

14 CHAIRMAN BABCOCK: But you can make it  
15 complex.

16 MR. ORSINGER: Well, you know, I like the  
17 simplicity. I don't like the complexity of what happened  
18 to 509, so the question is do we have to import all of the  
19 complexity of this tension between the state law and  
20 federal law into 510. It seems to me if we're going to  
21 vote to do it in 509 that we would do it in 510, but I  
22 think 510 is just so simple, it's pretty easy to apply,  
23 and if somebody has got an objection you didn't comply  
24 with federal law, and if you didn't then you don't do it,  
25 if you didn't comply with state law. So I don't know that



1 you need to write all of the complexity into it, so I'm  
2 okay with leaving (d) (2) in here. I just notice, as you  
3 observe, that it's no longer identical to 509.

4 CHAIRMAN BABCOCK: So you've talked yourself  
5 into it.

6 MR. ORSINGER: No, I don't -- I like this  
7 better than 509, but we already voted on that.

8 CHAIRMAN BABCOCK: Okay. All right. Any  
9 other comments?

10 Well, Dee Dee is crushed that she's not  
11 going to get to report for another hour and a half without  
12 a break. But if that's it, we'll -- we're done, and thank  
13 you for staying over. I don't think we could have gotten  
14 this done yesterday, despite not having a lot of time,  
15 hour and a half today, but thanks for staying over, and  
16 we'll be back in October on the 13th, I believe.

17 HONORABLE HARVEY BROWN: In Houston.

18 CHAIRMAN BABCOCK: It's going to be in  
19 Houston out at the South Texas College of Law, which  
20 Elaine is going to host us, and, Marcy, I conferred with  
21 people, and we just can't change the date.

22 MS. GREER: Understand.

23 CHAIRMAN BABCOCK: But we will make a -- an  
24 exception and allow you to participate by -- by Zoom, and  
25 the exception is only because South Texas can do it, but

1 Marcy has got some very overriding interests in being out  
2 of the country on that day, and yet she's integral to our  
3 subcommittee on business courts. Definitely going to have  
4 to have her, so that's what we're going to do.

5 PROFESSOR CARLSON: And I think this -- did  
6 we work out the parking yet?

7 MS. ZAMEN: Yeah, I'm working on it.

8 PROFESSOR CARLSON: Shiva will finalize  
9 that, but I think we will be able to provide parking as  
10 well. It's the lot behind the school, just press the  
11 button, tell the front desk you're here for a meeting, and  
12 they'll let you in.

13 CHAIRMAN BABCOCK: Great. Thanks,  
14 everybody. We're in recess.

15 (Adjourned at 10:24 a.m.)  
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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 19th day of August, 2023, and the same was thereafter reduced to computer transcription by me.

I further certify that the costs for my services in the matter are \$ 493.00.

Charged to: The State Bar of Texas.

Given under my hand and seal of office on this the 16th day of September, 2023.

/s/D'Lois L. Jones  
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