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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

JUNE 28, 2024

(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 28th day of June,
2024, between the hours of 9:00 a.m. and 12:42 p.m., at
the State Bar of Texas, 1414 Colorado Street, Suite 101,
Austin, Texas 78701.

1 **INDEX OF VOTES**

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

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7 Court Interpreter Cost	36172
8 TRCP 42	36193

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11 **INDEX OF DISCUSSION OF AGENDA ITEMS**

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17 Texas Rule of Civil Procedure 42	36173

1 Houston, it's in the court of appeals building; and we're
2 working out places in Dallas, Austin, and San Antonio, so
3 we're making progress on -- on all of that.

4 The appendix in lieu of a clerk's record,
5 which was directed by legislation the last session, has
6 been approved, changes in TRAP 34.5(a). Those went out in
7 April. The requirement that orders be e-delivered,
8 ideally, on re:SearchTX one of these days, but we're
9 trying to get case management systems in all of the trial
10 courts across the state to be able to hook up to
11 re:SearchTX and to be able to do that. That doesn't -- I
12 don't think that's too far out. OCA is already working on
13 standardizing case management software and hardware
14 throughout the state, which is a huge undertaking.

15 I'll just tell you that COVID hit, you
16 remember, March 13 in 2020, and that was on a Friday; and
17 Monday morning, the chief judge in New York called me and
18 said, "What are you going to do," and I said, "Well, it's
19 not going to really affect us that much in the outset
20 because we have e-filing." New York doesn't have
21 e-filing. In New York City they have it, but lots of the
22 rural areas in New York don't. So we're making pretty
23 good strides to get that done.

24 We swore in new lawyers in May, and then
25 approved the State Bar's budget. We're still looking at

1 the disciplinary rules that the membership voted on in
2 referendum in April, and we will have -- we have, I think,
3 90 days to make a decision on those, so you'll have
4 something out on those by the end of August. If you're
5 interested, again, in those rules or the comments that
6 have been sent in on them, you can find those on the
7 Court's website.

8 We did approve a rule that shortens the time
9 for the State Bar of Texas presidential candidates to run.
10 They were interested in shortening that time so it doesn't
11 eat so much out of the schedule of the candidates, so that
12 was approved.

13 We approved minor amendments in civil
14 Rules 103 and 107, omitting the requirement that process
15 servers put their birth date on the return. There was
16 some complaints by process servers that this was a privacy
17 issue, and we saw no reason for it, other than to make
18 sure that they're not minors, so we made those fixes.

19 The rules on paraprofessionals, as
20 recommended by the Access to Justice Commission and worked
21 on by us and others, should roll out here in the next few
22 weeks, and that program should be up and running December
23 the 1st, so we hope that those people who are trained and
24 licensed to do semilegal work as paralegals will make a
25 difference in the -- in legal aid offices and elsewhere as

1 well.

2 The Court has tentatively approved giving
3 the NextGen bar exam July, 2028. Maybe you've heard of
4 the NextGen bar --

5 MR. LEVY: I think we're old gen.

6 CHIEF JUSTICE HECHT: Yeah, some of us
7 surely are. It's been in development some years. It's
8 had some controversy attending it. Part of it was wanting
9 to put family law on, and the decision was ultimately made
10 to do it. Then the question about putting probate law on,
11 and the decision was made not to do it. So that's still
12 going back and forth a little bit, but the UBE will be
13 discontinued in a couple of years, so we don't -- our
14 choices are to go with NextGen or do what Florida is
15 trying to do, which is to write your own, and some other
16 states are trying to do that as well. There will be a
17 Texas law component to the bar exam, but it's supposed to
18 roll out -- the first victims are July of '28. So we'll
19 be hearing comments on that and keeping everybody apprised
20 of that.

21 The Board of Law Examiners is going to
22 develop the Texas law component, and they've done that
23 before, and it's a very good product, so we're confident
24 that that -- that will be good. I should tell you, in
25 that regard, that the Conference of Chief Justices in the

1 United States has formed a group called CLEAR. I think
2 it's Committee for Legal Education and Admission Reform, I
3 think is the acronym; but, anyway, it has nine Chief
4 Justices on it from across the country and a whole bunch
5 of other people; and they are going to be looking at the
6 entry into the profession from beginning to end, so
7 preparing high school students and college students better
8 for a possible legal career, how to get admitted to the
9 law school, what the training should look like, should it
10 vary depending on what kind of practice you're going to
11 have, and then what licensure looks like, should it always
12 be a bar exam or should there be alternatives; and they're
13 working with the ABA Council, which is a -- the group that
14 accredits the law schools in the United States. I think
15 there's 198 currently, but a couple of more are coming
16 online. So there may be some changes in the entry into
17 the profession before too long.

18 And, let's see, it's a little after 9:00, so
19 I hope the Court's orders are up, and if they are, we will
20 have cleared our docket one more time of argued cases.

21 (Applause)

22 CHIEF JUSTICE HECHT: And we beat the tar
23 out of SCOTUS this time.

24 CHAIRMAN BABCOCK: A friendly competition.

25 CHIEF JUSTICE HECHT: That's my report.

1 CHAIRMAN BABCOCK: All right.

2 Justice Bland.

3 HONORABLE JANE BLAND: Well, I thought
4 Jack Nicholson just walked into the room, but it's our own
5 Professor Dorsaneo. Welcome.

6 (Applause)

7 HONORABLE JANE BLAND: I have nothing to
8 add, other than I guess SCOTUS announced that they're
9 going to issue opinions on Monday, so they slipped just a
10 little bit over the line.

11 CHAIRMAN BABCOCK: How many do they have
12 left?

13 HONORABLE NATHAN HECHT: Seven.

14 CHAIRMAN BABCOCK: But who's counting? All
15 right.

16 CHIEF JUSTICE HECHT: We had seven, and we
17 got ours out.

18 HONORABLE JANE BLAND: There but for the
19 grace of God. Okay.

20 CHAIRMAN BABCOCK: Very good. Thanks,
21 everyone.

22 Well, our first order of business, it looks
23 like, looking at the agenda, it's the Chief Justice Tracy
24 Christopher show for the part of this morning, but we'll
25 start with the Remote Proceedings Task Force

1 recommendation regarding subpoenas, and, Chief
2 Justice Christopher, it's all yours.

3 HONORABLE TRACY CHRISTOPHER: Yes, well, I
4 understand that this is the most controversial of my
5 three, so maybe we should flip it, but I'll go forward
6 with this one. So we reviewed -- well, I'll go back to
7 when we had the Remote Proceeding Task Force when we were
8 dealing with COVID issues, and we looked at questions
9 about subpoenas, because at that point in time everyone
10 was pretty much doing everything by Zoom depositions, and
11 for the most part, it was all by agreement, people were
12 working it out. There was some questions about, you know,
13 serving people who won't open their door for personal
14 service because of COVID, and we decided not to tackle
15 that, that that was a too difficult process to consider.

16 We even talked about perhaps doing certified
17 mail, decided that that was a bad idea, did not recommend
18 that. We looked at how to describe document production in
19 Zoom depositions. We also decided that that was also too
20 difficult to handle by rule and that it seemed like during
21 the pandemic that people were handling it appropriately.
22 So, really, the only suggestion that we ended up coming up
23 with was a specific notation that you can subpoena someone
24 to show up by Zoom as opposed to -- or other -- or by
25 telephone or as opposed to showing up at a particular

1 place.

2 So our first suggestion, which is 176.2,
3 just basically means that the change is to specifically
4 state the subpoena can require someone to show up by
5 telephone or by Zoom as opposed to a particular place. So
6 I don't think this part is controversial in terms of a
7 suggestion.

8 The more controversial suggestion was in
9 176.3(b), and the concept behind this is that if I have a
10 case in Houston, I can subpoena someone in Dallas to show
11 up, which is more than 150 miles from Houston. I can
12 subpoena someone to show up by Zoom or telephone and
13 subpoena them there in Dallas for a proceeding in Houston,
14 notwithstanding the 150-mile designation, because the
15 witness is not actually traveling 150 miles. So that --
16 that was the point and the attempt that we have made here
17 with respect to subsection (b).

18 That is already happening in the federal
19 courts. The federal courts, for example, have nationwide
20 service of subpoenas by remote proceedings, and this is
21 just statewide, would not include any -- no Texas court
22 could subpoena somebody in New Jersey or Oklahoma. You
23 would still have to go through the usual process to get
24 that done, and we have specifically put in 176.2(a) that
25 court permission is required to make them show up at a

1 hearing or trial, which dovetails with the Civil Practice
2 & Remedies Code provision and with Rule 21 point --
3 Rule 21d. And, you know, if we want to cross-reference
4 that, we can do that to make it more explicit, but we're
5 not trying to go around the CPRC provision or Rule 21d in
6 terms of having someone appear at a hearing or trial
7 through this process.

8 So that's -- those are the changes that
9 we've made and suggest.

10 CHAIRMAN BABCOCK: Okay. Probably not
11 controversial at all, so we won't have any comments.
12 Robert, apparently, is always --

13 HONORABLE TRACY CHRISTOPHER: I knew Robert
14 was ready.

15 THE COURT: There's always one, isn't there?

16 HONORABLE TRACY CHRISTOPHER: He told me he
17 didn't like it a long time ago.

18 MR. LEVY: So I think there are a number of
19 potential challenges with this change. First issue is it
20 doesn't really match Rule 21d, the recent Supreme Court
21 rule that made very clear the expectation that parties
22 will be in court to testify. That's the standard and
23 not --

24 HONORABLE TRACY CHRISTOPHER: I -- I agree
25 with you. We did say court permission. If you want to

1 specifically reference 21d, perfectly fine to do that.

2 MR. LEVY: I do think that that needs to be
3 part of the analysis, but there are also some other issues
4 with the rule change, and I will suggest that the federal
5 rules have not changed. They do not have nationwide
6 service for remote testimony in that nature. They --
7 there is a suggestion that you include it in your proposal
8 to change the federal rules, but the -- the current rules
9 are actually more restrictive than the Texas Rule 21d in
10 terms of allowing remote testimony, and in most cases,
11 it's not -- it's not allowed, absent some very specific
12 requirements that a court has to find.

13 But some problems with this rule, one of the
14 problems is you have a witness who's traveling through the
15 State of Texas, attending a football game. You serve them
16 with a deposition notice, or trial notice, trial subpoena
17 notice. They might live in New York. They might live in
18 another country. Are they now required to appear at trial
19 remotely because they were subpoenaed while they were in
20 the State of Texas?

21 Another issue, you have party witnesses.
22 Generally speaking, we don't require trial subpoenas for
23 party witnesses, but you can't subpoena a party witness to
24 testify in the trial in Amarillo if they live in Houston.
25 You can ask opposing counsel to produce them, but they're

1 not obligated to do that, but now you send a party notice,
2 saying, "I want all of your witnesses to appear by Zoom,
3 remotely." That's a huge problem, because the challenges
4 of presenting a witness who might be all over the state
5 and presenting them as a party, you can't just get on the
6 phone and talk to them for five minutes and have them
7 appear. Presenting parties are going to want to have a
8 lawyer there, have somebody talking to them, make sure the
9 witness is comfortable.

10 It's a big issue to testify in a trial, and
11 now, all of the sudden, if you want party witnesses to be
12 there, you just send a list of 30, 40 witnesses that you
13 want to appear, and all of them might have been deposed,
14 but, now, all of the sudden, you want them to appear. And
15 the challenges also with this is that it raises the
16 prospect that -- that the burden of producing a witness
17 will be somehow undermined because the idea is that it's
18 easy for a witness to appear remotely, so the challenges
19 and burdens of having excessive testimony or people that
20 it would be very inconvenient for all of the sudden become
21 a nonissue, and the -- the idea will be it's no problem
22 for remote witnesses to be there, because they are easily
23 accessible by remote means.

24 The -- and I do think that the language of
25 the rule is also problematic, the way that it's set out.

1 The -- at the very least, it really should provide that
2 the expectation is that parties -- that the witnesses
3 should in most -- in all cases, but would appear in
4 person, and I also think that the presumption should be
5 that parties should agree, and if they don't agree, then
6 you take it to the court, but it -- this creates
7 significant issues, and I also think, in terms of
8 depositions, it's going to create the same kind of issues.

9 And the history and the reason why we have
10 the 150-mile rule, I should ask Richard how long that's
11 been in place, because I'm sure he knows the history, but
12 there's reasons for it. You want parties and the lawyers
13 and the participants to be there, and for a company like
14 mine, we do get concerned that all of the sudden you'll be
15 having depositions all over the State of Texas, day after
16 day after day, maybe multiple ones a day, and to take the
17 deposition, it's a piece of cake, but to present the
18 witnesses, it's a huge burden and challenge, and this kind
19 of change is going to just open -- potentially open the
20 floodgates to that type of dynamic.

21 CHAIRMAN BABCOCK: Yeah, Justice
22 Christopher.

23 HONORABLE TRACY CHRISTOPHER: The problem of
24 subpoenaing someone as they, you know, are in Texas for a
25 football game exists whether it's to show up somewhere or

1 not, so that is nothing different than here. I agree with
2 you that there are more difficulties from your perspective
3 in Zoom presentation of witnesses, but we already have a
4 deposition rule that allows that, right? And you're
5 allowed to be there in person if you want to. Rule 21d,
6 and as I said, I'm perfectly happy to make it clear that
7 Rule 21d applies to this, if it's not clear, you know,
8 says that a party is not required to appear remotely,
9 absent good cause or the agreement of the parties. So you
10 wouldn't have that problem with respect to party
11 witnesses.

12 You know, as you know, there's a new Supreme
13 Court opinion that basically says I can send a deposition
14 notice and require you to produce a corporate
15 representative within 150 miles of the courthouse. You
16 probably didn't like that case, but --

17 MR. LEVY: No, that's --

18 HONORABLE TRACY CHRISTOPHER: But it's out
19 there, though, right, so I understand your fears. I think
20 with Rule 21d, the fears are much smaller and because of
21 the guiderails we have in there.

22 MR. LEVY: One quick response.

23 CHAIRMAN BABCOCK: Go ahead, Robert.

24 MR. LEVY: So I appreciate that notation,
25 and I was not concerned about the decision requiring party

1 witnesses to appear, as long as they're within the
2 subpoena range.

3 CHAIRMAN BABCOCK: Everybody having trouble
4 hearing Robert?

5 MR. LEVY: Sorry. But the one challenge,
6 and, you know, it might be a question for the trial
7 judges. Yes, you're correct that somebody coming to a
8 football game could be subpoenaed, if they're in the same
9 district where the trial is going to be. If they're in
10 Austin and the case is in El Paso, it won't work, so it's
11 not the same. But even if it was in the same area, when
12 you go to a court and say, "Judge, this trial subpoena
13 needs to be quashed, my witness lives in Missouri," or
14 wherever, "and it's burdensome to have him come in to
15 testify," the judge is going to be very attentive to that.
16 She's going to to ask was their deposition taken, why do
17 you need this person to come in, are you going to pay the
18 costs, all of those issues.

19 Now you go in and say, "Judge, they just get
20 on the phone, it's no problem," and that's a real problem,
21 because it creates the same kind of burden, but trying to
22 explain that in the context of a remote deposition is
23 very, very different, and there is a -- I think there's a
24 fundamental unfairness about that.

25 CHAIRMAN BABCOCK: Justice Miskel.

1 HONORABLE EMILY MISKEL: I was going to ask
2 Robert, to me this gets very confusing because we're
3 mashing together a discussion about hearing and trial
4 subpoenas and deposition subpoenas, which I think have
5 different considerations.

6 MR. LEVY: That's true.

7 HONORABLE EMILY MISKEL: So, for example,
8 just the general rule about subpoenas is Rule 176, but
9 oral depositions are Rule 199. Which portion of your
10 objections -- for example, if we didn't modify Rule 176,
11 but instead added a section in Rule 199 pertaining solely
12 to, like, remote depositions, which part of your concerns
13 would remain? How would that change kind of what you
14 expressed?

15 MR. LEVY: On that one, my concern would be
16 that, without some language in either the rule or the
17 comment, that issues of burden might be minimized as it
18 relates to doing remote depositions, and those issues are
19 very, very important. So, you know, one issue is -- and I
20 know we have established precedent on apex depositions,
21 but if the argument is, you know, you send a deposition
22 notice or you get the CEO of a company and say it's only
23 a -- "I just want him for an hour, Judge, and he can just
24 pop on Zoom in his office. It's no burden to him." It is
25 a burden, and it might not be an apex person, but every

1 time somebody's deposition is taken, it's a huge
2 imposition. It's costly. It's difficult to prepare, and
3 you just have to go through that process, and so while we
4 want to make the process as efficient as possible and
5 reduce the cost, the idea of just allowing depositions
6 anywhere in the state, I think, opens it up too much
7 without some consideration that remote depositions can be
8 just as burdensome as depositions in person.

9 HONORABLE EMILY MISKEL: So you're saying
10 the it's easy to hop on Zoom hides the fact that every
11 deposition still requires you to prepare and all of the
12 other costs that might become invisible to judges if we
13 don't have that geographic restriction.

14 MR. LEVY: That's right. Right.

15 CHAIRMAN BABCOCK: Jim Perdue had his hand
16 up.

17 MR. PERDUE: I was going to agree with Judge
18 Miskel on the -- Justice Miskel, pardon me, on the
19 proposition of depositions versus trials, the rule, but --
20 and I don't mean to single out my friend Robert, but we
21 just enacted five courts with 250 -- 254-county
22 jurisdiction and a court of appeals with 254-county
23 jurisdiction. So, yes, the business court for Tarrant is
24 going to be in Fort Worth, but the reality is, is that
25 we've got a system now which is acknowledging kind of a

1 statewide jurisdiction, at least for one set of courts, so
2 you're looking at something that is progress for certain
3 people when it comes to business litigation, but we're not
4 allowed to analyze progress in regular district courts,
5 except those are the rules of procedure that are supposed
6 to apply to these business courts.

7 You know, the progress that's been made in
8 the last four years regarding the ability to take remote
9 depositions, the reduction of cost and time that that has
10 achieved in the discovery process for both sides I think
11 is a lot more than anecdotal at this point, and you're --
12 in this day and age, the 150-mile rule, when it comes to a
13 remote deposition, seems like an anachronism that is being
14 held onto somewhat hypocritically when you're in favor of
15 254-county courts, at least in five administrative
16 districts.

17 CHAIRMAN BABCOCK: Jim, can I ask you a
18 question?

19 MR. PERDUE: I may not be able to answer it,
20 Chip.

21 CHAIRMAN BABCOCK: Well, I'm counting on
22 that. It's really an answer in the form of a question.
23 It appears to me that under this rule for trial that it
24 would be within the judge's discretion whether to allow it
25 or not, but if they allow, in a jury trial, a telephone

1 testimony, is that going to impact how you try your case
2 to a jury, and is it going to change the dynamic of a jury
3 trial where jurors judge the credibility of a witness by
4 looking at them?

5 MR. PERDUE: So it's a great question that's
6 been looked at. You said -- you said telephone, and that
7 sounds a lot different than Zoom.

8 CHAIRMAN BABCOCK: No, no, it is different
9 than Zoom.

10 MR. PERDUE: Yeah, but I thought in the memo
11 on the federal rules it made a good point that would I
12 prefer -- would I prefer a remote witness via Zoom in live
13 cross for the purposes of a jury's comprehension over
14 cutting a discovery deposition? Absolutely.

15 CHAIRMAN BABCOCK: Yeah. No issue on that.
16 It's just the difference between Zoom and telephone.

17 MR. PERDUE: Yeah.

18 CHAIRMAN BABCOCK: And is there an issue
19 there, in your mind? As somebody who tries cases to a
20 jury.

21 MR. PERDUE: Well, I mean, I think the
22 visual input of seeing the witness versus just hearing
23 their voice is important. So I would agree with you.

24 CHAIRMAN BABCOCK: Yeah. Chief Justice
25 Christopher, then Justice Miskel.

1 HONORABLE TRACY CHRISTOPHER: So under our
2 rule, it's not going to happen in a jury trial, absent
3 agreement of the parties, right? So it's just not. Under
4 21d(b) (2) (b). Okay.

5 HONORABLE EMILY MISKEL: That doesn't cover
6 witnesses.

7 HONORABLE TRACY CHRISTOPHER: Oh, true, it
8 doesn't cover witnesses, right. All right. Correct.
9 Sorry. But -- and the reason why I did put the federal
10 suggestion in there, I do realize it's not the law.
11 Federal court has always been different. Federal court
12 has always wanted witnesses to appear in person. They
13 don't like depositions in federal court.

14 MR. LEVY: They're hearsay.

15 HONORABLE TRACY CHRISTOPHER: We have had,
16 you know, depositions in court for a very long time, you
17 know, and absolutely, Jim is right, wouldn't you much
18 rather have a Zoom live witness than a cut up deposition
19 in any jury trial? Yes. Okay, but it's not what the
20 Legislature wanted, right, and they enacted CPRC, and we
21 have followed that in 21d, and we are going to continue to
22 follow that in 176, subpoena.

23 CHAIRMAN BABCOCK: Okay. Justice Miskel.

24 HONORABLE EMILY MISKEL: I was just going to
25 say, I agree, no one likes telephone. I don't know why it

1 has to include telephone. My proposal would be to cut
2 telephone.

3 CHAIRMAN BABCOCK: Justice Christopher.

4 HONORABLE TRACY CHRISTOPHER: Okay.

5 Telephone was the first way we ever had hearings like
6 that, right, so witnesses --

7 MR. LEVY: Not telegraph?

8 HONORABLE TRACY CHRISTOPHER: -- couldn't
9 show up, with permission, you get somebody on the phone,
10 and then we had doctors testify by phone in trials. Yes,
11 Zoom is much better than telephone, but I think telephone
12 is still necessary. It's especially necessary for people
13 in foreign countries that have agreed to come in and
14 testify for things. The Zoom connection, especially in
15 remote areas, is just not there, where telephone might be.

16 CHAIRMAN BABCOCK: Okay. Kent, and then
17 back to Robert.

18 HONORABLE KENT SULLIVAN: Great point about
19 would you prefer a Zoom witness as opposed to, you know, a
20 deposition or portions of a deposition, but, you know, I
21 think my candid answer would be it depends, and it seems
22 to me that there are two overarching issues that we're
23 discussing. One comes under the broader category of, I
24 would call it, logistics, distances and various issues of
25 -- you know, associaed with trying to make it happen. But

1 the second would be what are the safeguards associated
2 with the more specific circumstances of how the testimony
3 is worth them giving.

4 And I apologize if I'm retracing any ground
5 here, but, you know, I actually tried to do a little sort
6 of best practices research yesterday after we got the
7 agenda and was just looking at it, and with a little help
8 from AI, interestingly, I, you know, pulled together some
9 things and came up with like 10 different categories that
10 various jurisdictions are concerned about with respect to
11 safeguards, and I do think that's something that maybe
12 should be of greater interest to us, and, you know, I can
13 read them off, but I don't want to bore everybody. But,
14 you know, I just -- I think there are a lot of different
15 details that go into trying to ensure that remote
16 testimony is going to be, you know, subject to the sort of
17 reliability guarantees that someone would be concerned
18 about in a trial.

19 CHAIRMAN BABCOCK: Okay. Robert, and then
20 Judge.

21 MR. LEVY: I will agree with Justice
22 Christopher that the federal process is different, and I'm
23 sorry to interject it, but in federal cases, deposition
24 testimony is considered hearsay unless certain exceptions
25 are met, so that is a very meaningful difference. It is

1 interesting, though, that even after the CARES Act and
2 process that the federal advisory committees went into
3 looking at the post-pandemic dynamic, they did not change
4 the rules to facilitate more remote testimony. They
5 recommended no rule changes would be needed.

6 This proposal is being looked at, but it's
7 not at all clear, and I do kind of follow that, that it's
8 going to actually happen, and, Jim, I'll point out that in
9 the business court context, actually, it is remarkably
10 narrow to the different districts where the business
11 courts reside, so that you don't have statewide
12 jurisdiction. Like for a jury trial, it has to be in the
13 county where the trial would have been held, and you -- if
14 you have a business case with venue in Montgomery County,
15 you cannot necessarily just bring it in Harris County or
16 Harris County business court. So the Legislature, in its
17 wisdom, decided to keep it pretty narrow, and -- and so it
18 might not allow the full uptake on -- on that new court,
19 but it does recognize the importance of witnesses and
20 people in -- in their locales.

21 I will also point out, you know, for
22 whatever it's worth, that the Legislature is very, very
23 interested in the issue of remote participation, as
24 reflected by some of the legislation that they considered.
25 I do think that they were very appreciative of the Supreme

1 Court's work in the changes to Rule 21d, but it is an
2 important issue, and for those others, if I could take one
3 moment to point out, as I'm watching the U.S. Supreme
4 Court, that other court, that they did overturn the
5 Chevron deference standard this morning.

6 CHAIRMAN BABCOCK: Judge Mendoza Salas. Did
7 you have your hand up, Judge?

8 HONORABLE MARIA SALAS MENDOZA: I didn't,
9 but I would like to after -- you were next, go ahead.

10 CHAIRMAN BABCOCK: Well, no, no, you can
11 pull rank on him any time you want. Go ahead.

12 HONORABLE MARIA SALAS MENDOZA: I just had a
13 couple of things on the deposition rule. I don't really
14 see how there is an increased burden. The lawyers still
15 have to prepare. I don't know who that is hidden from.
16 If anything, it reduces the burden on the witness or the
17 party, and why wouldn't you want that?

18 I think the issue is really with testimony
19 during trial, and I agree that I just -- you'd rather have
20 live or virtual testimony than depositions. I will say
21 that I've seen deposition splicing done really well, and
22 you have a lot of services where they run the -- the
23 actual like closed captions under the witness, and it's --
24 it can be done well. Does a jury still kind of tune out?
25 I think, yes. So you'd rather have it virtual than by

1 deposition, and so I think this would be good.

2 I also don't -- I mean, why are we
3 forgetting that that's what we've been doing for the last
4 few years? I mean, the only reason we're here is because
5 I think we've learned that this works and can be useful.
6 I will say, though, that I had several trials in '21
7 where, by agreement, the parties had witnesses give
8 virtual testimony, and it is not great. There are so many
9 factors, and in El Paso, we had -- we were able to pivot
10 and had virtual proceedings from the very beginning, but I
11 remember one case where we had someone testifying from
12 Pepperdine, who was an expert, and they agreed to it, and
13 his connection was bad, and so it really -- while you
14 preferred it, it does have the problems that we're all
15 aware of. So I think it's better, but you need to be
16 prepared for the backup, which is a depo, and then that's
17 why I would leave the telephone.

18 HONORABLE TRACY CHRISTOPHER: Right.

19 HONORABLE MARIA SALAS MENDOZA: Because if
20 you have testimony that has already begun and you lose one
21 way of taking it, you need to have the alternative.

22 So I think the rule is good. I wanted to
23 hear the safeguards, because I'm like, am I missing some
24 safeguards? I think there's enough there in the rules,
25 and, frankly, I was persuaded that we currently have that

1 gamesmanship where people will move certain witnesses or
2 parties outside of the scope, so I think this does away
3 with that or tries to deal with that, so I think there's
4 a -- the proposals are good.

5 CHAIRMAN BABCOCK: Good. Thank you, Judge.
6 Now, Roger, or has she stolen your thunder?

7 MR. HUGHES: I'm sorry, what?

8 CHAIRMAN BABCOCK: Has she stolen your
9 thunder?

10 MR. HUGHES: No, not at all. Good points,
11 all. I was intrigued by the comment that you would leave
12 document production to be worked out, but that led me to
13 another question, which was enforcement and protection.

14 Witness is summoned to a location in
15 Amarillo to testify by Zoom from that location for a case
16 in Houston. The third party witness goes, "This is
17 onerous. I have privileges. I shouldn't even be called
18 to testify." Or the document production is outrageous.
19 Where do they file their motion for protection? Because
20 if they have to go to Houston to fight it and fight it
21 there, they're not -- we're not achieving much protection
22 and vice versa.

23 I think I know the answer to this one. If
24 Smith says, "Come and get me, copper. I'm doing a
25 runner," and they want to go after the person for contempt

1 for not showing up, I think the answer is they have to go
2 to Amarillo to file the enforcement proceeding.

3 HONORABLE TRACY CHRISTOPHER: Right.

4 MR. HUGHES: But vice versa, what's the
5 story for Smith when they want to avoid looking like
6 they're being uncooperative? They want to fight it out in
7 court, what court do they fight it out in?

8 HONORABLE TRACY CHRISTOPHER: So 176.6
9 already says that they get to go to Amarillo, because it
10 says you can move for a protective order either in the
11 court in which the action is pending or in a court in the
12 county where the subpoena was served. Okay. So if I'm
13 the witness in Amarillo, I'm served in Amarillo for the
14 Zoom deposition. So they -- out of, you know, a Houston
15 case, so they can either go to Amarillo or Houston, under
16 our current rule.

17 MR. HUGHES: I assume that's where the
18 onerousness of the production would be filed.

19 HONORABLE TRACY CHRISTOPHER: Right. Right.
20 The real -- there's not any change with respect to
21 document production, right. The only thing that we didn't
22 feel like we should address was what happened during
23 COVID, right, where people exchanged documents ahead of
24 time so that you could question a witness with a document
25 via Zoom, right, either with a split screen or by having

1 sent them, you know, their whole set of documents to begin
2 with.

3 So because how to handle documents in a Zoom
4 deposition is trickier, we thought that would be best left
5 to the parties to work out the ramifications of it, and I
6 have seen it where it -- it doesn't always work in trial
7 if you don't have everything lined up ahead of time.
8 Like, if you just call somebody up on Zoom when you're in
9 trial and you don't have all of the documents already with
10 that witness or you don't have it -- you're using the
11 Court's machinery instead of your own machinery, in terms
12 of putting up a split screen so that the witness can see
13 the document, there are problems. I totally agree that
14 there can be problems with respect to using documents in
15 Zoom, so, but it's the sort of thing that we felt like had
16 to be worked out as opposed to trying to put it in a rule.
17 So we thought about it, we looked at it, and we decided it
18 was just too difficult to write in this.

19 CHAIRMAN BABCOCK: Yeah, and, Tom, I'm going
20 to get to you, but the judge just triggered something, so
21 as the -- as the Chair, I'm going to take the liberty of
22 saying it. In a case now, you have a video deposition,
23 and if you're good, you edit it down to 10 or 15 minutes,
24 because -- and it's edited well, so that the points that
25 you want to make come across, and it's on a big screen,

1 and the jury can get it. If you do that same witness by
2 Zoom, live, are you going to lose -- are you going to lose
3 time? Are you going to lose focus?

4 For example, if it's a live witness, the
5 direct might be more rambling and more free-flowing, and
6 the cross may very well be more free-flowing. In other
7 words, by doing it this way, are you going to lose any
8 efficiencies? And by this question I don't mean to
9 suggest an answer. I'm just wondering. So you get to
10 answer that one.

11 HONORABLE TRACY CHRISTOPHER: Oh, I get to
12 answer that one. From a judge's perspective?

13 CHAIRMAN BABCOCK: Sure.

14 HONORABLE TRACY CHRISTOPHER: I prefer to
15 see the witness answering questions in realtime as opposed
16 to the Memorex, here's my 15 minutes of key information,
17 but I can certainly see from a practitioner's standpoint
18 that they might want the 15 minutes Memorex and not have
19 the live witness. I can -- but I think from my
20 perspective and I think from a juror's perspective, that's
21 what they would prefer.

22 CHAIRMAN BABCOCK: Yeah. Tom.

23 MR. RINEY: I agree with Justice
24 Christopher. The hearings should be in Amarillo, and
25 thank you. But I have a question about the language of

1 176.2(a). It says you can command someone to attend and
2 give testimony at a deposition or hearing or trial, which
3 attendance may be in person, by telephone, or by other
4 remote means at a deposition. Can the language be used
5 to -- well, first of all, I assume the intent is not to
6 give the witness the choice of whether to appear by in
7 person, telephone, or other remote means, correct?

8 HONORABLE TRACY CHRISTOPHER: Well, that's a
9 good question, and I know that that issue came up
10 sometimes during COVID, like people would send out a Zoom
11 depo notice and one side would say, no, I want to be in
12 person, right, on it. So it -- you know, it seems to me
13 if a witness says, no, I want to be in person, that that
14 would be, you know, allowed, but --

15 MR. RINEY: Well, it's the flip side is the
16 problem. You want someone to be there in person, and I
17 think the language of the rule, arguably, could be used to
18 say, no, the witness gets the option. And I don't think
19 that should be the case.

20 HONORABLE TRACY CHRISTOPHER: No, no.

21 MR. RINEY: I think the person issuing the
22 subpoena has the right to determine how it's going to be.
23 Maybe that witness has a right under some other rule to
24 ask for protection, but I think the language should be
25 clarified.

1 HONORABLE TRACY CHRISTOPHER: No, I agree
2 with you. If I'm subpoenaing somebody within the 150
3 miles in person, they need to be in person, right? We
4 were trying more to address the idea of people that were
5 outside of the 100 and, you know, 50 miles, but, you know,
6 I -- I think, again, that kind of has to be worked out,
7 and if -- if you think it's unclear that in person means
8 in person, then, you know, we can do some wordsmithing on
9 it, but short -- you know, do I want to travel 147 miles
10 to a -- to attend a hearing? Wouldn't I rather say, "Hey,
11 can't you do it by Zoom?" You know, I'm a minor witness.
12 You know, it's only going to take an hour and, you know,
13 I've got to take a whole day to drive three hours from
14 Austin to Houston for this deposition, which yesterday I
15 noticed was 147 miles from my courthouse to the hotel
16 where I was staying at last night, so I thought it was
17 past that 150, but according to Google it was not.

18 MR. RINEY: Well, here's my concern. I've
19 got a case with Perdue. I subpoena a witness for
20 deposition in my office, within 150 miles. Jim thinks
21 that's fine, but the witness goes and gets a lawyer and
22 says, "Hey, look, I really don't want to give a deposition
23 in this case. Can't we do it by Zoom?" As someone who
24 presents witnesses for deposition, I would much rather
25 present them by Zoom than live because they're never going

1 to be as effective, and so I don't think the witness ought
2 to have the right to determine how the witness is going to
3 respond to the subpoena.

4 HONORABLE TRACY CHRISTOPHER: Okay. I was
5 anticipating -- and, like I said, if it's not clear --
6 that the subpoena would say show up in person at this
7 location for a deposition, or show up at this location for
8 a Zoom deposition.

9 MR. RINEY: I just recommend some
10 clarification.

11 HONORABLE TRACY CHRISTOPHER: Yeah.

12 CHAIRMAN BABCOCK: Okay. Any other -- yeah,
13 Richard.

14 MR. ORSINGER: I wanted to focus on the
15 150-mile restriction, which makes sense in terms of
16 physical presence, but if you're subpoenaing someone for a
17 telephone deposition, why should they have to drive up to
18 150 miles to call into a number when they can call in from
19 their home? Zoom is close to that, because presumably by
20 Zoom everyone will be connected electronically, and why
21 should a witness be required to drive 150 miles to get on
22 a computer to connect to a bunch of other people who are
23 on a computer? It doesn't make sense to me to require
24 someone to go up to 150 miles if they're going to testify
25 by telephone or deposition. So -- by Zoom, I meant.

1 So it seems to me that we should revisit
2 that 150-mile limit, which makes sense when your physical
3 body is going somewhere, but it doesn't make much sense if
4 everybody is connected remotely. Why does the witness
5 have to drive at all? Why can't they just do it from
6 their home or their office?

7 And I guess one other thing that I'd like to
8 say is do we need to alter the language in 192 about
9 seeking protective orders to, I guess, say something about
10 the right of a witness to make -- seek court relief about
11 whether they're going to appear physically or whether
12 they're not or whether they have to travel. I'm just
13 wondering, because I'm looking at those rules here, and
14 there are -- they're very much oriented towards physical
15 presence and not so much emphasis on the witness having a
16 right to come into court, and I'm not sure it's clear from
17 the rules, maybe from the case law, that you have to have
18 your protective order -- or you can file it in the county
19 of residence. I'm not sure if that's still true, but at
20 any rate, I just wanted to say that. Thank you.

21 CHAIRMAN BABCOCK: Okay. Yeah,
22 Justice Gray.

23 HONORABLE TOM GRAY: Well, Chip, it's been a
24 long time, 25 years or more, since I've had to worry about
25 getting witnesses organized and ready to present in a

1 trial.

2 CHAIRMAN BABCOCK: You never lose that
3 knack, Judge.

4 HONORABLE TOM GRAY: Yeah, I think I have.
5 I wouldn't want to worry about it now. The scheduling and
6 coordination, you know, and in effect, the ones I did were
7 small compared to what Tom and Jim and others in here are
8 trying these days, but so I don't fully understand how all
9 of this will fit together with that, but there are -- when
10 I was doing it, there were witnesses that we knew when we
11 were taking their deposition and we scheduled their
12 deposition and we took video deposition, knowing they were
13 not going to be in the courtroom.

14 CHAIRMAN BABCOCK: Right.

15 HONORABLE TOM GRAY: Nature of the
16 testimony, whatever it is, they were not going to be
17 there, and I'm not talking about even out-of-state
18 witnesses. I'm talking about going to Brownwood, Texas,
19 to depose a retired Office of the Comptroller of the
20 Currency that had done a bank examination, you know, over
21 in Marshall. It was one of those things that you just had
22 to do, and you did it. And to address Robert's question,
23 when you do it that way, you have the lawyer for both
24 sides being able to work with the witness on scheduling
25 and doing all of that, and most of that that we did was

1 without a subpoena. It was all done by agreement, and we
2 were working principally with the witness and the witness'
3 schedule to get that done.

4 I look at this rule now more as a witness
5 than I do as a litigant or as a trial lawyer or as even a
6 trial court. We don't see these kind of issues much at
7 the court of appeals level, so I don't have a lot of
8 working knowledge with that end of the problem, but
9 looking at this as a witness, and one of the things that
10 Richard just mentioned, I mean, why can I be served with a
11 subpoena while I'm sitting here in Austin, Texas, to
12 attend a trial in San Antonio when I live in Waco, and
13 maybe the notice that they give me is to attend a trial in
14 Houston, but they subpoena me for attendance at a video in
15 San Antonio? It just -- it doesn't make any sense.

16 The whole distance thing, if you're going to
17 do this electronically, makes no sense. But, I mean, and
18 I don't know if it's time to talk about the \$10 subpoena
19 fee or not, because, you know, that was a -- that was a
20 rule that was done when gas was -- I know y'all are --
21 some of y'all are going to find this easy to believe,
22 others will find it hard to believe, but I remember
23 pumping gas at 17 cents a gallon in my car. I mean, it's
24 not that long ago, but the -- you know, a bus ride, train
25 ride, 25 cents, 4-dollar hotel, you know, 2-dollar meals.

1 That would cover your \$10 a day. Well, \$300 won't hardly
2 cover it now.

3 So what I'm saying is there are a lot of old
4 pieces in these rules and procedure that need to be
5 updated, one of which I noticed was in the 176.3, where it
6 just says, "Produce documents or other things in a
7 county." We have counties in Texas that are almost 150
8 miles across, probably do have some in West Texas that are
9 that far across. In other places in the new draft of the
10 rule, they use the terminology "at a location," which
11 seems to be much better there than a general reference to
12 "in a county," and I have no idea why the place a person
13 is served should be a valid criteria for the application
14 of this rule.

15 The feds' draft, or proposed, maybe it's
16 their existing, says within a hundred miles of where the
17 person resides, works, or regularly conducts business. I
18 hate to say it, but in that instance, it looks like the
19 feds make a lot more sense than the state rule.

20 CHAIRMAN BABCOCK: Well, hush your mouth.
21 Chief Justice Christopher.

22 HONORABLE TRACY CHRISTOPHER: Well,
23 unfortunately, we have a statute that talks about \$10 and
24 150 miles, so, you know, that has to be changed before we
25 can get rid of those requirements, and case law says if

1 you don't give them that \$10, the subpoena is no good,
2 which was another reason why we did not attempt to change
3 that in this rule, because it's still going to -- it's
4 still going to require someone, disinterested, to go to a
5 person's house and give them that subpoena with \$10, even
6 if all you want them to do is to show up on a Zoom call.
7 You know, we are mandated by statute and did not feel that
8 we could change that.

9 CHAIRMAN BABCOCK: Kent, will you yield
10 to --

11 HONORABLE TOM GRAY: Yeah, because I wasn't
12 through.

13 HONORABLE KENT SULLIVAN: He still has the
14 floor.

15 CHAIRMAN BABCOCK: He was beating up on the
16 feds, and he was just getting going.

17 HONORABLE TOM GRAY: I just, you know, tried
18 to catch my breath there, and you let Tracy jump in on me.

19 HONORABLE TRACY CHRISTOPHER: Sorry.

20 HONORABLE TOM GRAY: But since you mentioned
21 the statute for the \$10, would that be a prohibition of
22 us, by rule, making it 300 or 200 or something that has
23 some semblance to what a witness may actually be out if
24 they are required to travel and stay overnight at a
25 location? But that's kind of a rhetorical question. I'll

1 put it out there.

2 I will say that this month the CCA allowed a
3 witness in a case to appear remotely, much like what was
4 described here. It was -- the thing that sort of
5 surprised me about that is there wasn't any prior
6 planning. It was just kind of on the fly, and at least
7 this would give some type of structure for how that was to
8 have occurred and noticed, and it seems to me that this
9 rule, while conceived to apply in 254 counties, it needs
10 greater flexibility in, I would guess, the trial judge's
11 application. Because I'm thinking of the -- like my
12 district, 13th Court of Appeals -- or 13th Court, District
13 Court, Navarro County, population, I don't know, a couple
14 hundred thousand people -- you know, about 50,000 people
15 in Navarro County, and the requirements for conducting a
16 trial in that county are very different than the 414th
17 that is in McLennan County, which is a quarter of a
18 million people there, and I can't imagine what it would be
19 like to try to coordinate in one of the Harris County
20 district courts and the trials that occur there and the
21 number of witnesses involved, and there needs to be some
22 latitude for the trial judge's involvement and protection
23 of the witnesses. I mean, it's just flat out easier to
24 get in and out of the courtroom in McLennan County than it
25 is in Harris County. I mean, that's just -- we have free

1 parking.

2 CHAIRMAN BABCOCK: Whoa.

3 HONORABLE TOM GRAY: So, anyway, with that I
4 yield.

5 CHAIRMAN BABCOCK: Are you done, Your Honor?

6 HONORABLE TOM GRAY: There was some more
7 editing things that I wanted to raise, but I don't think
8 we're to the editing stage yet.

9 CHAIRMAN BABCOCK: Okay. Kent.

10 HONORABLE KENT SULLIVAN: Well, I just
11 wanted to return briefly to my theme of safeguards, and
12 just by way of example, I'll point to one of the earlier
13 categories that was brought up, and that was document
14 handling in remote testimony. And I think the comment was
15 there's probably a need to work it out, and I understand
16 that. It's an acknowledgement, I think, of how uneven
17 things are in Texas. There are 254 counties, very
18 different circumstances that you may be dealing with from
19 one venue to another.

20 That said -- and I will note that with
21 respect to, you know, my little best practices research,
22 technology was one category of issues out of the 10.
23 Document handling was also another issue out of the 10.
24 Other jurisdictions have identified them specifically, but
25 I do think that, regardless of the difficulties, we're

1 going to have to look at some baseline minimum standards
2 that ensure reliability for testimony, particularly in
3 trials. Otherwise, you really face a wild west sort of
4 circumstance, and I think that's, to put it mildly, highly
5 undesirable.

6 If we talk about leaving this just to the
7 discretion of an individual trial judge, that sounds good,
8 but I think we need to examine it more specifically. Just
9 for example, number one, what are the different levels of
10 technological sophistication that you think individual
11 judges have around the state? My guess is that it varies
12 really significantly.

13 Number two, to my knowledge, there is no
14 training that is routinely and uniformly offered to trial
15 judges about how to handle these kinds of issues that
16 intersect significantly with technology issues, so leaving
17 this to the individual discretion of trial judges under
18 our current circumstances strikes me as a really unsound
19 idea. It will reduce very erratic results and, despite
20 the best of intentions, may produce circumstances that are
21 highly unreliable in terms of the witness testimony that
22 could be given. I'll leave it there for now.

23 CHAIRMAN BABCOCK: Chief Justice
24 Christopher, and then, Chris, did you have your arm up?

25 MR. PORTER: No.

1 CHAIRMAN BABCOCK: Don't do that.

2 MR. PORTER: Sorry.

3 CHAIRMAN BABCOCK: Chief Justice
4 Christopher.

5 HONORABLE TRACY CHRISTOPHER: Well, how does
6 a document production occur now when we're talking about a
7 third party witness? Presumably, when we're talking about
8 party witnesses, documents have already been exchanged,
9 right. Everyone has a universe of documents that they can
10 get to their witness ahead of time, if they want their
11 witness to be able to review it.

12 As we talked about on a Zoom deposition, you
13 know, do you have the split screen so that the witness can
14 see whatever it is, but in a normal situation now, when
15 you're talking about a third party witness, you subpoena
16 that witness to show up at a location with documents. All
17 right. And then the court reporter takes custody of the
18 documents, and they are attached to the deposition. I
19 mean, that is old-fashioned, how you do a deposition with,
20 you know, a subpoena attached for documents. And
21 everybody gets a copy of it and then they have it.

22 As a practical matter, it almost never
23 happens that way. One side or the other, whoever wants
24 the deposition, talks to the witness ahead of time, gets a
25 copy of the documents ahead of time, sends them out to

1 both sides. I mean, I would imagine it's a pretty rare
2 deposition where somebody shows up with a witness and
3 doesn't know what the witness is going to produce, but the
4 reason why we didn't deal with it at the time at the
5 Remote Proceeding Task Force level was because of COVID,
6 right, and we, you know -- it's a pretty simple procedure
7 when the court reporter shows up with the videographer,
8 and the person shows up, and they produce the documents,
9 right. And if everybody else is remote, then the court
10 reporter needs to have a really good scanner to get it to
11 everybody, right, but we didn't really think we should
12 micromanage how that would happen. But I do understand
13 Kent's position on it, but we just didn't think a rule was
14 possible to cover all of the variables.

15 With respect to, you know, should a witness
16 have to travel 150 miles or 140 miles, 192.6 does talk
17 about the discovery not being undertaken at the time or
18 place specified. So I don't think that needs to be
19 changed if there's going to be some sort of a contest with
20 respect to that.

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

23 HONORABLE EMILY MISKEL: Also, in thinking
24 about dealing with documents, I think we've already had
25 this fight in connection with requests for production.

1 Like when I started as a new lawyer, you would send a
2 request for production, and the other side would be,
3 "They're in a box in my office; you send a copy service,
4 you can come look at them," and then there was some case
5 law saying, no, you can't do that, you have to produce it
6 and the court can make you produce it electronically. So
7 it's already within the court's power within the existing
8 rules of, I think it was 196.1(b), that you specify a
9 reasonable time and place for production, and our case law
10 already interprets reasonable time and place to take away
11 parties' abilities to play games with making the documents
12 artificially hard to get to and allows courts to make you
13 send electronic copies of them. So I think very similarly
14 to those fights that we've already had and either won or
15 lost, depending on your perspective, I would anticipate
16 the court would have the same power to say, no, you've got
17 to send it electronically, you can't say it's in a box in
18 my attic, come look at it.

19 CHAIRMAN BABCOCK: Okay. Yes.

20 HONORABLE MARIA SALAS MENDOZA: I just
21 wanted to say that I agree with Justice Gray that -- I
22 still think the proposals are good, but I think they are
23 good because they do provide the kind of latitude that
24 trial judges need, and I do think it suggests the fact
25 that you have some judges who have really made use of all

1 of the -- the features of remote proceedings and probably
2 say, "We can do this, this is easy." The parties want to
3 do it, we can handle it, and you have judges that, as I
4 understood, there are still some courthouses that didn't
5 have good connectivity ever, and so those courts and those
6 cases will say, "We just can't do this." So even if the
7 parties agree, we have to figure something out, so I think
8 that's why you need the rule to provide the latitude for
9 those circumstances.

10 CHAIRMAN BABCOCK: Okay. Kent.

11 HONORABLE KENT SULLIVAN: Yeah, I don't know
12 whether Justice Miskel's comments were intended as
13 responsive to some of mine, but I thought I would at least
14 clarify one point, and that is in what I've seen in
15 terms -- and what I was speaking to, vis-a-vis what some
16 other jurisdictions are concerned about, is not a document
17 production issue. It is a contemporaneous use of
18 documents by a witness while testifying. The extent to
19 which you know exactly what the witness is looking at, the
20 extent to which the jury and the judge and everyone can
21 contemporaneously view exactly what the witness is looking
22 at, there are no questions about that. Those are issues
23 that I think at least other jurisdictions have suggested
24 are worthy of thoughtful consideration.

25 CHAIRMAN BABCOCK: Okay. Robert.

1 MR. LEVY: Just one small comment. I
2 recognize the challenge with dealing with the production
3 of documents and the complexities, but I think that if we
4 don't address that issue either in the rule or in the
5 comment, it's just going to create more problems, because
6 people will assume they can require the production of
7 documents the same way. So I think we need to either
8 address how to solve the problem or note that we're not
9 addressing that in a way that provides clarity.

10 CHAIRMAN BABCOCK: Justice Miskel.

11 HONORABLE EMILY MISKEL: I was going to ask
12 -- this is not a rhetorical question. It's a genuine
13 question. Could we just say do it the same as production
14 of documents for discovery? Like just follow, like,
15 Rule 196 applies to this, too?

16 MR. LEVY: But we -- yes, I'm just trying to
17 think in terms of if you're saying, like under the current
18 draft of the rule, that you could serve a production
19 request --

20 HONORABLE EMILY MISKEL: And let me back up
21 and change my question, because I think I renew my request
22 that we treat hearing and trial subpoenas differently from
23 discovery subpoenas. I think it would clear up a lot of
24 these problems. So for purposes of a discovery subpoena,
25 like a deposition subpoena, you could say the production

1 of those deposition documents has all of the same
2 proportionality and tailoring and reasonable time and
3 place, all of the existing rules we have for discovery.
4 Obviously, you might need a different rule for a live
5 hearing or trial, so excepting that, if we're talking
6 about deposition subpoenas, I think we have existing
7 rules.

8 CHAIRMAN BABCOCK: Chief Justice
9 Christopher.

10 HONORABLE TRACY CHRISTOPHER: Well, there is
11 sort of a difference between what's in 176.2 and the rest
12 of our discovery rules. Okay. 176.2 is a very broad --
13 broadly written rule, right. If you look at the current
14 subpoena rule, it says show up and produce and permit
15 inspection and copying of designated documents, right? So
16 show up with your documents, right? I mean, that is the
17 current rule that we've been living with for -- since at
18 least '98, and I'm sure before that also. It was a very
19 similar rule. So I'm not really sure what the concern is,
20 because we've had this same rule. We've had people
21 subpoenaed to show up and produce documents for a long
22 time, and there really hasn't been a lot of concerns.

23 CHAIRMAN BABCOCK: Somebody either was
24 brushing their hair or had their hand up over here. No?

25 MR. LEVY: It wasn't Tom then.

1 CHAIRMAN BABCOCK: Marcy.

2 MS. GREER: I was just demonstrating.

3 CHAIRMAN BABCOCK: Jim Perdue. And it's
4 very hard to see you.

5 MR. PERDUE: It is, and I apologize.

6 CHAIRMAN BABCOCK: That's all right.

7 MR. PERDUE: And I tend to brush my hair,
8 but I actually raised my hand.

9 CHAIRMAN BABCOCK: About every two minutes.

10 MR. PERDUE: I wanted to go back, and I
11 wanted to second -- the more I read this, Justice
12 Christopher, Tom Riney's point. With kind of the fix of
13 the way (a) has been rewritten, I fear that you're going
14 to open to a potential rash of motions to quash on trial
15 subpoenas, the way it's written. Because every trial
16 subpoena reads to be discretionary, the way it's written,
17 and I don't think that's the intent. I think it's to try
18 to bracket trial subpoena, appearing at physical trial
19 versus subpoenaing for a deposition, but I think this is
20 the point Tom was making, and I think I agree with it, as
21 I often do, that it seems to provide latitude to both
22 witness, and potentially represented party, to quash any
23 trial subpoena, to ask for the court's permission for any
24 witness, even in range, you know, for whatever reason, to
25 appear at trial. And I don't think that's the intent. I

1 think it's trying to bracket it from the subpoena rule for
2 depositions.

3 And I -- Justice Christopher is dead right
4 that the vagaries of the way that we deal with production
5 of documents is as variable as the trust relationship you
6 have with the attorney on the other side. I can get an
7 expert's file produced to me for a Zoom deposition two
8 days before the deposition, or I can have a flash drive
9 dumped into a drop box two minutes before the deposition
10 begins, which creates a problem for a discovery deposition
11 because when you do it that way, you've probably added a
12 couple of hours to the deposition unnecessarily, rather
13 than just being up front and giving me the documents so I
14 can get them organized and be able to question on them
15 more efficiently. And I don't know the fix on that, other
16 than micromanaging it by rule versus leaving it to the
17 parties to work such things out, Robert, because I --
18 there's -- that is one of those things which is equally
19 unfair to both sides.

20 MR. LEVY: I agree.

21 MR. PERDUE: Yeah.

22 MR. LEVY: Absolutely, and it is incumbent
23 on parties to try to work that out. The last thing I want
24 is to have to produce a witness a second time because I
25 didn't produce documents.

1 MR. PERDUE: Right, right.

2 CHAIRMAN BABCOCK: Justice Christopher.

3 HONORABLE TRACY CHRISTOPHER: Well, I guess
4 I'm repeating myself, but a lot of the problems that
5 people are talking about now are already in this rule.
6 They're in 176.3, limitations range, and it talks about if
7 you're subpoenaed where the person resides or is served,
8 so if I'm here for a football game and I get served, I'm
9 served, right.

10 And with respect to the deposition, appear
11 and produce documents at any location permitted under Rule
12 199.2. So we're already referencing in this current rule
13 that's been out there working, sort of, I guess, we're
14 already doing the things that everybody is concerned
15 about. But I can see splitting it out to say deposition
16 in person versus deposition by telephone or remote means,
17 just to make everybody happier.

18 CHAIRMAN BABCOCK: Yeah. Justice Gray, you
19 mentioned edits. Are you interested in editing anything?
20 Because we're going to vote here in a minute.

21 HONORABLE TRACY CHRISTOPHER: Oh, I was
22 about to say, why don't we just take those for the Supreme
23 Court to look at?

24 CHAIRMAN BABCOCK: Why don't we just what?

25 HONORABLE TRACY CHRISTOPHER: Take Tom's

1 edits and pass it on.

2 MR. ORSINGER: We don't know what they are.

3 HONORABLE TRACY CHRISTOPHER: I'm ready to
4 pass it on.

5 CHAIRMAN BABCOCK: Well, Tom is
6 frequently -- Justice Gray has frequently provided
7 healthy, insightful edits, and he mentioned that he wanted
8 to edit it, so here is his opportunity.

9 HONORABLE TRACY CHRISTOPHER: But I've
10 already agreed I should do some edits, too, so perhaps
11 it's premature to vote.

12 CHAIRMAN BABCOCK: Well, we don't have to
13 vote.

14 HONORABLE TRACY CHRISTOPHER: I'm not asking
15 for it.

16 CHAIRMAN BABCOCK: Yeah. Well, what do
17 you -- do you think we need more discussion or we
18 shouldn't vote or what?

19 HONORABLE TRACY CHRISTOPHER: I think we
20 should pass it for now. We'll come up with new language.
21 I'll take Tom's edits.

22 CHAIRMAN BABCOCK: Okay. I see what you're
23 saying.

24 HONORABLE TRACY CHRISTOPHER: I'll split out
25 in person and remote. I'll add 21d into it.

1 CHAIRMAN BABCOCK: Okay. I'm with you. You
2 want to try to do that today or wait for the next meeting?

3 HONORABLE TRACY CHRISTOPHER: I would wait
4 for the next meeting, because unless the Court really
5 wants to push forward on it, everything seems to be okay
6 without this rule.

7 CHAIRMAN BABCOCK: Yeah, I'm with you.
8 Sorry.

9 HONORABLE TRACY CHRISTOPHER: Let me just
10 put it that way.

11 CHAIRMAN BABCOCK: I misunderstood what you
12 were saying.

13 HONORABLE TRACY CHRISTOPHER: No.

14 CHAIRMAN BABCOCK: So that's fine. We'll
15 pass it to the next meeting, and that way Justice Gray can
16 edit at his leisure.

17 HONORABLE TRACY CHRISTOPHER: And send it to
18 me, and Jim can, too.

19 CHAIRMAN BABCOCK: All right. Next meeting.

20 MR. PERDUE: I'm not the grammatician that
21 you are.

22 CHAIRMAN BABCOCK: All right. Uniform
23 Interstate Depositions and Discovery Act. Once again,
24 Chief Justice Christopher.

25 HONORABLE TRACY CHRISTOPHER: Okay. We

1 were asked to look at this because of the last legislative
2 session where the -- and if I didn't give it to you this
3 time, I probably gave it to you last time, where basically
4 the Legislature said Supreme Court should look at and see
5 if we should adopt the Uniform Interstate Deposition and
6 Discovery Act; and if so, if the Court adopts it, then
7 CPRC 20.002 would be repealed.

8 So our subcommittee looked at it, and,
9 frankly, no one had much experience with the uniform act
10 on our subcommittee. We looked at the uniform act. We
11 thought that it looked good. It doesn't -- it's not a
12 whole lot different from what we currently have, but it
13 could be cleaner to say, yes, we have adopted the Uniform
14 Interstate Deposition and Discovery Act. So we
15 tentatively said, yes, it seems like the Legislature wants
16 us to do this. It looks like a pretty clean procedure,
17 and so the recommendation of the subcommittee was to do
18 so, but you have to remember that this is only dealing
19 with deposition notices coming to our state, right. It's
20 not dealing with deposition notices going elsewhere.
21 Like, by adoption of this act, we can not compel
22 California to do anything different other than what
23 they're already doing, right. So it's only a one-way act,
24 how we handle deposition notices from other states versus
25 how we get depositions in other states. So it's -- it's

1 kind of different.

2 So what we did is I've given you a draft of
3 the Uniform Interstate Deposition and Discovery Act, and
4 we have created draft new Rule 201.2, adopting the uniform
5 act. It's kind of the -- the act uses the term "foreign
6 jurisdiction," when it really just means a state other
7 than this state. So it's a little bit confusing, but
8 that's the way it's defined in the act, and we thought
9 about totally rewriting the act and calling it the act,
10 but decided that we should keep the terminology of the
11 uniform act. So our current rules, we don't -- foreign
12 deposition really means outside the country, but now the
13 uniform act says foreign deposition -- foreign
14 jurisdiction is a state other than this state, so we're
15 going to have to remember that.

16 So, basically, the draft, which is at Tab G,
17 does everything that basically adopts everything that's in
18 the uniform act. The only change that we proposed is in,
19 let's see, (b) (3), where we talked about a subpoena of any
20 party who has appeared and is not represented by counsel.
21 That's the only addition we made from the text of the
22 actual act. (C) and (d) under the uniform act say refer
23 to your own state rules, so (c) and (d) were added to --
24 are in there to refer to your own state rules, so we
25 referenced 176 and basically all of our rules in (d).

1 And then the second paragraph, you know,
2 specifically referencing back to 176. Then we added a
3 comment, which says, by adoption of this rule, the Supreme
4 Court adopts the Uniform Interstate Deposition and
5 Discovery Act. We're kind of in this weird -- you know,
6 because usually it's a legislative rule adopting these
7 acts, so but we wanted to make it clear what we were doing
8 so that it would correspond with the legislation that said
9 if the Supreme Court adopts it, then CPRC goes away. So
10 that's why we have put this in the comment, and we added
11 also the second sentence of the comment, which is in the
12 uniform act itself, and -- but we thought it belonged more
13 in a comment than in the rule itself.

14 So, basically, we adopted it. We added
15 things that pertain to Texas, as the uniform act requires,
16 and added the comment. So but then we had to figure out
17 what to do about depositions in foreign countries, so we
18 kept, basically, what we currently had and made a few
19 changes to it, because the CPRC that is going to be
20 repealed dealt with both foreign countries and other
21 states. So once that gets repealed, we have to have a
22 rule about foreign countries again. So that is what 201.3
23 is, and so --

24 CHAIRMAN BABCOCK: Great.

25 HONORABLE TRACY CHRISTOPHER: -- that's what

1 we did.

2 CHAIRMAN BABCOCK: Justice Gray.

3 HONORABLE TOM GRAY: The Interstate
4 Agreement on Detainers Act applies to all of the states
5 that sign on, does not apply to any state that does not.
6 Is this like that? In other words, if a state has not
7 adopted this and they send somebody in Texas a subpoena
8 for a deposition, does this apply, or does the regular
9 rule regarding what would have been another state apply?

10 HONORABLE TRACY CHRISTOPHER: No, there is
11 no reciprocity requirement on this uniform act.

12 HONORABLE TOM GRAY: Okay. Second question,
13 I'm a bit confused about the applicability, because the
14 first sentence of 201.2 says, "In a court of record of any
15 other" -- "if a court of record of any other state or
16 foreign jurisdiction," and then the definition of foreign
17 jurisdiction in 201.2 says, "Foreign jurisdiction means a
18 state other than this state." So it looks like, under
19 201.2, foreign jurisdiction is something other than an
20 "other state."

21 HONORABLE TRACY CHRISTOPHER: Well, (a)(1)
22 defines foreign jurisdiction as "a state other than this
23 state."

24 HONORABLE TOM GRAY: Right. Which seems to
25 be counterintuitive to the first sentence in 201.2.

1 HONORABLE TRACY CHRISTOPHER: No. No, we're
2 eliminating current 201.2 and replacing it with this 201.2
3 and then adding 201.3. So 201 -- the current 201.2 is
4 gone.

5 HONORABLE TOM GRAY: Okay.

6 MR. ORSINGER: Chip, can I comment on that
7 for just a second?

8 CHAIRMAN BABCOCK: You may. Will you yield,
9 Justice Gray?

10 HONORABLE TOM GRAY: Oh, I had started
11 drinking coffee again. I was done.

12 CHAIRMAN BABCOCK: Okay.

13 MR. ORSINGER: So, Justice Christopher, in
14 201.2 it says, "If a court of record of any other state or
15 foreign jurisdiction," which suggests that there's a
16 distinction between "other state" and "foreign
17 jurisdiction."

18 HONORABLE TRACY CHRISTOPHER: Right. I
19 didn't make it clear. Current 201.2 is gone.

20 MR. ORSINGER: And this is current 201, so
21 that --

22 HONORABLE TRACY CHRISTOPHER: Right.

23 MR. ORSINGER: -- duplication or --

24 HONORABLE TRACY CHRISTOPHER: Right.

25 MR. ORSINGER: Very good, thank you.

1 HONORABLE TRACY CHRISTOPHER: I am sorry I
2 didn't make this clear in my memo. Current 201.2 would be
3 gone, replaced by new 201.2, which is the act, and new
4 201.3, dealing with real foreign countries.

5 CHAIRMAN BABCOCK: Judge Chu.

6 HONORABLE NICHOLAS CHU: Justice
7 Christopher, I had a little hard time following this. On
8 page 46, on 20.002, the second paragraph and third and
9 fourth of that, is that meant to be just a comment on the
10 draft, or is it an actual comment? Is it essentially, in
11 other words --

12 HONORABLE TRACY CHRISTOPHER: This memo
13 wasn't written as well as I should have. I apologize.
14 Section 20.002 is the current CPRC rule.

15 HONORABLE NICHOLAS CHU: Yeah.

16 HONORABLE TRACY CHRISTOPHER: And we created
17 201.1 and 201.2 based upon the current CPRC provision.

18 HONORABLE NICHOLAS CHU: Okay, I gotcha now.
19 Okay. And then my next question then is should there be a
20 formal comment somewhere in the rule, just reflecting the
21 fact that the Civil Practice and Remedies Code section is
22 repealed based on some kind of statutory authorization or
23 something like that?

24 HONORABLE TRACY CHRISTOPHER: Might be a
25 good idea.

1 HONORABLE NICHOLAS CHU: Just because I know
2 some litigator will look at that and say, well, this
3 actually trumps because this is a statute versus rule and
4 not realize --

5 HONORABLE TRACY CHRISTOPHER: Right. I
6 think the last time this was on the agenda I included the
7 new language from the Legislature, and I apologize that I
8 didn't repeat it this time. But, yeah, so we could add
9 that to the comment, that by adoption of this, according
10 to this, this is repealed.

11 HONORABLE NICHOLAS CHU: Yeah.

12 CHAIRMAN BABCOCK: Right. Yeah, Roger.

13 MR. HUGHES: I had a couple of questions.
14 First, on the new subsection (b)(1), they have to submit
15 the request to the clerk of a court. I think it would be
16 advisable to specify what court, district, county court at
17 law, because, I mean, under this rule, they could ask a
18 municipal court clerk to issue it, and I don't think
19 that's what we want, and I can see certain difficult
20 litigants saying any -- that any court other than district
21 court has no jurisdiction to do that, but rather than get
22 into it, I suggest we -- I suggest picking a court to
23 submit it to, so we don't get that one.

24 Next, that -- the one that's "A request for
25 an issuance of a subpoena does not constitute an

1 appearance in the courts of this state." I think
2 essentially what they're saying is if you submit the
3 request, you are not -- it's a kind of a self-enforcing
4 special appearance. But the problem is, is that it says
5 only the request for an issuance. Well, what if there is
6 a discovery fight over it? Because later on, you adopt a
7 lot of the discovery and subpoena rules that would allow
8 someone to contest the subpoena or seek protection, and I
9 can see someone arguing as that, well, the request is
10 protected, but, you know, there was this subsequent
11 proceeding, the motion for protection, the motion to
12 quash, and that's not protected, so you did appear in
13 Texas. Or God forbid a mandamus should arise out of it,
14 is the mandamus, et cetera.

15 So I would suggest adding a phrase to the
16 effect that it's not just the request, but any proceeding
17 related to or arising out of the request. And I just
18 trust that this is enough to say that it -- a person is
19 not making an appearance and subjecting themselves to
20 Texas jurisdiction, and we don't need to kind of expand it
21 to drag in all of the verbiage that goes along with
22 conducting a -- contesting a personal jurisdiction in
23 Texas.

24 And then, finally, under subsection (d), the
25 draft is good. The draft brings in all of the rules of

1 this general discovery, which would include our
2 limitations on the scope of discovery and then the Rules
3 of Evidence, but choice of law, you know, what happens if
4 they're coming to Texas to get around a discovery
5 prohibition in their own state?

6 I would suggest considering some -- tossing
7 in something about other applicable law, because I don't
8 think we want to write a choice of law provision for this.
9 That, I think, would be getting too far into the weeds,
10 but just simply saying that there's some other applicable
11 law, for example, a statute in the original court's
12 jurisdiction that would prohibit -- that would allow a
13 privilege that Texas doesn't recognize yet or prohibit
14 production of a certain class of documents that Texas
15 would otherwise do. Just, perhaps, something in the
16 effect that, that or any other applicable law concerning
17 discovery, and I think that would solve the choice of law
18 problem.

19 HONORABLE TRACY CHRISTOPHER: Or "other
20 applicable Texas law." Because I believe the idea behind
21 the uniform act and your concerns are that even though
22 we're making it easier to -- let's say it's a New York
23 lawsuit, sends the subpoena to Texas for a witness to show
24 up and produce documents. The witness in Texas is
25 protected by Texas rules, not New York rules, so if I put

1 in -- if you made that change, I'm a little worried
2 whether it would expand to New York law, because I agree
3 with you, there are very different -- I mean, there might
4 be a reason why we want to quash something in Texas that
5 would be permissible in New York, and -- but that's why
6 the act is written the way it's written, I think.

7 CHAIRMAN BABCOCK: Justice Miskel.

8 HONORABLE EMILY MISKEL: The comment to the
9 uniform law specifically says those laws include -- on the
10 enforcement and application of the court provision, "Those
11 laws include the discovery state's procedural evidentiary
12 and conflict of laws rules. The discovery state has a
13 significant interest in protecting its residents who
14 become nonparty witnesses," et cetera, "any discovery
15 motions must be decided under the laws of the discovery
16 state. This protects the deponent," et cetera. So the
17 purpose of the uniform law is to say that the out of New
18 York discovery production in Texas will be governed
19 entirely under Texas rules.

20 MR. HUGHES: Well, but they also said it
21 would include Texas' choice of law, and there are times
22 when people get into fights over whether, under Texas law,
23 Texas would choose to recognize the privilege of some
24 other state as applicable as opposed to its own, so that's
25 why I get back to -- I mean, I don't want to get into

1 writing a special conflict of law. I think that would be
2 too onerous and unnecessary. I'm just saying perhaps
3 saying "any other applicable Texas law, including Texas
4 choice of law."

5 I leave it to wordsmithing. I'm just saying
6 I'm concerned that the person -- the witness may say, "I
7 may be testifying in Texas, but it's going to be read in
8 New York," et cetera, and we've already seen witnesses --
9 I mean, we get -- I won't get into it. I'm just saying I
10 think it's a problem, and I wouldn't want someone to say
11 the rule has shortchanged the argument that you can't
12 use -- invoke Texas' choice of law to invoke some other
13 privilege that might be applicable.

14 CHAIRMAN BABCOCK: Justice Kelly.

15 HONORABLE PETER KELLY: I think the statute,
16 the uniform statute as it's currently drafted and you're
17 looking at it, is at least intellectually consistent and
18 tracks the language with the domestication of foreign
19 judgments. That law follows, in this case, the discovery
20 state, and the domestication of foreign judgment is the
21 same laws that are in the state that rendered the
22 judgment, so I think that's -- it's parallel to that and
23 consistent with that.

24 HONORABLE TRACY CHRISTOPHER: I mean, we can
25 add another "applicable to Texas law" to that. With

1 respect to your comment about the clerk of the court, I
2 did think should we specify a court, and should we specify
3 a district court or a county court, or the uniform act
4 just says this? It probably is because, you know, other
5 states don't have the myriad levels of courts that we do,
6 but I think that that would be perfectly permissible to
7 say it needs to be in district court or county court.

8 The second sentence that you were asking
9 about there comes from the uniform act, is directly out of
10 the uniform act. We didn't make any changes other than
11 the underlying part in (b) (3), and it probably makes sense
12 to add that, too.

13 MR. HUGHES: Okay. And the reason I say
14 that is I don't practice a lot in other states, but we
15 have a pretty rigorous procedure for contesting personal
16 jurisdiction, and it's very mother-may-I, you've got to do
17 it this way and no other; whereas, a lot of states follow
18 the federal rules, which are not quite so strict; and a
19 party might -- coming to Texas, might not realize the
20 difficulty in trying to raise personal jurisdiction.
21 That's why I'm saying we might want to make it into the
22 rule. That's all.

23 CHAIRMAN BABCOCK: Richard.

24 MR. ORSINGER: On the issue of privilege, it
25 concerns me when we have interstate jurisdiction, or

1 particularly international jurisdiction, as to which
2 law -- which state's or country's law of privilege would
3 apply, and the list that Justice Miskel read did not
4 mention privileges. It mentioned procedures. There were
5 about three or four categories, and I think privilege was
6 not on the list.

7 HONORABLE EMILY MISKEL: It did say
8 evidentiary.

9 MR. ORSINGER: So you think that includes
10 privileges? Well, it seems to me that that would be
11 particularly a bad idea to specify that Texas law must
12 control on privileges, particularly where the litigation
13 is going on and involves mostly people in other states and
14 Texas is kind of collateral.

15 You know, under the interstate second we're
16 talking about governmental interest analysis and the state
17 with the most significant relationship to the issue and
18 the parties, and I can imagine that a lawsuit that's
19 primarily between New York people might have some
20 important information to get from a witness in Texas, and
21 yet New York law -- New York privilege law should be the
22 one to apply. So in my view, we should -- if we say
23 "other Texas laws" or whatever the catch-all phrase is, if
24 that forces the hand of the Texas judge to apply Texas
25 privileges, that probably is not as good as letting the

1 judge make a conflict of law determinations as to which
2 state's privilege should be honored.

3 HONORABLE TRACY CHRISTOPHER: I mean, we did
4 discuss it in the committee, and our recommendation is to
5 keep Texas privilege.

6 MR. ORSINGER: And so what is the rationale
7 for that?

8 HONORABLE TRACY CHRISTOPHER: Because you're
9 not a party. This is a nonparty witness, right, that -- I
10 mean, maybe if you were a party witness, it would be
11 different, but this is a nonparty witness that is just
12 supposed to give testimony in New York, and it seems to me
13 that because I live in Texas I'm entitled to the privilege
14 law of Texas. So, I mean, we did discuss it and
15 specifically put in the Rules of Evidence where our
16 privileges are.

17 CHAIRMAN BABCOCK: Justice Miskel.

18 HONORABLE EMILY MISKEL: I was going to say,
19 I would make it even stronger and say Texas law always
20 applies, regardless of Texas choice of law, because also,
21 as a judge, I don't want to be -- you know, these people
22 are imposing on our jurisdiction enough, and then having
23 us try to figure out New York law, I don't want to do
24 that. So if they're going to come to our state and do
25 discovery here, then they can live by our rules, and I

1 don't think -- I don't want to burden our judges with
2 having to try to figure out the law of every jurisdiction
3 that they come from.

4 CHAIRMAN BABCOCK: Robert.

5 MR. LEVY: I agree with that, because the
6 privilege issues can vary. In Europe, they're even more
7 variant and problematic, so I don't -- I think for the
8 purposes of taking discovery, Texas law should apply. If
9 the parties have an argument on privilege applicability,
10 then they should take it up with the host court, the --
11 where the case is pending.

12 CHAIRMAN BABCOCK: Fair enough. Any other
13 comments? David, you want to share those?

14 HONORABLE DAVID KELTNER: I'm going to eat
15 this note and swallow it. The -- I have --

16 HONORABLE TRACY CHRISTOPHER: I plead the
17 Fifth.

18 HONORABLE DAVID KELTNER: Two thoughts. I
19 understand the issues, but isn't it really this simple?
20 Couldn't you say "permitted by the" -- "the discovery
21 permitted by the foreign state and not prohibited by
22 Texas"? Then you get the scope of the foreign state, and
23 Texas, the Texas resident is protected by Texas law.

24 I also think, though, we ought to exclude
25 from foreign jurisdiction the state of Oklahoma, so we

1 don't have to deal with them.

2 MR. LEVY: Or Louisiana.

3 CHAIRMAN BABCOCK: Let the record reflect
4 that that was said in jest and deference to our Sooner
5 friends, or as one of my partners calls them, the land
6 thieves.

7 So any other comments? All right. It's an
8 appropriate time for our morning break, and we will be
9 back at 11:00 o'clock. Thank you.

10 (Recess from 10:42 a.m. to 11:06 a.m.)

11 CHAIRMAN BABCOCK: All right. We have
12 completed the Uniform Interstate Deposition and Discovery
13 Act, and it is submitted, Shiva, so we're good on that.
14 And we will now go to the court interpreter issue, and
15 guess who's leading that discussion.

16 HONORABLE TRACY CHRISTOPHER: Quite a day.

17 CHAIRMAN BABCOCK: All right. Take it away,
18 Chief Justice Christopher.

19 HONORABLE TRACY CHRISTOPHER: So
20 Government Code 57.002(g) was amended to clarify that a
21 person who has filed a statement of inability to afford
22 payment of court costs need not pay interpreter's costs,
23 and we were asked whether Rule of Procedure 183 should be
24 changed or a comment added to reference or restate the
25 statute. So we reviewed 145 and 183 and the Government

1 Code amendments.

2 The Government Code is a comprehensive rule
3 about interpreters and CART providers. By contrast, Rule
4 183 is very bare bones and seems to conflict with the
5 statute, so we actually recommend a complete revision to
6 Rule 183 to follow the Government Code, and in addition,
7 Rule 145 should be amended to list an interpreter under
8 the definition of costs. So the -- you can see what
9 current law, 183, looks like, and in our opinion, it
10 contradicted the Government Code, so it needed to be
11 rewritten.

12 So we have totally revised 183 to follow the
13 Government Code provision, with one possible change, and
14 so (a), (b), (c), and (d) are all straight from the
15 Government Code. The (d)(2) is poorly written, we
16 thought, and didn't really explain what the Legislature
17 was trying to get at, and we -- oh, I'm sorry, I forgot,
18 we added (c). We need to talk about that. So I'm going
19 to back up, and I'm going to go to (c).

20 So you have to have a certified court
21 interpreter under the Government Code. We put in Rule
22 183, provision number (c), which is, with the agreement of
23 the parties, a court may use a nonlicensed interpreter,
24 and the reason we wanted to add that is that there are a
25 lot of small, nondispositive hearings where we believe a

1 nonlicensed interpreter would save the counties a lot of
2 money and time. So right now if, you know, someone shows
3 up for a hearing, they don't speak English, they're
4 indigent under the rule, they're entitled to a certified
5 interpreter to help them understand the court proceedings.

6 If -- if it's just a very minor little
7 thing, the former practice had always been if -- if, for
8 example, it was a Spanish-speaking person, if your bailiff
9 or your court coordinator or your court clerk spoke
10 Spanish, they would interpret for the witness and tell
11 them what they needed to do from this point forward.
12 Technically, under the rule, that's not allowed, but we
13 wanted to allow that to be, you know, put back into the
14 rule, so that's why we added (c), and we made it with the
15 agreement of the parties.

16 We talked about, well, should we define
17 exactly what proceedings can go forward, you know, with
18 this nonlicensed interpreter, but we thought as long as
19 the parties agreed to it, we would be okay, but I
20 understand that that could be a point where people might
21 disagree with us. Another instance where you might not
22 need a certified interpreter could be like a minor
23 settlement hearing, right, where everyone is all agreed on
24 what the settlement should be, the parent comes in and
25 does a kind of a pro forma, yes, this is what I accept on

1 behalf of my child. The ad litem is there and says it's
2 fine.

3 It didn't strike us as the type of
4 proceeding where we would need to hire a certified court
5 interpreter and that, with the agreement of the parties,
6 you know, even somebody connected to the case could be the
7 interpreter, because, you know, in the olden days we would
8 have the legal assistant who spoke Spanish, or maybe even
9 the lawyer who spoke Spanish, who would, you know,
10 interpret back and forth.

11 It's not technically allowed under the
12 Government Code provision, so, you know, we would be
13 stepping outside the Government Code by adding a
14 subsection (c) here, but because it -- we included with
15 the agreement of parties, we thought that we could do it,
16 but, full disclosure, that's not what the Government Code
17 says. All right. Government Code says certified
18 interpreter unless there's certain exceptions, right? So
19 that's -- that's one addition, change that probably needs
20 to be discussed.

21 And then the (d)(2), the way it is written,
22 is the way the Government Code provision is written. We
23 thought it was kind of unclear, so we rewrote it. That's
24 what the alternative version is, just to make it a little
25 clearer what was really meant by that. And then this is

1 probably not necessary, but we made a suggested change to
2 costs, which is 145(a), to include fees for a
3 court-appointed -- fees for an interpreter, yeah, sorry,
4 fees for an interpreter. And sorry that wasn't
5 highlighted. I think it was in yellow, and that didn't
6 come through on the copy, but we added that language,
7 "fees for an interpreter."

8 So those -- those are the -- 145(a) is not
9 controversial at all. The question to be discussed is
10 whether we want to add (c), with the agreement of parties,
11 and then whether we should stick with the actual language
12 in the Government Code, which is (d)(2), or rewrite it in
13 the alternate version, which is, in our mind, clearer.

14 CHAIRMAN BABCOCK: Okay. Justice Miskel.

15 HONORABLE EMILY MISKEL: I am concerned
16 about the "by agreement" language. We don't have that
17 many licensed interpreters available, and so requiring the
18 agreement goes beyond the Government Code. The Government
19 Code says you can use a nonlicensed interpreter if the
20 court makes a finding that there's no licensed interpreter
21 within 75 miles, and there are languages that we got all
22 the time. We had a lot of Amharic speakers, which is
23 Ethiopia. We had Burmese speakers. We had particular
24 dialects of Bengali that we would need, and there aren't
25 licensed interpreters; and so I think 183(c) goes pretty

1 far because it says there has to be an agreement, so that
2 means we can't do it for a default judgment because there
3 won't be an agreement; and also, if someone wants to cause
4 trouble and just not agree, they can prevent the opposing
5 party from testifying or from the case going forward; and
6 so I think it's fine to say by agreement or the court
7 makes the finding that no licensed attorneys are
8 available, but I just -- there are a bunch of languages
9 that we just do not have access to licensed interpreters.

10 HONORABLE TRACY CHRISTOPHER: That's what we
11 meant, and that's a good change.

12 HONORABLE EMILY MISKEL: Okay. Okay.

13 CHAIRMAN BABCOCK: Okay. Any other
14 comments? Yeah, Judge Chu.

15 HONORABLE NICHOLAS CHU: I'm just a little
16 bit concerned about the "by agreement," just because in
17 the statute it -- it sets out for a population of under, I
18 think, 50,000 that if you aren't a certified court
19 interpreter, you have to be an expert, according to the
20 Rules of Evidence, over 18, and not a party to the case,
21 and so it creates a standard of who can be a nonlicensed
22 interpreter, whereas, in the rule, if we have just by
23 agreement, there's a potential for either a conflict of
24 interest or, I think, worst case, the guy who speaks more
25 Chinese than everybody else, so, therefore, he's the

1 interpreter, but maybe he's not really interpreting
2 everything correctly.

3 And so I think that if we do have a by
4 agreement standard, one, I'm in favor of just tracking the
5 Government Code itself and kind of leaving this by
6 agreement language out, but if we do do the by agreement
7 standard, I think it does have to have some kind of
8 criteria of who is eligible so it's not just, oh, the
9 parties agreed to this guy, so the court has to just
10 accept this guy, when maybe it's not sufficient, or there
11 may be a conflict of interest that -- that the parties are
12 okay with, but the court may not be.

13 CHAIRMAN BABCOCK: Justice Gray.

14 HONORABLE TOM GRAY: Well, first of all,
15 anecdotal comment, best interpreter I ever used at an
16 arraignment was another inmate. He was great. Incredible
17 guy. But under (c), why did we exclude hearing impaired?
18 Why would you not let someone use someone that was not
19 certified CART to do the interpretation for a hearing
20 impaired person?

21 HONORABLE TRACY CHRISTOPHER: I think we
22 just didn't think about it.

23 HONORABLE TOM GRAY: It would seem to me
24 that it would be a good idea.

25 HONORABLE TRACY CHRISTOPHER: Yeah.

1 HONORABLE TOM GRAY: For the same reasons.
2 Apparently Justice Miskel has an answer.

3 HONORABLE EMILY MISKEL: No, I have a
4 question, because, you're right, because I was thinking,
5 well, it would be hard for just an average person to
6 perform CART services, because they would have to have
7 like court reporter-esque skills, but I was like, well, a
8 nonlicensed person might do sign language interpretation;
9 and then looking at this, it doesn't provide for sign
10 language interpretation. So I would be totally in favor
11 of having a nonlicensed sign language interpreter in some
12 of these scenarios. I don't know that a nonlicensed CART
13 would be technically feasible or possible, but also,
14 interesting that sign language interpretation is not
15 provided for by the rule.

16 HONORABLE TRACY CHRISTOPHER: Yeah, I mean,
17 it's not in there.

18 CHAIRMAN BABCOCK: Lamont.

19 MR. JEFFERSON: Well, just on that point, so
20 deaf and hard of hearing, (3) talks about interpreter
21 services being provided free of charge. Someone has got
22 to pay for them, right, so how is that going to be --

23 HONORABLE TRACY CHRISTOPHER: The county
24 pays for them.

25 HONORABLE EMILY MISKEL: Yeah.

1 HONORABLE TRACY CHRISTOPHER: The county
2 does.

3 MR. JEFFERSON: The county pays for them
4 just like -- okay.

5 HONORABLE TRACY CHRISTOPHER: So, well, in
6 the bigger counties, they have interpreters on call, and
7 they submit their time to the county, and the county pays
8 them. In the smaller counties, the interpreter would, you
9 know, submit their time to the county.

10 MR. JEFFERSON: Well, I know in Travis
11 County they have a service where they provide -- the
12 interpreters are all paid. Because there's a deaf school
13 here, there are a lot of interpreters around, which makes
14 it easy to get an interpreter, because they know they're
15 going to get paid, and the Bar association has a program
16 that gets them paid. But if you're in San Antonio, you're
17 going to have a lot harder time finding an interpreter,
18 unless you, you know, pay them up front, and I don't --
19 it's a -- and I don't know if that should go in the rule
20 or how you address it, but that's a concern, is just
21 securing the services of an interpreter.

22 HONORABLE TRACY CHRISTOPHER: It used to be
23 that whoever wanted it had to pay, but now the Government
24 Code makes clear that, you know, it will be a county
25 expense ultimately, if there's not -- you know, if

1 somebody is indigent.

2 CHAIRMAN BABCOCK: Justice Miskel, then
3 Judge Chu, and then Robert.

4 HONORABLE EMILY MISKEL: So how it works
5 behind the scenes is this really comes up in connection --
6 the problem is solved, first, in connection with
7 magistration of people who are arrested, because those
8 people have to be magistrated within 24 hours, and so
9 counties have to have all of these resources available.
10 You have to have someone, if you arrest a deaf person,
11 that person has to be magistrated within 24 hours. So
12 counties have solved these problems.

13 Just like some counties have public
14 defenders, some counties have interpreters on staff.
15 Other counties handle it like payment of court-appointed
16 attorneys on a wheel. So in Collin County, we had local
17 rules for interpreting, and they submitted time sheets,
18 and we paid that -- the court approves them, just like we
19 do court-appointed attorneys for indigent people, so just
20 FYI.

21 MR. JEFFERSON: Just one last question, are
22 those costs charged as costs? Are the fees charged as
23 costs of court for interpreter services?

24 HONORABLE EMILY MISKEL: So the county only
25 pays if the party is indigent. So the budget line item in

1 the county budget is indigent defense.

2 HONORABLE TRACY CHRISTOPHER: But if the
3 party is not indigent, it is a court cost, and generally,
4 whoever needs the interpreter pays them to show up.

5 MR. JEFFERSON: So if you're deaf, and you
6 have -- you go to court, you have to secure your own
7 interpreter or --

8 HONORABLE EMILY MISKEL: I don't know about
9 deaf, because that's ADA, so that's different than foreign
10 language. So ADA we might have to accommodate you. I
11 don't know the answer off the top of my head, but for
12 foreign languages it's BYO interpreter, if you are not
13 indigent.

14 MR. JEFFERSON: Yeah, I have a lot of
15 familiarity with the deaf community, which is why I'm
16 asking about the deafness in particular. So if you're
17 deaf and you're in court in Bexar County, does this say
18 that the county will pay for an interpreter for you?

19 HONORABLE EMILY MISKEL: I don't want to
20 commit, but my recollection is for deaf, blind, physical
21 disabilities, things like that, the county has to provide
22 and not charge you for it, but I don't know for sure.

23 CHAIRMAN BABCOCK: Judge Chu, you've been
24 waiting patiently.

25 HONORABLE NICHOLAS CHU: Yeah, no, just to

1 add a little bit to that, I think most -- I can't remember
2 if it's all urban counties or all counties are required to
3 have a language access plan. Part of that language access
4 plan also includes ADA accommodations; and for the most
5 part, at least, I think in Travis County for sure, the
6 county has contracted interpreter services for ASL; and so
7 I think what happens is -- I'm just -- if there's a
8 requirement to pay up front, a lot of counties will have
9 issues with their auditors and issuing a payment for
10 services not rendered yet; whereas, in these situations,
11 pretty much if it's an indigent person, the county always
12 pays, and it's not a question of the interpreter won't
13 take the job because it doesn't pay. Maybe they won't
14 take the job just because of the county rate, but it's not
15 necessarily a "We can't find an interpreter because of
16 payment." It's usually a "We can't find an interpreter
17 because they don't speak this specific language in that
18 area."

19 Now, with the advent of Zoom and the
20 language line from OCA, it's become a lot easier to get
21 interpreters for unique languages and for ASL for, like,
22 magistration or other things, so it's a little bit easier
23 in those rural communities, but not as -- not totally
24 solved, if that gives some highlights into it.

25 MR. JEFFERSON: Last comment, so (3) says,

1 "Interpreter services shall be provided free of charge."

2 HONORABLE TRACY CHRISTOPHER: Right.

3 MR. JEFFERSON: And everybody just knows
4 that means the county is going to pay for it?

5 HONORABLE NICHOLAS CHU: Yeah.

6 CHAIRMAN BABCOCK: Yeah, Justice Kelly.

7 HONORABLE PETER KELLY: Because in 2024 we
8 have to ask, on subsection (c), where it's "Court may use
9 a nonlicensed interpreter," is that necessarily a human
10 interpreter, or does that include apps or AI? Are we
11 going to account for increased technology in that?

12 MR. DAWSON: We never thought about that.

13 HONORABLE TRACY CHRISTOPHER: Correct. We
14 did not think about that.

15 HONORABLE PETER KELLY: So a licensed
16 interpreter is -- I mean, it's obviously human, but a
17 nonlicensed interpreter, you could say a computer is doing
18 it as interpreter.

19 CHAIRMAN BABCOCK: Robert. Robert, then
20 Justice Miskel.

21 MR. LEVY: So, question, is -- are there
22 situations where a witness could be testifying, a nonparty
23 witness testifying in another language, where their rights
24 might be impaired if they get faulty translation? And so
25 the -- the reason why I'm mentioning that is you might

1 have parties that agree, but do we want to also permit
2 a -- the witness to question the interpreter or have the
3 right to challenge a nonlicensed interpreter? Because
4 they -- you know, their testimony potentially could be
5 subject to perjury, their rights could be impacted in
6 other ways, and so I think we maybe should at least allow
7 them to raise the point.

8 HONORABLE TRACY CHRISTOPHER: I didn't think
9 about that, but, I mean, we could add "with the agreement
10 of the parties and witness."

11 CHAIRMAN BABCOCK: Justice Miskel.

12 HONORABLE EMILY MISKEL: I was just going to
13 answer the question that the Government Code -- is it --
14 yeah, the Government Code defines a nonlicensed
15 interpreter as "a person who must be qualified by the
16 Court as an expert under the Texas Rules of Evidence," so
17 I don't think it could be an AI under this Government
18 Code.

19 MR. LEVY: Not yet.

20 HONORABLE PETER KELLY: Not yet.

21 CHAIRMAN BABCOCK: Justice Browning, did you
22 have your hand up?

23 HONORABLE JOHN BROWNING: Yes, I was just
24 going to add, first, I think we would defer to whatever
25 the definition of interpreter is, and I'm glad that it is

1 defined as a human, because I was going to add, in looking
2 at issues regarding AI translation, from the simple more
3 everyday ones that we're now familiar with like Google
4 translate, we've seen a number of problems in courts,
5 particularly immigration courts, where there have been
6 mistranslations that have led to an impairment of rights
7 or an impact on rights of the people whose testimony was
8 being translated, where they translated a singular
9 reference as plural; and that can have an impact as far
10 as, you know, number of witnesses, various other issues.
11 And this has come up in the immigration context. It's
12 come up in the criminal context, and so right now the
13 state of the law nationally is in a very cautious and,
14 right now, very little reliance on any sort of AI or
15 technology-assisted translation.

16 CHAIRMAN BABCOCK: Yeah, Judge Mendoza.

17 HONORABLE MARIA SALAS MENDOZA: So I was
18 just going to say that the -- I think the correct term is
19 "licensed court interpreter." I think you-all included it
20 in your (c), but in (a) and (b) you're using "certified
21 court interpreter," and I don't think that's the correct
22 term.

23 And then I was just going to say that I
24 think that because of the criminal indigent defense
25 constitutional requirements, you have interpreters, but

1 this is the civil, right, this is for civil, so you might
2 have counties that have access to court interpreters
3 because they are required to do it for criminal
4 proceedings, and this would cover the costs if you file
5 your affidavit of inability to pay, but if not, then it's
6 a cost.

7 CHAIRMAN BABCOCK: Okay. Roger.

8 MR. HUGHES: I think we already have baked
9 into -- I don't know whether you call it trial procedure
10 or the common law, that parties can contest
11 contemporaneously, I think, the translation. I think they
12 have to do it on the spot and raise it on the record.

13 The second thing is, and which is what makes
14 this difficult, is that, technically, interpretation is
15 not translation, and most interpreters do not literally
16 word-for-word translate. They are trying to gain a sense
17 as well as a translation of what the person is saying, and
18 if you've ever watched a foreign film in a language you
19 speak, you can realize the difference between what the
20 subtitles attribute to the speaker and what the person is
21 actually saying. Now, sometimes you have to struggle to
22 find the phrase in English that matches what the person is
23 saying, because it, as they say, doesn't translate exactly

24 CHAIRMAN BABCOCK: Yeah.

25 MR. HUGHES: So while we struggle with this,

1 let's give some, say, a plan that joins to interpreters,
2 because that's a necessary part of their function.

3 CHAIRMAN BABCOCK: Justice Kelly.

4 HONORABLE PETER KELLY: One more comment on
5 the suggested revision to Rule 145(a), at the bottom. You
6 say "Fees for an interpreter." 183 breaks out interpreter
7 and CART provider, so I wonder if you want to include CART
8 provider in 145(a) as well.

9 HONORABLE TOM GRAY: There are some other
10 changes to 145 that should be made, but it's to changes
11 that are language that's been there, so I'm not going to
12 raise those, but there's some other problems in that rule.

13 CHAIRMAN BABCOCK: Okay. Chief Justice
14 Christopher.

15 HONORABLE TRACY CHRISTOPHER: Well, just
16 kind of as an FYI, in the pattern jury charge committee,
17 we have been discussing a proposed rule to be given to
18 jurors in cases with an interpreter, and there's been very
19 lively discussion on what we should tell the jury about an
20 interpretation, especially when the juror knows the
21 language, right? And we're still working through that.

22 We -- I urged that the PJC take it here,
23 too, to get, you know, official Supreme Court blessing so
24 we didn't get it wrong. I'm not sure whether that's going
25 to happen or not, but it might show up in our book before

1 that, but in connection with that, I did research how you
2 object to an interpretation.

3 All right. So we have -- we have a rule of
4 procedure with respect to documents, right. You get your
5 certified translation; you give it to the other side. If
6 they can get their own interpreter, they can contest it.
7 You have a hearing. The two -- the judge, you know, makes
8 a decision as to, you know, which version is correct, and
9 then that is the official version of the document that is
10 given to the jury.

11 There is nothing in our rules about how to
12 challenge an interpretation, you know, from an
13 interpreter, and basically, you have to object at the
14 time. The case law says that, but --

15 CHAIRMAN BABCOCK: I'm sorry, you have to
16 what?

17 HONORABLE TRACY CHRISTOPHER: You have to
18 object at the time.

19 CHAIRMAN BABCOCK: Yeah.

20 HONORABLE TRACY CHRISTOPHER: But after
21 that, what you do is far from clear, right, and I don't
22 know if that's something that the Court wants to, you
23 know, consider down the road. I mean, we've seen it
24 different ways. Like I usually would say, well, you can
25 handle that on cross-examination if you think the word

1 choice was wrong by the interpreter, but some courts have
2 allowed the other side to actually question the
3 interpreter, right, because the interpreter takes an oath
4 at the time that they are going to truthfully interpret,
5 right? And so they're kind of a witness, in a way, and I
6 can actually see that as being useful.

7 We all know that some words have different
8 meanings, and usually you can tell by context in English,
9 you know, what meaning that word took on; but sometimes an
10 interpreter might miss the meaning of a word that's, you
11 know, tricky, has several meanings to it; and so then, I
12 mean, I can see it both ways; and we've discussed this
13 quite a bit in our pattern jury charge. Should you at the
14 point in time say, "Well, Mr. Interpreter, doesn't this
15 word have two different meanings?" And, you know, doesn't
16 it -- can't it mean this and that and, you know, which one
17 did the witness mean? So it's a really interesting area
18 of the law, if we want to get into it.

19 HONORABLE MARIA SALAS MENDOZA: I just want
20 to interrupt to say the reason it's super messy is because
21 we have jurisdictions where the jurors understand the
22 language and the lawyers understand the language, and so
23 it just gets really messy, and I think what we settled on
24 at the PJC is that we were not going to say "meaning,"
25 because "meaning" was too nuanced, and I think we ended up

1 just saying "the translation," or I don't remember, but
2 either way, it's a difficult thing.

3 I was just going to say very quickly, so
4 that it's clear, because I agree that the letter (c)
5 should not say "with the agreement of the parties,"
6 because I think that's beyond what we want to see
7 happening at a trial court, but even though Justice
8 Christopher referenced the rule that we have about
9 translations, I don't think the law actually requires it.
10 So if you have a statement that is in Spanish, and it
11 happens frequently, they have -- you have stops that are,
12 I would say, in Spanglish, not English or Spanish, and
13 involuntary statements in Spanish; and the parties get to
14 court, the most recent statement on that issue is
15 Castrejon, the First Court of Appeals decision; and it
16 says it's not required. The parties do not have to
17 actually do that translation and go through that process
18 of which is better.

19 The other case that's cited is Peralta.
20 It's a case out of my court, and we did have a
21 translation, and there were objections, and then in that
22 case it was whether you are required to have
23 contemporaneous interpretation in court, and the answer
24 was, no, because they did follow the rules.

25 But so I think that letter (c) goes way

1 further than Texas law requires. A court can have -- I
2 don't think the court has to find an expert. The court
3 can just determine this person is good enough, and it
4 could be the detective, like in Castrejon, who took the
5 statement.

6 HONORABLE TRACY CHRISTOPHER: I'm not sure
7 under the rule you can anymore. I mean --

8 HONORABLE MARIA SALAS MENDOZA: Under this
9 one?

10 HONORABLE TRACY CHRISTOPHER: Under the
11 Government Code. When someone -- and this rule says when
12 a witness comes in or a party comes in and says, "I need
13 an interpreter," I don't think that you can appoint a
14 noncertified interpreter for that person under the
15 Government Code, without this exception.

16 What you're talking about is different,
17 where you have a videotape of -- let's say it's a traffic
18 stop, and it's recorded on the camera, and then -- and
19 there are court of appeals opinions that say the cop can
20 interpret that, you know, because he was speaking in
21 Spanish to the defendant and, you know, understood what
22 was going on and that he has the ability, by his training
23 and experience, to do that interpretation. So we have --

24 HONORABLE MARIA SALAS MENDOZA: That's
25 different, right.

1 HONORABLE TRACY CHRISTOPHER: Yeah, a little
2 different levels of where we are, but this is when a party
3 comes in and says, "I want an interpreter," or a witness
4 comes in and says, "I want an interpreter." Government
5 Code says it has to be a certified one.

6 HONORABLE MARIA SALAS MENDOZA: Licensed.

7 HONORABLE TRACY CHRISTOPHER: Unless certain
8 requirements are met.

9 HONORABLE EMILY MISKEL: And I think that
10 would be the only times that we would really be taking
11 advantage of nonlicensed, because if it's Spanish, we have
12 Spanish interpreters. That's mostly easy. It's when we
13 have a weird language that we're doing this, and it says
14 "expert under the Rules of Evidence," which would qualify
15 by knowledge, training, or experience, or whoever that
16 they're bringing in. I don't, I guess --

17 HONORABLE TRACY CHRISTOPHER: Well, the
18 reason why we suggested it, and, you know, if the
19 committee says no, the committee says no, but the reason
20 why we suggested it is that I have heard that sometimes it
21 takes a long time to get the interpreter to the courtroom;
22 and, you know, if it's a minor thing that can be handled
23 by using your clerk or your court coordinator or your
24 bailiff, who speaks Spanish, just to be able to move
25 things along and not sit there and wait for the certified

1 person. I know that this committee doesn't like to give
2 judges a lot of discretion, but that's really what it was
3 designed for.

4 CHAIRMAN BABCOCK: Justice Kelly, I think
5 you had your hand up about a half hour ago.

6 HONORABLE TRACY CHRISTOPHER: Sorry.

7 HONORABLE PETER KELLY: Just to make two
8 follow-ups on Judge Christopher's point about the need for
9 objections and how do you remedy this during depositions.
10 I had a deposition 20 years ago, if I can get this right,
11 I think in Northern Mexico, "cinche" meant upper back and
12 in Guatemala and Southern Mexico it meant the lower back;
13 and that was crucial to determining whether there was a
14 prior injury; and so I just happened to notice that the
15 witness pointed to his upper back and not the lower back.
16 I had a defense lawyer who was willing to work with me,
17 and I was able to object and work through, get on the
18 record whether it was upper or lower back, but there was
19 no rule for it.

20 So it's a larger project for this committee
21 or somebody else, trying to figure out how to work through
22 whether the deponent can object or the opposing party can
23 object or what can be done to fix that in a live
24 deposition or live courtroom testimony.

25 CHAIRMAN BABCOCK: Okay. Yeah,

1 Justice Miskel.

2 HONORABLE EMILY MISKEL: And I was going to
3 ask, the way you were describing it was kind of like how
4 we have two rules of optional completeness. One you get
5 to interrupt right then, and one you have to wait until
6 your turn, right.

7 HONORABLE TRACY CHRISTOPHER: Right, right.

8 HONORABLE EMILY MISKEL: So you're treating
9 the objection to the interpretation like optional
10 completeness.

11 HONORABLE TRACY CHRISTOPHER: Right. Right.

12 CHAIRMAN BABCOCK: Okay.

13 HONORABLE TRACY CHRISTOPHER: So if we want
14 to vote, I guess the first question is whether we want to
15 have an agreement of parties exception for a noncertified
16 interpreter, not nonlicensed, a noncertified interpreter,
17 agreement of the parties and the witness.

18 CHAIRMAN BABCOCK: Okay. So everybody
19 that's in favor of -- yeah, Judge.

20 HONORABLE EMILY MISKEL: I'm sorry, I had a
21 quick question.

22 CHAIRMAN BABCOCK: Yes.

23 HONORABLE EMILY MISKEL: The Government Code
24 seems to be pretty thorough. Is there a reason we need to
25 have a separate rule?

1 HONORABLE TRACY CHRISTOPHER: Well, the
2 current 183 was bad. All right. So it is possible to
3 just delete 183, but I think we have generally tried to
4 put things in the Rules of Procedure rather than trying to
5 refer people to the Government Code. So that's why we did
6 what we did.

7 CHAIRMAN BABCOCK: Well, and our charge from
8 the Court was to do this, right?

9 HONORABLE TRACY CHRISTOPHER: Yes. Well, to
10 see if 183 needed to be revised, yes.

11 CHAIRMAN BABCOCK: Yeah.

12 HONORABLE TRACY CHRISTOPHER: It either
13 needs to be repealed or revised.

14 CHAIRMAN BABCOCK: Yeah. Okay. So state
15 the proposition we're voting on again.

16 HONORABLE TRACY CHRISTOPHER: Okay. The --

17 MR. BULLARD: (C).

18 HONORABLE TRACY CHRISTOPHER: (C), whether
19 we should have an exception to the Government Code for an
20 agreement by the parties and the witness to use a
21 noncertified interpreter.

22 CHAIRMAN BABCOCK: Okay. Everybody in favor
23 of that, raise your hand.

24 HONORABLE MARIA SALAS MENDOZA: Can I ask if
25 the alternative is a (c) that does not --

1 CHAIRMAN BABCOCK: No, not while we're
2 voting.

3 HONORABLE MARIA SALAS MENDOZA: All right.

4 CHAIRMAN BABCOCK: Because I lost count now.

5 HONORABLE MARIA SALAS MENDOZA: I'm sorry to
6 interrupt again.

7 CHAIRMAN BABCOCK: All right. Anybody
8 opposed?

9 HONORABLE MARIA SALAS MENDOZA: Can I just
10 say I'm opposed, but I want (c)? I just don't think it
11 should be with agreement of the parties.

12 HONORABLE TOM GRAY: My vote as well.
13 That's exactly why I'm voting no, is I don't think there
14 needs to be an agreement of the parties.

15 CHAIRMAN BABCOCK: Okay. So the vote is 27
16 in favor, four against, with eloquent and strong dissents
17 from two of the --

18 HONORABLE TOM GRAY: Don't put it that way.
19 Don't hang that dissenting stuff on me.

20 HONORABLE NICHOLAS CHU: I'm with them. I
21 just don't think we need the agreement of the parties.

22 CHAIRMAN BABCOCK: Got it.

23 HONORABLE TRACY CHRISTOPHER: Well, the
24 statutory exceptions still apply, so --

25 CHAIRMAN BABCOCK: Of course.

1 HONORABLE TRACY CHRISTOPHER: If you met the
2 statutory exception, that would be fine. The idea behind
3 the agreement of parties is when you don't meet the
4 statutory exception.

5 CHAIRMAN BABCOCK: Right.

6 HONORABLE TOM GRAY: Which doesn't that
7 raise the first question that we should have voted on,
8 which was Justice Miskel's, of do we need to have a rule
9 versus rely on the statute and just repeal 183? Is that
10 how you would phrase it?

11 HONORABLE EMILY MISKEL: Exactly.

12 CHAIRMAN BABCOCK: Okay. I'm all for
13 voting. You know I'm a big voter guy, so let's vote on
14 that. You want to phrase the vote, Justice Miskel?

15 HONORABLE EMILY MISKEL: Oh, I adopt the
16 wording. Do we repeal 183 and just rely on the Government
17 Code?

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

20 Everybody against, raise your hand.

21 All right. That fails by a vote of 6 in
22 favor and 18 against, the Chair not voting on this or the
23 prior one.

24 So any more votes that anybody wants to
25 take? All right. Are we ready to send this to the Court?

1 HONORABLE TRACY CHRISTOPHER: No. The
2 second question is whether --

3 CHAIRMAN BABCOCK: Oh, the alternative
4 language?

5 HONORABLE TRACY CHRISTOPHER: The
6 alternative language.

7 CHAIRMAN BABCOCK: Yeah.

8 HONORABLE TRACY CHRISTOPHER: Yeah.

9 CHAIRMAN BABCOCK: Sorry. Thank you. I
10 meant to raise that. Any discussion about which of the
11 alternatives to (d)(2) should be adopted?

12 HONORABLE TRACY CHRISTOPHER: So (d)(2) is
13 the statutory language. We just thought it was wordy and
14 a little hard to comprehend, so we made an alternative
15 version.

16 CHAIRMAN BABCOCK: The intent was to stick
17 with the statute obviously, but --

18 HONORABLE TRACY CHRISTOPHER: Right.

19 CHAIRMAN BABCOCK: But to write it in a way
20 that was more user-friendly.

21 HONORABLE TRACY CHRISTOPHER: Yes.

22 CHAIRMAN BABCOCK: All right. Any comments
23 about that, statute versus user-friendly? Sounds like it
24 tilts the argument a little bit.

25 No comments about that? Do we want to vote

1 on that?

2 HONORABLE TRACY CHRISTOPHER: Up to you or
3 the Court can decide.

4 CHAIRMAN BABCOCK: No, it's not up to me.

5 HONORABLE TRACY CHRISTOPHER: Or the Court
6 can decide, you know.

7 CHAIRMAN BABCOCK: All right. Everybody
8 that thinks we should stay with the legislative language,
9 which is the language in (d) (2) right before the alternate
10 version, raise your hand.

11 HONORABLE NICHOLAS CHU: Man, I feel like
12 I'm in the minority on all of these votes.

13 CHAIRMAN BABCOCK: Everybody that wants to
14 go user-friendly?

15 MR. DAWSON: Imagine that.

16 CHAIRMAN BABCOCK: All right. User-friendly
17 wins 23 to 2, the Chair not voting.

18 HONORABLE MARIA SALAS MENDOZA: Can I note
19 my abstention, because I just think if we're going to have
20 this with the agreement of parties, that I voted just to
21 keep the Government Code, and that's why I voted
22 consistently.

23 CHAIRMAN BABCOCK: I'm sorry, Judge, could
24 you --

25 HONORABLE MARIA SALAS MENDOZA: I didn't

1 participate because I think we should have just kept the
2 Government Code provision, and only because I hate that
3 with the agreement of the parties. I'm so vehemently
4 opposed to it.

5 CHAIRMAN BABCOCK: Got it, thank you.

6 Okay. Anything else that we need to touch
7 upon, Justice Christopher?

8 HONORABLE TRACY CHRISTOPHER: No.

9 CHAIRMAN BABCOCK: Okay. And that one's
10 ready to be submitted. So that will go to the Court, and,
11 Richard Orsinger, you are up now, and as best I can tell,
12 Chief Justice Christopher has no fingerprints on this.

13 HONORABLE TRACY CHRISTOPHER: I can read the
14 Court's opinions now. Sorry.

15 MR. ORSINGER: So, Chip, is this something
16 we're going to do between now and 12:00, or do you want
17 to -- because it will be brief. This is our fourth time
18 to consider this.

19 CHAIRMAN BABCOCK: Right, I know.

20 MR. ORSINGER: So we'll do an accelerated.

21 CHAIRMAN BABCOCK: Well, we'll do it as
22 accelerated or not as you care to.

23 MR. ORSINGER: Okay. So I did a short --

24 CHAIRMAN BABCOCK: You're not an accelerated
25 kind of guy, Richard.

1 MR. ORSINGER: No, I'm going to try to
2 restrain my inclination. So there's a memo back here that
3 summarizes the situation, if you've read it. If you
4 haven't, I'm going to just touch on it.

5 We have discussed what to do with the
6 unclaimed funds in class actions now for several meetings,
7 and, finally, on April 5th, 2024, we had a vote, and the
8 vote basically boiled down to whether the trial court
9 should allocate the unclaimed class action funds or
10 whether the Supreme Court should do it, either by rule or
11 in some other way, to determine in advance for all cases
12 whether there's one or more preapproved, or even
13 mandatory, recipients for these unclaimed funds.

14 So in the -- Judge Schaffer promoted the
15 idea or sponsored the vote to have the trial judge do it,
16 based on consultation with the parties, and as a corollary
17 of that, he said the worst thing possible would be to
18 escheat to the State. Pete Schenkan, in the final
19 analysis, argued the view that the Supreme Court ought to
20 adopt a rule, and he related the Civil Practice and
21 Remedies Code, section 26.001, requires the Court to adopt
22 rules for fair and efficient resolution of class actions.
23 He said or predicted that if all lawyers knew in advance
24 where the unclaimed funds were going to go, it could
25 actually speed up or simplify settlement of class actions

1 and remove the appearance of favoritism or any kind of
2 improper influence with regard to the decision on how the
3 funds were going to be allocated.

4 Pete also said the cy pres doctrine was not
5 mandatory, even in equity. It was a discretionary
6 concept, and it only applied to a particular area of
7 probate law and didn't really apply generally across the
8 spectrum, especially to include something like class
9 actions, and he concluded his comments by saying, "My
10 respectful suggestion is the concept here is as close as
11 possible to helping people who can't, in fact, afford to
12 pay lawyers to litigate cases that are otherwise
13 meritorious," and by that, it was in the context of his
14 recommendation that the Texas foundation -- the Texas
15 foundation for access to the legal system should be the
16 sole designated recipient to receive these unclaimed
17 funds.

18 In the vote, Judge Schaffer's model of the
19 trial court with the consent or advice of the parties got
20 13 votes in favor of it. Schenkkan's for the Supreme
21 Court to lay down a rule specifically for the access to
22 justice got 12 votes, so that's 13 to 12, and then there
23 were three that didn't vote. They didn't articulate why,
24 but they voted against both. So that's a pretty good
25 vote, 28 out of the committee members.

1 So it does seem to me at this point that we
2 have to make a fundamental and final decision about
3 whether we want to allow individual trial judges to decide
4 where those unclaimed funds go or whether the Supreme
5 Court should do something that's universal; and in the
6 context of something that's universal, I have recently had
7 a coalescence of my thoughts on this issue, which have
8 shifted back and forth, but the disposition of unclaimed
9 funds is not inherently a litigation issue. It's more of
10 an administrative issue. If you consider how due -- if
11 you're going to have people apply for -- for distribution
12 of funds, are you going to have a hearing, or is it going
13 to be sworn? Is it going to be just statements? Are you
14 going to request budgets, with a promise to spend the
15 money in the way that it's allocated? These are
16 administrative matters. They're not inherently litigation
17 matters.

18 So if you leave it in the trial courts,
19 you're almost pushed into a choice of letting the parties
20 agree, with the consent of the judge, because if you try
21 to open it up broader than that and allow applications,
22 whether it's the Texas Bar Foundation or whether it's the
23 access to the legal system foundation or some other
24 foundation, it doesn't fit the litigation model. So it
25 does seem to me if you stick with the trial courts, you're

1 stuck with the litigants and the judge deciding where the
2 money is going to go.

3 If you say, okay, this is really not a
4 litigation question. This is really an administrative
5 issue, and we just have to figure out how we're going to
6 dispense these funds, the Supreme Court has several
7 alternatives. They can pick a single provider, which some
8 states have done by legislation or rule; or they can pick
9 a list of preapproved providers, saying that the parties
10 and the judge are free to pick off of this list; or they
11 can split the baby by saying 50 percent of it must go to
12 the Access to Justice Foundation and 50 percent of it is
13 for the parties and the judge to work out.

14 There is another alternative that occurred
15 to me while I was drafting this memo. Sorry I didn't
16 raise it at an earlier meeting, and that is that we could
17 actually create a foundation for the sole purpose of
18 administering the disposition of these funds, and the
19 Supreme Court, you know, whoever creates it, sets up the
20 rules. I was actually the person who created the Texas
21 Family Law Foundation. That's easy. You just file as an
22 organizer, you apply for nonprofit status. The more
23 difficult part is getting the IRS to agree that you're a
24 501(c)(3), which should be easy. You can have one
25 organizer, or you can have a group of nine. They can be

1 done by volunteers. It can be done by private designation
2 by the Supreme Court of Texas. If the decision were to go
3 to a foundation that's just dedicated to dispensing these
4 funds, we could have an interim solution where we have the
5 Bar Foundation and the Access to Justice Foundation or one
6 or the other on an interim basis and later on to be
7 replaced by the foundation for this purpose.

8 What occurs to me is that if we pick the
9 access to the legal system, we are only facing one
10 dimension of issues that face Texans. If we go to the
11 Texas Bar Foundation, they're also law/litigation
12 oriented, but with a broader, I would say, focus; and my
13 perception is that the Bar Foundation moves forward by
14 applications by foundations or nonprofits that will submit
15 a budget and indicate how the money will be spent, and
16 then there's some follow-up to be sure that the money is
17 spent as promised.

18 I've had some -- some years as a member of a
19 foundation board, and what I've found, in experience, is
20 that the obvious charities that you would think to give
21 money to in your community, what surprised me in that --
22 in that part of my activities is when the application
23 grant process is open, there are many activities that come
24 to your attention you would not otherwise know, and some
25 of them, in my experience, have been amazing, what a small

1 group of people who are dedicated to a particular cause
2 are able to do that's being neglected or overlooked or
3 unattended by larger operations. So the advantage to
4 having a grant process is that -- that people will bring
5 to your attention needs that you may not predetermine, and
6 so that's, I think, something that the Supreme Court
7 should consider, is whether they want to have a grant
8 process of some kind and whether it should be restricted
9 just to legal services for those who don't have access to
10 the system or whether it should be broader law-oriented or
11 whether it should be even broader to include other needs
12 in our society besides just legal needs.

13 So the Supreme Court, basically, if they
14 can -- they have these wide range of things, but the
15 disadvantage to leaving it at the trial court level is
16 that on the cases that do get objected to and make its way
17 to the appellate court so we can read them, there are very
18 questionable decisions made about who received the money,
19 and sometimes the suggestion has been made that the
20 lawyers will agree on going to their own alma mater law
21 school or whatever, and then in order to get trial court
22 approval, they'll find a foundation that the trial judge
23 is affiliated with or a supporter of. So, you know, if
24 the Supreme Court makes the decision once and for all, we
25 don't have to worry about those particular situations

1 where the money might be going places we wouldn't prefer.

2 So if we do let the Supreme Court decide,
3 they're just going to say this is an ironclad rule, it
4 goes one place, it goes two places, or they're going to
5 allow some kind of grant process. You can -- both of
6 those -- the legal access and the Texas Bar Foundation are
7 basically foundations that administer funds based on, at
8 least, on the Texas Bar Foundation on a grant process, and
9 so the Supreme Court can kind of elect what group it wants
10 to be deciding how to allocate this, and that group, the
11 board of trustees or the subcommittee on grant funding,
12 will be selected on a basis that's broader, I suppose,
13 than if we just mandate one source.

14 So, to me, we're kind of down to the issue
15 here, Chip, of whether we're -- we're divided. The
16 committee is very closely divided on whether it should be
17 in the trial court or whether it should be in the Supreme
18 Court. If it is in the Supreme Court, the Supreme Court
19 has alternatives. They can go 50/50 and let the trial
20 judges and the trial lawyers get half and designate
21 foundations, or they could even have a list of approved
22 recipients that could change. It doesn't have to be in a
23 rule. It could be in an administrative order, and we can
24 add to it -- or the Court can add to it or subtract to it,
25 but I feel like we're at those choices.

1 CHAIRMAN BABCOCK: Yeah, I have devised a
2 series of complicated, but insightful, votes that we will
3 take, and I'll tell you the ground rules in a minute, but
4 I noticed that there's no option for the funds to be
5 administered by the Supreme Court Advisory Committee, and
6 I don't --

7 MR. ORSINGER: The administrative costs
8 would be too high.

9 CHAIRMAN BABCOCK: That's the problem with
10 that. I didn't recognize that.

11 MR. ORSINGER: Yeah, I think so, with all of
12 the hotel and everything.

13 CHAIRMAN BABCOCK: The other thing is to
14 send it all to the NIL fund of your alma mater, but --

15 MR. ORSINGER: And, by the the way, Chip, I
16 have sample rules back here, but I don't think there's any
17 point in us trying to deal with this. This is going to be
18 drafted by the Supreme Court ultimately.

19 CHAIRMAN BABCOCK: Yeah, I would guess that,
20 unless the Court remands it to us for our consideration.
21 Let's have a little discussion, to the extent we need to,
22 but we have talked about it three times.

23 MR. ORSINGER: I think, yes, although it may
24 go back more than that, but three times.

25 CHAIRMAN BABCOCK: At least three times.

1 Okay. Justice Miskel.

2 HONORABLE EMILY MISKEL: And please cut me
3 off if this committee has already discussed this. I don't
4 recall, but if the Supreme Court, in other words, the
5 government, is going to be keeping a list of where this
6 money that's not voluntarily taken from parties and given
7 to other parties, my concern is if -- if we're proposing
8 that an option be a list of charities, my concern would be
9 that we not ask the Court to make content-based decisions
10 on which charities are in and which charities are out. I
11 think it would be safer to stick to the functions of the
12 judicial branch, like legal aid, regulating the
13 profession, things like that, because I think to the
14 extent you get expansive, people are going to want to be
15 on the list, and then you're saying, no, your theater
16 organization can't be on the list, yes, your wetland
17 preservation can. You know what I mean? I think that's a
18 problem.

19 CHAIRMAN BABCOCK: Okay. Any other
20 comments? Judge Chu.

21 HONORABLE NICHOLAS CHU: And so along the
22 same lines of that is, Richard, could -- I'm just kind of
23 confused with what authorizes the Supreme Court to --
24 statutorily allow it to create an organization that says,
25 hey, it's going to be 50/50, and this is the organization

1 that you have to pick.

2 MR. ORSINGER: Well, Pete Schenkken
3 suggested the Government Code, section 26.001, requires
4 the Court to adopt rules to provide for the fair and
5 efficient resolution of class actions. That's pretty
6 broad, but to your point, many states in the country have
7 done this through legislation and not rule-making, and so
8 we don't have a legislative action. We have these funds
9 piling up. Something needs to be done with them, because
10 right now, it's just the wild west. You know, each trial
11 court handles it differently, so it's possible, if a rule
12 were adopted, the Legislature might get interested and
13 pass a law; but absent legislative enactment, then either
14 there's no regulation or at least Supreme Court
15 regulation.

16 HONORABLE NICHOLAS CHU: And just as a
17 follow-up to that, then if I was a party and I didn't like
18 how the Supreme Court divided up the residual funds, and I
19 appealed that, what would then happen? Like, would it
20 just put the Supreme Court in a position where they have
21 to recuse themselves and --

22 MR. ORSINGER: That's an interesting
23 thought, but the Supreme Court doesn't recuse itself
24 historically when it's litigating issues of its own rules,
25 because who else is there to decide the case except --

1 HONORABLE NICHOLAS CHU: Right.

2 MR. ORSINGER: So I don't think that the
3 fact that it's a rule would disqualify the Court from
4 ruling on -- in the litigation context, as to whether
5 the -- whether the -- it violates operation of powers or
6 something of that nature.

7 HONORABLE NICHOLAS CHU: And maybe I'm just
8 misinterpreting the fourth option where the Supreme Court
9 decides 50/50. Is it essentially just deciding, hey, it
10 goes to these entities, and then somebody else decides
11 these entities, or is the Court actually deciding on which
12 specific entity?

13 MR. ORSINGER: So in most of the instances
14 around the country, whether it's legislation or rules,
15 it's going to the access to the legal system is a
16 mandatory grant, say, for 50 percent, and the other 50
17 percent is for the parties and the judge to figure out.
18 So it could be anybody in the world.

19 HONORABLE NICHOLAS CHU: Okay.

20 MR. ORSINGER: So, to me, really the
21 question is the litigation model is not a good fit for
22 allocating funds, because really you need information
23 about who the recipient is going to be and that kind of
24 thing, unless you have someone preapproved. Like we know
25 what the Access to Justice Foundation does. They're all

1 controlled. They've got all kind of bylaws. Same with
2 the Texas Bar Foundation, and there may be others beyond
3 that that we can trust to administer properly.

4 MR. JEFFERSON: Can I ask a procedural
5 question?

6 CHAIRMAN BABCOCK: Certainly.

7 MR. JEFFERSON: The last meeting, so we had
8 the Schenkkan model and the --

9 MR. ORSINGER: Schaffer.

10 MR. JEFFERSON: Schaffer model.

11 CHAIRMAN BABCOCK: Yeah, your last name had
12 to end in S.

13 MR. JEFFERSON: Did we just have one vote,
14 or was there --

15 MR. ORSINGER: We just had one vote, I
16 think --

17 CHAIRMAN BABCOCK: We did.

18 MR. ORSINGER: -- after much discussion.

19 CHAIRMAN BABCOCK: But not today. Today
20 we're going to have multiple votes.

21 MR. JEFFERSON: Okay. Okay. Well, maybe
22 that answers my question. I thought at the last meeting
23 we voted in favor of the Schenkkan model.

24 MR. ORSINGER: I think Pete got the --

25 CHAIRMAN BABCOCK: There was one vote.

1 MR. ORSINGER: Schaffer got 13 and Pete got
2 12, and three voted against both. It's kind of like the
3 election.

4 MR. JEFFERSON: I'm reading the transcript
5 wrong.

6 MR. ORSINGER: Well, then I'm reading the
7 transcript wrong. When I read the -- if you've got the
8 transcript up, and I don't, why don't you just read it and
9 let's see?

10 CHAIRMAN BABCOCK: No, we don't care,
11 because that's -- we're voting anew. It's a revote.

12 MR. JEFFERSON: Fair enough.

13 HONORABLE TOM GRAY: They didn't like the
14 last vote, so we're going to do it over.

15 CHAIRMAN BABCOCK: The last vote was too
16 close, but this vote is going to reveal the real intent.
17 Giana, do you want to say something?

18 MS. ORTIZ: No.

19 CHAIRMAN BABCOCK: You had your hand kind of
20 halfway up. Yeah, Rich.

21 MR. PHILLIPS: Can I just ask a quick
22 question? The rule, as proposed, just looking at the
23 first one, I think all of the rules say this, "The trial
24 court shall provide." When is this supposed to happen?
25 Is it supposed to happen in the judgment, the order

1 approving the settlement? Does it happen later in the
2 process when there's money to be distributed? It just
3 says, "The court shall provide." Do we need to say when
4 exactly in the process the court should provide that?

5 MR. ORSINGER: People in the committee here
6 that have more active experience in class actions than I
7 do might have a different opinion, but my view of it is
8 that it occurs in the order approving the settlement and
9 that you specify and then you have an open period where
10 claims can be filed, and when the deadline is reached,
11 then the funds are distributable. Whether they're
12 distributable before or after that, may be some
13 preliminarily, but one of the questions I had is where
14 does the appellate review occur here? Do we have
15 interlocutory appellate review of this order, or does it
16 have to be folded into the final judgment?

17 And that raises the question of if it's
18 going to be subject to appellate review, don't we need
19 findings and conclusions so that the appellate court has
20 some basis on which to review the trial judge's decision?
21 And it's never going to get appealed unless somebody in
22 the class disagrees, and that's what's happened in the
23 federal circuits all around. Somebody -- in fact, there's
24 some foundations that offer the legal service. If you
25 feel like this allocation is being abused, we'll represent

1 you, and you'll see them recurrently at the courts and
2 even in the U.S. Supreme Court, which has reviewed -- they
3 have considered it, but refused to write on it now several
4 times.

5 CHAIRMAN BABCOCK: Richard, my thought is
6 that the Court needs to get the sense of this committee on
7 one -- one proposal, and if the Court wants further rules
8 to implement that proposal or some other proposal, then
9 we'll tackle that, and hopefully, they'll send it back to
10 us for further consideration, because no meeting would be
11 complete without dealing with this issue.

12 MR. ORSINGER: Chip, I think if we have to
13 bring it down to the ultimate test, it's kind of the
14 question of whether it should be the trial court that
15 makes the decision or the Supreme Court.

16 CHAIRMAN BABCOCK: No. We've got four --

17 HONORABLE PETER KELLY: Or the court of
18 appeals saying something.

19 CHAIRMAN BABCOCK: Everybody listen to this.
20 It's complicated. You've got four options. You've got
21 two trial court, two Supreme Court. Trial court with
22 complete discretion, trial court with discretion but
23 parameters, the Supreme Court with a hundred percent
24 discretion, or the Supreme Court with a hundred percent
25 selection what they do with the funds, and then Supreme

1 Court, 50 percent what they do with the funds.

2 MR. ORSINGER: I bet we're going to get
3 split votes that are --

4 CHAIRMAN BABCOCK: No, no, we're going to
5 come out with a clear winner, because every proposal is
6 going to have -- everybody is going to have four votes per
7 proposal. And follow me.

8 MR. ORSINGER: This is complex.

9 CHAIRMAN BABCOCK: If you vote -- if you
10 give a proposal your number one, so you say, "I like this
11 the best," that's going to be a weighted vote, one times
12 four. If it's your second choice, it's going to be times
13 three, and if it's your third choice, it's going to be
14 times two, and if it's your last choice, it's going to
15 just count for one.

16 MR. ORSINGER: So who's going to do this
17 math?

18 CHAIRMAN BABCOCK: Shiva. No, we're going
19 to vote. Then we're going to take a lunch break, and
20 everybody will have to stay until they come back after
21 lunch to hear how it came out.

22 MR. JEFFERSON: What does 50 percent mean?
23 What does the Supreme Court, 50 percent, mean?

24 CHAIRMAN BABCOCK: You want to explain that?

25 MR. ORSINGER: Yeah, the Supreme Court will

1 dictate that half of it goes to X and the other half is
2 decided by the trial judge and the lawyers.

3 MR. PHILLIPS: And when you say the Supreme
4 Court, you mean that by rule, the rule will say 50 percent
5 goes to --

6 MR. ORSINGER: You know, the rule could say
7 the legislations are clearly designated who the recipient
8 is. I don't know that our Supreme Court are that tied.
9 They could have a list of preferred recipients that would
10 be more flexible and could change.

11 MR. PHILLIPS: But to be clear, we're not
12 saying every one of these goes to the Supreme Court to
13 decide in every case where the money is going.

14 MR. ORSINGER: The fundamental choice here
15 is, is the Supreme Court going to announce a rule that
16 controls who receives this money or half of this money.

17 MR. PHILLIPS: So decision by Supreme Court
18 is decision by rule, not something else.

19 MR. ORSINGER: Yes, although, like I said, I
20 think it might be better to have a list of approved
21 recipients more flexible than the rule change process, but
22 the bottom line is the rule will say the Supreme Court is
23 going to have a list, and if you're on that list, you're
24 preapproved, and if you're not on that list, you're not
25 preapproved.

1 CHAIRMAN BABCOCK: And, by the way, we're
2 not going to do this by electronic voting. It's going to
3 be by hand, by raising hands. Justice Gray.

4 HONORABLE TOM GRAY: Of these four bad
5 options, if I am in support of a grant process like you
6 described, although the who can apply may need to be
7 circumscribed by rule, as Judge Miskel suggested, which
8 one of these options, bad options, would I vote for?

9 MR. ORSINGER: You know, that's not in
10 Chip's list, but you could have a grant process in the
11 trial court.

12 HONORABLE TOM GRAY: I'm only going to have
13 four options.

14 MR. ORSINGER: I know.

15 HONORABLE TOM GRAY: Which one is the
16 closest to the grant option?

17 MR. ORSINGER: Let me explain. You could
18 have a grant option in the trial court, if the Supreme
19 Court so said, and the question is do you have a public
20 hearing? Do you have public notice like Rule 76a? Do you
21 have applications? Do you have a trial judge figure out
22 which one of these charitable organizations should receive
23 this money? Are they going to be required to submit a
24 budget? Are they going to be required to stick to the
25 budget? Or the Supreme Court could do the same thing. We

1 know, of course, the justices are not going to do that,
2 which is why I think they need to delegate the
3 administrative function to some kind of administrative
4 operation, including one that's newly created for this
5 purpose, which can be done. So I don't feel like --

6 HONORABLE TOM GRAY: You don't feel like
7 that option is in any of Chip's options?

8 MR. ORSINGER: I think it is in the Supreme
9 Court options, that the Supreme Court could opt to
10 administer 50 percent of it or a hundred percent of it and
11 then designate the foundation to handle the
12 administration, whether it's the Bar Foundation or legal
13 access to the --

14 CHAIRMAN BABCOCK: Okay. Anybody want to
15 try this?

16 HONORABLE NICHOLAS CHU: Chip, can you
17 repeat the options again?

18 CHAIRMAN BABCOCK: We're going to start with
19 trial court discretion, and if that's your favorite, we're
20 going to see whose that's the favorite. And then we're
21 going to see on that one who prefers that as their number
22 two option, and then three and then four.

23 HONORABLE TOM GRAY: So you're going to take
24 16 votes?

25 CHAIRMAN BABCOCK: I'm going to take 16

1 votes.

2 HONORABLE TOM GRAY: Okay

3 MR. DAWSON: Before lunch.

4 CHAIRMAN BABCOCK: You're going to -- before
5 lunch. You're going to do the math, Justice Gray.

6 HONORABLE TOM GRAY: Oh, then good, I
7 already know how it's going to come out then.

8 CHAIRMAN BABCOCK: No, not that kind of
9 math. All right. All right. Trial court certification.
10 Yes, Justice Christopher.

11 HONORABLE TRACY CHRISTOPHER: Do we have to
12 agree with the parameters on trial court discretion?

13 CHAIRMAN BABCOCK: Do we have to do that?

14 HONORABLE TRACY CHRISTOPHER: To vote for
15 that as our preferred number, do we have to agree to all
16 of the parameters that are written?

17 CHAIRMAN BABCOCK: No.

18 HONORABLE TRACY CHRISTOPHER: Okay.

19 CHAIRMAN BABCOCK: We'll come up with other
20 parameters.

21 HONORABLE TRACY CHRISTOPHER: Okay.

22 CHAIRMAN BABCOCK: All right. Everybody
23 ready? All right. The first proposal, trial court
24 complete discretion, everybody who that's their favorite
25 option, raise your hand.

1 All right. Everybody who it's their next
2 favorite option, raise your hand.

3 Everybody who it's your third favorite
4 option, raise your hand.

5 Okay. And, finally, everybody who thinks
6 that's the worst option, the last option.

7 MR. ORSINGER: If you don't vote at all,
8 it's better than if you vote for four, right, because then
9 it doesn't score at all.

10 CHAIRMAN BABCOCK: Quiet.

11 HONORABLE TRACY CHRISTOPHER: It's true.

12 MR. ORSINGER: I withdraw my vote then.

13 CHAIRMAN BABCOCK: Okay. Trial court -- you
14 can manipulate the vote. That's your right as a citizen.

15 MR. ORSINGER: I withdraw my vote, so it's
16 not going to have any weighted voice.

17 CHAIRMAN BABCOCK: Trial court discretion
18 with parameters. Everybody who that's your preferred
19 option, raise your hand.

20 Second option?

21 Third?

22 And, finally, you don't like this one at
23 all, it's your last option? That one's going down in
24 flames.

25 All right, Supreme Court, a hundred percent

1 control. Everybody that's your favorite option, raise
2 your hand.

3 Next favorite option?

4 Third favorite option?

5 And last option.

6 Okay. Finally, Supreme Court, 50 percent
7 control. Everybody that's favorite option?

8 Next favorite option?

9 Third favorite option?

10 And last option.

11 All right. We'll break for lunch, come
12 back, and I'll give you the results.

13 (Recess from 12:15 p.m. to 12:38 p.m.)

14 CHAIRMAN BABCOCK: All right, thanks,
15 everybody. Come on, Justice Gray. Everybody take their
16 seats.

17 Before I reveal the votes, I should have
18 acknowledged somebody who's been a frequent contributor to
19 our committee and is now a member and has ascended to the
20 Fifteenth Court of Appeals, Justice Bullard.

21 MR. BULLARD: Business court.

22 CHAIRMAN BABCOCK: Business court. I knew
23 it was some court. Anyway, he's on a court now, but he
24 didn't used to be.

25 But everybody ready? Everybody here? Okay.

1 Here are the results. Finishing last, everybody's least
2 favorite option was the trial court with complete
3 discretion. It has a score of 24, only because we counted
4 14 last place votes. So there's truly not the option that
5 anybody prefers.

6 Finishing next was Supreme Court with 50
7 percent discretion. Finishing second was the trial court
8 with parameters, and that tells you that the Supreme Court
9 with a hundred percent discretion was the winner, with 64
10 points, followed by the trial court with parameters at 55.
11 The Supreme Court 50 percent at 56, and the trial court,
12 complete discretion, had 24, with 14 last place votes,
13 swelling the total of the trial court with complete
14 discretion.

15 So now there should be applause.

16 MR. ORSINGER: That's perfect clarity, Chip,
17 perfect clarity.

18 HONORABLE TOM GRAY: Well, I was just hoping
19 Jane would make sure and tell the other eight that I voted
20 for that option that won.

21 HONORABLE JANE BLAND: They might not thank
22 you for it.

23 HONORABLE TOM GRAY: Good point. Never
24 mind.

25 CHAIRMAN BABCOCK: I was going to say, even

1 though the Chair didn't vote, I would have voted for that,
2 but now I'm not going to say anything. But only because
3 we have so much confidence in the Court.

4 So that takes care of that, and if the Court
5 wishes us to implement any rules on that or any of the
6 other three proposals, you'll let us know, and that will
7 be good, and probably because Justice Christopher had the
8 majority of our docket today, we are done.

9 (Applause)

10 CHAIRMAN BABCOCK: And thanks for coming,
11 and particularly pleased to see Mike Hatchell and
12 Professor Dorsaneo.

13 MR. ORSINGER: Hear, hear.

14 CHAIRMAN BABCOCK: Hear, hear, and we'll be
15 in recess. Thank you.

16 (Adjourned at 12:42 p.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 28th day of June, 2024, and the same was thereafter reduced to computer transcription by me.

I further certify that the costs for my services in the matter are \$ 1,034.00.

Charged to: The State Bar of Texas.

Given under my hand and seal of office on this the 20th day of July, 2024.

/s/D'Lois L. Jones
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