* * * * * * * * * * * * * * * * * * * *

MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

DECEMBER 5, 2014

(FRIDAY SESSION)

* * * * * * * * * * * * * * * * * * * *

Taken before *D'Lois L. Jones*, Certified Shorthand Reporter in and for the State of Texas, reported by machine shorthand method, on the 5th day of December, 2014, between the hours of 8:58 a.m. and 2:36 p.m., at the Texas Association of Broadcasters, 502 East 11th Street, Suite 200, Austin, Texas 78701.

Documents referenced in this session

14-01 Texas Legal Services Center letter, Bruce Bower, 12-5-14

14-02 Jim Adler letter, 3-25-14

14-03 TEX-ABOTA PowerPoint, 12-5-14

14-04 Pattern Jury Charge Committee, Instruction on Spoliation

14-05 Memorandum, Motions for New Trial and Mandamus Review, Honorable Tracy Christopher, 12-1-14

--*-*-*

CHAIRMAN BABCOCK: Marti, if you want to come down here so I can introduce you. Welcome, everybody, to our only meeting of this year. I speak for not only myself but I bet for others as well that I miss seeing you guys every other month, and you may not know, but this is the last meeting of our three-year term. At least one of us didn't remember that, so the Court will be appointing a new committee over the new year, and I know I'll see most if not all of you back here, assuming they ask me to come back. So with that, I want to introduce Angie Senneff's replacement. Angie went in-house with Chevron, right?

MS. WALKER: ConocoPhillips.

CHAIRMAN BABCOCK: ConocoPhillips, sorry. Oil companies are all the same. But she's ably replaced by Marti Walker, who is my assistant, sitting to my right, and you've all corresponded with her by e-mail, so -- and she says she's nervous about this. Is that true?

MS. WALKER: That's true.

CHAIRMAN BABCOCK: So don't give her too hard a time this first meeting. So with that, Justice Hecht, your remarks.

HONORABLE NATHAN HECHT: In the year since we last met the Court's been very busy with rules. We

finally approved the e-filing rules a year ago, and now there is mandatory e-filing in 22 counties, which comprise 73 percent of the state's populations. The counties that are to come, that are to be mandatory January 1st, are already permissibly e-filing. All of the counties that are to come on next July 1st are doing the same except for three, so they'll be ready in plenty of time, and the counties that are to come on a year from now on January 1st, 2016, should be pretty much ready to go by the end of the spring of this coming spring, so that deployment is working very well.

There are more than 19,000 documents being filed everyday in Texas. I think this is the largest e-filing operation, court e-filing operation, in the country; and it is already beginning to be a model for other big states, which have faced the same problems that we do in trying to get everybody on board, a model for them to proceed as well. There are 87,000 registered users, of whom 45,000 are attorneys, which is -- there are about ninety-three or -four thousand members of the Texas bar. If they were all Texas attorneys that would be half the bar.

There's a glitch every once in a while, but so far it has been working pretty well, and I credit David Slayton, the executive director of the Office of Court

Administration with that and his work with Tyler Technologies. David is just Johnny-on-the-spot every time there is the hint of a problem and has done a lot to make this work as well as it has. So I expect there may be some funding in the next session to complete the availability of software and hardware in all the counties so that Texas will be fully mandatory e-filing on schedule by the summer of 2016.

The -- we approved the expedited foreclosure forms in February. This was at the behest of the Legislature, House Bill 2978. The same task force that had worked on these rules over the years chaired by Mike Baggett did the initial drafting work, and we have not received any feedback from the bar on these, so presumably they are working well.

In August we finally approved rules and fees for the Judicial Branch Certification Commission. This is a creature of the last legislative session to bring together the groups that oversee process servers, interpreters, court reporters, and guardians. So this is kind of an ombudsman group to oversee these various adjuncts to the judiciary, and they became effective September 1st and are in operation. The commission is in operation, and so that so far is working well.

We finally approved the amendments to Rule

902(10) of the Rules of Evidence, which the committee worked on, again at the behest of the Legislature in Senate Bill 679, and the -- I think the major change we made in that, Martha, was there was a proposed 30-day service period of the materials that are filed -- filed under Rule 902(10), and we shortened that to 14 at the -- on the arguments of the family law practitioners and criminal lawyers. So they apply beginning September 1st.

We finally approved the international practice amendments to the rules governing admission to the bar, and that was a task force chaired by Larry Pascal and vice-chair LeLand DelaGarza. The complaint by the Texas law schools was that New York and California are stealing all of our business and all of these foreign law students who want to get U.S. law licenses were going there instead of here. There instead of here means like 4,000 per year in New York and 20 per year in Texas, so this is an effort to make Texas a more attractive venue for these foreign citizens who want to come to Texas to get -- to the U.S. to get a law license. The -- these rules changes were supported by the law schools, by the business community. There were a few comments after they were put out for comment, but mostly they allow foreign citizens to come here and study, get LLMs, get licensed if they're here on optional practical training authorization

and so far seem to be well-received.

Then we just finished the restyled Rules of Evidence and the amendments to Rule 511 of the Rules of Evidence. So that was work that took a couple of years. You remember that we built on the Federal rule restyling project that so happens Judge Fitzwater in Dallas was the chair of for the Federal rules committee; and where the Texas rule is the same as the Federal rule we just changed the language to the new restyled Federal rule; and where the rule is different, Professor Goode and others worked to use the same principles to rewrite the rules in language that we hope is easier to understand.

The only other substantive change that we think we made was in Rule 613 where the committee -- this committee -- believed that the rule did not mirror the practice, and we changed the rule so that it did, and those rules are out for comment and will become effective April the 1st. So they'll be in the *Bar Journal* --

MS. NEWTON: January.

HONORABLE NATHAN HECHT: -- January. So that's what the Court has done on the rules front in the last year, and we still have pending Rule 145 and the ancillary rules. With respect to the session, the only bill that we know of so far that has been filed asking for rules is House Bill 241, which would require rules to

provide for substituted service of citation through social media issue that we have debated, and our previous difficulty in reaching a decision on that issue will no doubt be resolved if this bill passes, and but that's all we know about so far. Justice Boyd, you want to --

CHAIRMAN BABCOCK: Yeah, we're honored to have Justice Boyd with us, and any comments? A former member of this committee.

HONORABLE JEFF BOYD: Yeah, by my count I think I've been on this committee 13 years now, which means some of y'all are getting really old because you were here long before I was. I will never forget the very first meeting that I attended was over in the State Bar building, and we spent almost a half hour arguing whether a rule should say "less than substantially all of" or "substantially less than all of," and I wondered what I had gotten myself into. I'm glad today's agenda is not going to be quite as bogged down as that, but I know next year's meetings will be, but I always look forward to these meetings because this is the brain power of the legal community in our state, and I'm honored to be here with you.

CHAIRMAN BABCOCK: Thanks. Thanks, your Honor.

HONORABLE NATHAN HECHT: And I might just

add that our -- this committee's relationship with the Legislature currently is very good, very strong. There's a very trusting view of the committee that the implementation of policy decisions can be handled by the committee, technical things that the Legislature doesn't have time for in the limited time that it's in session, so we're very grateful for that, and we think we've used that responsibility to good end.

CHAIRMAN BABCOCK: Thank you, your Honor. The genesis of this meeting occurred about maybe four or five, six years ago when Justice -- Chief Justice Hecht and I were just batting around ideas, and it occurred to us that it might be a good idea to dedicate a meeting right in advance of the session to ways to improve the civil justice system in our state, and so this is the third such meeting like this and perhaps the most ambitious, because we have some terrific speakers with different perspectives on what services the legal system should provide them and their clients, so we're very honored and grateful that they've taken time out of their busy lives to come and be with us, and the first one on the list is my old friend S. Jack Balagia, Jack Balagia. We clerked together in the Northern District of Texas, and he clerked for Judge Taylor and I clerked for Judge Porter, and Judge Taylor used to introduce Jack in the way

I will introduce him, which was "If bullshit were wind, you would be a hurricane."

MS. ADROGUE: What, Chip? With friends like this.

CHAIRMAN BABCOCK: And Jack is sitting next to Judge Taylor's old court reporter, David Jackson, of this committee for 25 years and --

MR. BALAGIA: Is that going to be in the transcript?

CHAIRMAN BABCOCK: -- can substantiate my story about Judge Taylor. So, Jack, you can sit there and take it or you can come up to the podium and take it.

MR. BALAGIA: This will keep me further away from you, so I will stay right here. Listen, I appreciate -- by the way, what he said was actually true, Judge Taylor did refer to me that way. I don't know why. But it's an honor for me to be here. There is a lot of expertise in this room, and it is perhaps a little astonishing that I would be here talking to a bunch of Noahs about the flood, but I do have a perspective that I would like to share. I was in private practice for 20 years as a litigator and have been in-house now for 16 years, and these are my personal views, I might add. But the litigation business has changed pretty dramatically since I started; and I sort of think of my father telling

me how he used to walk three miles in the snow to get to school, so that's how I'm going to sound; but when I started practicing lawyers were charging $25 an hour; and as my senior partner used to say, "And they were glad to get it." But -- and, of course, back in those days discovery meant you turned over a couple of files, maybe a box, sometimes you would turn over a box of stuff; but I think, you know, the hourly rates and the advent of electronic discovery changed the landscape pretty dramatically; and just to give you a little bit of our in-house perspective, I can tell you that we have about a hundred terabytes of data on litigation hold, which is about, I am told, 8.5 billion pages of documents. Of course, we're big, we're a big company, so that may not be that surprising, but that is a lot of stuff to hold; and the fact is, of course, we can afford it; but there are a lot of businesses and people who are involved in the litigation system or want to be involved in the litigation system that cannot afford that.

This has all impacted our business, excuse me, the litigation business in this country. The National Center for State Courts has a study that they did recently that shows that new filings since 2000 are down in many categories of cases, some as much as a third. Usually when you have a big recession, litigation picks up. I

don't think we saw that in 2008 except for perhaps foreclosures and bankruptcies. Alternative dispute processes are much more prevalent. I will tell you, excuse me, in my experience arbitration is not cheaper. It's not shorter, but a lot of people don't know that, and they still put arbitration provisions in their contracts, and so I think we're seeing more of that.

I think -- I think Chip has given you this statistic before, but apparently Ebay resolves 16 million disputes a year online. People who might in the old days have used the courthouse are not using it anymore. So, you know, my perception is that the middle class is abandoning our system, and obviously poor people are depending on Legal Aid to get them into the system, and right now we're only serving one out of four of those people in this state.

Now, I'm saying all of this, but there are several studies that confirm this. One is the Duke Conference on Civil Litigation in 2010. They estimate cost of litigation are up 75 percent -- thank you so much. 75 percent since 2000 and then earlier this year the University of Chicago, Professor William Hubbard, produced a study that showed large companies are spending about $40 million a year just on litigation holds, preservation of documents. Less than half of those documents are actually

ever reviewed, and less than half of those are ever actually produced.

So -- so having painted this picture, I think it's fair to say that there have been some changes that have been made, and I think -- and I can say this because none of the dissenters are in this room, but there was a decision of the Supreme Court, *Brookshire Brothers vs. Aldridge,* I believe that has made a step in improving issues related to electronic discovery, in terms of spoliation and spoliation instructions; and I think that's a positive step. I think the amendments to the Federal rules that have been proposed now and are awaiting or will be ultimately approved unless Congress takes some other action, I think those rules which put further limits on the scope and introduce the proportionality issue into the Federal rules I think is a big step; and at the risk of being viewed as moving the deck chairs on the Titanic let me just suggest a couple of others I think it would be helpful if the committee considered.

One is to shift the proportionality analysis that is currently in Rule 192.4, move that into the definition of the scope of discovery. I think that will mirror the new proposed Federal rule, but I think it is a positive -- a positive move because it has maybe some slight effect of changing the burden, but at least

incorporating a cost benefit analysis into the scope of discovery rule. Another -- another proposal would be to permit the producing party to determine the format of the production, assuming the format is in a reasonable form, rather than allowing the requesting party to instruct how it wants the data produced. I think that would be helpful in reducing the costs; and, finally, I think if we could reduce the offer of settlement, reduce the -- right now an offer of settlement cannot be made before 60 days of the lawsuit being filed. I think it would be helpful if that limitation were not in -- I'm not really sure why that's in there. I'm sure there's a good reason, but that might get cases resolved more quickly, and I think that would be a positive.

So those are just a few suggestions. I really appreciate the opportunity to speak to this incredible group. I know you do great work, and if there's anything we can do to help with it, we would be glad to participate. So thank you very much.

CHAIRMAN BABCOCK: Thanks, Jack, and by the way, for the record, Jack is the general counsel of ExxonMobil. It's on our agenda, but I should have included that in my helpful introduction.

PROFESSOR CARLSON: A little balance there.

CHAIRMAN BABCOCK: A little balance. So,

Professor Carlson, why is the offer of settlement rule as it is?

PROFESSOR CARLSON: You know, I think we were mirroring the statute, if I recall correctly.

HONORABLE NATHAN HECHT: Yep. The committee wrote a rule that was balanced, it worked -- we weren't sure it would work, but -- and we didn't know how needed it was, but we wrote a rule that applied in every direction, and then the Legislature in House Bill 4, you remember, some things that it asked us to do were very strict and said you have to do this, this, this, and you have to do it exactly like this, and that was one of them, and then some of them were very general, but we, I think, wrote it the way the Legislature directed.

PROFESSOR CARLSON: I suppose the Legislature was trying to promote earlier settlements than later.

CHAIRMAN BABCOCK: Yeah, and is there any sense that anybody uses this rule? I mean, has anybody in here ever used -- Wayne Fisher is shaking his head "no." David Jackson.

MR. JACKSON: Chip, the room is a little bigger than it normally is, and we're having trouble back here hearing.

CHAIRMAN BABCOCK: Okay.

PROFESSOR CARLSON: Sorry.

CHAIRMAN BABCOCK: Could you hear me? My question was --

MR. JACKSON: I could hear you.

CHAIRMAN BABCOCK: Is anybody using this rule? Anybody -- yeah, Roger.

MR. HUGHES: Well, maybe my perspective is a bit slanted, but we defend a lot of the first party hail damage claims that are in the Valley, and several of -- several carriers have taken to making offers of judgment early on in the case; that is, they feel they have evaluated the claim fairly, and this is what it's worth, and they've made an offer of judgment.

CHAIRMAN BABCOCK: Offer of settlement or judgment?

MR. HUGHES: Pardon me, settlement.

CHAIRMAN BABCOCK: Okay. Yeah, the Federal rule is a little different. It calls for a judgment.

MR. HUGHES: Yeah.

CHAIRMAN BABCOCK: Yeah. All right, great. All right. Any other comments in response to Jack Balagia's -- yeah, Dean Hoffman.

PROFESSOR HOFFMAN: So let me just begin by saying that, Jack, you were very gracious. You may not remember, I was the -- put together the 75th anniversary

of the Federal rules program that we did in New Orleans I guess a few -- well, maybe D.C., a program. A bunch of luminaries including Jack Balagia were on that panel. It was a wonderful panel, and we got a lot of diverse views.

CHAIRMAN BABCOCK: He's graduated to luminary status?

PROFESSOR HOFFMAN: Yeah. 75th anniversary.

MR. DAWSON: He's come a long way from --

MS. ADROGUE: You should have introduced him, seriously.

PROFESSOR HOFFMAN: Well, with that said, I do want to push back just a little bit on one small --

CHAIRMAN BABCOCK: Sure.

PROFESSOR HOFFMAN: I'll make one small comment, though I think it's an important issue. The first proposal strikes me as a very much not worth us considering now, which is the possibility of moving from 192.4 on proportionality, and I just want to just quickly reference, so what Mr. Balagia was talking about is that in the proposed Federal rule changes that are like a train going to be passed, they have moved -- there is a proposal to move proportionality from one part of Rule 26 into the scope of discovery, the initial part of 26(b)(1). There are lots of people who commented negatively, yours truly included, thinking that we don't know what the effect of

this change is other than it is almost certainly to embolden defense lawyers to slow the process down significantly and urge that plaintiff's lawyers now bear the burden on demonstrating proportionality to justify their access to discovery.

So who knows what the right answer is. My point is simply before the state even considers going that way, let's watch this experiment play out on the Federal side and see whether or not it's a train wreck, as many of us think it may be. So that's my thought.

CHAIRMAN BABCOCK: Thank you, Dean Hoffman. Anybody else? Comments? Okay. Great. Well, thanks again, Jack. That was terrific.

Our next speaker is Wayne Fisher from Houston. Wayne is sometimes referred to as the great Wayne Fisher, mostly by his staff, but Wayne predominantly practices on the plaintiff's side of the docket and has graciously agreed to come here and share some of his thoughts. Wayne.

MR. FISHER: Okay. Thank you. Jack, you know, when you were rudely introduced I thought of the Mose Allison song where he says, "If silence were golden you couldn't earn a dime," and so maybe that is about our friendship here. No, Chip and I have worked together and have great respect, and I am not here in any official way

representing the plaintiff's bar, although I've been doing it 53 years, most of it probably on the plaintiff's side of the docket, but there are a few things that I just wanted to comment about that bother me about procedurally how things are actually being done day-to-day.

One thing I'll start with is what I view to be an absolute travesty; that is, objections that are made -- as we speak right now somebody is saying "objection, form," "objection, form," "objection form," over and over in depositions that make it almost impossible -- not impossible, makes it so difficult and so expensive to then go through and, first of all, try to get a judge after you have a case that has maybe some significance. You've got 8 or 10 rather complex depositions; and the judge, you've got to say, "Judge, you've got to rule on every one of these objections so that we know what we can play in the videotaped depositions or not." And when do you get that done? Unless the judge appoints a master it runs the trial judge bananas to say, "I'm not going to sit here for two or three days ruling on all of these objections to form"; but you have that; and if you look at the law and the rules, when somebody says "objection to form" -- and I realize the intent was to prevent a lot of speaking objections. That was a very valid intent to say, well, quit making all of these speaking objections and so forth,

but objections to the form of the question include the following: One, assumes facts that are not in evidence; two, argumentative; three, misquotes the deponent; four, calls for speculation; five, vague, ambiguous or confusing; six, compound; seven, too general; eight, calls for a narrative answer; nine, question has been asked and answered; ten, the question is harassing and oppressive; and three, the question is an incomplete hypothetical.

Now, it would take a lawyer of -- you know, I don't want to say brain damaged and offend people, but I mean, it would take someone of extremely limited IQ not to be able to figure out one of those, you know, when somebody challenges that objection. "Well, let me look here. Well, I'll say it's this." You see what I'm saying? And it makes the presentation of evidence in a complicated case extremely difficult when you've got all of those continuous. I mean, I've had lawyers I think get laryngitis saying "objection, form," and I said could we just get a signal, number one or whatever, but so I suggest -- what can be done?

Well, I don't have a solution, except to say if the Court and this committee would recommend saying those objections that are not sustained are admissible -- not admissible, can be played to the jury, just like an objection in trial. Somebody makes an objection, it's

overruled, jury hears it; and it causes lawyers, plaintiffs and defendants, to use considerable discretion about what they're objecting to because they know the jury is going to hear it; and I've thought for years if somebody -- these people making these continuous objections over -- knew they were going to be played to the jury, that would be an inhibiting factor in what I view to be a sad situation. It adds to the expenses that clients are having to pay having to take care of all of that, and I just think that it's a problem.

Request for admissions, we've got a situation where the bar generally and the judiciary seem to think that if someone denies a request for admission, okay, that's it, nobody can say anything about it. You can't admit it, you can't let the jury know that that has been denied, and to me that results in someone being able to say, "Well, if I deny this, nobody is going to be able to say anything about it," unless they can look at the rule and show that somehow the other -- it's subject to sanctions under Rule 215 or whatever the rule is, and that's extremely costly and difficult. So on request for admissions I'm just suggesting -- and I mentioned this to Justice Hecht several years ago -- if someone denies something, at least let it be shown to the jury, not that it necessarily has the effect of -- with respect to

motions for summary judgment, it wouldn't necessarily be something that you would count as evidence; but again, letting the jury know just like if I were to say if Jack Balagia was on the stand and I said, "Isn't it true that so-and-so-and-so?"

"No, it's not." Jury hears that. Why shouldn't they hear the denial of these requests for admissions and, again, give impetus to honest, clear cut and so we can narrow down the scope of these trials, and it would help immensely, at least in my view.

Arbitration, Mr. Balagia mentioned that. There's great concern in both sides of the bar about arbitration, and, you know, I was a regent of the American College of Trial Lawyers, and even then there were discussions about we may have to change the name of this organization to the American College of Mediators or Arbitration Responders, and the same thing with ABOTA, and I just suggest that the Court recommend going back to the rules and the Schlumberger case in 1997 which basically says if you have Exxon and Chevron with lawyers negotiating an arbitration agreement, that's one thing; but to have it in every sales contract that people have, it just seems to me to be unreasonable to require it unless both sides after the issue has come up are given a chance to say, yeah, well, I'd rather arbitrate it than

try it. Then everybody has had a fair opportunity, instead of saying, "Well, it's in the contract down in the fine print. You signed it, and therefore, it's compulsory arbitration."

That is a concern, and, again, I don't have all the answers to it, but it's a long way in a lot of these cases and the complexity of them and what all we have to do. I remember Warren Barnett, some of you will remember who Warren was. He was a plaintiff's lawyer of some legend who thought the rules were mere suggestions, by the way; but at any rate, he was asked at a docket call in Galveston whether he was ready; and he stood up in that booming bass voice and said, "Plaintiff is ready, your Honor"; and the judge said, "Warren, you know you're not ready. You never are." And he said, "Au contraire, your Honor, my office has an immutable rule that if we can find either the file or the client, we're ready, and in this case we have both." It's a lot more complicated than that. Thank you.

CHAIRMAN BABCOCK: Thanks, Wayne. Any comments to what Mr. Fisher has had to offer? Yeah, Justice Christopher.

HONORABLE TRACY CHRISTOPHER: I agree with the comment about "objection, form." It's worthless. It destroys the flow of depositions, and it's almost

impossible to edit out, so when you're playing this little video you'll hear kind of in the background, "objection, form," "objection, form." It's terrible, and the idea that you're going to play the objections to the jury as a punishment to the person who made objections is lost on the jury and is burdensome on everyone to have to listen to it. I think all objections ought to be, you know, preserved until time of trial. You don't have to make a single objection in a deposition. It would be a much better rule.

CHAIRMAN BABCOCK: Yeah, Buddy.

MR. LOW: Chip, we tried a case --

CHAIRMAN BABCOCK: Speak up, because they won't be able to hear you.

MR. LOW: Okay. Four and a half months, before Bob Parker; and one of the things he did, he had a magistrate ruling on objections the day before; and on depositions where they were "objection, form," "objection," he let us play; and you think that the lawyers didn't look bad repeating "form," "form," "form," it made Christians out of those people.

CHAIRMAN BABCOCK: Well, Judge -- Justice Christopher thinks that that's lost on jurors.

MR. LOW: Well, it --

CHAIRMAN BABCOCK: Yeah, Judge Wallace.

HONORABLE R. H. WALLACE: I have a question for Wayne. As a trial lawyer and a judge I've felt like request for admissions and interrogatories were largely worthless for the most part. Do you think request for admissions, I mean, if properly used they can be valuable?

MR. FISHER: Absolutely.

HONORABLE R. H. WALLACE: But when I see a request for "admit that you defrauded so-and-so," well, you know --

MR. FISHER: No, a properly written and carefully constructed request for admission that forces either side, plaintiff or defendant --

HONORABLE R. H. WALLACE: Right.

MR. FISHER: -- to have to address that is -- it becomes a judicial admission, and evidence can't be offered to the contrary, so you can't just send out 200 of them, but if you focus, it can be extremely useful in my experience.

HONORABLE R. H. WALLACE: What about limited request for admissions? Right now there is no limit on request for admissions.

CHAIRMAN BABCOCK: Could you speak up, Judge? I think you said what about limiting.

HONORABLE R. H. WALLACE: Yeah. There is no limit on request for admissions right now.

CHAIRMAN BABCOCK: Right.

HONORABLE R. H. WALLACE: And it is not unusual -- well, it is unusual to see 200.

MR. FISHER: Right.

HONORABLE R. H. WALLACE: Just if you limited them that would at least make people focus on, it seems to me, the real issues.

MR. FISHER: Yeah.

CHAIRMAN BABCOCK: Somebody else had their hand up? Yeah, Alistair.

MR. DAWSON: You know, the "objection, form" is -- I agree with Justice Christopher. It is useless, and the idea I think when we passed it was to give the questioning attorney the opportunity to fix the question if, you know, it really was a problematic question. That almost never happens, and so it's really a code I think for most lawyers to the witness who's answering the question that the lawyer doesn't like the question or be careful or I want to break up the flow or whatever. It doesn't serve a legitimate purpose, and we already have protections in the rules where you can instruct a witness not to answer if the lawyer is getting, you know, out of hand or is, you know --

CHAIRMAN BABCOCK: If it's an abusive question.

MR. DAWSON: Abusive question, that's right. So let's get rid of the "objection, form," and let's just reserve all objections until the time of trial.

CHAIRMAN BABCOCK: Well, what -- isn't it the case that if you object as to form and then the questioner says, "What's your objection," and you say, "It's leading" or "It assumes facts not in evidence" or "It's argumentative," whatever it may be, and then the questioner can decide whether he wants to reword the question.

MR. DAWSON: Right.

CHAIRMAN BABCOCK: And that wouldn't -- but the problem is once you get to trial and somebody says, "The form of that question was bad, Judge." "Sustained." Well --

MR. DAWSON: You need to ask them --

CHAIRMAN BABCOCK: You've got a witness who's not available.

MR. DAWSON: You need to ask them a better question. I mean, the number of times that that actually happens, the exchange that you've just articulated, is one in a hundred. If that. I mean, and so all you're doing is you're adding a whole ton of objections that don't really serve a purpose, that interrupt the deposition, and you know, so let's just reserve all objections, and if I

ask a bad question and the other side is not obligated to object and I get to trial and I don't get to play it, well, that's too bad on me because I asked a bad question.

CHAIRMAN BABCOCK: Okay. Good. Anybody else? Yeah, Justice Bland.

HONORABLE JANE BLAND: I agree with that. I like that much better than playing the objections at trial because I agree with Judge Christopher that the jury, you know, feels like it's a big waste of their time, but the preserving the objections until trial has the added benefit of if the judge is already going to be reading the other objections that are -- that you don't have to say form to like hearsay and everything else, for those depositions that are going to be played at trial and then nobody ever has to look at the 90 percent of the depositions that never see the light of day. So it seems like having that kind of a look, look, see at the time of trial when we actually know the deposition is going to be played is more efficient for everybody.

CHAIRMAN BABCOCK: Okay. Yeah, David.

MR. JACKSON: It would make the editing phase -- we do a lot of editing of videos, and the lawyers want us to cut out those objections, and it gets almost impossible to do, so, you know, you spend a lot of time trying to do that and trying to get it exactly clipped

where you hear no objections, and we have to bill them for that, but if you could just play them straight through they could build their own clips with their own software and not have to worry about it.

CHAIRMAN BABCOCK: Yeah. Good point. Anything else? Wayne, thank you very much for coming. We appreciate it. Peter Vogel will be here in the afternoon unless he snuck in on me, so we'll go to Bruce Bower, who is deputy director of the Texas Legal Services Center; and Bruce is going to make his way it looks like to the podium, so the variety of the way speakers have addressed us is great. Somebody sat down. One person stood up. Now we have a podium speaker. Thank you, Bruce.

MR. BOWER: Thank you very much, and thank you for the opportunity, Chief Justice Hecht, Justice Boyd, Chairman Babcock, judges and counsel. I appreciate this chance to speak with you. I'm an attorney --

HONORABLE TRACY CHRISTOPHER: We cannot hear you. Sorry.

MR. BOWER: I am an attorney who has mainly practiced in a Legal Aid setting in Alabama, Illinois, and now in Texas, and so I come from that background, and so most of my clients are no threat to any of your clients. On occasion there is an intersection, and I do want to say that one of the extraordinary intersections of Legal Aid

and the bar and the judiciary is Chief Justice Hecht building on the work of his predecessor, Chief Justice Jefferson, the two of them have been extraordinary, nationally recognized champions for access to justice, and I think that they are owed a round of thanks for the work they do on that.

(Applause)

MR. BOWER: I want to focus on just a couple of aspects, and the reason is that it's very clear and you'll hear from an attorney with Texas RioGrande Legal, Nelson Mock, and it will become clear how stretched the Legal Aid offices are in serving the clients that come their way, the portion that they're able to serve. They're very stretched, and so I would recommend that Texas expand what it already has begun, which is the presence of court self-help centers. My handout that you'll have available to you lists several counties where there already are court self-help centers that can help save court time. It can certainly help provide access to justice. An example is here in Travis County where there is an attorney in the the law library to help unrepresented individuals who are low income prepare documents and then up in the courtroom there is a lawyer who can help conduct the proceeding. It's been very, very time efficient.

Another matter I would like to emphasize, and I think here I may have a different perspective than some previous comments, is mediation. Mediation in the hands of a trained mediator can help to balance power imbalances, and it can be a very helpful way to resolve disputes. Mediators, trained mediators, as we all know, are trained to separate the positions that people may have from their real interests; and it's been a very effective way of resolving disputes for people of modest means when appropriate. Mediation, of course, differs from arbitration in that with regard to mediation a result can't be compelled and people can drop out of mediation and go to court if they want. It's a very, very effective tool many times, so I would certainly encourage that we maximize the use of mediation.

There is, of course, as has been alluded to, the arrival of e-mediation, and as long as e-mediation preserves that ability of balancing out power differences between disputants and as long as e-mediation maintains that ability to separate parties' positions from their real interests, I think e-mediation will be something to expand in the future, and we just need to make sure that it works well for people of modest means.

A third point I make is about volunteer lawyering. This State Bar with the leadership of this

Supreme Court has a long tradition of volunteer lawyering, extraordinary volunteer lawyering. One of the examples I'll give, and I hope he doesn't mind me mentioning him is Mr. Schenkkan sitting over here. Some years ago just one of his volunteer lawyer undertakings involved representing poor women who were faced with the loss of health care because of a improper state rule, and Mr. Schenkkan argued at the podium as well as any attorney ever has in Federal court here in Austin and won a ruling that was then upheld by the Fifth Circuit Court of Appeals. So he's I'm sure just an example of the volunteer lawyering present in this room, but the volunteer lawyering that is carried out by the lawyers of the State Bar of Texas is extraordinary, and I want to say thank you to Mr. Schenkkan for being an example of that.

My final point concerns a tool that I think could stand some guidelines, which is the authority in the Texas Government Code in Chapter 24 for district court judges and in Chapter 26 for county court judges to appoint attorneys for indigents in civil matters. The litigation that has arisen regarding especially Chapter 24.016 of the Government Code has repeatedly involved circumstances where people thought they should have court-appointed attorney representation and the Supreme Court has said "no." That took a lot of time. That

probably could be avoided in some instances if guidelines were promulgated for when a motion to appoint counsel under Government Code Chapter 24.016 or Government Code Chapter 26.049 is appropriate. Times when it wouldn't be appropriate would be when the matter is fee generating. Times when it might be appropriate would be when basic needs are at stake, such as access to health care, or when the State is on the other side and represented by an attorney. So I suggested some guidelines in my materials that if they were adopted for the exercise of discretion that is available under Chapter 24.016 of the Government Code and Chapter 26.049, I think in the long run would save disputants time, would save the courts time, and might, in fact, lessen the risk of members of the bar being erroneously exposed to the mandatory appointing authority that our judges have had since the 1840s.

So, again, I wanted to say thank you very much to this committee and to the Chief Justice and to the Supreme Court for the leadership in providing access to justice. There are some steps that can be done that I don't think would cost a lot of money that have already worked very well such as with self-help centers, the guidelines for the judicial discretion to appoint counsel, that doesn't cost so much money as it would provide some clarity, and I'll be happy to assist in any way that I

can, that my office can, in moving forward. Thank you again for all that you do for access to justice in Texas.

CHAIRMAN BABCOCK: Thank you, Mr. Bower. Don't move yet. This committee sometimes likes to shoot our speakers. Does anybody have any comments?

PROFESSOR CARLSON: Question.

CHAIRMAN BABCOCK: Yeah, Professor Carlson.

PROFESSOR CARLSON: Could you expand on e-mediation and how that operates?

MS. ADROGUE: Yes.

CHAIRMAN BABCOCK: Speak louder so everyone can hear you.

PROFESSOR CARLSON: I asked if he could expand on e-mediation and how that -- procedures that are followed and how that comes about.

CHAIRMAN BABCOCK: How does e-mediation work, Richard. Got it.

MR. BOWER: E-mediation actually is something of an umbrella term that stands for the use of e-mail but also telephone to resolve disputes, and in circumstances where the visual cues are not so necessary as sometimes if there was in face-to-face mediation it can be useful. I think that Ebay was mentioned. Another example is PayPal. I mentioned in my handout that there isn't uniform agreement that e-mediation is good. Some

people who have used it feel that they didn't get a fair shake, so I think it needs to be used with caution, but if you have a mediator, it requires, I believe -- it would work best with a trained mediator. It doesn't do away with the role of a mediator, but as in face-to-face mediation an e-mediator can communicate with this party and then with that party, or they can all be in communication together.

We know in mediation that there are different approaches. You know, the mediator can caucus with one party by e-mail, can caucus with the other party by e-mail, see what the real interests are, sort that away from the positions and see if there can be agreement arrived at; and as with regular mediation, the agreement would be reduced to writing, could be reduced to an agreed upon e-mail, so that's with e-mail only. Telephone mediation also is possible, and there is some use of that in the area of disputes over possession of children where there is some wrinkle that needs to be ironed out in a custody order that concerns who is going to have possession of the child, this holiday or the next holiday or this weekend or the next. Where it's a fairly narrow issue e-mediation probably works better than if it's a global who is going to have custody of the children and you're going to have a fight anyway. So I think

e-mediation would work on narrow issues, but a mediator would have the same tools available as in regular mediation, caucus or not, have the parties communicate together or not, but arrive at an agreement if that's feasible.

PROFESSOR CARLSON: Thank you.

CHAIRMAN BABCOCK: Thank you. Any other questions or comments? All right. Thank you so much for coming.

MR. BOWER: Thank you.

CHAIRMAN BABCOCK: Is Nelson Mock here?

MR. MOCK: Yes, sir.

CHAIRMAN BABCOCK: Yeah, there you are. Come on up. Nelson is the human rights coordinator and managing attorney for the Texas RioGrande Legal Aid Society, and thank you for coming.

MR. MOCK: Thank you for having me. I figure if it's good for Bruce to stand at the podium I'll do that, too. Chief Justice Hecht, Mr. Chair, distinguished members of the committee, again, my name is Nelson Mock, and I'm a managing attorney with Texas RioGrande Legal Aid. It's a pleasure to be with you here today, and I thank you for listening to our views about some of the issues that we face as legal services attorneys and people representing the indigent in Texas.

We in the legal services community truly appreciate the tremendous effort that the Supreme Court and others have made not only in helping to raise funds for the legal services community and representation for people who are indigent in Texas, but also raising the profile for the need for access to justice in Texas. Other states, as Bruce mentioned, have sought to duplicate these successful efforts. However, the problems with access to justice for the poor in Texas remains daunting. We rank 50th in access to Legal Aid lawyers with approximately one Legal Aid lawyer for every 11,000 qualifying Texans, and I want to put a face on our clients because sometimes it surprises people who we represent.

More than two-thirds of civil Legal Aid clients are women, and most of them have children. I was curious about my own case load and looked at -- I have about 65 open cases, only about 10 of those are men. Many of our clients, in addition to having children, work. In fact, 61 percent of the female headed working families in Texas are low income. It is also estimated that over 40 million people in the United States have disabilities, many of those living in poverty, and that plays a significant role in our clients as well. In my own caseload a majority of my clients either have disabilities or have family members with disabilities that become

important in their cases.

Texas RioGrande Legal Aid serves 68 counties, roughly a third of Texas. Our service area includes a poverty population of nearly 1.3 million, and we practice in many different areas of law. I practice in the area of housing, and I wanted to give you a sense of this. We have about 13 attorneys who practice housing law. Of those maybe five or six are full-time housing only, and that's for evictions, housing discrimination, foreclosures, and that's for a third of Texas, so you can see the numbers are daunting. The need is tremendous. In a 12-month period, TRLA has about 23 requests for legal assistance, and we have about 120 attorneys. The numbers are staggering, and I give you this information in part to explain why when I went to Legal Aid attorneys asking them for input on how we might improve our access to justice and the justice system, many of them replied, "We just need more attorneys," but I know that's not necessarily the role of you today, so I wanted to move on to some of the other things that they talked about.

Probably first and foremost frequently commented were continuing problems that we face, pro se litigants, Legal Aid attorneys, pro bono attorneys, concerning affidavits of inability to pay. These affidavits obviously based on Rule 145, 502, 506, and 510

of the justice of the peace rules and the Rules of Appellate Procedure 20 are essentially the gateway for Texans to our court system, and I know the Court is addressing this, so I list this -- I list some of these issues more to show the nature and persistence of the problem. We continue to see, based on responses that I got, clerks and courts automatically contesting every affidavit of indigence filed, even when the party is receiving means-tested public assistance. We continue to see delays of the filing of the cases, of processing of cases, when it's accompanied by an affidavit of inability to pay, requiring payment for certified copies of court orders even if there's an affidavit of inability to pay on file, but we see new problems as well.

With regard to e-filing, we -- in many counties there are -- there are transaction fees that are required even if there is an affidavit of inability to pay that is on file. We've had counties where they're requiring the filing of an affidavit every time there is a transaction with e-filing. We have cases in which -- in a number of counties where when you file a lawsuit with an affidavit of inability to pay, the clerk then charges for copies to print them out to give them for service of process, something that obviously diminishes the effectiveness of the e-filing and the promptness of the

processing of the case.

And there are many other examples of -- in cases in which, for example, requiring payment for mediators, requirement for applicant for protective order to pay costs even though there are Family Code provisions to the contrary. In the justice of the peace context, contesting pauper's affidavits even if the IOLTA certificate is filed, something that's allowed by the justice of the peace rules, but something nevertheless that again delays the processing of justice, and I could go on with many examples. The point more than anything is that for pro se litigants these barriers can be essentially the end of their access to justice. For attorneys, it is -- the effect is to spend more time on the -- these issues as opposed to the substance of the case, and it can dissuade pro bono attorneys from these types of cases.

In my limited time left I wanted to talk about a couple of other issues. One is something that a number of attorneys -- of our attorneys raised, and that is the fear of clerks of this -- the concept of legal advice. We've had instances in which clerks have -- court clerks have refused to provide information, and information much like the affidavits of inability to pay are kind of the gateway to the system, have refused to

provide information for fear that they are giving out legal advice, and this can -- this has included something as simple as providing brochures or informing about the availability of Legal Aid, but sometimes it has a much more serious effect. An example is in the justice of the peace where there are two ways to file an appeal of an eviction case. One is to post a bond, and the second is to file an affidavit of inability to pay. A justice of the peace would refuse to give the information that there was -- that you could appeal by filing an affidavit of inability to pay and would only say that you could post a bond, and again, the reason was because of the fear of giving legal advice, and so my thought is perhaps there could be some guidance from the Court on this and perhaps some training as well.

Last of all, but not least and perhaps related to my previous point, and that is the whole -- the whole issue of forms for pro se litigants, and I really see that there are areas where this could be expanded, and certainly the justice of the peace is a good example where many of the litigants are pro se in the first place, and an example to be a little bit selfish since I'm a housing law attorney would be in the justice of the peace regarding housing law cases, whether they're evictions, and the court obviously offers forms already in the form

of petitions and that sort of thing but does not in the form of answers, does not always have even the most statutory required, the affidavits of inability to pay or even frankly the forms that the Supreme Court has come up with -- the form that the Supreme Court has come up with regard to prepare cases in justice of the peace court.

So there is I think an opportunity here to help pro se litigants in that area because I think it helps with the broadening of the access to justice. It could be things like writs of re-entry where there are lockouts, things like writs of restoration, for example, application for writs for restoration where there are utility shut-offs and things of that sort. I hope you find some of these comments helpful. Thank you very much for your time, and thank you so much for considering these issues which are so important to our clients.

CHAIRMAN BABCOCK: Thank you so much. Comments? Yeah, Judge Estevez.

HONORABLE ANA ESTEVEZ: I liked his idea about guidelines for our court coordinators. My court coordinator is on the phone constantly with pro se litigants, and I am constantly telling her she can't tell them the things that she's telling them. I would like to know where that line is, because I don't know where they're going to get the information. There isn't any way

they can get it outside of a lawyer because it's not well-known information, it's legal information.

CHAIRMAN BABCOCK: What kind of things are being asked of your coordinator that you think is inappropriate?

HONORABLE ANA ESTEVEZ: I was trying to think of examples, but it happens all the time, and she doesn't do it as much as when I started, but I think for her to even give deadlines on how much time they have or what date their date is, I think that's giving legal advice, if someone has just gotten a default. I don't think she's allowed to say, "You have 30 days to do this," because then it's a question of, well, when does that 30 days start; and what if she tells them the wrong date or what if she said 45 days and it was really 30 days? I don't know where that is, but I tell her she's not supposed to give out any information. You know, we tell them you have the right to appeal. I might tell someone in open court what that date is, depending on, you know, in a judgment or usually in a criminal type of case, but there's so many -- there's so many examples. I don't even -- I can't even think of any, but there's just so many times. She gets called on every little thing, someone is calling, someone is at our window asking me, "Well, what do I do," crying and bawling about some sort

of issue that has come up.

MR. MOCK: If I may respond very briefly, I think one of the ways that you can -- it's funny because I deal with this from time to time for a number of reasons. One is because I've spoken with clerks about this issue, and the other is because we have very able paralegals that work in our offices who cannot practice law, and so we're constantly advising them that, you know, you're not -- giving legal advice is one of the basic functions of an attorney and the actual practice of law, and so the way you distinguish between practicing law, i.e., giving legal advice and just giving information is that you don't apply the information to their case in particular. Now, it may be coincidental that you're explaining that this is the law and they need to interpret it how they see fit, but I don't see, for example, with regard to deadlines.

There is a difference between if you -- let's take the example of an eviction case. If there is a judgment against you, you have five days within which to appeal a judgment in the justice of the peace court to the county court. That's a piece of information. That's not telling you, "You have five days, but I'm telling you that this is a piece of information, the law that is out there. I can't give you legal advice about anything further, but what I can tell you is that when one loses an eviction

case then they have five days within which to appeal that judgment," and to me that's the difference. In the example that I gave, we actually had a -- you know, the clerk was actually just giving partial information. Again, information not to them, but saying, you know, "In order to appeal you have to file a bond." That's true, and that's not legal advice.

HONORABLE ANA ESTEVEZ: I have an example. I actually had to force a full appeal because I didn't know where the line was, but a lady had come in our office. Before she came I was sent a default judgment on student loans, and I -- there was no answer, everything looked to be correct, and so I granted the default judgment. I don't know when she came by, but she called everyone in my office, came by about 15 different times, said she had filed an answer. She had filed an answer. She filed an answer in some other case and put eight different cause numbers on it. The clerk had never put it in our file. So sua sponte motion for new trial, I think the time limit was up. I'm not really sure what all had happened, but I knew that I couldn't tell her what she's supposed to do, at least I felt like I'm not supposed to tell her and my office isn't supposed to tell her, and she -- we -- I knew it would be reversed. They told her the rules about appealing, and she appealed it. It's been

reversed so she's back in court on the other cases. She did whatever she was supposed to do from whatever information she got on five of her cases, got reinstated, and I granted the new trial. I guess she forgot to do one. I don't know. But that's the kind of thing where I've got to waste my time because there was a clerk's error, but if I knew where that line was perhaps -- or perhaps we wouldn't have wasted the court of appeals' time, my staff's time, and now we're back to the same spot. I don't know.

CHAIRMAN BABCOCK: Yeah, Robert.

MR. LEVY: Do you have experience in your docket with the new expedited discovery rules? Is that something that impacts what you're doing?

MR. MOCK: It actually doesn't impact me as much, in part because I practice in housing; and if a case involves the Texas Property Code, it is excluded from that.

MR. LEVY: Do you have a sense in terms of your office how the rules are working?

MR. MOCK: I do not.

CHAIRMAN BABCOCK: Okay. Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Excuse me, one possible way to help in -- especially like in the JP

context, would be a requirement that the judgment include that information, that the judgment says, you know, "You have the right to appeal within X number of days. You must post a bond, or if you're unable to post a bond you must file an affidavit of inability to pay." You know, that way it's just a requirement of the judgment and would give people the information that they needed.

MR. MOCK: I think that's true, and I think with regard to the case that you talked about, I mean, there is definitely going to be a gray area because, again, I mean, if we're trying to nail down exactly what legal advice is, and I think that's an issue often for the unauthorized practice of law, right, that in the end the information -- kind of the thing that ties them together is whether or not you're actually applying that information to their case, but there's going to be a gray area. So, for example, if it's in the judgment, I think the court certainly has the discretion obviously to do that. Is it legal advice if a judge explains, you know, what the appeals are in that particular case? Perhaps so, but I certainly think that the court has discretion to do that.

On the other hand, I don't think there is anything wrong with, for example, giving a brochure about the whole -- describing the entire process. Is that legal

advice? I think it's not, I mean, because you're not actually applying it to their case. You know, in order to file an appeal or in order to file a case you need to do this, in order to answer you need to do this. I'm not telling you in your case what you need to do, but that's the information, and we give it to everyone. And I don't -- I think that, in fact, that is not legal advice, which is why you can have companies that create information and sell it or give it to people that is not applying it to their cases in particular.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: I'm wondering what are your thoughts about immediate review versus later review of the 145 determination? In other words, when a person is found not to be indigent in the trial court at the outset what do you think about the reviewability of that order, and does there need to be any kind of process in place for that, or is the status quo fine?

MR. MOCK: Essentially the way that it affects me there is immediate review. In the justice of the peace, for example, if you file an affidavit of inability to pay as a means to appeal and that's rejected, you actually can appeal to the county court, but during like in a family law case --

HONORABLE JANE BLAND: I'm talking about in

a different court, like in the family court cases, because there are lots of these come up eventually.

MR. MOCK: I don't know. I mean, I guess I like the idea of immediate review if it's been rejected because it seems to me that the concern is going to be access to the courts that you -- that the court would want to -- that the courts generally would want to defer to the possibility of access as opposed to not access, but I don't know, and I'm not a family law attorney, so it's hard for me to comment on the impact of that.

CHAIRMAN BABCOCK: Kent, and then Justice Christopher.

HONORABLE KENT SULLIVAN: I think that I've seen other states compile and provide pro se handbooks. In fact, it seems to me I've seen one from the state of Florida not too long ago. The idea for each category of court that is likely to have pro se litigants, that you provide them with basic information about how one would handle a case in that court. I do wonder if that's not what we're sort of talking around here to some extent where, you know, there would be one document available. It would be available at the courthouses. It would be available online, that sort of thing, and in an effort to pull together at least basic information.

It does seem to me that it would provide

more than a certain level of comfort and efficiency to take a lot of our court personnel and administrative personnel out of the loop of having to answer probably the same questions over and over and over and deal with walking this line of, you know, am I going too far or not far enough. You could basically refer all people, all callers, to, you know, one central document and then have an effort to try and keep it up to date and constantly improving.

MR. MOCK: It's an interesting point, I think in part because I think a lot of courts already kind of do that, I mean, and it's spotty, and they do it themselves, but, I mean, I definitely see courts providing, you know, one-page information or information on their website, so a coordinated effort to provide that seems like it would be a really good idea.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: I was wondering whether you-all thought it might be useful to provide a limitation of liability for volunteer lawyers who take cases when people file an affidavit of inability to pay. That would obviously take legislation, but, you know, and perhaps a higher burden of proof in terms of malpractice. You know, people -- people claim they would like to come in and help, you know, try pro se cases, but

they're nervous about malpractice, so if there -- I don't know if there's a way to make that better.

MR. MOCK: I don't know, and I actually don't know the malpractice situation with regard to the bar, if there's -- if some of that is offered. Bruce, I'm sure, knows.

CHAIRMAN BABCOCK: That's a good idea. I can't even see who that --

MS. GREER: It's Marcy.

CHAIRMAN BABCOCK: Hey, Marcy.

MS. GREER: We actually have some experience with that with the State Bar appellate section.

CHAIRMAN BABCOCK: Could you speak up? We can't hear you at all.

MS. GREER: We had some experience with that with the State Bar appellate section when I was chair. We developed the pro bono program, and we found that the premiums are not that expensive, and so maybe we could do something through the State Bar because it does come up. People are worried about it, and if they had insurance that might take the place without having to change the liability equation and provide some coverage, because a lot of firms say, "Well, we can't put it on the firm policy," and I get that, but we were surprised at how affordable it was, and I know the bar has been paying for

our program some.

CHAIRMAN BABCOCK: Thank you. Somebody else back there had their hand up.

MR. BOWER: Yeah. I would just mention that if a lawyer takes a case on a referral from a volunteer lawyer program of a local bar association or a Legal Aid program, those programs usually provide liability coverage for the lawyer regarding that case which is accepted through that means.

CHAIRMAN BABCOCK: Thank you. Justice Christopher.

HONORABLE TRACY CHRISTOPHER: But I do think that there's a -- we've got the people that are really poor, okay, that can get into the Legal Aid process. Then we have a lot of lower middle class people that, you know, don't meet that requirement of quote-unquote Legal Aid and end up representing themselves, and so I think it's kind of a gray area that, you know, you see people -- you come in, they seem to have legitimate cases, but -- and they're representing themselves and not doing it well.

CHAIRMAN BABCOCK: Yeah, I had a question -- actually, if that was Lisa's hand up I don't know, but it was for Lisa and the appellate practitioners, Pete, Skip, Jim Moseley. I know enough about this to be dangerous, but if you call up the U.S. Fifth Circuit clerk, they are

extraordinarily helpful in whatever question you might have. I don't know if it crosses the line between practicing law and just giving helpful advice. Frank, you might have some thoughts on this, and then you call another court of appeals, a different one, doesn't have to be named, and you'll get nothing. They'll say, "Read the rules and go home." Is that your experience? And, if so, which is the better system? Lisa, do you have any thoughts about that?

MS. HOBBS: That is my experience. Certainly the Texas Supreme Court clerk is very helpful when you have --

CHAIRMAN BABCOCK: You've got to speak up, sorry.

MS. HOBBS: The Texas Supreme Court clerk is obviously very helpful, because it comes up in matters of judgment, or we need to file this motion, we're not sure how to get it back to the trial court. I mean, there's nuances that Blake will walk you through that I'm sure there's lots of court of appeals clerks who would never think that they had the authority to kind of talk through that kind of stuff, but some of it is that some clerks are JDs and some aren't, so a lot of it has to do with their legal experience.

CHAIRMAN BABCOCK: Yeah. Skip or Frank.

Frank.

MR. GILSTRAP: It's been my experience over the years that the higher up you go in the system the more helpful the people are, and of course, the higher up you go in the system the less need there is to help pro se litigants. If you go down at the bottom, like a clerk in a low end court in a large metropolitan county, you're lucky if you walk away without getting chewed out in some cases, I mean, because they're so busy and they have to deal with so many people. I think the notion that somehow we're going to depend on the clerks to handle this has got real problems.

CHAIRMAN BABCOCK: Okay. Skip.

MR. WATSON: Well, I just agree with everything that's been said. I've always been curious how the Fifth Circuit clerks, who are so extraordinarily helpful, deal with the pro ses. I suspect it's exactly the same, that there's no drop off in service. I doubt that they ask any dumber questions than I ask and yet are dealt with, I'm sure, professionally and quickly, being given accurate information. What was just said is exactly right. I mean, the helpfulness is directly related to how high you are in the system. The courts of appeals is the place where it differs. Some court of appeals clerks are very helpful and just give you the information you need to

get it done. Some are like a mule looking at a new gate, you know, they're either clueless or they don't know what to do.

HONORABLE JAMES MOSELEY: I'm quoting you on that.

CHAIRMAN BABCOCK: Pete, you want to follow that up?

MR. SCHENKKAN: No. I'm still looking at that gate.

MR. MOCK: And I think the irony and the sad part about it, of course, is that the people that are in real need of the guidance or the information are the ones that are going to the lower courts and not as much the higher courts with the support that we have.

CHAIRMAN BABCOCK: Do you think it may be something, though, that we could -- I don't want to use the word legislate, but we could by rule encourage clerks to be more helpful or less helpful?

MR. MOCK: I think so, and I guess I hadn't -- because this is something that has come up this week, but multiple times in requests, and I certainly would like to think about it about how that guidance might take place, but it's just -- it happens enough, you know, that I think that it might make sense that there be some sort of guidance about it.

CHAIRMAN BABCOCK: Okay.

MR. MOCK: You know, and certainly, I mean, I think the slam dunk is you can have information, you can always have information. That's not legal advice, and that's the -- I really think that probably a lot of the clerks are fearful because they don't want to give wrong information. You know, they give wrong information then, you know, you should have appealed on this date, but actually, oops, it was the day before. That's a real problem. On the other hand, you know, just providing information to people I think should not be a problem, and maybe there's not that knowledge that they can do that.

CHAIRMAN BABCOCK: Yeah, Jim, then Professor Carlson.

HONORABLE JAMES MOSELEY: My life is no longer dependent upon the clerk of the court of appeals, but speaking on their defense, if you're going to --

CHAIRMAN BABCOCK: Oh, I thought you were going to slam them.

HONORABLE JAMES MOSELEY: If you're going to push the provision of information, whether you want to call it Legal Aid or legal services or not, into the clerk's office, you're going to have to change the way we hire and pay and budget for the clerk's office. They don't have the people to do it.

CHAIRMAN BABCOCK: Yeah. Professor Carlson, then Pete.

PROFESSOR CARLSON: I don't know if the State Bar -- Eduardo, you probably would know -- still has the committee. I worked on one maybe 15 years ago where we drafted brochures for pro se litigants principally in the JP court but also other courts. I can't remember the name of the committee because the years have not been kind, but --

MR. RODRIGUEZ: I don't know if they still have that particular committee, but they -- but there's a lot of different committees both at the State Bar and the Young Lawyers level that provide a lot of resources in that regard, and perhaps it's something that we might ask them to look into.

CHAIRMAN BABCOCK: Pete, and then Roger.

MR. SCHENKKAN: It seems to me like we have two problems here. One is getting a solidly framed and simplified correct answer to each of the large -- a fair number, I don't know how many, of very commonly asked questions that are causing the problem; and then we need to figure out how most efficiently and without causing other problems for liability to somebody or lack of staffing to get that information to the people who need it; and you mentioned the possibility, Chip, of a rule.

This seems to be more in the category of -- some people were talking about brochures; but I guess at this point it might be more like answers to FAQs, frequently asked questions, available by telephone and online; and all the clerk's office is supposed to need to do is have a big sign posted that says, "If you're indigent and you need answers to questions on this, you can call this number, this 1-800 number or go online to this website," and then we, of course, have the problem of who's on the other end and who's paying for that.

For that part I would think that Nelson and his colleagues who are in the trenches on this could provide a lot of guidance as to what's the priority list for the information that would be -- where we need these answers to and then the role of the system would be to find in an existing budget or once more call on the Legislature to add what I would hope would be a relatively modest additional amount of money to provide the people at the receiving end of those calls and websites, and perhaps it could even be done through the State Bar and not even have to ask the Legislature to do anything more than clarify that nobody is violating the unauthorized practice of law rules by doing this.

CHAIRMAN BABCOCK: Yeah.

MR. SCHENKKAN: And so our role, if any, it

seems to me might be to approve the answers to frequently asked questions.

CHAIRMAN BABCOCK: Yeah. Roger, then Judge Estevez, but before we get to Roger, in response to what you're saying, Pete, it occurred to me that as we've been discussing this that maybe there's -- that the best that the Texas Supreme Court can do is try to set the tone.

MR. SCHENKKAN: Yes.

CHAIRMAN BABCOCK: And I'll give you an example. The Texas Court of Criminal Appeals has a very firm policy that their clerks are not to tell defense lawyers or prosecutors what to do or how to do it. You remember in the controversy over Chief Judge Keller, that led to some very harsh consequences for both her and one of the people that were on death row because a paralegal called up the clerk and asked if they would keep the clerk's office open for a period of time, and the answer is the clerk's office is never open, but there's another procedure for filing after hours papers. You can file it under the TRAP rules if you just read the TRAP rules. You can file it with the judge, and there is a judge assigned to every death penalty case, et cetera, et cetera, but pursuant to their policy that information was not given, even though the organization the paralegal worked for, somebody in that organization clearly knew that, but the

paralegal probably didn't.

Now, if -- if the policy -- if the tone from the top was different then that information perhaps would have been given and the whole controversy would have been avoided, so that's something to me that bears thought. So, Roger, sorry. Sorry to intrude.

MR. HUGHES: No, no. I thought that was a good thing to hear about. I'm shifting gears back to the court clerks and their charging practices about the fees issue, but is this something you think could be changed as needed by rules or just better administration?

MR. MOCK: I actually -- I know the Court has considered changing some of the rules and is currently considering language actually from this committee that resolves a lot of the problems that I described, so, yes, I think it can be changed by rule, but I think it's also guidance in some of these instances.

MR. HUGHES: Well, without binding the Court, do you have some suggested rule changes?

MR. MOCK: I'm sorry?

MR. HUGHES: Without binding the Court, do you have some suggestions for rule changes?

MR. MOCK: Actually, what was proposed about a year ago are some excellent rule changes, the changes in Rule 145. I think as I was looking through them, they

actually -- they actually address many of the issues that I described. Perhaps maybe some clarification might be required for some of the e-filing issues that have come up since then, but aside from that many of the issues are actually addressed by the proposed rule.

MR. HUGHES: Okay.

CHAIRMAN BABCOCK: Judge Estevez. Sorry.

HONORABLE ANA ESTEVEZ: I'm going to go back, if that's all right, to the guidance --

CHAIRMAN BABCOCK: Yeah. Yeah.

HONORABLE ANA ESTEVEZ: -- information, and I just want to distinguish because the court clerk -- the clerks that take in the petition when somebody is filing a petition or a lawsuit of some sort, I believe they do give out a pro se brochure. That's not the issues that come up. They've now filed their lawsuit, and something is going to happen or something bad happened because they were the defendant, respondent, nonmovant, and now they're up at my office. So it's not the basic information, what is a lawsuit, how do I file a lawsuit, or maybe it is someone who is answering a lawsuit, and they didn't go down and get the sheet that whoever filed the lawsuit got and they needed that. So I'm not looking for that overall broad information. It's the other ones that have to -- that are so many.

You know, if I gave an example there would be 15 other questions that would never even dawn on me. We just need a how do we know where that line is, and I'm sorry, you know, my office probably used to be the open office like the Fifth Court of Appeals that you're talking about, and now it's closer to the one that doesn't give out any information because I'm not sure where the line is, so I step further away instead of on it or over it. I just don't know where that is, and I don't know if there's anything we can do about it, but it's not that general pro se brochure that I think most of the courts do give out. I think they do give that out, but I need more information.

CHAIRMAN BABCOCK: Thank you. Justice Christopher.

HONORABLE TRACY CHRISTOPHER: The courts versus the clerks, the clerks are independent elected bodies, and you can -- as a judge you can say to your clerk, please do something, but they don't always do it. You know, I mean, I remember we were having problems with the affidavit of inability to pay, and so the judges all got together and prepared a form affidavit and said, "Make this available," and, you know, they hid it behind, you know, a million pieces of paper and, well, maybe if somebody thought to ask for it we would give it to them

because they didn't want them to have our form affidavit that was, you know, a good affidavit. This was, you know, before the rule changed and such a thing happened, so even if we say we have the ability by rules or by the rule of judicial administration to say judges should make this information available --

HONORABLE ANA ESTEVEZ: Or can.

HONORABLE TRACY CHRISTOPHER: -- okay, it's very difficult for a judge to make it available via the clerk's office, so it's possible that you would actually need legislation requiring the clerks to make certain information available rather than doing it by rules or Rules of Judicial Administration, and TYLA does do a book on how to sue in justice court. I just pulled it up on the internet, but again, it's great if you have a sophisticated enough pro se who thinks to look for it. I mean, that's always the problem with, you know, brochures or pamphlets or, you know, whatever. If we can't get them into the hands of the people who need it for whatever reason, you know, we're having a blockage, then the information is great, but it's not available.

CHAIRMAN BABCOCK: Got it. Mr. Mock, thank you so much for --

MR. MOCK: Thank you.

CHAIRMAN BABCOCK: -- a very thoughtful

presentation and a great discussion. If any of our other speakers have time problems, let me know. In other words, they've got to leave sooner than later, let me know, but that brings us to our morning break, and we'll be back in 15 minutes. Thank you.

(Recess from 10:27 a.m. to 10:44 a.m.)

CHAIRMAN BABCOCK: All right, we're back on the record. We're going to go out of order because of a scheduling conflict that Bill Dorsaneo has. Bill, as you'll notice, is not here, and he has delegated his role to Professor Albright, who has a very important scheduling conflict later today, and so she's going to go next. That's the item on your agenda No. 8, "Revisions of the Texas Rules of Civil Procedure, the Recodification Project," which those of you who have been on the committee a long time know is a 50-year plus project that is still going on.

PROFESSOR ALBRIGHT: Okay, who remembers the recodification draft? Okay. So Bill brings it up every once in a while. It started in -- y'all excuse me. I've had laryngitis for a week, so if you can't hear me, I'll try to talk even louder, and if I have a coughing fit excuse me. In the early Nineties the Supreme Court appointed some task forces for various changes to the rules. Discovery was one, jury charge was one, and

sanctions was one, and the recodification of the Texas Rules of Civil Procedure was one. Bill was chair of the recodification task force. I was on the committee. It was 21 plus years ago because I was pregnant with my son who turns 21 next week, so I always know how old all of these things are, so I don't really remember this, but Bill claims that the draft was taken up by this committee and we actually passed a version of it that's sitting at the Supreme Court. Do you-all remember that?

HONORABLE NATHAN HECHT: Uh-huh. I think that's right.

PROFESSOR ALBRIGHT: So there is a version of it at the Texas Supreme Court, but it is at least 15 years old at this point in time, so what Bill recommends is that we start a new recodification process with a committee of interested people from this committee, perhaps from the Legislature, from the State Bar, the way we have done some recodifications recently such as the appellate rules, the Rules of Evidence, that have worked quite well.

You-all know that the Texas Rules of Civil Procedure have some big hunks of numbers that are -- have been taken out for things like the appellate rules. Many of the Texas Rules of Civil Procedure were enacted in 1939 based on the new Federal rules of 1938, and we have not

kept up with the amendments to those rules, so we still have many rules in our rules that are the 1938 version of the Federal rules, and it has caused some ambiguity in some different parts of practice. We have areas that need to be revised. For example, I always think about when I teach venue, our venue rules were drafted before the last statutory revision to the venue statute, so they don't match. So we have lots of problems with this, and so what Bill suggests and I support is to start another long-term process where we really try to recodify the Texas Rules of Civil Procedure.

CHAIRMAN BABCOCK: Okay. Thanks, Alex. Anybody have comments on that?

MR. LOW: Chip?

CHAIRMAN BABCOCK: Yeah, Buddy.

MR. LOW: I think one of the things also was to renumber, wasn't it, not just recodify, but to --

PROFESSOR ALBRIGHT: Right.

MR. LOW: -- reorganize and renumber because some numbers are out of order.

PROFESSOR ALBRIGHT: Right.

MR. LOW: Isn't that true?

PROFESSOR ALBRIGHT: Our numbering system, you know, we have big empty spaces. We also have rules that are A, B, C, because we ran out of numbers. Where

things are don't always make sense.

MR. LOW: Right.

PROFESSOR ALBRIGHT: It's kind of an ancient document that's been cobbled together over time.

MR. LOW: Yeah. And our numbers didn't coincide with the Federal.

PROFESSOR ALBRIGHT: No, not at all.

MR. LOW: And we're not trying to do that.

CHAIRMAN BABCOCK: Well, of course, any time you do that, there's a cost.

MR. LOW: 434 is no longer the same.

CHAIRMAN BABCOCK: Is what?

MR. LOW: 434 is no longer there. It would be 322.

CHAIRMAN BABCOCK: Well, one of the costs is if you rewrite the rules as we did with discovery, that's one thing, but if you just take an old rule and then renumber it, there's a difficulty in then trying to read cases that were decided under the old numbered rule, but so there's a cost to doing that.

MR. LOW: Cost to almost anything.

CHAIRMAN BABCOCK: Yeah, that's true. Any other comments or questions for Professor Albright? Okay. Well, thanks so much, Alex.

PROFESSOR ALBRIGHT: Sure, thank you.

CHAIRMAN BABCOCK: Report to Bill --

PROFESSOR ALBRIGHT: I will report to Bill.

CHAIRMAN BABCOCK: -- that you represented him ably. All right. The next on our agenda is Kent Sullivan, who is a member of this committee, and Kent has got a varied practice. He's currently a partner at Sutherland Asbill, but as most of you know, he was on the court of appeals in Houston, he was a district judge in Houston, and he was the First Assistant to Attorney General Abbott for a period of time, so he has a broad perspective and asked to be on the agenda, and so here he is.

HONORABLE KENT SULLIVAN: Well, Chip very kindly recited all the various positions I've held, which I guess is just a tribute to the fact that I've never been able to hold a job.

MR. DAWSON: That's the first time he's been nice.

HONORABLE KENT SULLIVAN: I know, that's true.

MR. DAWSON: That's the nicest introduction you've given today.

CHAIRMAN BABCOCK: You're lucky you're not speaking.

MR. DAWSON: I should be quiet.

HONORABLE KENT SULLIVAN: I raised the spoliation issue for consideration in the aftermath of the Texas Supreme Court's opinion in Brookshire Brothers that I think everybody is aware of that occurred earlier this year, and following the efforts of the pattern jury charge committees to formulate a pattern instruction on spoliation, which has occurred; and I've sent a copy and I think it was also included on the e-mail that was sent to everybody earlier. Brookshire Brothers expressly I think acknowledges the need for gap filling in the wake of that opinion. It's an opinion that clearly makes new law, speaks to the subject that had been dormant in terms of not getting very clear instruction for a number of years but still leaves a lot of variables requiring a number of decisions, particularly decisions by the trial court.

The one thing that Brookshire Brothers does is that it largely takes the issue and a lot of the predicate decision-making out of the hands of the jury and puts those issues and decisions clearly now in the hands of the trial court, but there are a number of issues. Those include, of course, the obvious big picture issues, whether there was a duty to preserve, whether there was a breach of that duty, and what is the appropriate remedy; but if you had the opportunity to read the opinion, you see a number of subissues identified. What was the intent

and culpability of the spoliator because the spoliation instruction is allowed only if there's a subjective purpose of concealing or destroying relevant evidence found or if there is negligence on the part of the spoliator that deprived a party of a meaningful opportunity to present a claim or defense in light of the evidence that was lost or if there was a finding of willful blindness in allowing otherwise perhaps benignly destroyed evidence to be lost.

I think the analogy that's made is some automatic destruction policies and the like; and of course, there is the other subissue of what prejudice occurred, the extent to which the evidence may have been cumulative, the extent to which the evidence was really relevant to run one or more core issues; and of course, there's the issue of the determination of the proper remedy with the old Powell decision in *TransAmerican vs. Powell*, still in the forefront of that calculus the notion that the sanction should be no more severe than necessary to achieve the remedial objectives.

So in the wake of the opinion there are a number of potential issues that probably need some fleshing out. The opinion, of course, does not provide any approved form of jury instruction, and the PJC committees -- and there are some folks around the table

who participated significantly in those efforts -- debated at great length over what a proper instruction was. You'll see on the final draft that was provided to everyone and that is scheduled for publication I think early next year that there is a continuing debate over whether the term "must" or "may" is an appropriate instruction for a jury relative to the inference that a jury can come to as the result of the loss of evidence.

I think there are also issues as to the precise nature and scope of the required findings by the trial court, the issue of exactly what findings need to be in writing and, you know, exactly what form. There may even be issues as to the proper timing of some of these predicate findings by the trial court, so I think there are a lot of gaps that are going to need clarification and probably the central issue is how will that happen, how will we provide that clarification; and there are only a couple of alternatives.

The common law rule making are the two principal ones, and I am just suggesting that we strongly consider and that the Court strongly consider rule making. I think that it's a more proactive approach. It's a more flexible approach that allows you to update the rule when and if necessary. It doesn't require cases to percolate up through the system, and it doesn't require the right

case. By that I mean the right vehicle for addressing the issue that needs to be addressed. It can be done, again, by way of a proactive rule change.

So I would encourage consideration of rule making as a way to flesh out some of the uncertainties that are left in the wake of the opinion, and I'll offer up a couple of other specific suggestions just for consideration. One is whether or not it might be appropriate to consider a safe harbor provision. It is something we also include in the current draft of the analog Federal rule, Rule 37(e), that's available for your review. The Federal rules committee spent a couple of years hearing from various parties, collecting information, and coming up with that draft, so it's at least a yardstick for consideration to the extent that we want to consider a rule on this subject.

Something that the Federal draft does not include but I think is worthy of some consideration is a safe harbor provision for parties that are presuit, but have legitimate uncertainty over the need to preserve and the proper scope of preservation. It might be an analog, perhaps a mirror image to a Rule 202 sort of proceeding in which a party could access the courts and otherwise obtain some boundaries as to the proper evidence preservation that is required under the circumstances. It would be a

way to allow a party that is trying to comply to actually comply.

That's -- that's generally what I wanted to put on the -- put on the radar screen here, is just that I think as a subject -- as Jack Balagia mentioned this morning, there's tremendous cost. There's a lot of significance attached to the issue of data preservation in 2014. I think it now affects everybody, certainly all -- it has for a long time larger businesses that, you know, collect data. It now affects the smaller businesses. I think it's to the point where it actually affects individuals, many of whom don't even perceive that they have an issue in this arena. The extent to which we could streamline this, clarify this, and provide a vehicle where we could stay abreast of developments so that when the rule needs to be revisited, needs to be updated, there would be an easy way to do that, I think that would be a substantial step forward.

CHAIRMAN BABCOCK: Thanks, Kent. Comments? Questions? Justice Peeples.

HONORABLE DAVID PEEPLES: Kent, do you want input on what you've got here?

HONORABLE KENT SULLIVAN: I'm sorry?

HONORABLE DAVID PEEPLES: Do you want input on this?

HONORABLE KENT SULLIVAN: Sure. Perfect time for it.

HONORABLE DAVID PEEPLES: On page two, you're telling the judge these three things, duty, breach, and prejudice. I'm wondering why there's no requirement to focus on the intentionality, whether it was intentional and whether the act was intended or hiding bad evidence was intended. Those are -- and then there's no -- that I see no Rule 403 balancing of good versus harm, which seems to me --

HONORABLE KENT SULLIVAN: You're talking about the PJC draft?

HONORABLE DAVID PEEPLES: Yeah.

HONORABLE KENT SULLIVAN: And I will tell you that -- and Justice Christopher may want to weigh in. She's chair of PJC oversight. We delayed as long as possible, and I was probably the strongest voice on delay because I was very concerned about trying to put out a pattern instruction first. In other words, there were a number of people on the committee who wanted to put something out even before Brookshire came out, and then when it came out the timing was such unfortunately the PJC committees are still driven by publication dates, and so we had to turn something around within a few months I guess, and this was the result of that effort.

So I would be the first one to say that, you know, there are concerns about it, about the adequacy of it. I certainly had those concerns in spades, but that's where we are; and, again, I think that may support the suggestion I'm making here; and that is I think it needs to be seriously considered. There needs to be an opportunity for many, many people to weigh in on the uncertainty and identify all the relevant issues; and then to the extent possible I would like to see a rule provide that in certainty.

CHAIRMAN BABCOCK: Judge Wallace.

HONORABLE R. H. WALLACE: I had -- I have a comment and then a question for the pattern jury committee on the jury instruction. It seems to me that the very last part of that where you tell the jury that you -- whether you "must" or "may consider that the evidence would have been unfavorable to the spoliating party on the issue of" -- whatever. It seems to me that's going to be very difficult at times to decide exactly what is the issue -- I mean, obviously there's going to be big debate over it, and it seems to me it may be very difficult to define exactly which issue or issues it's relevant to. Was any thought given -- or I'm sure there probably was -- to saying, "You must or may consider this evidence would have been unfavorable to the spoliating party," period,

end of instruction?

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: I'm going to stand up because my voice is a little hoarse, too. Just kind of a little background on the pattern jury charge and how this instruction came about. We've been working on it for probably three years, and each volume that puts out a book had representatives on sort of a joint committee that since it was going to be the same instruction for all the volumes. So we had a potential draft, then Brookshire Brothers came out, and we revised the potential draft at the last minute due to our publication schedule of now. So this draft is going to be published. However, if, for example, we came up with a new rule in this committee, that would immediately be e-blasted to anyone who has the pattern jury charge books, and all trial judges have free access to the pattern jury charge books electronically, so there's opportunity to correct, opportunity to clarify if this committee wants to do so.

We did our best, and it was quite -- as I said, it involved a lot of people reviewing this particular draft but felt that we needed something in the books because there were a lot of really bad instructions out there, and judges were confused on who decided what; and, yes, that particular question that you have was an

issue; but we decided that if someone destroyed some evidence, well, first of all, the judge has to figure out what it's relevant to, okay. So is it knowledge, intent, design, you know, what is it relevant to, rather than just, you know, unfavorable to the spoliating party. So we tried to incorporate sort of the relevance concept of, you know, you've destroyed some information, but we have to know that it was important and relevant on the issue of -- it's the best we could come up with. We're welcome to have this committee make a clarifying rule, and welcome -- you know, if we think it's affirmatively wrong we can always send an e-blast out to our committee and to the people that buy the book, but we figured that some advice was better than no advice, and that's what we've done.

CHAIRMAN BABCOCK: Thank you. Richard Munzinger.

MR. MUNZINGER: I serve on one of the pattern jury charge committees, and in response to Judge Peeples' question, the committees are bound by what the courts have said. They're not free to make recommendations. At least our committee does not view -- I'm on the commercial pattern jury charge committee. We don't believe it's our role to make suggestions or to provide remedies. It's our duty to attempt to give trial courts and the bar instructions that will withstand

analysis by the appellate courts based upon the law as we understand it to be and as it has been given by the courts of appeal and the Supreme Court. So we aren't free as this committee would be to make suggestions or to draft something, and I think that is part of the problem that they've had over the several years that we've all attempted to come to some solution of this problem, is that we aren't legislators.

HONORABLE TRACY CHRISTOPHER: Right, and we think we've tracked Brookshire Brothers as best we can.

CHAIRMAN BABCOCK: Okay. Any other comments? Roger.

MR. HUGHES: Well, I guess this addresses both the tailoring and also maybe the substantive issue. I'm disturbed about a suggestion that a jury be instructed that it must consider that the evidence would be unfavorable. I'm not sure that's quite where Aldridge goes yet; but be that as it may, I'm a bit concerned that by telling the jury what it must do with the evidence, how they must interpret it, we're essentially giving a directed verdict on whatever element that evidence was relevant to; and the other thing is that it -- the idea of tailoring it to the specific issue probably is a good idea; but it's tempered by whether or not it works in practice; and I was reading an article just last night on

the plane written by Mike Eady and another gentleman I don't remember, in the Litigation Section magazine -- a shameless plug for someone I sit on the board -- a magazine I sit on the board of; but they had written an article about trying to submit breach of fiduciary duty claims and all of the different forms and cases; and what he said was is that the anecdotal evidence that all of the tailoring that's suggested below the suggested question -- in other words, those two or three pages where it says, but in these situations you want to consider this and massage this issue, tailor, that's ignored, that basically that -- and I said this is only an anecdotal report in the article, but I can confirm in practice that the moment you leave a blank or if you have an italicized thing here, judges are -- busy trial judges are loathed to try to get too shall we say elaborate in their tailoring, and that would be my suggestion. Again, I think to sum it up, I think putting "must" in right now may be pushing the envelope. We're suggesting something that hasn't been decided, and like I said, I'm concerned that we're essentially in telling the jury how to interpret evidence rather than to give an instruction that they may infer it and let counsel use advocacy to nudge them one way or the other.

PROFESSOR HOFFMAN: Roger, that sounds like

an interesting article. What did you say the journal was that that was published in, just for the record?

MR. HUGHES: Well, just a second.

CHAIRMAN BABCOCK: Oh, show and tell.

MR. HUGHES: It's --

MR. DAWSON: Who's the --

MR. HUGHES: *The Advocate*, the State Bar Litigation Section. We can get you copies if need be.

MR. DAWSON: And who's the editor?

CHAIRMAN BABCOCK: Okay. Any more comments about Kent Sullivan's remarks and his paper? It's very well done, Kent. Thank you.

Okay. Moving right along, Justice Christopher on motions for new trial and mandamus review.

HONORABLE TRACY CHRISTOPHER: I've given you a very short memo, which Chip chastised me for being almost late with after I heard that I had to do a memo the day after Thanksgiving, so I felt I did pretty well in the two days, two working days, I had to provide it. I thought we were going to be talking about potential legislation, too, because one of the things that I have proposed in this memo is that we consider whether a review of a motion for new trial ought to be by interlocutory appeal. I had some lawyer e-mail me and say, "Y'all can't do an interlocutory appeal by rule." I said, "I know, I

know. I thought we were perhaps suggesting legislation, too."

You-all will remember that the very first time *In Re: Columbia* came out we had a pretty long discussion here at the Supreme Court Advisory Committee about motions for new trial and mandamus review that never really produced anything, and it was in connection with the recodification, and I would urge that we not wait for a recodification with respect to the issues on the motion for new trial. If we want to urge the Legislature to make this an interlocutory appeal or if we want to have some sort of guidelines in the motion for new trial itself in terms of review, so what has happened so far, the Supreme Court has said that the intermediate appellate court may conduct a merits review of the correctness of a new trial order. So we've been sort of struggling since then at the intermediate appellate court.

The Court went on to reverse in Toyota, in the two other cases, and to me it appears that they are not giving any discretion to the trial judge, but are instead applying a more appellate review. So in other words, on the -- for example, the two jury misconduct issues by the Supreme Court, they didn't give any deference to the trial judge's decision that this jury misconduct warranted a new trial. Instead they said there

is nothing in the record to show that this jury misconduct probably caused injury. To me, much more of a, you know, strict viewpoint of things on appeal. We've had two intermediate appellate courts in connection with findings of a motion for new trial being granted on against the great weight and preponderance of the evidence, and basically we are giving the trial judge no discretion in having heard the evidence, watched the witnesses, and, you know, I can certainly understand that. We don't want the trial judge to be a 13th juror. That was sort of the rationale, but basically the appellate courts were applying the exact same test that they would if it had come up on, you know, denial of a motion for new trial or "Please give me a new trial because it's against the great weight and preponderance of the evidence," exact same appellate test.

So keeping it as a mandamus to me sort of sends the wrong message to a trial judge that the trial judge still does have some discretion as opposed to having to meet a certain legal test, so I would believe that the more appropriate review would be by interlocutory appeal. I've also thrown in some brief compilation of Federal case law because for the most part there have been a few mandamuses; but, you know, the Federal courts don't legally like mandamus, so they will review the granting of

a new trial motion after the second trial; and, you know, it's kind of an interesting idea.

So I guess what I was asking for this Court or this committee to consider is do we want to keep it as a mandamus, do we want to give the trial judge any discretion, and I think where we get into problems is on a mandamus review we give the trial judge discretion with respect to facts, but we don't give the trial judge discretion with respect to the law, so it's hard for me to understand exactly, you know, what we're doing with respect to -- or what the Supreme Court was doing with respect to the two jury misconduct cases where they reversed the trial court, because it seemed to me that they gave no discretion to the trial court's implicit finding that -- excuse me, that the jury misconduct was such that it made the trial unfair. Otherwise, I don't know why they would have granted the new trial. So that's it. I'm throwing it up for discussion whether interlocutory appeal is the way to go, whether we keep it as mandamus, whether everyone thinks the courts are on the right track with respect to we're not giving the judge any discretion to do anything, and we're just treating it as a legal question always.

CHAIRMAN BABCOCK: Thanks. Thanks, Tracy. Yeah, Lisa.

MS. HOBBS: In support of the idea that if we are going to review the granting of new trials on appeal that it should be done by interlocutory appeal, I might add that when you have one of these orders reviewed by mandamus you are physically creating a record for the appellate court; and my position is I need the entire trial record because I don't want anybody to say I have a partial trial record even if I know that it's about some narrow issue that we wouldn't really need the whole record for; and then I have to figure out how to file that record in an e-filing system that has document limitations; and it is a real nightmare that I am the one creating a record that is essentially an entire trial record; and so if this were done by interlocutory appeal and then the clerks and the reporters created the record and sent it up to the court of appeals, that would be a great help to appellate lawyers who are doing this by mandamus.

CHAIRMAN BABCOCK: Okay. Thank you. Professor Carlson.

PROFESSOR CARLSON: Yeah, there is a former Texas Supreme Court case that -- it was a regular appeal dealing with what's the proper standard of review for factual sufficiency; and the appellate court had applied a standard of abuse of discretion; and the Texas Supreme Court said that was error, that should just be the

weighing of the evidence as we now know it; and the Court made the statement that if you use an abuse of discretion standard in reviewing a factual sufficiency matter, it robs the constitutional right to a jury of its vitality, so the Court would have to sort of square that.

We do have a rule on -- on too many trials based on factual sufficiency. This could be a legal jeopardy question. Rule 326 is our rule called "Not more than two," and it says, "No more than two trials shall be granted either party in the same case because of insufficiency or weight of the evidence." I think the interlocutory appeal is the superior way to go for a lot of the reasons that you said, Lisa, on this matter.

MS. HOBBS: I mean, I think the disadvantage is that you don't have a one order denial opportunity by the courts of appeals if they -- but if it's a factual sufficiency I think you'll have to outline the reasons anyway, but on some of the other legal questions that might come up you can't just deny -- I mean, if it's an interlocutory appeal it seems like you do have to at least do a memorandum opinion.

HONORABLE TRACY CHRISTOPHER: Well, I thought about that point of view because we do like our one paragraph denials, but I don't think we would be in a position to put one paragraph denial in connection with a

motion for new trial because the irreparable harm is often our reason for a one paragraph denial. We don't see this as irreparable harm. Supreme Court has already said, no, no, you know, we need to review these new trial orders. So I -- I felt that there would never be the opportunity for a one-page denial.

CHAIRMAN BABCOCK: Okay. Professor Carlson.

PROFESSOR CARLSON: I also had a question. Judge Christopher --

CHAIRMAN BABCOCK: I'm sorry. Peter.

MR. KELLY: Go ahead.

CHAIRMAN BABCOCK: I missed you, sorry.

PROFESSOR CARLSON: I think the case law so far is limited to the trial court must grant a reason for -- must state a reason in its order granting a new trial when the trial judge fails to enter a judgment based upon the jury's verdict, with the Court's rationale that there should be transparency in the process, and the jurors have served, and they have a reason -- they have a right to know why their verdict was not -- did not become a judgment. I don't know of other cases that say that every trial court's granting of a motion for new trial reason is subject to interlocutory or mandamus if we go with the current game plan. That would be significantly broadening the right of review.

HONORABLE TRACY CHRISTOPHER: I think we're there with *In Re: Toyota*, I mean, and with Health Care United and Whataburger. I mean, like I said, Toyota says we may conduct a merits review, but I can't figure out when we wouldn't do it, when we could do a one-page denial because we've declined to conduct a merits review; and if you think we have that right, I would like to -- I would like to have it in a rule that tells me we've got a right to do so and under what circumstances.

CHAIRMAN BABCOCK: Peter, sorry I missed you before.

MR. KELLY: No problem. One problem we have with motions for new trial, we have some that are -- say juror misconduct. You have a very limited record, you have an affidavit, two-hour evidentiary hearing, something like that, and it's easy for the court of appeals to review the entire record, but if you're having a factual sufficiency challenge, bear in mind you have to get your motion for new trial filed within 30 days. You're not going to have a reporter's record, especially if you have a longer trial, and it becomes very difficult for the court of appeals to review the entire trial if there isn't a trial transcript, if there's not a reporter's record available. To that extent you have to preserve some sense of trial court discretion; and Judge Christopher was

saying, this might be alluding that the trial court having to think they have discretion; but you have to give the idea that they do have some discretion, especially on a factual sufficiency challenge; and I think in *Perry Homes vs. Cull* tucked away in the response to dissent they talked about how there's many difference types of abuse of discretion and the trial court's discretion will change on the different types of decision that's being made and being reviewed; and I think that that principle that there are different types of discretion that can vary a great deal is preserved in the mandamus review. We don't need to go to an interlocutory review, so we have -- so we can give the trial court other discretion, especially on weighing factual sufficiency.

CHAIRMAN BABCOCK: Great. Any other comments? Yeah, Frank.

MR. GILSTRAP: The reason that the courts review these by mandamus is that that's the only procedural vehicle they have. There is no other interlocutory appeal here, and the problem is when the court conducts what we're calling a merits-based review, I question whether that is really a mandamus proceeding and is the court really engaging in an interlocutory appeal of -- a review of an interlocutory order when it does not have the power to do so. If we're going to do an

interlocutory appeal, we've got to go the Legislature. I think it's not totally clear that the Court can't enlarge its only jurisdiction by rule, but it probably can't. And when you look at the interlocutory appeal statutes they simply say the type of order that can be reviewed. They don't say on what grounds it can be reviewed, so the statute to preserve the current practice would have to be fairly nuanced. It would have to say you can review or grant a motion for new trial on these grounds but not others, and I'm not sure whether that is the type of thing that really is something the legislative process will handle very well.

MR. LOW: Chip?

CHAIRMAN BABCOCK: Yeah, Justice Gaultney, and then Buddy.

HONORABLE DAVID GAULTNEY: So we have a rule that deals with I think it's the agreed interlocutory appeals that does have the discretion in the court of appeals. It's a petition for review process essentially, so you could have -- you could maintain your mandamus discretionary aspect for the frivolous deals, and the ones that are clearly without merit by having a petition for review to have an interlocutory appeal.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: Chip, I've done no research on it,

but what is the thought behind the Federal courts? They don't favor interlocutory appeals. You've got to -- if you get a new trial, you've got to try the case again and then appeal. What is their thought process to eliminate the number of times a case may come to the appellate court, or what is -- what is behind that? Is there any history on it?

HONORABLE TRACY CHRISTOPHER: As I said, I did a very limited review of the Federal case law. It's just always been my impression that the Federal courts just don't like mandamus review.

MR. LOW: Well --

HONORABLE TRACY CHRISTOPHER: And, you know, it's very limited, so they've decided to handle the new trials this way.

MR. LOW: But they don't like interlocutory appeals either.

HONORABLE TRACY CHRISTOPHER: Right.

MR. LOW: And so I'm wondering is their thought, well, if the complaining party wins then we'll never have an appeal?

HONORABLE TRACY CHRISTOPHER: Right.

MR. LOW: I mean, I don't know if there's anything on that or not, but I always questioned what was behind that.

HONORABLE TRACY CHRISTOPHER: Well, and the ones -- I mean, the ones I have read, if, you know, let's say plaintiff wins the first time.

MR. LOW: Yeah.

HONORABLE TRACY CHRISTOPHER: Defendant gets a new trial. Plaintiff -- the opposite result the second time. They'll still reinstate the first verdict.

MR. LOW: Right.

HONORABLE TRACY CHRISTOPHER: So, yeah, I mean, it does -- you know, it's two trials, but the vast majority of times they probably settle.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: Well, if we do consider a rule or legislation on this, we need to limit at least the idea that this is for conventional trials on the merits because I don't think that the Texas Supreme Court has gone so far as to say that a new trial granted after a default judgment or a summary judgment or something like that should be reviewable by appeal, and I don't think that we want to encourage that because often trial judges grant new trials after default judgments because there's been some sort of procedural irregularity, and they're in the position to correct it quickly and move the case forward to a final decision on the merits, and slowing down that process I don't think would improve the

efficiency at all. I think the reason behind Columbia is that the idea is not to put everybody through the expense of a second trial if the trial judge was in error in granting it.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: There actually have been a few mandamuses where people have made that argument with respect to setting aside a default judgment, that it needs to be reviewed. So far the intermediate courts have not done so.

CHAIRMAN BABCOCK: Okay. Anybody else have a -- Lisa.

MS. HOBBS: There's also a bench trial. There's an intermediate court of appeals that refused to look at a granting of a new trial following a bench trial so the courts of appeals seem to be limiting this to review when there's been a jury verdict, as Professor Carlson indicated earlier.

CHAIRMAN BABCOCK: Yeah, Mr. Hatchell. Mike Hatchell.

MR. HATCHELL: I had the *In Re: Dupont* which was part of the trilogy, and I may have a slightly different view about how all of this works, so I would just like to offer that. I do not read *In Re: United Scaffolding* as holding that trial judges have no

discretion insofar as assessing *In Re: DuPont* issues. Historically we have reviewed new trials by mandamus since the late 1800s, and since 1950 one of the two most prominent ones was when there was a new trial based on irreconcilable conflict, and there was no conflict.

When I've spoken on this topic I've said the question before the Court now is, is it going to add to the categories. The Court surprised me somewhat in adding some categories to those types of errors that would be reviewed by mandamus, and Lisa is correct that when you add categories the difficulty that arises is the amount of evidence that's required to support the mandamus record, and I'm not sure I'm taking a position on whether or not an interlocutory appeal is a good way or not. It may well be the only way for those types of errors that involve a humongous record and a balancing of interest.

But back to *In Re: United Scaffolding*, the big question in this has always been how to do you look at weight and preponderance new trials on a mandamus, and I do not think *In Re: United Scaffolding* is as broad as some people read it, although there is no question that there are a lot of mandamuses being broad. How I read United Scaffolding is simply saying that in granting a new trial in weight and preponderance grounds a trial court has to make a record that demonstrate that it knows the standard

of review and that it has applied the standard of review, and I would take the position that if the record demonstrates that, that mandamus review would not be appropriate and both the trial court and the courts of appeals have discretion to say that.

CHAIRMAN BABCOCK: Okay. Any other comments? Okay. Great. Justice Christopher, thank you so much for that. We're now up to Item 9, and, Kyle, you and -- are you going to present or is your colleague going to be present?

MR. SCHNITZER: It will be me presenting.

CHAIRMAN BABCOCK: Kyle Schnitzer is with Jim Adler & Associates, about a lawyer advertising, and I'm going to recuse myself from this discussion because I've represented Jim Adler in the past on advertising issues, but more importantly, I currently represent Google on a very closely related case to this issue, so Buddy is going to come over here in the chair seat.

MR. LOW: Why don't you just sit?

CHAIRMAN BABCOCK: Buddy, as you all know, is our co-chair -- no, no, come up on up to the head. Justice Hecht needs some love from you.

MR. LOW: He came to Beaumont, the only Chief Justice we've ever had in Beaumont.

MS. ADROGUE: Oh, that's nice.

MR. LOW: All right. You may proceed.

MR. SCHNITZER: Good morning, everyone. I'm here today to talk about an ethics question on a specific type of internet advertising, specifically under what circumstances is it appropriate for a Texas attorney to use another attorney's name under a pay-per-click advertising scheme and target their advertisements at a specific class of potential clients. Now, given the specificity of this issue, I did want to take a moment and talk very briefly about how pay-per-click advertising systems work. Relevant advertising is effective advertising, so that's true in whatever medium. It's why when you watch a football game you tend to see an uptick in the number of beer commercials and that sort of thing. That certainly applies, too, for internet advertising.

When you do a Google search or a Bing search or any type of search engine really and you put in your search terms, you're very likely to see related links pop up, sponsored links, advertisements related to your search terms. The reason you see that is because those advertisers, the websites behind those links, have purchased from Google their right to associate their ad with that search term, that keyword. In fact, Google makes hundreds of millions of dollars each day, as do other search engine providers, through this pay-per-click

system, so named because if the ad is effective and the internet user clicks on that advertisement Google is paid and the user is taken to that website.

Now, the way the system is set up Google and the other search engine providers don't have a real strong economic incentive to regulate which persons can buy what search terms, what keywords. It's in their interest, in fact, to allow multiple parties to bid on keywords, whether they're generic terms or potentially intellectual property, which gives rise to the following potential scenario: Say there are two attorneys practicing family law in Houston, Allen Alpha and Bob Beta. They're not affiliated but they do pursue the same client pool. Bob Beta advertises on TV and radio in Houston, advertising his effectiveness as a divorce attorney, so much so that a Houston native like Greta Gamma, who wants to divorce her husband, the first thing she thinks of when she thinks of a divorce attorney in Houston is Bob Beta. So she goes online to Google or Bing or whatever search engine she prefers, types in the word "Bob Beta," and among her results is a sponsored link for "yourhoustondivorceattorneys.com." There's nothing in that link or that advertisement telling her what attorney is behind it, so she clicks on it; and of course, it turns out that it's Allen Alpha's website because he's paid

Google or Bing or whatever for the right to use "Bob Beta" as his keyword; and ultimately in this scenario perhaps Greta Gamma retains Allen Alpha as her divorce attorney instead of Bob Beta, the person she searched for.

Now, it's our position that there's at least two things about this scenario that should concern the committee, hopefully concern the Texas bar as a whole. First, in a scenario where Bob Beta's name is trademarked, you arguably have an intellectual property violation, a trademark infringement. Now, the law in this area is still developing. The Lanham Act that allows Bob Beta to pursue either potentially Google or Allen Alpha for infringement was written well before the internet was a going concern, so there's a dispute within the courts as to whether or not this sort of keyword PPC or pay-per-click advertising is a use in commerce violation. That said, there are courts that have at least allowed this to survive a summary judgment, both in California that I'm aware of.

There's a Minnesota case that I'm aware of where this is still ongoing, but the second point I'd like to make is that independent of whether or not this is a formal trademark violation that's actionable under the statute as written, it would certainly seem to implicate the same concerns that trademark law is designed to

protect against. For example, a trademark protects the mark's owner's interest in the goodwill that he has associated with his mark, building up that mark's reputation in the public, and what you have in the scenario I described is Allen Alpha is free riding on that mark. It's the same sort of concern that trademark infringement is worried about, and in that respect the North Carolina State Bar, which I believe I cite the opinion in -- or Mr. Adler and I cite the opinion in the letter that was written to this committee, has held under a very similar situation that that would be considered -- or Allen Alpha's conduct would be a violation of their -- or their Rules of Disciplinary Procedure 8.04(c), which is substantively identical to Texas' Rule 8.04(a)(3).

In addition, this conduct by Allen Alpha runs the risk of confusing the consumer, which is the second purpose of trademark protection. When a user searches for a particular trademark they expect to find goods or services that are actually affiliated with that mark. There are disclosure obligations and responsibilities that attorneys ethically have, even if it's not a formal trademark infringement violation where it's not unreasonable for Greta Gamma to think that she searched for Bob Beta, she goes to this website, she realizes, okay, this is actually Alpha's website, but, the

link came up when I searched for Bob Beta, perhaps they're affiliated, related attorneys somehow, and so you still have that confusion that should be a concern.

The bar has long taken the position, I think, and rightfully so, that we should protect potential clients from the risk of having to understand unnecessary ambiguities or misconceptions in attorney's communications with them, and it would be within the bar's authority to encourage advertisers online through PPC conduct either to prohibit this sort of conduct completely as the North Carolina bar has or to increase the -- perhaps the disclosure requirements on an attorney like Allen Alpha in the future. So we do feel that this is a problem that is occurring in Texas, and it's worthy of this committee's consideration.

MR. LOW: Let me ask you one question. Have -- I know there's an advertising committee, correct, that you put through. There's also the ethics committee, which doesn't answer questions of law, a remedy for the Legislature. What do you think is the approach or answer to this? What could we do that you couldn't do with a lawsuit to enjoin somebody and establish the law? What's wrong with that?

MR. SCHNITZER: Certainly, and two points in response to that. The first is whether -- if we do bring

a lawsuit on an individual basis, that only stops the one offender, and so you're chasing around putting out fires. This is an ethical concern that should concern the bar, we feel, such that there should be an obligation as a community of lawyers to hold ourselves to a higher standard, even if we are able to individually litigate successfully each individual offender; and the second question is, we are pursuing other remedies --

MR. LOW: Yeah.

MR. SCHNITZER: -- as we can. There was a letter written to the Ethics Commission, I believe, within Texas asking for an opinion on this subject. To my knowledge, I'm not sure whether or not it's been formally taken up, and because one of the requirements for asking for an ethics opinion is to not have that subject be in litigation, we've held off on formally filing suit.

MR. LOW: I understand, but I was chairman of the ethics committee for 25 years, and we steered clear of answering any question of law when we considered questions, so you might have trouble there. Any comments?

MR. SCHNITZER: I guess I should -- I'm sorry. I wanted to clarify that we weren't asking the ethics committee to answer whether or not it's a trademark violation so much as just whether this conduct would violate one of the existing --

MR. LOW: Canons of ethics.

MR. SCHNITZER: Yes, sir.

MR. LOW: I understand. Comments? Thank you very much.

CHAIRMAN BABCOCK: You've got one here.

MR. LOW: Oh, I'm sorry. Roger, excuse me.

MR. HUGHES: I guess I'm -- one of my questions is along the line of why aren't existing laws sufficient to halt this? I mean, we do have both state and Federal anti -- unjust competition laws in the Lanham Act. Why then do we need an ethics rule?

MR. SCHNITZER: Well, I guess my two points to that are, one, the courts have been so far reluctant or mixed as to whether or not those laws apply to this conduct in a way that would actually stop it.

MR. LOW: Carl.

MR. HAMILTON: Why doesn't 804.3 take care of it?

MR. SCHNITZER: The North Carolina bar held that the intentional purchase of the recognition associated with one lawyer's name to direct consumers to a competing lawyer's website would be dishonest conduct under their rules, so they slipped it in under dishonesty in terms of attorney dealings.

MR. HAMILTON: We have that under 804.3.

MR. SCHNITZER: And that was the rule that we asked the Ethics Commission to rule on. It's just that to my knowledge they have not yet, so we also wrote a letter to this committee, and this committee was kind enough to offer some time for us to present that position.

MR. LOW: Anybody else? Thank you very much.

HONORABLE NATHAN HECHT: Richard.

MR. LOW: Chip.

CHAIRMAN BABCOCK: Munzinger had something.

MR. LOW: I'm trying to get out of this chair.

MR. MUNZINGER: I wanted to make sure I understood what the problem is. If I click or if I put "Allen Alpha" into Google and press the button, Google comes back and on the left-hand side of the screen is Allen Alpha, and he's the first guy on the screen theoretically, and over here on the right-hand side of the screen is a list of Bob Beta and Joe Schmoe, et cetera, who are competitors to Allen Alpha. Am I correct so far?

MR. SCHNITZER: I was using the names reversed, but certainly I follow you, yes, sir.

MR. MUNZINGER: Regardless of their names, in essence what you're saying is you don't want competition.

MR. SCHNITZER: No, I don't think we would phrase it that way, sir.

MR. MUNZINGER: I understand you wouldn't. I know you wouldn't phrase it that way, but I am, and my point is -- and that's my whole point, so we have a new -- internet is a new way of advertising. It's a new way of getting information to consumers. It's the cat's meow, and you want to stop people from finding out that there's other people who do divorce work when they ask for Allen Alpha. He hadn't trademarked his name insofar as you know. It isn't the same as a trademark violation. Trademark violations require proof of the mark and proof of the public acceptance of the mark, and so you've done a number of giant steps. My only point is not to debate you except to say I don't think it's quite as stark as you have presented it, and I don't think it is limited to an ethical question.

MR. SCHNITZER: Yes, sir, and I wanted to clarify that we have no quarrel or any issue with these two attorneys buying the generic term such as "divorce lawyer" or "family law lawyer" or a scenario like that. It's specifically trading on the other attorney's name, the other attorney's reputation, that we were concerned about, and there was another point, but I'm afraid it's escaping me.

MR. LOW: All right.

MR. VIVIALA: My name is Toby Viviala. I also work at the Jim Adler Law Firm. I'm his internet marketing director. One comment I would like to make is there is a way to look at a search query and specifically denote that a trademark name was used versus advertising on something like "divorce attorney" or things like that, so you can differentiate between generic advertising and advertising specifically on a trademark name.

MR. LOW: Anybody else? Thank you, and we might come back or refer back at this point, I think you can probably wait to see.

MR. SCHNITZER: Yes, sir. Thank you.

CHAIRMAN BABCOCK: Thanks, Buddy. Nicely done. Man, competition for me. Next on our list is Don Jackson, who is the president of Texas ABOTA, and has a matter that he wishes to present to us which I know Texas ABOTA has been working on very hard for a number of months, if not years. Don, thank you.

MR. DON JACKSON: Thank you, Chip, and thank you to the committee for giving us a few minutes to talk about this topic this morning. I did want to confess that during the last speech I called my marketing director, and we bought the name Rusty Hardin out, so we'll be over there on the right side.

CHAIRMAN BABCOCK: So you're stepping down in clientele, huh?

PROFESSOR CARLSON: Incoming.

MR. DON JACKSON: He said that.

MR. DAWSON: First time I've seen Rusty quiet in a while.

MR. DON JACKSON: We'll see if we can get this running, but the presentation was circulated to the members of the committee, so maybe you've had a chance to take a look at it. I am here this morning as the 2014 president of TEX-ABOTA to speak to you about a proposal to amend the Texas Government Code, section 82.037, which is the oath of attorney. Usually when I speak about civility or professionalism, I start with stories about lawyers acting poorly, so I thought in a more uplifting approach this morning I would tell two quick stories about lawyers acting properly and the kind of behavior we're hoping to encourage rather than the kind of behavior we're hoping to discourage, so the -- here's the first story.

I was a second-year lawyer, long time ago, I was second chair to Brock Akers in a wrongful death case. Those of you who know Brock know that you're not going to find a tougher trial lawyer or a harder fighter than Brock. We're trying a death case. It was a very pitched battle. We're out in the hall in one of the breaks, and

opposing counsel came up to Brock, said, "Brock, who's your next witness?" Brock said, "Well, next witness is going to be witness A," and opposing counsel said, "Brock, you can't call witness A because we had an agreement that if you were going to call that witness you would tell me so I could take his deposition," and Brock's response to that was, "Well, I don't remember telling you that, and I don't remember making that agreement, but you say I made that agreement, I'll honor it." We didn't call witness A.

Second story, I was talking to Don Hudgins last night, and he told me this story about a case he and Alton Todd had. Don's firm had worked up this case on the defense side. He hadn't been involved. He got the file to get ready for trial. Alton was the plaintiff's lawyer, and Don's looking at the file, and he notices that his firm has answered for the company but not for the driver. Alton sued both the company and the driver, so Don's hoping, well, maybe Alton didn't get service on the driver, so he called Alton up, said, "Alton, did you get service on the driver?" Alton's answer was "Yep."

"Well, Alton, have you taken a default judgment against the driver?" Alton said, "Yep." Don said, "Well, Alton, would you consider setting aside that default judgment?" Alton said, "Yep," and that was the end of that. Set aside the default judgment, tried the

case straight up, so it's a matter to me of lawyers who were trained as baby lawyers, young lawyers, how to act right and the importance of acting right. That's something that ABOTA as an organization, TEX-ABOTA included, has taken on. Now I've got to figure out how to advance the thing.

Well, anyway, so the TEX-ABOTA's mission is in part to elevate the standards of integrity, honor, and courtesy in the legal profession. ABOTA, the national organization, has a code of professionalism that contains many of the sentiments that I think all of the committee members would agree with. One of our major efforts is a publication called Civility Matters that promotes the cause of civility. We also have programs based on the Civility Matters -- oh, I was hitting that one. Based on Civility Matters that we present in law schools, CLE conferences, at law firms, and any other forum where we can get the message of civility and professionalism out. There's broad support of this effort. All of these organizations that you see on the screen have supported the Civility Matters efforts and other civility initiatives.

The Texas Supreme Court certainly has done so much in this area. The Texas Center for Legal Ethics and the Baker course are doing wonderful things. So

there's a lot in Texas that is being done in the profession, in our professional organizations, and in our court system to -- to promote proper conduct, professionalism, civility. One of the many -- one of the perhaps greatest efforts is the Texas Lawyer's Creed, which you are all familiar with, and I've excerpted some of the wonderful language from that document, and I'll just focus on the last one here that says, "I will treat counsel, opposing parties, the Court, and members of the court staff with courtesy and civility."

So this is an obligation, and I know we all know that the Texas Lawyer's Creed is aspirational, but I think we all agree that it's an obligation, at least a moral oral obligation that we have, and we are doing these things to support it, to promote lawyers living up to that standard, but that doesn't mean there isn't something else that can and should be done. There is a national movement, has been for several years, to include a civility concept or component in the attorney oath. This map shows the various states in the country that have already taken this step. The most recent being California just to this -- just in 2014 has adopted and amended their attorney oath to include an obligation and an oath of civility and professionalism. We as TEX-ABOTA are suggesting that this is the time for Texas to join that

movement.

South Carolina and some other southern states have used this language to opposing parties and their counsel. "I pledge fairness, integrity and civility not only in court but also in all written and oral communications." There's another part of that oath that applies to conduct in court. New Mexico has a very simple one. "I will maintain civility at all times." Utah says "to discharge the duties of an attorney with honesty and fidelity, professionalism and civility." So there are these different formulations, but it all has the same meaning.

We have put together a proposed bill that we intend to have introduced into the -- for consideration by the 2015 Texas Legislature, and here is really the substance of it, and we're very grateful that the Supreme Court agreed to consider our proposal a few months ago. Actually justice -- Chief Justice Hecht took it to the Court for a vote, and we received unanimous consent or unanimous agreement in support of this proposal. They also made the very helpful suggestion that we try -- while we're at it while we are amending the oath that we achieve gender neutrality in the statute, and we have tried to do that, and now it's been pointed out to me that we missed a "his" in (a)(3) there, so we'll have to go back and take

care of that one.

The thing to focus on here is point (4), "conduct oneself with integrity and civility in dealing and communicating with all parties," and here by "parties" we mean something broader than just the parties to the lawsuit, so that's another wording issue that we may have to take up and see if there's a broader way to state it, but that is the sentiment. So this is just my concept of how that would translate into what the oath will now say, and it's "I," and the lawyer states his name, "do affirm that I will support the Constitution of the United States and of this State, that I will honestly demean myself in the practice of law, that I will discharge my duties to my clients to the best of my ability, and that I will conduct myself with integrity and civility in dealing and communicating with all parties." That is the TEX-ABOTA proposal. That's what we're going to take to the Legislature this session.

Next year's President is David Chamberlain, and next year's President-Elect of TEX-ABOTA will be Guy Choate, two seasoned lawyers in terms of dealing with the Legislature. They have been working on legislative sponsors. We feel like we're in good shape for that, and so we would love to have input and advice of this committee, and if you feel appropriate, support of this

committee or at least support of the individual members of the committee. Thank you for your time.

CHAIRMAN BABCOCK: Thanks, Don. Don't leave yet. Any comments about this proposal or any thoughts? Yeah, Justice Christopher.

HONORABLE TRACY CHRISTOPHER: I support TEX-ABOTA's suggestion, but -- and I know this will be heresy to many people here, but I suggest while we're changing the statute that we eliminate the word "demean" because it is an archaic word, and the current version and meaning of "demean" is to debase oneself, not to conduct, which is the meaning in the oath.

CHAIRMAN BABCOCK: Okay. Richard Munzinger.

MR. MUNZINGER: I'm going to be a lonely voice. If I were to say, "What a stupid idea," am I uncivil? Civility means politeness.

MR. HARDIN: Not to those who know you.

MR. MUNZINGER: So I go to a forum where I'm not known, and I get up and I say, "Judge, that's the most ignorant dadgum thing I've heard in my life." Have I been uncivil to somebody? Up until now I've had a profession that says be civil, be polite, be nice, but I now have a legal obligation to do this, an obligation that a judge can sanction me with. I had a lawyer one time say, "Don't point your finger at me. That's rude." My mother told me

that it was rude to point my finger. She nodded her head. Her mother told her the same thing. And I'm pointing my finger at her.

HONORABLE ANA ESTEVEZ: Don't point your finger at me.

MR. MUNZINGER: That's rude, and rudeness is impoliteness. In all due respect to ABOTA, which I know does wonderful, wonderful things and helps us all be good trial lawyers, I don't think it has any place in an adversarial profession where tempers run high; where lives, fortunes, and sacred honor is at stake in the courtroom; and people are called upon to be persuasive and argumentative and to fight with every fiber of their being for their client's interest; and then have someone say, "Oh, but, your Honor, he did so-and-so," and I've got a judge who doesn't like me or doesn't like my place, "Munzinger, you weren't civil. I'm going to sanction you." Come on. I think it's a bad idea.

MR. DON JACKSON: Chip, if I may?

CHAIRMAN BABCOCK: Yes, absolutely. That's what this is all about.

MR. DON JACKSON: And this is what we have heard in other venues, not in Texas, but in other ABOTA discussions; and that is, okay, there is a tension between zealous advocacy and civil conduct; and we acknowledge

that there can be that tension; but our argument is that we want zealous advocacy in a civil manner; and it's the concept of disagreeing while not being disagreeable; and so I appreciate your comment, I disagree with it. I don't think there is an irreconcilable tension.

Another concept that you've raised is the concept of sanctioning violations of the oath. ABOTA is neutral on that, and the reason we're neutral is there are differences of opinions among members. If Wayne Fisher were still here he would say the oath should be enforced by sanctions. My personal opinion is that it should not be enforced by sanctions. That's not -- that's not part of what we're proposing one way or the other. Ultimately it might be up to the Supreme Court, maybe with the advice of this committee.

MR. LEVY: That was very civil.

CHAIRMAN BABCOCK: Richard Munzinger.

MR. MUNZINGER: I left out one other reason.

CHAIRMAN BABCOCK: Now, be civil about it.

MR. MUNZINGER: If California is for it, you know it's a bad idea. If California is for it, you know it stinks.

MR. DON JACKSON: I'll tell you something that Louisiana has done that I would also favor is after Louisiana adopted the new oath, which, of course, is taken

by new lawyers, they actually sent out in the due statements a requirement that as you renew your membership, pay your dues, you sign the oath. We are not proposing that in Texas. We are proposing and we plan to propose for next year a voluntary ceremony, if you will, for lawyers who are already licensed -- I'll take part in this -- to take the new oath. Justice -- Chief Justice Hecht has agreed to preside and to administer that.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: You know, I have some question where the line is drawn, because we as advocates are supposed to do everything within the law and in the rights or the right thing for our client, and I've done the same thing you've said about giving up, setting aside a default judgment, but where do you draw the line? You're giving up a client's right just to -- I mean, there's just a certain point. Now, I believe in acting nice, but sometimes where is the line civility and giving up a judgment that your client has?

MR. DON JACKSON: Well, and I wouldn't imagine that any wording of an oath would take the place of a lawyer's judgment, and that's clearly in specific instances is a real matter of a lawyer's judgment. I would ask you though, Buddy, do you think we have a bigger problem with lawyers not being zealous enough --

MR. LOW: No. No.

MR. DON JACKSON: -- or lawyers not being civil enough?

MR. LOW: Don't even ask me that question, but I just -- drawing the line would be one thing. Chip, you'll remember we had David Beck -- is Alistair here? Anyway, David Beck had a proposal in a jury charge, you remember that, and it was voted down where lawyers -- you know, the jury is instructed that the lawyers are advocates and so forth, and that's the only time we've considered anything like that, just the conflict in instructing the jury that that's what the lawyers are supposed to do, and nobody disputed that's what the lawyers are supposed to do, within the law what's best for his client, but I agree with you that there's no need in -- you can tell somebody he's wrong in a nicer way than cursing him out.

CHAIRMAN BABCOCK: Gene, then Rusty, and then Carl.

MR. STORIE: Yeah, I like the idea, and I think I helped to shoot down the jury instructions because I thought it might be prejudicial to pro ses, but I certainly think we need more civility in the practice. I think that's going to save people potentially a lot of time and money. Whether it's sanctionable I think is a

real problem, and my concrete suggestion, though, is in your proposal how about trying to put the oath in the first person and just as a 22nd thought, first draft, something like "Before receiving a license take the following oath, 'I will support the Constitutions of the United States and this State, honestly conduct myself in the practice of law, and discharge my duty to my client or clients to the best of my ability, and conduct myself with integrity and civility in communicating and dealing with all persons.'" I think it should be "all parties."

MR. DON JACKSON: I like it. I'll give you my e-mail address, and if you will e-mail it to me I'll get it in the right hands.

CHAIRMAN BABCOCK: Yeah, Rusty.

MR. HARDIN: I think the importance of it is not the sanctions or anything like that, but it's to set a tone, and I'm amazed at the tone of both writing sometimes and oral statements in a courtroom, and I just don't see that -- I think it becomes -- you take it out of the sanction issue, and it is just something to remind lawyers of the oath they took and the judges. Judges can control their courtroom. It gives them something to talk to lawyers about when they get out of control, and I think it's sort of like Justice Stuart and obscenity. You know, you may not define it, what is and is not uncivil, but you

can recognize it, and I think it gives judges and sets a tone for us as lawyers that just improves the process. I really get bothered by some of the things people say and do against the opposing side, and I do disagree respectfully. I think you can be zealous, and I think you can be very, very careful in representing in every way your client and still be civil to the other side in the process, and I think it demeans us when we do it. I think it demeans the public, and I really endorse getting rid of the word "demean," though. I think we would we have to explain it to the public every time they saw it.

MR. DON JACKSON: Yeah. Our young lawyers stumble over it now.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: It seems to me that whether some conduct is civil or not is a matter of someone's opinion. Is there any kind of a guideline or definition of what we mean by civil or noncivil conduct?

MR. DON JACKSON: My personal response, if you're asking me, would be that not beyond the -- two things. In terms of the actual word "civility," I would just use the dictionary common meaning, but in terms of really giving more content to it, I would refer to the Code of Professionalism. I think it's an excellent document, and both the ABOTA Code of Professionalism and

the Texas Lawyer's Creed here in Texas. I've been rereading those things a lot lately, and I think they're outstanding.

MR. HAMILTON: If that's what we refer to, why do we need to add the word "civil" to it?

MR. DON JACKSON: Yeah, well, "civil" is in those things, but the oath to me -- and I think I can state ABOTA's position on this -- is something different because there's a certain moral force to an oath, and we believe that because we use oaths so many times in so many contexts in our system. There's a real moral force to the oath, and these are brand new entering the profession lawyers that are taking that oath. I think it really drives home that that's what's expected of a Texas lawyer.

CHAIRMAN BABCOCK: Brandy.

MS. WINGATE VOSS: Why wouldn't you require older lawyers or tenured lawyers to take the same oath? I mean, are you saying that young lawyers have to respect their elders, but their elders can be as mean and nasty as they want to be?

MS. ADROGUE: That's why there's going to be a ceremony.

HONORABLE JAMES MOSELEY: That idea is starting to grow on me.

MR. DON JACKSON: The answer is probably a

practical one. In Louisiana they figured out a way to do it, and I think they did a good job there.

MS. WINGATE VOSS: You could include it easily also -- I mean, everybody has to renew their profile on the State Bar website, and you have to click a button that says you swear all of this information is correct. You could do that easily and --

MR. DON JACKSON: I think those would be great things to keep on the agenda for future consideration. I'm going to focus right now on seeing if we can get this bill passed, but I think those are good ideas, and I would support that.

CHAIRMAN BABCOCK: Kent.

HONORABLE KENT SULLIVAN: I certainly support the effort. I think it's a good idea. I'm glad that you're doing that. At the same time, the problem that you are describing is probably not one that exists for lack of an oath, and I am curious to what extent ABOTA and maybe the people that you've been dealing with have considered other systemic solutions. Were there other things under consideration as well? And I appreciate your incremental approach to this. You've got to start somewhere. You probably need to start modestly, but I am curious about the fuller nature of the discussion.

MR. DON JACKSON: Okay. And, Kent, are you

thinking in terms of enforcement of civility requirements or more on the educational front?

HONORABLE KENT SULLIVAN: Perhaps all of it. I mean, I will just note that I think probably the most significant thing that has occurred during my professional life has just been the sheer increase in the numbers of people practicing law. I think it's gone up in Texas -- we have I believe almost a hundred thousand lawyers in the state of Texas now, so I think it's up three and a half times since I began practicing. The other thing that struck me, I don't know whether this is accurate or not, but in the stories that you told, all of which were great, there was probably a relationship involved in all of those; that is, the lawyers actually knew one another in some measure; and I think one of the problems that we face that is a combination of the sheer numbers and related factors is that things are much more transactional now with people who have no prior relationship dealing with people that they expect to deal with on a one-time basis; and I think that sort of expectation also helps to promote this.

Also, I think again the sheer number of people moving through the system, I think that law schools are more under the gun. You don't have people who now leave, get a job with someone else who is a mentor, and

they're really taught. They're more people going out and hanging out their own shingles. I think there are a lot of different factors, so I'm curious about the two that you are talking about; that is, in issues of enforcement, issues of education; or do you have other things on your potential agenda?

MR. DON JACKSON: Sure, and it's a great point, and I think we all feel the way the profession has gotten so much bigger just in terms of number of lawyers. I hadn't really thought about the number you just mentioned tripling. That is pretty astounding. One thing, one effort, ABOTA works with the American Inns of Court. American Inns of Court are really all about mentoring and promoting fellowship in terms of socially but mainly for the purpose of mentoring and to a large extent to teach professionalism to younger lawyers. That's one thing -- Justice Lang from the Dallas Court of Appeals has just completed a white paper on this subject for the American Inns of Court. It's terrific. I recommend that to everybody.

We are in the law schools with Civility Matters. We are on CLE programs with Civility Matters. We'll go to your law firms, anybody's law firm, and put the program on. So on the educational front we're doing those things. The -- on the enforcement issue, and this

is, again, we're -- my good friend Wayne Fisher and I disagree. I lived through the Eighties, as probably everybody did, and part of the reason we got into a lot of uncivil conduct was the sanctions regime of the Eighties, so I kind of react against that idea in terms of enforcement, but I really -- I really support the moral enforcement, and we all know a young lawyer needs to be told incivility has its own reward and it's a negative reward. You lose reputation and all of your cases become harder, more expensive, and less successful, and if you act that way in front of a jury, they'll punish you. If you act that way in front of a judge, you'll get punished in one way or the other.

So there are a lot of things going on on this front. American Inns of Courts are doing great work and the other organizations that I put up there on one of the slides, and we're always open to suggestions to do better and do other things.

CHAIRMAN BABCOCK: Anybody else? Don, thank you so much.

MR. DON JACKSON: Appreciate it.

CHAIRMAN BABCOCK: All right. Kathryn Murphy is the vice-chair of the family law bar, and she is going to address us on family law issues.

MS. MURPHY: So should I keep standing?

I've been sitting at the back jumping up and down. I was invited to attend this amazing meeting two days ago, and when I sat down this morning I saw my name on the agenda, so I thought, oh, my gosh, I better think of something to say, I'm glad I'm last, and after the first speaker the comment was mentioned that the speakers always get lots of bullets at the end of their presentation, so I've been a little bit nervous, but anyway, there is a lot of views from family lawyers. As you-all my know, we have strong opinions, and it has been an incredible honor to sit with this amazing group of professionals, so I'm so blessed to be here.

I could probably comment on each of the topics today, but what I will comment on is the pro bono, the pro bono work that some of the Legal Aid people have discussed; and the family lawyers, the family law section, the last few years we adopted Family Law Cares; and it's a program where we -- we go into the various cities. We have a large city group, a mid-city group, and a small city group, and we put on seminars to get free CLE. So the attorney that attends is going to get free CLE. All of the speakers are all of our top speakers at our advanced family law course, and in exchange for getting the free CLE they have to take two pro bono family law cases. So I think last year as a result of our program

250 cases were assigned, and the heads of this program from the family law council are working, I understand, directly with our Legal Aid service providers; and we also have involved the State Bar, so they have agreed to give us a certain amount of free advertising for these programs; and we've also started webinars because sometimes it's hard for the small town people to, you know, go to another small town, so now it's being offered online. So we're real excited about that, but I agree with the other speakers are saying, that is, we just need more lawyers. So, you know, we're really working, and we're trying to get the word out to do that, so anyway, if anybody has any questions I'll be around for lunch. Thank you.

CHAIRMAN BABCOCK: Any questions for Kathryn? Okay. Well, thanks so much for coming. Is that a hand that went up? No. Okay. We're not quite done. Peter Vogel has had some plane problems, but he anticipates that he'll be here between 1:15 and 1:30, and then we also have various members of of our committee who while not on the formal agenda have some ideas to bat around. So we'll take our lunch break right now for about an hour or so until Peter gets here and then we'll get back at it, and obviously I think we're going to finish early this afternoon unless there are latent ideas that

nobody has told me about sitting here. Kathryn, anything else we can do for you?

MS. MURPHY: No.

CHAIRMAN BABCOCK: Great. Thanks, everybody. Be in recess for an hour.

(Recess from 12:18 p.m. to 1:13 p.m.)

CHAIRMAN BABCOCK: Okay. We're back on the record after a lovely lunch, and Peter Vogel is still en route, but not here yet, so we will go on to the next item, which is several people from the committee want to talk about ideas that they have under our broad category of ways to improve the civil justice system, and Judge Estevez has some thoughts.

HONORABLE ANA ESTEVEZ: All right. As you know, I wasn't too excited about adopting all the forms, and that's for the pro se litigants because I didn't believe philosophically that the way to deal with the issue was to have them litigate on their own. I used the medical system as an analogy. The doctor's don't hand the financially challenged scalpel and alcohol pads and tell them to remove their own tumors, but that's what we are doing. We're just giving them the tools and saying, "Good luck, hope you do it right," and we don't even know what the results are, if they get them right or not. So my suggestion -- and it's very controversial, but I think

that once you do it, it will just seem like the natural thing for us to have done years ago, is to require mandatory family law appointments. If you're a member of the State Bar of Texas, you're subject to a court appointment rotation. If the case you get is too difficult, you can have it reassigned, and they'll give you one that is easier for you or within your area of expertise. I know that all the law schools require you to take family law. I know that it's part of the State Bar, so obviously it won't be anything that would be unusual for them to encounter and then obviously if you -- if we require it then the law schools will be a little more -- they'll prepare people for it, so in a few years it won't be an issue at all.

I don't believe that -- I believe people are going to complain, but I think even when we adopted electronic filing that that was more of an issue than this will ever be. I don't think it's something that the lawyers can't overcome. They do it in Federal court, didn't matter if you've never even seen a criminal case before, they call you in the Northern District of Texas, they tell you you're up. I don't care if you're an appellate lawyer and you've never even seen the inside of a courtroom, you get a court appointment. You're a member of the bar, you have to represent this client, and I think

that that will help. I know that an attorney who doesn't have a lot of expertise in family law is still better than a pro se litigant who has no experience.

CHAIRMAN BABCOCK: Okay. Great, thanks, Judge. Professor Carlson.

PROFESSOR CARLSON: So do you envision this for the pro se client?

HONORABLE ANA ESTEVEZ: For the indigent.

PROFESSOR CARLSON: For the indigent, okay. Family law is not a required course and neither is marital property, although many students take it. It's a bar course.

HONORABLE ANA ESTEVEZ: Well, it was on the bar.

PROFESSOR CARLSON: Yeah, it is a bar course.

HONORABLE ANA ESTEVEZ: So it could become a required course.

PROFESSOR CARLSON: Good luck with that. No, we have students like that are going into patent law. They may not take family law.

HONORABLE ANA ESTEVEZ: But they get that patent lawyer, if he's done anything in the Northern District of Texas, he's got to do a criminal case, and I know he's taking criminal law because that is required,

but I thought family law was, but maybe I --

PROFESSOR CARLSON: It may be at other schools. At South Texas it's not.

CHAIRMAN BABCOCK: Okay. Yeah, Judge Peeples.

HONORABLE DAVID PEEPLES: Would you give judges the discretion to decide which cases need an appointment, or would it happen in every case?

HONORABLE ANA ESTEVEZ: I think it would be the indigent ones, and I think you could do it the same way the magistrate does it. They call you up, and they say "Your name is up. This is your case," and you can let them know whether it's a court coordinator that's calling or someone else.

HONORABLE DAVID PEEPLES: But every case or just ones where the judge in exercising discretion thinks in this case this person needs a lawyer?

HONORABLE ANA ESTEVEZ: I guess it could be either. I would think every case would be better, but if we can't do that then at least the ones where the court can use their discretion.

CHAIRMAN BABCOCK: So would you say every indigent case in the family law area?

HONORABLE ANA ESTEVEZ: I would say that.

CHAIRMAN BABCOCK: Okay. Yeah, Judge

Wallace.

HONORABLE R. H. WALLACE: Any idea how many that would be in a large metropolitan area? I know what you're saying and agree in the Northern District, although I think in some of the larger areas now between the public defenders and people who voluntarily get appointed they don't appoint a lot of people who don't want to be, but I'm just wondering the volume of family cases, how many times the lawyers are going to -- will they get appointed once every 10 years, once every three months? I have no idea.

HONORABLE ANA ESTEVEZ: I bet you it would be once -- in the larger areas it may be probably 10 or 15 times a year, but some of them will be, you know, you call and you say, "I'm still working on this 10 years later," they may give you, "Well, here's one that will take you 15 minutes."

HONORABLE R. H. WALLACE: Okay. And also if you are going to pay them, it will have to be funded obviously.

HONORABLE ANA ESTEVEZ: No, I don't think that they should -- well, I don't know.

HONORABLE R. H. WALLACE: Well, you get paid -- court-appointed lawyers in criminal cases, at least in Federal court are paid. Not much, but they're paid.

CHAIRMAN BABCOCK: Yeah. Dean Hoffman, and then Richard.

PROFESSOR HOFFMAN: So why -- so I take it part of the reason for limiting it to family law cases is that there are a bunch of family law cases, but sort of expanding on the last comment, why not just a mandatory pro bono requirement that isn't tethered to a particular kind of case or maybe mandatory pro bono and then having certain buckets?

HONORABLE ANA ESTEVEZ: Because then you just go off and you're on your board that you wanted to be on, and you give them some advice during the board meeting, and you call that pro bono work. I think if you're going to do pro bono work, it needs to be in -- that you're going to count toward your mandatory, you need to do something that's actually in the courtroom.

PROFESSOR HOFFMAN: So and, again, so maybe -- I think what I'm hearing you say is the concern is if it's just mandatory pro bono that people will find ways to do things that maybe a lot of which might not be as socially valuable as others. What about then sort of creating some buckets? Like, so, for example, there's a lot of need around smaller civil cases that are not family law cases, we know that. Housing, you know, as the Legal Aid lawyer was talking about, one of the big areas; and

there's a lot of need around transactional stuff, you know, everything from basic estate planning, you know, even in very small matters, to medical powers of attorney and wills. I mean, obviously, we could come up with a list. What about creating potential buckets that addresses that, you know, they don't just do something that's not as socially valuable?

HONORABLE ANA ESTEVEZ: I don't think that's a bad idea. I think the problem is going to be who's administrating that. You know, I was talking about just in the court system as far as going through the surgery. This is like -- I would do the analogy of we're talking about surgery, not about getting your will done or something like that. You know, we're talking about a system in which it's adversarial, and there's going to be a consequence at the end of it. You know, the housing, yes, you may not find a house, but there's going to be somewhere for you to be until you get a house. I mean, you know, we have systems that take care of that. I'm just trying to focus on let's talk about when we're actually in the hospital and somebody is trying to revive you or decide what to do with you, and they don't know how to go through that system correctly, and we're giving them a false sense of security by giving them a packet and saying, "This is enough." Sure, I went to law school.

Sure, I take extra hours every year to ensure that I know what the law is, but I didn't need to do that because I could have just gotten a packet and been in the same spot.

CHAIRMAN BABCOCK: Eduardo.

MR. RODRIGUEZ: How would you handle the original -- I mean, the person that wants to file the suit? Who would they go to to get somebody appointed to represent them versus a person who's been sued that is called to the court and then the judge is there and says, "Okay, I'm going to appoint somebody for you"?

HONORABLE ANA ESTEVEZ: I think when you're talking about the initial process you should go through the legal services that are already there, and then once they're in that court the judge could make that determination. I mean, sometimes we do appoint when it comes up. Somebody files an enforcement action, well, they come for the initial hearing, and that's when they ask -- we ask them "Do you want an attorney," so they've already gone through the process, and that's when we're appointing. So I think when it's on a defensive side you wait until they're before you or ask those questions to see if they qualify, but if they're the ones that are actually bringing the suit then I think they should go through whatever --

MR. RODRIGUEZ: Legal services right now

turns down four out of every five people that come to them.

HONORABLE ANA ESTEVEZ: Because they don't have anybody, but now they will because we've just opened up a hundred thousand, 200,000 people. We just gave them 200,000 people to work with.

MR. RODRIGUEZ: So we're going to send lawyers to legal services, and that's what they're going to do? Is that your --

HONORABLE ANA ESTEVEZ: I think that's one way of using what we already have to administrate it faster and get it started, and then other than that when the need comes up, just like now, I mean, when they go through a court-appointed process we have someone that does that in our -- not in our offices, but the district courts, and then sometimes the need arises just in our court, and so then we take care of it then.

CHAIRMAN BABCOCK: Richard.

MR. MUNZINGER: If I understood the proposal correctly, it was that lawyers be required to work for the indigent in family law cases, and I want to share my experience and the experience of El Paso in an analogous area. We didn't have a public defender in -- let me back up a moment. I was chairman of the board of the hospital district in El Paso back in the Seventies. Essentially

one-third of our community was defined as indigent by the Federal government. We had an outpatient clinic and emergency room that saw several hundred thousand people a year, and we did it with no Federal funding or anything else. It was unbelievable. The amount of indigency in the border areas is I think beyond the experience of most people in other places, and I suspect Eduardo would confirm my experience, I don't know. I'm just telling you mine.

Back in the Seventies or so El Paso had a -- we did not have a public defender for criminal cases. We didn't have compensation for court-appointed attorneys. The judges began appointing, as they had to, attorneys to defend every indigent criminal defendant. The judges made the decision of indigency. There were three or four so-called large firms in El Paso at the time, mine being one of them. We found that all of our associates, whether they were child lawyers, business lawyers, corporation lawyers, securities lawyers, didn't make any difference who they were, every single one of them had 15, 18, 20 criminal cases a year that they had to defend. Every single one of them was in the jail meeting with the fellow, telling him what the DA was offering and this and that, trying to find cases. They were all well-intentioned young lawyers, male and female, doing

their best to find these people and to help them to represent them. It got to the point where the law firms and the lawyers could not afford what they were doing, and the bar -- then the El Paso Bar Association sat down and we worked out a deal where if a lawyer could pay X amount of money, the lawyer could buy his way off the indigent appointment rolls. Everybody took advantage of that, and the money was used to fund the first public defender that we had in El Paso County.

Now, if you think that handling -- you know what family law cases involve. They're just like criminal cases as well. "He called me a so-and-so"; "He beat me"; "She beat me"; "She took the children"; "I can't find my son." The phone is ringing all day long because of these kinds of things, and you're sitting here trying to practice law, and you're a real estate lawyer, and you're on the rolls. You're a lawyer, and you've got a divorce case. I just have to tell you at least in a jurisdiction like El Paso where I believe the degree of indigency as defined by the Federal government is probably fairly consistent with what it was 25 or 30 years ago -- I'm guessing at that. I don't know it for a fact, and I don't want to mislead anybody, but I can just tell you that if you go to a system like this, if you're going to compensate lawyers, I don't know how you can compensate

them.

The County of El Paso right now just finished having a huge fight over how much money they were paying lawyers in criminal cases because we still have indigent defendants that are not serviced by the public defender, and I think they were paying $75 an hour, I forget, and it might have been less than that, and the proposal was to go up to $95 an hour. This is the year 2015. My plumber charges me 150 to $250 an hour, but I'm getting a lawyer for $95 an hour, and the County of El Paso doesn't have enough money to paint the courthouse or to do the things that they need to do for the county. In all due respect, I think that any proposal such as this is totally, completely unworkable. That isn't to say that there isn't a need, but I don't know how you do it, and I certainly don't know how you do it with lawyers who have an equal right to make a living and to live a life as does anyone else.

CHAIRMAN BABCOCK: Richard, isn't there a program in El Paso where lawyers are appointed in family cases like, you know --

MR. MUNZINGER: Yes, but it's largely on a volunteer basis, and it's done because of children, children are involved, Child Protective Services and what have you. You can go and put your name on the rolls, and

Child Protective Services will appoint and does appoint people to work on those bases, but it's a particular category of family law case; and the last thing I would say to everybody is if Richard Orsinger were here -- he was here earlier. I don't know if he's still here, but I've been on this committee, what, 8 years, 10 years, whatever it has --

CHAIRMAN BABCOCK: Seems longer.

MR. MUNZINGER: Did you say "not long enough"?

CHAIRMAN BABCOCK: I said "seems longer."

MR. MUNZINGER: But he sits over there in that corner, and we come up with these rules, and we do this and that, and Richard raises his hand, and he says, "It won't work in family law because of section A, B, C." Family law is family law. It has gotten so complex that it's a specialty area, even if it wasn't before, and all of these rules that you have to -- the father has to do this and you can't do that and you do this, and so much of it is statutory, and you're going to take a young person out of law school who comes to my firm and doesn't know how to write a warranty deed and give them 15 divorce cases a year with people who don't speak English, for the most part. I can't imagine such a thing. I don't know that it -- how it would be in Houston or Dallas or

Amarillo or Lubbock or elsewhere. I know how it would be in El Paso, and I can just tell you it would be a disaster.

CHAIRMAN BABCOCK: Okay. Alistair, in a second. A long time ago I used to do Legal Aid at North Texas Legal Services, and you would go there, and most of the cases were family law cases, but you would walk out of there with maybe four or five cases, and by and large they weren't complicated. They were uncontested divorces, you know, no property, you know, sometimes kids, a lot of times not; and it wasn't all that tough to get it done; and the judges were very sympathetic to walking in and saying, "Hey, this is not my area" and helping you through it; and it seemed to me like that took a big load off the system and helped the courts move -- I had one guy who stayed married to his wife for 25 years. They weren't living together, but he didn't know how to get a divorce, didn't know how to do it, and he finally wandered into Legal Aid one night, and we got it done, you know, in the normal time period. So Alistair.

HONORABLE JAMES MOSELEY: Broke up a happy home.

MR. DAWSON: So the folks, indigent litigants who can't get representation, is a huge problem in Texas. There are currently 4 million, roughly, people

who qualified for Legal Aid who cannot get it. We can't get volunteers. The funding for, you know, RioGrande, Lone Star, the other legal services providers has been cut. It's a huge problem. Now, I was always under the impression -- I don't know where I got this from -- that a mandatory bar could not have mandatory pro bono. That may or may not be true. I had that impression from somewhere, but if we could have mandatory pro bono and if one could figure out at way to administer it -- that's a whole different issue -- then I think we should.

Now, I agree with Dean Hoffman, although it pains me to do so, that it ought to be beyond just family law. It ought to be for whatever you want to do. I don't think you should require people just to take family law cases. It ought to be whatever qualifies for pro bono, but the only way that -- Jack and I were talking when he was here, but there's no way to address our pro bono problem. We're not going to get the funding; and we're not getting the volunteers; and so the only way that I could think of is make it mandatory; and, yeah, there will be an outcry; but, you know what, it's an honor to be in our profession; and we ought to have to give back; and many of us do, but not enough of us do; and I'll also parenthetically point out at least in Houston -- I can't speak for other places; but in Houston we have a lot -- a

large number of family law pro bono cases; and we cannot get the family lawyers in Houston to offer pro bono services.

We have begged them, pleaded with them, talked to them, and we just -- and I used to know the statistics; but it's like pitiful, something like 15 or 20 a year when there are thousands and thousands; and Justice Bland may know better than me; but we can't get the family lawyers to give pro bono -- to do pro bono work; and so with respect to family law issues, I would start with the family law section. That's where it needs to start.

CHAIRMAN BABCOCK: Justice Hecht, and then we'll go to the right wing and then the left wing.

HONORABLE NATHAN HECHT: On the statistics, the 2013 statistics won't be published for a couple of weeks, but the preliminary numbers, OCA is still making sure they're right, but in rough numbers Texas disposed of 350,000 family law matters in fiscal year '13, and we don't have perfect numbers on this, but at least -- and at least two-thirds of the parties were unrepresented, and we can work -- we could get numbers on how many were unpaid, but we've never -- we've never done that, but it's obviously going to be a -- it's obviously going to be a big number.

CHAIRMAN BABCOCK: Pete, and then Richard,

and, Richard Munzinger, I will note that Richard Orsinger is now here, so you can hurl your invectives his way in the back there. But Pete.

MR. SCHENKKAN: First, I don't think I've ever been honored with the name of "right wing" before, but -- and let's see if it lasts.

CHAIRMAN BABCOCK: Wear it as a badge of honor.

MR. SCHENKKAN: This came up in, I want to say, the early Eighties. There was a big surge of concern about this same problem, which, of course, was half or a quarter or a tenth of what it is now. It's a problem, and I was and remain on the side that believes that mandatory pro bono ought to be part of being a lawyer. I did look at the law on the question of whether a bar can require it. The answer is yes or was then. Perhaps there have been some cases since then to shed some doubt on that, but the common sense of the law at the time was this is a profession. The State of Texas in this case can set its own criteria for what you have to do to get in it, just as you have to pass a bar exam, and you have to adhere to some ethics standards.

MR. WATSON: And be civil.

MR. SCHENKKAN: And be civil. The state could, if it wanted to, set a condition that one of the

conditions of practicing law in this state is that you do 50 hours of pro bono work a year. To make that workable you have to have a buyout. There is no way you can efficiently, and never mind with political acceptability, make business lawyers learn how to go to court. It isn't going to work. All you're going to do is generate such an outcry you'd never get it done, and the buyout is a good idea because it converts the hour obligation into cash that can be used to fund the professionals, the experts in it, whether they are with Legal Aid or with family law lawyers who can be paid at least at some level to take the more difficult family law cases that the pro bono lawyers, even litigators, can't handle.

So those are the first two things, but the third is, even saying those two things, this was such a third rail then that that idea I believe never made it to the agenda. The discussions behind the scenes were we're not even going to consider this publicly as an option. So maybe we've moved enough at this point to where we're prepared to consider it, but if we are I really think the way to do it is as a statutory change, and we'll have to see then whether there's the stomach for it.

CHAIRMAN BABCOCK: Munzinger, and then Judge, and then Eduardo.

MR. MUNZINGER: Well, I would only point out

some years ago the United States Supreme Court said that lawyers, like engineers and others, are subject to the antitrust laws and that it was no dodge to say that you were a professional, so that we can't fix prices, we can't have fixed fee arrangements, and this, that, and so forth; and we are left, as we should be, according to the Supreme Court to make our way in the economy as does everybody else. One reason that I think the family bar in Houston probably didn't want to do pro bono work was because so much of their work came from the 250 and 500-dollar and 600-dollar divorce cases that are the stuff of many people's practice in cities like mine. If you go to El Paso you'll find that there are many, many lawyers who will take divorce cases, and they may get $500 for the most litigious family grouping and what have you in the world, but that's their $500. They make a living that way, and so that is part of the problem.

The other part of the problem is you have described a societal problem. I agree with that. It is a societal problem. I will be judged how I dealt with that section of society when I die, how did I treat the least of my brothers. I understand that, but if it is a societal problem, society needs to be involved in the solution; and to say to lawyers, "You will take 15, or whatever it might be, indigent divorce cases and do your

best just as if it's the same as if General Motors were paying you, and work that way, and you won't have anything to say about it, and if you don't do it I will take your law license," you have imposed a burden on a segment of society for a societal problem that is not fair; and his point, a buyout may work, but if you don't have a buyout it won't work, how many young lawyers in the buildings here in downtown Austin who do securities work, who do trademark work -- the young man talked about trademark law here today -- who do trademark work, and you come in and tell them -- Richard Orsinger would tell us but you can't do that in the family law because it is too complex because of section so-and-so.

It's a disaster, and it's unfair, and so you need -- in my personal opinion you need to be very, very careful when you say we need to do this for society. Yes, we do, but society needs to pay for it; and if the politicians don't have the guts to raise the taxes to pay for it then don't tell us about the problem or at least don't talk about the problem. If you're going to posture, posture. If you're going to act, act, and if you're going to fund pro bono legal work for pro bono people with state money, okay, that's good, even though a guy might have to work for $50 or $75 an hour. What is the hourly rate in Houston today? $600 an hour, $700 an hour, $800 an hour?

MR. HARDIN: Just for Chip.

MR. MUNZINGER: Don't answer that question. Whatever it is.

CHAIRMAN BABCOCK: Are we talking about blended?

MR. MUNZINGER: But I think my point is obviously not only is it an economic burden, it is a professional burden, and it's a real problem on our border. This is Texas. Many, many -- 90 percent of the people who live in El Paso, Texas, are Latin American, and I suspect a good 50 percent barely speak English, and I'm bilingual. I can deal with people. I can handle any case in Spanish and English, by the grace of God. I learned to speak the language, but I don't want to sound unique in my firm, but there's 40 lawyers and there might be five -- the non-Hispanics. If there are 10 Anglo lawyers in my firm, 15 Anglo, three of us or four of us speak Spanish fluently enough to get along. What are you going to do with Pete Schenkkan's partner when that person comes in to Austin and doesn't speak Spanish. How are you going to handle that? You've got to translate the document for them. Have y'all paid for translated documents lately, a hundred --

HONORABLE ANA ESTEVEZ: There's a statute that takes care of that.

MR. MUNZINGER: -- and fifty dollars a page for court translated documents? $200 a page in El Paso. How can you handle this kind of thing? It's one thing to see a problem -- and I'm not being critical of anybody. I'm just saying, good gracious me, you talk about a tar baby, this is one of them.

CHAIRMAN BABCOCK: Okay. We're going to pause in this discussion, although, Judge Estevez, you can have the last word before we pause because I know you have to go, but we have a speaker who has just arrived who is on a short schedule, so last word and then we'll take this up again in a minute.

HONORABLE ANA ESTEVEZ: I disagree with Richard. I think it is our problem, not just a societal problem, but as our profession it's our problem. I believe Pete had a -- I think you're right. I think that you need to have a buyout. I think that that would make it more fair to the profession, and that buyout should be based on your highest hourly rate that year. So if you're making $600 an hour, and it's a 10-hour then you pay $6,000. If it's an attorney that gets court appointments and he usually pays -- charges and averages out at $50 an hour then he only has to pay $500 to buy out, but it will be based on whatever they're making. So if it's worth 6,000 bucks not to do one divorce that will take you 10

minutes to do then that's up to you.

CHAIRMAN BABCOCK: Great. Thanks, Judge. Let the record reflect that the judge was pointing all 10 fingers at Munzinger, but in a very civil way I thought.

All right. Peter Vogel has arrived from Dallas. Come up to the podium. I feel like this is *The Price Is Right* or something, and, Peter, thank you so much for joining us.

MR. VOGEL: I have mixed feelings about the fact that I haven't been to see this committee lately, given the discussion.

CHAIRMAN BABCOCK: But have at it.

MR. VOGEL: Okay. I thought by way of background I might talk about where I come from and relate to e-discovery particularly, because Chip kind of asked me to talk about today, and I know many of the people in the room, so bear with me, and I hope I don't bore you too much with this discussion, but before I studied law I had a career as a computer programmer. I have a Master's in Computer Science, worked on a PhD and hated that, so I went to law school, never intending to be a lawyer. I thought I would do computer consulting, so I taught graduate and undergraduate computer courses all through law school. When I graduated I moved back to Dallas, my hometown, and did computer consulting for about two years,

and then I started practicing law. I just hung up a shingle as a sole practitioner for 14 years, and I've been at Gardere this February will be 23 years, but the reason I put that in that perspective is that I've been involved in electronic discovery since 1978, because every single case I've ever had has electronic evidence.

So the whole notion and idea that this committee and the Supreme Court adopted specific rules dealing in 1999 -- I had already been doing it for 20 years. I was glad that we had the rule. I was also pleased that the Federal rules -- maybe I wasn't so crazy that they got changed, but I was glad that that got recognized. In any event, also I had the privilege to serve as the founding chair of the Judicial Committee on Information Technology for the Supreme Court for 12 years, so I had plenty of opportunity to report to this committee more than once. I've also been an adjunct professor at SMU law school for 28 years. I have taught courses on e-discovery and e-evidence, but also since 2000 I've been teaching a course on Law E-Commerce.

I have been a special master in state and Federal courts for more than 20 years with e-discovery issues, electronic information and internet, but one of the issues that I would like to address today that I think I would like the committee to consider and certainly the

Court, and that is in 2005 I -- I'm sorry, 2009, I had the occasion to meet an adjunct professor of e-discovery, named Allison Skinner, and she question -- she had left me a voice mail and asked if I could help her. She found me on the internet and said she wanted some help with a mediation, and it was to mediate an e-discovery dispute, and I called her, and I said, "I don't know what the hell you're talking about." I thought ADR, the express purpose of mediation, was to settle a case.

Well, in any event, over the years Allison and I have now given about a hundred speeches around the country. We created something called the American College of e-Neutrals, and starting next year we're going to start training all of the American Arbitration Association arbiters about e-discovery. We've done training about educating mediators so that they can help resolve disputes, and what we have found is that by and large when we discuss this around the country -- and we've been to many law schools as well, judges uniformly say, wow, what a great way to avoid the motion practice, and we have found this to be a very successful idea, so one of the things in reading *In Re: Weekley Homes* kind of getting ready to discuss this today, it seems to me that the kinds of things that are attributable to the Rule 26(f) conference and then the 16(f) conference, if there is one

in your district, when the parties have to get together, we don't have that under the state rules. That may be something to consider. It may be just aberrational that we encourage parties to get together to discuss e-discovery. Although I should tell you, and I'm sure many of you know this anyway, just because it's required under 26(f) there are plenty of parties that don't discuss this, and I mean no offense to anybody in the room because when I say this I can say it because I do have some gray hair. Generally my experience has been anybody with gray hair doesn't understand e-discovery. So that's, what, about 90 percent of the people here or 95?

And so the issue comes up like in my law firm, the people that are really responsible for e-discovery are the 31, 32-year-old associates. They take on the -- or the young partners, and so part of the issue is if we're going to have meaningful pretrial e-discovery exchange and the rules applied, it requires a lot of lawyers to understand this, and they can't just bury their head in the sand, which I think has been going on for sometime.

So, in any event, I guess my suggestion would be -- and although I'm not quite sure what to propose in terms of maybe changing rules, but Chip called and asked me if I would just address these issues, and I

think that what I have found -- and this is not just in Texas. As I say, it's been all over the country, we have found that there are -- that this e-mediation concept is something that has been unbelievably successful, and also the use of special masters to avoid the complications and waste of time in motion practice, so I would welcome any questions on any of this and discussion.

CHAIRMAN BABCOCK: Yeah.

MR. VOGEL: If you have gray hair you can still ask a question. I didn't mean to exclude anybody.

CHAIRMAN BABCOCK: Tell me again how does the e-mediation work. You've got a mediator who knows something about electronic discovery, and you've got a lawyer for the plaintiff, lawyer for defendant, and you come in and you say, "We're having a problem with our electronic discovery, and we want you to solve it for us." Is that somewhat --

MR. VOGEL: Okay. So this is what happens, and I do mean this offensively because I am one. I've got a master's in computer science. Generally anybody that's any good with a computer, the IT people, they're incapable of having a meaningful relation with another human, and if any of y'all have ever deposed one you know exactly what I'm talking about. They make terrible witnesses, but if you can have -- if a mediator can have a confidential

caucus with the IT leader, whoever that might be, and the attorney and the client, then they can come up with maybe a better strategy about how to comply with the discovery requests that the other side wants, and by doing it confidentially then they're not -- the IT people are not inadvertently trying to help the other side because that's inevitably what happens.

CHAIRMAN BABCOCK: So if the mediation is just on one side of the case, so if I'm representing the ABC Company and I've got my partner who does e-discovery and my tech guy and the client from the ABC Corporation, we all get together, and we go to the mediator, and we say --

MR. VOGEL: You come up with an e-mediation plan as a result. In other words, it may not be for the whole case. It may be that there's the initial documents that are selected or the custodians that are selected and the time frames and things like that, and so what we have found is that oftentimes after the e-mediation plan is in effect then the parties can come back later if there are more custodians or if the scope of discovery enlarges, and it allows -- I think the important part is it allows the reduction of motion practice because I've got to tell you most of the time when I'm called by a judge to be appointed a special master, generally the conversation

goes something like this: "The parties keep coming in and filing motions about e-discovery. I don't know what they're talking about. They don't know what they're talking about. I don't understand their witnesses, and so I'm appointing you to be a special master because it's time for the geeks to talk to the geeks," and I suspect that's probably universal because I've found that with most judges when I've been appointed special master. So I guess what I'm suggesting is if you don't have to have all of that motion practice in front of the judge, I think our state judges have plenty to do without having more e-discovery, and e-discovery is the monster that's eating Cleveland in litigation today. You know that by your own cases I know, right?

CHAIRMAN BABCOCK: Yeah. But what do you need in terms of either a statute or a rule? I mean, it sounds like this is going on now without formal --

MR. VOGEL: It's not formal, but I'll tell you in the New York Supreme Court, a trial court in the City of New York, they have adopted a rule where the justices are encouraged to appoint mediators in general, and so we have been talking to them about including also to expand that to e-neutrals is what we call the concept, so it's e-mediation.

MR. MUNZINGER: Chip?

CHAIRMAN BABCOCK: Okay. Richard Munzinger.

MR. MUNZINGER: If I understand, the e-mediator that you're talking about is a -- lawsuit is filed, plaintiff and defendant, huge database between the two parties relating to the lawsuit. The e-mediator's job is to come to some kind of a e-discovery program that both parties can accept and honor and utilize in the course of discovery.

MR. VOGEL: Right. So instead of letting the judge kind of arbitrarily pick one side or the other not necessarily understanding.

MR. MUNZINGER: And the e-mediator is a person who on motion or otherwise attempts, if he can't get the parties to agree to a program, to suggest to the judge a program that the mediator thinks will meet --

MR. VOGEL: Well, that I think sometimes is the role that a special master can take, because sometimes that's what ends up happening. Oftentimes when I've been appointed a special master it's because the judge is just totally frustrated that they can't get anything -- you know, they can't get past whatever the impasse.

MR. MUNZINGER: Does the mediator resolve questions of relevancy and discoverability or only the parameters of the electronic programs used to ferret out the material?

MR. VOGEL: Well, what we try to do is encourage them to give the best advice they can to -- you know, within the scope of the rules, so but a mediator in general without regard to, you know, this phase, they try and evaluate what the law is and the facts to try and help parties resolve whatever the dispute is, and actually, if you read the 1987 act, this falls under it. It is not -- it doesn't say the resolution of the case. It says to resolve disputes. So we don't -- it's already there. That's why I think it's kind of a convenient process.

CHAIRMAN BABCOCK: Frank, did you have your hand up?

MR. GILSTRAP: No.

CHAIRMAN BABCOCK: Just scratching?

MR. GILSTRAP: Yeah.

CHAIRMAN BABCOCK: Okay. Anybody else? Any thoughts or comments?

MR. VOGEL: And I would be happy if it would be helpful, Chip, to circulate some materials we have about this to maybe give the committee more background on what all we've been doing and how that might apply under the Texas rules.

CHAIRMAN BABCOCK: That would be terrific. Marti Walker is sitting to my right. If you get it to her, she can get it to everybody else.

MR. VOGEL: All right.

CHAIRMAN BABCOCK: That would be great. Well, thank you. I know you've got another speaking engagement. Thank you so much for coming.

MR. VOGEL: Thank you.

CHAIRMAN BABCOCK: All right. Should we return to the --

MR. VOGEL: Let me get out of here first.

CHAIRMAN BABCOCK: Yeah. I would do it in a hurry if I were you. Eduardo, you had your hand up on our prior discussion.

MR. RODRIGUEZ: Well, yes. What I was going to say was that I -- while I'm very, very sympathetic about this issue, it really I think would require -- because we're a mandatory bar, it would require the Supreme Court to order the lawyers to do that, and I think it's something that would really cause some tremendous amount of friction with lawyers and really cause some things to happen I believe that would get us to the Legislature and perhaps change the way our bar is running now because the -- it's just something that is not going to be accepted by the bar as a whole, and it would require a great deal of work to get -- to get the lawyers of Texas to accept this, and I really believe the only way it could be done is by an order of the Supreme Court as part of

their power overseeing the bar.

CHAIRMAN BABCOCK: Okay. Thank you. Judge Peeples.

HONORABLE DAVID PEEPLES: Three things, just to pick up on what Eduardo said. The family bar went ballistic over the forms, and you'll have the family bar plus the rest of the bar if this happens, so I think it's probably dead on arrival, but those are some realities that just seems to me have to be taken into account. The Supreme Court showed a lot of courage and backbone on the forms. This would be a lot more. On the merits --

CHAIRMAN BABCOCK: Are you calling the Court gutless? Just kidding, let the record reflect.

HONORABLE DAVID PEEPLES: Yeah. Chip, you mentioned the easy cases that you took a while back. The easy cases -- and there are a lot of them -- are the ones that need a lawyer the least because they're easy and simple, the people have no property and so forth. So those don't take a lot of time and the nonspecialist can handle those a lot more competently --

CHAIRMAN BABCOCK: Right.

HONORABLE DAVID PEEPLES: -- than the more complicated cases. The more complicated cases, the need is greater, but if it's complicated because there's property they probably might not qualify for an

appointment, if there's property and that's the reason it's complicated. Now, if it's children involved and it's complicated, that happens to poor people all the time, and there's a great need, but those are going to be time consuming if they're contested and hard for the securities lawyer or whoever it is that's going to be appointed. So that's point two.

The second thing -- the last thing that I would say is family law is almost all done nonjury, just 99 plus percent nonjury, which means the judge has a lot of discretion, and probably in more than half the family law cases I tried I asked a lot of questions. Nonjury, they've waived a jury, and if they're not telling me what I need to know, I ask questions, and you can get to justice a lot more readily when you're free to ask questions. Some judges don't do it so much, but it's fine to do it, and so that's the corrective, a potential corrective, in a lot of these cases, which there's so many of them are without a jury, and I just think those things need to be taken into account. You know, if there's going to be anything done like this, I would certainly not do it for every case, but only for cases where the judge sees the need for it and is given the discretion to make an appointment, which we probably have the authority to do right now.

CHAIRMAN BABCOCK: Judge Estevez.

HONORABLE ANA ESTEVEZ: Just to respond to the family bar issue, I don't think there is any way you can say this is going to impact their pocketbook in any sort of way because we're talking about indigent, so there wasn't going to be any money paid anyway. It was a requirement for the pro bono, so they're not going to lose any money. They're actually going to get relief because it may have been somebody that came in and they would have helped them out if they would have come in the office because of their own kindness and thoughtfulness.

CHAIRMAN BABCOCK: Okay. Great. Alistair, did you want to say something?

MR. DAWSON: No.

CHAIRMAN BABCOCK: Okay. Anybody else? Yeah, Richard Orsinger. I was wondering when you were going to say something.

MR. DAWSON: Pontificate.

MR. ORSINGER: This is probably the best time for me to speak. I'll step up here. On the underserviced needs of people in the family law arena, I've got several things to say, having been at this game for quite a long time. Mandatory pro bono has come up a number of times over the last three decades; and it's been submitted to public referendum among the lawyers of Texas;

and it's always been soundly defeated; and having watched the process I think that the main opposition came from the general practice section, solo practitioners and small law firm lawyers, who having spent a lot of time talking to them because I had different involvement in the bar activity, they felt like it was one thing to be on a salary and big law firm and you can do all of this pro bono and it doesn't affect your income, but if you're making a living off of the cases that you have and you have to give up three or four or five of your own cases in order to handle other people's problems then it affects your income; and I remember at the time thinking, because I was a solo practitioner for a number of years, I can see that there's a direct connection between the sacrifice that the solos are making when they do 30 or 60 or a hundred hours of pro bono a year than when someone who is on a salary.

I think that opposition will still be there. I don't know the practicality of the State Bar or the Supreme Court imposing that rule as a condition to licensure. They may have the authority to do that, so let me move on to my second experience. As a young lawyer, in San Antonio I was involved in two different programs where civil lawyers were appointed to criminal cases, the Federal District Court, Western District, did that and the

state district courts in San Antonio did that. We had in San Antonio -- I don't know think we have it anymore, but we had in San Antonio what we called The San Antonio Plan, and under The San Antonio Plan if you didn't want to take criminal appointments when your name came up by random, you know, you could buy immunity by paying $1,500 a year to the San Antonio Bar Association.

That money would be aggregated, and then they would offer a partial hourly rate to lawyers who were interested in taking that work so that when your number came up and you had paid into the plan then they would flip over. They had a list of lawyers who were willing to work for subsidized -- or for a reduced rate, so maybe the going rate in that day might have been 250 an hour. They might have been working for $75 an hour, but they were young lawyers or whatever, and they were willing to get partially paid out of The San Antonio Plan, and that worked well. I don't remember any criticism about The San Antonio Plan.

On the Federal side you couldn't buy out of your appointment, and I heard some awful stories. Mine were not so bad, the cases that I got appointed to, but I know one practitioner, civil practitioner, who got appointed to represent the 23rd defendant in some kind of drug conspiracy case. The case lasted for six months, and

he had to shut his practice down and let his employees go. It may have been a worse case scenario, but ultimately the Western District has now moved on, and they don't force criminal appointments on civil lawyers, so I don't think that was very successful. I would be curious to know what other people's experience around the state has been when you have mandatory appointment of lawyers who are not qualified to represent people out of your area.

Now, the family law section of the State Bar is not insensitive to this issue, regardless of your feeling about how they reacted to the forms for pro se representation. There's been a program to try to stimulate the ability of lawyers in Texas to deliver pro bono services to people who need family law services, and one of the things that they do is that they offer free CLE in the family law area in smaller communities, smaller cities, not necessarily the size of towns, but something less than Austin, Corpus Christi, that kind of thing, and if you agree to take three -- I think it's three pro bono cases a year.

MS. MURPHY: Two.

MR. ORSINGER: Two, two pro bono cases for a year.

MS. MURPHY: No, two pro bono cases for that seminar.

MR. ORSINGER: For that seminar, pardon me. I'm getting corrected here by the vice-chair of the section. If you will agree to take two pro bono family law cases, you can get a day of free CLE with literature and everything else and have the opportunity to talk to people and learn how to handle the family law case, and that's been successful to some degree because there are people out there who are willing and interested to help in the family law area where the need is so great, but they just have no idea what to do even in the simplest family law case. That maybe could be done on a larger scale if the central bar got behind that; and then instead of it just being funded by the section in the areas that we did and the big bar could get behind it, and maybe we could do it in Houston, we could do it in Dallas, and we could get a lot more civil lawyers who wanted to help but just felt unable to and give them the tools they need in order to take on these services.

Another comment that I want to mention, which I think Marcy Greer mentioned to me. I hope you don't mind if I use it.

MS. GREER: No.

MR. ORSINGER: But the geographical distribution of lawyers is not equal to the geographical need, so, for example, we may have tremendous need for pro

bono family law services in the border area, and yet we already have too few lawyers down there to provide those services, and I don't know how you're ever going to solve that problem because you can't have lawyers from Dallas and Houston going down and handling family law cases in Harlingen and McAllen and places like that. So even if you do have a robust voluntary program or even if you do have a mandatory program, there are going to be areas of the state that are underserved; and I get kind of back to Richard's point, which I tend to agree with philosophically, this is a society-wide problem; and it needs a society-wide fix. It's not a problem that the State Bar, even if everyone bought into it, would be able to solve.

And then the last point I want to make is it may sound very simple to just take a pro bono family law case, but a lot of times you'll find out that the reason they're in the family law case is because there's a criminal law problem. Somebody is being investigated or prosecuted for molesting a child or something like that, or you'll find that there are housing issues, they're being evicted, or you'll find that there are immigration issues, particularly along the border where a family is being broken up because somebody is having some kind of difficulties with the fact that they're not a legal

resident or citizen, and so to say you're going to take on a family law case sometimes means that you're going to take on a very complicated case that even a trained family lawyer is going to have difficulty with.

So I don't know that our problem is so much getting these uncontested divorces with no property and you can do guideline child support. Those people probably are successfully representing themselves; and we probably ought to facilitate them successfully representing themselves; but just don't forget that when you say that you're going to take over a client that's going through a family law dispute, you may be getting disputes that touch on a lot of different areas that don't have anything to do with the pending divorce; and so that makes the problem a little more complicated; and when you tell somebody, you know, you have to do a half dozen of these things, take them at random, any one of those may be more than just going down and proving up a divorce. It may be -- it may suck up six months of your time to try to find the solution for the pressures that are causing that family to fall apart. So, anyway, that's just one perspective about it.

CHAIRMAN BABCOCK: Brandy.

MS. WINGATE VOSS: Richard said everything that I was going to say.

CHAIRMAN BABCOCK: Yeah, I would guess that.

MS. WINGATE VOSS: I think the solution is not forcing people to take on pro bono but offering them rewards or incentives to do it, and I think the State Bar is the only one that can do that, and, you know, providing discounts on CLEs, possibly maybe even making it a requirement to do so many pro bono cases before you get your legal specialization. Incentives like that are the only way that's going to work without the entire bar throwing up their hands and saying, "We don't want this."

CHAIRMAN BABCOCK: Okay. Great. Thank you. Anything else on this topic?

All right. Lisa Hobbs, you've got something to talk about.

MS. HOBBS: Well, it's not as interesting as mandatory pro bono, but I would like the Court to consider reforming or perhaps eliminating the special appearance under Rule 120(a). I think that for nonresident defendants -- and it's all nonresident defendants who care about this issue -- they already have an image of Texas as being this wild, wild west justice system. Whether that's true or not, that is a reputation that folks from Canada or the UK might have about Texas justice, and then they come down here, and the first experience they have in challenging being in Texas is something that has become

quite the gotcha game on trying to make sure they don't waive their right to challenge the Texas jurisdiction, and it is hard to explain to them even -- I mean, so I have had a couple of these come up, and the reason why it's becoming even more difficult is because the Legislature and the Court is giving us more tools to get an early dismissal on the merits, too, and so you have companies who are deciding whether they should take advantage of an anti-SLAPP statute or take advantage of 91(a), and if they lose, how does that affect their rights, you know, to challenge Texas jurisdiction.

So the more tools we're giving them or giving everybody, all residents, residents and nonresidents, to glimpse at the merits early, the more complicated the special appearance process is becoming, and in just -- it just seems that it doesn't have to be so gotcha. You don't have to -- like I hate that I have to tell my client, like we're going to walk in this hearing and the first thing the other side is going to say is you waived this by doing something like, you know, opening the door at the courthouse or something. But, you know, I mean, like entering a protective order on --

CHAIRMAN BABCOCK: Right.

MS. HOBBS: -- like on jurisdictional discovery. Like you have confidential information and you

need a protective order for that before you send it over, and did you -- by agreeing to that protective order, did you somehow make a general appearance and waive your right to contest Texas jurisdiction? It shouldn't be -- that makes no sense. It shouldn't be that you have no protection under Texas process just because you want to make sure that you are able to challenge jurisdiction, but that's how it becomes. It becomes this game, and it is -- it leaves a really bad taste in nonresident defendants' mouths, so I think it's an easy fix, and I would encourage the Court to do something similar.

CHAIRMAN BABCOCK: Got it. Any comments about Lisa's idea and thoughts? Professor Carlson.

PROFESSOR CARLSON: So are you saying eliminate the special appearance or eliminate the due order of pleadings?

MS. HOBBS: I would say eliminate -- I think it's more the due order of hearing actually that becomes the more complicated thing, not the due order of pleadings, but it's something that all needs to be studied so that you can make a challenge and a simple motion to dismiss without -- you know, and I'm not saying waiver should never come into play, but it shouldn't be this gotcha game of like, oh, my gosh, did I invoke the jurisdiction of the court, you know, in this tiny way.

CHAIRMAN BABCOCK: Okay. Anybody else on this? All right. Thanks, Lisa. Professor Carlson, you've got --

PROFESSOR CARLSON: I have even a less sexy topic to talk to than Lisa did, and it has to do with the legislative changes more than anything else. Under our Rules of Civil Procedure 627, if a party doesn't post supersedeas a writ of execution can issue, but not until the expiration of 30 days after the day a judgment is signed or if their motion for new trial or some extending motion is filed 30 days after the rule -- overruled, and Rule 628 says "But, trial judge, you could allow execution to issue earlier if there's proof put on that the defendant is trying to make themselves judgment proof, dissipating assets, moving them, secreting them, wasting them."

Over in the Civil Practice & Remedies Code we have two other collection tools that the Legislature has created that can commence immediately after the judgment is signed, a money judgment is signed, turnover orders and potentially sometimes garnishment orders, and I've seen many times in the last three or four years in kind of bet-the-company lawsuits where they struggle to come up with a supersedeas because it's pretty much a hundred percent collateralization on supersedeas bonds. I

mean, if you go to a bonding company, if you're a bonding company that says, "What would you charge to put up a bond that you agree to pay my judgment if I lose on appeal," you would say, "Well, the whole amount," so they're a hundred percent collateralized pretty much; and I was thinking that it might be -- I think it would be very positive for our system of justice and for allowing appellate access if those turnover order statutes and the garnishment statutes at the post-judgment stage had that 30-day waiting period with the ability of the trial court to order that sooner if a judgment debtor is dissipating their assets in some way, trying to make themselves judgment proof.

Because what I see happen is most lawyers think, "Well, I have 30 days after the judgment so I don't have to worry about it," and plaintiffs will come in and start getting turnover orders immediately, and there's not prior notice required, so all of the sudden you get this order to turn over property that you weren't at the hearing, and it really is problematic, and it costs a great deal of money to undo that problem, and it has a very chilling effect on appellate access.

The other thing in that area is because the cost of supersedeas is so great, a lot of times still, even though there's a cap on it, it does compel settlement

in many instances. It's difficult to get any type of an agreement. Even our Rule 24 says a judgment debtor and creditor can come to an agreement on how the judgment might be suspended during appeal. Those rarely come to fruition. There might be an incentive if our rules changed to provide that the cost of the bond gets taxed as costs against the unsuccessful litigant eventually on appeal, and it would just probably promote more agreements on -- between a judgment creditor and debtor.

CHAIRMAN BABCOCK: Okay.

PROFESSOR CARLSON: That's it.

CHAIRMAN BABCOCK: Thank you. Any comments on that? Marcy.

MS. GREER: I wholeheartedly agree with Professor Carlson. This is a huge issue in the supersedeas world. The Fifth Circuit has just held last month that the supersedeas caps do not apply in Federal court, so the 25 million-dollar cap does not apply to a Federal court judgment against a Texas debtor. It's a two-one decision, but it is the current law of the circuit for Texas, and so we've got -- I have had several situations with nine figure judgments. It's very difficult to bond, and there is that fear that during the 30 days something might happen that maybe you can reverse, maybe you can't, and so because the -- you know, the laws

interrelate somewhat on execution, et cetera, in Federal court and state court, I think having some clarity that there is this waiting period to work it out would be very helpful.

The Federal rules do have a provision for cost shifting of the supersedeas premium, which is not insignificant, and sometimes that can be very helpful in negotiating with the other side on things like could we do an alternative letter of credit or something that is less damaging financially to your company that is going up on appeal in the supersedeas bond category. So I think those changes would be very well worth at least considering with a bipartisan group and really vetting because that is an area that leaves a lot of litigants in a great deal of uncertainty that things could start happening and that they can't get a bond in place fast enough.

CHAIRMAN BABCOCK: Great. Thanks, Marcy.

MR. LOW: Chip, I just want --

CHAIRMAN BABCOCK: Yeah, Buddy.

MR. LOW: She did one of the things I wanted to mention, the difference the way the Federals handle that, and I remember we had an issue 35 years ago when Pennzoil and Texaco, and Texaco then filed suit in White Sands, New Mexico, that our supersedeas was unconstitutional --

CHAIRMAN BABCOCK: White Plains, New York.

MR. LOW: White Plains. What did I say?

CHAIRMAN BABCOCK: New Mexico.

MR. LOW: Well, I got half of it right, and the reason I remember that, the issue was we were going to change it and then the argument was, well, Hadley -- I've forgotten, the teacher at Texas Tech, said, "Well, if we do that and say we're admitting it and there's litigation pending, let's just wait", so we waited, and I don't know what they did, because the only knowledge I had of it is what happened in the meeting and half of what state it was in, the "new."

MR. HAMILTON: Were you in the right state?

MR. LOW: No, I was in New Mexico.

CHAIRMAN BABCOCK: The proceedings were in New York, he was in New Mexico. Who knew?

Anybody else, any other comments on Elaine's proposal? All right. That's everything I know about from the members of the committee. Is there anybody else that has any -- anything that they -- they want to talk about or propose or -- yeah, Gene.

MR. STORIE: I'm not sure what to do with this honestly, but I was talking to a nonlawyer friend. He told me -- this is after his wife's death from cancer -- that he received a letter in the mail saying, "If you

need representation, for instance, asbestosis or some problem, give us a call." He was deeply offended by that, so I have asked around a little bit, I know that solicitations in the mail are considered okay because they're just junk mail, but I told him I would mention this, and so I have.

CHAIRMAN BABCOCK: Thanks, Gene. Any comments on that? Yeah. Peter.

MR. KELLY: Not on that but on a different issue.

CHAIRMAN BABCOCK: Okay. Anything on Gene's issue? Okay, Peter now.

MR. KELLY: Something that's been bothering me for a few years, and I just got an opinion from the Fourth Court addressing it, there's no meaningful special exceptions practice to summary judgment; and I'm trying to figure out whether a motion for summary judgment is no evidence or traditional, what the standard is for the trial court to review it, and in turn what the standard is for the court of appeals to review it; and you can file a special exceptions to a summary judgment, but that doesn't give you any more time to answer; and it would improve judicial efficiency if there were some way we could in responding to motion for summary judgment file special exceptions and have it considered by the court. The

defendant would then have to specify whether it's -- on what grounds they're moving for no evidence and what grounds they're moving for traditional summary judgment, and that way I can prepare a more meaningful and concise response, and it could be reviewed by the court better.

The problem is special exceptions would be due at the same time as the response to the motion for summary judgment are due, so I still have to write this very long response addressing every conceivable grounds that may or may not have been raised, and then you're up sort of at the mercy of the court, how they're going to look at it, whether they interpret it as no evidence or traditional. So I think there could be some way to create a meaningful special exceptions practice for summary judgments.

CHAIRMAN BABCOCK: I thought that there was a comment to the rule that said you had to specify if it was no evidence. Am I wrong about that?

MR. KELLY: Well, *Jacobo vs. Binur* says you can have hybrid motions. Sometimes you have a hybrid motion, and you can't tell -- I mean, they don't specify.

CHAIRMAN BABCOCK: Right.

MR. KELLY: This is traditional and no evidence, and they just sort of start listing grounds, and you don't know whether -- what their ground is and what

the standard is for it to be reviewed.

CHAIRMAN BABCOCK: Got it.

MR. KELLY: And, like I said, I just got this opinion from the Fourth Court where they had to spend the first half of the opinion reviewing this ground under traditional, this ground under no evidence, and it's just a waste of judicial resources to have to do that.

CHAIRMAN BABCOCK: Yeah, got it. Yeah, Levi.

HONORABLE LEVI BENTON: Well, it's interesting that Peter would end on the comment that he ended, that it's a waste of judicial resources because summary judgment practice is already ridiculously expensive, and my immediate response of Peter's comment and request is that it would just make summary judgments far more expensive and more resources would be wasted, so while I have some amount of sympathy, I dismiss it because summary judgment already costs too much, and it would just add to the costs, so --

CHAIRMAN BABCOCK: Okay. Yeah, Carl.

MR. HAMILTON: I've got a discovery issue that I think needs to be looked at.

CHAIRMAN BABCOCK: Anything more on Peter's before we go to that? Okay. Go ahead, Carl, sorry.

MR. HAMILTON: The rules require that you

name your people with knowledge of relevant facts or your experts. If you don't name them, you can't call them.

CHAIRMAN BABCOCK: Right.

MR. HAMILTON: And so in multiple party cases you have many people named with knowledge, many people named with experts, so everybody has to name everybody else's people of knowledge of relevant facts and experts if they think there's a possibility they might call them. So we get 26 pages of everybody naming everybody else's witnesses and everybody else's experts every time there's litigation, and we need to fix that some way or another. Maybe we don't need to rename them if somebody has already named them. They ought to be free game to be called.

MR. LOW: In other words, what you're worried about is somebody lists an expert or a witness, and I'd like him, too.

MR. HAMILTON: Yeah.

MR. LOW: Well, he's already listed, and what if they revise it, then, you know, so everybody just copies.

MR. HAMILTON: That's right. Everybody just copies it all.

CHAIRMAN BABCOCK: Yeah, good point. Any comments on that? All right. Kent.

HONORABLE KENT SULLIVAN: Well, I can't resist, and that is to suggest that -- and we have flirted with this a number of times, but we really need a rule on jury selection, it seems to me. We've talked about a rule on voir dire, I think, several times over many years, but there are wide ranging, very divergent practices around the state, at least in my experience. The boundaries of proper practice are unclear. It's an area where error is difficult to preserve, a lot of uncertainty. I think we would really benefit by way of a rule. I don't underestimate, of course, the difficulty, but I do think it's very significant for those people who have an active trial practice.

CHAIRMAN BABCOCK: Okay. On his point or something else?

HONORABLE R. H. WALLACE: No, something else.

CHAIRMAN BABCOCK: Okay.

HONORABLE DAVID PEEPLES: I want to second what he said. That would be a wonderful thing to do. We need that.

CHAIRMAN BABCOCK: Judge Peeples seconds Kent Sullivan's recommendation.

HONORABLE DAVID PEEPLES: Wish I had thought about it first.

HONORABLE KENT SULLIVAN: Call the question.

CHAIRMAN BABCOCK: Levi.

HONORABLE LEVI BENTON: I want to thank Judge Sullivan for re-urging my decade-old motion to abolish peremptory strikes movement, and I think it's timely in light of recent events around the country, and I'll stop there.

HONORABLE JANE BLAND: I thought it was the jury shuffle.

HONORABLE LEVI BENTON: Well, that, too. Thank you, Jane.

CHAIRMAN BABCOCK: Yeah, I thought it was the shuffle that you didn't like.

HONORABLE LEVI BENTON: The shuffle, peremptory strikes.

CHAIRMAN BABCOCK: Yeah. Fair enough. So Judge Wallace.

HONORABLE R. H. WALLACE: Quickly, Rule 91(a), motions to dismiss frivolous appeals that recently passed. I have just now seen two of those filed within the last couple of weeks, and what is happening is in both cases the plaintiffs and defendants are attaching a bunch of stuff to their pleadings, including deposition transcripts, and saying, "Well, the rule says that we can" -- "under Rule 59 says you can attach" -- "the court can

consider evidence that's attached to pleadings which forms the basis of the cause of action."

CHAIRMAN BABCOCK: Right.

HONORABLE R. H. WALLACE: And that's not what I don't think Rule 59 intended, and I don't think that's what we intended when we said the court can't consider any evidence other than that. In other words, they're just trying to put -- they're trying to attach all of that stuff and ask you to consider it, not as evidence but as something that's attached to their pleadings, and I don't know if we can -- I don't know how we can define it any more clearly than it is, but the thing I'm thinking about, well, do I have to go through now and say what I've considered is not evidence and what I have considered is part of the pleadings? I'm not sure, but that's what people are doing to try to bolster their motions to dismiss.

CHAIRMAN BABCOCK: Yeah.

HONORABLE R. H. WALLACE: And to -- that's been my experience.

CHAIRMAN BABCOCK: Comments on that?

MR. LOW: I thought 91(a) was limited to a pleading. You say as a matter of law you don't state a cause of action or no reasonable person could believe it, and you look at that only I thought.

CHAIRMAN BABCOCK: But we added something about Rule 59 because -- and I think Judge Wallace is absolutely right. We were talking about the situation where it's a breach of contract action --

HONORABLE R. H. WALLACE: Note or -- yeah.

CHAIRMAN BABCOCK: -- but the plaintiff doesn't attach the contract, so the defendant says, "Okay, I want to dismiss this breach of contract action, and you can't obviously deal with a contract action unless you see what the contract is." So in Federal court under 12(b)(6) there's a pretty well-developed body of law about what you can and can't attach to your motion to dismiss, and my sense was that's what we were trying to get at, but Judge Wallace says it's gone beyond that. Lisa.

MS. HOBBS: Just because I don't hear very many people who have experience with 91(a), just out of curiosity, how within the 60-day time frame did they have deposition transcripts and -- I mean, because it seems like the quickness of it would eliminate most of this problem.

HONORABLE R. H. WALLACE: This was a -- aspects of this case had been litigated previously, so --

MS. HOBBS: Okay. So it was an amended pleading?

HONORABLE R. H. WALLACE: -- they had old

transcripts and stuff like that, but they were attaching letters that they had written each other and all kinds of garbage.

CHAIRMAN BABCOCK: Not to prejudge it, but --

HONORABLE R. H. WALLACE: I've already ruled.

CHAIRMAN BABCOCK: Justice Pemberton.

HONORABLE BOB PEMBERTON: Since we're throwing out suggestions, if the Court is disposed to examine such things as special appearance and similar procedural vehicles, why not also take a look at the plea to the jurisdiction? There's been a lot of evolution in the case law in recent years. Counsel still get bollixed up on some aspects of it and the role of evidence. I've been -- I guess there's been some commentary about, you know, not -- having essentially a summary judgment type practice, yet not having the safeguards of 21-day deadlines and the like as further proof for thought.

CHAIRMAN BABCOCK: Any comments on that?

MR. SCHENKKAN: Seconded, but there are pending cases that may resolve or at least reframe it, so that one might go farther down the agenda until we see what the Court says in adjudication.

MR. GILSTRAP: Well, Justice Brister when he

was up here, plea to the jurisdiction was his favorite, if you'll recall. This is the poor man's summary judgment, and I'm seeing all sorts of claims addressed in plea to the jurisdiction that you would not believe would be a subject of the plea to the jurisdiction, and sometimes they work because it's quick and it's cheap, and the Supreme Court likes it.

CHAIRMAN BABCOCK: Is quick and cheap and the Supreme Court likes it bad?

MR. GILSTRAP: No. No. I don't necessarily say that's so.

CHAIRMAN BABCOCK: Okay, Pete.

MR. SCHENKKAN: But the problem is it's quick and cheap for the plaintiff, for the movant, sorry, for the movant. It's quick and cheap for the movant, and then if the movant loses it's long and expensive for the nonmovant because of the interlocutory appeal.

CHAIRMAN BABCOCK: Ah.

MR. SCHENKKAN: It all depends on which side you're on.

CHAIRMAN BABCOCK: Richard Munzinger, and then Richard Orsinger.

MR. MUNZINGER: Can we change subjects?

CHAIRMAN BABCOCK: Sure, I don't know why not.

MR. MUNZINGER: I'm just curious what the group thinks about the possibility of investigating electronic discovery as a group and in depth, because as Mr. Balagia said, it's the elephant in the room. I mean, it kills clients. The expense of it is just overwhelming, the work that's involved in cases and what have you not, and I don't know that there's anything that a rule of civil procedure could do about it that hasn't already been done. At the same time I don't know -- there are others that know more than I do on this subject, but my goodness gracious, this electronic discovery thing is a real mess, and I don't know if the group feels that maybe if we as a group addressed it to simplify it, speed it up, et cetera, et cetera, that there weren't things that we could come up with. If we're looking for things to do to improve the system, the biggest bugaboo in my personal opinion in discovery is electronic discovery and what it means to all of us and to our clients. So I just throw that out.

CHAIRMAN BABCOCK: Yep. Well, and the Feds have been trying to solve it for several years now.

MR. MUNZINGER: I know.

CHAIRMAN BABCOCK: Orsinger, do you have something?

MR. ORSINGER: Yes. As long as we're decorating the Christmas tree, I have an ornament.

CHAIRMAN BABCOCK: Is it one ornament or is it the whole tree?

MR. ORSINGER: Well, it's one ornament, but it's an ornament that has two faces.

CHAIRMAN BABCOCK: I thought so.

MR. ORSINGER: I worked for sometime on that recodification draft of the rules, which is still there, and we can dust it off and do something with it, but one of the things that we worked on that I think is perhaps important separately is Rules 93 and 94, which lists defenses that have to be stated under oath or have to be pled explicitly, are seeming -- appear to be exhaustive lists of things that are affirmative defenses. Apparently some people are taught that and then a lot of people have come to accept that in practice, even though it's not true, and so we thought it would be better for everyone concerned that it be either not list any of them or list all of them, but not just list some and therefore people are using it as a checklist don't get reminded, and so we did -- in that codification draft we did identify all of the identifiable defenses and then list them in the modified rule. I don't know if that's still valid work. We may have invented some since then, and we may have lost some, but I think if we're going to be tweaking any of the rules, let's take a look at those specifically identified

defenses and be sure that the list is complete.

CHAIRMAN BABCOCK: Well, earlier, Richard, earlier today, Professor Albright made a plea to the codification.

MR. ORSINGER: I know. I heard that, and I felt -- in my heart I felt that she had the right thing.

CHAIRMAN BABCOCK: Somebody over here had their hand up.

MR. GILSTRAP: Richard, are you talking about all the affirmative defenses on the planet? Are you talking about the sworn defenses?

MR. ORSINGER: Well, 94 is unsworn, but it's an incomplete listing that I think leads some people to error, and so the debate is should we create the illusion that we're listing all of the affirmative defenses but not list them, or should we just not list them specifically. I'm of the view that if we're going to let people think that it's a comprehensive list it should be comprehensive.

MR. GILSTRAP: I can't imagine that someone would think that that's an all-inclusive list.

MR. ORSINGER: I know, but you're a very intelligent appellate lawyer.

MR. KELLY: Doesn't the rule specifically say -- lists them all and then it says "or any other

matter in avoidance"?

MR. ORSINGER: That's not the problem. The problem is in practice whether people are reading the list and saying, "That's the list, and I don't have that defense." We've debated this and decided that we're actually perhaps causing harm to list some but not all, and it looks like it's a comprehensive list.

CHAIRMAN BABCOCK: Okay. Thanks, Richard. There is always at the end of these things a time for public comment. Are there any members of the public that wish to say anything at this time about our civil justice system and ways to improve it? I don't see anybody. We've outlasted them all.

Well, Justice Hecht wants to say something in closing, but in closing I will say have a happy holiday, everybody, and it's always an honor to serve with you all. It's a great group of people, and it's professionally the best thing I do. I really enjoy being with y'all.

MR. LOW: Chip, thank you.

CHAIRMAN BABCOCK: So now Justice Hecht.

HONORABLE NATHAN HECHT: On behalf of the Supreme Court, we thank you for your service. This committee has been in existence since the Rules Enabling Act passed in 1939, and it has always been regarded by the

Court as one of our best resources because we do intend to bring together the best and brightest from all different areas of the state and all different areas of our practice, and you are that, and we know that you serve at some sacrifice, but we thank you very much. We especially thank our Chair, Chip Babcock, for his wise and gracious leadership of the committee, and again, you've made a wonderful contribution to the State, and we appreciate it. Thank you.

CHAIRMAN BABCOCK: All right. Unless there's anything else, we're in recess. Thank you.

(Adjourned)

* *

.

REPORTER'S CERTIFICATION
MEETING OF THE
SUPREME COURT ADVISORY COMMITTEE

* *

I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above meeting of the Supreme Court Advisory Committee on the 5th day of December, 2014, and the same was thereafter reduced to computer transcription by me.

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

Charged to: The State Bar of Texas.

Given under my hand and seal of office on this the _____ day of _____, 2014.

_____
D'LOIS L. JONES, CSR
Certification No. 4546
Certificate Expires 12/31/2012
3215 F.M. 1339
Kingsbury, Texas 78638
(512) 751-2618

#DJ-366