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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

AUGUST 29, 2025

(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 29th day of August, 2025, between the hours of 9:00 a.m. and 3:32 p.m., at the State Bar of Texas, 1414 Colorado Street, Austin, Texas 78701.

INDEX OF VOTES

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

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CHAIR TRACY CHRISTOPHER: Welcome. I'm glad to see we have a pretty full house today, despite it being Labor Day weekend, so thank you all for coming and doing this important work. I'm going to turn it over to Justice Bland to give us a status report.

HONORABLE JANE BLAND: I don't have a formal report this morning. The biggest news for our Court is that we had our August petitions conference and administrative conference on Wednesday, and that was Justice Jeff Boyd's last participation -- last participation in conference. His last day is September 1st. So we are eagerly awaiting his replacement, but as many of you know, Justice Boyd is a very hard-working, wonderful colleague. He served as the deputy liaison on this august body for a long time, and if there is anybody who ran through the tape, so to speak, he did, because we talked about 140 petitions and then some additional causes and motions for rehearing and things like that, and he had prepared for every case and had his votes ready to go for every case, so no short-timers disease for Justice Boyd.

So we are really going to miss him. In addition to being a great worker, a great independent legal thinker, he also was the kind of colleague that would bring us all together outside of our discussions

about cases, and as all of you know, it's so important to spend some time with colleagues not talking about the law, and he was really one of the people, is one of the people, and Justice Young, that really nurture that aspect of the Court. So we're going to miss him.

On September 1st, also, the judiciary is going to have the first raise to base pay in something like 15 years.

(Applause)

HONORABLE JANE BLAND: And over the summer I kept saying, oh, I'm getting a pay raise, and I would spend some money, and by the end of August my husband said, well, you've probably spent it about five times over now. So I'm eagerly awaiting it, but, you know, those -- you know, they don't come nearly as often as leap year. I've been on the bench 27 years. I think I can count on one hand the number of times the Legislature has given the judiciary a pay raise, so we're very grateful to the Legislature and to all of the judges and lawyers, some of whom are in this room, that did some pretty hard work to make it happen. Particularly grateful to Senator Huffman and Representative Leach, who found common ground and an elegant solution at the 11th hour, and that solution could be good for our judiciary going forward because it untethers judicial pay and consideration of judicial pay

from legislative retirement, which has always been a difficulty that we have encountered that we can't really -- that we couldn't really do anything about. So there's a process now in place for evaluations and recommendations to the Legislature that will hopefully make evaluation of that more regular.

As you also probably know, the Governor vetoed the court omnibus bill, which is the one that creates new courts. Anybody here from a county where there were new courts created -- you might be. If you're from Harris, you definitely are, and so it wasn't that part of the bill that created a problem, I don't think. I talked to Megan LaVoie last night. She said -- or it was yesterday morning. She said that the Legislature's passed a new version of the omnibus bill, and it's heading to the Governor's desk. She's hopeful that the Governor will sign it, but we won't know until we know.

The Court has been working really hard on the work that you did in June in connection with statutes that are going into effect on Monday, and I have nothing to report about those preliminary orders, except to stay tuned to this afternoon at around 2:00 o'clock, and the Court will be releasing various administrative preliminary orders, which include rules changes and other matters that are related to statutes going into effect on September 1.

Ordinarily -- I was calling them preliminary orders. Ordinarily, they are preliminary, and they don't go into effect for about 60 days, but because some of these are necessary to be consistent with state law that's coming into effect on September 1, the Court went ahead and adopted them as final orders that go into effect immediately, but included a public comment period, with the hope that, you know, even though the order is into effect, when we see hiccups from the way the orders are working, we can go back and tweak them after they've gone into effect.

So that's my report. Justice Young, do you have anything to add?

HONORABLE EVAN YOUNG: Just very briefly. Justice Bland talked about our conference on Wednesday. It was probably the longest day of conference I've had in almost four years on the Court. We were all exhausted at the end of it, but in the lead up to it and at the end of it, it struck me a few things. First, I'm like second chair here. Being second chair on appeals is kind of great, because you get to be part of all the discussions, but you don't have to stay up all night before the argument. Three things struck me. One, our first chair at the Court, Justice Bland, how hard she works, all of these things that I was going through the memos, the

e-mails, final things, Justice Bland is a hard worker.

Second thing, how hard Jackie works. Jackie is one of the hardest working lawyers we've got. She is working so hard and going through everything that SCAC does, trying to define this, take the direction of the Court. It's just amazing how much, and I don't know what we would do if we didn't have Jackie, so I'm going to maybe get some bubbles around your car or something like that. We've got to keep you.

And then the third, of course, is how hard this group works, and just looking at the number, the volume of things we were considering in this concentrated time period and the work that had been done by all of you in all of these months, and some cases longer than that, it's just an astounding thing, and the Court depends so much on you, and we all value you so much, and we should say that a little bit more often, but I want you to know it is true, and the proof will be in the pudding and as the things start to be released. So thank you very much.

CHAIR TRACY CHRISTOPHER: All right. We are going to change our agenda slightly. If we haven't gotten to third party litigation funding by lunchtime, we're going to move it up, because Robert has to leave early today, and he has asked for that, so we will move on to our summary judgment rule, which, as Richard will explain,

is still in flux.

MR. ORSINGER: Thank you, Chief Justice. So this project would seem to be quite simple. We have a statute that really imposes two things that the Court is required to do and can't modify. One is it's got to establish a deadline that oral argument on a motion for summary judgment under Rule 166a must be submitted to the Court no later than the 45th day after the date for the response to the motion, after the date in which the response to the motion is filed, and then the court has to rule within 90 days after oral argument, oral submission, or a written submission. And so that seems simple enough until you get into it, and then it turns out to be difficult.

But in addition to that, my subcommittee, which I think I'm kind of sharing a subcommittee with Pete on this one, we had a lot of volunteers that have had good ideas about other changes to the summary judgment rule as long as it was on the table. I described it to Pete, it's kind of like having a Christmas tree, and people are starting to hang ornaments on it, and there are a lot of heartfelt ideas about things that could make this rule better, and they surfaced, and so we treat -- we tried to deal with them, and so you'll see in the rule that has emerged from this prehearing, premeeting process, that

there are a number of changes to consider and discuss.

Now, this is not like a typical subcommittee proposal, because the time was so accelerated between getting the instructions to do this and the deadline, September 1, that we just -- we tried very hard, and we did a lot of e-mails and had some Zoom meetings, but it really wasn't time enough to hash out a consensus on the subcommittee, and so what we've got here is our best -- our best idea of a proposal that will raise issues for everyone to consider, but I don't think you should consider this proposal to be committee recommended. It's really a combination of things that probably there was a consensus on and then some things that clearly there was not a consensus on, but the decision was made to keep it in the proposed rules so it would be discussed. Even those of us, including myself, who oppose certain changes, wanted them in there so they could be discussed.

So I want to point out on page -- the memo, subcommittee memo, starts on PDF page six and carrying on from that, and at the end of the statute on the second page, paragraph (e), it says, "Notwithstanding section 22.004, subsection (a) or (b) may not be modified or repealed by the Supreme Court" -- "by Supreme Court rule." And (a) is the timetables I discussed. Have to have submission or hearing within 45 days of when the response

is filed, and you must rule within 90 days of submission.

And (b) is if the summary judgment is considered without a hearing, the clerk is supposed to report the date of submission in the public record or in the court's record, so we have a start date for the 90-day clock. (c) is the requirement that the clerk report information no less than quarterly to the Office of Court Administration, and (d) is the requirement that the Office of Court Administration prepare an annual report on the judges in the state. So, oddly enough, the reporting requirement is not mandatory on the Supreme Court, but the timing requirement is and the requirement to make a record of the written submission.

So then we move on into the rule itself, and it's redlined to show you the changes, and you can see that they're substantial, but part of the reason that there's so much redline is that the rule was restructured, and I want to, at this point, give public recognition to Harvey Brown, who is traveling right now and can't be with us, but Harvey took the responsibility on himself to come up with the proposal that, I guess, echoed some of the comments that were made in our last committee meeting, and then as a result of e-mail comments or Zoom conferences, he made edits that reflected what the discussion resulted in, if you will.

And so a lot of this red is not actually new wording. A lot of it is restructuring, but some of it is new wording, and there is just no way around it other than to take it sentence by sentence, I'm sorry to say. I'm going to try to give you the high points here, but at any time we can switch over to the rule and start looking at it, but I think it might be helpful to have some sense of the ideas or motives behind some of these changes. So --

CHAIR TRACY CHRISTOPHER: Richard, before we get into the details --

MR. ORSINGER: Yes.

CHAIR TRACY CHRISTOPHER: -- could you explain to the group that this rule might change?

MR. ORSINGER: Yes. So Chief Justice Christopher has been the conduit for my awareness of what's going on at the Legislature, which is very, very tricky, but a lot of the trial judges, or some of the trial judges, anyway, and certainly a group in Harris County, was dissatisfied with the potential difficulty of implementing the Legislature's directive with these timetables that are triggered by the filing of the response, but there's no particular deadline for the response and some other difficulties that are encountered, and they came up with a proposed amendment.

And we were having a special session.

Normally, it takes, you know, two years to fix a problem with legislation, but here we happen to have a special session at hand, and so a bill was introduced to make a floor amendment to the omnibus bill, the omnibus court bill that Chief Justice Christopher talked about, and -- or I guess it was Justice Bland that talked about it, and it refocused the timetable away from the filing of the response to, I guess, restructuring from the standpoint of when is the motion filed and what is due in response to that. So under this floor amendment and, Chief Justice Christopher, the floor amendment was adopted by both houses?

CHAIR TRACY CHRISTOPHER: Yes, it's passed.

MR. ORSINGER: So it's sent to the Governor.

CHAIR TRACY CHRISTOPHER: Right.

MR. ORSINGER: Okay.

CHAIR TRACY CHRISTOPHER: But it may get vetoed, is the scuttlebutt.

MR. ORSINGER: Yeah. The subtext of this is that in the Governor's veto message he targeted part of the omnibus bill that he didn't like and was his stated justification for vetoing the omnibus bill in the regular session. The amended bill, or the bill that has come up in the special session, included a floor amendment that was reflected in these materials, in the supplemental, I

guess, attachment that you received the day before yesterday, but the omnibus bill had the same flaw in it that caused it to be rejected by the Governor, vetoed by the Governor the first time. And so you thought, well, golly, you know, you could have just fixed one thing and the bill would go through, but the subtext thought is perhaps the Legislature wanted the omnibus bill to be vetoed again in order to cause the Governor to call another special session.

Now, that's way more complicated chess than I can deal with, but I don't know if it's right or wrong. Justice Christopher might have more to say or might not want to say it.

CHAIR TRACY CHRISTOPHER: Rumor, rumor, rumor. That's all I know.

MR. ORSINGER: Well, all I can say is if you're the Legislature and the Governor just nailed your omnibus bill for the whole court system and you give it back to him in special session and it's got the poison pill in it, why did you do that? And so anyway --

CHAIR TRACY CHRISTOPHER: But as a result of that, the bill, the original summary judgment bill, goes into effect September 1st. Even though we don't have to have rules done September 1st, it actually goes into effect September 1st for all new summary judgments filed.

Not cases, but summary judgments filed. So the trial judges, of course, are in a terrible flux, waiting to figure out are they going to be subject to the 45-day after response time line or the new bill, which is 60 days after the motion is filed. So the subcommittee has both rules for us to look at.

MR. ORSINGER: Yes. And the most essential difference, in my view, is that the floor amendment bill, which is now part of the omnibus bill, has a timetable that starts with filing, rather than -- filing the motion for summary judgment rather than the response, which I think greatly simplifies understanding the sequence of events, but I don't want to -- I don't want to preempt the earlier rule, because that's the one that's in the statute, or that's our effort to conform to the statute and may be gone this afternoon. I don't know. But at any rate, I think the most productive would be for us to show you what we did on the subcommittee level, and then the changes that we would make, many of the structural changes and things of that nature, would still be valid, this work that the subcommittee did, even if the omnibus bill came in, but the timetable would be completely revamped.

CHAIR TRACY CHRISTOPHER: John.

MR. WARREN: Yeah, so I just heard from -- from our person with the Legislature that the Governor's

office and Senator Hughes has agreed on the language, and it's on the Governor's desk.

MR. ORSINGER: All right.

CHAIR TRACY CHRISTOPHER: Oh, all right.

MR. ORSINGER: Well, okay, so that kind of -- I'm going to de-emphasize the discussion about the adjustments we had to make to make the timetable that works backwards from the date of filing and all of that. We'll skip that part, because it looks like we're going to use the floor amendment --

MR. PERDUE: It got changed in the --

MR. ORSINGER: Jim, what were you saying?

MR. PERDUE: I don't know where you got that the exact same version of the omnibus bill passed in the special.

MR. ORSINGER: Is that right?

MR. PERDUE: That did not happen.

MR. ORSINGER: Okay.

MR. PERDUE: The expunction language did get changed.

MR. ORSINGER: It did, okay.

MR. PERDUE: Yes.

MR. ORSINGER: All right. Then I withdraw what I just said. Can you strike that, Dee Dee?

Okay. So Jim has now clarified that, in

fact, the Legislature did make a good faith attempt to satisfy the Governor, and it appears that that was successful, because the word now is, is that the Governor's okay.

MR. PERDUE: Well, and that could change in the next hour, but the expunction language actually was an issue before today, and, yeah, it did get changed. Whether it got changed to satisfaction or not, but I don't think the Senate would have concurred within 24 hours if it hadn't been fixed.

MR. ORSINGER: Okay. So that's a prediction.

MR. PERDUE: A dangerous one, given my politics.

MR. ORSINGER: All right. Thank you for that clarification, because I was just operating off of rumor, and you seem to be operating off of knowledge, so that's good.

MR. PERDUE: Sadly, I was deeply involved in this issue.

MR. ORSINGER: Oh, good, okay. I should have talked to you before the meeting. So, at any rate, the contents of the motion has been consolidated so that the traditional motion and the no-evidence motion have been combined into the first section.

The time to file the motion is where this activity between the original statute and the new statute has occurred, so we're going to defer to the discussion on that in detail.

The request for the setting is kind of up in the air. There was a suggestion in the subcommittee example of a proposed rule that would regulate how long the setting could be delayed and things of that nature, and I think we probably should wait until we get into the proposed rule to discuss that further.

The timetable, on paragraph (4), on response, we had a timetable for a response that the purpose of this portion of the rule is to give the trial judge more opportunity to be prepared for the hearing, and so the idea was move the response deadline from seven days before the submission hearing to 14 days before so we could introduce a requirement that a response -- or that a reply, the movant's reply to the response, would be seven days before the hearing. So instead of having the nonmovant's response filed seven days before and then frequently the movant's reply was filed the day before or the day of the hearing, not giving the judge time to read it in advance of the hearing, the idea was to move the response back to 14 days before and then have the reply due seven days before so that the judge had all of the

paperwork that was needed to evaluate it before the hearing occurred, and that concept is still valid, even under a different timetable.

The hearing is -- we have to introduce the concept now, because the statute recognized this, of having an oral submission versus having a written submission, and that was not previously distinguished in the rule, but it is now. And the merits of the motion, paragraph (7) of the rule, is largely what it was.

The ruling, paragraph (8), some people on the subcommittee, or assisting the subcommittee, wanted to have proposed orders submitted to the judge. Some did not think that would be helpful, and it's in the rule now for us to discuss here today. Is it helpful for a judge to get a proposed order that says motion is granted or a proposed order that says motion is denied? Does that really add value or is it worth -- is it worth the effort and it's just more paperwork to deal with?

And paragraph (9), which is titled "The Appeal," says something explicit in the rule now that was in the case law, that on appeal you can only raise issues that were addressed in the filings in the summary judgment proceeding.

And then paragraph (10), on appendices and references, perpetuates the earlier language that unfiled

discovery can be considered, but suggests that at least 35 days before the hearing of submission, or if it's responding party, 14 days before hearing or submission, it must be made reference to it or must be included in the summary judgment record, excuse me.

And then the old subparagraph (i), paragraph (11) of this memo, the no-evidence motion has disappeared because it's been moved up to the first paragraph and combined with this standard motion.

So having that overview, we'll start into the redlined portion of the rule. So we have Rule 166a, summary judgment, paragraph (a), for the claimant. "A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may move, with or without supporting affidavits, for summary judgment in its favor" -- got rid of "his" -- "upon all or any part thereof."

Now, the phrase that was in the original rule, "at any time," they moved "at any time after the adverse party has appeared and answered," is too obvious to bother to state here if he filed a motion for summary judgment after somebody has filed an answer.

Subdivision (b) is for the defending party. "Party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may" --

strike the words "at any time," because that's also self-evident -- "may move with or without supporting affidavits for a summary judgment in its favor" -- get rid of "his" -- "as to all or any part thereof."

Subdivision (c).

CHAIR TRACY CHRISTOPHER: Okay. Any comments on (a) and (b)?

MR. ORSINGER: Well, there's a good point. We should take them up.

CHAIR TRACY CHRISTOPHER: I think we should take them one at a time. Giana.

MS. ORTIZ: I just wanted to clarify which version, Richard, that we're looking at, because I missed it if you have clarified which page on the PDF, because there's a few versions in here. Are we looking at the assuming amendment passes version?

MR. ORSINGER: Well, I was just looking at page five, because that, as my understanding, is what the final product of the back and forth of the subcommittee level was. Do you think it's not?

MS. ORTIZ: Well, on the updated PDF, at page 23 starts the assuming amendment passes version with the 60 and 90 days, and I'm just wondering if we're looking at that version or --

MR. ORSINGER: No.

MS. ORTIZ: -- we're looking at the prior version.

MR. ORSINGER: Right.

MS. ORTIZ: So Tab 2 of the MSJ materials.

MR. ORSINGER: Yes.

CHAIR TRACY CHRISTOPHER: Considering what Jim has said, is there a reason not to move to the newer version?

MR. ORSINGER: We absolutely can.

CHAIR TRACY CHRISTOPHER: Because it's identical, except for No. (3).

MS. ORTIZ: The 60 versus 90, which I think is in (c)(3).

CHAIR TRACY CHRISTOPHER: Yeah, (c)(3). And that way we'll be on the same page for that.

HONORABLE TOM GRAY: Except I've already written all over the first version and not the provided one.

CHAIR TRACY CHRISTOPHER: Sorry, Tom.

MR. PERDUE: So, Giana, y'all will remember, but I think the rules are the same other than (c)(3).

MS. ORTIZ: That's correct. So your notes will still apply, except when we get to (c)(3) you might want to turn to the PDF at -- and the amendment passed version is at page 23 of the PDF, for anybody who's

looking on the PDF, and it's pretty much the same. I think there's one other small change other than (c)(3).

MR. ORSINGER: Well, if you want to go ahead and explain what that is, maybe we can skip a lot of discussion.

MS. ORTIZ: Okay. Well, the 60 versus 90 from the filing of the motion versus 45 days for the filing and response is in (c)(3), and I think that there was a change in part (6), and I would have to go do a comparison to our prior version, which I don't have in front of me.

MR. ORSINGER: Well, let's talk about section (3) then. So it's on page 23 of the --

CHAIR TRACY CHRISTOPHER: Let's -- if you don't mind, I think it will be easier, we've looked at (a) and (b). You've made changes. They're the same on either version. Do we have any discussion on (a) and (b), those particular changes? Lonny.

PROFESSOR HOFFMAN: I have some incredibly uninteresting things, but I'll raise them. Since it looks like we're trying to modernize language, "its" for instance, what about "thereof"? So what -- and for that matter, when would someone bring a summary judgment that isn't in its favor?

So how about instead we say, "move, with or

without supporting affidavits, for a summary judgment, in whole or in part." So I am proposing that we eliminate the "favor," because presumably all summary judgments will be in favor of the one who has brought the motion, and getting rid of "upon all or part thereof" and instead say "in whole or in part." That's it.

CHAIR TRACY CHRISTOPHER: All right. Justice Gray.

HONORABLE TOM GRAY: And this is a comment that I will bring later, but if we use the term "supporting affidavits," I would much prefer instead of "affidavits" there and in some places later that we used the word "supporting evidence," because it's not limited to just affidavits. It's all summary judgment evidence.

CHAIR TRACY CHRISTOPHER: All right. Those are both good updates. I don't think we need votes on it. Jackie, you will sort of keep track of those things for us, and we can move on.

MR. ORSINGER: So when we get to section (3), Giana, do you want to talk about that? We basically have reset the timetable so that it starts with the filing rather than -- the filing of the motion rather than the response.

HONORABLE TOM GRAY: How about (c)(1) and (c)(2) first?

MR. ORSINGER: Oh, I'm sorry. We jumped. What was your comment, Justice Gray?

HONORABLE TOM GRAY: Contents of the motion.

MR. ORSINGER: Oh, so you have a comment there?

HONORABLE TOM GRAY: Yeah. On the first sentence, you used the word "shall." Second sentence you used the word "must." Appellate rules suggest that you mean something different by the use of the two. I think they need to be the same. With regard to the word "move" in -- let's see, where is it, "move."

MS. WOOTEN: (c)(2).

HONORABLE TOM GRAY: Do you mean something different than filed? Let me see if I can find the -- I'm sorry. That's down in the subsection (2).

MR. ORSINGER: Right.

HONORABLE TOM GRAY: In the --

CHAIR TRACY CHRISTOPHER: Was there -- let me ask this question, Justice Gray. Was there any discussion in the subcommittee about the difference between "must" and "shall"?

MR. ORSINGER: No. And I would be curious for Justice Gray to say what he thinks the difference is.

CHAIR TRACY CHRISTOPHER: Or which was the better word.

HONORABLE TOM GRAY: It is not that I think there is a difference per se, but under our rules of construction when one is -- when different terms are used, we are going to go looking for a different meaning. And I would prefer -- it would seem that those two should be the same.

MR. SCHENKKAN: I think the --

CHAIR TRACY CHRISTOPHER: Pete.

MR. SCHENKKAN: -- accepted practice is "shall" is what we're supposed to do. It's mandatory.

MS. DAUMERIE: "Must."

MR. SCHENKKAN: Oh, "must," I'm sorry.

CHAIR TRACY CHRISTOPHER: "Must" is the new word evidently. Justice Miskel.

HONORABLE EMILY MISKEL: That's what I was going to say, is I think modern practice is to say "must" instead of "shall," but we didn't change every part in this rule that already says "shall."

CHAIR TRACY CHRISTOPHER: Well, does the group think -- I mean, while we're rewriting the whole thing, which is what the subcommittee has done, modernized it, should we -- is it the consensus of the committee that we should change the shalls to musts?

MR. ORSINGER: Yes. I mean, this may be -- in the memo, I pointed out that this rule was adopted back

in the Forties, I think, and maybe '49. It was amended in '51, '66, '70, '77, 1980, '83, '87, 1990 ,and 1997. It's been a restless rule, but '97 was the last time that this was modified, and we're revamping the timetable, so why not modernize the rule and make it consistent with the intervening case law.

CHAIR TRACY CHRISTOPHER: All right. I think the consensus then is that we'll change all of the shalls to must, and we'll move on to number (2).

HONORABLE TOM GRAY: Not yet.

CHAIR TRACY CHRISTOPHER: Oh, sorry.

HONORABLE TOM GRAY: After it says "shall state the specific grounds," the phrase is "in support of the motion." That has always been troubling in the appellate arena. What does it mean to support the motion?

I think a better phraseology would be "upon which the motion is based," and I am an advocate for there stating "identify the evidence upon which the motion relies." And it gives the movant the burden to identify its evidence earlier. It can be supplemented later, if needed in relation to the response, but the respondent, the nonmovant, then has access from the beginning to the evidence upon which the motion is being based, and you don't wind up, in effect, laying behind the log, the problem of delays.

This is particularly important with regard to this new rule where you have a sequence of events happening in a very short order. It was less of a problem under the existing rule, because you could always kick the hearing down the road. In this situation, I think it is important to move the reference to the evidence, identification of the evidence upon which the motion is based, to the motion.

CHAIR TRACY CHRISTOPHER: So what is the exact language that you would propose there?

HONORABLE TOM GRAY: I would strike "in support of the motion" and say "upon which the motion is based and identify the evidence"-- and I struggled then, "upon which the motion relies" or "upon which it is based."

CHAIR TRACY CHRISTOPHER: Judge Miskel.

HONORABLE EMILY MISKEL: So to rephrase what I think you're saying, so it would say, "A traditional motion for summary judgment shall identify the grounds and evidence upon which the motion is based." Is that what you're suggesting?

HONORABLE TOM GRAY: I hate the word "grounds."

HONORABLE EMILY MISKEL: Okay.

HONORABLE TOM GRAY: But yes. I mean, you

want it to identify the basis of the motion and the evidence upon which it is based. So we just struggled in the appellate arena with what is a ground? Is it an element? Is it a cause of action? Is it what? And but still --

CHAIR TRACY CHRISTOPHER: Let me ask -- let me ask this question of the group. Does the group think that identifying the evidence should be in the motion, that concept? Because that's what you're trying to add here, right? And we can wordsmith afterwards.

HONORABLE TOM GRAY: Yeah.

CHAIR TRACY CHRISTOPHER: Pete.

MR. SCHENKKAN: And one concern about that, only a concern. Maybe this is not a real one, but (a), as it has always said so far, allows you to move with or without supporting affidavits, which we've now said we're changing to evidence, and so then you're requiring you to support the evidence, maybe it would be "if any" or something like that.

I mean, at least still have the option of doing it based on the -- I'm not sure what it is we would do it without, unless --

CHAIR TRACY CHRISTOPHER: Well, I would think of it like a summary judgment on limitations, and all you do is attach the petition showing that the two

years had passed.

MR. SCHENKKAN: So then with or without evidence means the evidence in (b) in this second one.

CHAIR TRACY CHRISTOPHER: Robert.

MR. LEVY: I guess I get a little bit concerned that this will be a gotcha in terms of if you didn't properly set forth exactly what the basis for the motion is in the motion, then that would be a grounds for denying it, and like even to the point that if you put it in the brief but not the motion, that could be a defect, and I'm just a little bit reluctant to put technical requirements in this provision, with the possibility that it -- it could be reversible on a grant.

CHAIR TRACY CHRISTOPHER: Let me ask...

Okay. Any other comments on the stating the grounds and the evidence? I think the Supreme Court has said that they are going to try and get a rule out, even though they don't have to in terms of the mandated deadline, but the fact that the timing is going into effect -- well, that's another question, actually, with the omnibus bill changes and when exactly the timing of the, you know, 60 days versus the 45 days comes into effect, and I'm not sure what the answer to that is, but so let's go ahead and continue to discuss whether or not we want the particularity that Justice Gray is suggesting

in the rule as we modernize it. Richard.

MR. ORSINGER: So my practice and the practice of the people that I engage in, is for the motion for summary judgment to state the legal theories and the background law and then also to list exhibits that are attached to the motion, which consist of unsworn declarations of the client and the experts, but also the documentary materials, and in the cases that I have summary judgments in, frequently the documentary materials are integrated into the expert's unsworn declaration. The client will authenticate the documents. The expert will say this is the sequence of documents to consider, and these are the conclusions you draw from it, and they're all attached to the motion.

So this rule change wouldn't affect that practice, but I can understand what Robert is talking about, because if someone is more globalistic in the way that they state their motion and they don't articulate it, you know, this is Exhibit 1, Exhibit 2, Exhibit 3, if you don't put that in your motion and you just say "the attached information" or "the summary judgment record," then maybe you have reversible error if it's granted. So I can see the problem, and I'm not sure, Chief Justice Gray, if we were to require that the evidence be stated, to what degree of specificity would you have to go?

HONORABLE TOM GRAY: To me, that would be left to work out by case law. We have it existing already, the -- a body of case law about the specificity of the identification of the evidence and the grounds. My recollection is that a ground stated in a brief has been the subject of whether or not that is a ground upon which the judgment can be based, as opposed to a ground stated in the motion. And I'm trying to bring some clarity to those areas that have been only addressed in the case law and make it cleaner for the appellate court to address the issues that may come up on appeal, which is most often either the evidence was not identified, what it was based upon, or that the ground that the judgment is based on was not in the motion; and it is difficult for an appellate court, when you think about all of the pieces that they have to look at, the pleadings, the briefing, the notice, if there's a notice of evidence that's separate. Then some of the evidence is filed. Some of it is not filed, and suddenly, you wind up with a desk full of paper to try to figure out was the ground -- sometimes was it pled, was it a ground in the motion, was it supported by evidence that is appropriately referenced; and it just -- it becomes a search and find.

And then you will find the opinions that say we don't have an obligation to sift through this

deposition and identify the piece of testimony that the movant is relying upon, even though they identified the deposition. I would just like to see more people follow the Richard Orsinger practice, where they do all of that from the front, and normally I wouldn't even raise that issue in this context, except that we are now going to be dealing with a motion that has to be ruled upon by a trial judge in what is considered a greatly abbreviated period from current practice, and by doing this, you enhance the ability of the nonmovant to address the issues from the get-go.

CHAIR TRACY CHRISTOPHER: Skip.

MR. WATSON: This, I may have been -- I may be wrong the way I've always been doing it, but on both the grounds and the evidence I've always just assumed that, first, the grounds, a ground is the specific issue that you were moving on. It may be broad, limitations, or it may be narrow, lack of, you know, substantial causation. But I've always said "specific issue" rather than grounds, and I've always said the specific evidence and put in there "referenced in the following tabs," much like what Richard is saying, just to sort of say, okay, at the beginning, first paragraph, we're defining terms, you know, and specific issues or grounds and specific evidence of the tabs attached. Whether that works or not, I don't

know, but I've never been busted doing it that way.

CHAIR TRACY CHRISTOPHER: And if I can interject, even though I'm not supposed to, but the number (9), appeal, which it all goes into what we're talking about right now, is in the current rule, but it is not the law. So while we're -- because, I mean, like it says "issues not presented by a written motion, answer, or other response shall not be considered."

Well, there is no obligation to file a response in a traditional motion for summary judgment, and on appeal, the loser can still say they failed to prove entitlement to the motion for summary judgment. So this sentence, which has been in the rule forever, is not how we actually do it on appeal.

So, you know, while we're modernizing and thinking about it, there's a lot in, you know, summary judgment practice, and there's a new case from the Supreme Court in the no-evidence context where the courts of appeals are often likely to say you failed to tell me what you were talking about, denied. But the Supreme Court is like, well, they referred to an affidavit. The affidavit is only five pages, so they don't have to be more specific than that. And then there's a footnote that says, but, you know, if they referred to a whole bunch of evidence without being specific, that might be different.

So it's an interesting case and an interesting footnote, and, you know, to me, in the appellate world, that is sort of like the footnote, you know, about noncompetes. You know, footnote 14, before they changed the law on noncompetes, but because, you know, that's -- that has been a huge issue in the intermediate courts on whether you're specific enough in pointing out your evidence or your responsive evidence, because it's usually the responsive evidence, right. They dump in an entire deposition, but don't tell me where to look in the deposition for, you know, what they say is the controverting evidence. So in the intermediate court world, it's a big problem. So to the extent we can make it clearer in the contents, I'm for it.

Any other, you know, suggestions on this? Any other comments on that concept of being -- because if everybody did their motions for summary judgment like Skip and Richard, we would be a lot better off, but that's not how they often look, and I'm sure Judge Schaffer can speak to that. So I think it's a -- I think it's a good change, but I think Robert is right that it could lead to potential fights in and of itself.

So I know the Supreme Court wants to get this moving, but I do think it's something that could use a little extra work just in -- you know, unless we want to

change what current law is by changing what we say in the rule. So...

HONORABLE JANE BLAND: I know I'm not supposed to say anything either, but it seems like it's the converse that's true, that the summary judgment cannot be affirmed --

MR. SCHENKKAN: Yes.

HONORABLE JANE BLAND: -- on a basis that is not presented in the motion, and that has been the law for a long, long time, and so it's odd that the rule seems to have done the converse, which is not quite right.

If you want to do more work on this rule, feel free.

CHAIR TRACY CHRISTOPHER: Pete.

MR. SCHENKKAN: Surely that, for this particular point, that's the best solution, to conform what has got moved around in this version and looks like it's new, but as you say, it's actually been in the rule for a long time, and it's wrong. Let's make it right. Let's say summary judgment shall not be affirmed on a -- and then we still have the problem of whether it's a ground or an issue, but I'm kind of in favor of "issue."

CHAIR TRACY CHRISTOPHER: All right. Any discussions on "ground" versus "issue" that might be helpful to the Court or a future draft? Then was that it

for number (1)? All right. We can move on to (c)(2).

MR. ORSINGER: I have one comment before we leave number (1), and in the second sentence you can see that the no-evidence motion has now been put into the section on contents of the motion; whereas, previously, it was in an isolated section; and you're going to find, as we go through this rule, that we have to have two types of rules set for each subsection, the traditional motion and the no-evidence motion, as opposed to having a rule that's 99 percent traditional motion and then one subsection for no evidence. So that was a decision that had been put up here for discussion, and as we go along, somebody may decide they don't like the confusion.

CHAIR TRACY CHRISTOPHER: Lonny.

PROFESSOR HOFFMAN: Often in life I raise my hand and regret the words that come out, but since --

MS. WOOTEN: Go on.

PROFESSOR HOFFMAN: Since we're talking about this, I'll ask it more as a question or statement. Did -- was there any consideration of the possibility of merging these two, or another way to say that is recognizing that what we refer to as a no-evidence motion for summary judgment is just another discovery tool and maybe we ought to do away with it and just actually have a single motion for summary judgment?

So I really don't mean that as an advocate's point. I actually mean that as a question. Did the committee give any thought to the possibility of getting rid of the, without editorializing, distinction that we currently draw in the law between these two different forms of motions?

MR. ORSINGER: The answer to that is no. The issue of the no-evidence motion was first brought up a decade or so ago. It was quite controversial, and I'll have to admit that I was sitting in the place where the first vote on whether to go for or against the no-evidence motion, and I voted against it because I thought it was really going to change summary judgment practice and change the burdens on the parties and whatnot, and, boy, was I mistaken.

It's really, I think, worked well. It's really streamlined cases that otherwise couldn't die, because there was no real vehicle to establish that whatever has been pled, there's not evidence to support the pleadings, so do we have to wait until a directed verdict in the middle of a jury trial to figure that out?

So, you know, Lonny, I'd love to have the discussion with you, maybe not on the record here, in light of the time; but in my experience, even though I was skeptical originally, I think that the rule has proved to

be beneficial, the no-evidence motion for summary judgment.

CHAIR TRACY CHRISTOPHER: Pete.

MR. SCHENKKAN: Also, the answer is correct. We didn't dig into that possibility, but we also -- I don't want people to be under the impression that the result of having both traditional and no-evidence motions in the rule as revised makes it very complicated. There are only, I think, three places where references come in to the no-evidence motion, but they are ones where they need to be because the situation is different if you're moving on a no-evidence ground. Otherwise, we tried wherever the same deadlines or the same procedures would apply to both, that's the way this is drafted.

CHAIR TRACY CHRISTOPHER: Well, let's ask the question, do people like putting them together, or do you like going back to the separate paragraph on the no-evidence motion for summary judgment? Anyone have an opinion on that particular point?

Okay. And Jim.

MR. PERDUE: Well, I will say I struggled with it, because I've -- I feel like AI motions are -- have been called that, and they've lived in a separate space, and we refer to them that way, so I struggled with this, but there's a -- there's a secondary part, Lonny,

that I think Judge Christopher, while she's maintaining the chair's silence, weighed in on a little bit.

One of the effects of this -- there's twofold. One, obviously, the law hasn't changed, and the rule still says you can't file one of those until there's been adequate time for discovery. One of the things that was in the conversation at the last meeting about kind of this reengineering, and some of my colleagues, you know, will file a summary judgment, but we don't want to set it for hearing. Because we want it on file, it's kind of looming out there in advance of mediation, but we don't really want to get it ruled on or heard. I think that practice is probably about to end, because of the law as it exists, and especially with the revision law, is you're going to go to hearing, right?

And so this kind of leverage concept on no-evidence summary judgments may be changed a little bit by the reality of what will become the pragmatics of the requirement that you're going forward, and as Judge Christopher has said but not said, you know, you have to have some discovery, and you better be moving your case, whether you're movant or nonmovant, on this -- in this system.

So I will say I was concerned about the conflation of the issue and rolling it back up, because

it's supposed to live as a separate thing and be considered a separate thing, and as the committee will know, I kept trying to make sure the word "traditional" was in advance of all of the rules regarding the old summary judgment so we didn't get confused in the conflation that was being engineered here. I think at the end of the day, the second sentence of (2) preserved my concern about early motions for -- for no-evidence summary judgment and the exit ramp for a judge to say, this -- there's no way this is timely, so the answer is it's denied, and that remains a -- that's a ruling. It's a ruling under the rule. It's appearing, and the rule provides for it, so I evolved on that exact issue, and I got to agnostic on it.

CHAIR TRACY CHRISTOPHER: Yes.

MR. HUGHES: My recollection is part of the reason we adopted the no-evidence rule in subsection (i), is there was a movement in the Legislature to jam it down our throats, that essentially we were told if you don't enact such a rule, we will, and we will deprive you of the power to change it by Rule of Civil Procedure, so this came about. I'm concerned that, once again, this may happen.

Secondly, and I echo all of the remarks that as long as the rule provides an off-ramp that it not --

that there has to be an adequate period of discovery, I think then it's a good rule. I don't think it's a discovery tool. I agree with the remark earlier that we need something like this so that the party who doesn't have the burden of proof has an off-ramp before trial, rather than have to sit there and wait for the motion for directed verdict on a claim that a party has no evidence.

And I might also point out, this is sometimes used against defendants when they challenge an affirmative defense upon which the defense has the burden of proving. Say, well, you can't prove contributory fault. You can't prove limitations, et cetera, et cetera. You know, sauce for the goose is sauce for the gander.

Again, I think as long as we bake into the rule you really do have to have an adequate time for discovery and give a judge the off-ramp, the judge says we haven't had an adequate time, then I think it should be denied.

CHAIR TRACY CHRISTOPHER: So, you know, you think you know a rule until you start digging into it to make changes to it, and I had told the subcommittee that often -- it was certainly my practice as a trial judge, and I think the practice of most trial judges, that if you didn't think there was adequate time for discovery, you just granted a really long continuance. Can't do that

anymore under the new law saying you have to have a ruling. And, actually, our current rule allowed you to just deny a motion for summary judgment if the other side proved by affidavits that they needed more time to, you know, get their discovery done.

So we always had that tool in our toolbox as trial judges, but I don't think trial judges understood that, and I do think there's going to need to be some CLE for everybody about, you know, the changes here.

MR. PERDUE: And so that you know, some of the subcommittee -- we were -- this was much more substantially engineered than a couple of iterations. Judge Miskel mentioned, there was what Justice Christopher is talking about, was, you know, the ruling of the court to not rule, but to delay, would not be not in compliance with the Government Code, and, you know, we had a lot of different iterations that had actually got simplified by the fix in the omnibus bill, but there was a lot of engineering to try to address some of that that comes back to judicial education.

CHAIR TRACY CHRISTOPHER: Right. Judge Schaffer.

HONORABLE ROBERT SCHAFFER: I was going to wait until we actually got to paragraph (2) to bring this up, but was there any thought given to further defining

what a reasonable period of time for discovery was? Because I had no-evidence motions filed five to six months after the answer was filed, which I don't think anyone in this room thought that's a reasonable time to conduct discovery, but arguments were made. Was there any thought given to giving a more definitive definition of what that meant in this rule?

MR. PERDUE: I can't remember if there was a draft, a comment, or language. I feel like at some point there was an iteration that said "after the period of discovery is closed."

HONORABLE ROBERT SCHAFFER: That's generally what I used as a bright line, is the discovery period in the first docket control order, and I said no no-evidence motions until then.

CHAIR TRACY CHRISTOPHER: Judge Miskel.

HONORABLE ROBERT SCHAFFER: Nobody really put up a big argument there.

HONORABLE EMILY MISKEL: So that was suggested, and then someone pointed out that in lots of cases, like family cases and level three, the discovery period may not close until 30 days before trial. So we initially had a reference to the discovery period, and we chose to take it out because of that.

And then also, I struggle to set a dead -- a

beginning deadline for an adequate time for discovery, because you said five or six months couldn't be enough, but, like, our Rules of Judicial Administration say that certain types of contested cases have to be finally resolved within six months of the answer, right. So, you know, three months might be be adequate time for discovery if you've got to sign a judgment within six, you know. So I hesitate to prescribe, based on complicated civil cases, a rule for every case.

HONORABLE ROBERT SCHAFFER: I think my thought was based on the fact that, in the civil courts, anyway, I don't think any case goes to trial off of its first docket control order. It would surprise me if it happened.

HONORABLE EMILY MISKEL: Another thing that we often find is that how things work in Harris County is not representative of how they work in other counties.

HONORABLE ROBERT SCHAFFER: You think?

MR. PERDUE: Well, we also found that how things work in family court is not the way things work, and you'll love the iteration of the rule that did not survive, but there's a different rule for family cases.

HONORABLE EMILY MISKEL: Okay. And can I respond, which is everyone characterizes it as a special rule for family, when I think we're often doing rules for

everybody based on special complex civil cases. So agree to disagree.

MR. PERDUE: No, that's true.

HONORABLE ROBERT SCHAFFER: Anybody want to guess what kind of court she presided over?

CHAIR TRACY CHRISTOPHER: Yeah, Richard.

MR. ORSINGER: So many points I wanted to make, I won't remember all of them, but the most recent one, the current comment to Rule 166a, which was the comment to the 1997 rule change, says, "The discovery period set by pretrial order should be adequate opportunity for discovery, unless there is a showing to the contrary, and ordinarily a motion under paragraph (i) would be permitted after the period, but not before."

So right now, we have a comment from the Court that if you have a scheduling order or a docket control order, that kind of sets the parameters, but what worries me is outside of that context, and particularly because I practice in family law, I am concerned that motions could be filed all the way up until, you know, shortly before -- I mean, the discovery window closes in family law cases 30 days before trial.

The discovery window closes in general civil litigation nine months after the first discovery is set. So there actually is a discovery period in a civil case,

not really in a family law case, but my greatest concern was a plaintiff, probably, but it could be -- it could be the defendant is -- there's a no-evidence motion by the defendant against the plaintiff, but it could be the plaintiff against the defense, is that it's filed so early in the case that when the Legislature requires that it be ruled on by a certain period of time, the only out is to deny the motion, without prejudice, because a lot of times if it's denied once, it will never even be looked at again.

So the concept is, either tacitly or in a comment or in the rule, that we say that the court can grant -- pardon me, deny a motion without prejudice to refile it. So I am concerned about those that are filed too early, and I'm concerned about any summary judgment motion that's filed too late.

CHAIR TRACY CHRISTOPHER: Judge Estevez.

HONORABLE ANA ESTEVEZ: So I like that idea, and I think that it would be very helpful to the judges if we just put in the rule if the court finds that an adequate period of time for discovery has not passed, the court either shall or can grant the no-evidence motion for summary judgment. That way they know to just deny it for that reason, and our orders can just say an adequate period of time has not passed, and so you're not actually

working on the merits, but it's another way for them to all be -- you know, all of the judges consistently be able to deny no-evidence motions for summary judgment, which by the way, I do like. I think that I grant more of those than a traditional motion for summary judgment. I think it's a lot easier to find that there's nothing there than that is a scintilla.

CHAIR TRACY CHRISTOPHER: Pete.

MR. SCHENKKAN: I think a lot of people in the room who weren't involved in the subcommittee process, and especially if there are any of you left out there who, like me, don't do motions for summary judgment very often, because I'm in a regulatory litigation practice, and by the time we get to the courts there usually isn't much opportunity for that, may be wondering what this is all about.

The Legislature caused us to have the discussion we're having right now by a concern that trial judges were leaving motions for summary judgment sitting indefinitely and not ruling on them and that this was bad, and they picked a trigger to force earlier action that was based on when the respondent filed a response to the motion, and there could be all sorts of reasons why a respondent might not otherwise want to file a response, and the legislative requirement and the setting of the

deadline by which the judge's papers are going to be graded for a decision based on the response changed the dynamics of litigation and the settlement negotiation dynamics for both sides and disrupted the trial judge's ability to manage the different good reasons there might be for postponing this.

So the discussion you've heard about the off-ramp, this how do we allow for the trial judges to fix a problem that needs to be fixed, it ultimately came down to, if you have to, just let it be denied by operation of law and with prejudice. So that's why we're having this discussion.

For the no-evidence summary judgment motion part of it, I think we really need to stick with adequate time, because there are a lot of fact situations in which not much time at all is required, because there shouldn't really be any discovery or much discovery needed to say there is no evidence of this. There's no evidence of an excuse for not being within the statute of limitations. It's really a law question, and we can get it done right now and end this case, so I think we need to stick with adequate, but what we're -- the rest of what we're doing is trying to figure out how to get the system to adapt itself to the judges -- to the Legislature's desire that judges decide these summary judgment motions sooner,

without screwing everything else up.

CHAIR TRACY CHRISTOPHER: All right. I think we're on (c)(2) without really getting to (c)(2), but any more comments about (c)(2)?

HONORABLE EMILY MISKEL: I had a friendly amendment to the proposed language that we proposed for (c)(2). So the introductory clause there, "Unless a different deadline is set by local rule or court order," what we were referring to is a lot of courts or scheduling orders say that these types of dispositive motions have to be filed and heard at least 30 days before trial, so what we're referring to there is the Court can say it has to be done earlier. But what I realized is that phrase is in the sentence with a traditional summary judgment, and so I could see someone arguing that the court can't set an earlier deadline for no-evidence summary judgments, which is not what we intended.

So some sort of rephrasing to say unless an earlier deadline is set by local rule or court order, or, I guess, local rule or court order can set earlier deadlines for each of these, instead of, just the way we have it written now, it looks like it only applies to traditional motions for summary judgment.

CHAIR TRACY CHRISTOPHER: Judge Chu.

HONORABLE NICHOLAS CHU: Along that same

lines, the only question or tweak I would throw out there is I kind of don't like the idea of a local rule modifying the deadline. The reason why is I think a lot of times we bury -- the judiciary buries a lot of rules that then become substantive deadlines that not a lot of people who practice outside of that county forgets about or gets caught in a gotcha game. It's sometimes fun seeing that, I know, where it's our advantage if we're in the county that we practice in, but just for the sake of fairness, I think it makes sense to have a specific docket control order or a court order for that case that the lawyer knows, okay, these are my deadlines, or just go off of the general rule, and we won't have 254, or even with all of the different types of courts more than 254, different types of deadlines that could potentially exist without outlining a local rule to modify them in mass.

CHAIR TRACY CHRISTOPHER: Kennon.

MS. WOOTEN: Along the same lines, I would say that if this rule is going to refer people to a local rule, there might be benefit to including a comment to direct people to where they can find local rules on the Office of Court Administration website, because I think someone who doesn't practice law, a self-represented litigant, would look at that and have no idea where to go potentially. So I think that guidance could be useful in

a comment, if nothing else.

And while I have the floor, I will say that I think the phrase "adequate time for discovery" has been litigated extensively, that the courts have come out with good tests that we can find and follow. I think it would be difficult to put all of that in a rule. I would just leave it to the phrase that's been analyzed extensively by the courts, and I will say I appreciate having this tool in the toolbox. It's been very effective and needed in some cases, and when I say the tool, I'm referring specifically to the no-evidence summary judgment motion.

CHAIR TRACY CHRISTOPHER: Can I ask a question of the group? Are there counties where there's a local rule about timing for summary judgments as opposed to a docket control order that, you know, sets time for summary judgments? Is anyone aware of a county that uses a local rule for that? If so -- if not, no one has raised their hand, then perhaps we should cut that out and make sure that it is an order in a particular case that everyone would get a copy of. It seems like we have consensus on that.

Any other discussion on (c)(2)? Justice Gray.

HONORABLE TOM GRAY: I would like to see the word "schedule" used instead of "deadline," because

"deadline" suggests last date. "Schedule" would allow the earlier date, and then the way to make the first sentence apply to both types of motions would be to strike the word "traditional" from the first sentence so that, unless a different schedule is set by court order, a party may move for summary judgment at any time after the -- after that.

And then was there a reason that we used the term "move" versus "file," because file is a hard date? You know when something is filed. I don't necessarily understand what it would mean to move for a ruling on a motion without a filing of some type.

CHAIR TRACY CHRISTOPHER: Especially in light of the time change, I think that that would be a good thing, since the new time change is going off when a motion for summary judgment is filed, that we change moving to filing.

HONORABLE TOM GRAY: But you're not commenting on that.

CHAIR TRACY CHRISTOPHER: Not -- I'm agreeing with you. This is very hard for me not to comment. You-all know that.

MS. WOOTEN: You're too good at this to be stifled as Chair.

CHAIR TRACY CHRISTOPHER: It's very hard, very hard.

MR. ORSINGER: I would move that we suspend the rule that prohibits you from expressing opinions.

CHAIR TRACY CHRISTOPHER: Well, no, it's better that I don't. Okay. Any other changes, suggestions, on (c)(2)? Robert.

MR. LEVY: I was just going to agree with Justice Gray in terms of using the word "file," because without the word "file," you could read into this that a motion could be made orally and not in paper form.

CHAIR TRACY CHRISTOPHER: Okay. All right. Moving on to (c)(3), which we are looking at the assuming the legislative amendment passes, since Jim Perdue claims he's got good intel on it.

HONORABLE JERRY BULLARD: Can I add something to that real quick?

CHAIR TRACY CHRISTOPHER: Yes, go ahead.

HONORABLE JERRY BULLARD: That omnibus bill that did pass, it would be effective like the 91st day after the session ends, so we're going to have at least a 90-day window where we're going to have to deal with the 45-day response time and then the 90-day kick-in. For whatever that's worth. Maybe that just adds more frivolity to the party.

CHAIR TRACY CHRISTOPHER: Wait a minute. So what you're saying is that the current rule with the

45-day is going to be in effect for 90 days?

HONORABLE JERRY BULLARD: That's the way I read the omnibus bill. It says the effective date is going to be the 91st day after the day the session ends, whenever that is, and when you read the rule dealing with summary judgments it says it's going to apply to a motion filed on or after the effective date of this act, so we have a 90-day window where we're going to have to deal with the 45-day response thing at least. Sorry.

MR. ORSINGER: I think what he's saying is, is that the new statute will replace the old statute's deadline with a kind of a default deadline for all bills, right?

HONORABLE JERRY BULLARD: Well, the new --

HONORABLE JANE BLAND: Ordinarily we don't address effective dates in the rules themselves.

HONORABLE JERRY BULLARD: No, I understand. I understand.

HONORABLE JANE BLAND: So this will be something to maybe work on outside of --

HONORABLE JERRY BULLARD: I understand.

HONORABLE JANE BLAND: But we should work on the rule as it's going to go forward --

HONORABLE JERRY BULLARD: Yes.

HONORABLE JANE BLAND: -- with the

amendment.

HONORABLE JERRY BULLARD: No, I agree. I'm just letting you know the timing of the --

HONORABLE JANE BLAND: I just didn't want to get off on the -- go back on the --

HONORABLE JERRY BULLARD: No, no, no. I wasn't suggesting that at all. We had some talk about the time line and when these new rules would go into effect.

MR. ORSINGER: September 1. We may not have a September 1 deadline. If the Governor signs this bill, we've got time.

HONORABLE JERRY BULLARD: Yes, you will, but that's okay.

CHAIR TRACY CHRISTOPHER: Well, you do because the summary judgment bill becomes effective September 1, but then the amendment to it doesn't become effective for 90 days.

HONORABLE ANA ESTEVEZ: That's important for the judges.

CHAIR TRACY CHRISTOPHER: Right.

MR. ORSINGER: But it also gives the committee -- it gives the committee a little more time to respond to this meeting.

CHAIR TRACY CHRISTOPHER: But I think what Judge Bullard was saying is that there will be 90 days

when the old rule is in effect.

HONORABLE JERRY BULLARD: That's correct.

CHAIR TRACY CHRISTOPHER: Or the --

HONORABLE EMILY MISKEL: The response-based.

CHAIR TRACY CHRISTOPHER: The response-based time frame.

HONORABLE JERRY BULLARD: That's correct.

CHAIR TRACY CHRISTOPHER: Yeah, Pete.

MR. SCHENKKAN: And I think as we work our way through this effort to create an off-ramp that prevents the Legislature's legitimate and understandable desire to not let people sit on summary judgments forever, as we work our way through it, I think we will see that that 90-day window is not going to be much of a problem because of the steps that are required.

First, somebody is going to have to file a motion for summary judgment after -- on or after September 1, and then second, somebody is going to have to request a hearing on it to trigger these various dates that are set out in here. I don't think it's going to be a big problem. It is definitely one to consider and make sure we don't screw up, but I think it's going to leave us still fundamentally with is our solution for going forward 90 days from now good?

HONORABLE ANA ESTEVEZ: I think it's a judge

problem, and it means that we have to have a hearing within 45 days of the response being due, one way or the other without a rule, and that we have to rule within that 90-day period.

CHAIR TRACY CHRISTOPHER: Correct.

HONORABLE ANA ESTEVEZ: So it's just a --

CHAIR TRACY CHRISTOPHER: It's a judge problem.

HONORABLE ANA ESTEVEZ: It's a 90-day judge problem, not a practitioner problem.

CHAIR TRACY CHRISTOPHER: Robert.

MR. LEVY: So I just pulled up HB 16, the enrolled version, and while Judge Bullard is correct that the general effective day is 90 days after, but the -- it also includes "unless otherwise specified in the act," and in that section, it talks about effective on September 1, 2025, so the effective date very well could be next week.

CHAIR TRACY CHRISTOPHER: All right. We're moving on to the legislative amendment passing. (c)(3). Yes.

MR. ORSINGER: Before we leave that subject, is it our responsibility to have a rule that may be in effect for 90 days?

CHAIR TRACY CHRISTOPHER: No.

MR. ORSINGER: We're going to skip that, let

the judges figure it out, and we're just going to move on to the future.

CHAIR TRACY CHRISTOPHER: Right.

MR. ORSINGER: Okay. I got it.

CHAIR TRACY CHRISTOPHER: Right. Okay. (c)(3), you want to explain what's been done here, or you want Giana to do it because she drafted it?

MR. ORSINGER: It's up to you, if you'd like to.

MS. ORTIZ: Sure, I'm happy to take a crack at it in just previewing the different sentences. The different sentence requires the movant to bring the filing to the court's attention. This is one of the changes, Richard, that came from elsewhere in the rule because of the amendment, but, here, the subcommittee discussed and felt it was important to give trial judges a heads-up that a deadline was beginning to tick, and because the amendment says that the deadline begins upon filing of the motion, that's what that sentence is meant to do.

The second sentence is basically the amendment, which is that the court must hear the summary judgment motion or set a submission within 60 days of filing of the motion. The third sentence provides for the exception to the 60-day deadline that is also in the statutory amendment, which says that the Court, if

necessary for its docket or if the movant consents or for other good cause, the court can extend that 60-day deadline to 90 days, so that will give them a 30-day extension, and that (a) and (b) that you see there in the draft rule is very much adopted from the amendment.

And the last sentence says that the court can't set the hearing any sooner than 35 days after the motion was filed, and that is meant to build in a response time frame basically, and then a subsequent reply time frame, which are issues addressed further down in the rule.

CHAIR TRACY CHRISTOPHER: Okay. Yes, Richard.

MR. ORSINGER: So on the first sentence, there was some disagreement, I should say, or lack of consensus on the subcommittee about who should call the court's attention to the filing of the motion, which starts the timetable that's binding on the court. Under Rule 296, when someone requests findings of fact and conclusions of law, it's the clerk that's required to tell the judge right away, because that judge is on a very tight timetable to do those findings of fact and conclusions of law, but then at the subcommittee level there was a lot of discussion, and maybe Justice Miskel will repeat some of that today, that some courthouses

there's not a direct connection or just a few steps from the clerk's office to the judge and so that you can't necessarily rely on the clerk to inform the court and, therefore, it's on the party who is moving to inform the court.

But then what does "inform the court" mean? Does it mean a telephone call, an e-mail message? Does it mean you walk down the hallway? So I think that that deserves a little discussion.

CHAIR TRACY CHRISTOPHER: Judge Miskel.

HONORABLE EMILY MISKEL: Yeah, so my recollection, I think the fact that in some courthouses the clerks are on a different floor on the opposite side of the building, that was in reference to a different issue.

The discussion about who should bring it to the court's attention was really most important when the deadline was based on the response, and so what we wanted to make sure is that when a party files a response, they must call that deadline to the court's attention. We also didn't want to give extra work to district clerks, because we felt like the parties should bring it to the court's attention.

Now that the strict deadline runs from the filing, I don't have necessarily the same concern with

saying the clerk can bring the filing of a motion to the court's attention, or the party can do it, or honestly, the courts probably need to keep an eye on this themselves, too. So that was really important when the deadlines were based on the response. I don't know that it's that important now, the distinction of who does it, when the deadline is based off the filing of the motion.

CHAIR TRACY CHRISTOPHER: So I did ask a current trial judge how many filings he thinks he gets in a day in his docket, and he estimates around 250 pieces of filing comes into his docket of cases, so I don't think it's realistic for the judge to have to sit there and check to see if there are summary judgments.

HONORABLE EMILY MISKEL: I just meant, regardless of who we give it to, I, as a judge, would probably be running reports to see if summary judgments were filed, just as good practice, but I wasn't suggesting we put it in the rule that judges have to do that.

CHAIR TRACY CHRISTOPHER: All right. John. From our clerk's perspective, go ahead.

MR. WARREN: Well, one, first, will this be county and district clerks, but the clerks do not set the judges' hearings, but we have a case management system, and it's pretty much statewide, Enterprise Justice, where you can set a flag, so if a motion for summary judgment is

filed, the court coordinator and the judge will get an alert that a motion for summary judgment has been filed.

CHAIR TRACY CHRISTOPHER: So then you think it would be easy for a clerk to notify the judge of the filing?

MR. WARREN: No, because, while that one judge, as you said, has 250, those are filed with the clerk, and so we -- just like for me, I have five civil courts, and each one of them have about 7,000 cases where everything is being filed, and so that notice would just -- it would be an e-mail notification that would go to the coordinator and the judge that a summary judgment has been filed.

CHAIR TRACY CHRISTOPHER: Okay. So you think under the current -- the current system, as you know it, you could e-mail the judge?

MR. WARREN: No, it wouldn't be necessary to e-mail them. It would be an automatic e-mail.

HONORABLE EMILY MISKEL: I hear him saying the opposite. He's saying don't give it to the clerk, you can sign up for your own e-mail alerts. Is that what I'm hearing you say?

MS. GILLILAND: Well, I'm a district clerk in Parker County, and we're on the same system, and when you flag something, it does not automatically tell the

judge.

MR. WARREN: But you can set it for -- for an e-mail notification when you get a flag.

MS. GILLILAND: Then we may be on a different version. I think across the state, with 254 counties, I don't think that there's a lot of passive ways to say when this happens it gives an automatic notice. I just don't think that that's necessarily a technology that's available today.

CHAIR TRACY CHRISTOPHER: Well, may I ask both of you what you do with requests for findings of fact and conclusions of law?

MS. GILLILAND: So, for our office, that's one of the things in our training that we say, stop the presses, you've got to do something with this. I think the toughest thing in training staff is learning what is your responsibility as the clerk, like findings of fact and conclusions of law. We don't get that request a lot, so hopefully it's triggering, oh, yeah, we do something special with this. The toughest thing is everything else that the clerk is dealing with, the parties are responsible for driving what they want to happen. So that if they want a hearing set, they may file something requesting please set this for hearing. That tells the clerk, oh, let the judge's office know they want a

hearing, or otherwise they're calling the judge's office directly to get that set.

I don't think it's unreasonable to think that the clerks could do this. I think just my biggest concern is something falling through the cracks because you have so many things that it's the parties' responsibility to follow up on if they want something to happen versus a few things that it is the clerk's responsibility.

CHAIR TRACY CHRISTOPHER: If we change the rule to make it you file the motion for summary judgment and you request the hearing on the same day, the request for hearing will trigger something in your court, is what you're telling me?

MS. GILLILAND: I think a lot of it is probably the different practices within each -- within each county, because I know that there are some that that was nice that you asked for it, but you do need to call the judge's office. It's just, in our county, we've taken it as a business practice to say -- or if they submitted, you know, an agreed motion and a proposed order, our business practice with our local judges is we go ahead and bring that to their attention.

CHAIR TRACY CHRISTOPHER: Okay. Judge Chu, and then Judge Estevez.

HONORABLE NICHOLAS CHU: I was just going to say that I think we don't really need to worry about this. The reason why is because there are deadlines for findings of fact and conclusions of law and/or recusals that the court has to act within three days of certain things for that, so that there are already processes in place for whatever county and whatever clerk operations for that. So once we create the rule of saying, hey, here's a deadline, here's a trigger date, I think courts will go with their clerk's office and figure out a solution there.

CHAIR TRACY CHRISTOPHER: But I think both of those rules require the clerk to bring it to the attention of the judge.

MR. ORSINGER: Yes.

HONORABLE NICHOLAS CHU: Oh, well, we just copy that language then. Yeah. Then because whatever is there works right now.

CHAIR TRACY CHRISTOPHER: Okay. Because that's not what's in here now. Judge Estevez.

HONORABLE ANA ESTEVEZ: So I don't necessarily like this as the idea, but maybe we can go from there to have either a motion for leave with an order allowing the filing, and the only reason is it's an order that triggers us knowing something, so we get an order in our queue, then we always know unless the clerk's going to

give us a notification. So if we have the party that filed the motion have to file an order, not for the final disposition, but an order that we would sign at that same time, or --

CHAIR TRACY CHRISTOPHER: An order setting hearing?

HONORABLE ANA ESTEVEZ: No, because they need to call the clerk. I mean, they need to call our court coordinator to get that hearing date, unless we require them to set the hearing date at the same time they file a motion. You could require that, a hearing date will be set at the time of filing. But they won't -- we won't set one unless the motion is already filed.

CHAIR TRACY CHRISTOPHER: Richard.

MR. ORSINGER: So to refocus, I'm concerned about how a moving party immediately brings the filing of the motion to the court's attention. If somebody that works all day long in the courthouse with the judge and is connected on the computer network can't advise the judge, then what is the lawyer supposed to do? Go down and wait in the hallway until the judge leaves for lunch and then catch her in the hallway and say, "I wanted to call your attention that I filed a motion for summary judgment"? Or do you just wait until there's a break in the middle of a jury trial and you just sit in there? I just don't know

how I would call it to the attention of the judge, and then is somebody going to accuse me of an ex parte communication? I can defend it as just procedural, but it is an ex parte communication. I just think the problems of lawyers doing it are worse than the problems of full-time government employees informing the judge.

CHAIR TRACY CHRISTOPHER: Yeah.

MR. PHILLIPS: I have the exact same comment. I don't know how we bring it to the attention. What I would do is file a letter, but that just goes on ECF, and it's the same thing as a summary judgment motion.

And then the second question is a written request for an oral hearing or a written hearing. There's a bunch of courts where the way to get a hearing is to pick up the phone and call the court coordinator, and if you file a letter saying, "I want a hearing," they're not going to do anything until you pick up the phone and ask the court coordinator for a hearing date. So requiring a written request for a hearing for submission date isn't going to work in all 254 counties.

CHAIR TRACY CHRISTOPHER: Yes.

MS. GILLILAND: I think my preference, instead of saying it's the clerk's responsibility or the filing party's responsibility, these deadlines are falling on the judges' reports of their clearance rates, and maybe

it's something to just be left to each county and each court and clerk to utilize what technology they have available. So if it's something that the judge's office and their court coordinators can run some reports for motions for summary judgment, and they're saying, oh, look one got filed, we need to set it for hearing, or if they want to have that relationship with the clerk and, okay, clerk, you tell us, and let them develop their own business processes to make sure that those deadlines are being met.

CHAIR TRACY CHRISTOPHER: So you would eliminate the first sentence completely of (c)(3) and let each county figure it out?

MS. GILLILAND: Yes.

HONORABLE ANA ESTEVEZ: Can we give it to OCA? Don't tell Megan I said that.

CHAIR TRACY CHRISTOPHER: Judge Miskel.

HONORABLE EMILY MISKEL: Well, I was just going to say the clerks already have the obligation now as part of your OCA reporting to report the summary judgments that were filed and ruled on and all of those dates, so the clerks are already going to be pulling reports and reporting filings of summary judgment.

MS. GILLILAND: True, but when these kind of filings, this technology is available when you have it set

up that this is filed, it's reporting in the background on your software. So we're not -- we don't have a tablet that we're doing checkmarks each time a summary judgment or some other type of filing comes in.

I think just in terms of being like an active like e-mail or, hey, ding, this happened, I'm just not aware of any software that clerks are using that gives an automatic notification to somebody else that this type of filing -- it should be available. I'm just not aware that that is currently available.

CHAIR TRACY CHRISTOPHER: Kennon.

MS. WOOTEN: If we have a history of the process that works for findings of fact and conclusions of law, I think it would be wise to carry it over to this context, not only because we know it works, but also because judges could face serious consequences if they fail to meet the deadlines.

And I agree with the comments about the problems in putting it on the party to bring it to the court's attention for two reasons. One is practical. I don't know how to do that necessarily, because it's going to depend on the county I'm in and the court I'm before; and, two, because that is, again, a situation where it could invite ex parte communication by somebody who is reading these rules, never practiced, they don't know the

limitations and they just feel like, okay, I've got to bring it to the court's attention, I'm going to call the judge or I'm going to e-mail the judge. I just think it invites problems and could lead to judges missing deadlines, and that would have serious consequences under the amended canons.

CHAIR TRACY CHRISTOPHER: All right. Rule 296 says that "such request shall be filed," request for findings of fact, and it's filed with the clerk, "who shall immediately call such request to the attention of the judge who tried the case." So that's the language that you think we should have in the first sentence of (c)(1), or (3).

MS. WOOTEN: Something akin to that. In this situation you don't have the judge who tried the case, but the concept being that the clerk immediately notifies --

CHAIR TRACY CHRISTOPHER: The judge.

MS. WOOTEN: That's correct. That's what I would do.

CHAIR TRACY CHRISTOPHER: Judge Estevez.

HONORABLE ANA ESTEVEZ: Okay. Under this rule, it is now the judge's responsibility to set a hearing that no one has ever requested. So if that's true, then I am okay with they must file a request for a

setting at the time they file their motion for summary judgment, because I'm thinking about it practically. Let's say somebody sends me something and I get an order in the -- in my queue, and I look there, and I see that 91 days ago there was a motion for summary judgment that was filed, and nobody had ever told us about it. I didn't know about it.

So at that point I'm supposed to deny it, right? I mean, I didn't hear it. I didn't consider it. It was filed. My time is up. I need to deny it, period. You agree?

MR. ORSINGER: She can't take a position.

HONORABLE ANA ESTEVEZ: Okay. You agree?

MR. ORSINGER: Yes.

HONORABLE ANA ESTEVEZ: But if that's true that, no matter what, I have to rule on these, whether or not anyone has even requested or wants a hearing, then I do want to set the hearing, and I don't care if they don't like the date, and I don't even care -- I would want it to be given by submission right at 60 days every single time.

CHAIR TRACY CHRISTOPHER: I think it is the judge's obligation to set the hearing, whether it's asked for or not, under the current rule. That's just my personal opinion. So, yes, which is why it's important to know about the filing.

HONORABLE ANA ESTEVEZ: Okay. Well, then --

CHAIR TRACY CHRISTOPHER: Because then the judge does whatever they do, get with their coordinator, if the coordinator is the one who sets the hearing, get with the clerk if the clerk is the one that sets the hearing. You know, everybody's county is different, right?

HONORABLE ANA ESTEVEZ: Well, we set them all for submission unless they call, and it's 60 days out, and that's our new local rule.

CHAIR TRACY CHRISTOPHER: Or you might want to set it at 35 days.

HONORABLE ANA ESTEVEZ: I might, right.

CHAIR TRACY CHRISTOPHER: You know, and that gives everybody wiggle room, to move it.

HONORABLE ANA ESTEVEZ: But I'm saying if -- and I will say that I have never pushed a hearing date for a motion for summary judgment. I mean, I have never been the one to set it, unless the docket control order or something like that, but if somebody filed it, I don't even know, so I've never set something. But I would know with the order setting hearing being required to be sent at the time of the filing, and that would take care of the notice issue, too.

MR. ORSINGER: So, if I may, this first

sentence, perhaps we could restructure it. "Upon filing a motion for summary judgment, the party must make a written request for oral hearing or written submission," period. And then just say, "The clerk shall immediately" -- and we could say "shall immediately notify the court." Now, it may -- as a practical matter, it may be the court coordinator that really needs to be informed, because they have to talk to the judge about setting the hearing, but the idea is, is that if the motion is coupled with the request for a setting, then doesn't that put us in a good place in terms of the computer system and the processing to know that somebody wants a hearing on this and the --

HONORABLE ANA ESTEVEZ: But I want a proposed order, because I'm not going to see the letter.

MR. ORSINGER: A proposed setting order, you mean?

HONORABLE ANA ESTEVEZ: Yes.

CHAIR TRACY CHRISTOPHER: Order setting. Rich.

MR. PHILLIPS: Given the deadlines, isn't filing a motion for summary judgment a request for a hearing? I mean, why are we making people file a request for a hearing? When you file a motion for summary judgment, you're requesting a hearing within the next 60 or 90 days.

MR. ORSINGER: I think the response is that a request for a hearing is handled differently on the computer system and by the staff than a motion. You get thousands of motions, but you maybe only get hundreds of requests for setting.

MR. PHILLIPS: But you don't always make a written request. In some counties, the way to get a hearing is to call the coordinator and ask for the hearing. So, again, you're going to get a whole bunch of motions, but every summary judgment motion has implicitly a request for hearing in the next 60 or 90 days.

CHAIR TRACY CHRISTOPHER: Judge Miskel.

HONORABLE EMILY MISKEL: The way I read the rule is to say you need to make a written request for whether you want a oral hearing or a written submission.

CHAIR TRACY CHRISTOPHER: Right.

MS. ORTIZ: It may turn into --

CHAIR TRACY CHRISTOPHER: Giana.

MS. ORTIZ: It may turn into -- almost like when you file your appellate brief, oral argument requested or not requested, and let the court deal with it similar to what the appeals courts do.

CHAIR TRACY CHRISTOPHER: John.

MR. WARREN: As an option, would it be possible for -- before the attorney files their motion for

summary judgment, they contact the court coordinator to get a date, and they include that date in their motion, filing this motion for summary judgment is scheduled to be heard on this date. That way it's already done by the time --

CHAIR TRACY CHRISTOPHER: Roger.

MR. HUGHES: I guess I kind of go the other way on this. I think the burden should be on the party filing the motion to bring it to the court's attention, and I think trying to bake into the rule some special procedure for bringing it to the court's attention is getting too far in the weeds, frankly.

And I agree with Rich. If you want a hearing on any motion, you're going to know how to get it. Your legal secretary or your legal assistant, or whomever in your office, knows who to call in the judge's chamber that isn't going to -- you know, the court coordinator or whoever, to get a hearing set. And I think at that point, just simply saying you have -- the party filing the motion or the party filing response has -- must bring it to the court's attention. Then that will leave it up to local practice how that party goes, and so to speak, going to the right desk within the judge's chambers, but trying to mandate that in a rule, put a bunch of duties on the clerk and the judge, I think is a bridge too far.

I think -- and, I'm sorry, my experience is if you're an attorney and you want a setting, you know what that judge's local practices are, and you know how to go about doing it, and requiring some special rule about it is just going to interfere with judges' local practice and go, well, for all other motions, you have to call my court coordinator, but for motions for summary judgment, we're going to have a special practice altogether. I don't think we want to do that.

CHAIR TRACY CHRISTOPHER: Judge Miskel.

HONORABLE EMILY MISKEL: I was going to also say, one of the things we talked about in our subcommittee was many people had the same reaction of bring it to the court's attention, how am I supposed to do that, but we already have an established body of law. For example, if you're mandamusing a trial court for failure to rule, one of the things that you have to show in your mandamus is that you brought it to the court's attention and asked for a ruling. So there's a whole existing body of law -- I'm sorry, did I misstate something?

CHAIR TRACY CHRISTOPHER: No, you're correct, there is. I just think it's a terrible body of law.

HONORABLE EMILY MISKEL: Okay. But -- okay. But the fact is, like, so, for example, during COVID there

were plenty of opinions that said this did bring it to the court's attention or this did not bring it to the court's attention, so, anyway, this is a problem that's already exists. It's not brand new with this summary judgment.

CHAIR TRACY CHRISTOPHER: But, can I -- again, I'm -- the law says the hearing has to take place within 60 days of filing the motion, so if somebody filed the motion and waited 59 days to call up the clerk and say, "Oh, oh, tomorrow, I've got to have that hearing tomorrow." You know, otherwise, you, Judge, will be disciplined. Because that's what's going to happen. A judge is going to get disciplined if they don't have the hearing at the 60th day or the 90th day. So, you know, I'm trying to protect the judges here.

MS. WOOTEN: I completely agree, and I understand, you know, putting the burden on the party, but the parties are not going to consistently do this. The parties are not going to consistently get it to the judge's attention in a timely manner, and I'm not being negative towards parties. That's just the reality of the situation, and if the hammer falls on the judge because the party didn't comply with the rule, that's a problem.

So if you have something baked into this process where the clerk immediately notifies the judge, the judge has the opportunity to do what he or she needs

to do to not have a hammer in the disciplinary process, and I think that's important.

CHAIR TRACY CHRISTOPHER: Kennon, if you were -- other than importing the language from the findings of fact rule, clerk immediately brings it to the attention of the judge, what else would you -- would you change in that first sentence? Would that be enough, do you think?

MS. WOOTEN: I think that would be enough. I am a little concerned, though, with the concept of the party having to request the hearing before filing the motion, in part because we can't even do that in Travis County, as a general matter. The motion has to be filed before we request a setting, and that makes sense to me practically, because otherwise the docket could get clogged up with things that ultimately never come to pass.

So I do think, more than anything else, what we need is clarity as to how the judge knows, will know the clock is ticking, and I don't think it should necessarily be triggered by a notice of hearing filed before a motion, because that could create other issues.

CHAIR TRACY CHRISTOPHER: Judge Schaffer.

HONORABLE ROBERT SCHAFFER: Later today we're going to be talking about the Code of Judicial Conduct as it relates to willful and persistent violation

or noncompliance with rules and statutes. If you put this on the judge to find it and do it and set it, then that could be more morphed into a willful or persistent violation of the statute without the judge even knowing about it, so we have to keep that in mind in discussing this rule, too.

CHAIR TRACY CHRISTOPHER: What would your suggestion be?

HONORABLE ROBERT SCHAFFER: Well, my practice for 16 years was contact my clerk, and she gave you a hearing date, and it was as simple as that, and it always -- I'm not aware of any time when it didn't work, but I understand that there's 254 counties in Texas and everybody doesn't do it the same way.

CHAIR TRACY CHRISTOPHER: But they had to file the motion for summary judgment before they called your clerk to get a hearing date.

HONORABLE ROBERT SCHAFFER: In my court, they called the clerk before they filed it, got the hearing date, and with the motion, they filed a notice of oral hearing or they filed a notice of submission.

CHAIR TRACY CHRISTOPHER: Right, but Kennon says that's not the way it works in her county. You have to file the motion first.

HONORABLE ROBERT SCHAFFER: And that's why I

said I understand there's different -- different policies in different counties, and so I don't know what the answer to it is, but I don't think we should put it on the judges to search their files for everything that's filed. I don't know if it's 250 things filed in Harris County district courts, but it's a lot, and the judges in these large counties just don't have the time to do that.

CHAIR TRACY CHRISTOPHER: Judge Chu.

HONORABLE NICHOLAS CHU: Just going back to the legislative mandate that we have with the omnibus bill, assuming that passes, it just says the 60th day after the date the motion was filed. And so just using that as our base of where we're going with this, I really don't think we need to go into the weeds of the parties submitting a notice of hearing or things like that. We just kind of copy this rule that we already have when it comes down to findings of facts or recusal orders and then we just say, figure it out, just make sure you set it within this time, because that -- the triggering date isn't -- the triggering thing is not, you know, when we call the coordinator or not. It is when the motion is filed, and that starts the clock, according to this law.

CHAIR TRACY CHRISTOPHER: Jim.

MR. PERDUE: So the reason why I'm concerned about the findings of fact analogy is the court's already

had a contested matter on that issue, right, so there's a record. This is just a motion that is filed amongst many, many motions, and the -- the idea of the party being responsible to request the hearing was in the rules of procedure and inform the party that when you are filing a motion for summary judgment, you need to inform the court that you were seeking a hearing or submission on it.

The problem -- the problem with just kind of an internal procedure for the courts becoming a Rule of Civil Procedure, which is what you're talking about if it's kind of -- it has nothing to do with the parties, is you're essentially, I think, making court practices in the Rules of Civil Procedure that are intended for parties. The parties need to inform the court that they filed it by asking for a hearing.

But also, the parties, if you're requesting a hearing and you're in contact with the court, don't the parties want a date that works for the parties? I mean, in concept, especially if you're asking for oral argument, you'd like to try to work with the court to say, "I've got three available dates, this one works," and again, that makes the system work for both courts and the parties.

And if you just do the -- I mean, the bill's rough justice, the revision of the bill is rough justice, but if you do -- if you do kind of the court is in control

of every motion that gets filed is getting a hearing date on the 55th date after the motion is filed or the 50th or 45th or whatever, then how do the parties -- how do the parties are able to accommodate that date for purposes of oral argument, for example? How does the -- you're essentially saying the court system becomes the Rule of Civil Procedure.

I think the courts can create systems to address the deadline and will and can, but a motion without a request for a hearing, the request for hearing is what brings it to the court's attention that it's been filed. We were always struggling with the -- because I remember, Judge Miskel, the issue of this immediately bring the filing of the motion to the court's attention, which was generated in the idea that you had this response deadline as the initial version of the deadline and then you could have games of somebody filing it and then having a response filed the next day that you have no idea a response is filed and the movant hasn't requested a hearing, and now you've got a deadline that's kicked in on a response that doesn't have any way of informing the court that a response got filed, and there's no request for hearing, and now you're really back up on it.

So I think the systems that work closest to a 254-county system was the idea that now the practice

shall be that a motion for summary judgment is going to be accompanied by a request for a hearing or submission, at the very least, and then the procedures that would deal with the court's administration aren't really Rules of Civil Procedure as much as they're court procedures, but we're baking in this 60-day deadline, which is on the court's side.

And just from a court perspective and a party perspective, it strikes me that if you delete the idea that some party has asked for a hearing or submission, you're missing a step that doesn't exist in the analogy to request for findings of fact.

HONORABLE NICHOLAS CHU: But Jim --

CHAIR TRACY CHRISTOPHER: We've got a lot more, but I'm going to give Dee Dee a break, because I just realized we've been sitting here for a while. So let's take a 15-minute break and then we'll come back.

(Recess from 10:53 a.m. to 11:11 a.m.)

CHAIR TRACY CHRISTOPHER: All right. Let's get started again, if we can. So the Court is going to bring the summary judgment rule back in the October meeting, but there are just a couple of things that are major changes that the committee has suggested that we kind of want to get the feel of the group.

The major change is, instead of 21 days is

the minimum time frame to, you know, set a hearing after summary judgment, it's been moved to 35, and they've built in time for the response and the reply have been built in. So, Richard, why don't you explain those to us?

MR. ORSINGER: Well, the Legislature has set the overall timetable, but we have like a subsidiary, internal timetable about when the response is due and when the reply is due, and I mentioned that in my original comments. The feeling was that we need to create enough space for the response to be due and still allow time for a reply by the movant to be due and still allow time for the court to read both filings, and we do that by building this internal time line, and that's the purpose of it.

It gives the judge seven days after the last document is filed before the submission or the oral hearing, and it doesn't conflict with the statute because it doesn't affect the overall hearing deadline or hearing and ruling deadline.

CHAIR TRACY CHRISTOPHER: Any discussions on that? Anyone who thinks it's unnecessary, thinks it's a good idea?

I see no hands on this point. Okay. I will say, anecdotally, that I've heard from trial judges that they think it's unnecessary, that this subcommittee deals with big, hard summary judgments where you've got to build

in extra time, and a lot of summary judgments don't need this, but that's what I have heard anecdotally from people who looked at your draft.

MR. ORSINGER: Well, in response, let me say that the Legislature has given 60 days, and if we just keep the current practice as usual, you know, we don't need the 60 days, so we now have the time to do something if we want to, and I'm not sure that having these deadlines hurts the judge at all. I mean, if they don't want to read it until the day of the hearing, they don't have to, but if someone does want to read it, they have seven days to read it.

CHAIR TRACY CHRISTOPHER: Judge Schaffer.

HONORABLE ROBERT SCHAFFER: As Justice Miskel so eloquently put it, that the big cases seem to wag the dog, I think that's probably, as you just said, from the civil judges in Harris County, this is probably one of those times; but I think it's one of those times that it's necessary, because as we discussed at the last meeting, you spend months preparing a summary judgment, and the respondent, nonmovant, has 14 days to prepare a response to it; and so essentially, in some cases, if it's a major case, a big case, has to just stop working on things and work solely on this.

So I don't think this rule is a bad rule. I

think the instances where it's not necessary can be dealt with, but, again, like Richard just said, the 60 days to rule kind of makes this really, I think, a situation that calls for expanding the time like we're doing in this rule.

CHAIR TRACY CHRISTOPHER: All right. Any other discussions on that timing? All right.

Then I think the other key change that we should discuss is number (8), the ruling. And if you have comments on other changes, since it is going to come back, if you would put that in writing and send them to Richard. Judge Gray. Because we're trying to get to a few other time sensitive issues today. So and I'm wondering if we made -- if you-all made the changes to (8) in light of the amended bill, if more changes have to be made to (8) in light of the amended bill.

MR. ORSINGER: It was intended to be in light of the amended bill, but something may have been overlooked, so we may need to reconsider it. There's two concepts that are important here and could be controversial. One is that if there's a crunch with the statutorily required ruling deadline, the out is to deny the motion without prejudice, and that way you've defeated the timetable, the motion is still there.

Maybe the respondent needs to take three

depositions out of state before they can do the response or whatever, the idea is our back is against the wall and we've got to make a ruling, got to have the setting, we can deny the motion without even considering the merits, and that could be controversial, because in this proposal we even have a provision that by operation of law a motion will be denied without prejudice if the movant passes the hearing by filing a written notice. So that means the movant says, "I don't want a hearing yet," then it's denied by operation of law.

It's kind of like automatically withdrawing it, or the court grants a continuance of oral hearing or written submission, which the Legislature apparently didn't contemplate would be done, so since we can't grant a continuance with the setting deadline, we have to deny the motion and reset the timetable.

Now, in number (3), the court rules that there was not adequate time for discovery, so there's your no-evidence motion problem. There wasn't enough time for the party that's defending the motion to gather all the evidence they need to have their case put on trial. They're on pretrial in the summary judgment, and so the idea is we can't grant a continuance because of the statutes, so what we're going to do is it's automatically denied by operation of law without prejudice of refiling.

And number (4), the movant files summary judgment evidence later than the deadline, and that, in a sense, is kind of making a new motion for summary judgment, so it's not fair to hold to the old timetables when the evidence that the respondent is going to have to respond to has been filed just shortly before the setting or the hearing.

So, to me, this idea of -- of having overruling motions without prejudice by operation of law is completely novel. I don't know of anything similar to that that exists right now, but it does fix the problem that sometimes you just need to get out of the deadline without -- and the legislation doesn't let you grant a continuance. So I think that's the debate.

CHAIR TRACY CHRISTOPHER: Judge Schaffer.

HONORABLE ROBERT SCHAFFER: I don't have a problem with this, except on the item number (4), what if the movant has filed evidence with the motion in a timely manner. If the movant comes up later on and files additional evidence, under this section that would take the whole -- that would deny the entire motion, instead of maybe just disregarding the late-filed evidence and ruling on the motion based on what was filed timely.

MR. ORSINGER: Good point. And right now, I think the court's discretion, isn't it, whether the

evidence can be filed after the original filing? So, you know, occasionally the response will cause the movant to want to put additional evidence in. Right now, the judge can allow that. Can the judge allow -- should the judge be able to allow that?

HONORABLE ROBERT SCHAFFER: Well, in your number (4), it says, "without leave of court," so if I come through within 14 days or seven days with my reply and add additional evidence, but I ask for leave of court to add additional evidence, this would not implicate this part of the rule, would it?

MR. ORSINGER: I think you're right. But what if the judge denied leave of court? Then you, I guess, could withdraw your motion, or if it's denied, it's going to be by operation of law denied without prejudice.

CHAIR TRACY CHRISTOPHER: Judge Miskel.

HONORABLE EMILY MISKEL: So I was, I don't know, one of the voices or maybe the only voice, I don't know, on the subcommittee that was -- I was opposed to this entire sentence and concept and all four subpoints.

I don't -- I mean, summary judgments aren't denied with prejudice ever. Summary judgments are always without prejudice. You can always hear them again or later or different ones. So my thinking was to educate judges on denying a summary judgment because there wasn't

adequate time for discovery. It has no prejudice to that person urging it later or filing a new one.

I think we just need to educate judges and leave that out of the rule, because any court can do any of these things already under their own power, and I don't think -- I think the rule, by naming some situations and not others, we could bicker forever about which ones are named and how to phrase them, and it's not going to cover everything, and I think we should just leave this entire concept to the court's power to deny summary judgments, which are always without prejudice.

CHAIR TRACY CHRISTOPHER: Judge Chu.

HONORABLE NICHOLAS CHU: Two things. First, along Judge Miskel's or Justice Miskel's line, I agree with her. I think because these rulings can be reconsidered later on, I don't think we need to go into the weeds of this is prejudice, this is without prejudice. It kind of muddies the water. I think also, too, that when you start talking about continuances and the timings of those, I think it's just simpler just to say the ruling, according to the law, says we need to file within I think 90 days, or whatever it is, written ruling. So we just say that's the requirement for that law, and then have all of these other things that are kind of trial court unique things kind of working themselves out with

each individual judge.

The second thing is I really don't think that first sentence is necessary where we require the parties to submit a proposed order. I mean, the way that will work in reality is they submit a proposed order that just says "summary judgment granted" or "summary judgment denied," and then when the judge actually considers it, I will contact the prevailing party to say "create a proposed order that says this." You're kind of creating double work for both sides for something that will eventually get solved later on. So...

CHAIR TRACY CHRISTOPHER: Any other comments on this idea? Judge Schaffer.

HONORABLE ROBERT SCHAFFER: With all due respect, Judge Chu, I always wanted an order attached to a motion. It may be a wrong order, and it may not be one that I sign eventually, but if I'm hearing it, and it takes care of the case, it's gone. We don't have to continue messing with it. So I -- I was surprised that it was in here, but I think that's a good idea, and it should stay in there.

HONORABLE NICHOLAS CHU: But I think you could solve that still by saying your local rules require a proposed order, and then not have to mandate that for the other 254 counties, right?

HONORABLE ROBERT SCHAFFER: Yes, but I think it's a good idea for the other 254 counties.

CHAIR TRACY CHRISTOPHER: Judge Miskel.

HONORABLE EMILY MISKEL: Well, I was going to agree with Judge Chu, and Judge Schaffer actually illustrates my point, which is even without that being in the rule this whole time, he's always been able to make that be the way he likes it.

HONORABLE ROBERT SCHAFFER: It's a local rule.

HONORABLE EMILY MISKEL: So I don't see any benefit. Because the other part we talked about in subcommittee is this requires the movant and the nonmovant to submit a proposed order, and, like, oftentimes nonmovants don't participate at all. So I just don't see this rule, this first sentence in number (8), as accomplishing anything, and also courts have always had the ability to do whatever they want regarding this anyway.

CHAIR TRACY CHRISTOPHER: Pete.

MR. SCHENKKAN: I'd like to carve out requiring a movant to do an order and a respondent. What Justice Miskel just said is a good reason why you may not want to require the respondent to offer a proposed order, but requiring movant's counsel to actually say the words

that movant wants the judge to sign is helpful in terms of getting the issues more crisply in focus, and I think it's not so much a matter of making the 254 counties do it. It's making the lawyers do it everywhere, if you're fighting for a motion for summary judgment. There's often a step after the judge has said, "I'm going to grant the motion for summary judgment," but I'm concerned about the wording or somebody could give the wording and then we have another round, which may shorten that some if there's at least an initial proposed ruling in the package.

CHAIR TRACY CHRISTOPHER: Judge Gray.

HONORABLE TOM GRAY: In 26 years at the appellate court I don't remember a traditional motion for summary judgment that was granted and appealed in which there was not also rulings on objections to the summary judgment evidence being raised on appeal. You're going to get some really helpful drafts for the judge if you require the party to sit down and draft them, because you're going to see those rulings on the summary judgment evidence also in the order. It's probably going to deny all of the nonmovant's, but the ruling on objections brings in a whole new layer of problems in these summary judgment hearings. Because if you can't have evidence, you may not have the -- you know, there's going to be evidence with regard to the objections, and it's -- it

cascades into the order, and so, anyway, I would say that the exercise of both parties going through drafting a proposed order can be very helpful.

CHAIR TRACY CHRISTOPHER: Kennon.

MS. WOOTEN: Everything you said, Justice Miskel, about what the judge has the power to do makes good sense to me in that you don't need to spell out some of the many powers in the rule, but what isn't addressed in that commentary is the operation of law concept that I find appealing, in light of the consequences of judges missing these deadlines, and I do think that perhaps the situations under which that would be triggered should be narrower, right?

For example, what we have in the rule now is the court actively granting a continuance. Well, the court could just exercise the powers that you've mentioned in that circumstance, but it strikes me that if you have a movant passing the hearing date and not resetting it, that perhaps it makes sense under those circumstances for there to be a denial by operation of law, just automatically, so judge complies with the deadline, that judge wouldn't be able to meet because of what the movant did with respect to the hearing.

CHAIR TRACY CHRISTOPHER: Judge Miskel.

HONORABLE EMILY MISKEL: Okay. So this was

the part that where the clerks sit was relevant to the discussion, because apparently in Collin County they have clerks in the courtrooms or next to the courtroom -- or, I'm sorry, in Harris County they have clerks like right there in the trial court; is that right?

HONORABLE ROBERT SCHAFFER: Sometimes.

HONORABLE EMILY MISKEL: Okay. So in Collin County, the clerks are in the basement on the opposite side of the building, and the judges are not allowed to talk to them, because they do not work for you and they are not your employees. So -- allegedly. But so what I was saying is, so, for example, if a judge is going to be dinged for, you know, you know, willful and persistent misconduct, how is -- when the clerk does the reporting of summary judgment rulings to OCA, how will the clerk know that a movant passed a hearing, right? Because if the movant calls the court and says, "I'm passing a hearing" or if the movant stops by and says, "Oh, I'm on my way to the 416th, but I won't need that hearing," how can that ever be by operation of law, because how will anyone ever know that the hearing was passed, right? Because the Harris County people on the subcommittee were like, "Oh, the clerk's right there. You just tell the clerk." Well, that's not how it works everywhere, right, so I think there are functional problems with that, even though

conceptually it might be good.

CHAIR TRACY CHRISTOPHER: So -- Judge Schaffer.

HONORABLE ROBERT SCHAFFER: Why don't you just say it's overruled by operation of law if not ruled on in 60 days or whatever the time frame is?

HONORABLE EMILY MISKEL: We talked about --

(Simultaneous crosstalk)

THE REPORTER: Wait a minute.

CHAIR TRACY CHRISTOPHER: One at a time. Sorry. Judge Estevez.

HONORABLE ANA ESTEVEZ: 180 days.

CHAIR TRACY CHRISTOPHER: Judge Miskel.

HONORABLE EMILY MISKEL: We didn't want it to be perceived as us trying to make a rule that would be an end run around the Legislature.

HONORABLE ROBERT SCHAFFER: Okay.

CHAIR TRACY CHRISTOPHER: Could I --

MR. PERDUE: That was Justice Miskel's position.

MR. ORSINGER: Is that obvious?

CHAIR TRACY CHRISTOPHER: Since we are -- since we are coming back on the summary judgment rule, one thing that we were discussing with the idea of resetting, okay, versus filing, right, refiling your motion for

summary judgment, right? Normally, if something got passed, you just call up the clerk and say, "I want a new hearing on it." Okay. Well, I don't think that works under the new rule that says motion for summary judgment has got to have, you know, a hearing date within 60 days, so just something for the committee to think about.

So even if we kept this language in there, to being reset for hearing is problematic, just from that point of view. So I would suggest that once a summary judgment has been denied, if you want it heard again, it has to be refiled, because otherwise, the judge will say, "Well, you know, I already gave you that 60-day hearing, so now I don't have to." And I'm afraid the Legislature would not like that idea. Roger.

MR. HUGHES: I'm a little concerned about how section (8) is going to affect summary judgment practice on governmental and official immunity, because a motion for summary judgment that asserts governmental immunity or official immunity as a defense is treated as a quasi plea to the jurisdiction, and, therefore, the denial of that motion is subject to an interlocutory appeal.

My concern is the Supreme Court has made it very clear that if you try to refile a plea to the jurisdiction or a motion for summary judgment on immunity, all your deadlines for the interlocutory appeal are going

to run from the first denial. You can't refile it, retool your motion, get another ruling, and then appeal. All of your deadlines are pegged to the first denial.

If a judge is truly saying, "I'm not ruling on the merits of your motion," there ought to be a way to say that can be put off without forcing the party to treat the denial as something that triggers an interlocutory appeal, because then it's going to go up on the record prior to that, and that may be something that the judge didn't want, nobody wanted. So my suggestion to deal with that is to say that a motion for summary judgment is denied without reference to the merits and without prejudice to refiling under those circumstances.

Hopefully, by including the phrase "without reference to the merits," we won't be deemed a ruling on the whether the defendant is entitled to immunity or not and won't trigger the appeal. I say hopefully because, as we all know, these sort of things often do get tested by an appeal, but I think it's the best we can do now to prevent what you might call hair-trigger appeals.

CHAIR TRACY CHRISTOPHER: So under current practice, if the judge wanted to continue it, there wouldn't be a ruling. It would just be a continuation, but, now, because the judge can't do that, we've created -- there is this problem.

MR. HUGHES: Yes. In other words, the interlocutory appeal would be pegged to the date a written order is signed, and if the judge signs an order with the word "denial" anywhere in it, the party may go, "Oh, my God, I've got to appeal now," which, you know, depending on the circumstances, maybe not what they wanted, maybe certainly not what the respondent wanted and certainly not what the judge wanted.

CHAIR TRACY CHRISTOPHER: Could that be fixed in the appellate rules?

MR. HUGHES: No. Well, I'm not sure how we would revise TRAP, and then we also have a statute.

CHAIR TRACY CHRISTOPHER: Right, I know it couldn't fix the statute, but --

MR. HUGHES: Yeah, we wish, but not. Maybe it might be a TRAP to do that, but that would be taking a look at rewriting that rule to make it clear that it's only an appeal from a substantive ruling, not a procedural denial.

CHAIR TRACY CHRISTOPHER: Judge Miskel.

HONORABLE EMILY MISKEL: I was going to say, I know it's often the practice of some government entities to file their plea to the jurisdiction together with a summary judgment on the same sovereign governmental immunity issue, but it's really the plea to the

jurisdiction that has the interlocutory appeal. So it's interesting that now the plea doesn't have that deadline to be ruled on, and the summary judgment does, but it might just change the practice of the governmental entity to only file a plea instead of also a summary judgment with it.

MR. HUGHES: Well, the way it has worked out is that the Supreme Court and the lower courts have said if your plea is directed only to the sufficiency of the pleadings, and a ruling on that would allow you then to refile immunity as an attack on the evidence, that is, is the evidence sufficient to get around the immunity, and that would not be -- that would not trigger -- you could appeal both rulings, but it's really tricky, because you have to show that your earlier motion was -- doesn't raise the same issues as your second motion.

HONORABLE EMILY MISKEL: I guess what I meant to say was that's always the case with a plea to the jurisdiction that's titled a plea to the jurisdiction and filed as. A lot of people do both, like belt and suspenders, also motion for summary judgment, but now with this new deadline, perhaps that's just not good strategy anymore and will stick to just filing the plea to the jurisdiction and not implicating this summary judgment deadline.

MR. HUGHES: Well, that might be a solution, a practical workaround, to say I'm going to file a plea to the jurisdiction about the sufficiency of the pleadings and then later file a plea to the jurisdiction attacking the evidence. That might be the workaround.

CHAIR TRACY CHRISTOPHER: Okay. I think we have one comment, Judge Gray, and then we're going to move to the disciplinary rules, because it dovetails into the summary judgment discussion.

HONORABLE TOM GRAY: Yeah, one real quick. If you do decide to leave in the (1) through (4), on number (2), that would do a denial even if you granted a continuance within the 90-day deadline, and so you need an exception on that that the court grants the continuance beyond the 90th day after the motion was filed. Does that make sense? You understand what I'm saying?

MR. ORSINGER: Absolutely. Yes, absolutely.

CHAIR TRACY CHRISTOPHER: Well --

HONORABLE TOM GRAY: In other words, if you set the hearing, and it was like on the 60th day and it was -- and they just wanted a five-day continuance or 10-day continuance, they're still going to get their ruling within 90 days, but --

CHAIR TRACY CHRISTOPHER: The hearing within 90 days.

HONORABLE TOM GRAY: -- they granted a hearing extension, and suddenly you've automatically denied it.

CHAIR TRACY CHRISTOPHER: Right. Okay. That's a good point. Judge Miskel.

HONORABLE EMILY MISKEL: Very briefly, the (1) through (4) was not supported by a majority of the subcommittee. This was just one of the items that was in here for discussion, I believe.

CHAIR TRACY CHRISTOPHER: All right.

Okay. We're going to stop on summary judgment, even though there's still a lot more to discuss, and move to the Code of Judicial Conduct, section three, because it dovetails with this summary judgment issue. And that's Judge Boyce.

HONORABLE BILL BOYCE: Thank you, Chief Justice Christopher. So if we just spent two hours debating this, could this ever be willful? I'm not sure.

HONORABLE ROBERT SCHAFFER: Don't be so sure.

HONORABLE BILL BOYCE: But it raises the larger question, and I think Judge Schaffer and Kennon have already flagged this, which is the remit for this next topic is in light of amendments from Senate Bill 293 that created time limits for rulings and other

requirements that have to be followed under the rubric of willful or persistent conduct that is inconsistent with the proper performance of the judge's duties, how much of this do we want to import into the Code of Judicial Conduct? And by this, I mean what level of detail, what language, what definitions?

The willful or persistent conduct language traces back to the Constitution. It's carried forward in Chapter 33 of the Government Code. As things stand right now, it really hasn't been part of the Code of Judicial Conduct, and the -- the code, which is attached to the memo that was distributed, I think reflects a lot of -- a lot of flex, which is appropriate, given what it is addressing. There's interests of courts. There's interests of judges. There's interests of the court system as a whole. There's interests of the litigants. There's interest of the attorneys and the advocates. All of this being taken into consideration when it comes time to determine is there going to be some sort of censure or sanction or other penalty directed at a judge for conduct by the judge.

And so now we have the referral that asks whether or not the Code of Judicial Conduct should be amended now that section 33.001 has been amended to say that the statutory term "willful or persistent conduct

that is clearly inconsistent with the proper performance of a judge's duties" has now been expressly amended to say, "including failure to meet deadlines, performance measures or standards, or clearance rate requirements set by statute, administrative rule, or binding court order."

The subcommittee looked at this issue and came down with a recommendation that the 10,000-foot level is that it makes sense to flag for interested parties that the code is being applied against a backdrop of a constitutional standard and statutory standards and potentially other standards. The recommendation is that that can be done in the preamble. You could also do it through comments, if that were the preference, but I think where the subcommittee came down -- and if I'm overreaching, anybody can add their additional thoughts, but I think where the subcommittee came down was that going much beyond that really potentially gets us into a thicket. A thicket in terms of the fact that these standards are evolving. They're evolving in the last month, so we've got amendments upon amendments, so I guess you could have an inquiry about willful or persistent conduct in a 90-day window when certain standards apply and subsequent to that when other standards apply.

The point being that the specific

performance standards are spelled out where they're spelled out, and they operate like they operate, and certainly those are going to be taken into consideration when the Judicial Conduct Commission is handling inquiries, when parties or courts or litigants are looking at the Code of Judicial Conduct, but the question on the table is in what level of detail do these need to be incorporated into the Code of Judicial Conduct itself?

And the subcommittee's takeaway was that they should be referenced, but that it would not be advisable to have wholesale addition of new defined terms and the use of those terms, because they're already set out, and the more helpful or appropriate or useful or practical approach is to reference where these standards can be found and that they may be potentially applicable, but not to repeat them or otherwise incorporate them into the code itself. So that was kind of the big picture recommendation.

A couple of subpoints within that. One was we have had some particular discussion about whether -- if the phrase "willful or persistent" is going to find its way into the code, should there be any additional effort to define what that means, and I think I could safely report that there was zero appetite on the subcommittee's part to try to define that further, and I think this

morning's discussion about timing standards for Rule 166a underscores why there's just so many variables. It's so context-specific that trying to further define terms like that would not merely be difficult, it would -- it would probably run afoul of other standards that are in other statutes. It wouldn't necessarily help the process.

At the end of the day, and this is me speaking personally, this is so -- these inquiries into judicial conduct are so highly context-specific that attempting a broader definition of a phrase like "willful" is a hazardous undertaking, particularly when the judges in Collin County can't talk to their clerks and they're in another part of the building. I mean, just all manner of particular circumstances like that. So that's one subpoint, and then I'll make a second subpoint and then be quiet.

One of the ideas that was floated was whether a way to address some of these considerations, without getting into all of the gory detail of exquisitely refined definitions, would be to look at a potential revision to amending Canon 3B(9), which currently reads, "A judge should dispose of all judicial matters promptly, efficiently, and fairly." The idea was floated maybe "should" becomes a "shall." I put that out for discussion. That is not a recommendation by the

subcommittee. That was a discussion point that was raised, and there's a little history to that.

There have been some judicial discipline proceedings where repeated timing questions and other circumstances have been found not to be warranting of discipline, because 3B(9) -- among other reasons, 3B(9) is aspirational, rather than a command. Those are out there. You can look at them and make your own conclusions.

I probably -- I would come down on the notion that promptly, efficiently, and fairly are subjective terms. They are in the eye of the beholder, and trying to mandate things that are exquisitely context-dependent and potentially very subjective is not going to be helpful, and so the bottom line, the recommendation before you is to add references to the other sources of standards that may be looked at in the terms of assessing whether a conduct satisfies the code or may be subject to discipline, but to not try to incorporate that, in whole or in part, into the Code of Judicial Conduct itself.

So that's the point for further discussion.

CHAIR TRACY CHRISTOPHER: Any disagreement? Judge Gray.

HONORABLE TOM GRAY: Remembering that I'm on the subcommittee but was unable to participate, the -- I

go back to my premise on the whole judicial conduct, that this is one of the areas where all of the standards by which the judge is going to be measured, i.e., the Constitution and statutes, should be part of the code, and I like having that one place to go to, against which my conduct will be measured.

At the very least, I would want the statutory definition of willful and persistent, as set out on page two of the memo, be included somewhere in the code so that, for example, a judicial candidate that is bound by the code would be able to go to it and read it and see it and understand it. Well, understand it might be a stretch, but at least read it. And it is -- I understand the pitfalls that come by attempting further definition thereof. I agree that we should not endeavor to do that, but the statute is the statute. Setting it out in the code, to me, makes a lot of sense, and it is a constitutional underpinning. So that would be my comments on it at this time.

CHAIR TRACY CHRISTOPHER: So when the Judicial Conduct Commission is investigating a judge, they send the judge a notice that says, "Your conduct violates X of the Judicial Conduct Code." And if we don't have this definition in the Judicial Conduct Code, what are they going to do?

HONORABLE TOM GRAY: Make it up.

CHAIR TRACY CHRISTOPHER: That's why I'm agreeing with Judge Gray that I think it needs to be in the code. Judge Orsinger. Or Richard. Not judge, sorry. I know you want to be.

MR. ORSINGER: I've never been honorable, right. So on a different point, but consistent in view, the Constitution requires standards like a judge may be removed from office for willful and persistent violation. When you get down to Canon 3B(9), though, it just says a judge should dispose of all judicial matters, and I think "shall" is more consistent with the constitutional import and also with the legislative intent that we really mean this. This is not an aspirational goal. If you chronically default any of your responsibilities as a judge, you can be removed, and so, to me, there is a difference. In emphasis, maybe only, and it may be that it's affecting only the people on the Judicial Conduct Commission, but it may also affect judges when they read that and then they say, "Holy moly, this is no longer something I ought to do, this is something I have to do." So, to me, substituting "shall" would be beneficial.

CHAIR TRACY CHRISTOPHER: And I would say "shall" --

MR. ORSINGER: "Must," "must," sorry.

CHAIR TRACY CHRISTOPHER: -- and then I would add in "and shall meet deadlines, performance measures, or standards or clearance rate requirements set by statute, administrative rule, or binding court order." So then the judge knows that that's what they have to do. And then, you know, if you don't make it, you argue in front of the Judicial Conduct Commission, "Well, you know, it's just one time. It wasn't willful or persistent, I'm really sorry," and that, you know, should let you off, but you know, if it's a hundred times, then they're going to say it's willful and persistent.

Kennon.

MS. WOOTEN: My preference would be to include the mandatory language but restrict it to what is actually mandated. Because if you don't restrict it, then a judge can be disciplined for not disposing of a matter promptly.

HONORABLE BILL BOYCE: Or fairly.

MS. WOOTEN: Or fairly. And those standards can be perceived differently, depending on who's assessing the judge's conduct. So I would limit it to what is actually mandated, bottom line, and not impose a mandate for arguably fuzzy standards.

HONORABLE BILL BOYCE: May I follow along with that comment?

CHAIR TRACY CHRISTOPHER: Yes, go ahead.

HONORABLE BILL BOYCE: I agree with Kennon's observation, because, you know, my overall understanding of the process is that complaints get filed for all manner of reasons. They get filed because there is a understandable concern about how something is happening. They get filed by dissatisfied litigants. They get filed by gadflies from time to time. And all complaints, all inquiries, need to be given appropriate attention and handled appropriately. I have some heartburn that a command that a judge shall rule fairly provides fodder for some types of complaints, so I'm echoing and agreeing with what Kennon is saying.

CHAIR TRACY CHRISTOPHER: Well, but there are findings from the Judicial Conduct Commission that someone's conduct violated 3B(9), right? I mean, there are current findings to that effect. So the Judicial Conduct Commission is certainly considering that finding, whether you have "should" or "shall" in it.

HONORABLE BILL BOYCE: Uh-huh.

MS. WOOTEN: But they'll have a lot less wiggle room if you replace "should" with "shall."

CHAIR TRACY CHRISTOPHER: I mean, the ones that I've seen under 3B(9), especially on "fairly," it's the judge should have recused and didn't, and, you know,

failed to refer it and did all of these other bad things in connection with a recusal matter.

HONORABLE BILL BOYCE: Uh-huh.

CHAIR TRACY CHRISTOPHER: But if -- if the Judicial Conduct Commission is going to discipline someone for that conduct, the more you define it, it seems to me, the better. Now, perhaps, you know, I mean, and I'm agreeing with Judge Gray that judges need to know, you have to meet these deadlines. Judge Estevez.

HONORABLE ANA ESTEVEZ: So I agree it needs to be in Canon 3B(9), and I also agree that we need to change the language.

I also wanted to educate the committee, for anyone that may not know, that last legislative session, that is when the Legislature decided to put performance measures on the courts, and in there, they also required regional presiding judges to assign mentors to judges who didn't meet those standards. They've been spending the last year and a half, and today's the last day that they'll be gathering data for the next cycle regarding disposition rates and for all types of cases and counties, and then they're going to be adding these motions, and they're going to be adding everything else for the last two years.

And I think that's extremely important,

because what had happened with some people, as we called judges and we told them that their disposition rate was under 90 percent, they would laugh and say, "Well, I work really hard. That's -- you know, what are they going to do to me?" And, apparently, it must have gotten back to someone, because they've decided that they could not only sanction you, but apparently remove you now if you don't get your numbers up. And so this is a true standard, and I think that judges absolutely need to know, not just coming from a presiding judge or not just having to read about it somewhere or whether or not they go to the right conference where they mentioned it, if we put it in that Code of Judicial Conduct, then the new judges are going to come in and they're going to be instructed about it.

And I just -- I find it extremely important because it really is a pet peeve with part of the Legislature, and they're just going to keep coming back if we don't take it seriously enough to even put it in our book, so it needs to be in there.

CHAIR TRACY CHRISTOPHER: I'm agreeing with the subcommittee that I wouldn't define "willful and persistent misconduct." I would just put meeting deadlines is part of your duty under 3B(9).

HONORABLE ANA ESTEVEZ: And the clearance rate.

HONORABLE BILL BOYCE: So, for clarity, is -- is the view that, without defining it, the term "willful or consistent conduct," et cetera, et cetera, needs to be in there, comma, "and this includes all of the deadlines," or is it leaving out willful or persistent, but saying in so many words, you know, part of your duties pursuant to Canon 3B(9) is to obey the deadlines and -- or that the standard is not satisified by failing to meet deadlines, performance measures or standards, et cetera, et cetera.

So I guess what I'm asking for clarity on is the key portion of SB 23 about failing to meet deadlines, it sounds like there's some view that that should be in there. Does that get tied to willful or persistent, or is it just a statement in there?

CHAIR TRACY CHRISTOPHER: I would just make it a duty under 3B(9) and leave willful and persistent alone, but that's just my feelings on it. Judge Gray.

HONORABLE TOM GRAY: I would leave (9) alone and insert the duty to perform without -- in other words, there needs to be -- because "should dispose of all judicial matters promptly, efficiently, and fairly," could be violated, but you may not have busted out of the performance measures.

CHAIR TRACY CHRISTOPHER: True.

HONORABLE ANA ESTEVEZ: That's true.

HONORABLE TOM GRAY: And so that is still aspirational, and I would leave (9) with "should," as it appears currently, but somewhere else -- and I don't know where the duties of the judge are specified, but it's basically to perform those duties without willful, persistent, and unjustifiable failure, as the statute defines.

HONORABLE ANA ESTEVEZ: I think that's better, so I want to change my answer to his.

CHAIR TRACY CHRISTOPHER: We're voting it needs to be in there. Come back.

HONORABLE BILL BOYCE: Okay. I would appreciate guidance on "should" versus "shall," because I'm hearing different things.

HONORABLE TOM GRAY: I think "should" on (9), and it remains unchanged. Then you have to figure out where you put the "shall" provision to not do it willfully -- willful, persistent, and unjustifiable failure, that that's a ground for discipline and removal.

CHAIR TRACY CHRISTOPHER: Well, I don't agree. I think that it should be -- I'm fine with "should," imposing that as (9), but then you shall meet your performance deadlines. That's -- you know, that's a provision in the code that says -- you know, because

that's you shall meet them, and you don't get disciplined until it's willful and persistent, but the goal is that we shall meet those deadlines. John.

MR. WARREN: Isn't "should" volitional? You should do this, you should consider doing this, but it's not necessary.

HONORABLE TOM GRAY: Yeah, if you look over at page 17 of the memo, which is the full text of the -- I'm sorry, 16 of the memo, somewhere there, "should" and "shall" are defined.

MS. WOOTEN: 15.

HONORABLE TOM GRAY: 15, Kennon tells me. Yes. Beginning of terminology, and that's why I was using the term aspirational, because, as you say, "should" is aspirational. It is not a requirement. It's what we want to happen. The "shall" is the part, if it's willful, persistent --

MR. WARREN: It's required.

HONORABLE TOM GRAY: -- and unjustifiable failure to meet the performance measures, then it is disciplinary in nature, including removal from office, and that's why I think you have to break the two out. We want it promptly, efficiently, and fairly, but you shall do it in a manner that is not willful, persistent, and unjustifiable failure to timely. So, anyway, that's the

thoughts. I don't know if that gives Bill any more guidance. I'll be in the subcommittee meetings maybe this time, and I'll --

CHAIR TRACY CHRISTOPHER: Any -- we've had a lot of judges weigh in. Obviously, it's more important to the judges than it is to the lawyers. Any lawyer input on this issue? Richard.

MR. ORSINGER: My view is that it's a good solution to leave this 3B(9) as "should," with the standards that are vague, like prompt, efficient, and fairly, but since we do have performance guidelines and they are specific, we ought to have a separate sentence that says, listen, this is not general. This is specific. You do this, or you could be in trouble. To me that makes great sense.

CHAIR TRACY CHRISTOPHER: Robert.

MR. LEVY: I guess as, you know, thinking back to my days in the courtroom, the question for the lawyer would be if you don't feel that the judge is performing according to the standards that now the Legislature have set out, what are the remedies, what are the steps you can take as an advocate?

One interesting issue, we were talking with Judge Evans yesterday on the business court issue, and he noted that the presiding judge will often deal with these

types of issues, but people don't know to bring it up to them. So, you know, if there's a case that's languishing, they will talk to the judge. They will deal with it. Maybe they'll move it to another court. And I think it's a broader question, not for this -- for the code, but the providing guidance to litigators to raise issues like this.

CHAIR TRACY CHRISTOPHER: All right. Anything that the task force -- or that the subcommittee needs from us?

HONORABLE BILL BOYCE: Nope.

CHAIR TRACY CHRISTOPHER: Okay. We are going to move on to the business court rules, hopefully discuss that for about 30 minutes, and then break for lunch. And if we need to come back, we'll come back.

All right. Marcy, I think that's you.

MS. GREER: That's me. So we have obviously submitted our proposal and our proposed rules that we voted on to the Court, and I don't know if anything is going to come out at 2:00 o'clock this afternoon in orders. They're going to keep poker faces, but we did get some comments to the subcommittee, one from Presiding Judge Grant Dorfman of the business court, and we've talked about those. I think he's got some good suggestions. I do want to say I think there was a

fundamental misunderstanding that both TBLF and Judge Dorfman had, and so we may want to tweak the language of the rule, and its focus -- all of these are focused on the transfer provision that goes into effect under the new statute.

The business court will have jurisdiction over cases that were filed before September 1 of 2024 in very limited instances, but these are to deal with cases that have been pending for a long time, not getting moved, that probably belong in business court, and that's at section 56 of House Bill 40 that implements this, and that is the -- it is based on an agreed motion by the parties. So if a case is -- would otherwise be in business court, but otherwise was filed before September 1 of 2024, there is a procedure now that we prepared a rule for, proposed rule for, excuse me, to how to get that into business court, and the statute gives us a lot of guidelines in that that we're bound by. So we proposed that rule, which is 363, to the proposed rules.

Like I said, we talked about where that motion is filed and how it gets -- and the procedure, and in a general sense, I think there's consensus, and we talked with Judge Dorfman as well about this, that the motion, the agreed motion, gets filed in the district court where it's pending, the case is pending, whether

that be in Dallas County, Bexar County, et cetera. And then it gets kicked up to the presiding judge, the administrative presiding judge, the regional presiding judge, excuse me, who in the case of -- we had a lot of input from Judge Evans on this, which was very helpful, because he is on the subcommittee, and he is a presiding regional judge.

And so the presiding regional judge would be the one to make the determination of whether it's going to get referred to business court, and of course, the business court has to accept it after that, but there are a lot of things that have to be considered and where they're considered and how they're considered.

We had originally proposed that the district judge, in referring the case to the presiding regional judge, would -- is it regional presiding or presiding regional? Regional presiding. Okay. I'm sorry if I keep getting that wrong. The RJA. Can I do that? All right.

The RJA is the one who will make the decision, and the RJA will be the one to confer with Presiding Judge Dorfman at the business court to have a conversation about whether this is an appropriate case to be transferred.

But there was some concern that the way that we proposed the rule's language made it sound like the

district judge had the authority to veto the promotion from getting to the RJA, and that was never the intent. Our intent was simply that the RJA is going to confer with the district judge and say, "Is this an appropriate case to get kicked to business court," and so we just wanted the regional -- I'm sorry, the district judge to give a thumbs up or thumbs down as to how they felt about transferring the case. It was never intended to be veto, and so if we need more precise language to make that clear, you know, we're very amenable to that, because, again, that was not the intent.

There is some sensitivity that Judge Dorfman raised, and I think appropriately, so that the parties may not want to file a motion that says anything more than "agreed" in the district court, because basically the grounds are you're not getting me to trial, and it's going to potentially appear to be critical of the judge, and I think that makes a lot of sense. We talked about that a bit, that maybe you want a bare bones agreed motion and then kick it up to the RJA, and the RJA has the ability to hold proceedings, can ask for briefing, can set a briefing schedule, do whatever needs to be done, et cetera, and also will be conferring with Judge Dorfman to find out whether the business court can take the case, because that's one of the -- one of the things that's required to

be considered in the statute, is what is the docket of the business court.

And again, it's one question if it's eight cases. It's a whole other question if it's 800. We don't know how many cases are going to fall within this category. I think initially there may be a lot. Over time that's going to fall off, because, you know, every day we get past September 1 of 2024 is less of an issue, and so -- so that was one of the suggestions that Judge Dorfman made, is that the initial motion just be bare bones and then briefing as to the factors, such as the demands on the district court and how quickly they're getting to resolution by trial, et cetera, would be addressed before the presiding judge where it may not be as easy to find and appear as critical to the judge that has to hear it if it gets remanded back to the district judge. So that was one of the issues that he talked about.

There are some discussions about having a three-judge panel to look at it, et cetera. We thought that was really too complex. It really ought to be very simple. Agreed motion goes to the RJA. RJA decides how they want to handle it. They reach out to Judge Dorfman, find out whether the business court can take it with its docket, and then a decision is made by the RJA about

whether to refer it. If it is referred -- and this was another suggestion that Judge Dorfman made that I think is a good one, and also TBLF, that we have a specific provision in the rule that says the business court accepts it.

As a practical matter, we didn't do that, because we felt like the conversation that happens between the RJA and Judge Dorfman, being the presiding judge now, would probably take care of it, because if Judge Dorfman says, "I'm not going to be able to take it" or "Our court's too busy," then the regional judge is going to deny it; and if he says "yes," then yes, but because the statute requires it, we have no problem adding that to the rule if that is necessary to be -- to fulfill the objective.

However, there is one consideration that the statute requires consideration of, but it doesn't say by whom, and that is of the jurisdiction of the business court. And both of the proposals suggested having some language in there about the RJA considering whether or not this case is within the jurisdiction of the business court, and I know Judge Evans feels very strongly that he does not want to make that determination; and I think that's appropriate, because, at least in federal court, a decision on jurisdiction can be preclusive of future

decisions on jurisdiction; and in our minds, it makes sense that the only person deciding the jurisdiction of the business court would be the judge to whom the -- the business court judge to whom it is ultimately assigned, if it actually goes there.

So it wouldn't make sense, and Judge Dorfman agrees with us, and Judge Bullard, I believe, agrees with us, as did our subcommittee, that the consideration of whether it's within the business court's jurisdiction should be tentative -- not even tentatively made. Just when the RJA is considering it and Judge Dorfman is considering it, they should only be considering is it possibly within the business court's jurisdiction.

And I don't know if we need language to that effect. I don't really think so, because if everything goes as planned and it ends up on the track that gets to business court, it's going to be randomly assigned to a business court judge in a proper venue. That judge will make the determination of whether it's within the business court's jurisdiction. So we did not want to add anything in there that requires the judges to have to think about jurisdiction other than the ultimate business court judge, if it gets there.

Let's see, what were the other -- there was also a suggestion by both Judge Dorfman and TBLF that we

make it clear that cases coming out of Montgomery County go to the Eleventh Administrative Judicial Region for this purpose, which is in the statute, because under the new -- under the House Bill 40 that's going into effect on Monday, the Montgomery County has been basically opted into business court jurisdiction and placed under the Eleventh Court's jurisdiction. Or the administrative region's jurisdiction. So that was just clarifying that, and we think that's fine. Let's see...

CHAIR TRACY CHRISTOPHER: Let me give just a little bit of background.

MS. GREER: Okay.

CHAIR TRACY CHRISTOPHER: The committee gave a rule to the Supreme Court. The complaints, discussion, came afterwards, and, you know, we're on a tight time frame, and I just asked the committee to look at it a week ago. So they did not have time to come back with the wordsmithing change to their rules, so do you need us to vote on whether the rules should be changed, or do you feel like the complaints made by Judge Dorfman are all good, and you need the time to do it?

MS. GREER: We would like the time to do it, because we agree with a lot of what he's proposed. We agree with some of the suggestions that have been proposed by TBLF, but there was not enough time to actually make

the changes, and we don't know if the Supreme Court is going to issue a proposed rule today, in which case -- no? Okay.

HONORABLE EVAN YOUNG: No.

MS. GREER: No, okay. So if there is more time, we would very much like more time.

CHAIR TRACY CHRISTOPHER: So are there any points that you would like the committee to vote on? I know we don't have new language to look at, but are there any points that the greater committee should talk about?

MS. GREER: The only one -- and this is one I haven't even touched on yet, is what Judge Bullard had proposed about the fees for the jury fee, because that is a little bit time sensitive, and it's a little strange because the original statute that we proposed rules for when the business courts opened, said that the Supreme Court was supposed to come up with a fee schedule.

We, as SCAC committee, proposed that the Court address that by administrative order, which is how the Court handled it, and Judge Bullard has suggested how the jury fee would be handled as part of a Supreme Court order, and so he -- I'll let you address it and present it to the group, but that is the one thing I think it would be worth having a vote on, just so there's clarity on this point. My personal opinion is, is that if the business

court judges have looked at this and considered it and think this is appropriate, I think we should support it, and it makes sense to me.

CHAIR TRACY CHRISTOPHER: Before we get into the jury fee, let's talk about the potential rule changes as discussed. And do we have any comments, I looked at Judge Dorfman's, and I agree with it or disagree with it? Robert.

MR. LEVY: Well, I think it might be helpful if the committee goes to -- it's page 43 of the amended -- or the updated package, and I think it's page 33 of the original one, and that's Judge Dorfman's proposal, but as Marcy was relating, we had talked about amending that to, under subpart (c), the transfer decision. We would suggest, I think, at least in terms of our discussion, that we would take out (c)(ii)(a), and that's the language that says whether the case comports with the business court's jurisdiction, because that's an issue that would put the regional presiding judge in the position of having to make a substantive law determination and would need to look at the precedent from the business court where it's addressed its own jurisdiction, and that really is not a useful exercise for the presiding judge to address.

The questions about the capacity of the business court and whether the case involves complex civil

issues that's part of HB 40 would be part of what the presiding judge would decide, right, based upon the input from the presiding judge of the business court. So that decision would be informed by the business court presiding judge.

And then another point that Judge Evans addressed, under subsection (c)(iii), it talks about if the regional presiding judge signs and files, this is the language in terms of what happens if the decision is made not to transfer the case; that is, it stays in the district court; and Judge Evans suggested that it should be referred to -- or to the regional presiding judge to address, because if there's a problem with a case not being effectively handled by the district court, then the regional presiding judge would want to talk about potential solutions. And so rather than just automatically sending it back down to the district judge who has the case, that it would stay with the regional presiding judge for further determination. And that's an issue that might cause some discussion here. I'm not sure. It seems like a good idea, but I didn't know if this group would have thoughts about that.

MS. GREER: Well, let me just clarify. We went over that with Judge Dorfman just a few minutes ago.

MR. LEVY: Oh, you did? Okay.

MS. GREER: And he was amenable to taking it out, because he said "I hadn't even thought about that implication, but that makes so much sense that the regional presiding judge being made aware that there's a problem with this judge and this case might want to have full authority to do whatever." So he was amenable to taking that out. So it may be a good idea that we go back to committee --

MR. LEVY: Sure. That makes sense.

MS. GREER: -- and tweak this and come up with -- and one other issue that might be of interest to the group to comment on is the provision (f) about orders are not appealable.

MR. LEVY: Right.

MS. GREER: We were -- we were thinking that that provision doesn't need to be in the rule, because orders are appealable if by statute, or in the case of some business court rulings, if by rule, if the Legislature gives the Supreme Court authority to do that, and so the decision about whether it's appealable or not, the presumption is it's not appealable and we don't need to say that, and Judge Dorfman was fine with that as well. So, you know, I think we -- in fairness, we didn't have the full committee available yesterday when we met, so I think a little more time would be helpful to really, you

know, noodle on this.

CHAIR TRACY CHRISTOPHER: Judge Gray.

HONORABLE TOM GRAY: I was wondering if Marcy had -- or the subcommittee had considered under the proposed 363(a)(ii) whether or not it's the party or the clerk's duty to bring the motion to the attention of the judge.

MS. GREER: They're going to consider it now.

HONORABLE TOM GRAY: That is not -- yeah. No, I'm not suggesting anything. I'm fine with the way it is.

CHAIR TRACY CHRISTOPHER: All right. So is there anything that you -- that we haven't talked about that you think the greater committee needs to talk about?

MS. GREER: I don't think so. Robert, Judge Bullard.

HONORABLE JERRY BULLARD: The only other comment I would make about the order not being appealable issue, I think the -- I think the concern was if there was a jurisdictional determination by the regional presiding judge, and during that process that that would -- that part is not one we should say should not be appealable. Now, the decision that's made by the judge, once the presiding judge weighs the issues of the trial court's

experience, whether they can get to the case or not, I don't think anybody had any heartburn with that if there was something in the rule that addressed that issue that would be nonappealable, but I don't know that it needs to be in the rule either, but heartburn, if there was any, was on the jurisdictional question.

CHAIR TRACY CHRISTOPHER: Okay. The Supreme Court is next going to take this up on September 23rd, so if the subcommittee could have a draft done maybe a week before that and send it to the entire group, we'll just have some last-minute suggestions from the entire group by e-mail.

MS. GREER: September 23rd.

CHAIR TRACY CHRISTOPHER: A week before that?

MS. GREER: Yeah.

CHAIR TRACY CHRISTOPHER: How does that work? Obviously, there are people in this group that are more invested in this particular issue than others, and I'm sure they'll look carefully at your proposed revisions.

All right. Let's talk about the jury fee issue quickly.

HONORABLE JERRY BULLARD: Okay.

CHAIR TRACY CHRISTOPHER: Because I did say

we would break at 12:30.

HONORABLE JERRY BULLARD: Well, I'll be as quick as I can. You know, HB 19 originally charged the Supreme Court, obviously, with adopting the fees that the business court would charge, which included a jury fee, and the Court did so with its order, and I forgot the date of the order. I don't have it with me, but, essentially, what the order said is the business court will set the jury fee in an order and said what the fee will include.

If you look at our materials, I have page 15 of 33 in mine. I don't know what the page number is in the PDF document, but you'll see the text of the language.

MR. ORSINGER: It's PDF page 45, of PDF.

HONORABLE JERRY BULLARD: Page 45 of PDF. And the red print was what we suggested be added to the rule, and, of course, the black line or the redline is what we suggested be changed. The concern that the court had, the business court judges, after we had talked about it, was, number one, there was a question, I guess, whether we had the statutory authority to collect a fee or the components of the fee, whether it would be more than just summonsing a jury or the expenses associated with that, but also reimbursing for facilities or questions along those lines were questions that we had.

So during the legislative session, we had

talked to OCA about this, about the issue, and the comptroller tended to agree that there may be something that would need to be added to the HB 40 for the budget to deal with this issue about the jury fee and collection of what -- I call it a jury fee, but it encompasses a lot of other expenses.

So in the packet, on the backside of my memo I highlighted the rider in the budget that deals with the business court filing fees, and through that process of suggesting language to OCA and then the comptroller suggested its own, this is when we looked at that and compared it to the Supreme Court's order about what the -- what the fee ought to be that the business court charges.

And just a little bit of background, some of our courts are located in county facilities. Some of our courts are located in a law school. We're not going to have jury trials there, but since our facilities are in different locations, there could be a jury trial, arguably, in some other facility that's not county-owned, and we didn't know if we had the -- we had the authority, based on the language in the Court's order, to be able to collect those fees, reimburse those expenses, or whatever it may be that comes to us in terms of what we determine after talking with the county, or whatever the political subdivision is, that we would be able to, number one,

collect those fees and then disburse them to the entity who has incurred the expenses.

So a lot of the -- the language that you see as our suggested changes is intended to clarify what authority we have to collect fees and expenses and then reimburse the parties or the entities who had incurred them. Everything else I think is self-explanatory in the memo as to what our suggested changes are, but it's more just to make sure that we can do what we need to do to have a jury trial when we have one. And just for everyone's reference, of the cases that have been -- that are currently pending, about 46 of those cases have jury demands associated with them; and when those come in and when the parties demand a jury, we are already coordinating with counties, or whoever it is, to reserve space to have a jury trial, if we get to that point.

And as we get closer to that trial date, what we envision doing is sending a letter or communicating with the counties, or whoever we need to communicate with, to say this is the jury -- this is the jury trial date, can you give us an idea of what your expenses are going to be? That's going to be an estimate for summonsing a jury, security measures, facilities charges, a lot of things that go into that calculation, and that's going to help us determine what that fee is

going to be. The Court has said it needs to at least be $300. Well, it's going to be more than that when we start factoring all of these expenses, and so whenever we talk to counties or jurisdictions and we get the information from them about what it's going to cost to do this, do this trial, that we can collect that from the parties, and then disburse those funds after the case goes to trial.

So with all of that background, that's why we have our suggested changes to the language in the order.

MS. GREER: It's on page 45 of the materials, the amended revised materials.

CHAIR TRACY CHRISTOPHER: Do you want to have the business court reimbursing fees, or do you want the Office of Court Administration doing that for you? Because when you become in charge of money, you are going to have to have -- follow all of the state rules involving spending money, which are complicated.

HONORABLE JERRY BULLARD: I understand. Our understanding was that we had been charged with collecting that fee. So, we, being the business court.

CHAIR TRACY CHRISTOPHER: But you can collect the fee, but the rule says you're going to reimburse people.

HONORABLE JERRY BULLARD: Yes. Okay. I

certainly understand. I would be happy for someone else to do that, do that for us.

CHAIR TRACY CHRISTOPHER: Well, I mean, like, so the courts of appeals, we have an accountant on our staff that goes to many, many hours of training to understand the rules related to being a state entity using our money, and I'm saying that you're not in a position to do that.

HONORABLE JERRY BULLARD: Well, and as I understand it, too, of course, Office of Court Administration pretty much administers our budget right now, so all of our staff is hired by the Office of Court Administration, all of our -- everything, all of our expenses are paid through them. So I guess when I say, the Court, I would like to be able to say that is the Office of Court Administration doing that, but if we're the ones charged with doing it, then we wanted it the right way.

CHAIR TRACY CHRISTOPHER: Because the proposed language says the business court will reimburse. I would say -- I would change that to the Office of Court Administration.

HONORABLE JERRY BULLARD: I would welcome that change.

HONORABLE NICHOLAS CHU: Well, and, Judge

Bullard, educate this little probate judge here about who's your clerk? Is it the clerk of your county that you're sitting in, or is it a --

HONORABLE JERRY BULLARD: Well, there's a clerk of the business court who is here in Austin.

HONORABLE NICHOLAS CHU: All right. So because I think because the way fees are collected for all other courts is the clerk collects the fee and then the fee is distributed by court order by the clerk. And so I think that process is essentially the same for the business courts, if it's organized with its own clerk, is that you would -- you would order the clerk to collect the fee, and then whoever the business court is organized under, whether it's OCA right now or comptroller's office, however you guys deal with those fees right now, it just goes through their processes.

HONORABLE JERRY BULLARD: Yeah.

HONORABLE NICHOLAS CHU: So I would think the rule would just say the clerk of the business court instead of the business court on there.

HONORABLE JERRY BULLARD: Yeah. I would be amenable to that as well, but if the Office of Court Administration is the one who needs to be disbursing funds, we're happy with that, I would imagine.

CHAIR TRACY CHRISTOPHER: Unless there's

something in the statutes that would prevent that, I would suggest that that's the language you should have in there. Because you-all and your clerk, like our clerk of court, you know, we're an agency, just sort of -- which is a little bit closer to what you-all are versus what a district clerk is in terms of spending money and, you know, the -- so we are an agency. We have a budget, and we have to follow all of these state rules when we spend money.

All right. Right now, OCA has been, for example, renting space from Harris County on behalf of the business court judges that office in Harris County building, and, you know, this doesn't strike me as anything different, that you should -- you should make sure you can collect it, but then you give it to OCA and expect them to pay it. Unless there's something in the statute that says you can't.

HONORABLE JERRY BULLARD: I would be happy with that arrangement. I would be ecstatic if they're doing that. We were working under an assumption, which is a bad thing to do. I understand sometimes it assumes things, but the language in the existing order did talk about the invoices being submitted to the business courts, the information necessary to issue a fee order, that perhaps we were the ones that actually had control of the

funds, our clerk, not the court, but the clerk would, but if it's Office of Court Administration, I am happy to allow them to do that.

CHAIR TRACY CHRISTOPHER: It's a lot of work, if you're in control of the funds.

HONORABLE JERRY BULLARD: It is.

CHAIR TRACY CHRISTOPHER: So I would suggest that you try not to be.

HONORABLE JERRY BULLARD: Okay. I will adhere to that suggestion. But, no, that's a fair point.

CHAIR TRACY CHRISTOPHER: All right. Any other discussions on this point? Yes, John.

MR. WARREN: I would just like to remind that if you are collecting money, then you're also required to be audited, so I would just like -- just as Justice Christopher said, let OCA do that.

CHAIR TRACY CHRISTOPHER: Yeah. You do an order saying this is the amount of money, you pay it to OCA. You tell the parties, pay it to OCA. Then OCA keeps it and does the payment.

HONORABLE JERRY BULLARD: I'm in favor of that.

CHAIR TRACY CHRISTOPHER: Okay. That's a very good point, John, about collecting the money. You do not want it written to your clerk. Okay.

All right. Any other discussions? If not, we'll take a lunch break for an hour.

(Recess from 12:35 p.m. to 1:21 p.m.)

CHAIR TRACY CHRISTOPHER: We're going to start with Rule 4, but it's going to be quick. And Justice Gray says he doesn't have any comments on it, so we're bound to move quickly. And, let's see, my Amarillo group are going to be leaving early, is what I have heard.

HONORABLE ANA ESTEVEZ: Two of them already left.

CHAIR TRACY CHRISTOPHER: Yeah, they had to leave early because of bad weather, so we're going to try and move forward if we can.

All right. Let's talk about Rule 4.

MR. LEVY: So you'll find it on page 363 of the original package. It's the last tab of the updated package, and this is a memo from August of 2024, and the issue is the fact that under Texas Rule of Procedure 4, which is the rule that has the last day language and computation of last day language, does not have a clarity in terms of what day you count when you count backwards from the day that is set out in the Rules of Civil Procedure, and it has caused a lot of confusion. I remember personally not being sure of what that means, particularly, even in the summary judgment context, with a

filing that is seven days before the hearing, so you don't know which day you start with.

And the suggestion that came in externally was that we should consider the language that the Federal Rules of Civil Procedure have as Rule 6(a)(5) that defines next day as "The next day is determined by continuing to count forward when the period is measured and an event" -- "after an event and backwards when measured before an event." And the backward language is really the key addition. You can see in the memo the discussion. There are a few cases on this topic, but there is clearly confusion, so the committee, the subcommittee, was unanimous in suggesting that we recommend the adoption of the additional language.

CHAIR TRACY CHRISTOPHER: All right. So adopting the language that's already in the federal rules. Do we have any discussion on that? Judge Schaffer.

HONORABLE ROBERT SCHAFFER: Well, there's one case in there that I think is almost right on point to what we're discussing, and that's the *Hammonds vs. Thomas* case, and I have very intimate knowledge of that case, because that was my case that I appealed, because I filed my response to the motion for summary judgment on July 5th, because July 4th was a holiday, and I happen to think they were very wise in their decision in the

Hammonds case.

I think -- and all kidding aside, I think that's the right decision, because if it's not, if you go backwards, then that 14-day period, for instance, the 14-day period, I have to respond to a summary judgment has now been reduced to 11. And so the other side of that argument, well, they only have six days to reply, well, that seems more fair than taking three days away from the respondent in a summary judgment. So for that reason, I think it should be you count back a week and then you go to the next day, which would be forward, and not backward.

MR. LEVY: Well, I would amend then my motion to call this the Judge Schaffer rule.

CHAIR TRACY CHRISTOPHER: Any other comments on that? Yes, Rich.

MR. PHILLIPS: Maybe I'm just dense, but I don't understand what the rule does. It says I keep counting backward when measured before an event, so if it lands on a holiday you go -- you keep moving backwards one day, so my stuff is due a day before it would have otherwise been due? Or I get an extra day because -- I read this a couple of times, and I was like I don't understand how this works.

MR. LEVY: And, Judge Schaffer, you can correct me if I misstate it, but as I understand it, if

you're -- if the time line is based upon the date of the hearing --

MR. PHILLIPS: Right.

MR. LEVY: -- and you have seven days, you would count backwards, so seven days and then if the seventh day is a holiday or a weekend, then you would continue to count backwards so that it would be -- so if the seventh day is a Saturday, you would keep going to the Friday.

MR. PHILLIPS: So my response is due Friday instead of Saturday, so it's due earlier.

MR. LEVY: Friday instead of Monday.

MR. PHILLIPS: So due earlier than it otherwise would be.

HONORABLE ROBERT SCHAFFER: Correct.

MR. LEVY: Correct.

HONORABLE EMILY MISKEL: I think the place where it often comes up is discovery, so the discovery period closes 30 days before trial, and you have to send your request 30 days before that. Do you get to -- this is a Sunday, get 29 and then another 29, because that one was also a Sunday, and I think this way would say, okay, 30 days before trial is a Sunday, you actually have to send your -- the discovery period closes 32 days before trial, which is on a Friday, and if you're going to send a

request, you've got to count 30 days before that, and if that's a Saturday, it's due 31 days. That make sense?

MR. LEVY: And the biggest issue is this provides clarity in the rule so that you can know what day it is and not have to guess.

MR. ORSINGER: So, Robert, the way I would phrase this so it's more intelligible, is if counting forward, roll forward; if counting backward, roll backward. Now, that may be too informal for the rules, but it's certainly clearer than this.

MR. LEVY: I don't think that there's any issue in terms of the specific language, if it would be clearer or if there is another way to add a word to --

MR. ORSINGER: This is awkward wording.

MR. LEVY: Yeah. Our view was that we should clarify it. I don't think we were wedded to specific language.

MR. ORSINGER: Yeah. Well, I don't think you can roll around in the rules, but this is clearer than our rule, which doesn't even address it.

MR. LEVY: Right. Well, that's the issue.

MR. ORSINGER: But I think that, though, after a while, after a few CLE lectures, after getting your fingers burned a few times, you'll understand what this rule means.

MR. LEVY: And if it's helpful, we maybe could add a little explanation into the committee note. I mean into the --

MR. ORSINGER: Comments.

MR. LEVY: Into the comment.

MR. SCHENKKAN: It's the Schaffer rule with the Orsinger comment.

MR. ORSINGER: Yeah, we could. Or we could just put it up on the internet, you know, just --

MR. LEVY: Right.

MR. ORSINGER: How to interpret Rule 4.

HONORABLE EMILY MISKEL: Another thing, you could just be a little wiggle room in it, so it says, "Next day is determined by continuing to count forward when the period is measured after an event and continuing to count backward when measured before an event," just to help with sort of what Rich was talking about, do I change direction, do I keep going.

HONORABLE TOM GRAY: I know I said I wasn't going to say anything.

CHAIR TRACY CHRISTOPHER: Yes, Judge Gray, sorry. You promised.

HONORABLE TOM GRAY: And I hate the comparing anything to the federal rules, but the federal rule uses the definition as set out in the memo, as I

understand it from Robert's memo, and I am -- I think there is value in using the same language as the federal rule.

MR. ORSINGER: What value would that be?

HONORABLE TOM GRAY: That would be that the federal rule is already there. It's established. It has the judicial interpretation, all of which could be argued in Texas as persuasive, not binding.

MR. ORSINGER: And that's an advantage, huh?

HONORABLE TOM GRAY: In this instance, I would say that it is.

MR. ORSINGER: Okay.

HONORABLE TOM GRAY: Which is contrary to the position I normally take.

MR. ORSINGER: All right.

CHAIR TRACY CHRISTOPHER: Remember, no stray comments. Dee Dee has to keep us all in line here.

Okay. All right. Anyone opposed to the change? Judge Schaffer. Anyone else?

All right. Then we'll move on to our next topic.

MR. ORSINGER: Wow, good job, Robert.

MR. LEVY: Thank you, thank you.

CHAIR TRACY CHRISTOPHER: We're going to do third party litigation funding, hopefully, and then we'll

move to confidential identity in court proceedings. Hopefully you all can still be here. If we have to jettison something, sorry, Roger, it will be the evidence things.

MR. HUGHES: I'm heartbroken.

CHAIR TRACY CHRISTOPHER: So we're putting you at the end.

All right. Robert.

MR. LEVY: Okay. So if you would go to page 105 of the package. It is under Tab 6. That is a memo from the Rules 1 through 14c subcommittee, although I will point out that because of timing we didn't have the opportunity to fully vet it, but the purpose of the memo is to update the committee on the topic we last discussed in November of 2024, and at that time, after a pretty fulsome debate, we had not had the opportunity to complete that discussion, and I think that there were some members who had expressed a desire to gain more familiarity with the issue.

This is -- also in the memo, included some of the more recent developments that have taken place on the topic. There has been a considerable activity, as noted in the -- as we discussed at the last meeting, the federal -- and I'm sorry, Justice Gray --

HONORABLE TOM GRAY: That's okay.

MR. LEVY: The Federal Civil Rules Advisory Committee had appointed a subcommittee to look at this question. They had discussed it previously, but the -- they had, for the first time, a specific committee focused on it, and they are continuing their discussion on the topic. They will actually be having a conference at George Washington Law School in October, right before the committee meets in October, and so I anticipate that there will be significant discussion there as well.

There has also been a lot of state legislative activity that a number of states in 2025 considered and adopted TPLF disclosure language, and some Legislatures considered and did not adopt it. There was a bill that was filed in the Texas Legislature that didn't -- the chairman did not ask for a hearing, so that bill did not progress; and one of the issues there, as I understand it, is that the goal was for the Legislature not to address the issue in deference to the Supreme Court, and with the advice of this committee, to consider whether the Court should adopt a rule; and that does raise the question about if this is a political issue or a policy issue, should this be a topic that is best left to the Legislature versus the Court regarding whether disclosure should be required.

And I think, in my view, that the -- the

right answer is that the Court really is in the best position to consider and adopt rules that relate to procedure, including disclosure of the information in litigation, and that, while the Legislature certainly is a policy-making body, they are not always the most adept at legislative language that comports to clear rule-making, as we saw in some of the other instances, such as business court rules.

The -- another factor that is set out in the memo is that -- or something to consider as one of the questions that came up at our meeting is what -- what difference does disclosure make? Why is it pushed by the proponents? Why is it necessary? How does it change the case or the outcome of the case? And the memo discusses the content of specific funding agreements that have been disclosed through disclosure, or in cases where there has been debate about -- or the lawsuits about the funding agreement itself, so funder and party have a lawsuit, a breach of contract suit, and the funding agreement is relevant to that proceeding, and so looking at those agreements that have been disclosed, it provides, I think, a very important and -- perspective on why funding disclosure might be important and might be significant to the court and the litigants.

Obviously, there are a number of arguments

as to why that shouldn't happen, and we'll defer to Mr. Perdue, Jim, to discuss those. The memo does relay a number of the arguments that have been made against disclosure, but I think that one of the key elements for this committee to consider is how the existence of funding changes significantly the dynamic of a litigation proceeding, the ability to settle, the limitations that might exist from the part of the plaintiffs in terms of whether settlement is practical or possible, depending on where the case is or what the -- what the dollar amounts are being discussed, who has the authority to make that determination, and whether, in fact, the plaintiff would even have the authority to settle based upon provisions that might include nonmonetary relief.

I do also want to point out, we have gotten some input this week from the Alliance for Responsible Consumer Legal Funding, and Eric Schuller is here on their behalf. They have commented about the desire or the suggestion that a disclosure rule would not -- should not include and would need to be revised to make clear it doesn't include circumstances where there are funders or loans that are made to individual plaintiffs to pay their expenses, medical bills or whatever; and this is a component of the funding world that is very different than the funding that the disclosure rule is designed to

address.

In those circumstances, a plaintiff might receive a loan for expenses, and the plaintiff would not be obligated to repay the loan if the lawsuit -- if the plaintiff does not recover, but if the plaintiff does recover, the plaintiff repays the loan plus some component of interest, but the funder does not get a percentage of the proceeds of the case. So they are only getting their money back plus the interest, and I don't believe that the disclosure that's been proposed is trying to get at that type of funding.

Additionally, there are situations where there are funders, people that are funding lawsuits on, you know, social issues or political issues; and there are groups that are supportive of lawsuits that are being brought; and they might, in fact, provide funding for that litigation; and they would -- if there is a recovery, if -- in that case, then they would be entitled to get their money back, plus probably some, you know, small interest component. That also is not the type of funding that the funding disclosure rule is designed to address.

That doesn't change the dynamics of the case. It doesn't impact questions about decisions on proceeding, settling, or otherwise, and is not a situation where the funder has an interest in the percentage of the

outcome. They are simply going to get their money back that they had loaned to the plaintiffs to bring the proceeding.

The -- one of the other issues that the funding dynamic raises, and again, the memo talks about the situations with the different types of agreements and how they -- how they work in real practice, that if there could be situations in cases where there's funding provided by the funder to the plaintiff or the funding is provided to the law firm; and it could be a situation where the law firm is getting paid by the funder and the funder has a percentage of the outcome and they have input into how the case is managed; or the funder could be funding a portfolio of cases for the law firm, and the funder might be involved in developing the cases or not, but they still would have some say and control over how the litigation progresses.

And those facts, I do think, change the dynamic of the case, and more significantly change, or potentially change, the dynamic of the justice system and our trial courts, to the extent that the funding itself becomes the reason for litigation and not the merits of the individual case and the efforts of the plaintiff to obtain justice and the defendant to defend themselves, and that might be fine. It might be a good thing. It might

open up courts to new opportunities, but I think it's an important really critical issue, and without disclosure, it's unknown, because you don't know whether funding is impacting the case or not if there's no disclosure.

One interesting fact, at least I found it interesting, that was reflected by the -- in the discussion of the federal disclosure rule, is that some estimates are that at least 50 percent of the cases in IP litigation are funded, where the funders have a percentage interest in the outcome of the case. So this is not a minor trend that's only hitting a few cases. This is a very significant trend that promises to have a long-term impact on our justice system.

I learned today that the Arizona Supreme Court adopted, yesterday, a funding rule that -- or funding disclosure rule that will go into effect next week, and it's a dynamic that courts are addressing and Legislatures are addressing, because there is a significant amount of money now that is impacting the process.

Also of note, may be relevant, is the fact that funders are talking about even investing in law firms generally, and in states like Arizona, where they've allowed non-attorney ownership of law firms, the funders are talking about purchasing an interest in the firms

themselves. I don't know that that would be covered by a funding disclosure rule, but it does reflect a very significant dynamic in our legal system that will be important for, I think, this committee and the Supreme Court to be knowledgeable about.

I think that's kind of the overlay of the issue. And, Jim, did you want to add to my comments or respond?

MR. PERDUE: Well, I don't want to add to your comments. So I got -- I pulled this, and Robert's been very kind to include me in this committee a little bit late. John Kim, as y'all know, has -- is having some issues, and he's not here to address this, and John's in a little different situation because John handles more commercial-oriented litigation than I do, so I begin with the caveat I don't handle intellectual property cases. I don't handle very, you know, super large commercial versus commercial cases. And I don't want to belabor too much this, out of my ignorance.

What Robert just said at the end I think was important, is my understanding of this universe, to the extent you guys have a memo here, he has cited a -- I think three examples of funding agreements that were obtained somehow in litigation from 2014, one for 2018, and one for 2019. All of those obviously were produced by

court order, so in specific cases where the issue is raised, there is a remedy in the judicial system for this access to this.

The rubber meets the road, however, and I told Robert this up front, is that the rule as written takes very much a sledgehammer to the pen and would address it basically in our discovery rules in 194 of mandatory -- of an additional element to mandatory disclosure in all cases. Robert was kind enough to concede to me that at least the goal of the proponents of this rule are not trying to get to consumer funding, which he just referenced at the end, which are kind of loans directly to the party, but those loaners do have an interest in getting repaid out of the recovery, which would make that agreement subject to the rule. And I don't -- I think even ExxonMobil would concede it's looking at different issues involved in a party that has it in federal court over climate change litigation versus somebody who is suing Exxon for an F-250 hitting it after an oilfield incident. Those are just two different instances, but the remedy is identical under the proposed rule.

To the big picture question, this has been a legislative issue in every state that's addressed it. Robert is correct that the Federal Rules Advisory

Committee has been studying it for sometime. He cited you multiple states that have addressed it by legislation. This is legislation that has hit the Texas Legislature at different iterations probably for the last multiple of sessions. Again, that legislation has tried to be more nuanced in addressing commercial lending for financing a piece of litigation through the firm versus consumer lending for a bridge or interest of somebody who has suffered a -- you know, and now can't work, which, again, as I understand, is not necessarily the goal. But it has represented a policy enactment.

I think Robert can correct me. I think a few states have enacted this. Maybe Jersey. Jersey is unique, for multiple reasons, but, generally, this has been addressed through a policy question and, thus, a legislative question. In the big beautiful bill there was a lot to do with this area and a massive change to the taxation status on these types of loans that comes -- let's be fair, comes from the exact same proponents of the rule for disclosure were behind the legislation, the purpose of which is to deprive capital to certain entities in -- in the economy. And disclosure is designed to deprive capital. That is the end point.

So when Robert and the proponents of the rule say that the rule is designed to give you disclosure

to let you know about the interests that are involved, what you're talking about is allowing the defendant to know where capital has come from that has allowed a law firm that litigated against Fox News related to lies about a voting company, you're talking about a defendant being allowed to know where capital has come to allow a defendant to allegedly move literature in the medical marketplace regarding birth control issue -- birth control pharmaceuticals.

And that's what these things do, at the end of the day, is they allow the defendant to understand the flow of capital to people who are making claims against them and without comments about the -- especially the 2014 one that they apparently got, and they got it by court order. These agreements are taken on by, you know, pretty advanced counsel, and they end up representing a repayment interest in the recovery of the lawyer, generally. I will admit that I do not know what the contents are as they exist in IP litigation, because I don't do IP litigation, and those obviously live in federal court, and they're not -- they're not really the business of the Texas Rules of Civil Procedure, when you come to saying that there's a bunch of funding going on in patent cases, which don't exist in our system.

So I think that this is a -- this is a

nationwide push. The proponents can't deny that it is -- the U.S. Chamber is very much behind this push. They have drafted these rules in multiple states. They have been behind the push for the rule at the federal level. They have been behind the push for the legislation that was part of the big bill that -- and then it got pulled out in the negotiations between the House and the Senate on the federal level.

So it does constitute a policy decision when it comes to capital flows. This has been an issue that has been presented to the Legislature by proponents at various times. We've had -- we've got a couple of more on the agenda today that the policy decision was made by the Legislature to put rules in the Court's decision, but they're policy decisions, and the policy decision was then made by the Legislature. This is an instance where the proponents of the rule have not been able to win the day at the Legislature, so they're bringing it straight to the Court, and the map goes to show you that the proponents of the rule then take successes in various states to other states to support the effort in those states.

Let me conclude with Arizona. Robert and I might agree on this, above all else. Arizona is a model of a lot of things that are going wrong as far as the practice of law. If there is private equity that is

taking ownership stakes in law firms for the purpose of having ownership in the law firm, for the purposes of entrepreneur litigation, Arizona has made that policy decision to open that market to what it is. From my perspective, it's bad for the practice of law, but even Arizona, because they've -- they're redefining the Wild West, as a policy decision, not by rule, but by regulation in their statutory scheme, is now having to address that private capital behind those ownership interests. And that is the -- that is the ramification of Arizona, but realizing that the law that passed in Arizona has to do with regulating these entities, and much of this has to do with the, quote-unquote, foreign capital.

We have had similar issues in the state regarding BlackRock and other funds, the ability to write bonds in the state, all addressed at the legislative level. And so a rule that just takes to the rules of procedure and mandate in every single case that it's as it's written, anybody -- anybody that has an interest in the recovery of -- and within the case, other than the lawyer or an insurance company, must be disclosed to the defendant for the defendant to assess it.

It doesn't change the path of litigation, by the way. It just allows the defendant to have knowledge that it exists, to use it then for whatever purposes it

feels, and I can see how that may make some sense in tailored intellectual property litigation. Two of the instances that are cited in the rule, in the memo, are specific to patent litigation. There has been a wealth of literature regarding patent trolls and the problem that exists in patent litigation regarding patent trolls. There has been a ton of rules to address that. There's a lot of case law around it, and even then, you know, you're confronted with a policy decision regarding that flow of capital.

So a rule has not been brought to you that is designed to kind of carve out consumer loans. A rule has not been brought to you to kind of address the nuances that even Robert concedes exist in the marketplace, a marketplace of which I will be the first to admit I am not familiar, but there's a lot of issues; and, ultimately, at the end of the day, you're brought a political question versus a procedural question; and it's this committee's role to advise the Court on whether it wants to weigh in on a political question versus a procedural question.

Robert and I have a different take on that. I think it's clearly a political question. I think all of the activity around it is political. I think the fact that this was -- this issue was brought to the committee by a -- by a lobbying group, which tells you, I mean, it

wasn't brought by like a judge or somebody that confronted it in state court, district court litigation in the state of Texas.

Robert might be surprised at how much we may agree about the devil in the details of specific funding agreements. But since I've never entered one, I wouldn't know. But that's -- those are certainly the contrary points to the memo, and Robert was kind enough to put a lot of those contrary points in his memo to offer you a balanced memo on the issues involved with it. I wish John was here. For a lot of reasons I wish John was here, but that would be my reply.

MR. LEVY: If I could just clarify a couple of things. On Arizona, the memo talks about Arizona, and they do have this proposal where they're experimenting with non-attorney ownership, and there are discussions about disclosure relative to that, but the one thing that was not noted in the memo is that the Supreme Court yesterday adopted a separate rule that goes into effect in January that provides for disclosure. It does include language that exempts loans, contracts or arrangements to pay expenses that require repayment, regardless of the outcome, or loans for arrangements for personal needs or medical treatment of a party, unless the purpose for doing so is to enable the pursuit of the claim. So those types

of provisions would exempt out the consumer lending issue.

And one other point that I do think that's relevant, or two other points. One is, you're correct, Jim is correct, in terms of the courts that have ordered disclosure, and one of the challenges is that courts that considered this issue without a rule come to very different results. So some courts that have considered request for disclosure have denied those requests because they focus on discoverability and the fact that the funding agreements are not pertinent to the issues in dispute in the case; and, therefore, they're not relevant and discoverable under discovery rules. And going beyond that, there's not clarity in many state court rules to provide the courts with guidance on that, and that's one of the drivers for having a rule on disclosure, is so courts understand what the standard would be and how to make that determination.

Another issue is if -- I wasn't involved in this. Some here might recall the discussion that took place many years ago on the debate over disclosure of insurance agreements, and no doubt the insurance industry was very vociferous in arguing against that, and corporate -- or defendant companies were probably also opposed to that fact, because they knew that if somebody had knowledge of how much money is available to settle a

case in terms of the amount of insurance, then that's going to focus the plaintiff on getting that amount of money in settlement, and it changes the dynamic of settlement discussions. But the argument was made that disclosure is important, and the Court adopted a rule doing that, and that was a decision that was made by the Court, and it's now standard practice that parties have to disclose insurance and the amount of insurance.

So there are, I think, policy reasons involved, but, fundamentally, this is a procedural question that I think I suggested the Court is well-suited to address and should be the first place to consider an issue like this.

CHAIR TRACY CHRISTOPHER: Could I ask, Robert, if this rule is passed, what would a defendant do with it once they get the agreement? How does it benefit the defendant?

MR. LEVY: How does it benefit? The fact that they are able to understand the dynamic that would be involved in -- let's say you have a multiplaintiff case and you've got multiple defendants and you're making a decision about how to assess the case and make a settlement offer, how to understand what money would be necessary that if the plaintiff has, you know, a contingency fee, which you're going to assume, and then on

top of that, whereas first -- excuse me, as first dollars, you're going to have another 10 to 20 percent that go to the funder, plus the funder has the ability to influence the case by saying that they're not -- they have the right to approve settlement, or they have the right to withhold further funding, then that will have a significant impact on a defendant's ability to assess the case and whether it can be settled.

And, similarly, if you're looking at situations where the funder is -- requires a calculation of the value of nonmonetary relief, then that will help the defendant understand can they propose a result or settlement that would involve, you know, an agreed injunction or an agreement not to use certain technology or an agreement to pay into a lifetime trust versus a payment now, and those issues are very important to understand as you try to make a determination of how to progress the case.

Additionally, I think that it will also be important, and for the court as well, to also understand what other parties are involved that have a direct stake in the outcome. That can have a significant impact on the potential that there could be a conflict with the court. One of the issues -- and we discussed it a little bit in November, but one of the issues that's important is, as

these funding dynamics become more mainstream, there are retirement funds that are going to be investing in these proceedings. There are holding companies and others that are realizing that there is a significant return potential in funding litigation, and as a result, there will be more and more kind of mainstream companies engaged in this, and it is certainly possible that a court could have a financial interest in a company that is invested in -- in funding, and they would not know that if there was not disclosure.

CHAIR TRACY CHRISTOPHER: Yes, Justice Kelly.

HONORABLE PETER KELLY: With regard to that last issue, there are insurance funds and pension funds. They can select which funds they invest in, and they can rule out, say, any green energy solutions, like we have in Texas, so you could easily get around that by statute or rule-making for selection of pension funds so you don't have a conflict of interest, the judiciary wouldn't.

A couple of points. First, they want to understand it, the funding dynamics, so they can exploit the dynamics. It's not out of the kindness of the heart that Exxon, CenterPoint, and Koch Industries -- and I could go on -- want to understand this. They want to exploit the fact that there might be other financial

considerations.

Secondly, there's no real -- yes, situations do arise where cases become unsettleable, but how often does that really happen? There's not really any -- again, this is legislation or rule-making by anecdote and not by any considered empirical survey of what -- how this is affecting the civil justice system at all. Jim was very right on point saying this is a political policy issue. If you want to get deep into it, it's not just the flow of capital. It's the existence of capital itself in that the defendants, these industries that are interested in acquiring disclosure of the litigation funding, they're in it for the long haul. As it stands now, on the plaintiff's side, the plaintiffs are not in it for the long haul. They're one-shot plaintiffs. There was one accident, one poisoning, one train derailment, you know, that they're focused on. So once the plaintiffs are compensated, they have no political interest in continuing to fight the battle.

However, the defendants, the corporate defendants, the -- or as they're now called, the malefactors of great wealth, do have an interest in distorting the -- a long-term interest in distorting and exploiting the civil justice system in their favor.

What this would do, for better or worse,

what this is doing is actually creating long-term players that have a continued interest in reforming the civil justice system in their favor, so the first time you would have a capital counterweight doing the lobbying, trying to counteract the long-term players on the defense side. So this really is a deep policy, political issue, that is probably well beyond the scope of the rule-making authority of the Texas Supreme Court. Under the Constitution, it's for the efficient -- I pulled up the quote earlier. It's on the Supreme Court website, right, "responsible for the efficient administration, shall enact rules necessary for the efficient and uniform administration of justice of the various courts."

Doing something so deeply political and deeply -- it's actually affecting the economic structure of the country, is so far beyond the efficient administration of the judicial system that it can only be considered beyond the rule-making authority of the Court.

CHAIR TRACY CHRISTOPHER: Yes, Justice Gray.

HONORABLE TOM GRAY: I think it's important to distinguish what some of the other states' involvement in this is with regard to the topic. I start from the premise that information has value. Some of these states are regulating the industry of litigation funding, what they can fund, disclosures mechanism in the industry. I

think that is a policy question that we should not involve the judicial branch in, but as the memo talks about and as Robert has made clear in his presentation, and I think as well as what Jim had to add to it and Peter, that the -- what we're talking about for the Supreme Court is the disclosure of information inside litigation, existing litigation, and whether or not information is going to be disclosed about the other side, the way it is being funded.

To me -- and I noticed that Robert got to this towards the end. I would have made it more towards the front of the presentation. To me, this is the flip side of the coin about discoverability of insurance. The arguments that were made back in the beginning, and I'm trying to remember what the -- Stowers. Stowers is probably one of the most famous cases in personal injury and all of Texas law, because it is about whether or not -- what the policy limits are and whether or not you can then go get into the insurance company's pocket, because they didn't reasonably settle a case.

To me, this is the flip side of that coin where the plaintiffs wanted to know what the insurance policy is. The defendants are now wanting to know how the plaintiffs are funding the litigation. And in that regard, I think the proposal is actually a -- kind of a

mid-ground. It doesn't require the disclosure of the agreement. It just -- it's a summary, basically, as I understand it, a disclosure of what the agreement covers, and then if there is something more that is relevant to different aspects of the litigation, then the parties have a right to seek more and potentially obtain more through a court order.

The one area of this that I may have touched on before I left the court was in a -- what would be characterized as patent troll litigation. The issue in that case was all about the attorney's fees and the sanctions that had been imposed upon the plaintiff's lawyers and potentially whoever was standing behind the lawyers, and it was a -- I mean, that is a relevant question if you have someone else that's funding the litigation that you would get access to that information through this disclosure.

This seems to be a disclosure in discovery, a mid-ground that is appropriate for us to wade into, not the policy decision about whether litigation funding is good or bad or how we're going to regulate it. We don't have a, you know, Department of Insurance regulatory body to deal with that, but it certainly is a financing issue that the Legislature may want to look at, but for the discoverability of this information in litigation, I don't

see it as outside the Court's purview, although I am a proponent of we shouldn't be writing the rules at all, as I told Nathan when I was first asked to be on this committee. And he said, "I'd heard that. That's why we want you on the committee," but he probably regrets that now.

But I think it is something that we need to address, because it is about discoverability, and probably the most compelling aspect to me of it is that it should not be left to individual courts, geographically, politically, nature of litigation. It needs to be something that is uniform across the state, across litigants, and as I understand from the presentations that have been made, it will be an affirmative disclosure in relatively -- a relatively small number of cases in Texas. By far and away, the majority of cases will have no third party funding, and it's very -- the rule would be very easily complied with by that statement.

CHAIR TRACY CHRISTOPHER: All right. Any other discussion? Kennon.

MS. WOOTEN: I guess I should start by saying I wasn't a part of the conversation about insurance agreements, so there might be some nuances I'm missing, but it seems to me like the question is are these things within the scope of discovery and that the test is -- is

there in the rules, right, is it relevant or reasonably calculated to lead to the discovery of admissible evidence, and the rule on insurance agreements specifically refers to agreements under which a person may be liable to satisfy part or all of the judgment rendered, which is inherently within the scope of discovery, because it goes right to the judgment and what happens in that case. This is harder to assess for me, because we don't know necessarily what the agreements say, and so I'm struggling with the concept because of that scope of discovery guardrail that I'm thinking should apply if it's going to be a mandatory disclosure.

CHAIR TRACY CHRISTOPHER: Alistair.

MR. DAWSON: So to the point about it helps settlement, I have a hard time accepting that, because, my understanding -- I've never had a litigation funding agreement in any of my cases. My understanding is that they are there to fund expenses associated with the lawsuit, expert fees and things like that, and you -- almost all of the cases that I've been involved in, the plaintiff lets you know what their -- what they've got in costs in the case as part of any settlement discussion. If they've got 5 million in costs, they let the other side know that, so that they can, you know, include that in their settlement discussions. So I don't see how giving

them the funding agreement, which is essentially just paying for those costs, assists in settlement, because you're already going to provide that information.

And I don't know if this is analogous or not, but I'll throw it out there, since it's Friday before a holiday weekend, I don't think we require plaintiffs to share referral agreements. Jim and I could have a referral agreement, because he's got so much more money than me, he pays all of the costs, and that's not discoverable, nor should be discoverable. Who's paying -- as between Jim and I how we're dividing up costs is not really relevant to any issue in the case. What's relevant is what the costs are for purposes of the settlement or what you can recover at trial, but not who's paying for it. So I don't see how it really facilitates anything in the case, and even though I have no experience with it, I am a bit concerned that it could be used for improper purposes, and I don't really know what those are, but I just -- I worry about that.

CHAIR TRACY CHRISTOPHER: Do we have other people who would like to weigh in? Yes, Pete.

MR. SCHENKKAN: There do seem to be acknowledged across the board, both among those who think the Texas Supreme Court should consider adopting a rule on this subject and those who don't, a recognition that there

is a big picture debate over the balance of power in major high stakes litigation and that this rule would affect that balance and it would shift it in one particular direction. I think that is all you need to know to know that the Court should look very closely at the benefits and risks of associating itself with taking a stance that could be perceived as taking a side in that matter of balance of power, when it is not necessary to the part of the system that the Texas Supreme Court is in sole and ultimate charge of, and I believe that that part of the Court's duties and powers are best exercised -- and I'm only hesitating slightly when I say "only exercised" in making sure that the rules of professional responsibility are appropriate in this regard.

If there are occasional funding agreements that impair the independence of the lawyer in representing his client, that's a problem that the Texas Supreme Court has the power and the duty to see what it -- to think about what can it do to prevent those abuses. That's not part of discovery in an individual lawsuit. It shouldn't be. We're just weaponizing a counterpart abuse.

So I'm very much against our going down this road at all. I think the -- I think the Court's -- if the Court perceives that there is a problem of significant numbers of lawyers or lawyers in certain contexts of

certain kinds of lawsuits and certain kinds of funding agreements yielding their independence and their responsibility to their clients, as opposed to the people they have entered into funding agreements with, or their clients have entered into funding agreements with, the Court should investigate that possibility and see what amendments, if any, to the rules of professional responsibility are appropriate, but it should stay out of making this -- adding this into the business of discovery in major litigation.

CHAIR TRACY CHRISTOPHER: Lonny.

PROFESSOR HOFFMAN: Since there's not a question exactly on the table other than what do you think, I'm not sure what the Court is asking here for our input, but I can judge by the fact that you're letting this conversation go on that the Court must want to have a general sense of the room of how to think about this, so if that's all you're asking, you can count me on the camp of we should stay as far away from this as possible. I'm happy to say more.

CHAIR TRACY CHRISTOPHER: No, go ahead, give your explanation on why you think that.

PROFESSOR HOFFMAN: Sure. We have a problem in this country with our litigation system that everyone knows. It is that it is too expensive for most people.

There is a small segment that has figured out a way to fix that problem, but the case has to be worth something for -- for litigation funding, for capital to be willing to go there, and so it is amazing that we are spending any time thinking about how to take away capital possibilities, when there's one small sliver that has actually figured out how to address that. This is not going to fix access to justice problems whatsoever, to keep it -- to either keep it, expand it, or eliminate it.

But, Robert, you had a line where you talked about the notion of -- I wish I had remembered your line, but it was like something about how the money skewing the litigation system, and I'm like, are you kidding me? I mean, that's everything. There isn't anything that isn't about money, and our entire system is designed for your guys, always, and this is the smallest of smallest of efforts that have been made, and they're enriching a very small number of people, and then -- and then the only other point I'll add is that the points for disclosure are -- I tried to listen as carefully as I could to kind of hear what it is that proponents want, and I just don't hear it. I just don't hear anything that sounds credible.

I mean, you could -- they want disclosure because they want to deter people from participating, the same reason that the Tillis bill taxes at 40 percent,

because the goal here isn't disclosure. It's to end litigation funding, because there's a source that makes those litigations possible. So yeah.

CHAIR TRACY CHRISTOPHER: Going to the proposed rule that your committee has drafted, but you have already agreed that it's too broad, because it encompasses more things than you think need to be done in 14a(a); is that correct, Robert?

MR. LEVY: I think that's fair. We had a prior version of the rule that was in our October -- or our October memo. This one was a little bit cleaner, but it -- but I will agree that it would be beneficial to carve out the consumer lending and the loans that would be repaid with interest, but not a percentage of the outcome.

And I do want to point out that the language in the memo from this week, that was not voted on by the subcommittee, so I don't want to represent that that's the subcommittee's view of what the rule should say. In the October memo, we did vote on it, and there was a proposed rule included, but it was there at the request of the Chair that we -- that we come up with the rule language, even if we didn't recommend that it be adopted, and so that was the basis for the version in the October memo.

CHAIR TRACY CHRISTOPHER: Is there a reason that you didn't just put it in mandatory disclosures?

Why, you know, if there was a such a rule, why wouldn't it be there rather than in some standalone rule?

MR. LEVY: Yes. And I say this a little chagrinned. I -- I thought that it -- to put it in Rule 14 because that was within the subcommittee's section, but it probably would fit better in the mandatory disclosure rules, but I didn't want to tread into anyone else's jurisdiction.

CHAIR TRACY CHRISTOPHER: Okay. So if it was in the mandatory disclosure rules, then (b), (c), (d), and (e) would not be in play. What we would instead focus on is the language in (a) --

MR. LEVY: Correct.

CHAIR TRACY CHRISTOPHER: -- that you believe that we should have some changes to it with respect to consumer funding, I guess is the way we would --

MR. LEVY: Correct.

CHAIR TRACY CHRISTOPHER: -- call it.

MR. LEVY: I think it could be drafted in a broader sense in that any -- it would not include loans to plaintiffs where the repayment of the loan and interest is the subject of the agreement, so that it wouldn't -- you know, that should exclude out consumer loans, and it would exclude situations where somebody is going to a bank or

going to an organization that would be providing funds for the lawsuit that are simply going to get repaid.

CHAIR TRACY CHRISTOPHER: Yes, Chris.

MR. PORTER: I hear that, and it all seems the same to me. The bottom line is who's funding litigation, whether it be a bank or whether it be an uncle or whether it be, you know, the neighbor down the street, right, or a funder, right. If the point is we want to get to the source of funding of the litigation, I'm not sure how we can draw these distinctions and draw these carve-outs relating to the course that you've mentioned. And so, to me, it goes back to the fundamental point of do we really care or need to know who is actually funding the litigation.

MR. LEVY: So if I could address that. I think the answer is very much yes, and, you know, for a number of reasons. One, it goes back to something that Kennon was talking about. I don't think that insurance agreements are discoverable in a litigation because they don't relate to the claims or defenses, and they certainly don't relate to any information that could be used before the finder of fact. They are important, and that's why it was 1999 when the Texas rules were amended to require disclosure of past of insurance agreements, because they do significantly impact the economics of the case itself.

If you are bringing a lawsuit against a party who doesn't have assets to satisfy a judgment, you're going to want to discover that, but generally, you would discover that after you get a judgment, not before. That -- because it doesn't relate to the merits of the case, and, similarly, in this type of situation, the -- the importance is the ability to gauge what the interests are in the case and also who's controlling the case.

In the consumer loan situation, for example, you don't know. You don't really care because the lender isn't going to have the ability to tell the plaintiff settle or don't settle, but if you have an agreement where the funder does have that right that has to be consulted whenever there's a potential settlement offer, that is a definite change; and, you know, for example, if a court says, "I want all of the parties at mediation," and that includes the insurance company, because they are decision-makers in whether it's to settle, that makes sense, and judges often require insurance company representatives with authority to appear at mediations because they know the case cannot settle without their involvement.

In this situation, if you have a settlement discussion and the funder has a say in the outcome and they're not at the mediation, case is very likely not

going to settle. And in response to Alistair's point, I think if you had a funded case, you would know it, and you would know how significantly it changes the dynamic of the case, because it does hugely change who you talk to and what the -- how to craft an outcome. And the -- another, I think, significant issue is, you know, in talking about what this is all about, there are certainly those that are trying to -- that would say there should not be funding, and there are arguments to be made as to why there shouldn't be funding and arguments to be made as to why there should be funding, including allowing access to courts. But that's not what this proposal is talking about.

It's talking about disclosure of the existence of funding and what that -- what those agreements provide, and that should not and would not change whether funding is offered, available. It doesn't tell a funder that you can't be in the case. It doesn't do anything to limit the ability of somebody to get capital and participate. The funders don't want to disclose that information, because they have -- they're able to manage and control and influence the outcome without the defendants knowing about it. It gives them a strategic advantage, but the fact that disclosure would be available, again, is a similar context of the insurance

agreement situation.

And I did want to make one other point. In the discussion about the ethical issues Pete made, that there is actually -- and Kennon pointed this out in the November discussion. There is a rule, it's 1.08, I think it's (f) in Texas, that does have limits on the ability of a lawyer to accept funding from a source other than the plaintiff, and there are expectations on lawyers regarding whether they can do it or not. The challenge is -- and this is a broader challenge, not one that this rule would address, is there are -- I think, or believe, there are situations where plaintiffs aren't even aware of funding, because if a plaintiff's lawyer has portfolio funding from a funder, and the funder is not taking an interest in the specific case, but in the portfolio of cases, they are very involved and they care about the outcome and they're monitoring the outcome, but the individual plaintiff doesn't know. So the individual plaintiff's decision whether to settle or not is really not relevant, because the issue is caught up in the broad portfolio cases.

I don't know what the answer is to that. This rule I don't think would solve that, but it would provide transparency, at least that if there was such a funding agreement, it would be known.

MR. PORTER: If I could briefly just

respond, just briefly. Respectfully, I'm not sure I really heard what the difference is or if you necessarily addressed what I was saying, because ultimately under that logic, my neighbor down the street would be entitled to come sit in the mediation because he or she would have -- he or she would be getting paid back, depending on the outcome of the case --

MR. LEVY: Again, that's --

MR. PORTER: -- but setting that aside, I think the difference between -- I understand the point about the insurance agreements and making sure that people are able to understand what could be there, are we going after a party that would actually have some funds, is there going to be a "there" there, but this is, again, you've said the other side of the coin, and I agree with you, but in a completely different context, because this is the large part the plaintiff would be bringing this case, and whether and to what extent that plaintiff has funding to continue their -- to fund their lawsuit and press it forward and prosecute that lawsuit, I'm not sure what significance or what business that would be necessarily of the defendant.

Again, I'm not saying this isn't something that we should do. I'm just really not hearing your compelling reason for it, and the point about the

insurance doesn't really move me, because, again, that's -- we're talking about something completely different. This is literally talking about a typically -- typically, sometimes they do have defense side funding, but typically we're talking about plaintiff's side funding and funders who are helping people to go forth and prosecute their cases. I just don't understand why defendant would necessarily need to know that information.

But I -- I'll be quiet for the rest of the day, so we can go get out here and go watch Texas beat up on Ohio tomorrow.

CHAIR TRACY CHRISTOPHER: Marcy.

MS. GREER: So my understanding is that the litigation funding agreements cannot -- a plaintiff's attorney or an attorney who is relying on them cannot give away the control to a funder, and there is a difference in insurance, because an insurance company needs to be at the settlement table because the money is not going to come out of the insurance policy unless the insurance company agrees to do that; whereas, in litigation funding, they're funding the litigation as it goes. They're not funding a pot of money from which recovery can be made, and so it is a little bit of a different animal.

I recall John Kim saying that he would never enter into an agreement -- I've heard several plaintiffs

lawyers say this -- that would concede control over the settlement.

MR. LEVY: That, actually, in looking at the few agreements that have been disclosed, unfortunately, that's not what they say. They give the funder significant influence and input and, in some cases, veto rights on settlement.

CHAIR TRACY CHRISTOPHER: But do they have the same disciplinary rule that we have that would prevent that?

MR. LEVY: Well, I mean, it is an ABA -- it's also an ABA rule. I don't know what -- in each state what they have applied. Jim actually asked an interesting question with respect to, you know, what state laws apply to the funding agreement themselves. That's a whole different discussion, but the agreements so far have -- give funders significant power. One specific power -- and I don't blame them for doing this -- is they fund entrenches, and so they'll give you a hundred thousand dollars and then, you know, half a million and then more money as the case progresses; and if they are not happy, they have the right to pull the funding, and including if they're not happy with how some of the cases are settling. And -- but other cases, they have even more specific -- as the memo points out, they have specific rights with

respect to settlement, how it's conducted, and what monetary terms versus nonmonetary terms, and so those issues are clearly part of funding agreements today.

MS. GREER: But, again, I think the veto right would transgress an ethical boundary.

MR. LEVY: Well, which one -- which ethical boundary?

MS. GREER: Because the lawyer is ceding control, professional judgment, and representing fiduciary duty to the client by allowing someone else to have veto power. I mean, again, in the insurance context it's different because the insurance company has the full --

MR. LEVY: I'm not sure that that duty is as clearly stated, particularly if -- if in a situation where a plaintiff signs off on the agreement, but even if they don't, I'm not sure -- I'm not sure that issue is really governing how those agreements are drafted, and we don't know otherwise, because nobody sees them.

CHAIR TRACY CHRISTOPHER: Well, the few -- the one Texas case that you cited apparently didn't contain any bad provisions in it. So perhaps we're better in Texas.

MR. LEVY: I hope so.

HONORABLE PETER KELLY: Was that John Kim's agreement?

MR. LEVY: I don't think his was disclosed.

CHAIR TRACY CHRISTOPHER: Pete, and then Richard.

MR. SCHENKKAN: Back to the point about the Texas Supreme Court sticking to the core part of its responsibilities, if it is inadequately clear from the rules of professional responsibility in Texas at this point, the Court should certainly consider making it clear that the lawyer for a plaintiff must disclose to the plaintiff any funding agreement and its potential implications on the lawyer's control of his representation of the plaintiff; and if it's not clear at this point that, as Marcy just suggested, crosses the line on that, that a funding agreement that gives the funder control over whether to settle crosses that line, we should amend the rules of professional responsibility accordingly. Otherwise, we should stay the hell out of this.

CHAIR TRACY CHRISTOPHER: Richard.

MR. ORSINGER: I wanted to say two things. If we move this out of 14 into mandatory disclosures, I'm concerned about the protective order provision. I can see that if we're going to require this disclosure to the defendant in a case, it should be limited to the defendant. The court should be able to curtail that, or maybe it ought to be written into the rule that it's only

to go to the defendant. If we move it to mandatory disclosures and leave behind 14c on protective orders, that would concern me.

Another thing is, is there any follow-up discovery to the disclosure of the agreement? Like if the agreement is between XYZ, LLC, it doesn't tell you who they are. You just know the terms that some unknown entity has some potential control. Is there any follow-up discovery? I would have that question, but I'm sitting here wondering, you know, what does this result in? Perhaps the defendant's lawyer could file a grievance against the plaintiff's lawyer for having traded away control over the claim. Is that what this is? Are we attempting to use the defense attorney to regulate the relationship between the plaintiff's lawyer and the client?

Otherwise, I don't see how this has any value other than the discussions we've had about control of capital in our society, which is way beyond the scope of the Rules of Civil Procedure, it seems to me, but I just don't know what this information is for. It's not admissible in the case, and if it does show an irregularity between the plaintiff's lawyer and the plaintiff's client, it's the defense's -- the defense attorney is the last one I would want to get in the middle

of that relationship. So I'm just very uncomfortable. If this was a statute where the Legislature was establishing public policy, you know, we would probably have to live with it, unless there's some First Amendment right here, but, boy, this doesn't look like a rule of procedure to me.

CHAIR TRACY CHRISTOPHER: All right. Any other general comments?

All right. No more general comments. We're going to take a vote on whether we -- not as to the specific language at this point, but whether we think there should be a disclosure of these type of agreements in our rules. All in favor, raise your hand. That's five.

All opposed? That's 14, the Chair not voting. All right. Okay, we're good.

MR. LEVY: If I --

CHAIR TRACY CHRISTOPHER: We'll move on to our next subject, which is confidential identity in court proceedings. And that's you, Jim?

MR. PERDUE: No.

MR. SCHENKKAN: It's me.

CHAIR TRACY CHRISTOPHER: It's Pete.

MR. PERDUE: I'm very blessed to have, I will say, the best vice-chair in all of this committee.

MR. SCHENKKAN: The way this worked out was that I was supposed to be in charge of summary judgment but knew nothing whatsoever about it, and Richard took care of summary judgment, and Jim was busy in the Legislature trying to keep all sorts of things from going off the tracks, and so I have done what could be done, with limited consultation with Richard and Jim, and I am single-handedly responsible for anything that was wrong with what I'm about to say.

The starting point here is that the Legislature created some new causes of action, created two new ones and added a part to the Deceptive Trade Practices Act in which the claimant is authorized to use a pseudonym and to protect other identifying information, and the court is obliged to respect that and to make sure that that works and it happens, and that -- the question of whether we needed to amend two particular rules, Rule of Civil Procedure 21c and TRAP 9, to reference this or comment on it, or both, was sent to the legislative subcommittee.

We quickly discovered that you probably should start with Rule 79, which, as presently worded, says that parties are required to name and provide the residences of parties, and without any exceptions. So we then -- what I've tried to do is look to see what are the

various places we might need to amend this, and in the course of that, discovered that these three new statutes very closely track two existing statutes, both of them -- one from strictly family law context and one from the juvenile civil action context, and there are also two existing other parts of the Civil Practice and Remedies Code that have confidential identity situations of their own. So we're going to start by suggesting that we amend Rule 71.

MR. ORSINGER: 79.

MR. SCHENKKAN: 79, sorry, and this would be at page 3 of 15 of the tab for the confidential identities, to state "except to the extent confidential identity is authorized or required by statute, the petition shall state the names and residences." And then because you have the problem that the initial filing would presumably be made using the pseudonym, you have to do something to say, okay, how do we get a filing about this if somebody thinks it's not proper, and the tentative suggestion is, upon notice of opposition, another party to the proceeding says, "I really don't think this person is entitled to proceed under a confidential identity," then the petitioner needs to file a motion explaining why they are authorized and under statute to proceed.

That would be the first step in amending

Rule 79. The second problem is that, though 79 has always said this, Texas courts, like all other American courts, also have situations in which people ask -- file using a pseudonym, a confidential identity, and do so not based on any statutory authorization or requirement, but simply because they believe it's important to protection of their privacy and just in a way that should be recognized as good cause for doing so; and when they do that, and if a party on the other side objects to it, the court essentially makes a good cause decision, is this a situation in which the person who wants to use the pseudonym's privacy interests outweigh the general presumption of openness of the courts that would include, in this case, the identity of the plaintiff.

And as you can well imagine, the decisions under that approach are very much case-specific, and there may well be problems with that approach that perhaps should be addressed. Those problems might even include procedural problems, meaning is the process for invoking I've got a general good cause claim that I -- to being allowed to proceed under a pseudonym, maybe should be addressed by rule, but we're not under a September 1 deadline to do so, and it's a bear's nest.

The memo includes in it a reference to a law review article by Professor Volokh of UCLA Law School that

is summarized very briefly by quotes at the bottom of page six and the top of seven of the memo, *When May Parties in American Civil Cases Proceed Anonymously*. The answer turns out to be deeply unsettled, and then the professor says he aims to lay out the legal rules, such as they are, and the key policy arguments in a way intended to be helpful to judges, lawyers, pro se litigants, and academics. So if we wanted to dig more -- if the Court wanted us to dig more deeply into what should we do, should we do something procedurally about people asking for a good cause permission to do this, that's a bigger project than we have time for right now, but would it at least be a good idea to say, after we've made the amendment already discussed to reference the fact that there are statutes, should we also say -- after saying "except to the extent confidential identity is authorized or required by statute" should we also say "or on leave of court, for good cause shown," and then otherwise proceed as previously indicated?

So that's the second proposal. We've got two possible amendments to Rule 79. Then Rule 21c, which was part of the letter referring it to the Supreme Court Advisory Committee and to the subcommittee, 21c is a --

CHAIR TRACY CHRISTOPHER: Can we, before we move on --

MR. SCHENKKAN: Sure.

CHAIR TRACY CHRISTOPHER: -- to 21c, let's talk about 79.

MR. SCHENKKAN: Sure.

CHAIR TRACY CHRISTOPHER: And is the committee in favor of adding the good cause, or is it just an extra?

MR. SCHENKKAN: I am in favor of just adding the -- or with the additional exception of for good cause shown and no further detail at this time, but, yes, it would be my personal belief that we ought not to have a rule ignore the fact that you don't actually have to have statutory authority to do this, at least sometime you can do this without statutory authority, but that's part of existing case law.

CHAIR TRACY CHRISTOPHER: Okay. Richard.

MR. ORSINGER: I think that we have kind of a chicken or egg problem here, because, obviously, we can't have a person file in their name in compliance with Rule 79 and then file a motion for good cause and go into a pseudonym. It has to be filed under a pseudonym from start. So it should be on the part of the plaintiff to decide whether to include their name or not, and then I guess the court or the defendant should be able to go to court and ask the court to make the plaintiff show good

cause for why their name shouldn't be revealed.

I also would like to say that, in doing research for the memo that I sent to Peter, is that some protocols require that anyone filing anonymously must provide a confidential document to the clerk of the court so that the real name is associated with the pseudonym in the cause of action, and that way the government, whoever is authorized in the government, which would be a judge or a clerk or whoever, can know who this is. If we don't have that protocol that somewhere in the judicial system is a confidential document telling us who Jane Doe is, then we've really kind of lost control of the litigation.

So it seems to me that, number one, 79 should make it clear it's elective for you to file anonymously, if you think you're entitled to, and the other side or the court is entitled to say, "Show good cause why I should allow you to go forward." And secondly, do we want to have a secret government record where we can find out who the anonymous person is?

MR. SCHENKKAN: I would say I agree with both of those. That's why I tried to, for now, just acknowledge that there should be -- needs to be a process. But the details of it do require a more detailed consideration, in part, because Rule 79 is really intended for the petitioner initiating a lawsuit, but petitioners

are not the only ones who sometimes need to proceed under a pseudonym. And thus, there are other procedural possible contexts of this arising that we need to consider more carefully than we were able -- than I was able to do under this deadline.

CHAIR TRACY CHRISTOPHER: So I think what Richard is talking about in the good cause area --

MR. SCHENKKAN: Yeah.

CHAIR TRACY CHRISTOPHER: -- you say, "or on leave of court for good cause shown."

MR. SCHENKKAN: Yes.

CHAIR TRACY CHRISTOPHER: But that doesn't allow you to file without leave of court.

MR. SCHENKKAN: Well, the way I, perhaps inadequately, artfully attempted to solve that is by the second addition to the first paragraph of the -- of 79, page 3 of 15 of the tab. "Upon notice of opposition to use of a confidential identity, petitioner shall promptly file a motion showing statutory authority," and this would, in the good cause version, that would be "or other good cause."

MR. ORSINGER: But the first sentence is the one that causes the trouble.

CHAIR TRACY CHRISTOPHER: Right.

MR. ORSINGER: Because it says except to the

extent that the statute authorizes it, and we've got about six of them listed in the memo, "or on leave of court for good cause shown." So if I'm outside of one of these statutory harbors, how do I get good cause without filing a lawsuit, and what name do I put on it when Rule 79 says it has to be my client's real name?

MR. SCHENKKAN: Right. You're correct.

MR. ORSINGER: So, to me, I think that the law of Texas, as it now stands on the few cases we have, is you're free to file, if you want to, in derogation of Rule 79, and then somebody has to do something, but we can't make you file under your real name and ask for permission to move forward anonymously. That obviously doesn't work.

So, to me, the rule ought to say -- I don't think the rule should ban anonymous filing. I mean, that's a radical proposal, but it shouldn't ban anonymous filing, but it should allow the court sua sponte or the opposing party, or maybe even if you want to go Rule 76a, members of the public like newspapers and others to follow a 76a protocol and allow a hearing in which a judge will decide whether anonymous is okay or not.

HONORABLE JERRY BULLARD: Justice Christopher, I've got a question.

CHAIR TRACY CHRISTOPHER: Oh, yes, sorry.

Judge Bullard.

HONORABLE JERRY BULLARD: Pete, I told you I was going to comment on it. I didn't get to it. I apologize for that. The question I have, Richard, I think this goes to your question or your point. There's a provision in Senate Bill 441, that's section 98b.008, that says "except otherwise provided by this section in a suit brought under this chapter, the court shall make it known to the claimant as early as possible in the proceedings of the suit that the claimant may use a confidential identity in relation to the suit." And so I don't -- that's not really addressed in our rules, and I don't know if they're requiring the court to do something, that the statute requires the court to do. It needs to be somewhere wrapped up in the rule, but that puts an obligation on the court to be paying attention to what's filed, because the court has an obligation to let that person know.

MR. ORSINGER: It goes without saying that the horse is already out of the barn when you close the door, right?

HONORABLE JERRY BULLARD: That's true.

MR. ORSINGER: I would assume that lawyers may be informed that their client falls within one of these statutory safe harbors, but pro ses may not, and what do you do if a pro se has filed under their real

name? The best you can do is to tell them immediately that they have that option, and if they do it, then seal the file and try to limit its disclosure or dissemination on the internet, or everything you can do to try to save that secret.

CHAIR TRACY CHRISTOPHER: Perhaps the solution would be to say, "The petition shall state the names of the parties and their residences," and then the calling it to their attention is, you know, the "Under certain law, you do not have to do so," and here's the law. So, I mean, if we really have a pro se, they're going to look at -- hopefully, they're going to look at the rule, right, and the rule says this is how you write a petition, but you don't have to put your name down if you fall into these exceptions.

It seems like that would make it a little clearer and would cover the court telling someone what they can do by putting it in the rule.

HONORABLE JERRY BULLARD: Or if you're e-filing, and I know pro ses aren't going to typically do that, but when you go through that process of identifying plaintiff, and it's a Tyler Technologies question, I guess, or whoever is in charge of that, but there might be some indication there where you may file anonymously if -- I don't know what that looks like, but that's just one way

maybe to deal with it for electronic filing purposes.

MR. SCHENKKAN: And I think the part of the statute that Judge Bullard called our attention to also needs to be addressed, and I think it's only, at this point, addressed in the proposed amendment to the Rules of Judicial Administration, where this is a task on the judge that is almost certainly most important, maybe only important, in a pro se case, so we can't depend on lawyers to have figured it out and have told their client that we actually don't have -- you can go forward without using your name. The first person with the chance to do so may well be the judge, and so we'll need to make sure it's in the rules and in the training for the trial court judges.

CHAIR TRACY CHRISTOPHER: I think that first sentence is not enough notice.

MR. SCHENKKAN: Okay.

CHAIR TRACY CHRISTOPHER: To me. If we're going to rely upon "make the claimant aware that he or she may use the confidential identity," the court is supposed to do that, we should say, "The petition must state the name of the parties," you know.

MR. ORSINGER: Unless.

CHAIR TRACY CHRISTOPHER: Unless you fall under these, and then you do not have to, because if I was a pro se --

MR. SCHENKKAN: That's much better, clearly. That's the right answer.

MR. ORSINGER: So then the question is, is it in the rule, or is it in the comment to the rule? You know, rules are hard to change, but comments are more easy to change, but the -- on the Court they may be equivalent, but in my observation over decades, comments come and go, even though rules tend to stay, and so since the Legislature may add or take away some of these statutes, we might consider putting it in a comment to the rule so it's in the rule book and right next to the rule, but it can be more easily modified without all of the public comment or whatever is normally associated with a rule.

CHAIR TRACY CHRISTOPHER: To me, I would put it in the rule, because it is imposing these duties on the court. And we should probably also talk to Texas Law Help to make sure that they have that information also on their forms, because that's where a lot of people go to get a form for something.

MR. SCHENKKAN: And so the wording, which we're clearly trying to do here in the committee as a whole, but the basic idea is unless -- you have to do this unless a statute authorizes, and then the comment would say a bunch, too.

MR. ORSINGER: But Chief Justice Christopher

wants it to be in the rule.

MR. SCHENKKAN: I'm saying in the rule. I'm saying that the rule would say "unless a statute authorizes." The comment would say "and here are a bunch that do," or unless -- now, here's a suggested wording to deal with the fact that the only person at this point who knows they may even want to or needs to know that they -- if they want to, they may be able to, is "or unless the plaintiff" -- and that's the problem, because it won't always be -- believes there is good cause to be allowed to proceed under pseudonym. Then you can go ahead and file under pseudonym, but you're going to have to respond if somebody challenges it.

CHAIR TRACY CHRISTOPHER: If the good cause filing under a pseudonym is already known to people, I think we focus just on the statutory exceptions at this point.

MR. SCHENKKAN: But I think nobody knows that except lawyers who have read some case law.

CHAIR TRACY CHRISTOPHER: True.

MR. SCHENKKAN: And let me say, not very many of them, because there aren't very many cases in Texas, and they are balancing cases.

CHAIR TRACY CHRISTOPHER: Justice Miskel.

HONORABLE EMILY MISKEL: I was going to say

it's not necessarily acceptable. I don't know if y'all remember when Tarrant County had a big controversy because people were filing divorce -- like high profile people, like a baseball owner or somebody, filed a divorce under initials or something, and then it blew up and said that's not what open records means and you're not allowed to just put your divorce under initials because you want to keep it a secret from the public, and so like people got dragged through the newspapers. And so that wasn't necessarily a result via an appellate opinion, but everybody got the message from the newspaper that this is not what a government official is supposed to be doing, allowing parties to hide their identities. So I think it's a very tricky area of -- I think it's safer to say "authorized or required by statute." This good cause is a whole can of worms that might be more complicated to talk about than the rest of the changes that need to be made.

MR. SCHENKKAN: That was where I started.

CHAIR TRACY CHRISTOPHER: All right. Any other comments on Rule 47?

HONORABLE TOM GRAY: 47 or 79?

CHAIR TRACY CHRISTOPHER: I mean 79. Where did I get --

MR. SCHENKKAN: Because 79 says you have to plead the things that are in 47.

CHAIR TRACY CHRISTOPHER: Right.

MR. SCHENKKAN: But they aren't anything about this.

CHAIR TRACY CHRISTOPHER: 79. Any more comments on 79?

HONORABLE TOM GRAY: I would leave out the reference to in limitation of the -- by statute, excuse me, by statute, because not only is it recognized in the common law that it can be done and is done, we've got some rules that address confidentiality. There may be constitutional provisions. I just don't know that all of the exceptions are -- that authorize it or require it are a statute.

MR. SCHENKKAN: So maybe "under other law" instead of "by statute."

HONORABLE TOM GRAY: I just struck "statute," "is authorized or required, the petition shall state," and of course, you're revamping that introductory part. The same with regard to upon notice, and you don't have to show statutory authority. You just have to show authority and so --

MR. ORSINGER: But are you undermining the common law when you say that, because, you know, *Roe vs. Wade* was filed under the common law, right?

HONORABLE TOM GRAY: That's what I'm saying.

I'm saying that's okay, because that's authority.

MR. ORSINGER: Okay.

HONORABLE TOM GRAY: But it's not statutory authority. Common law is the basis upon which I am maintaining my confidentiality.

MR. ORSINGER: Well, if the common law is the standard, then anybody can file it. There's no requirement that it be limited to the statutory authority, and the common law allows you to file any time you choose to file anonymously, right? I'm not arguing against your principle, but I'm just saying, does it really have a limit if you say any authority, and the authority is the common law, which allows anyone to do it?

HONORABLE TOM GRAY: But the common law is limited by case law. I mean, by the common law itself. It limits when you can do that to a situation in which it is appropriate to maintain your confidentiality, as in *Roe vs. Wade*, which I don't think there was any statutory authority --

MR. ORSINGER: No, there wasn't.

HONORABLE TOM GRAY: -- for that, and they did it, and I've seen this challenged, and I seem to remember a fairly recent high profile case being dismissed because the plaintiff refused to identify themselves in the pleadings, and so, as a result, their case was

dismissed. So unless they show the authority under this rule for their ability to do it, which ability may be citation of common law, when it's appropriate under the common law, then their case winds up getting dismissed. Or could.

CHAIR TRACY CHRISTOPHER: All right. Moving on to your suggested change to --

MR. SCHENKKAN: 21c.

CHAIR TRACY CHRISTOPHER: 21.

MR. SCHENKKAN: 21c is a rule that requires protection of sensitive data, and it defines -- the existing 21c defines sensitive data. Again, its definition does not include one of the items that is required by these three new statutes and is also part of two of the -- for existing ones. The telephone number. That can be maintained as confidential, and the existing Rule 21c does not protect an address. It only protects a home address. Whereas, the three new statutes, and two, at least, of the four existing ones also protect any address. That's not limited to a person's home address, but can be the business' address. And so we certainly, it seems to me, ought to protect that.

And then we need to protect the name -- the existing Rule 21c protects the name of a person, only of a minor, and we clearly need to protect the name of a person

proceeding under a confidential identity under any of these other grounds.

And then because the real problem is that what other confidential -- what other information identifying a person is, is intrinsically not limited to any particular list. In the facts of the case, there may be other identifying information which should also be protected, and that's why I'm suggesting we add to the list of items of sensitive data, "any other information identifying a person proceeding under that confidential identity."

CHAIR TRACY CHRISTOPHER: Justice Miskel.

HONORABLE EMILY MISKEL: So 21c says attorneys and parties can't file anything with the sensitive data in it, and if something is filed with sensitive data, it can't be posted online. So anything that has a telephone number can't be filed, must be redacted and can't be posted online. So anything that has a signature block would not be able to be -- it would have to be redacted, and we would not be able to post it online.

And then, secondly, for an address, same thing. So anything that has a signature block would not be able to be filed, or the address of the properties that are the subject of the litigation wouldn't be able to

be -- but they would have to be redacted. I think it's unworkable. I guess you could use the full property description of it every time, but that seems unwieldy. So my recommendation would be to leave out telephone number and address from things that are not allowed to be in things that are filed, except to the extent that they are required by these three new causes of action, then I would leave it to be what you have as number (7), any other information that's prohibited, or some other way just limiting it to those three causes of action, because there are plenty of legitimate reasons that phone numbers and addresses appear in things that get filed in court.

MR. SCHENKKAN: I think that's an elegant solution.

CHAIR TRACY CHRISTOPHER: I was wondering how anybody could serve anybody if addresses were all gone.

MR. SCHENKKAN: But it already said -- you know, okay. Sounds like we've got a better solution.

MR. ORSINGER: Well, I mean, as a practical matter, when I file my pleadings for service I don't put an address in there. I just say information will be provided to the party serving the paperwork, and the private -- the private process servers want you to give them an address. They don't expect it in the petition

anymore, and I think that that would be a perfectly reasonable alternative to not require it in the pleading so that it's on the internet where the Chinese and the Russians can read it, but it's available to the process server so they can locate the defendant.

CHAIR TRACY CHRISTOPHER: But if you're pro se, and your address is your address where you're going to be served and get documents, how -- you know, that's an address. I mean, I can understand it bears your service address maybe, but what are we going to do with self-represented people who, you know, the court has to have some way to serve them. We just recently had a motion where a self-represented litigant wanted their e-mail address removed from the court's files. And I'm like how are we going to serve them? Well, they gave us a P.O. box. Okay. So we have a P.O. box to send them notice, but it's going to be an issue. Yeah, Justice Kelly.

HONORABLE PETER KELLY: It's not that hard to set up a second e-mail address.

CHAIR TRACY CHRISTOPHER: Well, yes, I know, but not for pro ses.

HONORABLE PETER KELLY: All of us probably have personal ones, work ones, and our e-file ones. It does put a burden on a pro se plaintiff to do that, but so

getting a P.O. box is more of a burden than that.

CHAIR TRACY CHRISTOPHER: I mean, it's a problem if we're going to start deleting things like this. Justice Miskel.

HONORABLE EMILY MISKEL: I think I heard a comment saying that home address was already confidential under 21c, and that's not quite correct. It's only home address of minors that is confidential under 21c.

MR. PERDUE: So, pragmatically, one of the -- there's a scope of discovery issue, which we confront, which is if you're going to disclose like a witness, or even a party, you're supposed to disclose their address and the last four digits of their driver's license. So I always thought that 21c thing was trying to address your discovery burden, and you're up against, now, these statutes, two of which have been on the books and we haven't changed the rules to address, that statutorily establish good cause for anonymity.

So, yeah, we have a common law around anonymity, but now we've got at least five causes of actions on the books that allow you to file anonymously as a matter of statute, without all of the analysis that goes into all of the case law that Pete was kind enough to pull. So I've never thought of signature blocks being subject to 21c, but that's just my ignorance.

HONORABLE EMILY MISKEL: It currently is not, but the proposed change would make it.

MR. PERDUE: Right, and but if I've got somebody who is a subject of a deepfake porn that's bringing a cause of action for the person that did that, or a sexual trafficking case, and you file anonymously, per se their identity is supposed to be protected, but then you get into discovery, and they have to produce their address or the last four digits of their social? Even though their identity is protected by statute, there's got to be some way to square that, and I thought that's what 21c was supposed to try to achieve.

CHAIR TRACY CHRISTOPHER: Justice Miskel.

HONORABLE EMILY MISKEL: I think it's slightly different. So 21c just talks about things that are filed with the court, so but you can always invoke a privilege in response to a discovery request, and I would imagine you could ask for a protective order, given your statutory right to --

MR. PERDUE: That's a fair point. I know that this comes up in child trafficking or sexual trafficking litigation, of which there have been a lot of anonymous filings, even without permission by the rule, and now you've got a statutory permission to do exactly that.

So when we first got referred this, it was supposed to be an issue of 21c, but 21c doesn't address the petition, which is how Pete came up with the 79 amendment to address what question we both recognized was -- because the federal law around this comes out of the federal pleading rule and our pleading rule, which is very ad hoc, but as the Legislature continues to confront kind of the evolution of the internet and different aspects of society and creates causes of action for them, which, in just the last three sessions, you've got five. Who knows what will happen in another two years. You basically have a statutory decision that there is good cause to proceed as an anonymous plaintiff.

MR. ORSINGER: Can I make a comment?

CHAIR TRACY CHRISTOPHER: Yes, sorry, Richard. I'm looking at 191.3 in terms of if you're pro se, you have to -- you have to sign with the party's address, telephone number, and fax number, if any.

MR. ORSINGER: Well, I mean, it raises the question of if you're the defendant against a pro se, how do you give them notice of anything if you don't have their telephone number, e-mail address, or mailing address?

But on 21c, I wanted to comment that I don't think that 21c keeps the telephone number, the address,

secret from the other parties. I think that it just needs to be redacted from the public document, so I would anticipate that the petition that's served on the defendant would actually have the plaintiff's address on it, but the copy of it that's with the district clerk would have it redacted. Is that anyone's understanding or everyone's understanding?

MR. SCHENKKAN: It hadn't occurred to me, but it strikes me as exactly the kind of thing we will need to try to dig into when he we have more time than we have between now and Monday.

MR. ORSINGER: Yeah, so the question whether it's discoverable or not, Jim, I don't think 21c is a discoverability --

MR. PERDUE: You're absolutely right. You're absolutely right. It's the pleading requirement of identification, and you're right.

MR. ORSINGER: And so the thought, to me, is perhaps we should clarify this in the comment or something that it should be redacted from the copy filed with the court, but not from the copy served on the defendant.

MR. PERDUE: Well, that -- so I'm not -- that would terrify me as a solution. Because if you're trying to maintain -- I mean, yeah, at some point the identity of a sex trafficking victim is going to become an

issue and will be known by -- known to the defendant. But preserving that, once you -- just the reality is once you put that name in writing and you give it to another entity, that preservation of confidentiality is highly at risk.

MR. ORSINGER: Then maybe we ought to subject it to a court's ruling on protective order on disseminating the information, but we're not going to get all the way through a trial with the plaintiff testifying under a pseudonym, are we? At some point doesn't the real identity need to be known? I don't know, maybe it doesn't. It just seems to me that at some point the defendant will be entitled to know who the plaintiff is.

MR. PERDUE: I don't know how you get a verdict *In Re: S.R.V.* I hear you.

CHAIR TRACY CHRISTOPHER: Judge Miskel.

HONORABLE EMILY MISKEL: I was just going to respond to a practical concern about the idea that you could have a redacted version on the public website and an unredacted version served on the defendant, which is the way the rule works right now, it says you are -- the party is supposed to redact the information before you e-file it. So how -- and that's what the clerk uses to assemble the package to be served. If you file the unredacted one, then we're putting a burden on clerks to do the re -- you

know what I mean?

MR. ORSINGER: We don't want the clerk to have to redact it.

HONORABLE EMILY MISKEL: Right. And then related to that, something you said earlier about what if -- on the court's need to advise people about their right to file anonymously, and you're like, oh, we're closing the door after the cow's already out of the barn, and I don't think that's quite correct either, because it can be fixed under 21c under, is it (e) or (f)? One of them says if you mistakenly file with confidential information, you can do a substitute redacted copy, and I've done that several times with the clerk, and they lock away forever the unredacted one and replace it with the redacted one for all purposes, so it can be -- so in other words, it's not dumb to say you can fix it later because it functionally can be fixed later.

MR. ORSINGER: You need to fix it when you can, but, realistically, the pro se is going to first learn about it at the first hearing when they go into court, which would be weeks or months, and by that time it may be in the newspaper. I hope it's not.

HONORABLE EMILY MISKEL: It may be, but if at that time they still want to make it confidential going forward, it's possible to do that is what I meant to say.

MR. ORSINGER: Sure. Absolutely.

MR. SCHENKKAN: But, ultimately, if the Court is trying to address this by rule, and they should, precisely because in the world we presently live in, once that first filing has been made with the disclosure, if there's anybody looking, it's now known forever, no matter what you do later.

CHAIR TRACY CHRISTOPHER: Well, I mean, some people buy the daily filings --

MR. SCHENKKAN: That's my point.

CHAIR TRACY CHRISTOPHER: -- of, you know, a county.

MR. SCHENKKAN: Yeah, and so we're -- and then with artificial intelligence, it's going to be scrubbing those systematically for all sorts of purposes, including ones initially entirely unrelated to this, but having scrubbed it, they've got it; and so the rules really need to be designed, to the extent the Court is capable, of can we, in fact, by rule do so to both inform and incentivize participants, at all of their varying levels of sophistication and responsibility, for the judges to lawyers to pro se plaintiffs, to understand this problem and do what they can to minimize it. That's the goal, and there just wasn't time to figure out how to do that.

The conversation we're having right now is very good examples of the kinds of thoughts that need to go into how much can be done by rule in advance and what are the trade-offs for other problems like getting the lawsuit on file.

CHAIR TRACY CHRISTOPHER: So in terms of the proposed changes to 21c, we're having problems with the -- all telephone numbers and all addresses, but we think we're still covered under (6) and (7), if there is a confidential telephone number.

MR. SCHENKKAN: Yeah.

CHAIR TRACY CHRISTOPHER: Or confidential address.

MR. SCHENKKAN: Yeah. I think that's a -- I really think that's an elegant solution to that problem.

MR. ORSINGER: Well --

HONORABLE EMILY MISKEL: I was going to add -- oh, sorry, I was going to add one more thing, which is under certain of the preexisting confidentiality statutes, they provide for -- I think it's like a respondent of a protective order to keep their address confidential, and they get a forwarding address through the attorney general's office that mail can be sent through, but I'm unaware of these three new causes of action, but it doesn't sound like they provided for that similar address

confidentiality protected by forwarding via the attorney general. So I just wanted to note that that is already available for previously existing causes of action, but it sounds like not available for the new ones.

MR. SCHENKKAN: From a quick look at one of the two statutes, no, I don't think they have a comparable provision in them, so if it were going to be supplied, it would have to be supplied by the Court by rule.

CHAIR TRACY CHRISTOPHER: Okay. So then our next issue is the appellate rules that you think need to be changed.

MR. SCHENKKAN: I think what we need to do on the appellate rules is let the dust settle on the rest of this and then conform them to this. I don't think there's a separate drafting problem. It's essentially the same one. Because whatever we wind up doing with the confidential identity, whether by statute, with statute by statute specifying what is a confidential identity and what is related information, or good cause under common law, case-specific variations in saying all we're trying to do, as I understand it at the appellate level, is trying to make sure that nothing that has been -- that we've been trying to protect below suddenly comes out in an appellate opinion.

We're just trying to keep the appellate

courts from inadvertently invading privacy that we've been trying to protect up until that point. And so I'm hopeful once we have a clearer understanding of what the words are at these other levels, then we can -- I hope we can quickly draft something that will work in TRAP.

CHAIR TRACY CHRISTOPHER: And RJ 9.5.

MR. SCHENKKAN: Same, basically. And in the RJ --

MR. ORSINGER: While Pete is looking that up, can I comment on the --

CHAIR TRACY CHRISTOPHER: Let Pete finish his thought and then I'll come back to you.

MR. SCHENKKAN: In 9.5 I think we are more or less okay already under 12.5 little (i), any record that is confidential or exempt from disclosure under a state or federal constitutional provision, statute, or common law, and then we may need to look into the including clause and see if some new including clause is needed on top of all of the ones that are already there, of which we only know are one here at the moment.

CHAIR TRACY CHRISTOPHER: And, Richard, a comment on the appellate rule?

MR. ORSINGER: Yes. We have a model to go by. Actually, three models, in TRAP 9.8. It's required that the identity of a minor in an appellate proceeding be

redacted in the record, and it's now a universal that all of the cases involving minor children that you see in family law are all initials, one initial, two initials, whatever, and so that protocol exists, and if you file an appeal with a reporter's record that has the minor's name in it, it will be bounced back. So somebody in the courts of appeals is checking that to be sure that it's true.

TRAP 9.9 talks about redacted sensitive data, which I think ties into the Rule 29 conversation that we were having. 21c, I'm sorry, and then TRAP 9.10 talks about criminal cases and what's appropriate sensitive data and then things that are clearly not sensitive data of the convicted person. So we have those rules already written as models of how we can handle whatever we decide to plug into those rules.

CHAIR TRACY CHRISTOPHER: I think he was just adding a (d), right?

MR. SCHENKKAN: Yeah.

CHAIR TRACY CHRISTOPHER: You were going to add one more paragraph to 9.8?

MR. ORSINGER: And I think what Pete was saying is whatever we decide to do at the trial court level, we'll just put that into that subdivision of the TRAP rule.

CHAIR TRACY CHRISTOPHER: All right. Any --

oh, under RJA, you had a question at the bottom? Claimant filing under a pseudonym to file a document that identifies the claimant.

MR. SCHENKKAN: Yeah. That was a suggestion that Richard had made, and I thought that if we -- if the Court wanted discussion on it, and I wasn't too sure if you would, given, you know, the limited ability of us to move the ball along this far at this time, but in later discussions, one of the questions might be do you want a confidential document filed with the court that identifies the claimant the way we apparently do, Richard informs me, under criminal cases?

HONORABLE JANE BLAND: Yeah, we have sensitive data sheets that contain that information, so we just would have to decide whether that information should be provided and to whom and how.

MR. ORSINGER: And that would be in a rule, though, wouldn't it, or would it be an administrative rule?

HONORABLE JANE BLAND: Right now some of that is housed in the JCIT rules, so let me -- we'll work on that, how to do it, but we understand -- I understand the issue.

CHAIR TRACY CHRISTOPHER: Justice Gray.

HONORABLE TOM GRAY: Yeah, on the memo on

page 15 of 15, you have Texas Rule of Judicial Administration 9.5, but all of the discussion is about Rule 12. Is the 9.5, I'm assuming, should be 12.5?

MR. SCHENKKAN: It should be. It looks that way. I'm sorry.

HONORABLE TOM GRAY: Okay. That's okay. Because I think it's important to understand that Rule 12 doesn't apply to anything that is filed in the trial court or the court of appeals as a pleading, response, or anything else. Those records that it references are judicial records, not court records. And so I'm not sure that 12.5 is impacted by what we're trying to do here.

MR. SCHENKKAN: Got it. My apologies. As I say, I'm responsible for all of the incompleteness and errors in this mess. Not Richard or Jim.

HONORABLE EMILY MISKEL: 12.5 or 12 is confusing because it refers to judicial records, but it defines them as they can't be anything that relates to a case.

MR. SCHENKKAN: Right.

HONORABLE TOM GRAY: Makes perfect sense, after you've worked with it for 20 years.

CHAIR TRACY CHRISTOPHER: All right. Anything else on this issue? And do we want the subcommittee to continue to work, or are you going to --

HONORABLE JANE BLAND: We'll let you know. We'll circle back.

CHAIR TRACY CHRISTOPHER: We'll circle back. Don't work on it now until we ask you to work on it.

And Justice Bland and Young have said that we're going to have an early Labor Day break. And, sorry, Roger, we are not getting to your evidence rules today.

MR. HUGHES: Well, in the words of Milton from his sonnet "On The Blindness," "They also serve who only stand and wait."

CHAIR TRACY CHRISTOPHER: All right. Thank you. Our next meeting is...

MS. DAUMERIE: October 10th.

CHAIR TRACY CHRISTOPHER: October?

MS. DAUMERIE: 10th.

CHAIR TRACY CHRISTOPHER: October 10th. All right. Thank you very much.

(Adjourned at 3:32 p.m.)

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REPORTER'S CERTIFICATION
MEETING OF THE
SUPREME COURT ADVISORY COMMITTEE

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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 29th day of August, 2025, and the same was thereafter reduced to computer transcription by me.

I further certify that the costs for my services in the matter are $ 1,801.00 , which was paid or will be paid by The State Bar of Texas .

Given under my hand and seal of office on this the 29th day of September, 2025.

/s/D'Lois L. Jones
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