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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

NOVEMBER 1, 2019

(FRIDAY SESSION)

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 Taken before *D'Lois L. Jones*, Certified
Shorthand Reporter in and for the State of Texas, reported
by machine shorthand method, on the 1st day of November,
2019, between the hours of 9:00 a.m. and 5:11 p.m., at the
South Texas College of Law, 1303 San Jacinto Street,
Houston, Texas 77002-7006.

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Documents referenced in this session

- 19-33 Memo - Appeals in Parental Termination Cases, 9-5-19
- 19-34 Subcommittee Report on Protective Order Registry, 10-29-19
- 19-35 SB-325 Summary
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- 19-37 Current Databases Storing Criminal or Firearms Information
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- 19-40 Memo on Registration of Out-of-State In-House Counsel, 10-30-19
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- 19-42 Letter from State Bar Re Parental Leave, 10-23-18
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- 19-44 ABA Resolution
- 19-45 Memo Re: TRAP-49.3 Motion For Rehearing, 9-02-19
- 19-46 Memo Re: Mechanisms for Obtaining a Trial Court Ruling, 10-2-19

1 can you hear me? Thank you for being here. We are
2 thrilled to be able to host you today and tomorrow. If
3 you see people walking around with a little bit of sad
4 expression, please have sympathy for them. The game was
5 only a day and a half ago, and people are still
6 recovering. I would ask that you can please discuss Texas
7 law. You can discuss federal law, local law, just please
8 don't mention "national" law. It's still too soon for
9 people to hear that word.

10 We are thrilled to have you here, and today
11 is the Feast of All Saints Day. And I went to mass last
12 night and then went home and was reviewing the materials
13 that Professor Carlson gave me, and it was interesting,
14 because the Feast of All Saints is one in which we
15 acknowledge and respect those who have come before in the
16 church, those who have done great things. It's kind of a
17 who's who list in the church going up through the early
18 apostles all the way up through Mother Teresa.

19 And as I was looking at the list of people
20 who are on this committee, it's a who's who list of Texas
21 law. It is just an amazing group of individuals. And
22 what was particularly poignant in that comparison, as I
23 was thinking about it, is those that we respect in the
24 church did it not for themselves, but for a higher
25 calling. They didn't do it for the glory. They did it

1 because there was something more important, and the folks
2 who are here are doing the same thing. You do this not
3 for the breakfast that we give you, certainly not for the
4 pay. You do this because you recognize that justice is
5 important, and the administration of justice is crucial to
6 our society thriving and that the rules that we have are
7 important. And I just wanted to take a moment to
8 acknowledge and appreciate that you give of your time and
9 of yourself and of your experience to be part of this.

10 The issues that you face today, some of them
11 are crucially important; and as I was just looking through
12 the agenda, the issues that you're addressing, one
13 particularly struck me now as a president and dean of the
14 law school; and it was the one dealing with the ability to
15 get a delay based on maternal or paternal leave; and I
16 don't know if this is the right answer, but I do know that
17 we currently have 54 percent of our students are women;
18 but if the next 20 years reflect the past 20 years, we
19 also know that 20 years from now, 54 percent of the people
20 in senior positions will not be women, because there are
21 systemic issues that are challenges that women face in the
22 practice that add a degree of difficulty to their ability
23 to progress. I don't know if this is the right answer.

24 There are a lot of issues that are
25 potential for abuse, and there's things that need to be

1 addressed, but the fact that you are looking at the issue
2 and trying to get to the heart of some of those
3 institutional challenges, I think is vitally important,
4 and I commend you for at least bringing that issue to
5 bear.

6 It is constitutionally required that
7 whenever a dean addresses a group of people, he brags on
8 his school, so I just will do that just for a second, but
9 with a request. We found out this week that we are
10 receiving the Texas Access to Justice award for public
11 service this year, and I will be happy to accept that
12 award on behalf of our clinics and our school on
13 November 18th swearing in.

14 This past year, our clinics, and we have 23
15 of them, will give \$1.8 million worth of pro bono service
16 to the Houston community. \$1.8 million. It's, I think,
17 very impressive. And we are nationally regarded for our
18 advocacy programs. We have more than twice as many awards
19 for advocacy than any other law school in the country.
20 When it comes to legal writing, we actually have five
21 times as many awards as any other school.

22 Our ADR program is nationally competitive,
23 but our clinics are second to none, and we believe it's
24 important for a couple of reasons. One is because it
25 serves our mission; and as you walked in the front door,

1 you may have seen to the right, our mission is in really
2 big letters on the wall because it's that important to us,
3 and part of that mission is service. But, partly, we do
4 it as well because I take a commitment to every student
5 who comes here that not only will they be able to pass the
6 bar exam, but they will be ready for practice, and my law
7 school didn't give a rat's anything about whether I was
8 ready for practice. It didn't care. But we recognize
9 that the world has changed, and that our students have to
10 be ready from day one, and those clinics are vital to
11 helping us do that. And this is where the request comes
12 in.

13 I sat at a table two nights ago with Edith
14 Jones, who with a little bit of that glint in her eye that
15 you know, was telling me about her law clerks this year;
16 and one of them is from South Texas and she has Chicago, I
17 think, Vanderbilt and Emory, and she had that glint in her
18 eye because she was telling me that the South Texas grad
19 is knocking the pants off all of the other ones, including
20 the ones in the University of Chicago, and the reason the
21 glint was in her eye was sitting between the judge and me
22 was the clerk from the University of Chicago, so she was
23 having the fun that she likes to have, but our kids are
24 ready, and what we have is we have many first generation
25 students, as do all the law schools in Texas. We have

1 folks who need mentors. We have folks who need
2 opportunities, externships, and internships.

3 Please reach out to our school, to your
4 school, to schools in Texas. Please bring them in, give
5 them that opportunity, see what practice looks like, help
6 them be practice ready. We are training them to join a
7 profession, and the strength that they have coming out of
8 this school only stands to all of our practice.

9 I can be reached at a very easy e-mail
10 address, president@stcl.edu. President@stcl.edu. South
11 Texas College of Law at e-d-u. If you would be willing to
12 help, please reach out, because not only will our students
13 benefit, but our profession will benefit from the
14 experience that they get. We are thrilled to have you.
15 If there's anything we can do, please let us know, and
16 have a great session.

17 CHAIRMAN BABCOCK: Dean, thank you very
18 much.

19 (Applause)

20 CHAIRMAN BABCOCK: Thank you so much. A
21 couple of announcements before we get to the agenda.
22 Behind me is the sign-in for the wireless for the
23 internet. Marti tells me that that will disappear in
24 seven minutes, so if you want to have your internet pass,
25 you probably ought to write it down, although we have

1 written copies of that -- one written copy that I have,
2 and I'm not sharing it with anyone.

3 So the second announcement is we always knew
4 that Kim Phillips was a big deal, actually a big screaming
5 deal, but now she's even a bigger screaming deal. She has
6 been promoted to the global litigation general counsel of
7 Shell, which is quite an honor.

8 (Applause)

9 CHAIRMAN BABCOCK: We always knew you would
10 amount to something.

11 MS. PHILLIPS: Baby steps.

12 CHAIRMAN BABCOCK: Right. Okay. With that,
13 we'll go -- we'll turn to Justice Hecht for his comments.
14 Chief Justice Hecht.

15 CHIEF JUSTICE HECHT: Justice Bland is now
16 the deputy liaison for the committee. She just can't tear
17 herself away from all of you, so that's good. And her
18 investiture is Thursday the 7th at 2:00 p.m. in the House
19 chamber, so please come and be a wonderful time together.

20 As far as news, the Court has created a task
21 force for procedures related to mental health. We did
22 that October the 1st. It is -- to take care of our charge
23 under Senate Bill 362, which passed last session in the
24 spring. Senator Huffman's bill. It largely has to do
25 with mental health issues in the criminal justice system,

1 but the bill specifically requires the Supreme Court to
2 adopt rules to streamline and promote the efficiency of
3 court processes under a chapter of the Health & Safety
4 Code, which governs emergency detentions, and adopt rules
5 or implement other measures to create consistency and
6 increase access to the judicial branch for mental health
7 issues.

8 So we're sort of doing that already with the
9 Judicial Commission on Mental Health that we created
10 jointly with the Court of Criminal Appeals, but this task
11 force will specifically look at the issues that the
12 Legislature has directed us to look at under Senate Bill
13 362. Judge Brent Carr in Fort Worth, county court at law
14 judge, is the chair. Judge Hervey from the Court of
15 Criminal Appeals is on it, Bill Boyce is on it, and the
16 recommendations of that group will probably come to the
17 advisory committee. The work has to be done by
18 December 1st of next year, so we will be looking for that.

19 I'm particularly pleased by the
20 Legislature's directive, because it marks 16 years that
21 the Legislature has been fully confident of the Court's
22 rule-making process and of the good work that this
23 committee does, and some of you who are -- predate that
24 time remember that that has not always been the case, but
25 it certainly is now, and here even in issues that

1 predominantly affect criminal cases the Legislature is
2 looking to this group and the Court for rules to improve
3 efficiency in those cases.

4 The Judicial Committee on Information
5 Technology is meeting in December, and the -- as you may
6 recall, e-filing will be mandatory in all criminal cases
7 in all courts of the state as of January 1st of 2020. So
8 they're down to all of the counties except those with less
9 than 20,000 population. So once that's done, we will have
10 to rethink whether to make e-filing mandatory in juvenile
11 and truancy cases. We left those out originally because a
12 lot of the lawyers who practice in those cases are
13 criminal lawyers, and since e-filing was not going to take
14 place in criminal courts for a while, we left those out,
15 but we may now want to stick those back in. So we will be
16 getting a recommendation from JCIT on that.

17 And then finally, we're in the process of
18 creating a task force to re-examine the justice court
19 rules. For those of you who were here in 2013, you
20 remember that we put together a task force and we had
21 representatives of the creditor's bar, Legal Aid for
22 debtors and tenants, and representatives of the Texas
23 Apartment Association and other landlords to go through
24 the justice court rules principally on evictions and debt
25 collection, but in the end they went through all of the

1 rules and completely revamped them.

2 Those changes have been very
3 well-received. In the end the 806 justices of the peace
4 embraced the rules. They were quite proud of them, but
5 they want us to take another look at them just because
6 things have changed. One of the things that have changed
7 is there has been an enormous uptick in debt collection
8 cases just in the last couple of years. They -- our
9 preliminary members from fiscal year '19, we won't have
10 the final numbers for a couple more months, but the
11 preliminary numbers look like the cases are up 30 percent
12 over 2000 -- fiscal year 2018, which is 65,000 more
13 cases -- 112,000 more cases than we had in physical year
14 '17.

15 So we're not sure exactly why this is
16 happening. Of course there was a great surge in cases
17 when the economic downturn occurred back in 2009, 2010,
18 but that's not the case now. So we're not exactly sure
19 where this is happening, but there's a huge number of
20 those cases. And then effective next year the justice
21 court jurisdiction will increase from 10,000 to \$20,000,
22 and as you know, about half or probably two-thirds, maybe
23 three-fourths, of the litigants in justice court are
24 representing themselves pro se. So we really need to take
25 a hard look at these rules to make sure they're working as

1 efficiently as they can so that the justices of the peace
2 can handle these cases. If you will recall, the
3 representatives on the task force, both sides of these
4 issues, got together on about 90 percent of the rules and
5 brought to this committee just a handful of issues that
6 remain to be decided.

7 Issues like what does it take to get a
8 summary judgment in a debt -- in a small debt collection
9 case, and the JPs were all over the map on this, and you
10 set a formula and say if the creditor has this, he's going
11 to get it. If he doesn't have it, he's not going to get
12 it, and if you don't like that, you can go to the district
13 court and file your suit, and those have worked really
14 well, so well that a lot of other jurisdictions in the
15 country have taken our process of bringing the principals
16 together to talk about these rules. They're using that
17 same process as well in their jurisdictions. So you can
18 be proud that the work that began here is having an effect
19 in the country. And I think that's it, Chip. Oh, yeah,
20 yeah.

21 CHAIRMAN BABCOCK: Almost it.

22 CHIEF JUSTICE HECHT: I started to make
23 myself a note and I forgot. This week, the Governor and
24 Lieutenant Governor and the speaker made their
25 appointments to the Judicial Commission on judicial

1 selection -- I'm sorry, the Texas Commission on Judicial
2 Selection, which the Legislature created in the last
3 session to study judicial selection in Texas.

4 Judge Keller and I appointed
5 Wallace Jefferson and Tom Phillips to the commission some
6 weeks ago. And the Lieutenant Governor and speaker were
7 to appoint senators and members of the House respectively,
8 which they did. And the Governor had made four
9 appointments, one of whom is the chair of this committee,
10 Chip Babcock. And they will be studying the judicial
11 selection process in Texas.

12 Just a word about that. Governor Bullock
13 passed a selection change in the Senate back in the
14 Nineties, three times. Got to the House floor and never
15 got any further than that. But it's been a while since we
16 have talked about it seriously, but Governor Abbott is now
17 the first governor in history to publicly favor, support
18 changes, in judicial selection. So we are counting on
19 Chip to carry the ball on this one and know that he will.

20 CHAIRMAN BABCOCK: Thanks. Thanks, Judge.
21 Justice Bland, your turn.

22 HONORABLE JANE BLAND: Well, good morning,
23 it's a real treat to have everyone here in Houston. I was
24 happy to see that the skies did not darken when the dean
25 compared us to saints, so --

1 PROFESSOR CARLSON: He's new.

2 HONORABLE JANE BLAND: But I'm so delighted
3 to be able to continue to serve on this committee as the
4 Chief's deputy, you know, because there are -- you know,
5 there's no other group in the state whose work is more
6 vital to the judiciary and whose company I enjoy more. So
7 I look forward to continuing to be here, albeit at the
8 other end of the table, sigh. But I look forward to it.

9 CHAIRMAN BABCOCK: Great. Thank you. Thank
10 you, Justice Bland. All right. The first agenda item is
11 suits affecting the parent-child relationship, and it's
12 being led by Pam Baron, the chair of the appellate
13 subcommittee. So, Pam, you want to take us through it?

14 MS. BARON: Well, actually, this is being
15 led by Justice Bill Boyce for our committee.

16 HONORABLE BILL BOYCE: So to recap, briefly,
17 we sort of dipped a toe in this topic at the end of the
18 last meeting. I guess today we'll wade the rest of the
19 way in, at least as far as the first aspect of this the
20 subcommittee has looked at. But to recap briefly, we've
21 got referrals that cover a number of topics under the
22 general heading of appeals in parental termination cases,
23 covering some specific aspects of it.

24 One aspect of the referral covers untimely
25 appeals or -- or disrupted appeal processes and

1 contentions that there's been ineffective assistance of
2 counsel in circumstances where appointment of counsel is
3 required for parental termination, for conservatorship
4 that is sought by a governmental entity.

5 This topic covers some potential approaches
6 to this, including whether or not to have a late appeal
7 procedure, an abate and remand procedure, some type of
8 collateral attack under a habeas or bill of review style,
9 or other aspects of this. Additionally, other arms of
10 government have been looking at issues related to parental
11 termination appeals. This involved House Bill 7 passed
12 during the 85th Legislature, which resulted in a task
13 force that has issued two reports over the course of the
14 last couple of years.

15 This covers areas such as right to counsel
16 showing authority to appeal, frivolous appeals, procedures
17 in courts of appeals to consider ineffective assistance
18 claims, and standardizing sort of an Anders type procedure
19 that in some respects has been looked to as an analog for
20 dealing with appeals involving terminations of parental
21 rights where there may be questions about whether there's
22 really a viable basis for that appeal.

23 Another aspect of this involves a potential
24 for opinion templates to address the issues that come up
25 frequently here. This committee has previously addressed

1 an aspect of these issues in July 2017 report on late
2 filed petitions for review in parental termination cases.
3 That's attached to your materials. That has been
4 submitted to the Supreme Court. And the state of play
5 right now is that the issues we're going to talk about
6 today and in coming meetings are going to be considered
7 together with the prior recommendations with respect to
8 late filed petitions for review in parental termination
9 cases. So if you're looking for a road map about how
10 we've broken this down, because there's a lot of issues
11 here that are related but they're not necessarily the
12 same, I direct you to page two of the September 5 memo,
13 issues for discussion.

14 The subcommittee looked at this and
15 determined that breaking this down into two stages would
16 be an organized way to start tackling this, stage one
17 involving out of time appeals related issues. The topics
18 that are covered in this specific September 5 report are
19 really stage (1) (a), dealing with some of the House Bill 7
20 recommendations, right to counsel on appeal, notice of
21 right to appeal, and showing authority to appeal.

22 There's additional aspects of this that
23 we've broken down into later stages. One being that after
24 you get past this threshold, notice of appeal, right to
25 appeal, showing authority, how do you address untimely

1 appeal processes that may result, particularly when you're
2 dealing with certain events that involves right to
3 counsel. Ineffective assistance of counsel claims that
4 may arise based on that and a late appeal procedure,
5 collateral attack and so forth.

6 The second stage that we identified is
7 briefing and opinions, how to deal with potentially
8 frivolous appeals, looking to Anders procedures as an
9 analog, parental termination brief checklists, and then
10 opinion templates as well. That will be the topic for
11 later, later discussions, although we do have another
12 agenda item on here that may start some of that
13 discussion.

14 So if you look to page three of the
15 September 5th memo, this is the topic that we began
16 discussion on at the end of the last meeting and got a bit
17 of a way through it. We did not get all of the way
18 through it, so I'm going to summarize our discussion and
19 summarize some of the comments that we received -- that
20 were received during the prior meeting. So the House Bill
21 7 task force made a recommendation regarding mechanisms to
22 provide notice of the right to an appeal and the right to
23 counsel on appeal. One of these involves the contents of
24 the citation and to begin flagging at the very initiation
25 of the case the right to counsel and the right to appeal.

1 The House Bill 7 task force provided
2 proposed language for citation. This is in keeping with
3 separate efforts that have been undertaken, particularly
4 with respect to the Rules 15 through 165a subcommittee
5 that looked at modernizing, issuing forms of citation, and
6 really a recommendation towards moving away from rules
7 that tell you what should be in there in kind of general
8 terms to actual form citations that can be uniformly
9 applied. So the House Bill 7 recommendation fits with
10 that in terms of recommending the specific form of
11 citation that includes a second paragraph here referencing
12 explicitly a right to appeal and right to counsel.

13 When we talked about this at the last
14 meeting, we received some comments around the form of this
15 proposed citation form. The subcommittee largely agreed
16 or was comfortable with the House Bill 7 task force's
17 proposal with the addition of some language as reflected
18 on page four at the end of the second -- of the first
19 paragraph to say, "If the Court determines you are
20 indigent and eligible for appointment of attorney, the
21 Court will appoint an attorney to represent you." The
22 thought of the subcommittee was to add language, "at no
23 cost to you" to be more clear and to also parallel the
24 form in the second paragraph.

25 When we talked about this at the September

1 meeting, we received a number of comments from the
2 committee as a whole. I think to summarize them, that
3 there was I think general comfort level with the concept
4 of a whole -- as a whole of including clear language in
5 the notice of citation, but suggestions for a way that
6 this language could be in plainer language, less legalese,
7 more easily understood.

8 After our meeting, Frank Gilstrap had
9 suggested some language that -- that puts it in very
10 direct wording, and we can talk about that in a little
11 bit, but there were other suggestions along these lines.
12 Some discussion about whether indigent is really the best
13 term to use, is there a more plain language along the
14 lines of being unable to afford an attorney as a way to
15 communicate this better. Indigent is going to be a
16 comfortably known term to legal professionals, but not
17 necessarily nonlegal professionals or other litigants who
18 are navigating this process.

19 Robert had raised a question about whether a
20 reference in the second paragraph to a right to appeal is
21 potentially broad enough when we're talking about not just
22 a right to appeal in the intermediate court of appeals,
23 but also a right to pursue a petition for review in the
24 Texas Supreme Court, which is an appellate process broadly
25 defined, but may not be necessarily captured by this

1 specific language.

2 Other comments that we've covered at the
3 last meeting, Justice Christopher had raised the
4 possibility -- and this was issued by Commissioner
5 Sullivan about including the form of affidavit of
6 indigency with a citation to underscore that aspect of the
7 process. Chief Justice Gray had raised the possibility of
8 looking at a parallel to the certificate of right to
9 appeal that now exists in criminal cases and trying to
10 adapt that to this procedure.

11 Another possibility that Robert had raised
12 was including a statement of the right to appeal in the
13 notice of termination to underscore what is trying to be
14 captured by having a more clear citation form, and so
15 that -- that kind of brings us up to date on as far as we
16 got at the last meeting, and perhaps, Mr. Chairman, this
17 is the appropriate time to reopen the conversation for
18 further comments about the proposal thus far, the form of
19 citation and other aspects of that.

20 CHAIRMAN BABCOCK: Yeah. I think so. We
21 spent, what, maybe 40 minutes or less on it last Saturday
22 at the tail end? So comments? Additional comments from
23 our group? Yes. Levi.

24 HONORABLE LEVI BENTON: Commissioner
25 Sullivan would like the committee to know we're out of

1 coffee. We're out of coffee. That's a big problem.

2 CHAIRMAN BABCOCK: All right. We're out of
3 coffee.

4 HONORABLE KENT SULLIVAN: For the guy who
5 speaks for himself.

6 CHAIRMAN BABCOCK: Well, you have a right to
7 coffee before you file your notice of appeal, right? All
8 right. That's helpful, but anything else regarding these
9 rules?

10 MS. HOBBS: Chip, this is Lisa on the phone.
11 Can y'all hear me?

12 PROFESSOR CARLSON: Yes.

13 CHAIRMAN BABCOCK : Okay.

14 MS. HOBBS: You know, one of the -- my
15 partner, Karlene Poll, does a lot of termination appeals,
16 and we've gotten called where -- I'm sorry -- we've
17 gotten called where there was an untimely motion for new
18 trial, then the few days passed and there was no
19 opportunity for notice of appeal. Is that anything that
20 was discussed in the subcommittee?

21 HONORABLE BILL BOYCE: No. We did not
22 discuss that specific predicate to the appeal. That may
23 be captured by some of the later discussion that we might
24 have in terms of potential for a collateral attack type
25 procedure. But that -- that is something that we would

1 definitely want to take into consideration in terms of
2 reasons for why a notice of appeal might be timely and how
3 to address that.

4 MS. HOBBS: Thank you.

5 CHAIRMAN BABCOCK: And that was Lisa Hobbs,
6 right? On the phone?

7 MS. HOBBS: Yes, it was Lisa Hobbs.

8 CHAIRMAN BABCOCK: Okay. Great.
9 Justice Christopher.

10 HONORABLE TRACY CHRISTOPHER: Well, I have a
11 couple of points in connection with abating and remanding
12 for hearings. According to OCA, the Supreme Court said
13 that if we have to abate and remand for a hearing, it does
14 not stop our 180-day deadline. I don't know whether that
15 is true, but that is according to what OCA said the
16 Supreme Court told them.

17 So it's pretty common at the court of
18 appeals, like if you're having trouble with the court
19 reporter's records, you abate a case, and you remand it
20 back, you know, to figure out what's going on with the
21 reporter's record. And that has always stopped our
22 appellate time line in terms of getting things done. But
23 apparently in the parental termination cases, the
24 abatement process is not doing that. And so from -- from
25 the court of appeals point of view, any abatement process,

1 especially for an evidentiary hearing in support of an IEC
2 claim cannot count towards our 180 days. I mean, we
3 barely get -- by the time all the briefing is done, we
4 barely get a month to read and write the opinion, so you
5 know, that's just the reality of getting these things done
6 and if we're abating, we will be busting our 180 days all
7 the time. So that's number one.

8 Number two, while we're looking at this
9 issue and the idea that, you know, you're going to attach
10 the form to citation, that's great, but the first thing
11 that usually happens is an emergency removal hearing. All
12 right, and that's the first time the person shows up, and
13 they might have their form filled out saying I want a
14 lawyer, but the emergency removal hearing will take place
15 without them having a lawyer.

16 So I think that's something that the task
17 force needs to look at, you know, on that point, and I
18 understand it's an emergency. That's why, you know, CPS
19 is coming to court and saying the children are in danger,
20 this is an emergency, but the parents do lose substantial
21 rights by not being represented at that original hearing.
22 I don't know how to get a lawyer involved quickly enough
23 in that phase, truthfully, but I think it's something that
24 y'all should look at.

25 CHAIRMAN BABCOCK: Okay.

1 MS. HOBBS: This is Lisa Hobbs again. I was
2 on the House Bill 4 -- or 7, House Bill 7 task force, and,
3 Judge Christopher, I don't have the stuff in front of me,
4 but I'll look at it. I feel like we did talk about how
5 these delays affect your 180-day rule. So I'll pull that
6 back up and maybe send you an e-mail separately with that.

7 HONORABLE TRACY CHRISTOPHER: I'm just
8 saying that OCA -- that's OCA's marching orders, so
9 somebody needs to give OCA different marching orders on
10 abatements.

11 CHAIRMAN BABCOCK: Pam.

12 MS. BARON: Well, I think the 180-day rule
13 comes from the Rules of Judicial Administration; and I
14 think, Justice Boyce, as we proceed maybe we can recommend
15 that there be an alteration to that if we think it's
16 necessary to accommodate these proceedings for late-filed
17 notices of appeal that are going to require some kind of
18 trial court hearing to determine ineffective assistance of
19 counsel; and that shouldn't be counted against the court
20 of appeals deadline for getting these cases decided.

21 CHAIRMAN BABCOCK: Okay.

22 MR. HUGHES: I was just curious what -- what
23 the purpose of the -- effectively on a certificate that I
24 have conferred with my client and they really want to
25 appeal, what problem is that addressing; and my other

1 comment was if we're having a problem with lawyers just
2 willy-nilly filing appeals in these cases, why require a
3 certificate at all? Why just say we -- we're going to
4 allow -- just cut that all together and go to the chase,
5 that is create a procedure to challenge it and be done
6 with it.

7 HONORABLE BILL BOYCE: Well, I think the
8 concern that prompts that proposal is that it is not
9 always clear that a parent whose rights have been
10 terminated wishes to challenge it. It may be a
11 circumstance where the -- the intention to challenge it
12 changes during the course of proceedings. There's an
13 initial desire to challenge it and maybe that changes over
14 time, and I think that uncertainty coupled with an
15 accelerated time frame for the handling of these appeals
16 means it's a -- it's a -- it's a great big hurry up
17 process that may result, for example, in court reporters
18 having to transcribe matters, and it turns out later that
19 the parent whose rights have been terminated does not wish
20 to proceed with the appeal, and somebody is going to be
21 left holding, you know, uncompensated or otherwise
22 compelled to do something that turned out not to be
23 necessary. I think that -- that's my understanding.
24 Other subcommittee members or other members of the whole
25 committee may have their additional aspects of it that

1 they want to comment on, but that's my understanding of
2 the motivation for this or the concern.

3 MR. HUGHES: Well, my thought here, I mean,
4 I don't do this area of law, but I know a lot of counsel
5 who deal with low income, poor, indigent people, they have
6 a problem explaining things to people. And the other
7 thing is, they worry a lot about being sued for
8 malpractice. The client didn't understand and then they
9 get sharp shot later; and therefore, it's easier to take
10 the most protective course of action and worry about it
11 later.

12 The other thing here is, like, well, if
13 you're counsel, and you have to make the certification,
14 when do you -- which conference with the client do you
15 consider? I mean, do you have to like say "I certify that
16 I've talked to them within the 24 hours before I filed it,
17 or the week before I filed it"? Or can I rely on a
18 conference they gave me, et cetera, et cetera.

19 I mean I understand people are spending
20 money, et cetera, et cetera, but I might suggest this, and
21 of course some people will be upset with me later, to say
22 if the attorney has filed it precipitously cost tacked to
23 the attorney, personally.

24 HONORABLE BILL BOYCE: Well, I think a
25 related issue is that --

1 CHAIRMAN BABCOCK: I'm sorry.

2 HONORABLE BILL BOYCE: Oh, I'm sorry.

3 CHAIRMAN BABCOCK: Richard just had his hand
4 up. Go ahead, and then I'll recognize Richard.

5 HONORABLE BILL BOYCE: Just to identify one
6 aspect, an additional aspect of this is it may be
7 difficult to find the parent, and there may be uncertainty
8 about the intention to appeal because they're not able to
9 be located or they've been maybe incarcerated, so that's
10 another aspect. Yes.

11 MR. HUGHES: Well, And those are the
12 hypotheticals I was going to throw out, precisely what I
13 was thinking about.

14 CHAIRMAN BABCOCK: Richard Orsinger.

15 MR. ORSINGER: So I was on the House Bill 7
16 task force, and what Justice Boyce is talking about was
17 certainly an important factor, but also we were very
18 concerned, not only on the task force but among family
19 lawyers generally, about what we call the phantom appeal.
20 And that was the appeal that was automatically taken by
21 the lawyer appointed to represent the parent, even if the
22 parent was completely absent from the proceeding, and you
23 can't take a default judgment, as I understand it. I
24 don't try these cases, but you can't take a default
25 judgment, the state has to have a trial and put on its

1 proof. if anyone knows that I'm wrong, correct, me. But
2 because you're an appointed lawyer, you have an absent
3 client, when the case is over and there's a termination,
4 you have a legal obligation or somebody has a legal
5 obligation to represent that person on appeal. And so the
6 trial lawyer always files a notice of appeal, even if they
7 are -- even if they've never talked to their client.

8 And then the notice of appeal triggers all
9 of these obligations on the part of the clerk and
10 particularly the court reporter, and they are hugely
11 accelerated, or they were hugely accelerated for the court
12 reporter, which disrupted the normal trial proceedings.
13 And we were -- you know, they were begging us for two
14 weekends to do this instead of just one. It's a mess.

15 And the phantom appeal is, for me, an appeal
16 where the parent never appeared and which is one of the
17 reasons why I became concerned that we give notice in the
18 citation about the right to free counsel if you're
19 indigent, because that may be the last time that you hear
20 from this parent -- or the only time the parent hears from
21 the judicial process at the participatory level is when
22 they get served with citation, so --

23 CHAIRMAN BABCOCK: And you say it should
24 give them notice of their right to counsel on appeal?

25 MR. ORSINGER: Trial and appeal, yes.

1 CHAIRMAN BABCOCK: Trial and appeal, right.

2 MR. ORSINGER: Yes, and that's one of the
3 reasons why certainly I favor the idea of having a form
4 instead of general instructions of what to put in the
5 citation. Because I think the policy should be set by the
6 Supreme Court and then it ought to be required that it be
7 implemented, not be left to local option about what the
8 citation says. But there are situations where you have a
9 client who participated in the trial and there were
10 grounds for termination, sometimes multiple grounds, and
11 they just don't wish to appeal. And they should have a
12 right not to appeal. They ought to have a conversation
13 with their lawyer, and that was the source of this
14 certification of the discussion.

15 As far as Roger's concern about, well, which
16 conversation do you rely on, probably -- we envisioned
17 that you would have a conversation after the verdict came
18 down or maybe even after the judgment of termination was
19 signed, saying, would you like us to appeal this to the
20 court of appeals, we have an indigency presumption. You
21 may qualify -- continue to qualify for an appointment,
22 free counsel. And they ought to be given the option not
23 to appeal if they want to. But to me the larger issue, at
24 least on my mind and on the family lawyers that I talked
25 to that weren't on the task force, was the true phantom

1 appeal where there really is no client, and some of these
2 parents are in foreign countries and are incarcerated.

3 You just never have had communication with
4 them, so there's just no point -- as long as due process
5 is provided in the trial court, we felt like there was no
6 point in forcing every one of these cases into an appeal,
7 even if the parent didn't want it or we didn't know
8 whether they want it or even if the parent hadn't
9 participated. I think that covers the ground.

10 CHAIRMAN BABCOCK: Well, but, yeah, what's
11 the trial lawyer going to do in that issue? Tell them the
12 trial --

13 MR. ORSINGER: Well there's --

14 CHAIRMAN BABCOCK: -- lawyer gets to file a
15 notice of appeal?

16 MR. ORSINGER: Yeah, I think that that
17 requires some consideration by the appellate rules
18 committee, but I personally don't think that we should
19 require that the trial lawyer file the notice of appeal.
20 But that requires the courts to either appoint the trial
21 lawyer or to appoint a replacement appellate lawyer
22 because many of these trial lawyers are not qualified to
23 take an appeal and don't really want the responsibility of
24 taking the appeal.

25 But somebody has to be there during this

1 critical time frame when these time deadlines are running,
2 and so we tried -- on the task force we recommended
3 extending some of these deadlines, like the filing of the
4 motion for new trial, which had dual benefit, because we
5 really need to bring an appellate lawyer in to decide
6 whether the trial lawyer was ineffective. You can't
7 expect the trial lawyer to be sitting in judgment of their
8 own competency or incompetency. And the timetables were
9 so quick that the briefs were due before, you know, we
10 even could have a hearing on a motion for a new trial, so
11 the task force had recommended that there be an
12 independent post-rendition timetable for motion for new
13 trial, the appointment of appellate lawyer, who has to
14 probably read the record in order to determine whether the
15 trial counsel was competent or not.

16 And it's not just the failure to make
17 objections or other essential error preservation steps
18 during the trial. There's also the failure to call
19 witnesses and the failure to interview witnesses, which
20 requires a little leg work on the part of the appellate
21 counsel, and all of that takes a little bit of time. But
22 at any rate, the concern that I heard voiced most often
23 was not that the parent who sat through the trial that
24 decided it was best for the child or just didn't want to
25 continue the fight. It was the one that was truly absent,

1 showed no interest at all, never contacted, never returned
2 any calls. Those are cases where we really shouldn't be
3 bringing all of the apparatus for an appeal automatically
4 in every case.

5 CHAIRMAN BABCOCK : Yeah, but the problem
6 that you identified a minute ago when you started out was
7 the, quote, "phantom appeal."

8 MR. ORSINGER: Uh-huh.

9 CHAIRMAN BABCOCK: And that's triggered by a
10 trial lawyer who's been appointed who thinks, look, I've
11 got a duty to preserve the right of appeal because this
12 person may show up, or they may continue to be a phantom.
13 I don't know, but that's my duty.

14 MR. ORSINGER: Right.

15 CHAIRMAN BABCOCK: And how are you going to
16 absolve the trial lawyer of that duty?

17 MR. ORSINGER: Well, you absolve them of the
18 duty by requiring that before the notice of appeal is
19 filed that they certify that they contacted their client.
20 If they can't reach their client or their client won't
21 return their calls or is at no telephone number or address
22 that they can find, then the certificate can't be filled
23 and the notice can't be filed.

24 As I understand, it's required that you
25 certify that you contacted your client and the client

1 wants to go forward with the appeal, and that's a
2 precondition to filing the notice. Isn't it, Bill?

3 HONORABLE BILL BOYCE: Uh-huh.

4 MR. ORSINGER: Yeah, so the actual
5 mechanism, Chip, is --

6 CHAIRMAN BABCOCK: If that happens, then
7 it's not phantom then, is it?

8 MR. ORSINGER: Well, by default you can't
9 file the certificate that you spoke with your client if
10 you can't find your client or your client won't return
11 your calls and your letters. So let's just say that the
12 parent is in Mexico or Central America, wherever. You're
13 never going to be able to contact them.

14 CHAIRMAN BABCOCK: Well, they have phones in
15 Mexico.

16 MR. ORSINGER: Yeah, but you don't have the
17 phone -- I mean, okay. If you want to talk to people that
18 take these appointments, you can get it from the horse's
19 mouth, because I don't do these cases, but a lot of my
20 friends do. And I've served on committees with these
21 guys, and sometimes it's just really impossible to locate
22 no matter how hard you try. Even if you know -- even if
23 they live in the United States or live in Texas, but you
24 can't tell where the residence is. Everybody is afraid to
25 talk to you because they're afraid you're with the

1 government or an investigator or something.

2 So the certificate mechanism is a way to
3 weed out the cases where we cannot confirm that the parent
4 wants to appeal. That could be because they were in trial
5 and lost and they don't want anymore, or it could be you
6 never spoke to them or if they vanish after the verdict.
7 It doesn't matter. The point is that we're not going to
8 have phantom appeals from people that haven't said, "Yes,
9 I want to take advantage of my appellate right."

10 CHAIRMAN BABCOCK: And the trial lawyer is
11 absolved if they've made sufficient effort to contact
12 the -- their client, the parent, and they can't contact
13 them?

14 MR. ORSINGER: Right. Or there may be an
15 appellate lawyer that has been appointed by that time, in
16 which event the duty may be devolved on the appellate
17 lawyer, but either way, some lawyer who is going to be
18 responsible for the case has to say that I've communicated
19 this -- with my client about this right to appeal, and
20 they have indicated no interest in appealing or they
21 indicated they don't want to appeal.

22 THE COURT: So -- so you're going to prevent
23 the phantom appeal in two ways, either when a client --
24 when a client says, "I don't want to appeal," that's not
25 really what you're talking about phantom.

1 MR. ORSINGER: No, the phantom is the one
2 that --

3 CHAIRMAN BABCOCK : You can't reach them.

4 MR. ORSINGER: Right. And this covers both.

5 CHAIRMAN BABCOCK: Okay. Yeah, Roger.

6 MR. HUGHES: Okay. Now I see the problem,
7 but I'm not sure this is going to solve it. I mean, if
8 the lawyer -- the lawyer has to certify this to file the
9 notice of appeal, you know, last time I checked, if you
10 file a notice of appeal that doesn't have something
11 correct on it, it's effective. So, I mean, if you can --
12 if the certificate is not there, it's not fatally
13 defective. It just needs to be corrected upon the request
14 of a party. So now, once again, what are we requiring the
15 lawyer to certify? When was the -- does he have to say
16 "I've talked with my client within the last week" in order
17 to file a an adequate certificate, within the last 24
18 hours, within the preceding month; and the next thing is,
19 if this is about protecting the lawyer from filing a
20 frivolous appeal or being sued by the client because you
21 didn't keep in contact with me, et cetera, I don't know
22 that that can be fought because the one thing I've
23 learned in litigation is the lawyer can always paper a
24 file to death, but the client is going to say, "Well, gee,
25 he knew where my cousin lived, and my cousin always has my

1 phone number."

2 I mean, it's always going to end up being a
3 fact question, and the lawyer has no bulletproof shield to
4 drop down and say, hey, you know, that certificate, I'm
5 protected. I mean, the only thing I can think of, that's
6 why I say don't require the certificate. Instead create a
7 process for the -- to have a quickie hearing of how do you
8 know your client has authorized this, and I'm sorry, we
9 may have to lift the client -- the lawyer may have --
10 there may have to be some inroads into the lawyer-client
11 communications, but I don't think just requiring the
12 certificate in order to file the appeal is going to
13 protect anybody from anything. And God help the lawyer
14 who says, "Well, I didn't file a certificate because I
15 couldn't -- I didn't file a notice of appeal because I
16 couldn't find my client," and the client goes, "Well, gee,
17 you know, I was on Facebook" and whatever the social media
18 du jour is. You could have just used Snapchat or
19 something.

20 CHAIRMAN BABCOCK: You could have Twittered
21 me.

22 MR. HUGHES: Yeah. Yeah.

23 CHAIRMAN BABCOCK: Just saying.

24 Justice Gray.

25 HONORABLE TOM GRAY: This is a really

1 multi-faceted problem that I've spent a lot of time
2 dealing with at our court. I think it would help us
3 understand if we understood the magnitude of the issue,
4 how many of these are filed in the trial court, how many
5 get actually appealed to the court of appeals, and how
6 many to the Supreme Court of Texas. The -- there's been a
7 ongoing comparison of termination cases to criminal cases,
8 and they've been referred to as the death penalty of
9 the --

10 CHAIRMAN BABCOCK: Family law.

11 HONORABLE TOM GRAY: -- civil, family law.

12 In death penalty cases -- and I say this some
13 tongue-in-cheek, but depending on what these numbers are,
14 if 99 percent get appealed then this is not so much
15 tongue-in-cheek, but if it's really a strong percentage,
16 then it is. But speaking from the court of appeals
17 perspective, if this is like a death penalty, they don't
18 have to file a notice of appeal and all of the appeals of
19 death penalties go directly to the Supreme Court, and so
20 I'm fine with that.

21 CHAIRMAN BABCOCK: Self-interest aside.

22 HONORABLE TOM GRAY: And really, it's not
23 entirely tongue-in-cheek because if everything gets
24 appealed anyway, why not make the appeal and review,
25 especially given what the Court did to us in N.G., we're

1 going to have to review it anyway, even if it's an Anders
2 case and even if they're not asking for a reversal, which,
3 while Nathan is sitting here, I think I will say is an
4 absurd ruling, but you'll see that in writing soon, but if
5 you want to read the record, it's a premonition.

6 CHAIRMAN BABCOCK: This is just a heads-up,
7 right?

8 HONORABLE TRACY CHRISTOPHER: I would like
9 to say I like the decision, and we were already doing that
10 on the First and Fourteenth.

11 CHIEF JUSTICE HECHT: We'll carefully
12 consider it.

13 HONORABLE TOM GRAY: I'm sure you won't
14 because you won't see it because it -- anyway, I don't
15 think it will ever get there, but the point is there is
16 a -- there is a problem in this area. I don't know how --
17 what percentage of cases we are actually dealing with.
18 The certificate concept, if it was both certification of
19 the right to appeal and the desire to appeal. The right
20 to appeal is not to so much an issue, but the desire to
21 appeal is what I was focused on.

22 When paired with what Richard was talking
23 about, including in the citation, you're not going to
24 eliminate -- and I compare this again to the criminal
25 arena, which I would say other than the court of appeal

1 justices in here, not a lot of us have had contact with,
2 but when the certificate of the right to appeal was
3 adopted in criminal proceedings, it dramatically affected
4 the number of cases that stayed appealed at our level,
5 because we would get pro se notices of appeal, and we
6 would get appellate lawyers' notices of appeal that were
7 trying to CYA, when at the trial court level at the time
8 the sentence was imposed when the client was there and it
9 wasn't, therefore, a phantom appeal problem, they actually
10 were in the courtroom and they signed a piece of paper on
11 that day that said, "I understand I have no right to
12 appeal."

13 And it is effective when it comes to us
14 because we can then summarily dismiss that appeal because
15 it was -- the certification is not present in the record
16 and with the notice of appeal when it comes to us. So
17 you're never -- but we still get the case in which by writ
18 or by an effort to appeal, they try to attack whether or
19 not their plea was knowing and voluntarily or their waiver
20 of the right to appeal was knowing and voluntary, so
21 that's still going to be a problem in this case, in
22 termination cases, just like it is in criminal cases.

23 One of the problems that I feel we're
24 headed -- and I don't know exactly where to interject this
25 into the conversation, but since y'all have been kind and

1 let me talk, I will interject it here. The problem of
2 this procedure that an appointed counsel or a client that
3 had an appointed counsel might be able to challenge the
4 lack of certification or ever how it's done, someone else
5 can come in and attack whether or not the attorney wants
6 to do -- we have to be very careful that that is not just
7 for appointed counsel appeals, or you're creating two
8 levels of rights between that attorney or that client that
9 is represented by an appointed counsel having a greater
10 right to a late appeal than someone who unfortunately
11 hired an incompetent counsel and didn't get the notice of
12 appeal filed. So that's a different problem than what
13 we've tried to address here so far. Because it -- you are
14 creating a different level of right between those that are
15 appointed by -- or represented by appointed counsel versus
16 retained counsel.

17 CHAIRMAN BABCOCK: Justice Christopher.

18 HONORABLE TRACY CHRISTOPHER: I sort of like
19 the idea of the judge signing the right to appeal as
20 opposed to the lawyer certifying that he's talked to the
21 client, and because what will happen -- and I think the
22 vast majority of cases are where we're talking about where
23 the parent doesn't show up. Okay. And there is still a
24 trial because they still have to prove that, A, the parent
25 was the parent, which is often an issue in the case, and

1 then, B, they have to prove that it's in the best interest
2 to terminate parental rights.

3 So a lawyer who shows up to represent this
4 absent parent before the trial finishes does not want to
5 tell the judge, "I talked to my client and he could care
6 less about this child. He didn't even know it was his
7 child." I mean, it's generally the absent fathers. I
8 mean, that this happens on, right? So "I tried to get him
9 to sign a relinquishment of parental rights and he was not
10 interested," right? Well, that would be the kind of
11 person that shouldn't -- we shouldn't be hiring a lawyer
12 to take the appeal for, right? And that's the kind of
13 information that the lawyer could give after the trial is
14 over, after the judge has made -- or the jury has made
15 their decision to terminate. So rather than relying on,
16 you know, some sort of certificate from the lawyer, I
17 think it would be better to have the process of at the end
18 of the trial the lawyer telling the judge why his client
19 wasn't there and that he's not interested in the case.

20 CHAIRMAN BABCOCK: Yeah, Justice Gray.

21 HONORABLE TOM GRAY: And for comparison in
22 the criminal arena, the certification of right to appeal,
23 which if any of y'all have your 2019 books, it's on page
24 186 -- wrong one. It's appendix D, page 378, of your rule
25 book. It is signed by the trial judge, the defendant, and

1 the defendant's counsel. So all three actually are
2 involved in that certification, and that's why it's so
3 effective at then cutting off these frivolous or --
4 they're not even frivolous appeals in the sense that there
5 may have been an issue. They just cut themselves out of
6 the appellate process by that certification.

7 CHAIRMAN BABCOCK: Justice Christopher, what
8 if the lawyer after the trial -- the appointed lawyer
9 after the trial says, "Judge, I've never been able to get
10 a hold of this person. I don't know what his or her view
11 is on this whole thing, so I can't say they want to appeal
12 or don't want to appeal. I just don't know."

13 HONORABLE TRACY CHRISTOPHER: I think at
14 that point they have gotten the due process that was
15 necessary by going through a trial and that they shouldn't
16 have a right to appeal, personally. I mean, I understand
17 people could have different viewpoints on that, but to me
18 that should be the end of it.

19 CHAIRMAN BABCOCK: Yeah. Richard.

20 MR. ORSINGER: I like Roger's suggestion
21 that a certificate doesn't really protect the lawyer from
22 a later attack that they were not diligent in locating the
23 parent; but I'm troubled, especially as explained by
24 Justice Christopher, we have to respect also the
25 attorney-client privilege; and the way the certificate is

1 drafted, I don't think it improperly invades it because
2 all the lawyer is saying is that my client has authored me
3 to file an appeal, which to me is not a confidential
4 communication because there's going to be a notice filed
5 and all of this, so I don't think you could argue that it
6 was intended to remain secret.

7 But if you have a lawyer who's either
8 speaking as an officer of the court or under oath in a
9 hearing with the judge saying, well, you know, I tried
10 this and they told me that, and I left a message and, you
11 know, then the client said this and won't take my advice,
12 or whatever, we're way into the attorney-client privilege
13 there. So I think --

14 CHAIRMAN BABCOCK: Well, you said a bunch of
15 things, and some of them are attorney-client privilege,
16 and others may not be.

17 MR. ORSINGER: Right, because if they said
18 something and they're a representative of the client,
19 that's probably covered.

20 CHAIRMAN BABCOCK: "I tried to call and
21 nobody answered."

22 MR. ORSINGER: Yeah. Or if somebody left me
23 a voicemail message, is that hearsay? Maybe not if it
24 comes from the parent. But if it comes from the wife of
25 the parent or a cousin, it probably is inadmissible

1 hearsay. I mean, this is not -- having a hearing, while
2 it would be I think probably give better protection and
3 perhaps even more assurance of due process, it's not a
4 problem-free area to say that we're going to have a
5 hearing in which a lawyer is either going to volunteer or
6 be examined by the judge or by the CPS attorney.

7 CHAIRMAN BABCOCK: Well, you're the one that
8 brought up this phantom -- phantom appeal thing. Do you
9 think it's preferable to have this the certificate or to
10 have a hearing?

11 MR. ORSINGER: Gosh, you know, I like the
12 fact that the hearing is a judicial determination, and so
13 the lawyer is not responsible for deciding that there will
14 not be an appeal. The judge is responsible, and I like
15 that. It's due process, it's protection for the lawyer.
16 I'm just -- I'm trying to envision how we're going to get
17 more out of a lawyer than you would get out of a
18 certificate, because I -- I see all kinds of problems in
19 having a hearing where the lawyer is talking about his
20 conversation with his client or her client.

21 CHAIRMAN BABCOCK: Harvey.

22 HONORABLE HARVEY BROWN: I like the idea of
23 a hearing; and one of the things to -- that could occur at
24 that hearing, in response to your question about what if
25 the lawyer says, "I haven't reached him," we could have a

1 comment that basically refers to the procedures we're
2 talking about for default judgments. You know, have you
3 checked with Facebook, have you checked this, have you
4 checked that. So the judge just asks the right questions
5 at least, to answer some of Roger's points earlier about
6 have you really gone forward and made a real effort, and
7 so that would then have an independent person deciding, a
8 judge, whether you made reasonable effort to satisfy due
9 process.

10 CHAIRMAN BABCOCK: Commissioner Sullivan,
11 and then Justice Christopher.

12 HONORABLE KENT SULLIVAN: Well, one quick
13 threshold comment is to say what good work I think this
14 subcommittee has done in terms --

15 CHAIRMAN BABCOCK: She can't hear you. You
16 have to speak up.

17 HONORABLE KENT SULLIVAN: I was just going
18 to start by saying what good work I think the subcommittee
19 has done in terms of having to deal with these
20 extraordinarily difficult issues, and you know, as you
21 both read some of the proposals and hear them, I mean,
22 many of them sound very good to me. The difficulty that I
23 have, and I assume it may be a common issue, is that we're
24 operating in a vacuum, and for many of us these are issues
25 of first impression, and we have no -- no history to draw

1 from and no data to draw from in terms of what may work
2 and what may not.

3 And in circumstances like that, it always
4 occurs to me that some form of best practice analysis
5 might be in order, meaning for me anyway, what are the
6 other states doing, and do any of them have experiences
7 that we should draw from in terms of having done either
8 research or already been down certain procedural paths
9 that have yielded experience and/or data about how good or
10 how bad those alternatives are.

11 I mean, it allows you to steal good ideas,
12 quite frankly, when they're proven. It allows you also to
13 avoid mistakes that other states have made, and so it just
14 occurs to me that it might be something worth looking into
15 in an area like this where I presume many of the issues
16 that we're discussing are issues that are common to many,
17 if not all, of the other states.

18 CHAIRMAN BABCOCK: Justice Christopher.

19 HONORABLE TRACY CHRISTOPHER: Well, already
20 in the criminal field there is some small waiver of the
21 attorney-client privilege when people are proving up a
22 plea deal, for example. You know, have I explained to you
23 the pros and cons of going to trial? Yes. Have I
24 explained to you your right to appeal? Yes. So those
25 sort of things are already done. And, you know, in a way

1 that would be a limited -- that would be a waiver of the
2 attorney-client privilege, but that sort of information is
3 given to the judge, and so then the judge can then
4 determine it's a voluntarily -- a voluntary plea.

5 All right. So to me, I wouldn't worry too
6 much about a small waiver of the attorney-client privilege
7 in connection with this right to appeal. You know, did
8 you explain -- if the answer is, "I never got hold of
9 him," that's one thing. If the answer is, "I got a hold
10 of him and he chose not to come to trial," you know, "Did
11 you explain the appellate process to him?"

12 "Yes."

13 "Did he indicate any interest in appealing?"

14 "No." And then the judge would say, you
15 know, no need to appeal here.

16 CHAIRMAN BABCOCK: Yeah, I was just looking
17 at Rule 12, which has a similar -- you know, someone
18 challenges the authority of the lawyer to appear for a
19 particular client and the lawyer -- the challenged lawyer
20 has got to come to court and tell the judge why they do
21 have authority and that might, Richard, get into
22 attorney-client stuff to a limited degree anyway.
23 Richard.

24 MR. MUNZINGER: I think the concern for the
25 attorney-client privilege is -- I don't know what the

1 right word would be. It's almost artificial. I am
2 claiming that I didn't have due process rights when you
3 took my child away, and I'm going to use the
4 attorney-client privilege to protect my right to stay in
5 court to make that argument. We've always said that the
6 attorney-client privilege can't be used as a sword and a
7 shield. We've always had Rule 12 in the trial court,
8 which requires the attorney to prove that he has the power
9 to bring the lawsuit, and I'm not sure that an attorney
10 could make that statement if someone contested the
11 attorney saying so.

12 Well, I'm authorized by my client. Well, I
13 don't accept that, your Honor. Let the client come down
14 here and say that they've authorized this. I've had --
15 I've filed three Rule 12 motions in my law practice in my
16 lifetime, and all three of them were contested, and I won
17 all three, and in part it was because no one could produce
18 a client that could say, "I have authorized this lawsuit."
19 I think it's almost an artificial issue to be concerned
20 with the attorney-client privilege.

21 CHAIRMAN BABCOCK: Okay. Yeah, Elaine,
22 Professor Carlson.

23 PROFESSOR CARLSON: Richard Orsinger, can --
24 may an appointed attorney in one of these cases file a
25 notice of nonrepresentation under appellate Rule 6.4?

1 MR. ORSINGER: You know, it's my
2 understanding or my recollection that the Texas Supreme
3 Court has ruled that if you're appointed as a lawyer,
4 you're on the case until you're relieved, which means
5 including on appeal; and the Supreme Court has ruled that
6 there is a constitutional right to appeal in parental
7 termination cases. So I don't think you can file a notice
8 of nonrepresentation.

9 PROFESSOR CARLSON: Because I notice in
10 subsection (b) of that rule, it specifically provides in a
11 criminal case.

12 MS. HOBBS: I agree with what Richard is
13 saying.

14 PROFESSOR CARLSON: "An attorney appointed
15 by the trial court to represent the indigent party cannot
16 file a nonrepresentation notice." And I was just thinking
17 by analogy, does that apply?

18 MR. ORSINGER: I think they can't. I think
19 that when you're appointed as a trial lawyer, you're on
20 until you're relieved, all the way up to the court of
21 appeals and really arguably all the way to the
22 Texas Supreme Court. Although House Bill 7 task force has
23 made certain recommendations about trying to get more to a
24 discretionary review from the court of appeals to the
25 Supreme Court level, but the Supreme Court cases are out

1 there, and we have to abide by them.

2 PROFESSOR CARLSON: Thank you.

3 CHAIRMAN BABCOCK: Any other comments?

4 Bill.

5 HONORABLE BILL BOYCE: A question. If -- if
6 the -- if there's interest in going down the certificate
7 of right to appeal path, then to address Professor
8 Carlson's question, does that certificate also include an
9 express statement saying, "I find that there's not
10 interest in pursuing the appeal," and the appointed lawyer
11 is now done?

12 CHAIRMAN BABCOCK: Well, Elaine.

13 PROFESSOR CARLSON: I just raise the
14 questions.

15 CHAIRMAN BABCOCK: As professors do.

16 HONORABLE TRACY CHRISTOPHER: Yeah, I think
17 it would need to include a discharge of the trial attorney
18 because they're on the hook until the appellate lawyer is
19 appointed to move on, so I think it should include a
20 discharge.

21 CHAIRMAN BABCOCK: Yeah, I think -- I think
22 that's right. Anybody disagree with that? Okay. Any
23 other comments on this?

24 MS. HOBBS: This is Lisa, and I'm sorry, I
25 can't hear Elaine, but I do think that the whole reason

1 why we have the Anders process in these cases is that you
2 need a court to relinquish you from your representation.

3 And then secondly, I just want to point out
4 one other thing that Judge Christopher said in her
5 original comment, was about these emergency order -- like
6 emergency hearings to remove the children from the current
7 situation. One of the things that the appellate committee
8 hasn't addressed that they might consider addressing or
9 with the permission of Chief Justice Hecht addressing is
10 typically when those temporary hearings happen and you
11 have appellate grounds, the only appellate remedy -- like
12 the only appellate remedy is by mandamus. I do think that
13 the courts of appeals have consistently said you do have a
14 right to mandamus review of those orders, but I don't
15 think that anything we've talked about in this advisory
16 committee or even in the HB 7 committee was the
17 appointment of counsel to take those mandamuses, and so I
18 know that's an issue outside of the charge of this group
19 right now, but I just point it out that it is a problem
20 and it is really truly the only appellate remedy if you
21 think that a judge has improperly removed your children
22 from your home on a temporary basis.

23 CHAIRMAN BABCOCK: Okay. Any other
24 comments? Bill, what else do we need to talk about on
25 this?

1 HONORABLE BILL BOYCE: Well, we've kind of
2 covered the authority to appeal point. I guess the only
3 point left in -- that's highlighted right now in the
4 September 5th memo is just a place holder to say that
5 whatever we do here needs to be synced up with how
6 petitions for review processes are handled in the
7 circumstances. But I guess what would be helpful at this
8 juncture is some kind of indication from the committee as
9 a whole about whether this is consensus to continue down
10 the path of authority to appeal or if there's a desire to
11 go more in the direction of a certificate of right to
12 appeal, and it seems like there was discussion about the
13 wanting to get judicial -- a judicial determination with
14 respect to whether or not there's a desire or a
15 continuation of the appeal. So some guidance along that
16 line would be helpful for further discussions.

17 CHAIRMAN BABCOCK: So the two competing
18 thoughts would be to go the certificate route, where in
19 the appeal document the filing lawyer would say, "I
20 certify that I've talked to my client and they want to
21 appeal," or I've -- "I've been unable to talk to my client
22 because they live in a foreign country, and I don't know
23 how to do the international codes and, therefore, couldn't
24 reach them." If you're Orsinger, who doesn't know how to
25 dial to Mexico apparently.

1 So that would be one way to do it, and then
2 the other would be after judgment -- I assume, Justice
3 Christopher, after judgment there would be a hearing while
4 the trial court still had plenary power where the lawyer
5 comes down and says, "I can't get a hold of my client" or
6 "I can get hold of them and they don't want to appeal," or
7 "I got hold of my client and they very much want to
8 appeal, and that's fine, appoint appellate counsel for
9 them, but I'm out." In any event, all of those situations
10 the trial lawyer would be -- judge says, "Okay, you're
11 out. I find that you've done a good" -- "you've, you
12 know, done a good job trying to find the person. You
13 can't find them, I accept that and so no appeal, and
14 you're off the hook." Are those the two competing ideas
15 in broad form?

16 MR. JACKSON: Well --

17 CHAIRMAN BABCOCK: David.

18 MR. JACKSON: I think added to the hearing
19 aspect, a hearing would put everyone on the same page as
20 to whether the court reporter is required to start working
21 on the reporter's record or not, so that would be helpful
22 to get everybody on the same page about whether that's
23 going to happen or not going to happen.

24 CHAIRMAN BABCOCK: Well, if the trial judge
25 at the hearing says, "I accept the fact you can't find the

1 client and, therefore, no appeal," or "I accept the fact
2 that you've talked to your client and they don't want to
3 appeal," the court reporter is off the hook. So the court
4 reporter is only on the hook if the lawyer says, "I talked
5 to my client, they want to appeal, please appoint
6 appellate counsel. And, court reporter, you know you've
7 got to get the work."

8 MR. JACKSON: And everybody knows that day.

9 CHAIRMAN BABCOCK: Everybody knows that day.
10 Richard Orsinger.

11 MR. ORSINGER: As an afterthought, the trial
12 lawyer may also want to file a motion to withdraw or for
13 permission to be -- to have the appointment terminated or
14 something like that in conjunction with this appellate
15 hearing, because I think there does need to be an official
16 end to responsibilities, and it should come from the
17 judge, not just by the playing out of the appellate
18 timetable with no notice being filed. So just as an
19 afterthought, we might expect these lawyers also to file a
20 notice -- motion to withdraw or motion to terminate the
21 appointment.

22 CHAIRMAN BABCOCK: What about the timing of
23 the hearing? Does it happen after judgment or after
24 ruling? Where does it come in the -- Justice Christopher,
25 where would you anticipate this hearing happening? When

1 would it happen?

2 HONORABLE TRACY CHRISTOPHER: Well, I think
3 it would happen on the day of trial. I mean, most
4 transcripts that I review, the judge makes the decision at
5 the day of trial. You know, at the end. Sometimes not,
6 so that would be a little more complicated.

7 CHAIRMAN BABCOCK: Well, not only that, but
8 if the -- if the appointed lawyer's client is not there,
9 they're going to need some time to either try to find them
10 if they can or to communicate what the ruling was.

11 HONORABLE TRACY CHRISTOPHER: Yeah, true.

12 CHAIRMAN BABCOCK: And do you want to
13 appeal.

14 HONORABLE TRACY CHRISTOPHER: Although, I
15 mean, if the -- if the -- if the parent isn't there and
16 we're talking about I tried to get hold of the parent and
17 I can't get a hold of the parent, I'm not really sure
18 having more time to try and get a hold of the parent and
19 say "I can't get hold of the parent" is going to lead us
20 to anything. And then with the parent that they've
21 actually talked to and said, you know, show up for trial
22 and the parent says to them, "I'm not interested, I don't
23 care, I don't want to be there," then, you know, to me the
24 trial attorney can say, "Well, if you lose, do you want to
25 appeal," and, you know, the answer will be "no." But I

1 mean, I -- because that's what you tell your client. If
2 you don't show up for trial, you're going to lose. You're
3 going to lose your rights to your child. I mean, that,
4 you know, is included as part of your trial judge -- your
5 trial attorney advice.

6 CHAIRMAN BABCOCK: So you --

7 HONORABLE TRACY CHRISTOPHER: I think you
8 could do it at the time, but -- and that would, you know,
9 streamline things for everybody, but if -- if an attorney
10 wanted just a few more days to double check then, you
11 know, it seems like that's useful, too.

12 CHAIRMAN BABCOCK: Well, in the situation
13 where the trial judge says, "Hey, this is complicated, I
14 need a couple of days to think about it," then under the
15 hearing model he would have to have people come back in --

16 HONORABLE TRACY CHRISTOPHER: Right, he
17 would.

18 CHAIRMAN BABCOCK: -- and say, "Okay, here's
19 my ruling and I'm terminating the child."

20 HONORABLE TRACY CHRISTOPHER: Right.

21 CHAIRMAN BABCOCK: And at that point the
22 lawyer stands up and says, "Hey, I can't get a hold of my
23 client, I've tried really hard, and so discharge me." And
24 the trial judge says, "Okay, no appeal, you're
25 discharged." That's it.

1 HONORABLE TRACY CHRISTOPHER: Right. It
2 will be more work for the trial judges to require that
3 second -- and for the lawyers to come in the second time,
4 but I think it's important.

5 CHAIRMAN BABCOCK: Yeah, there's no avoiding
6 it, I wouldn't think.

7 HONORABLE TRACY CHRISTOPHER: No.

8 CHAIRMAN BABCOCK: Okay. Yeah, Pam.

9 MS. BARON: But when you do have a parent
10 there, and they --

11 CHAIRMAN BABCOCK: Yeah.

12 MS. BARON: -- clearly indicated to the
13 attorney that they do want to appeal, you shouldn't have
14 to go through this hoop. You shouldn't require it in that
15 situation.

16 CHAIRMAN BABCOCK: Harvey.

17 HONORABLE HARVEY BROWN: I think it should
18 be on or before the judgment, because that gives the
19 person some right also to go think about it. The parent
20 may think immediately yes, I want to appeal, but may out
21 of reflection say no, or vice versa. It could be done on
22 the date of the appeal, using on or -- I mean, day of
23 verdict, but this would give a little more time for the
24 person to reflect on an important decision.

25 CHAIRMAN BABCOCK: Okay. Richard, you're

1 the one that created this whole mess.

2 MR. ORSINGER: You know, it was really my
3 friends, not me.

4 CHAIRMAN BABCOCK: Oh, really. You have
5 special little friends? Professor Carlson.

6 PROFESSOR CARLSON: Yeah, another question.

7 CHAIRMAN BABCOCK: Speak up.

8 PROFESSOR CARLSON: If the parent was served
9 by publication, because we don't know where they are, does
10 the Family Code have anything that is -- that would
11 override Rule 244 and give the defendant two years to file
12 a motion for a new trial, or does this legislative
13 provision for appeal negate that?

14 MR. ORSINGER: I know the answer as far as
15 divorce, but not as far as parent-child issues. I don't
16 know.

17 HONORABLE TOM GRAY: Six months.

18 MR. ORSINGER: Six months?

19 HONORABLE TOM GRAY: Six months. You can
20 file a writ of habeas corpus in six months, or you can
21 file your restricted appeal, but it is, I believe, for all
22 purposes final, final, after six months.

23 MR. ORSINGER: Well, yeah, I think that
24 Elaine's -- was talking about a two-year extended motion
25 for new trial deadline for citation by publication, is

1 what it is for a divorce.

2 PROFESSOR CARLSON: I guess that doesn't --
3 that doesn't apply to an accelerated appeal, though,
4 right? I guess that's how that works.

5 MR. ORSINGER: I think I'm going to have to
6 get a copy of the Family Code to answer your question. I
7 just don't know off the top of my head whether -- oddly
8 enough the citation by publication rules I think that
9 govern parent-child issues are the ones that are stated in
10 the earlier part of the Family Code relating to husband
11 and wife, but I need to pull that out and read it. I'll
12 try to do that on my phone this morning.

13 CHAIRMAN BABCOCK: Yeah, is there a
14 consensus about certificate versus hearing? You want to
15 have a vote? It's early I know, but --

16 MR. LEVY: I'll move for certificate.

17 CHAIRMAN BABCOCK: Go ahead.

18 MR. LEVY: I would propose certificate, so
19 if you want to --

20 CHAIRMAN BABCOCK: Okay. So Robert moves
21 certificate. How many people are in favor of certificate?
22 Was there a bark on the phone, Lisa?

23 MS. HOBBS: There was. It's Lisa, and I'll
24 just say that I prefer the certificate over a hearing.

25 CHAIRMAN BABCOCK: Okay. And so now your

1 certificate people should not vote. How many people would
2 suggest a hearing?

3 The results of the vote are 9 for
4 certificate and 15 for a hearing. So there you go.

5 HONORABLE TOM GRAY: Can we talk about when
6 that hearing occurs, because it affects the timetable?

7 CHAIRMAN BABCOCK: Sure.

8 HONORABLE TOM GRAY: Because you've got 20
9 days to file your notice of appeal after the judgment is
10 signed, and if you're going to have to have a hearing in
11 that time, then it's going to be tough.

12 CHAIRMAN BABCOCK: Yeah. Well, that's what
13 Justice Christopher was addressing I think before about --
14 about you have it on the day of trial when the judge
15 issues the ruling, but there could be some other time I
16 suppose. Do you have a thought about when it ought to be?

17 HONORABLE TOM GRAY: Well, I'd be -- if
18 you're going to require a hearing, I think it needs to be
19 in conjunction with the signing of the judgment or the
20 pronouncement of what the judgment is going to be. As
21 Judge Brown was talking about, the problem -- I mean, in
22 criminal cases it's simple because the sentencing is done
23 in the presence of the defendant, and whether it's the
24 certificate or if it was this type of hearing, it's all
25 going to be there while they're there. Everybody is, in

1 theory, there on that day, whether they wanted to be there
2 or chose to be absent, and you're really messing with the
3 timetable, the ability to timely file the notice of appeal
4 if you're waiting for that hearing.

5 CHAIRMAN BABCOCK: Right.
6 Justice Christopher.

7 HONORABLE TRACY CHRISTOPHER: Well, I mean,
8 if it happens that, you know, the judge says, "I'm
9 terminating the parental rights" at the end of trial and
10 then they have the hearing right then, and then the
11 judgment gets entered after CPS sends in the form of the
12 judgment, you know, a week, two weeks later. If the judge
13 says, "I'm going to take it under advisement," then you
14 can either have the hearing then or you just have to put
15 in the rule that he can't sign the judgment until he's had
16 the hearing. So that -- and then there would be no
17 problem with the appellate timetables since it doesn't
18 start until the judgment.

19 CHAIRMAN BABCOCK: Okay. Richard Orsinger.

20 MR. ORSINGER: I just wanted to put into the
21 record and tell Elaine that I found Family Code, section
22 102.010, for citation by publication in SAPCRs, suits
23 affecting the parent-child relationship. I haven't found
24 anything here about an extended timetable, so I will keep
25 looking.

1 CHAIRMAN BABCOCK: Okay. Well, Bill, does
2 that give you guidance, 17 to 9?

3 HONORABLE BILL BOYCE: I understand us to be
4 going down the pathway of fleshing out what the hearing
5 process is going to be, what it's going to look like, and
6 then I think the offshoots of that are going to be once
7 you have a hearing and it results in the certificate of
8 some kind, then we'll have a decision tree about handling
9 the inevitable late appeals after the certificate and the
10 inevitable contentions that somebody will appear on scene
11 who was determined to be unfindable later on and whether
12 or not there's going to be some right to collateral attack
13 on any of this.

14 HONORABLE TOM GRAY: I didn't think there
15 was a certificate involved in the hearing process.

16 CHAIRMAN BABCOCK: Right.

17 HONORABLE BILL BOYCE: Okay.

18 CHAIRMAN BABCOCK: Yeah. That's what I
19 thought, too.

20 HONORABLE BILL BOYCE: All right.

21 MS. BARON: Our decision tree is growing
22 many branches.

23 HONORABLE BILL BOYCE: Just for my clarity
24 then, we're talking about a hearing that results in a
25 determination, and that's it?

1 CHAIRMAN BABCOCK: Yeah.

2 HONORABLE BILL BOYCE: Okay.

3 CHAIRMAN BABCOCK: Justice Christopher.

4 HONORABLE TRACY CHRISTOPHER: Well, I was
5 actually anticipating the hearing and the written
6 certificate that says "permission to appeal, appellate
7 lawyer appointed" --

8 CHAIRMAN BABCOCK: Yeah, yeah, from the
9 judge.

10 HONORABLE TRACY CHRISTOPHER: -- with him
11 there and trial judge discharged. I mean, I was
12 anticipating something that looks like that, a
13 certificate, but my understanding of the other certificate
14 that we were talking about and that people voted on was
15 just the lawyer's own certificate without court
16 involvement. So I still see a certificate after the
17 hearing process.

18 HONORABLE BILL BOYCE: And to be -- to be
19 clear of what I understand us to be talking about is a
20 certificate of a right to appeal or something signed by
21 the judge.

22 HONORABLE TRACY CHRISTOPHER: Right. That's
23 what I would anticipate.

24 HONORABLE BILL BOYCE: As a result of the
25 hearing.

1 CHAIRMAN BABCOCK: Right.

2 HONORABLE BILL BOYCE: All right.

3 CHAIRMAN BABCOCK: Okay. Richard Orsinger.

4 MR. ORSINGER: So I would envision that what
5 we would get is a court order, and the court order would
6 either instruct the court-appointed trial lawyer to file
7 the notice of appeal and handle the appeal or relieve the
8 trial lawyer and appoint a new appellate lawyer to file a
9 notice of appeal and conduct the appeal or say the court
10 finds that the client has not expressed a desire to appeal
11 and, therefore, the trial lawyer is relieved and no
12 appellate lawyer is appointed, and then after a period of
13 time the case dies due to lack of appeal. Levi has got
14 his hand up over there, Chip.

15 CHAIRMAN BABCOCK: Yeah, Levi.

16 HONORABLE LEVI BENTON: So Richard and Tracy
17 both addressed this point of the trial lawyer being
18 discharged during the hearing. It's not my area of law,
19 and I don't know anything about it, but, you know, in a
20 civil case a lawyer couldn't be discharged or permitted to
21 withdraw without notice to the client. So how do you have
22 this hearing and realtime have the trial judge say to the
23 lawyer, "You're discharged," even if an appellate lawyer
24 is being appointed when there's been no notice to the
25 client that lawyer Richard is no longer going to be your

1 lawyer.

2 CHAIRMAN BABCOCK: Yeah, Richard.

3 MR. ORSINGER: If this was simple, we would
4 have found the solution already.

5 HONORABLE LEVI BENTON: Well, listen, you
6 made my year. I one-upped Richard Orsinger. I stuffed
7 him.

8 MR. ORSINGER: Great, and we still have a
9 couple of months.

10 CHAIRMAN BABCOCK: Robert, and then Justice
11 Gray.

12 MR. LEVY: I don't know this field as well,
13 but in the criminal context, I presume that an
14 appointment, that indigent appointment for a trial, lasts
15 through that trial, and there's no obligation to carry
16 forward an appeal on behalf of the defendant.

17 MR. ORSINGER: There is. I think there is
18 an obligation to carry forward with the appeal if you're
19 appointed in trial.

20 MR. LEVY: Okay.

21 HONORABLE LEVI BENTON: And the
22 defendant there in the courtroom --

23 MR. LEVY: Right.

24 HONORABLE LEVI BENTON: -- probably gets
25 notice that Robert lawyer is going to be discharged --

1 MR. LEVY: No, Richard, lawyer Richard.

2 HONORABLE LEVI BENTON: Oh, lawyer Richard
3 is going to be discharged after this judgment convicting
4 you and that lawyer Lonny is handling your appeal.

5 CHAIRMAN BABCOCK: Right.

6 MR. ORSINGER: You know, the fact that the
7 criminal defendant is present during the trial either
8 voluntarily or involuntarily, you get a lot of notice
9 problems solved by just saying things in front of the
10 defendant.

11 HONORABLE LEVI BENTON: Right.

12 MR. ORSINGER: But if you have an absent
13 parent, none of that works. You don't have the waivers
14 for a plea. You're not standing in front of the judge,
15 and so I think we need to take into account that a
16 significant number of these cases there's no parent in the
17 courtroom, and we've got to figure out what to do. But if
18 you start building in a lot of delay for time to give
19 notices to people that you don't know how to contact, then
20 we're crashing into these accelerated deadlines that we
21 have for all of these actions that have to be taken.

22 CHAIRMAN BABCOCK: I think that the problem,
23 Levi, is for the situation where the appointed lawyer has
24 not been able to get a hold of the client. That's
25 resulting in these phantom appeals that Richard is worried

1 about.

2 HONORABLE LEVI BENTON: But even in civil
3 cases, Rule 12 --

4 CHAIRMAN BABCOCK: Yeah.

5 HONORABLE LEVI BENTON: -- you still have to
6 make a record that you sent the certified letter, file the
7 green card with the court or you've got to file some
8 record of the effort made to communicate, but, again, I
9 don't -- I don't know anything about the accelerated
10 appeals. I can see it's a problem. I don't know what the
11 solution is, and --

12 CHAIRMAN BABCOCK : Yeah.

13 HONORABLE TOM GRAY: There is a -- I'm
14 sorry.

15 CHAIRMAN BABCOCK: Yeah, Justice Gray, and
16 then Justice Christopher.

17 HONORABLE TOM GRAY: There is a practical
18 problem if you try to discharge them at that hearing,
19 because the right to appeal will still, under the rule,
20 still exist, and they would be -- if they're appointed
21 counsel, deprived of the counsel during a critical stage
22 of the proceeding, and so that counsel probably needs to
23 be discharged effective at the expiration of the right to
24 appeal timetable.

25 CHAIRMAN BABCOCK: Justice Christopher.

1 HONORABLE TRACY CHRISTOPHER: Well, and I
2 just wanted to point out that parental termination cases
3 have a deadline to get a final judgment, too, so it's not
4 just appellate deadlines.

5 CHAIRMAN BABCOCK: Yeah.

6 HONORABLE TRACY CHRISTOPHER: There is a
7 hard and fast deadline to get that done, too, so it has to
8 be on a pretty accelerated basis. You can't take the time
9 to do a, you know, certified mail to your missing client
10 that has already told you "I'm not interested in this
11 case," if you've talked to him.

12 CHAIRMAN BABCOCK: Yep. Justice Gray, your
13 problem that you're talking about, we've got three
14 situations. One, the appointed lawyer has been in contact
15 with the client and says they don't want to appeal. So
16 the judge says, "Okay, I'll accept your representation,
17 you're discharged."

18 Second, "I've talked to the client and they
19 do want to appeal." All right. "File your notice of
20 appeal and then you're discharged and I'll appoint an
21 appellate lawyer." The problem is the third situation
22 where the lawyer comes in and says, "I've checked
23 Facebook, I've done Snapchat, I've tweeted, I've done all
24 of these things. I sent the -- I have the quaint evidence
25 of a returned green card, or an unreturned green card" and

1 so the judge says, "Okay, no appeal. You're discharged."

2 HONORABLE TOM GRAY: And I think you
3 could -- depending on what judges were reviewing it, would
4 be potentially subject to a deprivation of due process
5 because you did not have counsel during a critical stage
6 of the proceeding. And that would be the tied --

7 MR. ORSINGER: Can I ask how that would
8 arise, because the appeal would have been forfeited, so
9 they would be conducting an out of time appeal, and
10 there's no habeas corpus collateral attack on termination.

11 HONORABLE TOM GRAY: Well, actually, there
12 is, but that's another story. It would be effective 20
13 days.

14 CHAIRMAN BABCOCK: Twice in one hour.

15 MR. ORSINGER: Wow.

16 HONORABLE TOM GRAY: You've got the 20 days
17 in the -- between the date that that judgment is entered
18 that discharges your client and terminates your parental
19 rights to file a notice of appeal.

20 MR. ORSINGER: Okay.

21 HONORABLE TOM GRAY: I don't have an
22 attorney now. I find out about the judgment, and I say,
23 "Whoa, wait, I want to file a notice of appeal. I don't
24 have an attorney." And so, yes, now, you're -- you're
25 collaterally attacking that by being after the fact and

1 saying, "I was deprived due process because I did not have
2 an attorney during the critical stage of the proceeding
3 when I could have filed a notice of appeal."

4 MR. ORSINGER: So how does the case get into
5 your court? Because it's not going to be on direct
6 appeal. That was waived because the notice wasn't timely
7 filed. So if they don't file a direct appeal complaining
8 that they were denied a direct appeal, then they would
9 have to file a collateral attack. And you said there's
10 another story, but are you saying there is a collateral
11 attack on a termination decree where you failed to appeal?

12 HONORABLE TOM GRAY: Well, I think there is.
13 You could either do it by mandamus or by writ, but the
14 writ is only good for six months, but if it's --

15 MR. ORSINGER: You're talking about a direct
16 appeal for a default judgment? Or a writ of what --

17 HONORABLE TOM GRAY: Writ of habeas corpus.

18 MR. ORSINGER: A writ of habeas corpus.
19 Okay. But this is not the parent who is in the custody of
20 the state, so we don't have a writ of habeas corpus.

21 HONORABLE TOM GRAY: The child is in the
22 custody of the state or has been removed pursuant to a
23 judicial order.

24 MR. ORSINGER: We'll have to discuss that
25 over the break or lunch. That's --

1 HONORABLE TOM GRAY: We need that Family
2 Code here. That's where that provision is.

3 CHAIRMAN BABCOCK: Apparently Richard is not
4 conceding that you've one-upped him on this one.

5 HONORABLE TOM GRAY: I'm not either. I'm
6 not attempting to one up him. All I'm saying is that
7 there's a problem because there's a time period in there
8 when the parent can do something if they disagree with the
9 court's order that they are entitled to -- or not entitled
10 to an appeal and they don't have an attorney.

11 CHAIRMAN BABCOCK: Got it. Bill, it seems
12 to me like we've pretty thoroughly discussed this issue,
13 but if you need more, throw it out.

14 HONORABLE BILL BOYCE: I guess I'm not sure
15 I understand if there is a consensus on the timing of the
16 hearing.

17 CHAIRMAN BABCOCK: Okay. Timing of the
18 hearing. We've got judge -- Justice Christopher says that
19 the hearing ought to be at the time the decision is
20 announced, be it at the conclusion of the trial or at some
21 later time. I haven't heard any other proposals for when
22 the hearing ought to be. Anybody else got suggestions on
23 when the hearing should be?

24 MS. HOBBS: This is Lisa. I don't propose
25 going through this realm, but if you're going to do it and

1 it's not practical or feasible for it to happen at the
2 time of judgment, which is what I would agree with
3 Judge Christopher on that point, if we're going to go this
4 route, but then I would say within five days of the
5 signing of the judgment.

6 CHAIRMAN BABCOCK: Not later than five days
7 after the judgment is entered. Richard Orsinger.

8 MS. HOBBS: Yeah, that was my position.

9 MR. ORSINGER: Yeah, I would say no later
10 than the day that the notice of appeal is due. That would
11 be the outside time I think for this hearing.

12 CHAIRMAN BABCOCK: Yeah, but --

13 MR. ORSINGER: I'm not recommending it. I'm
14 just saying that that ought to be a limit, and I think
15 that's -- I think that's 20 days.

16 CHAIRMAN BABCOCK: It is too late though.
17 Justice Christopher.

18 HONORABLE TRACY CHRISTOPHER: I think it
19 needs to be either when the decision is announced or entry
20 of judgment.

21 CHAIRMAN BABCOCK: Yeah, Judge Christopher,
22 I don't know if you could hear her, Lisa, said either when
23 the decision is announced or the entry of judgment,
24 whichever is later. Well, I guess the judgment would be
25 the last thing anyway, so --

1 HONORABLE TOM GRAY: When you say --

2 MS. HOBBS: I would -- I mean, I don't
3 disagree with Judge Christopher. And again, I'm against
4 all of this having the judge involved only because judges
5 don't want appeals of their decisions, so I think the
6 primary concern of mine is that judges are going to be
7 like, no, but I think she's not proposing anything
8 unreasonable. I just think Richard's comment about it
9 being up until the time of notice of appeal is actually
10 impractical for those of us who do this, and I think it
11 needs to be very short.

12 And if I could just say something maybe just
13 for those members of the Supreme Court who are present,
14 keep in mind that the reason why we have all of these
15 deadlines, whether it's the trial court's deadlines or the
16 court of appeal's deadlines is 30 days in the life of a
17 child is a big deal, and 90 days in the life of a child is
18 a big deal, and 180 days in the life of a child is a big
19 deal.

20 We're looking for stability in the life of
21 these children, and I know it sucks from the judiciary
22 standpoint and even from the lawyer's standpoint about how
23 quickly these move, but the reason why is because we're
24 dealing with eight-year-olds who need stability in their
25 life. And I think whatever we do as a committee or

1 whatever the Court chooses to do to implement our
2 recommendations, I think it is critical, critical,
3 critical that we remember that what we're looking for --
4 like I know we have constitutional rights involved here,
5 and I'm more of a pro-parent person than probably half
6 that room, but I also think we can't lose sight of the
7 fact that litigation to us being resolved in 180 days
8 seems like no big deal. Stability in the life of a child
9 about where they're supposed to be or going to be, 180
10 days is like a super big thing.

11 So I constantly remind myself to get out of
12 my appellate lawyer mode about what seems reasonable to me
13 as an appellate lawyer versus what creates stability for
14 these children. And that's a policy issue that's beyond
15 my pay grade and while I'll never be a policy person, but
16 I think it's worth reiterating to the Court that that's an
17 important thing that you've always got to keep in mind.

18 CHAIRMAN BABCOCK: Yeah. I think those are
19 good points, Lisa, and we're now going to take a vote on
20 everybody in the room who is anti-parent. Justice
21 Christopher.

22 HONORABLE TRACY CHRISTOPHER: I would just
23 like to say for the record that I do not think trial
24 judges will not -- will -- will waive the right to appeal
25 when it's inappropriate. We already have this in criminal

1 cases, and they don't do that. So I -- I am pushing back
2 on that statement of yours, for the record, but I do --

3 MS. HOBBS: And I appreciate that, Judge
4 Christopher.

5 HONORABLE TRACY CHRISTOPHER: But I do
6 appreciate that we do have to get these things timely, and
7 while we're at it, let's eliminate en banc review. That's
8 a long story that I'll tell you all later, privately.

9 CHAIRMAN BABCOCK: We're all throwing rocks
10 out here. Yeah. Lisa, as I was listening to you it
11 struck me that the hearing approach would advance the
12 interest that you're talking about, because it would
13 eliminate this -- this business of a written certificate
14 by a lawyer that somebody could then go in and
15 collaterally attack later because, "Well, you did not try
16 to get hold of me," but anyway, that's neither here nor
17 there. Justice Gray.

18 MS. HOBBS: That's also a fair point. Let's
19 all recognize that these are very hard issues with
20 competing interests, and I'm glad I'm not the
21 Supreme Court who has to actually decide on what the right
22 rule is, because it's complicated.

23 HONORABLE TOM GRAY: There is another
24 complicating factor that Bill is going to have to factor
25 into this whole process somehow or another. Remember that

1 you've still got a right to file a motion for new trial
2 that is running that cannot begin to run until the
3 judgment is signed, and then you've got your 20 days to
4 file your notice of appeal, but you've got 30 days to file
5 your motion for new trial, and it may or may not affect
6 the judgment, but I mean, it's -- it gets gnarly.

7 CHAIRMAN BABCOCK: Yeah. So,
8 Justice Christopher, do you want to formulate for the
9 purposes of a vote a -- a proposal on timing when the time
10 for this hearing ought to be?

11 HONORABLE TRACY CHRISTOPHER: Well, I
12 believe that the time for the hearing should be at the
13 time of the oral rendition by the judge of or the receipt
14 of the jury verdict or at the time of the actual signing
15 of the judgment, which would require a second hearing.

16 CHAIRMAN BABCOCK: Yeah. It's either-or.

17 HONORABLE TRACY CHRISTOPHER: Right.

18 CHAIRMAN BABCOCK: Okay. So that's the
19 proposal. How many people think that that's the right way
20 to go on timing? If you do, raise your hand.

21 How many people think that is not the right
22 way to go on timing? So 20 to 2. Justice Christopher's
23 thought on timing is -- seems to be the consensus of the
24 committee. Bill, what else -- what else can we do to help
25 you at this point?

1 HONORABLE BILL BOYCE: We cannot talk about
2 en banc right now.

3 HONORABLE TRACY CHRISTOPHER: Yes, yes,
4 please, let's talk about it.

5 HONORABLE BILL BOYCE: I think that's --

6 HONORABLE TRACY CHRISTOPHER: It's not
7 possible to do an en banc hearing in 180 days, and so, you
8 know, we should eliminate en banc.

9 CHAIRMAN BABCOCK: Okay. So en banc is off
10 the table for discussion. We'll take our morning break
11 and be back at 11:05.

12 (Recess from 10:50 a.m. to 11:10 a.m.)

13 CHAIRMAN BABCOCK: All right, let's get back
14 to it, everybody. We're back on the record, and we have
15 discussed as much as we can the suits affecting the
16 parent-child relationship, which is agenda item one. And,
17 Bill, agenda item two, will come back next time as well.

18 HONORABLE BILL BOYCE: Yes.

19 CHAIRMAN BABCOCK: So agenda item two, out
20 of time appeals in parental rights termination cases, is
21 dependent upon what it looks like coming out of this
22 meeting on the first agenda item. So we caught Richard
23 offguard here. He thought he had plenty of time.

24 MR. ORSINGER: I'm ready to go. Yes, sir.

25 CHAIRMAN BABCOCK: So we'll move to

1 protective order registry forms.

2 MR. ORSINGER: Okay. So Senate Bill 325,
3 which passed the last Legislature, they call Monica's Law,
4 is instruction from the Legislature to the Office of Court
5 Administration to establish an online registry for the
6 posting of -- or for processing and posting of protective
7 orders, and as presently conceived, it would be elected
8 with the victim or the target of the violence whether less
9 or more or no public information is made available, but
10 the database needs to be there for law enforcement as well
11 as for the public.

12 And so OCA is -- it's their responsibility.
13 They have staff. There may even be some federal money
14 available perhaps to do this process, but it's just
15 getting started. The deadline is next summer, and so
16 they've got to move quickly, but this is coming to this
17 committee for information and perhaps, you know,
18 discussion, but not input entirely yet because we don't
19 have the details worked out. But in the process I
20 realized that this protective order information is needed
21 not only for the registry to post some information about
22 perpetrators of violence, but there's also it's important
23 to the criminal reporting system at the state level and
24 the federal system and the registry that needs to be
25 checked in connection with a licensed vendor sale of

1 firearms.

2 And so what probably we need to do is not
3 only have the database designed and implemented and a
4 website, a web portal, put there by OCA, but we also need
5 to design an intake form to capture the information that's
6 going to go into the protective order registry, but also
7 the criminal database and the federal database and with
8 sufficient information to check off the data that goes to
9 the registry for those who are purchasing guns.

10 So the tabs that you have is a simple
11 summary, if you will, of the project, and then behind that
12 is a summary of Senate Bill 325. That was Tab C, I think,
13 and then Tab D is the highlights of the registry as
14 conceived by Rule 325; and then Tab E is an indication of
15 the databases that would need to capture this information
16 or should capture this information, although not mandated
17 by the Senate Bill; and Tab F is the so-called Brady
18 worksheet, which is information that the federal law
19 requires be evaluated in selling firearms; and then Tab G
20 is the Texas Criminal Information Center, TCIC protective
21 order data entry form, which is a form promulgated by the
22 department of public services -- Department of Public
23 Safety, but is not required, I believe, at this time.

24 And so what I did was reached out to OCA,
25 and I met Kimberly Piechowiak, who is with us here today.

1 Kimberly spent over 20 years prosecuting family violence
2 cases in Bexar County and then has been involved in
3 training and dissemination of family violence crimes
4 against women information to a variety of places,
5 including in municipal courts, including the law
6 enforcement agencies, and whatnot. And Kimberly has --
7 her job is a domestic violence training attorney for the
8 Office of Court Administration; and she has been out there
9 on the field talking to people, trying to tell them what
10 the law requires and hearing what they have to say back to
11 her; and so Kimberly, I'm very happy is able to come
12 today; and she's going to talk to us a little bit about
13 the OCA project, how they're going to undertake this
14 mission to get it done by the December 2020 and the
15 possibility that in the process of getting information and
16 the database and the linkages in place for the registry
17 for protective orders, that we can capture the information
18 that we need for DPS and for federal purposes. So,
19 Kimberly, welcome, and please go ahead.

20 MS. PIECHOWIAK: Thank you so much. I
21 really appreciate y'all having me today.

22 MR. ORSINGER: Speak up, would you?

23 CHAIRMAN BABCOCK: Take the mic over there.

24 MS. PIECHOWIAK: I'm usually not told I'm
25 not loud enough, but I will, since we have someone taking

1 stuff down and on the phone. All right. How is that?

2 Can you hear me?

3 MR. LEVY: Yes.

4 MS. PIECHOWIAK: Okay. Very good. Again,
5 my name is Kimberly Piechowiak, and I'm so happy to be
6 here. Thank you so much for letting me come and talk
7 about this today. The registry itself, we are in the
8 very, very beginning stages of planning for this. We've
9 had our kick-off meeting within OCA. We've also met with
10 one of the authors of the bill, Representative Landgraf,
11 and also the mother of -- I mean the father of the woman
12 who was killed, Monica Deming, in the Midland-Odessa area;
13 and based upon that, her father, who is retired law
14 enforcement, and the family had talked to the
15 representative about what can we do to see if there's a
16 way that -- at least there's a possibility that victims --
17 not victims, but potential victims can check in a database
18 to see if this is a person that has a protective order,
19 because he had protective orders against him, but she
20 didn't know that.

21 So, anyway, we met with him the other day,
22 so we're in the process of getting everything started.
23 Our IT department is. We are building the database
24 in-house, so we are having a fair amount of control about
25 how that's going to work, but I want to make sure to note

1 that this is a database and a registry that is going to
2 run parallel to the existing databases that are --
3 protective orders are currently reported to; and so even
4 though this is a separate type of issue, what we
5 definitely want to kind of look at is being able to use
6 this as an opportunity with the forms that Mr. Orsinger
7 was talking about, to kind of close some gaps that the
8 ladies to my right are way, way, way familiar with of
9 problems that we've had with dealing with getting
10 protective orders properly entered into TCIC, which feeds
11 up into the national systems, so that a person is flagged
12 that they cannot have a firearm. But there's lots of gaps
13 in how that happens, mostly because there is not really a
14 mandated procedure on how that needs to be kind of set out
15 for the courts to be able to make sure that information is
16 going to the right place at the right time.

17 There is a form, again, promulgated by DPS,
18 that has a ton of information on it, and you have an
19 example of it. It's kind of a nightmare how it's written,
20 but that's okay, but it's also not mandated. Most
21 jurisdictions use it, but it's not consistent across the
22 board, and some jurisdictions actually change up that form
23 a little bit, and sometimes people don't use it at all,
24 and I know that there are times when there's no form that
25 is filled out, and so then we're having folks at the

1 police departments who do the data entry for TCIC having
2 to like dig through protective orders and find this
3 information. And so one of the biggest issues is making
4 sure that whether or not someone is legally prohibited
5 from having a firearm, whether or not that is actually
6 plain enough on the current form, and we'll talk about
7 that here in a minute.

8 First of all, the registry, there is a
9 public facing component, and then there is a law
10 enforcement justice personnel facing component. There is
11 very limited information that the public would be able to
12 access on this, and they would need to be able to search
13 it by just a couple of different things, maybe a name and
14 a case number, things like that. However, the information
15 that is going to be available to them is only available
16 because the victim of that incident, the complainant or
17 the applicant, has actively affirmatively given permission
18 for that to go into that public facing registry; and that
19 is for obviously victim safety, in small towns, but not
20 necessarily in small towns.

21 If -- I mean, my last name is Piechowiak.
22 There's three of us in Bexar County. It's me, my husband,
23 and my kid, and so if, you know, Piechowiak, Daniel, has a
24 protective order against him it's pretty easy to figure
25 out who is the victim in that case, and so -- or at least

1 the applicant in that case, and so he we have those kinds
2 of issues, and we don't want to make -- we wanted to make
3 sure that the victims are not -- this is not another
4 obstacle for them to try to seek assistance from the
5 system, and so that's kind of why that's there.

6 So what the result of that is going to be,
7 that there is going to be not complete records on every
8 single protective order is going to be available to the
9 public, but every single protective order after
10 September 1 of 2020 will be entered into this registry for
11 purposes of -- for law enforcement, for prosecutors, who
12 currently don't have direct access to this information.

13 What I really, really like most about it is
14 it will include an image of the actual order, and if
15 anyone here has ever actually seen a hit off of TCIC, it's
16 horrible to read. It makes absolutely no sense and
17 oftentimes it's incomplete. So this would be something
18 that law enforcement would be able to check when they're
19 in their car, and let's say they're -- they need to make a
20 traffic stop, and they will check to see like, okay, is
21 there a protective order on this person and what does that
22 order actually say, as opposed to just some of the kind of
23 sporadic information that's currently in TCIC. The
24 applications will be also entered into the system, but
25 just very, very little information, not going to be

1 accessible to the public.

2 Magistrates orders for emergency protection
3 will be entered into the system, and those along with
4 ex parte orders, temporary ex parte orders -- protective
5 orders, will not be accessible to the public either. So
6 we have a very kind of a narrow classification of the
7 types of orders that would be eligible to be accessible by
8 the public, because the great majority of protective
9 orders in Texas are magistrates' orders of emergency
10 protection, usually about 60 percent, and so there's still
11 going to be a bunch that are not out there, but because
12 they're -- the due process that is given is a little bit
13 more minimal. In magistrates' orders, they don't want to
14 have it out there for the public to see, which I totally
15 understand, but that will be, however, accessible to law
16 enforcement, prosecutors, other users, potentially judges.
17 We haven't a hundred percent figured out -- the bill
18 doesn't say so directly, and my thought on that is most
19 judges are going to have -- their clerk is going to have
20 access to it because they're going to be the ones actually
21 doing the data entry and can actually pull up that
22 information for their judge. We have a few, like JPs, and
23 muni court judges in very small jurisdiction that maybe
24 they also act as their own clerk, and so that may be an
25 exception, but we're still kind of on the seeing where we

1 are on that.

2 The -- let me see here. I want to make sure
3 I've gotten everything for the highlights here. I did a
4 little handout just about the current databases. I wanted
5 to talk a little bit about the Brady Act. The Brady Act
6 is basically -- it's many, many things, but one of the
7 things it does, is the federal -- lays out the federal
8 requirements for someone to not be able to possess a
9 firearm; and so whenever something gets entered, like a
10 protective order gets entered into the system, there is
11 this little tiny, itty bitty, if you look at the
12 protective order data entry form, I would say it's
13 probably about -- it's right under the protective order
14 conditions, and it says "Brady indicator."

15 Number one, I hate how it's written because
16 it says, "No, respondent is not disqualified." It kind of
17 reminds me of, yes, we have no bananas, or "Yes, the
18 respondent is disqualified." So the yes is what says that
19 this person cannot have a firearm. The problem with this
20 Brady indicator is in 2015 the government accountability
21 office on the fed side did -- they weren't just on Texas.
22 They did it for all states. They ran all protective
23 orders that were actively in that system for like that one
24 year period of 2015, and only about 10 percent of the
25 Texas protective orders had this Brady indicator attached

1 to it.

2 While not all protective orders in Texas
3 would qualify for this federal prohibition, because it's a
4 very narrow type of protective order with narrow -- a much
5 narrower list of relationships it would cover, I guarantee
6 you it's more than 10 percent. About in 2014, we headed
7 up a project where we just -- and I harassed people in
8 this room -- wanting to know anybody that lives, breathes,
9 touches, looks at, has anything to do with protective
10 orders. We did a study, and I went and talked to people
11 in person, we did a survey, and I called people. We
12 talked to as many people as we could from the judges all
13 the way down, survivors, to law enforcement, to the poor
14 clerk at the police department that is stuck doing the
15 data entry, to clerks who are having to chase down
16 information because they want to pass this information on.

17 We were able to highlight some of the
18 problems, and some of those things have actually been
19 fixed in legislation in recent sessions, but we still have
20 some other issues. One of the groups that I talked to
21 specifically was the Texas Criminal Justice Information
22 Users Group, and these are the folks that do a lot of
23 training for the communications folks in law enforcement
24 that do the actual data entry, like dispatchers, things
25 like that; and the discussion that we had was if they

1 don't know specifically that this is -- whether or not
2 this is a Brady indicated case or not, they just enter
3 unknown; and that's where that technically 10 percent have
4 an actual Brady disqualifier attached to it. And so I --
5 it's also just to kind of give you an idea of something
6 that I think would be beneficial, that as we are looking
7 at the registry and the mandate for -- for y'all is to --
8 there's a specific form that allows the -- would allow the
9 applicant to consent to have public access or to withdraw
10 consent for public access, and that those forms would be
11 promulgated through the Supreme Court.

12 But what Mr. Orsinger and I got to talking
13 about and what we have been talking about and I have been
14 talking about with all of the people that have been having
15 issues, is if this is an opportunity to take the
16 existing -- something like the existing form, make it a
17 little more or a lot more user-friendly, but also include
18 that sample checklist that I included in -- that we
19 included in your materials that helps determine what the
20 Brady indicator actually -- the questions that needs to be
21 asked to determine if there is a Brady indicator. And
22 what I love about this, I stole it shamelessly from
23 Nebraska, but the other thing I love about it is one of
24 the premier protective order experts in Texas that worked
25 for Texas Council on Family Violence, she actually is the

1 one who gave input on this list.

2 She has now since moved to Cleveland, why
3 would she want to like go live with her husband who got
4 transferred to Cleveland, but she's a huge, huge resource
5 and a great expert on this stuff, and I love the actual
6 checklist because it has specific yes/no answers that need
7 to be figured out; and if everything is a yes on that one,
8 including the narrow definition of the relationships, was
9 there due process, was there hearing, what does it -- what
10 does this order prohibit, all of those things are a
11 determination, and then -- then that is what will -- the
12 information that would say, yes, we need to put this as a
13 Brady indicated case; and we could include something along
14 those lines in a form that -- that can be used both by law
15 enforcement for TCIC data entry purposes and also by the
16 courts to be able to make sure that all the information
17 for both the registry and the TCIC system has everything
18 it needs to have, then I think that that would streamline
19 some things, especially if we can include this Brady
20 indicator stuff because we know that there is more that
21 should not have firearms than what are indicated in the
22 system currently.

23 Mandatory would be fantastic in lots of
24 ways. Who would fill out that form is going to depend on
25 a couple of different things. What would probably be most

1 helpful is if there is a section of that form that is for
2 sure filled out by the applicant; and that's going to be
3 the same things that are in the application, addresses,
4 phone numbers, all of the information about the respondent
5 that's important to have; but there's other parts in the
6 TCIC, current TCIC data entry form that they have
7 no business filling out, things like the protective order
8 conditions.

9 I sometimes will have officers just pass
10 this to a victim at a scene and they want to apply for a
11 magistrate's order of emergency protection, and the poor
12 victim is like checking off like it's a Christmas list,
13 and that's not what this is for. It's supposed to be a
14 guide of what the actual order says so that the data entry
15 person can get it into the system, and so I think if we
16 had portions of it that were sectioned off, you know, for
17 court use only for those certain things to be done,
18 sectioned off for the applicant or their attorney or their
19 advocate to make sure that all of the pertinent
20 demographic information is in there, to get -- it gets
21 entered, I think that those things are things that are
22 potentially good to do.

23 The biggest issue right now is even though
24 we have this form promulgated by DPS, it is not mandatory.
25 In fact, there are not too many procedures about how this

1 information is gathered and forwarded that would make sure
2 that there is some consistency across the board. So
3 that's kind of what we're looking at as far as any type of
4 a form based upon -- and having the opportunity to do this
5 as part of the registry forms. Certainly we want to make
6 sure that it's included in the protective order
7 registry -- I'm sorry, protective order application kit,
8 and have the option in the actual application protective
9 order kit talk about -- about specifically explaining to
10 victims, applicants, exactly what this consent looks like,
11 what that will be, what that won't be, what the public
12 will have access to or not have access to, only if they
13 agree.

14 We know that certainly someone who is going
15 through this and they're applying at the time, they may
16 not be in any kind of condition to actually make that big
17 of a decision, but we need to make sure, and part of what
18 I will be doing is I'm helping on the subject matter
19 expert on the registry. But then I will be -- so y'all
20 will be seeing me again, lucky you -- doing the training
21 of all of the different players in this; and that's part
22 of the mandate under the bill, is for the training to
23 happen and that's probably going to be me. And so, but we
24 want to make sure that the applicants are very aware of
25 exactly what their rights are, that they are not required

1 to make it accessible to the public, but they are welcome
2 to.

3 I'm trying to think of what else
4 specifically that I missed. I'm sure there's something.
5 Does anybody have any questions, or, Mr. Orsinger, is
6 there anything that I talked about, or did I miss
7 something big?

8 MR. ORSINGER: Maybe if you could just
9 briefly explain the NCIC and the TCIC.

10 MS. PIECHOWIAK: Yes.

11 MR. ORSINGER: And then there's another --

12 CHAIRMAN BABCOCK: Hey, Richard, Rusty had
13 his hand up. Rusty, did you have a question?

14 MR. HARDIN: Yeah. I've been looking
15 through it trying to see, is there any procedure in the
16 act for removal of it, if, in fact, it was found to
17 wrongfully been granted?

18 MS. PIECHOWIAK: And that is what -- there
19 is nothing specifically in the act. That is something
20 that we are already talking about, because for sure what
21 it talks about, that it will be -- if it's vacated or if
22 it expired, that there's a note in the record. However,
23 certainly we know -- maybe sometimes they're vacated
24 because maybe an applicant came back and said we worked
25 this out, we don't want this order anymore. Still

1 probably needs to be there but showed that it was vacated
2 for that reason, but if it's vacated because, let's say,
3 the ex parte order is granted but then by the time they
4 get to the hearing the judge determines like there is not
5 enough here to do a protective order and then -- and then
6 what we were talking about, and Mr. Orsinger, on the phone
7 we were talking about this the other day, was that
8 specifically in the order to say "and to order removal
9 from the protective order registry." So that that TxPO
10 is no longer there either, and of course if it's on appeal
11 or it's found somewhere up the chain that it shouldn't
12 have been filed -- I mean, it shouldn't have been granted,
13 same thing.

14 And so there's no specifics in the bill for
15 that, but that is definitely something that we are wanting
16 to make sure there is a mechanism for. It has to get done
17 pretty much within about 24 hours, which is going to be
18 kind of crazy, but it's going to make it so that it
19 doesn't just kind of lay around and it was vacated two
20 weeks ago and it's still languishing in the system.
21 That's the goal. Yes, sir.

22 MR. ORSINGER: Chip?

23 THE COURT: Yeah, I'm sorry. Go ahead.

24 MR. ORSINGER: Yeah. One of my concerns to
25 follow-up, Rusty, is ex parte orders that are not --

1 they're either abandoned or there's no protective order
2 granted after a fact hearing --

3 MR. HARDIN: Yeah, that's my concern.

4 MS. PIECHOWIAK: Exactly.

5 MR. ORSINGER: -- which suggests -- yeah.

6 Which suggests a possibility that the evidence that was
7 support of the ex parte order does not stand up in court.

8 MS. PIECHOWIAK: Right.

9 MR. ORSINGER: And the statute I believe
10 provides that the public registry will not reflect an
11 ex parte order.

12 MS. PIECHOWIAK: Right. Well, it's not
13 going to reflect an ex parte order on the public side, but
14 it will be included on the justice personnel side, but,
15 again, I think it's really important that once that
16 determination is made that it's something that should not
17 have been granted, then for sure then having a mechanism
18 for the removal, but the only thing that's going to be out
19 to the public is going to be actually issued protective
20 orders under the Family Code. And that's it.

21 Not the ex parte orders, not the
22 magistrates' orders of emergency protection, but we
23 definitely want to get those vacated orders that either,
24 like I said, maybe applicant didn't show up and abandoned
25 the case, then, okay, there was no hearing really so we

1 need to take that out, kind of thing, and so we're looking
2 at a mechanism to do that, but it is absolutely -- that's
3 one of the first things we started talking about at our
4 kick-off meeting, is to make sure that we figure out a way
5 to get that done.

6 CHAIRMAN BABCOCK: Richard Munzinger.

7 MR. MUNZINGER: How do you determine that an
8 order is an ex parte order? You. Your agency. You said
9 that --

10 MS. PIECHOWIAK: My agency?

11 MR. MUNZINGER: You said that your agency
12 will not report or keep a record of an ex parte order.

13 MS. PIECHOWIAK: Right.

14 MR. MUNZINGER: How do you determine that an
15 order was ex parte?

16 MS. PIECHOWIAK: Well, see, and that is --
17 that is another thing that this form needs to be adjusted.
18 Right now it doesn't really talk about what kind of an
19 order is this. What we would want to do is have a spot on
20 the -- on that order say is this an ex parte order, is
21 this a magistrate's order, is this a permanent order. And
22 actually, the folks who actually will be entering that are
23 the clerks -- are the clerks' offices, and we'll be doing
24 lots and lots of training on exactly which ones need to go
25 and which ones don't.

1 MR. MUNZINGER: Do you understand that the
2 only orders that are to be entered in your registry are
3 those issued pursuant to Chapters 83 and 85 of the Family
4 Code and 17.292 of the CCP?

5 MS. PIECHOWIAK: Yes, I am aware, but that
6 is something that is going to be only for justice
7 personnel who have access, restricted access, not for the
8 public to be able to see.

9 MR. MUNZINGER: My concern is for the
10 parties to a divorce case where -- and I don't do this
11 kind of work, but in the old days if you filed a petition
12 for divorce, you asked the judge for an order saying keep
13 the guy from coming around the house and hollering --

14 MS. PIECHOWIAK: Sure.

15 MR. MUNZINGER: -- and so forth, and that's
16 what I envision as an ex parte order that routinely
17 issued, and the possibility of injuring someone's
18 reputation or having some adverse inference drawn against
19 you for having your name in this registry trouble me
20 because of that reason.

21 MS. PIECHOWIAK: Right.

22 MR. MUNZINGER: And I don't know what you
23 have that you are doing to protect people whose
24 reputations and lives can be affected by an improper,
25 unjustified entry into your system of an order that is

1 routine and sought out of spite or something instead of
2 fear for violence. That concerns me.

3 MS. PIECHOWIAK: Right, and I -- and I
4 certainly understand, and that is not something we want to
5 happen either, and again, that's been noted. We are just
6 barely into this process, and we want to make sure that we
7 build in those kind of safeguards, but also if there is an
8 order that is like that, that was done routinely, if it's
9 still an order then that's fine, but if it's a situation
10 where it is later on determined to have not been a valid
11 order, then that's when we would want to answer
12 Mr. Hardin's question, to be able to get it removed as
13 soon as that legal determination has been made, and then
14 we would get notice of that, and then ultimately -- and
15 there's requirements for the clerks to notify OCA to do
16 that, and that it's not a valid order and we're going to
17 put it in place.

18 Any ideas about how to do that and
19 especially under what circumstances, this is my call out
20 to all of the experts in the room who know way more about
21 the family side of the world than I do. Any suggestions,
22 ideas, thoughts, whatever. I brought business cards.
23 I -- anything that you can send to us, because this is the
24 time to be addressing those things.

25 MR. LOW: Let me ask one question.

1 CHAIRMAN BABCOCK: Buddy, then Rusty. Speak
2 up, Buddy.

3 MR. LOW: There is a statute, like somebody
4 has been indicted and it goes on your record. You can
5 file a suit, give notice to the police, and a lot of
6 people for removal. I mean, is there any type thing you
7 have for removal of your name on that?

8 MS. PIECHOWIAK: Oh, and that's one of the
9 things that we're talking about. We don't have anything
10 specifically in the bill, but that's something we want to
11 do.

12 MR. LOW: Well, that statute gives a
13 guideline of how an indictment removed. You might read
14 that statute. I haven't been charged, so I haven't had to
15 use it --

16 MS. PIECHOWIAK: Right.

17 MR. LOW: -- but I'm familiar with it.

18 MS. PIECHOWIAK: Right.

19 MR. MUNZINGER: Chip?

20 CHAIRMAN BABCOCK: We have equipment failure
21 over here. Rusty.

22 MR. HARDIN: You might look along with what
23 Buddy is saying, you might look at the criminal statute
24 that allows you to file for expunction.

25 MS. PIECHOWIAK: Right.

1 MR. HARDIN: And whatever you do here
2 allowed that -- make clear that that statute can be used
3 for a particular protective order under some
4 circumstances.

5 MS. PIECHOWIAK: Right.

6 MR. HARDIN: You have to figure out the
7 deal. My concern here is every time we for a very, very
8 noble reason for a very legitimate problem, we forget
9 about that 5 or 10 percent that should have never been
10 applied to, and that's more than 15 or 20 --

11 MS. PIECHOWIAK: Whatever it is, yes.

12 MR. HARDIN: And that's my concern here.
13 For instance, in Harris County, if somebody is charged
14 with any type of domestic violence case --

15 MS. PIECHOWIAK: Uh-huh.

16 MR. HARDIN: -- they will not be given a
17 bond until a protective order has been entered. It's
18 automatic. So only an allegation gets a protective order,
19 and that protective order stays throughout the period of
20 time that case pends. It may be in effect for a year, two
21 years, even longer --

22 MS. PIECHOWIAK: Right.

23 MR. HARDIN: -- and it was not entered based
24 on any evidence, only based on the allegation.

25 MS. PIECHOWIAK: Right.

1 MR. HARDIN: So as you're drafting this, if
2 you could keep that in mind it would be helpful.

3 MS. PIECHOWIAK: Absolutely, sir, and
4 actually, I'm glad y'all mentioned the expunction aspect
5 of it because part of what we have hired -- I think we've
6 hired this person, but it's the person who actually works
7 on the expunction issues, and they will also be the ones
8 that will be assisting with this as well, to make sure
9 we're checking and doing and staying on top of it.

10 MR. HARDIN: Right. If it's a procedure
11 where the lawyer when it's concluded or it's determined to
12 be invalid, has statutorily shown that he can invoke that
13 expunction statute.

14 MS. PIECHOWIAK: Right, and that -- and that
15 is definitely something that we want to make sure is
16 included, and then ultimately you're right, put into the
17 statute.

18 CHAIRMAN BABCOCK: Richard Munzinger.

19 MR. MUNZINGER: Richard Orsinger, could you
20 tell me briefly what Chapters 83 and 85, what are the
21 conditions precedent to the entry of such an order like
22 this? Because in my experience many years ago it was
23 routine for the wife's lawyer who filed a divorce case to
24 seek an ex parte order, and they were routinely granted.

25 MR. ORSINGER: Well, let me comment that

1 there was a problem in *U.S. vs. Emerson* case where there
2 was a routine temporary orders issued in a divorce case
3 out of the family law practice manual with like 50
4 different paragraphs about not protecting -- not
5 destroying evidence, about protecting community property,
6 and in there, you were not supposed -- It's just very
7 vague language about not to threaten or demean the other
8 party.

9 Well, in that *U.S. vs. Emerson* prosecution,
10 that's standard TRO that was issued or temporary orders
11 issued in almost every divorce case that followed the form
12 book, which is most of them. The federal government
13 indicted the husband for possessing a firearm in violation
14 of that orde, under the then violence of women -- Violence
15 Against Women's Act, and that particular case gained
16 notoriety because it was a ruling by the Fifth Circuit
17 about the right to keep and bear arms. But it shows the
18 difficulty in allowing sweeping with too broad a brush
19 about what constitutes an order that should trigger a
20 forfeiture of the right to keep and bear arms.

21 So I think that this bill is designed to
22 limit to the chapter on family protective orders, and I
23 don't have the Family Code language in front of me,
24 although I can look it up here in a minute, but I believe
25 you have to show that there was not only a violent act,

1 but also a prospect of future violence.

2 MS. PIECHOWIAK: Exactly, exactly.

3 MR. ORSINGER: And so we're not talking
4 about a generic prohibition against committing future
5 violence. I think there needs to be evidence that some
6 event occurred --

7 MS. PIECHOWIAK: That is correct.

8 MR. ORSINGER: -- and not only that an event
9 occurred, but that there is a prospect of future violence;
10 am I right?

11 MS. PIECHOWIAK: That is correct. That's
12 why it's very narrowly tailored to those two things --
13 it's the ex parte order that says, okay, while we're
14 waiting for a hearing, we have shown -- there's a showing
15 that there's been violence and there's a prospect of
16 violence in the future, and then once it becomes -- and if
17 it becomes permanent order after hearing, that's Chapter
18 85.

19 MR. ORSINGER: So you can see that that's an
20 important safeguard that's built in compared to the old
21 days in Emerson where it's just a generic statement about
22 don't threaten the other party suddenly became the
23 foundation of a federal indictment.

24 MR. MUNZINGER: And that's the very problem
25 here. You have nonjudicial people who are making the

1 decision as to whether or not someone is or isn't on a
2 registry, and whether they're on a registry has an
3 enormous potential for harm to that person's life, without
4 protection, the protection of -- and I mean -- do not mean
5 to demean clerks, but they aren't judicial officials, and
6 they are not weighing the effect on people's reputations
7 and lives of the entry into a government database. Good
8 God, to get Sears to correct your account when Sears
9 existed you had to move Mount Etna, you had to fight tooth
10 and toenail to get a dadgum computer changed for a
11 10-dollar item. What are you going to do with government
12 to get them to change something for God sakes that was
13 inadvertently put in there. This has a lot of risk, in my
14 opinion, to innocent people, and it's very troubling.

15 MS. PIECHOWIAK: Might I respond, sir?

16 MR. MUNZINGER: I'm not arguing with you.

17 MS. PIECHOWIAK: Oh, I know you're not, but
18 I --

19 MR. MUNZINGER: I'm just very serious about
20 things.

21 THE REPORTER: Wait, wait, wait.

22 MR. MUNZINGER: I talk this way in my sleep.

23 MS. PIECHOWIAK: So do I.

24 MR. HUGHES: Even here. Even here.

25 MR. MUNZINGER: It is --

1 MR. HARDIN: Can we have an amen?

2 MR. MUNZINGER: It is a free society that
3 people's reputations and lives can be so terribly impacted
4 by a clerk's decision that it can have enormous effects
5 not only on their criminal liability, their right to
6 exercise possession of a gun, but other rights and their
7 reputations. Why can't I subpoena this registry and use
8 it in a trial? Why can't I get this registry and use it
9 as evidence that this fellow is prone to violence or hot
10 tempered or whatever it might be? There are all kinds of
11 problems with this.

12 CHAIRMAN BABCOCK: Yeah, Sharena.

13 MS. GILLILAND: Just as a practical matter,
14 I think one thing that would help the clerks in thinking
15 about designing these forms, if you had something similar
16 to our criminal judgments that certain information has to
17 be on there, because the clerks use that on the criminal
18 side to report convictions in the CJIS database. If you
19 had something where the prosecutor or the magistrate or
20 the judge is checking "This is pursuant to Family Code
21 85," and kind of a summary of what's in the order, I think
22 that would help in the data entry into the database.

23 I know the clerks struggle when you have to
24 take what's in this order and summarize it down into a
25 database. Things like recording for NIC somebody that

1 can't have a handgun, and you see some of the things that
2 happen out there with shootings, that's something I know
3 in our office we're so concerned about. We don't want to
4 be the office that misses that checkmark. On the same
5 token, I don't want to be the office putting somebody's
6 name in a database that says he's prone to family violence
7 if it shouldn't be there.

8 MS. PIECHOWIAK: Right.

9 MS. GILLILAND: So anything that we could
10 have that goes through the process kind of summarizing
11 things of, yes, it needs to go in or it's pursuant to
12 whatever would help at that clerk staff level to be able
13 to properly enter the information. I also think at this
14 point in promulgating forms and thinking about forms, if
15 we could put a little meat into it on the applicant's
16 completing some of this information, we get stuck in
17 between the courts and law enforcement that there's not
18 enough information provided to fully put into TCIC to make
19 it effective; and the clerks find themselves hunting down
20 attorneys, hunting down applicants, saying please give us
21 something -- law enforcement is in the same situation --
22 please give us something to put into the system to make
23 this an effective order, and because they're not required
24 to provide that --

25 MS. PIECHOWIAK: Right.

1 MS. GILLILAND: -- we can -- we can reach
2 out --

3 MS. PIECHOWIAK: All day long.

4 MS. GILLILAND: -- and if we don't get it,
5 it's just not an effective database, whether on the TCIC
6 side or the OCA database.

7 MS. PIECHOWIAK: Right. If I can tag onto
8 that and also address a little bit about what you said,
9 that is kind of the biggest issue it has been for trying
10 to have the consistency, number one, of being able to get
11 this kind across the board the same way; and I think a
12 form that is required as part of the filing at the very
13 beginning is what's very, very helpful.

14 Just to circle back on yours, Mr. Munzinger,
15 I understand, and I absolutely agree, and this is the
16 conversations we're having as well. However, the orders
17 that are going to be included in this registry, especially
18 that's going to be public facing, those are already public
19 record, and they are after an order and after the judge
20 has had a hearing or it's an agreed order. The
21 applications are not going to be out there for the public
22 to see.

23 Law enforcement may be able to see it, but
24 it's going to note that this is just an application, and I
25 guarantee you we're all very much aware of, okay, we know

1 that there are enough folks out in the world that file
2 applications for protective orders that shouldn't file
3 them, but as far as just kind of having these kind of
4 nebulous sort of allegations on this website that people
5 can decide to poke around in at 3:00 o'clock in the
6 morning when they're board, that's not going to be the
7 case, and the clerks are very -- I have not had -- and
8 I've had lots of conversations with clerks also, but very,
9 very interested in making sure that what is going in is
10 accurate and timely, but think we just need to kind of the
11 mechanism to kind of make that happen, but your concern
12 is -- we all have that concern, and that's what we're
13 trying to figure out. So --

14 CHAIRMAN BABCOCK: Yeah. And, Sharena, you
15 and Nancy didn't take his comments personally, did you?

16 MS. GILLILAND: Oh, no.

17 MR. MUNZINGER: Thank you.

18 MS. GILLILAND: He talks like that all the
19 time.

20 CHAIRMAN BABCOCK: Yeah. I thought they
21 were terribly insulting, but Skip has been waiting
22 patiently with his hand up for at least 20 minutes.

23 MR. WATSON: No, no, no. I'm just trying to
24 figure out what precisely what we're doing. As I
25 understand it, the bill has been passed. These nice

1 people are trying to implement it, and we're trying to
2 help refine the forms, et cetera, et cetera, so that they
3 do their job, but do the least damage possible in doing
4 that job; and to do that, to help the forms discriminate,
5 I'm sorry, but, Richard, I need a kind of elementary
6 school language to understand what an application for a
7 protective order under Chapter 82 is versus a protective
8 order issued under Chapters 83 and 85.

9 I had no idea we had multiple chapters of
10 protective orders, and clearly they're different, and I
11 would just like some basic information about what kind of
12 species of animal each of these application versus orders
13 is, and I don't have a clue. I mean, I swore I would
14 never do another family law case 35 years ago, and that is
15 one oath I have kept, so I don't know.

16 MR. ORSINGER: But I think it would be
17 helpful to the committee to do a memo about that. We're
18 not asked to come up with any language or approve any
19 language today.

20 MR. WATSON: I know.

21 CHAIRMAN BABCOCK: This is high level
22 comments.

23 MR. ORSINGER: Yeah.

24 MR. WATSON: I know. I'm just trying to
25 figure out what we're talking about.

1 MR. ORSINGER: Well, it's a valid point, and
2 so we'll spend some time preparing the context. It didn't
3 seem like -- it seemed like that was premature today.

4 MR. WATSON: Okay.

5 MR. ORSINGER: Because we don't -- this is
6 more of like an information, like, guys, this project is
7 underway now. It's going to be coming back here before
8 too long, and you're going to have to look at it. One of
9 the important things to me about that everyone should be
10 aware is the -- while the bill just says design a
11 registry, there is also a very, very important public need
12 to get this information up the food chain to the right
13 agencies, which are not only statewide but nationwide and
14 which are specified in the NICS, the national instant
15 crime background check system, and in order for that to
16 make it all the way to the top, we've got to have the
17 information they want in their databases. And so it seems
18 to me like this is the perfect opportunity when we're
19 designing a form for our registry to go ahead and be sure
20 that we have got the information to get into the TCIC,
21 which gets to the NCIC, which gets to the NICS.

22 If we don't do it now, it will probably
23 continue to be just a mess where 10 percent of the forms
24 are filled out and people aren't even using the only one
25 form promulgated by the DPS. So it does seem to me that

1 we ought to use this opportunity to make a form that's
2 useful all the way up to the top, but it's still being
3 talked about. It hadn't been designed yet, and there are
4 going to have to be some DPS people to sit down at the
5 table and --

6 MS. PIECHOWIAK: And that's kind of the next
7 thing that we're working on. We have people that we are
8 bugging to come be part of the users group or part of the
9 advisory group, as we're putting together this -- this
10 thing from the beginning as part of the planning process,
11 because there is just so many different components that we
12 want to make sure we have all of that.

13 CHAIRMAN BABCOCK: Skip just wanted the
14 ABC's of a protective order. Roger.

15 MR. HUGHES: Well, I see the need for having
16 some procedure to get your order about you off -- off the
17 list if you don't think it's appropriate, and some people
18 have talked about analogizing it to expungement. Well,
19 having recently done an expungement case, I had a couple
20 of questions. The first one is, who are going to be the
21 stakeholders about applying to get your name off the list?
22 I mean, is this going to be a court procedure; and if so,
23 who is going to be the defendant? Because in an
24 expungement proceeding, you file an application to
25 expunge, there are several different government agencies

1 that have to be notified, and every last one of them gets
2 to come in and say "no." And not only that, every last
3 one of them, if they don't show up and say "no" get to
4 file a bill of review.

5 So, in other words, if you don't get all of
6 these agencies lined up, your expungement petition could
7 be opposed and you don't know it's safe, if you get a
8 favorable ruling, until after the bill of review,
9 expedited appeal, whatever you call it, six-month appeal,
10 has run.

11 So that's one thing that has to be done.
12 The other thing of it is -- and I say that, because I see
13 that this registry is going to be curated by the
14 Department of Public Safety.

15 MS. PIECHOWIAK: Actually, OCA.

16 MR. HUGHES: Oh, okay.

17 MS. PIECHOWIAK: We're getting their
18 cooperation and help, but yes.

19 MR. HUGHES: Well, I know that DPS is very
20 interested in these expungement issue precisely because
21 they're always very concerned who gets to have guns, and
22 they're real concerned when people with arrest records and
23 criminal histories are suddenly able to get -- want to get
24 firearms because of expungement orders.

25 The other thing of it is if you're going to

1 analogize it to expungement, my impression -- and that's
2 an unstudied one -- is that the expungement statute is
3 kind of like the U.S. tax code. Every tax question is
4 answered, "Taxpayer owes more money." Every expungement
5 issue seems to be answered, "No, you don't get it," and
6 that's my personal impression. So I'm going to say we
7 need to sort of decide at the outset how we want to slant
8 the -- the procedures, whether we want to draw it narrowly
9 so that you -- the answer to most legal question is going
10 to be "No, you don't get your name off the list," or do we
11 want to draw it broadly to give some liberality to it, and
12 that's just purely an observation.

13 MS. PIECHOWIAK: That's a great suggestion.

14 CHAIRMAN BABCOCK: Richard, these protective
15 orders are -- they're not -- they're not broadened to say,
16 "John Smith, you know, you're violent. Don't be violent
17 anymore." It's "John Smith, don't be violent towards Mary
18 Jones."

19 MR. ORSINGER: Yeah, I agree. They are
20 targeted to the applicant and members of the family.

21 CHAIRMAN BABCOCK: Who is this?

22 MR. ORSINGER: Do you agree with that?

23 MS. PIECHOWIAK: Yes, absolutely.

24 CHAIRMAN BABCOCK: So they're the subject of
25 the protective order?

1 MR. ORSINGER: Right. So it wouldn't be a
2 broad-based -- I mean, the court has the power to make a
3 broad-based surrender all of your firearms or, you know,
4 unload them and put them in a gun safe, and they do that
5 sometimes --

6 CHAIRMAN BABCOCK: So --

7 MR. ORSINGER: -- but this particular thing
8 is designed to adjudicate the claim that this particular
9 victim was a victim of family violence, but I think it
10 also -- protection extends to anyone in the family, even
11 if they weren't the target of the violence. Do you agree
12 with that or not, Kim?

13 MS. PIECHOWIAK: Usually, it's to the people
14 within the household, but they do everything they can to
15 have those people named. Also protected parties named,
16 also certain locations. You know, if we have a
17 magistrate's order, it's actually certain locations, but
18 if they decide they want -- they need to get together and
19 talk, they can meet at the McDonald's and do it. Whereas,
20 the permanent protective order might be no contact
21 whatsoever, but all of those are very, very specifically
22 delineated in the order.

23 CHAIRMAN BABCOCK: So the subjects of the
24 protective orders will be named, like "Mary Jones."

25 MS. PIECHOWIAK: Yes.

1 CHAIRMAN BABCOCK: "Johnny Jones."

2 MS. PIECHOWIAK: That's correct.

3 CHAIRMAN BABCOCK: "Billy Jones."

4 MR. ORSINGER: But the anticipation is, is
5 that the registry will not reflect the victims or the
6 applicant's names, correct?

7 MS. PIECHOWIAK: That is correct. This is
8 only going to be respondent's information that's in there,
9 and it's going to be very, very narrow, and it's not going
10 to be for applications or ex parte orders or magistrates'
11 orders.

12 CHAIRMAN BABCOCK: Well, why is it just the
13 respondent? What's the basis for saying that?

14 MS. PIECHOWIAK: Well, there is a privacy
15 issue. There is a safety issue, and having -- we already
16 have a lot of folks -- while we do have a percentage of
17 folks who seek protective orders that probably don't
18 deserve a protective order, we have a whole lot more out
19 there that probably should get a protective order, but
20 they are already scared to come do it. And so in order to
21 keep safety to the forefront, because if we're doing
22 something that's not safe, then we should not be doing it,
23 I don't care what any of us -- our jobs are here, but it
24 comes down to making sure that those -- those applicants
25 are safe and feel like, okay, I'm going to not be the

1 object of harassment, ridicule based upon I'm showing up
2 in this public database.

3 CHAIRMAN BABCOCK: But, Kim, doesn't the
4 statute say that the registry has to include the name of a
5 person who the subject of the protective order?

6 MS. PIECHOWIAK: Subject of the protective
7 order is the respondent.

8 MR. ORSINGER: In fact, the statute says --

9 CHAIRMAN BABCOCK: Y'all just said a minute
10 ago it was the Jones family.

11 MS. PIECHOWIAK: Look, the name of this --
12 generally, the subject of the protective order is the
13 person who is being told not to do something.

14 CHAIRMAN BABCOCK: Well, not necessarily. I
15 mean, the person that's being told not to do something to
16 somebody else, they're both subjects of the protective
17 order.

18 MS. PIECHOWIAK: Right, but my understanding
19 as far as when I talk to folks who do this on a regular --
20 on a very regular basis, generally, the subject of the
21 protective order is -- is meant to mean respondent. I
22 wish it did say "respondent." That would have made it a
23 much, much cleaner statute.

24 CHAIRMAN BABCOCK: Well, whoever did the
25 summary said "respondent." That's what got me thinking

1 about it.

2 MS. PIECHOWIAK: I did the summary. I did
3 the summary.

4 CHAIRMAN BABCOCK: Yeah. Well, and, you
5 know, maybe there's legislative history, but the text of
6 the statute says --

7 MS. PIECHOWIAK: Right.

8 CHAIRMAN BABCOCK: -- "the name of a person
9 who is the subject of the protective order."

10 MS. PIECHOWIAK: Right.

11 CHAIRMAN BABCOCK: And we have to implement
12 the text --

13 MS. PIECHOWIAK: Right.

14 CHAIRMAN BABCOCK: -- unless there's some
15 reason not to.

16 MS. PIECHOWIAK: I believe in the history
17 there is, but I will double check and see what I can find
18 out for sure, but that -- during the hearings, during the
19 discussions of the wording of the order, I mean, of the
20 bill, we were involved. We didn't -- we weren't the ones
21 starting it, but we were involved, and we were asked about
22 that in the -- and the implication for everybody was that
23 that is the respondent, but you're right, it's not what's
24 actually said in the actual -- and I didn't write the
25 bill, so --

1 MR. ORSINGER: Well, it seems to me that
2 somebody should request an attorney general opinion on
3 that. I don't have the standing to do that, but do the
4 sponsors of the bill have a standing, members of the
5 Legislature have a standing? I don't know if OCA has the
6 standing to request an AG opinion, but somebody ought
7 to -- they do? Somebody ought to request an AG opinion,
8 and it will tell us at least what the state's official
9 position is on whether the -- whether the --

10 CHAIRMAN BABCOCK: You see the problem?

11 MR. ORSINGER: The word you used was --

12 PROFESSOR CARLSON: Subject.

13 MR. ORSINGER: The person who is the subject
14 of.

15 CHAIRMAN BABCOCK: "The name of a person who
16 is the subject of the protective order." That's what the
17 statute says.

18 MR. ORSINGER: Yeah. I think there's room
19 for disagreement.

20 CHAIRMAN BABCOCK: Well, there's not because
21 I asked my leading questions of you, and you-all agreed
22 that the Jones family was the subject of the protective
23 order.

24 MR. ORSINGER: No, I didn't. I can tell you
25 if that proposition is right, there's going to be a lot of

1 upset --

2 CHAIRMAN BABCOCK: I'm just saying.

3 MR. ORSINGER: -- so we better get it
4 correct.

5 MS. PHILLIPS: But if it's not in the order,
6 this TCIC, right, where -- which is where the data will be
7 uploaded, this form has protected personal data.

8 MR. ORSINGER: This is not public.

9 MS. PHILLIPS: Okay.

10 MR. ORSINGER: The DPS form is just for the
11 criminal side and then certain members of the -- of the
12 judicial -- judicial branch, or maybe not any. Maybe it's
13 only law enforcement has access to this.

14 MS. PIECHOWIAK: The court will have access
15 to it, but it's not going to be part of a -- it's not part
16 of a public record; and, in fact, last session, any -- any
17 information about specifically a victim's location,
18 address, personal information, the court can actually
19 order that there be a separate record that has that
20 information redacted that would be public, and the full
21 information is only accessible to the court and to law
22 enforcement.

23 CHAIRMAN BABCOCK: Yeah. Justice Gray.

24 HONORABLE TOM GRAY: Observation, question,
25 and then a couple of topics, but my observation is that if

1 I understand this correctly, that Monica would not have
2 been protected under this statute that bears her name
3 unless the victims of the prior protective orders had
4 opted for public --

5 MR. ORSINGER: Correct.

6 MS. PIECHOWIAK: You are correct, sir.

7 HONORABLE TOM GRAY: Okay. You just said
8 that courts would have access. I was looking at 72.155 in
9 the memo at (c), and I didn't see anything about a court
10 having access. It was all law enforcement of some nature.

11 MS. PIECHOWIAK: Of --

12 HONORABLE TOM GRAY: It may be somewhere
13 else, but I --

14 MS. PIECHOWIAK: Specifically -- well, okay,
15 the court has access as part of their -- their court file
16 of that TCIC data entry form, but as far as having access
17 to the registry, yes, courts are noticeably not on there,
18 and we were trying to figure out if that was the intent or
19 was it a situation where -- because if an authorized user
20 who is going to be the clerk of that court who does the
21 data entry, then they would be able to share that
22 information with the court.

23 HONORABLE TOM GRAY: They would have that
24 one entry, but they're not authorized to access --

25 MS. PIECHOWIAK: Sure, they would be. The

1 authorized user has access to look up and say, hey, does
2 this person have a protective order someplace else as
3 well.

4 HONORABLE TOM GRAY: Seems to be in
5 violation of the statute, but I will leave that to the
6 expert.

7 MS. PIECHOWIAK: Okay.

8 HONORABLE TOM GRAY: At the last JCIT
9 meeting, which I'm not on the committee but I went, they
10 were talking about a term. I think the term was
11 "integrated," and it was talking about courts being
12 integrated with the e-filing system; and it seems to me
13 that if we promulgate the form for the application and
14 that application is e-filed, why can we not craft that
15 application in a format in which the information will
16 automatically feed into the registry; and on the other end
17 of that equation, if we promulgate the form for the
18 protective order and the orders are integrated with the
19 e-filing system and the court's individual web page, why
20 can it not automatically populate the registry as well?

21 MS. PIECHOWIAK: And -- and that's a valid
22 question, and those are all questions that they are
23 looking at how they want to make sure this information is
24 integrated, but like I said, we are very, very early in
25 that process.

1 HONORABLE TOM GRAY: Okay.

2 MS. PIECHOWIAK: And that would certainly be
3 ideal if we could do that, and so I will make sure that
4 those concerns are addressed, but we've been talking about
5 that as well.

6 HONORABLE TOM GRAY: Okay.

7 CHAIRMAN BABCOCK: Additional questions? Is
8 the source -- I've got one. Is the -- are there public
9 documents that are the source of the data for this -- for
10 this that are then converted into nonpublic because of
11 72.155 and other provisions of the statute? In other
12 words, if I file an application for protective order --

13 MS. PIECHOWIAK: Right.

14 CHAIRMAN BABCOCK: -- with the court, and
15 that's a court document, and that's public, right?

16 MS. PIECHOWIAK: Right.

17 CHAIRMAN BABCOCK: If a judge grants it,
18 that's an order of the court, and that's public.

19 MS. PIECHOWIAK: Right.

20 CHAIRMAN BABCOCK: So those two things we
21 know are public, but are there documents that go into the
22 registry that then because they're in the registry you
23 can't see them, you can't get them?

24 MS. PIECHOWIAK: No. I don't believe so. I
25 think it's -- this is just to make this be a registry that

1 people can look up without having to know what county they
2 need to go to look up a protective order and go dig around
3 in the, you know, clerk's office, but --

4 MR. ORSINGER: Chip, let me say that the
5 public --

6 CHAIRMAN BABCOCK: You just cut her off.

7 MR. ORSINGER: Yeah, I'm sorry.

8 MS. PIECHOWIAK: No, go ahead.

9 MR. ORSINGER: The information that is
10 public at the courthouse --

11 CHAIRMAN BABCOCK: Yes.

12 MR. ORSINGER: -- some of that will be in
13 the registry --

14 MS. PIECHOWIAK: Sure.

15 MR. ORSINGER: -- but not available to the
16 public --

17 MS. PIECHOWIAK: Right.

18 MR. ORSINGER: -- through the registry, but
19 it's always available at the courthouse.

20 CHAIRMAN BABCOCK: At the courthouse.

21 MS. PIECHOWIAK: Right.

22 MR. ORSINGER: So, yes, this registry is
23 narrower in terms of what you can get off this website, it
24 is narrower than what you can get at the courthouse.

25 MS. PIECHOWIAK: Right. It is.

1 CHAIRMAN BABCOCK: That's the point I was
2 trying to make.

3 MR. ORSINGER: I know that. I know that.

4 MS. PIECHOWIAK: That is correct.

5 MR. ORSINGER: But the Legislature made that
6 decision.

7 CHAIRMAN BABCOCK: No, no, no. I just
8 wanted to know if that was a fact.

9 HONORABLE TOM GRAY: And, see, the point I
10 was trying to make is that it may be at the courthouse and
11 it may be in this registry, but it's all going to be on
12 re:SearchTX once the court gets inverse integrated with
13 the e-system, and so much of this seems redundant, highly
14 redundant, other than getting the information so that it
15 feeds up into the databases that are needed for the
16 protective orders.

17 That's why I was wondering if it could be
18 automated, because it's already going to be there. If we
19 do our job right in promulgating the form for the
20 application and the form for the order, all of the
21 information necessary to fill out one of these information
22 sheets is just going to fall out in the lap of whoever has
23 to do the entry, and I would say that needs to be an
24 electronic, not a person.

25 CHAIRMAN BABCOCK: Good point. All right.

1 Other -- other comments for Kim.

2 MS. HOBBS: Hey, this is Lisa on the phone,
3 can y'all hear me?

4 MR. ORSINGER: Yes.

5 THE COURT: We can hear you.

6 MS. HOBBS: I just want to put on the record
7 that I think bills like this are a violation of the
8 separation of branches of government. This is by its
9 nature a law enforcement problem, and I'm not saying that
10 the judiciary doesn't need to give law enforcement
11 information that they need to do to do their job, but I
12 feel strongly that OCA is becoming an arm of things that
13 are outside of the judiciary and what our -- what our
14 branch of government is meant to be, and I put -- I put it
15 as an "our" because I relate to it, having been the
16 general counsel of the Texas Supreme Court, but this is
17 very problematic that we -- that OCA has been the one
18 charged with keeping this registry. It's one thing to ask
19 for information from the judiciary that the law
20 enforcement agency could use to do their job better, but
21 it's not the judiciary's role to be the keeper of
22 information and the liability that might come along with
23 what we do or do not do.

24 And I -- and I apologize that I didn't
25 realize this is on the forefront until this week, but I'm

1 really bothered by it, and it goes to a lot of things.
2 Like the judiciary is getting more involved in
3 guardianships and now protective orders and other things,
4 and OCA can be a data driven entity of the judiciary, and
5 that role is very important, and it serves a real function
6 to let the policy makers and the executive branch of the
7 government take the role of doing their job better, but
8 when the legislative branch asks the judiciary to be the
9 actual repository of this information, I feel like that's
10 a real separation of powers problem, and it bothers me,
11 and so I -- I just want to put that on the record.

12 I've been texting with David Slayton a
13 little bit, and he tells me it's more nuance than I
14 appreciate, and I will continue to study it, but I just
15 wanted -- before this conversation closed, I wanted to put
16 that out there that I think this is a real separation of
17 powers problem, and it bothers me immensely.

18 HONORABLE TOM GRAY: Amen.

19 CHAIRMAN BABCOCK: We have another --

20 MR. ORSINGER: The dog agrees, too.

21 CHAIRMAN BABCOCK: We have another former
22 rules attorney here. Come on, Kennon.

23 MS. WOOTEN: My statement is much less
24 insightful perhaps, but it pertains to the meaning of
25 "subject to the order," that phrase. If you look in

1 Chapter 85 of the Family Code, which is referenced in the
2 memo from Richard Orsinger, you'll see the phrase "subject
3 of the order" used in section 85.024 in a way that makes
4 it clear that the person subject of the order is, in fact,
5 the person who has been found to have engaged in family
6 violence, so that might provide guidance moving forward.

7 CHAIRMAN BABCOCK: Okay. Anything else?
8 Kim, and Susan, and Robert, if we break for lunch now, is
9 that okay?

10 MR. LEVY: Sure.

11 CHAIRMAN BABCOCK: Take up your topic right
12 after lunch at 1:15?

13 MR. LEVY: Sounds great.

14 CHAIRMAN BABCOCK: Okay. Anything else?
15 Kim, thank you so much for being here and --

16 MS. PIECHOWIAK: Thank you for having me.

17 CHAIRMAN BABCOCK: -- for listening to us,
18 and if there's nothing else, we'll recess for lunch and be
19 back at 1:15.

20 (Recess from 12:15 p.m. to 1:13 p.m.)

21 CHAIRMAN BABCOCK: Okay. Is everybody back?
22 Let's get back on the record and turn our attention to
23 registration of in-house counsel, and Robert and Kim and
24 Susan. And I don't know if Allen Cook is here.

25 MR. LEVY: Allen is not.

1 MS. HENRICKS: No, he's not.

2 CHAIRMAN BABCOCK: He won't be here. All
3 right. Good. Well, Robert, take it away.

4 MR. LEVY: Sure. Thank you. This proposal
5 was submitted by the Board of Law Examiners to the Supreme
6 Court to provide a procedure for the registration of
7 in-house counsel who are licensed in other states or other
8 countries. Currently, if a lawyer who is licensed in the
9 state comes to Texas to work for a corporation, there is
10 no specific requirement or procedure for that lawyer to do
11 anything, to seek admission to the Texas bar, and there's
12 no registration requirement.

13 Most of the states have provision, many of
14 which are obligatory, that an out-of-state lawyer has to
15 register as in-house counsel if they're coming from
16 another state, but in Texas we do not have that, and this
17 is obviously of interest to corporations like my
18 corporation and Kim's because we have lawyers who
19 frequently come from elsewhere to either work for us or to
20 work for a temporary period of time in one of our Texas
21 offices. And the purpose or goal of this proposed rule,
22 which is listed as Rule 23, although it actually would be
23 Rule 24. There's a -- Rule 23 has already been taken, but
24 this proposed rule would provide a procedure for lawyers
25 outside of Texas to register.

1 The questions, though, and one of the issues
2 that we explored in our memo to the committee are some of
3 the challenges or issues about adopting a rule like this,
4 and I think both Kim and I recommend that a rule be
5 adopted, because it will be very beneficial, but I wanted
6 to make sure we talked about some of the issues that are
7 triggered by the proposal, and the memo outlines them.

8 One of the first question is that where a
9 rule would be adopted providing for the registration of
10 lawyers that are not licensed in Texas, but there's no
11 requirement that that take place. As I understand it,
12 that to establish a requirement would require either
13 change in Texas law, the State Bar Act, or a disciplinary
14 rule or arguably if there was an ethics opinion on this
15 point, but right now there's no explicit obligation for a
16 lawyer who is licensed in another jurisdiction to become
17 licensed in Texas to work for a corporation.

18 And I've noted some of the provisions about
19 what you can do in the process, that if you want to become
20 licensed in Texas you can sit for the Texas bar, or you
21 can waive into the bar if you've met five of seven years
22 of continuous practice, and then the board then will
23 review applicants with all of their background information
24 and go into extensive vetting to validate that that lawyer
25 has met those requirements and otherwise is in good

1 standing, and there's also a procedure for foreign
2 attorneys to become certified in Texas. That's a specific
3 provision under the bar act.

4 The -- one of the other issues to consider,
5 or as I noted, that this would bring us somewhat in line
6 with where most of the other states are, and there's also
7 an ABA rule that -- or a model rule on this topic. The
8 other key issues I just wanted to raise as talking points
9 is that the -- there's some questions about would this
10 rule apply to individuals who are contractors for
11 corporations, and is it -- is it a requirement that you be
12 employed by a corporation versus being a contractor, and
13 there are situations where lawyers will -- will become
14 contractors for a corporations. In fact, in some cases
15 lawyers who retire will sometimes come back later on on a
16 contract basis, and the question is would this
17 registration process be applicable.

18 As a side note, one of the advantages for
19 the registration process as contemplated by the rule is
20 that a lawyer who registers under this rule can use the
21 time period of registration to meet the continuous
22 practicing requirement, and the rule contemplates that you
23 could then apply to waive into the bar when you have had
24 three out of five years of continuous practice versus the
25 current five out of seven years, which you would need to

1 meet if you were coming from another state.

2 Another question, as you'll note, under the
3 proposed -- proposed rule, there is a provision that
4 carves out certain activities that you are not supposed to
5 be able to engage in. That's under section (2)(b), and
6 it's under (2)(b)(4), which talks about that you would not
7 be able to prepare any legal instrument affecting title to
8 real property, including deed, deed of trust, note,
9 mortgage, or transfer or release of lien, and that's based
10 upon Texas Government Code, section 83.001. The provision
11 about that code actually says that a lawyer -- only a
12 lawyer can earn a fee and be paid for those specific
13 services in Texas, and that's the reason that the rule
14 exempts it or carves it out from the practice permissible
15 to a registered out-of-state lawyer.

16 The question that I would propose is that
17 that's really not necessary under this circumstance
18 because the individual is not earning a fee for those
19 services. The individual is performing their work for
20 their company that they are working for and the -- I don't
21 think that the carve out is needed to make this rule
22 consistent with the Texas Government Code provision.

23 Another significant question that I wanted
24 to bring to everyone's attention and get input on is
25 section (3), the disclosure provision. The Rule as

1 drafted suggests that a registered out-of-state lawyer
2 must disclose that they are not licensed in Texas in any
3 communication to anyone other than that individual's
4 employer or company, so that any time they communicated,
5 whether it was by letter or e-mail or instant message or
6 chat or even in a telephone call or a face-to-face
7 discussion, the way the draft rule is set out that that
8 requires them to say, "By the way, I'm not a Texas
9 lawyer." I think that and in talking -- and I apologize,
10 I didn't introduce Susan Henricks, who is the executive
11 director of the Board of Law Examiners whose office
12 prepared the draft. We think we agreed that that language
13 might be over broad, but the question is, is the
14 communication issue even necessary. Does a registered
15 out-of-state lawyer need to communicate their lack of
16 Texas licensure in any communications, whether they're
17 written or otherwise. So I would appreciate input on that
18 as well.

19 In conclusion, I guess the other point is
20 that in talking to Susan and Allen Cook, who is the
21 general counsel, the goal is to get input from the
22 committee. We already know that there are some provisions
23 that might need to be changed, and you'll note in the
24 proposed rule that there was a potential implementation
25 that would take place in December. That obviously is --

1 is not going to happen. This draft was actually prepared
2 sometime ago, and so it's obvious that the actual
3 implementation date would be pushed off, and so we're
4 hopeful to get input and guidance from this committee and
5 then Susan and her team will prepare an updated version.
6 And, Kim, any other comments?

7 MS. PHILLIPS: No. I think that covers it,
8 other than I think, number two, the tweaking of the
9 definition of what's a registered in-house lawyer to
10 specifically include foreign jurisdictions, because it was
11 interesting when I raised this with a number of my
12 colleagues --

13 MS. BARON: Hard to hear you down here.

14 HONORABLE TRACY CHRISTOPHER: We cannot hear
15 you at all.

16 MS. PHILLIPS: Just clarifying who is --
17 what is registered in-house counsel to specifically
18 include foreign, like non-U.S. lawyers. So there are some
19 rules that specify the district D.C. and U.S. territories
20 and foreign countries, so I think that clarification, that
21 explicit clarification would be helpful.

22 CHAIRMAN BABCOCK: Okay. Any other
23 comments? Professor Carlson.

24 PROFESSOR CARLSON: So --

25 CHAIRMAN BABCOCK: And then Buddy.

1 PROFESSOR CARLSON: Two things. One, I
2 guess you were wanting -- you're proposing this because
3 it's not clear right now --

4 MR. LEVY: Right.

5 PROFESSOR CARLSON: -- what out-of-state
6 licensed attorneys coming in to work for an entity need to
7 do in Texas.

8 MR. LEVY: Correct. And Susan can elaborate
9 on that as well.

10 MS. HENRICKS: Yes.

11 PROFESSOR CARLSON: Secondly, and would that
12 -- I'm sorry. Go ahead.

13 MS. HENRICKS: No, that's fine.

14 PROFESSOR CARLSON: And, secondly, would
15 this include litigation, or are we talking transactional
16 or anything?

17 MR. LEVY: As contemplated, it would include
18 lawyers that are -- that are working for a corporation,
19 and as drafted it would include a lawyer who is in the
20 litigation practice. That is I think a fair question in
21 terms of if a lawyer wanted to appear in court on behalf
22 of a client for which that lawyer works, would that lawyer
23 still have to apply under the Texas rules for pro hac vice
24 status.

25 MS. HENRICKS: If I can answer that, the way

1 we drafted the rule if you look at (2) (b), it does say
2 that a registered in-house counsel could not appear in
3 court or sign pleadings, but and they wouldn't be eligible
4 for pro hac vice because you must be a nonresident to
5 qualify for pro hac vice. So if they wanted to appear in
6 court for the corporation, they would need to get a full
7 Texas license to do that, which is the way it is now.

8 PROFESSOR CARLSON: Thank you.

9 CHAIRMAN BABCOCK: Buddy.

10 MR. LOW: Yeah, Robert, isn't it usually the
11 lawyer only does work for the company he works for? And I
12 know it's a pretty simple procedure. I've got a case in
13 Connecticut, had some in Oklahoma and in other states, and
14 I get permission and approval for that particular case.
15 Why couldn't they get specific approval from the
16 Supreme Court of Texas as long as they're members in
17 standing of some other state and so forth and have a
18 simple procedure instead of just handling one case, doing
19 legal work for one company.

20 MR. LEVY: Well, Buddy, that's what this
21 process would provide, that you're being authorized to do
22 your job.

23 MR. LOW: I know, but it looks like it could
24 be shortened. I don't have to fill out many things other
25 than -- I can't even remember what it is, but that I'm a

1 member of the bar and so forth, and I can go to Oklahoma,
2 and I can -- it's very uncomplicated, and it doesn't seem
3 to have all of the stuff that this does. I just wonder if
4 that would be a simpler and shorter way to do it and get
5 approval from the Supreme Court.

6 MR. LEVY: I think -- I don't disagree with
7 you in principle. I think this is the way to effect that.
8 If the question is should these rules require all of the
9 process steps that are included, and this is kind of
10 the -- as I see it, the bridge between what you're talking
11 about and the full waiving into the bar, which does
12 involve a lot more due diligence and process.

13 MR. LOW: Okay. I mean, the simpler
14 something can be done and accomplishes the objective is
15 something I believe in. That's all.

16 MS. HENRICKS: Well, we're certainly open to
17 suggestions about how we might simplify the process. Most
18 states do require this type of -- some kind of
19 registration or regulation of out-of-state lawyers who
20 come into the state and practice for a corporation, which
21 is different from the pro hac vice.

22 MR. LOW: I understand it's different and
23 not just for one case, but I have to certify that I'll be
24 bound by the rules and I don't remember what all, but it's
25 very easy, and I just read a few things, sign my name and

1 I'm there. And I don't -- I haven't studied this,
2 don't -- it just looks more complicated than the procedure
3 I'm familiar with in practicing in another state.

4 MS. HENRICKS: It is a little more. Uh-huh.

5 CHAIRMAN BABCOCK: Yeah, Richard.

6 MR. ORSINGER: I'd like to ask a -- several
7 questions and points. First of all, without this is there
8 a danger that these lawyers are practicing law in Texas
9 without a license?

10 MS. HENRICKS: Well, I would -- the main
11 thing is it's just unclear. From our perspective, we have
12 out-of-state lawyers who come into the state, and they
13 call our office and say, okay, what do I need to do to be
14 allowed to work as an in-house counsel in Texas, and we
15 say, well, there's really -- you don't have to do
16 anything, there's no law on this.

17 MR. ORSINGER: And there's no ethics opinion
18 or court ruling or lawsuit that's threatening? This is --
19 this is just needed, but it's not in response to a
20 particular threat?

21 MS. HENRICKS: No.

22 MR. LEVY: And I looked at that issue,
23 Richard. I didn't do exhaustive research, but there are a
24 few, and I've alluded to the ethics opinions, but they all
25 are on the periphery of the issue. They don't provide an

1 explicit requirement. My view, if I was advising somebody
2 coming from out of state, I would say the better part --
3 you know, the more conservative approach would be to, at
4 least right now, to become licensed in Texas because of
5 the uncertainty, but there is no explicit prohibition
6 right now.

7 MR. ORSINGER: So on page one, paragraph
8 (1) (a) (2) is a provision that the attorney in this status
9 will be -- receive compensation for legal services on
10 behalf of the business organization. Now then, I would
11 have thought that they wouldn't receive compensation for
12 legal services. I thought they would get a salary as a
13 W-2 employee. Does this -- is this intended to allow an
14 attorney to be in-house counsel but to bill for legal
15 services like a lawyer would?

16 MS. HENRICKS: I think -- I don't think it
17 would prohibit that.

18 MR. ORSINGER: Okay. So that's getting more
19 into the nature of independent law practice than it is
20 being an employee of a corporation where my job is to give
21 legal advice. Is that inadvertent, or is it intended that
22 lawyers who are out-of-state lawyers could say, "I'm
23 registering as in-house counsel, but I have my own law
24 office or my own law firm, and I'm going to bill them for
25 the time that I spend"? Is it intended that they be

1 allowed to do that?

2 MS. HENRICKS: I think that's a question
3 that Richard raised about could they be in essence
4 independent contractors working exclusively for their
5 corporate employer. Obviously they wouldn't be working
6 for any other employer or have any other clients.

7 MR. LEVY: But I think what Richard's point
8 and it gets to a good issue, and that is you wouldn't want
9 a situation where an out-of-state company decided to hire
10 a bunch of lawyers to practice law here and say they're
11 working for us as a corporation, and -- and they're
12 authorized to do it under this registration process, but I
13 think that the general principle is that they are
14 employees of the company that they are working exclusively
15 for and not providing legal services as part of what that
16 company does. They are providing advice to the company
17 that's doing what it does, which is not legal work
18 necessarily.

19 MS. HENRICKS: And I wouldn't be surprised
20 if there are lawyers doing that now.

21 MR. ORSINGER: Well, this authorizes it,
22 and, you know, if you're -- my concept of an in-house
23 counsel is that you're an employee, just like the head of
24 HR or the CEO or the head of the engineering division, and
25 you're giving legal advice to your employer, but if you

1 are allowed to bill for legal services as a nonemployee,
2 in my opinion you're engaged in the practice of law, so
3 but anyway, I just make that point, and I'm not sure that
4 I like that.

5 On the second page, paragraph (2) (a), I'm a
6 little concerned about the idea that providing legal
7 services to a single business organization. Because a lot
8 of businesses that I run into, in the family law context
9 anyway, there are multiple businesses that are
10 interrelated, and I don't know exactly what the definition
11 of "single business" is going to be in this context, but a
12 limited partnership always has a general partner and at
13 least one limited partner. And a lot of companies have a
14 hierarchical organization, like for JP Morgan and
15 Chase Bank are independent banks that are owned by the
16 same holding company, so I think you guys need to be
17 careful about this use of the word "single business
18 organization."

19 I agree somebody shouldn't open up an
20 in-house counsel shop and represent 15 different
21 corporations, because then they're just practicing law,
22 but I think you should be careful about the use of the
23 word "single" or the definition of "business organization"
24 because, in fact, many businesses are a cluster of
25 businesses that are being managed by a management

1 structure.

2 MR. LEVY: Sure. We talk about that,
3 Richard.

4 MS. HENRICKS: I think that's addressed with
5 the definition. We tried to address it there, on one --

6 MR. ORSINGER: I'll go back and look at
7 that.

8 MR. LEVY: We talked about that and -- and
9 the -- you point out something that's very appropriate in
10 that it's not only who you work for, but you are providing
11 advice to a family of companies that might be affiliated
12 with your employee corporation, and so I think we'll work
13 on making sure that's clear.

14 MR. ORSINGER: So on (2)(a), compare (2)(a)
15 to No. (5), (2)(a)(1). You're authorized to give legal
16 advice to directors, officers, employees, and agents, and
17 I get that, but then on (b)(5) you're not authorized to
18 render to anyone except the business organization any
19 service requiring the use of legal skill or knowledge; and
20 if you go back and read the definition of "business
21 organization," it's all about entities; and to the limited
22 extent that I've represented companies in ancillary
23 litigation where their owner or CEO is in litigation, I
24 usually take my marching orders from the board of
25 directors, if the CEO is the one who is individually sued,

1 and I don't want to be representing a company and taking
2 direction from the CEO that may be just supporting the
3 CEO's interest and not the company's interest. Okay.

4 So in those situations I've given legal
5 advice to members of the board of directors, and so I see
6 a little tension here between giving legal advice in
7 (2) (a) (2) to the directors and being prohibited from
8 giving advice to anyone except the business organization,
9 which is an entity, so it seems to me like you should
10 reconcile those two concepts so that -- you know, so that
11 it is clear that you can -- you can represent the entity
12 within the scope of this rule by coordinating through the
13 directors.

14 And then on page two, subdivision (2) (b),
15 there's "appearing for a business organization in Texas
16 courts," that's a prohibited, and my question is what
17 about arbitrations? Because a heck of a lot of business
18 litigation in this day and time is done in arbitration.
19 I'm not sure arbitration really has a forum. I mean, I
20 guess if you're in a Texas office, you're arbitrating in
21 Texas, but you may not be under Texas rules. You may be
22 under commercial arbitration rules. Is there any thought
23 or concern about discussing representing a company in
24 arbitration, which may have been referred by a Texas court
25 or may not have been referred by a Texas court? Is that a

1 thought that's of any consequence to you-all?

2 MR. LEVY: It is of consequence, and I would
3 suggest that there's a big difference between practicing
4 in a Texas court versus practicing or representing your
5 company in an arbitration, and that does happen. There
6 are many types of proceedings that take place in
7 arbitration that they might be located in Texas or the
8 arbitration might be somewhere else, but you're
9 representing your Texas company, you're working on behalf
10 of your Texas company, and I -- in that arbitration
11 proceeding, and I think that that is an appropriate rule
12 that a registered out-of-state lawyer should be able to
13 engage in.

14 MR. ORSINGER: Well, do you have to be
15 registered to -- if this is adopted, do you have to be
16 registered in order to represent the entity in an
17 arbitration or --

18 MR. LEVY: Well, this rule will not require
19 you to be registered.

20 MR. ORSINGER: Okay.

21 MR. LEVY: This only provides a procedure to
22 be registered.

23 MR. ORSINGER: Okay.

24 MR. LEVY: And that's one of those -- that
25 gap point that I pointed out initially. It certainly

1 provides you with a vehicle to have comfort that you're
2 doing the right thing, but there's -- there's no specific
3 sanction for not registering.

4 MR. ORSINGER: But if you do register,
5 you're prohibited from appearing in a Texas court as a
6 legal representative, but you're not prohibited from
7 participating in a Texas arbitration or an arbitration set
8 up pursuant to a referral from a Texas court.

9 MR. LEVY: Correct.

10 MR. ORSINGER: And so that's conscious and
11 intended? It's conscious and intended.

12 CHAIRMAN BABCOCK: It is now.

13 MR. LEVY: It is now.

14 MR. ORSINGER: It would be.

15 MR. LEVY: Not having drafted this, I can't
16 speak to the intent --

17 MR. ORSINGER: Ah, okay.

18 MR. LEVY: -- but I think that's the right
19 result.

20 HONORABLE LEVI BENTON: I'm sorry, Robert,
21 you think that's the right result?

22 MR. LEVY: I think that's the right result.

23 CHAIRMAN BABCOCK: Yeah, Richard Munzinger.

24 MR. MUNZINGER: Several of my law partners
25 are licensed in New Mexico and Texas, and the way the

1 opening paragraph reads, "This rule requires attorneys
2 licensed to practice in states other than Texas," it would
3 require them to be registered, or if it isn't a
4 requirement it certainly would authorize. It seems to me
5 this needs to make it clear that you're talking about
6 people who are not licensed in Texas as distinct from
7 people who hold licensure in Texas and other states.

8 (Phone system message stating "There doesn't
9 appear to be any activity in this meeting.")

10 MR. ORSINGER: Be sure to write that down.

11 MR. MUNZINGER: Can I continue anyway, even
12 though I'm not engaged in activity? I agree with
13 Richard's concern about the definition of business
14 organization except on a different point. It seems clear
15 to me that business organization includes all parents,
16 subsidiaries, et cetera, but it says "affiliates," and it
17 doesn't define the word "affiliates," and I think it
18 should. It's a very general word, and if the intent is
19 that it means under the same or common control, it should
20 so state, because I could be affiliated with you arguably
21 by contract and not by control, so I think "affiliates"
22 probably needs to be defined.

23 The rule forbids, as I read it, (2)(b), "No
24 in-house counsel may appear in a Texas court for the
25 business organization" as ultimately defined. It's

1 strictly forbidden, and I believe that's what you said.
2 Does that apply to administrative agencies? We have a lot
3 of, quote, "litigation," close quote, before
4 administrative agencies in contested case hearings in any
5 number of statutes under the State Office of
6 Administrative Hearings; and if you intend to proscribe
7 the practice in court, why would you not proscribe
8 practice before those agencies, most of which -- that's --
9 I'm not -- I'm not qualified to say that. Many of which
10 adopt the Texas Rules of Civil Procedure, sometimes
11 amending them to reduce the time limits and sometimes the
12 number of interrogatories and what have you, but most of
13 them apply -- they clearly apply Texas law, and most of
14 them apply Texas trial court nonjury procedures to them in
15 terms of discovery and otherwise. So you may want to look
16 into the question of whether or not you want this to apply
17 to practice before administrative agencies. And I don't
18 think I have anything else, and if I do, it's not
19 meaningful activity anyway so --

20 MR. LEVY: Can I respond to that last point?
21 It's a very good point. I would, again, suggest that the
22 best outcome would be not to limit an in-house counsel
23 from appearing before an administrative agency, whether it
24 be state or local or even federal in Texas, because it's a
25 different type of process, and the rules that govern the

1 administrative act that governs those proceedings are
2 different in some cases, and in many cases somebody who is
3 not a lawyer can appear in those proceedings on behalf of
4 their company, and -- and there's no issue with that. So
5 I don't think that the requirement that you be licensed in
6 Texas should apply to that type of proceeding.

7 MS. HENRICKS: And in that we did attempt to
8 address that with (2) (a) (3), which says that that is an
9 authorized activity.

10 MR. LEVY: Right, you did.

11 MS. HENRICKS: And -- and it's true, as you
12 say, in my experience, you don't even really necessarily
13 have to be a lawyer to appear. It's an area of
14 uncertainty, about whether you have to be a lawyer to
15 represent your company in an administrative proceeding.

16 CHAIRMAN BABCOCK: Commissioner Sullivan,
17 and then Levi.

18 HONORABLE KENT SULLIVAN: I'm looking at
19 page two of the memo. Do I infer correctly that this is
20 taken from a 2016 ABA model?

21 MR. LEVY: And that is the model rule for
22 registration, but I think, as Susan indicated, they looked
23 primarily to the California, New Jersey, New York, and
24 Pennsylvania rules.

25 MS. HENRICKS: But we did look at the model

1 rule, and there is a model rule.

2 HONORABLE KENT SULLIVAN: And I'm just
3 curious it would just be interesting to know to what
4 extent we deviate and why and to know what the experience
5 has been in those other states, because I think that might
6 inform some of the choices that we make. We certainly
7 might know the answers to some of these questions because
8 some of the other states perhaps have been down these in
9 their matters.

10 MS. HENRICKS: Well, I -- I have made some
11 effort to speak with my counterparts in other states to
12 see what experience they've had when they have implemented
13 similar rules in the recent past; and they have said that,
14 you know, the compliance is -- it's hard to know the
15 degree of compliance; but they know that it's not
16 complete, they know there are certainly in-house lawyers
17 who are not registering; and that was the main perspective
18 I was looking at. I'm not aware of any particular
19 problems or difficulties that have arisen from the
20 implementation of these registration procedures in other
21 states, but I could ask some more questions about that.

22 MR. LEVY: And before we go on, I did want
23 to mention one other point for -- that I failed to point
24 out.

25 CHAIRMAN BABCOCK: Well, Levi, had a --

1 MR. LEVY: Okay. Go ahead.

2 CHAIRMAN BABCOCK: Several points ago. So
3 go ahead.

4 HONORABLE LEVI BENTON: Robert, you said at
5 least twice that not requiring the registration before
6 agencies was the right result and you said the same thing
7 before an arbitration. Why is that the right result, and
8 who is it right for? It doesn't seem right for the
9 taxpayers or citizens of Texas who could, at a minimum,
10 extract a fee from Exxon and Shell and others to require
11 their out-of-state lawyers to appear before agencies and
12 arbitrators.

13 MR. LEVY: Well, I think that the answer is
14 that if I am a corporation and I want to appear in an
15 arbitration proceeding, frankly, I don't -- arguably, you
16 might not even need to be a licensed lawyer to participate
17 in that.

18 HONORABLE LEVI BENTON: Well, may I
19 interrupt just one second?

20 MR. LEVY: Sure.

21 HONORABLE LEVI BENTON: I don't know where
22 that comes from, because -- and I've had this question as
23 an arbitrator. The rules -- there are rules, State Bar
24 rules, that still apply to me as a sole arbitrator, and
25 you would be asking me to sanction the unauthorized

1 practice of law.

2 MR. LEVY: Well, I'll ask --

3 MS. PHILLIPS: (Inaudible)

4 THE REPORTER: I can't hear you.

5 MS. BARON: Kim, you're really hard to hear.

6 HONORABLE LEVI BENTON: Kim said that they
7 can draft their own rules in contract. That's true, but
8 they don't trump state law.

9 MR. LEVY: So the question, Levi, is that if
10 you are -- let's say you are an arbitrator and you're
11 sitting in Texas, but you -- all of the parties are in
12 another state. How does a Ohio lawyer appear before you
13 in Texas?

14 HONORABLE LEVI BENTON: Well, okay, so it
15 has happened, the question -- the question still gets
16 asked, it's not answered, but we've got a number of
17 questions that are on the table now, and I want to circle
18 back to my question. Why is it the best result, and who
19 is it exactly best for?

20 MR. LEVY: So there are many situations
21 where issues are adjudicated or arbitrated that are in
22 very efficient proceedings that happen where you deal with
23 issues over and over. In labor matters that's often the
24 case or other types of proceedings where they don't
25 involve the full process of that would typically be

1 involved in a litigation proceeding. There might be
2 summary proceedings. These are all done pursuant to
3 agreement of both parties obviously, and to require a
4 corporation in Texas or a corporate to hire a counsel if
5 they don't have local Texas lawyers would create a
6 significant burden on them that doesn't really advance any
7 issue in terms of representing their interests. I would
8 ask you, could a corporation appear pro se in an
9 arbitration? I think the answer is yes. So how would
10 they do that?

11 HONORABLE LEVI BENTON: The answer is no.

12 MR. LEVY: Why is it no?

13 HONORABLE LEVI BENTON: Because it's the
14 unauthorized practice of law.

15 MR. LEVY: If a corporation want to
16 represent itself in -- in a arbitration, you're saying
17 they can't?

18 HONORABLE LEVI BENTON: Okay. Excuse me, I
19 misspoke. Well, I don't -- I don't know. Perhaps the
20 others around the table are convinced. I'm not convinced
21 that it's the right result, and I'm not sure who it's
22 right for, and it also -- it denies an economic
23 opportunity for Texas lawyers, so --

24 MR. LEVY: And I appreciate that.

25 CHAIRMAN BABCOCK: Robert, just to follow on

1 Levi's point for a minute, I think in California if you're
2 arbitrating and a corporation hires an out-of-state lawyer
3 to act as the counsel in the arbitration, the California
4 bar requires you to fill out a form that says, you know,
5 "I'm from Texas, but I'm going to be here in California
6 representing ABC Company" --

7 MR. LEVY: Right.

8 CHAIRMAN BABCOCK: -- "and I've got local
9 counsel, but he's not going to be participating in the
10 arbitration."

11 MR. LEVY: I think California is very
12 aggressive on that point.

13 CHAIRMAN BABCOCK: Yeah.

14 MR. LEVY: And I'm no expert, but I haven't
15 come across that issue in other states.

16 CHAIRMAN BABCOCK: Well, you don't have to
17 do anything else.

18 MR. LEVY: Right.

19 CHAIRMAN BABCOCK: And there doesn't appear
20 to be any consequence, except I think you can pro hac in
21 only so many times --

22 MR. LEVY: Before you have to --

23 CHAIRMAN BABCOCK: -- and the bar says,
24 well, wait a minute.

25 MR. LEVY: Right.

1 CHAIRMAN BABCOCK: -- You've only pro hac'ed
2 in once, but you've handled five arbitrations in the last
3 12 months, so we're going to tell the judge not to let you
4 in.

5 HONORABLE LEVI BENTON: And there's a fee
6 paid.

7 CHAIRMAN BABCOCK: There is a fee paid.

8 MR. LEVY: Right, but that -- that rule
9 would apply for an out -- an outside counsel. If you have
10 co-counsel that is employed by the company you are
11 representing, perhaps that rule would apply. I'm not
12 sure.

13 CHAIRMAN BABCOCK: Yeah, I don't know if it
14 would either.

15 HONORABLE LEVI BENTON: Okay. One -- one
16 last point, I'm sorry.

17 CHAIRMAN BABCOCK: You're just trying to
18 collect a little revenue here.

19 HONORABLE LEVI BENTON: Yes. And I'm
20 looking out for local lawyers.

21 MR. LEVY: I understand. I'm a local
22 lawyer, too.

23 HONORABLE LEVI BENTON: But there's
24 another -- there's another -- there's another point I
25 think, that expressly in front of the agencies, let's

1 say -- let's say Robert from Kentucky appears before some
2 agency.

3 CHAIRMAN BABCOCK: Insurance commission.

4 HONORABLE LEVI BENTON: The insurance
5 commission, good point, Commissioner, and you express--

6 HONORABLE KENT SULLIVAN: We don't have a
7 commission. We just have a department.

8 HONORABLE LEVI BENTON: Pardon me? And you
9 expressly insult and offend Commissioner Sullivan.

10 CHAIRMAN BABCOCK: Easily done.

11 HONORABLE LEVI BENTON: And before that
12 agency has the opportunity to discipline you for such
13 conduct, you're on Southwest Airlines back to Kentucky,
14 never to appear in Texas again; and they have no -- you
15 know, it just seems to me that's not the right result.

16 MR. LEVY: Well, and one of the issues about
17 the agency practice is more than in arbitrations, but
18 companies are before administrative agencies all the time
19 doing many, many things. They're dealing --

20 HONORABLE LEVI BENTON: Railroad Commission.

21 MR. LEVY: They're getting permits.
22 They're -- they're talking to agency staff, there are
23 filings, sometimes there are administrative proceedings,
24 and this -- this is like the bread and butter of what some
25 in-house counsel do, and, you know, it's -- the question

1 there is why have in-house counsel, and I know that you
2 might agree with also.

3 CHAIRMAN BABCOCK: Levi's got an opinion on
4 that.

5 HONORABLE LEVI BENTON: Okay. So put me
6 down as a "no" on this one, Chip.

7 CHAIRMAN BABCOCK: Okay.

8 MR. LEVY: One quick point, if I could, just
9 one other issue to consider that as currently proposed the
10 lawyers who are registered or licensed in other states who
11 register under this provision would be required to meet
12 the Texas CLE standards, 15 hours a year, three hours of
13 ethics, even if their home state does not require that
14 level of CLE; and so a question is, should we just require
15 the lawyer to continue to be in good standing under their
16 local bar and meeting the CLE requirements there? Or even
17 if they're not as extensive as Texas?

18 CHAIRMAN BABCOCK: Richard Orsinger. Do you
19 have an answer on that question?

20 MR. ORSINGER: No. No, I have a new point.
21 Okay. So --

22 CHAIRMAN BABCOCK: Anybody want to speak to
23 that question?

24 MS. HENRICKS: Well, part of our reasoning
25 on that was that we were going -- we do have the provision

1 that would allow three years of experience as a registered
2 in-house counsel in Texas to qualify them for admission
3 without examination instead of having five of the last
4 seven years. So the thought was that if they're in Texas
5 and they're paying dues to the State Bar and they're
6 getting Texas CLE or at least enough CLE to meet our
7 requirement, then that would support or it would justify
8 giving them that extra dispensation.

9 CHAIRMAN BABCOCK: Yeah, that makes sense.
10 I should know this, but do we let -- do we waive in
11 anybody from any state if they have, you know, five years
12 experience or --

13 MS. HENRICKS: If they meet the other
14 requirements. For example, they have to have J.D. from an
15 approved school, which is an ABA school, is the primary
16 other requirement. Yes.

17 CHAIRMAN BABCOCK: So even California or
18 Florida, we'll let them in?

19 MS. HENRICKS: Yes.

20 CHAIRMAN BABCOCK: Even though they won't
21 let us in.

22 MS. HENRICKS: Lots of them. Yes. Yes.

23 CHAIRMAN BABCOCK: Levi, you got an opinion
24 on that? Never mind. Richard.

25 MR. ORSINGER: So I'm looking at (2) (a) (2)

1 that they're authorized to negotiate and document matters
2 for the business organization and comparing that to
3 (2) (b) (4), which prohibits preparing legal instruments
4 affecting title to real property, and I realize that this
5 expressly compensates negotiating and drafting contracts
6 that do not constitute an instrument affecting title to
7 land, right?

8 MS. HENRICKS: Yes.

9 MR. ORSINGER: Okay. So what's really --
10 what this really represents is there are certain aspects
11 of what we would all think in practicing law that will be
12 allowed for this one client, the employer, and then there
13 are a few areas of practicing law that will not be
14 allowed, like appearing in court like a licensed lawyer,
15 or filing real estate documents like a licensed lawyer.
16 So what's happened is that we've -- it's a limited
17 permission to perform legal services for your employer,
18 except for a couple of things that we've decided are too
19 important to allow a nonlicensed out-of-state lawyer to
20 do, which would be courtroom activity and real estate. Is
21 that basically what's happened here?

22 MS. HENRICKS: That's what it says, yes, but
23 we talked about that perhaps the rationale for the real
24 estate restriction, which is based on this provision in
25 the Government Code, might not really be necessary because

1 they're not doing it for separate compensation but just as
2 an employee of their corporate entity.

3 MR. ORSINGER: Well, do you think -- I mean,
4 I assumed all of these years that the restriction relating
5 to real estate had to do with a concern for messing up
6 legal title.

7 MR. LEVY: No, it's back to Levi's concern.
8 It's a protective provision --

9 MR. ORSINGER: It's a revenue for lawyers.

10 MR. LEVY: -- that requires you to be a
11 lawyer. Now, the argument would be that only lawyers are
12 qualified to do that work, but -- but it protects the
13 lawyer revenue stream.

14 MS. HENRICKS: Yeah, I think a lot of it had
15 to do with title companies.

16 MR. ORSINGER: I remember, because they --
17 there was a fight over whether they could do deeds --

18 MS. HENRICKS: Right.

19 MR. ORSINGER: -- and they were cut back to
20 just earnest money contracts. They can do earnest money
21 contracts now, can't they?

22 MS. HENRICKS: Well, that's agents. Real
23 estate agents can do earnest money contracts.

24 MR. ORSINGER: I see.

25 MS. HENRICKS: And but I think title

1 companies have to employ a lawyer to prepare these
2 documents.

3 MR. ORSINGER: Yeah.

4 MS. HENRICKS: And there I think maybe at
5 one time there was some lack of clarity about that and
6 then the statute came out of that.

7 CHAIRMAN BABCOCK: Judge Wallace.

8 HONORABLE R. H. WALLACE: Okay. Well, I
9 guess I was going to ask the question, but what you're
10 just saying, I suppose I understand, (2)(b)(4) then
11 specifically excludes the matters set out in section
12 83.001 relating to a transaction for the lease, sale, or
13 transfer of any mineral interest.

14 MS. HENRICKS: That's right.

15 MR. ORSINGER: Mineral.

16 HONORABLE R. H. WALLACE: So you need to be
17 a lawyer to do mineral leases and --

18 CHAIRMAN BABCOCK: There's nothing going on
19 in this meeting.

20 MR. LEVY: Well, like a land man is not a
21 lawyer, but they certainly engage in that activity.

22 HONORABLE R. H. WALLACE: Yeah.

23 MR. LEVY: One of the concerns also about
24 this --

25 MS. HENRICKS: I think there's an exemption

1 for them in the statute.

2 HONORABLE R. H. WALLACE: Well, but does
3 that mean, okay, so a nonlawyer can prepare a lease?

4 MR. LEVY: Well, except --

5 MS. HENRICKS: Not for compensation.

6 MR. LEVY: Not under this language that's in
7 the Government Code. The additional concern is that we
8 would have lawyers who quite frequently would work on
9 things like a joint operating agreement, which could
10 include provisions related to who owns the property and --
11 and provisions in that contract that would arguably affect
12 real property and is a contracted legal instrument, and if
13 that contract talks about ownership rights, would that be
14 inconsistent with this provision. And so either this
15 provision needs to be more clearly drafted or in my view
16 it just should be taken out.

17 HONORABLE R. H. WALLACE: Well, that's --
18 because when I read (4), that's what I wondered, was does
19 that apply to mineral leases, mineral deeds?

20 MR. LEVY: That's the uncertainty, and it
21 needs to be clarified.

22 HONORABLE R. H. WALLACE: We need a little
23 more uncertainty in the area of mineral leases. We don't
24 litigate that enough.

25 CHAIRMAN BABCOCK: That's always been what

1 I've said. Skip, and then Justice Christopher.

2 MR. WATSON: Robert, I missed something at
3 the beginning. Is the -- the impetus of this is primarily
4 uncertainty of just not knowing where these people fall?

5 MR. LEVY: I think, yeah, as Susan
6 described, they get calls frequently from lawyers who move
7 to Texas to work for a company, and they ask, "What do I
8 need to do," and the answer is, "Well, nothing, we think."
9 I think, is that fair?

10 MS. HENRICKS: Yes. That's --

11 MR. WATSON: Okay.

12 MS. HENRICKS: That's the way we --

13 MR. LEVY: So the board is saying\ I'm not
14 real comfortable about that.

15 MR. WATSON: That's where I'm going. As I
16 understand it, there have been no ethics opinions and no
17 disciplinary proceedings in this area, correct?

18 MR. LEVY: Not that I've seen, but I've not
19 done an exhaustive search.

20 MS. PHILLIPS: But nobody wants to be the
21 first one.

22 MR. WATSON: No, I understand that, but as I
23 look at how detailed this is and then I see that I think
24 you said there are no sanctions for not registering; is
25 that correct?

1 MR. LEVY: The way that it's drafted there
2 are no sanctions, and I don't know how this rule could
3 impose sanctions.

4 MR. WATSON: So I'm trying to figure out
5 exactly how this advances the ball. I mean, it does give,
6 you know, the -- the Board of Law Examiners or whomever a
7 way to answer the question when the phone rings, but to me
8 if there are no DR's, DR violations, no ethics opinions,
9 it doesn't look like there's been a lot of even smoke, let
10 alone fire.

11 MR. LEVY: Well, there are questions. I
12 mean, this issue comes up. Kim was pointing out that they
13 were discussing this just recently, and we've had -- we
14 asked the same question, what do we do, and if we have a
15 lawyer let's say who is coming in for a two-year
16 assignment. It doesn't make sense for them to sit for the
17 bar or even go through the process so --

18 MR. WATSON: You've answered it.

19 MR. LEVY: -- we want to make sure they're
20 in the right place.

21 MR. WATSON: But if it is that important,
22 then why isn't there enforcement? Let's say that a lawyer
23 does come in, register under this and yet drafts a lease
24 that turns out to, heaven forbid, violate the rule against
25 perpetuities. You know, what happens, other than a civil

1 action?

2 MR. LEVY: So I don't know how we could --
3 if a lawyer chooses not to register under that rubric, if
4 this rule passes, I don't see how we could have an
5 enforcement mechanism because there is no ethic rule,
6 disciplinary rule, nor is the statute clear that you
7 require registration. If you do register under this
8 provision, you are obligated to follow the terms of this
9 registration rule; and if you violate that, I think the
10 sanction would be your registration is revoked. So there
11 is that limited sanction, but you also obligate yourself
12 in effect, under the Texas disciplinary rules, so maybe
13 you could be sanctioned in a disciplinary proceeding, but
14 I'm not sure how that would work, because you're not a
15 Texas lawyer.

16 MR. WATSON: Yeah, that's -- that's -- you
17 put your finger on the part that I'm having trouble
18 finessing here.

19 MS. HENRICKS: The intention was that they
20 could be subject to discipline under the disciplinary
21 rules.

22 MR. LEVY: Okay.

23 MR. WATSON: And it would help if something
24 said that.

25 CHAIRMAN BABCOCK: Well, it does say that.

1 MS. WOOTEN: Yeah, it does say that.

2 CHAIRMAN BABCOCK: It says they will follow
3 the disciplinary rules in (2) (a).

4 MR. WATSON: Well, I understand that.

5 CHAIRMAN BABCOCK: Or (4) (a).

6 MR. WATSON: But what happens if you don't,
7 I mean, is this aspirational, or is this --

8 MR. LEVY: It is.

9 CHAIRMAN BABCOCK: No, I agree.

10 MR. LEVY: I think that's right.

11 CHAIRMAN BABCOCK: Justice Christopher has
12 been waiting to say something.

13 HONORABLE TRACY CHRISTOPHER: Well, can you
14 explain how much harder it is to actually apply to waive
15 into the bar versus this in-house registration?

16 MS. HENRICKS: The -- well, some people who
17 would qualify for this registration would not qualify for
18 admission without examination, either because they
19 don't -- they can't meet the lawful practice experience
20 requirement or because this would also apply to people who
21 did -- who went to foreign law schools and maybe are
22 licensed in a foreign country.

23 HONORABLE TRACY CHRISTOPHER: Okay, but
24 taking away the foreign law school aspect, what -- I mean,
25 if I have practiced five out of seven years, what is

1 required for me to become a full member of the Texas bar
2 that would -- that differs from this?

3 MS. HENRICKS: You also would have to have a
4 satisfactory MPRE score. Most people have taken the MPRE.
5 I have not, but most recently licensed lawyers have taken
6 the MPRE, and you have to meet the law study requirement,
7 which generally requires you to have a J.D. from an ABA
8 approved law school, and there are many lawyers
9 practicing, especially in California who have not obtained
10 a J.D. from an ABA school. They would be allowed to
11 register, but they wouldn't be allowed to obtain a license
12 without examination.

13 MR. LEVY: And -- and if I could add, in
14 talking to my colleagues who are not licensed in Texas
15 originally, the process for waiving in is -- is pretty
16 detailed and --

17 MR. HARDIN: I think it's over now, isn't
18 it?

19 MR. LEVY: What was that?

20 MR. HARDIN: The waiving in now is over,
21 isn't it, as of December 1st?

22 MR. LEVY: You're talking about -- that's
23 the bar exam issue.

24 MR. HARDIN: Okay.

25 MR. LEVY: And that will be much easier,

1 but --

2 MS. HENRICKS: But we're still accepting
3 applications for admission without examination.

4 MR. LEVY: And but so the issue about the
5 MPRE, a colleague of mine did not take the MPRE, and so
6 he's going to have to now sit for that exam and being a
7 lawyer for 35 years, which is not the end of the world,
8 but -- but it does make the process more difficult, and
9 proving up your status of practicing five out of seven
10 years can be also very challenging, because you have to --
11 they're very careful about proving that you've done that,
12 and you can't just say it. You have to demonstrate that
13 you have done that.

14 MS. HENRICKS: If you're self-employed it
15 can be difficult. If you have been employed with a
16 corporation and can readily show that you've been fully
17 licensed and a full-time employee of a corporation or a
18 law firm then it's not so difficult. It's mainly for
19 people who are solos or a small firm.

20 MR. LEVY: Right. And I've -- and one of my
21 colleagues had been a contractor actually to Exxon-Mobil
22 for many, many years, and they had to work through a
23 number of hoops to meet that requirement.

24 CHAIRMAN BABCOCK: Levi.

25 HONORABLE LEVI BENTON: Susan, I apologize,

1 I must have been distracted when you were introduced.

2 You're with the State Bar?

3 MS. HENRICKS: I'm the executive director of
4 the Board of Law Examiners. We are the ones who qualify
5 the applicants for admission.

6 CHAIRMAN BABCOCK: So don't make her mad.

7 HONORABLE LEVI BENTON: And --

8 MS. HENRICKS: No, you're already licensed.
9 I don't have anything to say about it. That's the Chief
10 Disciplinary Counsel.

11 HONORABLE LEVI BENTON: So is it the opinion
12 of the Board of Law Examiners that an out-of-state lawyer
13 appearing before an agency or appearing in an arbitration
14 seated in Texas is not required to be a Texas licensed --
15 a licensed -- licensed -- a licensed Texas attorney?

16 MS. HENRICKS: You're asking me if the board
17 agreed that this proposed rule would allow for that if
18 they're registered?

19 HONORABLE LEVI BENTON: No, that's not
20 exactly my question.

21 MS. HENRICKS: Okay.

22 HONORABLE LEVI BENTON: Let me see if I
23 can't express it a bit clearer. Is it the board's opinion
24 or your opinion that if I'm a Kentucky lawyer I can appear
25 before the Railroad Commission and not be licensed in

1 Texas, irrespective of this registration stuff?

2 MS. HENRICKS: My board has never discussed
3 that issue and has never come to any conclusion or opinion
4 on it. In my personal experience, I was a board certified
5 administrative lawyer and practiced in the state for 30
6 years. I think they probably can do that. There's not
7 really any law or rule that I know of that specifically
8 prohibits it.

9 CHAIRMAN BABCOCK: When you say, "They can
10 do it," the Kentucky lawyers --

11 MS. HENRICKS: Yes.

12 CHAIRMAN BABCOCK: -- can come down.

13 MS. HENRICKS: I've seen them do it, yes.

14 CHAIRMAN BABCOCK: En masse.

15 MS. HENRICKS: And I have researched that
16 question, and it wasn't clear to me that they couldn't do
17 it.

18 HONORABLE LEVI BENTON: Okay. So Rule 8.03,
19 reporting professional misconduct, not in that -- those
20 rules, but in these rules --

21 MR. LEVY: Disciplinary rules.

22 MS. HENRICKS: Okay.

23 HONORABLE LEVI BENTON: Disciplinary rules,
24 which requires each of us who's licensed in Texas to
25 report misconduct of another lawyer, and it doesn't say a

1 Texas lawyer, of another lawyer whose conduct has violated
2 the rules, is not -- is not triggered or implicated if I
3 appear in an agency proceeding with a Kentucky lawyer not
4 licensed in Texas.

5 MS. HENRICKS: I've never considered that
6 question.

7 MR. LEVY: You might need counsel to
8 represent you.

9 MR. WATSON: That's right. This is a trick
10 question.

11 MS. HENRICKS: I'm not going to answer it.

12 MS. WOOTEN: Wise woman.

13 CHAIRMAN BABCOCK: Judge Wallace.

14 HONORABLE R. H. WALLACE: On the last page,
15 paragraph 7, continuing legal education requirements, it
16 says, "In-house counsel should comply with all continuing
17 legal education requirements applicable to members of the
18 bar" is that -- what bar is that?

19 MS. HENRICKS: The State Bar.

20 HONORABLE R. H. WALLACE: Texas State Bar?

21 MS. HENRICKS: Yes.

22 HONORABLE R. H. WALLACE: Okay. How would
23 they do -- I mean, if they've got to have 15 hours of CLE
24 here, do they have to get those 15 hours before they can
25 exhibit -- be registered? You understand what I'm saying?

1 MS. HENRICKS: No. No. They would just as
2 an ongoing requirement. Just like all other lawyers.

3 CHAIRMAN BABCOCK: What would they put down?

4 MR. LEVY: Would they have a bar number? Or
5 what number would they put down?

6 CHAIRMAN BABCOCK : What bar number do they
7 put down?

8 MS. HENRICKS: No, they wouldn't get a bar
9 number, so the State Bar would have to address that
10 question.

11 MR. ORSINGER: We just have to trust these
12 Kentucky lawyers.

13 HONORABLE R. H. WALLACE: Well, I don't
14 know, I think you mentioned this earlier, but to me, it
15 would seem to make more sense to just require them that
16 they meet the CLE requirements of whatever state they are
17 licensed in.

18 MR. ORSINGER: Well, how is it going to --
19 the 15 hours of Louisiana law isn't going to help you a
20 lot in Texas, is it?

21 HONORABLE R. H. WALLACE: Well, no, but --

22 MS. HENRICKS: I imagine that the CLE that
23 they got in Louisiana might be accepted by the Texas MCLE
24 department.

25 MR. LEVY: It often is, if you go to

1 national conferences.

2 MS. HENRICKS: Yeah, it is. If -- they look
3 more at the provider than the topic, I think.

4 CHAIRMAN BABCOCK: Richard Munzinger.

5 MR. MUNZINGER: The question that was just
6 asked reveals the ambiguity of section (7), "to members of
7 the bar." Why would you say "to members of the State Bar
8 of Texas" if that's the bar that applies?

9 MR. LEVY: Yeah, that should be.

10 MS. HENRICKS: That's a good idea.

11 MR. MUNZINGER: That was meaningful
12 activity.

13 CHAIRMAN BABCOCK: Professor Carlson.

14 PROFESSOR CARLSON: You may have already
15 addressed this, and I apologize. What was your thought
16 process with making this permissive as opposed to
17 mandatory, and did you give any thoughts to reciprocity?

18 MS. HENRICKS: Well, we -- I think it would
19 be hard to enforce. And, in fact, we would have no means
20 to enforce it whatsoever, meaning the Board of Law
21 Examiners. We wouldn't have the means to do that at all.
22 In many states that have these types of rules, there is
23 no -- it's not mandatory. It's really just permissive,
24 and so we just took that approach as being we thought an
25 appropriate first step at regulating this particular area,

1 and as far as the reciprocity goes, are you talking about
2 admission without examination?

3 PROFESSOR CARLSON: Yeah, Chip was saying he
4 can't go to Florida and do what this would allow him to
5 do, would allow Florida lawyers to do here.

6 MS. HENRICKS: Well, they're allowed to do
7 that now if they meet the requirements for being admitted
8 with or without examination, we do that, and with the
9 advent of the Uniform Bar Examination, which we're going
10 to start taking those applications next month. Now,
11 neither Florida nor California gives the Uniform Bar
12 Examination right now, but most states do, and so we are
13 going to have a lot more lawyers who will qualify for
14 admission in Texas with those UBE scores.

15 MR. LEVY: And, professor, I could not -- as
16 I was looking at the proposed rule, I felt like it would
17 be a problem to require this in a rule, a State Bar
18 rule -- or a Board of Law Examiners rule when there is a
19 State Bar Act that provides for licensure and/or the
20 disciplinary rules that have a different approval process.

21 CHAIRMAN BABCOCK: Professor Carlson.

22 PROFESSOR CARLSON: Has this been vetted
23 with the State Bar of Texas?

24 MR. LEVY: Susan, have you?

25 MS. HENRICKS: I'm sorry. What was the

1 question?

2 MR. LEVY: Has this been discussed with the
3 bar?

4 MS. HENRICKS: I have talked to Trey Apffel
5 about it. He was supportive of the idea. It hasn't gone
6 any farther than that.

7 PROFESSOR CARLSON: Thank you.

8 CHAIRMAN BABCOCK: Okay. Yeah, Kennon.

9 MS. WOOTEN: A question regarding the
10 registration process is whether it's intended to condone
11 the in-house non-Texas attorney and his or her dealings
12 with litigation, and the reason it comes to mind is
13 because I look at the authored activities under (a)(1),
14 and I was just thinking about whether it would allow, for
15 example, the in-house counsel to talk with a legal expert
16 involved with litigation. And so that, really, the
17 question is -- is whether it should pick up basically any
18 activity the in-house counsel may engage in litigation
19 process or not?

20 MR. LEVY: Well --

21 MS. HENRICKS: I -- I don't think there's
22 anything that would prevent an in-house counsel now from
23 speaking to an expert. I think there are, you know, as
24 you know, a host of issues for the litigation counsel
25 about that, but these, it's not intended to address any of

1 that.

2 MS. WOOTEN: Okay. Is the intent -- I
3 guess, the question more directly, is the intent to allow
4 the in-house counsel to be involved with litigation in
5 Texas?

6 MS. HENRICKS: Well, they obviously might
7 give legal advice to their employer or the directors or
8 officers about the litigation, but it does say down in the
9 unauthorized activities, as we've already talked about,
10 that they could not appear in Texas courts in person or by
11 signing pleadings, so that would be the limitation on it.

12 MS. WOOTEN: Uh-huh.

13 MS. HENRICKS: If they want to do that then
14 you get a full license.

15 MR. LEVY: And currently --

16 MS. WOOTEN: Or pro hac vice.

17 MS. HENRICKS: They don't qualify, because
18 they live in Texas.

19 MS. WOOTEN: Uh-huh.

20 CHAIRMAN BABCOCK: Scott.

21 MR. STOLLEY: Yeah. One of the things that
22 this group does a good job of is getting consultation and
23 buy-in from different constituencies that have an interest
24 in the issue, and somebody just mentioned the State Bar of
25 Texas. I've recently served on the board of directors of

1 the State Bar, so it occurs to me that it probably would
2 be a good idea to run this by the State Bar board of
3 directors, because I think you would want to get that
4 constituency to buy in on this if you want to enact it.

5 MR. RODRIGUEZ: I echo that. I ditto that.

6 MS. PHILLIPS: If it's not enacted, then
7 people will just not register at all, so you won't have
8 any -- there will be no -- you won't know one way or the
9 other. Right?

10 MS. HENRICKS: And that's the way it is now.
11 Yes.

12 MR. STOLLEY: And that -- that may persuade
13 the State Bar board to get behind this.

14 MS. WOOTEN: And I'll add just for the
15 record that part of what we do at my firm is counsel
16 people on ethical considerations before litigation arises,
17 before people get in trouble, et cetera, and this is a
18 question that comes up.

19 MS. HENRICKS: Uh-huh.

20 MS. WOOTEN: So just because we're not
21 seeing it in professional ethics committee opinions
22 doesn't mean that it's not very much on the minds of
23 people, and I think the definition of practice of law
24 being as vague as it is in 81.101 is something that merits
25 concern for people not wanting to cross the line in Texas.

1 MS. HENRICKS: That's what we hear, yeah.

2 CHAIRMAN BABCOCK: That really raises a good
3 question, what has this come up and this is -- this
4 purports to be Rule 23 of the rules governing the
5 admission to the State Bar of Texas. Is that a rule that
6 the Supreme Court promulgates, or is it a rule that the
7 bar promulgates?

8 MS. HENRICKS: It's a Supreme Court rule,
9 and it would actually be 24 because since we drafted this
10 rule --

11 CHAIRMAN BABCOCK: Right.

12 MS. HENRICKS: -- there's been a 23.

13 CHAIRMAN BABCOCK: Yeah. Okay. So we
14 haven't wasted our time, good. Justice Gray.

15 HONORABLE TOM GRAY: It seems to me that
16 we're dealing in an area where there's a lot of
17 uncertainty and that this may bring some certainty, so it
18 seems like a worthwhile endeavor. The focus, however, has
19 been on those attorneys that are residing or relocating to
20 Texas, and we live in a society now where there's a lot of
21 travel involved, and it would seem to me that the same
22 concerns would exist if any lawyer were coming to Texas to
23 work with their client, their employer, say a -- I'm more
24 familiar with the big eight accounting firms, many of
25 which -- well, now it's the big four or three or

1 something.

2 MR. ORSINGER: Three, yeah.

3 HONORABLE TOM GRAY: The ones that -- are we
4 down to three now? Okay. There were eight involved when
5 I was.

6 MR. ORSINGER: I remember. We lost one of
7 them here in Houston.

8 HONORABLE TOM GRAY: And they had a -- New
9 York was their home office, but lots of offices in Texas,
10 and their in-house counsel would come to Texas and work
11 with us on litigation here and, you know, work directly
12 with -- and I really want to get away from the litigation
13 but focus on other things, partnership, internal issues,
14 their own leases where they were negotiating for multiple
15 floors of, you know, an office tower, those things where
16 their counsel are coming here and avoiding an argument
17 that they are providing the unauthorized practice of law
18 in Texas. So I -- I don't fully understand why we are
19 only striving to protect those who reside or relocate
20 here, and I see Robert has an answer to that part of it.

21 MR. LEVY: Well, I think that goes to the
22 same issue that when Levi goes to New York City for
23 deposition, he's not doing anything to seek New York's
24 imprimatur to appear in that state to conduct legal work
25 on behalf of his Louisiana client. That's an interesting

1 issue, and there are also tax implications with that as
2 well, but I think it's a little bit beyond what this is
3 trying to accomplish.

4 HONORABLE TOM GRAY: Okay. The -- then I'll
5 boil it down to go from the macro to the extreme micro.
6 Under (b) (2) -- I'm sorry under (2) (b) (1), it says
7 "appearing for the business organization in Texas courts."
8 I'm assuming that's going to include federal courts in
9 Texas, and it would seem to me to be "appearing for the
10 business organization in a court in Texas" would be a
11 better way to phrase that. It's a gnat.

12 Also, as a gnat on section 4 on
13 registration, (a) (2) (c), the registration has to say
14 something about "is not subject to a disciplinary
15 proceeding." The way the disciplinary proceedings work,
16 at least in Texas, you may or may not know that you are
17 subject to a disciplinary proceeding, so I would suggest
18 that that phrase say "is not aware of a pending
19 disciplinary proceeding."

20 And then on section 4(a) (2) (4), it says
21 "submit an application to register." I would say "a fully
22 completed application" so that they can't leave things
23 out. I have some more gnats, but I figure I'll stop with
24 those two.

25 CHAIRMAN BABCOCK: Those are good gnats.

1 Gnats flying all around. What else? Jane got it.
2 Although she didn't appreciate it. All right. Any other
3 comments about this rule? Alistair, is that your hand
4 going up?

5 MR. DAWSON: Nope.

6 CHAIRMAN BABCOCK: Judge Wallace.

7 HONORABLE R. H. WALLACE: Well, if we're
8 going to -- if there's going to be a provision that they
9 comply with the State Bar of Texas CLE requirements, how
10 is that going to be -- how are we going to know if they do
11 that? I mean, if I don't comply I get a notice that your
12 license is suspended or going to be, but I don't know how
13 this would -- what would be plugged in with the CLE system
14 to keep track of that, but something would need to be
15 done.

16 MS. HENRICKS: Right, we haven't gone that
17 far with it, but if they're going to be -- they're going
18 to be registered with the State Bar and paying dues to the
19 State Bar, so I think the State Bar could be responsible
20 with that, and in speaking with Trey, he didn't see any
21 issues with that.

22 CHAIRMAN BABCOCK: Anything else? Okay.
23 Well, thanks for that. Thanks very much for that.
24 If there are any more revisions or comments or input from
25 the State Bar or anything else with respect to this

1 proposed rule, contact Jackie or Martha or Paulene, and do
2 it as timely as you can, and then we'll consider this rule
3 submitted to the Court, and it will not be back on the
4 agenda unless somebody needs it to be.

5 So moving -- moving right along, the next
6 item on our agenda is the parental leave continuance rule,
7 and Professor Carlson and Tom Riney are the experts on
8 this.

9 PROFESSOR CARLSON: Kennon is going to take
10 the lead on this section.

11 CHAIRMAN BABCOCK: Okay. Kennon is going to
12 take the lead.

13 MS. WOOTEN: Okay. So the materials include
14 three different documents for consideration. One is for
15 background purposes, and it's the letter from Randy
16 Sorrels to Jackie dated October 23rd, 2018, which is in
17 the record so that you-all know why the court rules
18 committee ultimately proposed revisions to Rule 253 of the
19 Texas Rules of Civil Procedure to address parental leave
20 continuances, and that is the second item in the packet of
21 materials. It's the court rules committee's proposal.

22 The third and final item in the materials
23 today is the American Bar Association's reports to the
24 House of Delegates on Resolution 101B, and this resolution
25 came out not long after the court rules committee had

1 completed its work on the continuance provision, so we
2 wanted you-all to have that as well so you have a complete
3 picture.

4 And on that note of providing a complete
5 picture, I will state for the record that to our knowledge
6 as of today you have just a few jurisdictions with rules
7 on place -- in place, excuse me. Florida, North Carolina,
8 and then in Texas we have one standing order in Harris
9 County that is put out by Judge Sandill of the 127th
10 District Court in Harris County. So this is an area
11 without a whole lot of precedent, but it has a lot of
12 attention on it. If you are on any social media platforms
13 you may have seen some of that, and you can also get a
14 feel for the attention on this particular area if you read
15 through the resolution from the American Bar Association.

16 So going back to the first document, the
17 letter dated October 23rd, 2018, you can see that Randy
18 asked for consideration of implementing a statewide policy
19 pertaining to maternity and adoption issues that arise in
20 the litigation setting, and he specifically asked the
21 court rules committee to look into developing and drafting
22 a policy to address some of the issues parents face in an
23 upcoming birth or adoption of a child. So Giana Ortiz was
24 the chair of the court rules committee who took the lead
25 in getting this proposal down on the books, and as you can

1 see, it entails amending existing Rule 253 of the Texas
2 Rules of Civil Procedure to add a subpart (a) and leaving
3 intact the existing language of Rule 253, which is now in
4 subpart (b) of the rule.

5 And then walking through at a high level the
6 proposal, you'll see that there are a few things that
7 stand out. One, it's meant to apply to people regardless
8 of their gender, so it's males and females alike. Two,
9 that consistent with Randy Sorrels suggestion it addresses
10 both birth and adoption. And three, there are basically
11 three categories of lawyers who would be governed by this
12 particular rule. Bless you. One is the lead attorney who
13 has been on the case for more than 10 days prior to the
14 date that the suit is set for trial. Two is the lead
15 attorney who comes in within that 10-day period, and the
16 third and final category is an attorney other than a lead
17 attorney who is involved in the case and working it up in
18 a meaningful way.

19 So one thing we wanted to do today as a
20 subcommittee is just go through some kind of high level
21 kind of policy issues that we grappled with at the
22 subcommittee level. One of those is whether we need a
23 particular provision for parental leave continuances as
24 opposed to just having what we have on the books now for
25 continuances. So that's one big issue.

1 Another big issue is whether the rule that's
2 proposed should have different categories of treatment for
3 different types of lawyers, as opposed to just saying for
4 all lawyers across the board if you're going to seek a
5 continuance you get it in the absence of a substantial
6 prejudice to the other side, for example, and then the
7 third issue that's been discussed in the subcommittee
8 level that we wanted full committee feedback on is how
9 soon should somebody have to seek this continuance when
10 they're involved in a case and know that they might need
11 time due to parenting responsibilities.

12 In looking at the proposal now, you'll see
13 that in subpart (a)(1) there's a reasonable time
14 requirement that's been proposed. This is one of the
15 things that was discussed at the subcommittee level, which
16 is perhaps needing to be more concrete, so we would like
17 the full committee feedback on that point. And Professor
18 Carlson may have additional big picture items she wants us
19 to consider, so I'll turn it over to her.

20 PROFESSOR CARLSON: I did speak with, I
21 think, Jackie, you were on the phone.

22 MS. DAUMERIE: Yes.

23 PROFESSOR CARLSON: We spoke with the --

24 HONORABLE TRACY CHRISTOPHER: We can't hear
25 you.

1 PROFESSOR CARLSON: I'm sorry. Jackie and I
2 had a phone conference with the attorneys in Florida.

3 MS. DAUMERIE: Yes, and a group called
4 Mother's Esquire. Yes.

5 PROFESSOR CARLSON: And the president of
6 that group.

7 MS. DAUMERIE: Right.

8 PROFESSOR CARLSON: And they were kind of
9 explaining the Florida process, how this came to be, and
10 apparently -- correct me if I'm wrong, apparently this did
11 not bode well with the rules committee to begin with.

12 MS. DAUMERIE: Yes. Their group that's like
13 SCAC was opposed to this sort of rule, but the State Bar
14 was very much for it, and the court asked them to -- I
15 guess they had oral arguments recently. I'm not sure
16 they've actually passed a rule yet.

17 PROFESSOR CARLSON: Well, I had the
18 impression they had.

19 MS. DAUMERIE: I think they just had oral
20 arguments in August, but I can check.

21 CHAIRMAN BABCOCK: They had an argument
22 about the rule?

23 PROFESSOR CARLSON: Yes. Because I asked
24 the lawyer several times on the phone, "You had oral
25 arguments?" They said, "Yes the Supreme Court ordered us

1 to oral arguments about the rule."

2 CHAIRMAN BABCOCK: Justice Bland.

3 HONORABLE JANE BLAND: Did the committee
4 think about or look at a leave requirement like -- I mean,
5 a leave like this in connection with anything under the
6 Family and Medical Leave Act, rather than parental, solely
7 parental leave?

8 PROFESSOR CARLSON: We did not. We did not
9 look beyond the face of this, and we've only --
10 Justice Bland, we've only had one phone conference of the
11 subcommittee. Most of the subcommittee liked the idea of
12 it. Some felt very negative about it because it could be
13 subject to misuse, like we see potentially with the
14 legislative continuance, and then of course, the devil is
15 in the details. So before we got too far into the weeds
16 we thought let's hear back from our committee, just on the
17 big picture, high level, what do you think. Do you think
18 it's a good idea, bad idea.

19 MS. WOOTEN: And one thing I'll note in
20 terms of potential abuse is that there is a different
21 treatment for the lead attorney who has come in within 10
22 days of the date the suit is set for trial, and that's
23 mirrored in part after what we see in the legislative
24 continuance rule, which is Rule 254 of the Texas Rules of
25 Civil Procedure, and it's designed to get at that

1 possibility that someone might game the system by getting
2 somebody on the case at the last minute who could be used
3 to justify a continuance.

4 MR. GILSTRAP: Can't imagine.

5 CHAIRMAN BABCOCK: Judge Wallace.

6 HONORABLE R. H. WALLACE: Yeah, I think
7 there's real problems with the 10-day rule, but also the
8 lead attorney. The lead attorney, first of all, the Texas
9 rule, Rule 8, defines lead, if no one else is designated
10 it's the attorney whose name first appears on the
11 pleadings, so down at the clerk's office it's going to
12 show that as lead attorney. Other attorneys come and go
13 sometimes --

14 MS. WOOTEN: Right.

15 HONORABLE R. H. WALLACE: -- and my
16 experience is they very seldom change lead attorney, so
17 defining what the lead attorney is sometimes is not going
18 to be easy in a case, you know, where there may be a
19 number of attorneys.

20 MS. WOOTEN: And I will say that the intent
21 at the court rules committee level was for the lead
22 attorney to be as it is defined under the Texas Rules of
23 Civil Procedure, and that led to a discussion of the
24 reality that in many cases the lead attorney may not be
25 the attorney who is actually working up that case for

1 trial, which is why there's the separate provision in the
2 rule for attorneys other than lead attorney.

3 HONORABLE R. H. WALLACE: Or the lead
4 attorney may leave that firm and withdraw, and nobody else
5 says, "I'm now lead attorney."

6 CHAIRMAN BABCOCK: Yeah, right. Yeah,
7 Frank, go ahead. And then Justice Christopher.

8 MR. GILSTRAP: Well, I'm not sure whether
9 this is a problem in search of a solution or a solution in
10 search of a problem. I certainly -- we're all for the
11 idea of family leave, but, you know, I mean, if you --
12 anyone who's been through a difficult litigation where the
13 other side is continuing to avoid trial and you've got a
14 provision that says, you know, you could have a lead
15 attorney who has got a two-month-old child and you get a
16 continuance, no -- no -- no discretion on the part of the
17 court. That's going to be abused.

18 At the -- I think the question -- and
19 something obviously that's bothersome about this in that
20 it privileges birth of a child over other family
21 emergencies, like death of a child. That's just as
22 traumatic, even worse, why that, and why -- why attorneys
23 and not parties? I mean, the defendant -- the defendant
24 just had a baby. Well, you don't get the automatic
25 continuance, but the lawyer would. I guess you want to

1 ask is -- you know, is there evidence? Does anyone have
2 any experience on this? Are there judges who are abusing
3 this?

4 Well, according to the American Bar
5 Association's committee they say there's anecdotal
6 evidence across the country concerning incidences where
7 continuances are denied for pregnancy or birth-related
8 issues. When you read the report you find that there was
9 one high profile case in Georgia in an immigration court
10 where the mother wound up taking the newborn child to
11 court, and that obviously got on the internet. There's
12 also some reports that some things have happened in New
13 Hampshire, and that's it. I guess, you know, what's
14 driving this is the popularity of parental leave. If
15 you'll look at the language, the judge here in Houston was
16 inspired to adopt a standing rule. Well, inspiration is
17 not a very good reason to adopt rules.

18 CHAIRMAN BABCOCK: It depends on your
19 perspective.

20 MR. GILSTRAP: Well, I mean, it may be
21 something -- it may be a proper thing when you're passing
22 legislation, it may be a proper thing where you're a judge
23 deciding a case, but we're talking about the Rules of
24 Civil Procedure. I'm all against racial discrimination.
25 We don't have a rule in this provision prohibiting that in

1 the rules because we don't need it. We don't need
2 something -- do we need this? The State Bar rules
3 committee says that they're adopting -- they want this
4 because they are committed to the concept of parental
5 leave. Well, that's etiology. Committed to the concept
6 is not a good reason to adopt a rule. Is there a problem?
7 Does anybody have any anecdotal information? Do we need
8 this? Why not just keep Rule 2-5 -- was it 254 or 253
9 that deals with it as a matter of discretion. 253.

10 CHAIRMAN BABCOCK: I was going to ask if
11 anybody was opposed to this thing? But thanks for --
12 Justice Christopher, and then Tom, and then Kennon.

13 HONORABLE TRACY CHRISTOPHER: Well, I -- I
14 believe that most trial judges grant continuances if asked
15 in connection with parental leave, but I assume that
16 there's always some outlier out there somewhere, and
17 that's why people want the rule. But I -- you know, if --
18 if we do it for parental leave, well, what about death of
19 a child, what about death of a parent, I mean, how many
20 things are we going to add in that it's an automatic
21 continuance.

22 As to the text of the rule itself, I do not
23 imagine a scenario where companies are going to bring on a
24 pregnant woman to get a continuance. I just don't see it
25 happening, so I just wouldn't worry about the timing of

1 when they filed the motion for continuance. If you want
2 to put it in there, I would make it more than 10 days, if
3 you really are worried about this -- this, you know,
4 influx of pregnant women to get continuances.

5 MS. BARON: They need more --

6 HONORABLE TRACY CHRISTOPHER: I just don't
7 see it happening, and then with respect to the nonlead
8 attorney, just put them in the regular continuance rule,
9 this whole shifting burden and back and forth, just put
10 them in the regular continuance rule.

11 CHAIRMAN BABCOCK: The problem, though, is
12 this is not -- this is gender neutral, so the company
13 doesn't run in the pregnant woman. They run in the spouse
14 of the pregnant woman who --

15 HONORABLE TRACY CHRISTOPHER: Well, you know
16 what, if we want to prevent abuse, we need to make sure
17 that that spouse doesn't go to work for three months.

18 MR. GILSTRAP: We can't say he can't go.
19 Okay.

20 HONORABLE TRACY CHRISTOPHER: If he gets a
21 continuance, he can't go to work for three months.

22 CHAIRMAN BABCOCK: Tom.

23 HONORABLE TRACY CHRISTOPHER: That's how to
24 stop that.

25 CHAIRMAN BABCOCK: Tom, Kennon, and then

1 Rusty.

2 MR. RINEY: Like Lisa this morning, I think
3 I'm pro-parent, and I think my track record on being
4 pro-family is pretty good, but I see a lot of problems
5 with this rule. I was on the subcommittee, and I
6 expressed many of the concerns that have already been
7 summarized. Any time we adopt a specific rule for a
8 specific situation, there are going to be consequences,
9 and we need to think about those consequences. If I've
10 got a case, if I'm defending a case that I don't want to
11 go to trial on, and Perdue's representing a widow in a
12 wrongful death case with minor children, and I bring in an
13 associate and all of the sudden he's lead counsel because
14 his wife's pregnant, I suspect that Perdue's client is not
15 going to think this is a pro-parent policy.

16 And it says it's a three-month continuance,
17 but in a lot of cases, particularly in my part of the
18 world where a judge may have multiple counties, the next
19 time we get a trial setting may be six months, and it may
20 be eight months, it may be longer, and I have seen in a
21 case -- and listen, I wasn't complaining because I was new
22 to the case, too. I thought it was just fine, but one of
23 the defendants hired lead counsel. The case was already
24 set for trial. She came in to court and said, "That's
25 right near my due date. We're going to have to put it

1 off," and it moved the trial off six months, at least,
2 over the objection of the plaintiffs and the intervenors,
3 and right after the continuance was granted, we never saw
4 her again, never at a hearing, never at a deposition, and
5 so, it can --

6 (Phone system message stating "There doesn't
7 appear to be any activity in this meeting.")

8 MR. RINEY: Now, we get into Munzinger's
9 category.

10 CHAIRMAN BABCOCK: Okay. Let's go.

11 MR. RINEY: Part of the problem is it does
12 impose upon judicial discretion. Some examples been
13 given, but I just wrote down three. Suppose that one of
14 the lawyers has a child in Amarillo that's been diagnosed
15 with cancer and that needs to come to M.D. Anderson for
16 three months. They don't get an automatic continuance. I
17 can't imagine the judge denying it, but I can't imagine a
18 judge doing it under most circumstances. Suppose that
19 someone had an elderly parent who was living alone and had
20 a severe illness and needed help. It's putting priority
21 in a specific category while ignoring others and
22 presumably giving it a higher level of importance.

23 What if the lawyer has just had an
24 intervention and needs to go to rehab, well, that wouldn't
25 be automatic, but that associate that I bring in whose

1 wife's pregnant is automatic. I don't think it's good to
2 take that kind of discretion away from our trial judges,
3 and I think there may have been abuses. I don't question
4 that there may have been. I think the evidence is pretty
5 slim, but we can't make a rule taking away the judge's
6 discretion for every situation, and I can go on and on and
7 on with the examples of how it can be abused.

8 I think that we have to leave some of this
9 to the discretion of the trial judge, and I agree with
10 Frank. Let's not create a new set of problems when we
11 haven't really established what it is, the problem is that
12 we're trying to solve here.

13 CHAIRMAN BABCOCK: Kennon. Then Rusty, then
14 Roger.

15 MS. WOOTEN: A few things. One, we did get
16 an additional example of a problem occurring in Texas
17 courts, specifically in I think it was Collin County where
18 a woman who came to a firm and was put on a case and was
19 pregnant five months before the setting, sought a
20 continuance and didn't get it from the judge, and she was
21 told by the judge that someone else in her office could
22 try the case.

23 So there's more information here that I can
24 provide, but I'm telling you about this now so you will
25 understand it's not just one concrete example, and I will

1 say as a woman that we are not always going to come
2 forward and complain, so the fact that we don't have a
3 whole lot of concrete examples of this being a problem,
4 doesn't mean that there hadn't been problems, and so I
5 throw that out there because I think it's a reality that
6 women confront particularly in some big firm law
7 practices.

8 The second thing I wanted to note is that
9 some of the language in the court rules committee proposal
10 comes from the Florida rule that is quoted, and that's on
11 page five of the ABA resolution, in case you wanted to see
12 where the language originated, and that's more
13 specifically about the burden shifting, and it perhaps is
14 too complicated and it doesn't need to be there, but it
15 does have some -- some grounding in that Florida rule
16 language.

17 And the third thing that I wanted to point
18 out in here is if anyone wants to see Judge Sandill's
19 standing order, it's also quoted on page five of the ABA
20 resolution.

21 CHAIRMAN BABCOCK: Okay. Rusty.

22 MR. HARDIN: I have a hard time figuring out
23 how people are really going to manipulate this. It seems
24 to me the only -- and therefore, I think we may be
25 overdoing the concerns about any abuse. If a woman is

1 pregnant and she is not the lead counsel but she's made
2 the lead counsel or if the man's wife is pregnant and he's
3 not the lead counsel and he's made the lead counsel, it
4 seems that lead counsel changing to manipulate it can be
5 done in the statute. You have to be lead counsel within
6 90 days before you're asking for a continuance or some
7 period of time so that it's clear that somebody can't mess
8 with changing of lead counsel. Otherwise, going out and
9 finding a man or a woman who are about to have a child in
10 their relationship in order to get a continuance seems to
11 me to be a pretty big challenge.

12 CHAIRMAN BABCOCK: You really need the
13 continuance.

14 MR. HARDIN: If you really want to try to
15 manipulate, you're going to have to work at it. And we
16 lived through the legislative continuance, used to drive
17 me crazy when a lawyer would show up and then we would
18 never see him or her again after they got the continuance.
19 I realize lawyers are going to sort of do this, but when I
20 think of all the damage the Legislature does to the
21 jurisprudence of this state and yet we have let the
22 members of that Legislature automatically get a
23 continuance, it seems to me having a child and having both
24 parents involved trumps it by a bunch. So I think we're
25 exaggerating the problem.

1 CHAIRMAN BABCOCK: Roger, and then Judge
2 Wallace.

3 MR. HUGHES: Well, three things. I think
4 most of the pushback coming here, I think the first
5 pushback is we've all seen how the legislative continuance
6 gets abused, and yet it's still with us. Why is it still
7 with us? Because we know what the Legislature would do if
8 we abolished the rule. Okay. Isn't that -- I mean, if we
9 could get rid of this rule, it -- we would, but we know
10 how the legislators would react. I mean, we've already
11 seen what they do to the rules when they don't trust us.
12 Think what would happen if we got rid of the legislative
13 continuance, which leads me to my second point about why I
14 think there's perhaps some pushback on this.

15 What I noticed, I read the book called "*Half*
16 *The Sky*," which was a reference to a Chinese statement
17 that women hold up half the sky, and it was a pointed
18 analysis of what happens when women in third world
19 countries suddenly get political economic power, and since
20 we are seeing today is more and more women take the bench
21 and also enter the profession, we are seeing certain
22 issues become important that weren't important before.
23 Why? Because there were no women to advocate for them in
24 any position of authority, and one of them is child care
25 and health care.

1 I don't want to have to explain to the
2 public why it is we have given the legislators a freebie
3 chip to throw down so they know they can be hired and they
4 can be paid fat fees so that they can bail a client out to
5 keep them from going to trial, but God bless a woman gets
6 pregnant, and she's thrown in the hopper with everyone
7 else to see if she can get a continuance or not. And it's
8 only going to take a couple before it's going to make us
9 all look bad. So those are my two first points. Because
10 that -- I mean, it's only going to take a couple of cases,
11 and everybody is going to look at us, what are you doing,
12 y'all are a bunch of neanderthals down there.

13 Now, the other thing is this: My
14 suggestion -- I mean, I think the rule is a little overly
15 complex, and maybe it would be better just to tweak it to
16 give, you know, lead counsel for more time and then
17 everyone else goes into the general rule. I suggest a
18 comment and the comment be that issues of pregnancy and
19 adoption be taken into account when we set cases for
20 trial. It would be really interesting if we had judges
21 going, oh, yeah, I know about the parental leave, but
22 here's what we're going to do. We're going to set it one
23 week before your due date or your wife's due date, and
24 we'll just -- we're just going to have a little note
25 posted in the file that it will get continued if there's a

1 delivery before then, and it's like what do you do?

2 I mean, I think there should be something --
3 especially because most cases, most trials -- I mean, I
4 don't know how it works everywhere else, but in many
5 counties the judge doesn't set it for trial. You go back
6 and you talk to a court coordinator. Sometimes it's a
7 woman, but sometimes it's a guy. It would be nice to have
8 a comment to put in front of them saying you're going to
9 have to consider Ms. so-and-so's due date when you set
10 this case for trial so we don't end up setting it right at
11 the time around her due date. And that would be my only
12 addition to the rule.

13 CHAIRMAN BABCOCK: Okay, thanks. Judge
14 Wallace.

15 HONORABLE R. H. WALLACE: I was just going
16 to say somebody asked -- I think Frank -- about how big a
17 problem it is. In 10 years on the bench, I've never seen
18 a contested motion for a continuance over a family leave
19 matter. I've seen a few agreed, and Tarrant County is a
20 pretty good place to practice law, so that may not be the
21 end all, so in that sense, but I can understand why we may
22 need to have a rule, okay, but if you're going to have a
23 rule, don't put something in it where the trial judge has
24 no discretion either for a lead attorney or nonlead
25 attorney.

1 I mean, every time the Legislature says
2 something that one side will be awarded attorney's fees,
3 Rule 91a, anti-SLAPP cases, all the time you see them
4 where some of those are close questions and you say I wish
5 I didn't have to do this, but you do. So, I mean, if
6 somebody is abusing the 10-day rule or whatever, give the
7 judge at least the discretion somehow to apply some test
8 that, no, huh-uh, that's not going to work. If Chip
9 didn't want to go to trial, I bet he can find somebody in
10 Jackson Walker who either was pregnant or has a pregnant
11 spouse. I'm not saying he's going to do it, and I doubt
12 that that would be widely abused, but just leave some
13 discretion in there would be my suggestion.

14 CHAIRMAN BABCOCK: Yeah. Who was next?
15 Well, Alistair, we haven't heard from you today.

16 MR. DAWSON: Right. So I'm on the
17 subcommittee and when we first started talking about this,
18 as much as I never like to disagree with Tom Riney --

19 HONORABLE LEVI BENTON: Speak up.

20 MR. DAWSON: Oh, me? I've never been
21 accused of that.

22 CHAIRMAN BABCOCK: Yeah. Believe it or not.

23 MR. DAWSON: I think this is a no-brainer to
24 pass this rule. You know, I worry about sexist judges who
25 are not going to grant continuances to women who are

1 pregnant. I've never been pregnant, but I understand it's
2 a very challenging time in a woman's life, and, you know,
3 there's a lot of emotional issues, there's a lot of
4 stress. I worry about judges who want to deny
5 continuances in hopes that it will encourage the parties
6 to settle, and I just think as a practical matter if a
7 woman knows if -- and I know it applies to men as well,
8 but in my mind this is primarily -- my comments are
9 primarily directed about female attorneys.

10 If she knows when she gets pregnant that she
11 has a right to get a continuance, it takes one issue off
12 the table that she doesn't have to worry about, and to me
13 that's hugely advantageous, and I recognize that there
14 are -- with all of our rules there is potential for
15 abuses, but I just sort of weigh the benefits and the
16 negatives and the benefits far outweigh the potential
17 downside in my judgment.

18 CHAIRMAN BABCOCK: Evan, did you have your
19 hand up? Yeah.

20 MR. YOUNG: Yes, sir. I also support the
21 rule, and I think there are a couple of values that maybe
22 transcend the specific case of are we going to see abuse
23 here, are we going to have a quicker trial or delay there.
24 One of them, though, is that if there is abuse of the sort
25 that has been identified, as rare as I think it will be,

1 it will -- that cynicism of using a very well-intended
2 rule in order to achieve a result that really doesn't have
3 anything to do with the underlying value will harm the
4 value, will harm the rule. And so I wonder if one thing
5 that the rule could do to discourage further what I expect
6 would be a rare thing but could happen, there are
7 attorneys that have been known from time to time to do
8 things that might not seem entirely proper, would be to
9 simply require the certification that as the norm as
10 extensions of time that it's not for purposes of delay,
11 and I think at least some people, even if the person would
12 be brought in, oh, new trial, might not think much of it
13 necessarily, but if they have to sign that certification,
14 it might discourage someone from asking or agreeing to be
15 used in that way, and the reason for it is not, again,
16 because I think that's a frequent occurrence. It's a
17 signal to people we take this seriously and it would be
18 very egregious to abuse something so valuable that has
19 this larger transcendent value for the law, which is to
20 say that we value people who are lawyers but are going
21 through what indeed are very challenging times in life.

22 It's hard enough, young women in particular,
23 who are in litigation at this particular time in finding
24 what's an increasingly path towards partnership, for
25 example, and the knowledge that you're going to be out of

1 commission for a significant time, even though the law
2 says you're not supposed to be treated any differently,
3 it's more than possible that they themselves will opt out
4 of certain roles out of deference to clients or others,
5 knowing what's coming or that partners in firms,
6 supervisors in other organizations, will even
7 subconsciously limit opportunities.

8 And so to me this is a way that the Court
9 could signal to clients, to firms, to prior generations
10 that indeed this is a part of life that we anticipate and
11 we welcome and we encourage and it should, at this point
12 at least, maybe in, you know, a certain period of time
13 like Justice O'Connor said about affirmative action, maybe
14 we won't need it in 25 years, but I think we do still need
15 it if only for the signaling value, even if there aren't
16 that many judges who will deny it today. I think I've
17 seen with my own eyes the challenge continues to exist,
18 and it is a worthwhile thing for the Court to take a
19 modest step that encourages people to have children
20 without thinking that there's going to be a penalty for
21 themselves or their client for perhaps counter-balanced
22 with that simple statement that assures themselves and
23 others that they are doing it for that reason and not
24 something else, thus preserving public confidence in the
25 Court's rule is doing what it says it's doing and not

1 doing something else like the accusations that have been
2 made about the legislative continuance, so I think on
3 balance, it's more than worth the cost that articulate may
4 be real, but the benefits would more than outweigh.

5 CHAIRMAN BABCOCK: Yeah, and thanks, Evan.
6 On your idea of a certificate, I was -- I was thinking
7 about that myself and wondering if in addition to the
8 usual language, this is not sought for purposes of delay,
9 et cetera, whether we might consider the lawyer saying, "I
10 certify I am the lead lawyer in this case and will be the
11 lead lawyer at the resetting."

12 MR. HARDIN: I think the second half is
13 important, too.

14 HONORABLE R. H. WALLACE: Yeah.

15 MR. HARDIN: The second half of what you
16 just said is important, "and will be."

17 CHAIRMAN BABCOCK : Yeah.

18 MR. HARDIN: Not only I am, but will be.

19 CHAIRMAN BABCOCK: Yeah, because that will
20 avoid the scamming. Commissioner Sullivan, and then Judge
21 Wallace. I think.

22 HONORABLE KENT SULLIVAN: I was going to
23 endorse the Hardin Doctrine. I do think in practice this
24 is going to be fairly difficult to manipulate with one
25 significant exception, which I think is what is being

1 alluded to by most people, and that is the suggestion that
2 you would move to substitute counsel or designate new lead
3 counsel for the purpose of manipulating, and I would think
4 that maybe there we need to specifically say, "My motion
5 to substitute counsel will not be used -- nothing about
6 this will be used for the purpose of delay," and if you
7 found out that someone's spouse was pregnant or whatever
8 and that was known at the time that, you know, you moved
9 to substitute or that you requested designation of new
10 lead counsel, that might be grounds to strike the
11 designation or to deny the motion. Anyway, that plus
12 perhaps your suggestion that this is someone who intends
13 to remain as lead counsel would, I think, obviate a lot of
14 the problems.

15 CHAIRMAN BABCOCK: Judge Wallace.

16 HONORABLE R. H. WALLACE: Well, I was
17 thinking the sort of the same line, like a vacation
18 letter, you know. I am -- "for purposes of parental leave
19 I will be unavailable," if you want to set a number of
20 days or whatever, whether it be in the form of a motion or
21 notice. If the trial hadn't been set, you could almost
22 just say they give notice, and the trial cannot be set
23 during that period of time. They're going to have notice
24 quite a ways ahead, right? It's not something that's
25 going to happen 10 days before trial. That may not be

1 good, but I agree, and maybe -- maybe the answer is, is to
2 give -- have them represent that they will be lead counsel
3 and then if somebody comes in to substitute as lead
4 counsel, maybe there is where the court ought to have
5 discretion to say, no, you know, you're not coming in,
6 unless you want to represent you're not going to ask for a
7 continuance or something.

8 CHAIRMAN BABCOCK: Yep. Kennon, then
9 Richard Orsinger, then Levi, and then Richard Munzinger,
10 and then Justice Christopher, and then Buddy. And if
11 anybody will write that down for me.

12 MS. WOOTEN: I wish you had asked before you
13 started identifying people. I've already forgotten.

14 HONORABLE LEVI BENTON: Can I have leave to
15 go?

16 CHAIRMAN BABCOCK: Do you want to yield to
17 Levi?

18 MS. WOOTEN: I will yield to Levi.

19 HONORABLE LEVI BENTON: I generally support
20 the rule, but I have personal experience that there are
21 lawyers, for example, like Bobby Meadows, who cannot try a
22 case without the substantial participation of other
23 lawyers to assist him, so I don't -- I don't think it
24 ought to say "lead attorney." It ought to be any --

25 CHAIRMAN BABCOCK: Anybody assisting

1 Meadows?

2 HONORABLE LEVI BENTON: -- any lawyer who
3 will attest that they have substantially participated and
4 that they expect to substantially participate when the
5 case is tried. Because, I mean, Bobby is out flying to
6 California and surfing, and he's got other lawyers
7 substantially participating getting the case ready, and I
8 don't mean that as a slur. I mean, that's great, but I
9 mean, he doesn't try a case by himself. There's a lot of
10 lawyers who get the case ready, and so there ought to be
11 lawyers who are substantially participating as those words
12 are ordinarily understood.

13 CHAIRMAN BABCOCK: So you don't subscribe to
14 the one riot, one ranger approach? Orsinger.

15 MR. ORSINGER: Okay. Several points, Chip.
16 First of all, everyone is talking about how it's gender
17 neutral, and I see that it says regardless of applicant's
18 gender, but the phrase "in connection with the birth or
19 adoption of a child by an applicant," to me arguably means
20 adoption by an applicant, but it can't mean birth by an
21 applicant if they're not the mother. So I don't know if
22 anyone wants to look more closely at that language.

23 Three months, I want to echo what Tom Riney
24 said. A three-month continuance could easily be a
25 six-month or a nine-month continuance, so let's not fool

1 ourselves. We may be using up the better part of a year.
2 At the end of section (a), the only exemption to the
3 mandatory grant is juvenile proceedings under Chapter 54
4 or child protective proceedings under 262, but family, I
5 mean, the family violence orders or protective orders
6 under Chapter 82 and 85 probably belong on that list, and
7 there may be others. I think we should -- if we're going
8 to have a mandatory continuance rule, let's be sure that
9 everything that is really, really important is added to
10 this list of exceptions where it becomes discretionary.

11 I can tell you just from personal experience
12 in San Antonio that we had a county court at law judge who
13 was receiving -- a verdict was -- a jury was out
14 deliberating a verdict when -- let's see, I think after
15 the trial started there was a legislator, maybe it was
16 slightly before the 10 days. Anyway, the court of appeals
17 issued a mandamus while the jury was out. She went ahead
18 and took the jury verdict but kept it sealed, and then
19 they filed -- the court of appeals filed a show cause
20 order against her to show cause why she shouldn't be held
21 in contempt for disregarding the mandamus order by
22 receiving the verdict, and she was unable to defend it.

23 I mean, her explanation was, you know, I
24 wanted to finish the trial and we sealed the verdict and
25 everything, and I was in the courtroom. They held her in

1 contempt. This is an all female appellate court. They
2 held her in contempt, and they put her in handcuffs, and
3 they took her away to the Bexar County jail, and that was
4 a big cause locally, and she was a well-known judge about
5 family violence, and this was a family violence criminal
6 prosecution. The only time that a sitting judge went to
7 jail as far as I know in the history of Texas, and I was a
8 witness to it.

9 But my point is that family violence is as
10 important as child protection, and it's as important as
11 juvenile prosecutions, I think, and there may be some
12 others that we need to think through, if there is going to
13 be a mandatory rule with no discretion whether there's
14 more areas than just those two.

15 Going on, "an application must be filed
16 within a reasonable time after the later of learning of
17 the basis for it or learning of the setting. Well, that
18 works if you're already hired in the case when you find
19 out there's going to be a birth event, but for those who
20 get hired in 11 days before trial, they can't comply with
21 (a) (1) so I'm going to assume that (a) (1) doesn't apply to
22 somebody that got hired in after they found out that there
23 was going to be a birth, and I think we need to be careful
24 about how (a) (1) is handled, either -- either it should be
25 said it applies only to someone in the cases where they're

1 already hired, or we ought to somehow recognize the fact
2 that people are going to get hired in after the deadline
3 in (a)(1) has expired.

4 Number two, 10 days is way too short. I
5 mean, try to convince me why somebody hired 11 days before
6 trial is going to be the lead lawyer, I don't believe it.
7 If it's a complicated case, you've got to be in the case
8 for more than 11 days in order to take over and try it.
9 So it seems to me that this ought to be moved back a more
10 reasonable time, whether that's 30 days or whether that's
11 more than 30 days.

12 Carrying on to subdivision (a)(2) in the
13 second sentence, in cases where an attorney is employed
14 within 10 days of the date set for trial then it's
15 discretionary. Well, but they could have previously been
16 employed but not designated as lead counsel. So if they
17 are employed or designated as lead attorney within 10 days
18 then you ought to have discretion, not just hired, because
19 you could have somebody that's been hired for longer
20 than -- and you could designate them at the last minute.

21 I agree with the comment that was made, I
22 forget, several comments at the end about a
23 representation, but I would suggest that representation be
24 that this lead attorney will remain lead attorney when the
25 case is tried, because that's where the rubber meets the

1 road, not just that they're lead attorney now but that
2 they're really going to be around on the back end of this
3 mandatory. And then if they withdraw or are replaced or
4 fired or send another lawyer, then somebody ought to be
5 paying some money in the form of sanctions because of a
6 misrepresentation, and that ought to be -- have to do with
7 the future.

8 Then on subdivision (3) on the next page,
9 this is where you have assisting lawyers, and the only
10 way you're allowed -- it becomes discretionary if you can
11 make a prima facie showing of substantial precedence
12 resulting from the continuance. So I would question --
13 raise for thought whether the prima facie showing should
14 be focused on substantial prejudice or whether it ought to
15 be whether the associate attorneys or the affiliate
16 attorneys importance to the case. Could it be -- could it
17 be allowable for someone to challenge the presumption or
18 even the nondiscretionary rule by saying that this
19 attorney has never appeared in the case before or they've
20 never spoken out in court. We've had three or four or
21 five, 10 hearings. They never handled a single hearing or
22 they've never signed a pleading or whatever. The question
23 is, is the only prima facie showing that gives the court
24 discretion prejudice to the defendant, or can you
25 challenge the legitimacy of the -- of the other party's

1 designation of this assisting lawyer as being so important
2 to the case that the continuance should be mandatory. So
3 anyway, those are just some thoughts.

4 CHAIRMAN BABCOCK: Thank you. Munzinger.

5 MR. MUNZINGER: I was just going to comment
6 on the judge's suggestion that you know when a baby is
7 coming, you can write a letter in advance and set the
8 dates out and what have you, and I don't know how
9 adoptions work. I don't know that you can predict the
10 date of an adoption. My understanding is you get a
11 telephone call and say, "We've got a baby, you qualify,
12 come pick it up," and -- or her up or him up or whatever
13 they say, and so whoever ends up drafting the final
14 version of the rule needs to keep that distinction in mind
15 if the rule is going to apply to natural birth and
16 adoption.

17 CHAIRMAN BABCOCK: Justice Christopher.

18 HONORABLE TRACY CHRISTOPHER: I would get
19 rid of the timing requirements as to, you know, you have
20 to do it as soon as you knew you're pregnant. I would get
21 rid of all of that, and I would model it on the
22 legislative continuance, which if you will remember quit
23 being a problem after they required the Legislature --
24 legislator to say that it is his intent or her intent to
25 actively participate in the preparation or presentation of

1 the case and that the attorney has not taken the case for
2 the purpose of obtaining a continuance under this section.
3 It seems to me if, you know, that's good enough for a
4 legislative continuance to avoid playing games, it should
5 be good enough for a parental leave continuance to avoid
6 playing games, and I wouldn't make the distinction between
7 lead and nonlead attorney for the reasons that everyone
8 has talked about.

9 CHAIRMAN BABCOCK: Okay. Buddy had his hand
10 up.

11 MR. LOW: Chip, I've listened to a lot of
12 talk about this.

13 CHAIRMAN BABCOCK: Go ahead, Buddy.

14 MR. LOW: I say I've listened to a lot of
15 this, and I've not heard one word about somebody that this
16 happened to that got -- didn't get a continuance. Not
17 one. And I'm impressed with what Frank said about further
18 family matters are just as important and if we stress this
19 and Randy didn't cite to any cases in this. I mean, it's
20 a -- we're honoring family and so forth, and I understand
21 that, but just to name that as one, I'm against it.

22 CHAIRMAN BABCOCK: Yeah. All right. Kennon
23 didn't say just one word.

24 MR. LOW: What --

25 CHAIRMAN BABCOCK: She had an example that

1 she used maybe 20 words, but --

2 MR. LOW: Well, that must have been when no
3 activity was going on.

4 MS. WOOTEN: Perhaps I should have spoken
5 louder. There is a concrete example that I provided, and
6 there's also one in the ABA resolution.

7 MR. LOW: Well, that's not the only time
8 I've missed something. Okay.

9 CHAIRMAN BABCOCK: Sharena.

10 MS. GILLILAND: I think it's great as a
11 profession that we're talking about this, but I would
12 rather see going the direction of things that generally
13 qualify under the Family Medical Leave Act having some
14 priority or something. To Judge Wallace's point, I think
15 most judges try to be sensitive of these things, and most
16 attorneys are professionals. I can tell you when I was
17 pregnant with my first child, we were quickly approaching
18 a trial date, and I was not the, quote, "lead attorney."
19 I was the associate doing all the grunt work, and our
20 strategy was just don't pop before the -- before the trial
21 date. And I think when you get to so many details about
22 this lead attorney and I swear I'll be the lead attorney
23 and I won't be, I would rather just see a general policy
24 from the profession -- I mean, from the bench that says we
25 value family issues, whether that's childbirth or care of

1 a critically ill family member and to be professionals and
2 be courteous and let the judges have some discretion to
3 ask questions, are we doing this just to delay and get an
4 easy continuance or is there something real happening with
5 the attorneys on this case.

6 CHAIRMAN BABCOCK: Yeah. Skip.

7 MR. WATSON: Well, I just want to echo what
8 Judge Christopher said. I agree with as we get down to it
9 that we probably shouldn't be trying to say X number of
10 days. We probably -- I mean, I don't know how many of you
11 have read the record of the lawyer who came in even 30
12 days before trial, brand new to try it, but they ain't
13 pretty. I mean, it's an appellate lawyer's annuity when
14 it happens.

15 I just think that kind of thing needs to
16 come out, and I also think that it should be anybody who's
17 critical to the presentation of the case, and just, you
18 know, give the judge the discretion to decide, but
19 everybody knows that the big cases today are done by
20 groups, and -- and key members are indispensable when you
21 get right down to the presentation of the DNA expert, who
22 may not be the lead counsel's witness, and we all know --
23 we've all been there when it was a two-lawyer case and the
24 young lawyer was the one that worked it up and the old
25 lawyer took it home over the weekend and read the file and

1 was going to try it, but the young lawyer better be there
2 whispering in his ear and passing him notes or it's not
3 going to be pretty. I just say anybody who's critical to
4 the case and get rid of the time limits and leave that to
5 discretion.

6 CHAIRMAN BABCOCK: Okay. Elaine,
7 Professor Carlson, and then Kennon.

8 PROFESSOR CARLSON: I just had a couple of
9 general responses. One is you really can't trigger
10 anything from -- well, you could, but it would not be a
11 good idea to trigger, well, do this within so many days of
12 when you know you're pregnant, because a lot of people
13 don't reveal they're pregnant for fear of miscarriage.
14 And to give you another story, I had a colleague who had a
15 former colleague who had a miscarriage and was denied a
16 continuance the next day, here, in Houston; and I also
17 want to say that there is a large effect on young women,
18 like Kennon, because I'm not young anymore, when you have
19 worked up a case but you're not the lead attorney, and
20 that's probably going to be the scenario, and now you're
21 off the case because you couldn't get a continuance and
22 now when you come back that's not your case anymore. So
23 that's not your business.

24 There is about 50 percent of the associates
25 who are women and about 10 percent of women are share

1 equity partners. So having said that, I have always been
2 offended by Rule 253, that lawyers are fungible and if you
3 can't be there get somebody else, and I do agree with the
4 comments that there should be a basis for encouraging
5 judges -- and most judges do the right thing, but for like
6 death of a family member or for having to care for an
7 emergency situation, things of that nature, and Hurricane
8 Harvey and things like that. I don't like Rule 253 at
9 all. I think it's insulting to the practice to say if you
10 can't come, send somebody else, and I don't know why it
11 says that. I guess lawyers were making up reasons for
12 continuances. I don't know.

13 CHAIRMAN BABCOCK: Well, yeah, I don't -- I
14 don't care for that rule either, or that concept either,
15 but and I've never been a judge, but I have worked for a
16 judge and, you know, getting cases set for trial and
17 getting them heard when all of these different things are
18 going on, it's not -- it's not just the parental leave
19 stuff. I mean, it's a witness can't get here or there are
20 a million things and it's hard for a court to manage its
21 docket. Now, having said that, I think this is a good
22 idea myself personally, and I wonder, maybe Jackie and
23 Kennon and Professor Carlson, what -- what's the
24 opposition in Florida? Like they're going to have an oral
25 argument about it?

1 MS. DAUMERIE: They already did.

2 CHAIRMAN BABCOCK: They did?

3 MS. DAUMERIE: Yes.

4 CHAIRMAN BABCOCK: Was it -- was it -- were
5 they goofing or did they really --

6 MS. DAUMERIE: No, I think their rules
7 committee was really opposed to it, and it's for a lot of
8 the reasons that were discussed here, putting the
9 attorneys' needs over that of the client or witnesses,
10 putting having a child over the death of a child, all of
11 those things were brought up before them.

12 CHAIRMAN BABCOCK: But they did it in an
13 advocacy setting?

14 MS. DAUMERIE: Yeah.

15 PROFESSOR CARLSON: Yes. With briefs.

16 MS. DAUMERIE: You can watch it.

17 CHAIRMAN BABCOCK: With briefs?

18 MS. DAUMERIE: Yes, you can watch it.

19 MR. DAWSON: Yeah, I think we should have
20 oral argument.

21 MS. DAUMERIE: They don't have a rule yet,
22 just for the record.

23 CHAIRMAN BABCOCK: They don't have a rule.

24 MR. DAWSON: Right.

25 MS. WOOTEN: It says the discussion on the

1 rule started in 2017.

2 MS. DAUMERIE: Yes

3 MS. WOOTEN: So it has been a long --

4 PROFESSOR CARLSON: Gestation period.

5 MS. WOOTEN: Yeah, long gestation.

6 CHAIRMAN BABCOCK: Frank, and then Eduardo.

7 MR. GILSTRAP: Well, obviously Rule 253 is
8 not very good, and it may be time to rewrite it. The --
9 the notion of Roger's argument is that one good abuse
10 deserves another, but --

11 CHAIRMAN BABCOCK: Is that your argument?

12 MR. GILSTRAP: That's the way it struck me.

13 MS. BARON: Frank, can you speak up?

14 MR. GILSTRAP: What? I'm sorry.

15 HONORABLE TRACY CHRISTOPHER: Can't hear
16 you.

17 MR. GILSTRAP: I'm sorry. The provision
18 that involving substantial participation is totally
19 unenforceable. You know, I'm going to be involved,
20 substantially involved, six months from now or a year from
21 now, and you show up in court you haven't done it. Oh,
22 well, I'm still involved. It's totally unenforceable.
23 Look, if you want -- if you're concerned about optics,
24 rewrite the rule, put all of this stuff in here that --
25 that -- that judges should consider.

1 MR. LOW: Right.

2 MR. GILSTRAP: So you can emphasize it.
3 Emphasize it in judge school, but at the end of the day do
4 not put a provision in there that gives the defendant an
5 absolute right to game the system because I promise you,
6 there are not only lawyers, there are litigants who are
7 very smart and very unscrupulous and would give anything
8 in the world to put off the case, and they will find a way
9 to do it if you give them an absolute right to get out of
10 trial.

11 CHAIRMAN BABCOCK: Eduardo, and then Kennon.

12 MR. RODRIGUEZ: Yeah, so I'm -- I'm real
13 glad that we're discussing this. I think it's extremely
14 important for the future of the practice of law. Just for
15 your information I got some statistics yesterday from
16 University of Texas School of Law because I'm going to be
17 giving a speech about stuff, and 42 percent of last year's
18 grads at the University of Texas were women, and I think
19 this is an important issue that we need to be prepared
20 for, and I'm glad that we're discussing this and that
21 we're moving forward in -- in a positive way to address a
22 significant segment of our legal profession in the coming
23 years.

24 CHAIRMAN BABCOCK: Thanks. Kennon.

25 MS. WOOTEN: It strikes me that one of the

1 reasons to treat parenthood differently from some other
2 things is that parenthood is perceived as a choice. And
3 when you're --

4 MR. LOW: Can't hear, Kennon.

5 MS. WOOTEN: It strikes me that one of the
6 reasons to treat parenthood as some -- as different from
7 other things like death of a child, for example, is that
8 parenthood is perceived as a choice, and so people
9 sometimes think you're choosing your family over your
10 profession, and there is a stigma associated with that in
11 some firms. That's the reality, whether we want to
12 confront it or not, it's the truth, and so to me that
13 gives rise to a justification to have a rule perhaps that
14 addresses parenthood, even though it doesn't address every
15 other situation, and I say that in part because we do have
16 rules that are broader in scope that can address those
17 other situations, so it's not as though without addressing
18 them they're left untouched.

19 The question just comes, I think, to us
20 whether we might need a rule like this to help reduce the
21 stigma associated with becoming a parent, and I, for one,
22 think it's very good that men are recognized as part of
23 the parenting team in this rule because there's a shortage
24 of that in our law and in our firm practices.

25 CHAIRMAN BABCOCK: Okay. Judge Wallace.

1 HONORABLE R. H. WALLACE: Okay. One thing I
2 just thought of --

3 CHAIRMAN BABCOCK: You want discretion,
4 right?

5 HONORABLE R. H. WALLACE: Well, yeah, but
6 you know, you might also have some kind of a rule where
7 the default result is a continuance of some amount of
8 time; and if that's not the case, the judge has to make
9 maybe some specific findings as to why not. That's just
10 off the top of my head.

11 CHAIRMAN BABCOCK: Okay. Without regard to
12 the specifics because we've talked about a lot of
13 different things and a lot of different problems in the
14 rule as drafted, I want to vote in a second after we hear
15 from Levi about who's in favor of the concept in the rule
16 without the specifics, and who's against it, just to give
17 the Court a sense of what this committee thinks, but,
18 Levi, what do you --

19 HONORABLE LEVI BENTON: I just wonder why
20 the subcommittee did not bring us a companion rule on
21 appellate deadlines because the same issues happen there,
22 and, you know, there are courts, even in this city, that
23 are hostile to requests for extensions of time.

24 MS. WOOTEN: Also, the subcommittee at this
25 juncture hasn't brought any proposals. The thought was

1 that we need to get feedback generally from this committee
2 before drafting anything, but that's a good point that we
3 should consider appellate procedures.

4 MS. DAUMERIE: I'll just add that
5 North Carolina, who does have the rule, has an appellate
6 rule.

7 MS. WOOTEN: Ah.

8 CHAIRMAN BABCOCK: Well, this draft here,
9 this is not the subcommittee's work product.

10 MS. WOOTEN: No, this is the court rules,
11 State Bar court rules committee.

12 CHAIRMAN BABCOCK: State Bar court rules,
13 okay. Good.

14 MR. DAWSON: Point of clarification,
15 Mr. Chair, what we're voting on is just the concept?

16 CHAIRMAN BABCOCK: Concept.

17 MR. DAWSON: Not this particular rule, but
18 just do you want a rule that allows for this continuance,
19 or are you opposed to parental leave in general?

20 CHAIRMAN BABCOCK: Yes.

21 MR. GILSTRAP: Well, come on.

22 MR. ORSINGER: We don't need to take that
23 vote.

24 MR. GILSTRAP: That's the problem. We're
25 making rules based on we're committed to the concept, and

1 we can all vote and feel good, so what? But tell me what
2 the concept is.

3 CHAIRMAN BABCOCK: Buddy, what do you have
4 to say?

5 MR. LOW: And Roger made a suggestion about
6 a footnote, judges shall put priorities or anything, I
7 mean, is -- is -- what was your suggestion?

8 MR. HUGHES: My comment was that if it's --
9 that as a companion to this other rule, which I still
10 advocate, we have a comment that when cases are set
11 consideration be given to pregnancy or adoption. I
12 mean --

13 MR. LOW: Yeah.

14 MR. HUGHES: -- if you've got a lead counsel
15 and you know she's pregnant, why set the case on her due
16 date? And -- and you might say, well, who's going to do
17 that, but you know somebody's going, "It's a crowded date.
18 We're on a rocket docket around here. We'll set it and if
19 it comes up or comes out, we'll give you a continuance."
20 Why should -- why should counsel have to wait until her
21 due date or his wife's due date to find out if he's going
22 to get a continuance on a case? You know, that just seems
23 to me senseless, and it would be very helpful when you're
24 talking to court coordinators or clerks, who are the ones
25 who really -- who often are the ones who set trial dates

1 here in Texas.

2 CHAIRMAN BABCOCK: Frank, I didn't -- I
3 didn't catch Alistair's last clause, his smart-ass clause,
4 when I agreed with him. So we're voting on a rule for
5 parental leave or absence of counsel as grounds for
6 continuance in trial. Now, whether we like the concept or
7 whether, as some have expressed, we don't think that's
8 appropriate.

9 MR. RINEY: It should be mandatory.

10 MR. GILSTRAP: You don't think it's
11 appropriate grounds for a continuance?

12 CHAIRMAN BABCOCK: To have a rule.

13 MR. GILSTRAP: To have a rule.

14 CHAIRMAN BABCOCK: To have a rule. We are
15 voting on whether people support -- like some people in
16 Florida -- were they the appellants or the appellees?

17 MS. DAUMERIE: I don't know that they refer
18 to them like that.

19 CHAIRMAN BABCOCK: A rule for parental leave
20 or absence of counsel as grounds for continuance of trial.
21 Everybody in favor of that, raise your hand. Everybody in
22 favor of that, raise your hand.

23 MR. MEADOWS: This is a mandatory
24 continuance?

25 MS. WOOTEN: No, just having a rule.

1 MR. GILSTRAP: Do we need a rule?

2 CHAIRMAN BABCOCK: Okay. Everybody opposed?
3 Okay.

4 MR. LOW: I'm further removed from being
5 involved in this.

6 CHAIRMAN BABCOCK: Hey, don't you want the
7 election results here? The result is 20 in favor, 5
8 against, and for the record, the Chair voted on this in
9 favor. So I don't often vote, but I voted on this one.
10 So we could take a break now if we wanted to before we go
11 onto the next one. So we'll be back at 20 after.

12 (Recess from 3:24 p.m. to 3:43 p.m.)

13 CHAIRMAN BABCOCK: Okay. Motions for
14 rehearing in the court of appeals, and Pam, you got this
15 one or are you --

16 MS. BARON: It's me this time.

17 CHAIRMAN BABCOCK: Somebody get the
18 microphone over by Pam.

19 All right.

20 MS. BARON: Okay. This is Rule 49. This
21 involves motion for rehearing after a court of appeals has
22 issued its opinion in a case, in a civil case. There are
23 two different nonexclusive avenues for asking for
24 rehearing in the court of appeals. First is to ask the
25 panel that decided the opinion, the three judges that

1 decided the opinion, to rehear it and that takes a
2 majority of the panel to grant rehearing.

3 There's also en banc consideration. We are
4 not talking about en banc today because Justice
5 Christopher asked us not to, but en banc has a different
6 standard, and I just want to tell you this so you know.
7 It is not favored, and it issues only -- it can be granted
8 only to ensure that the court's decisions are consistent
9 to maintain uniformity of courts' opinions or in
10 extraordinary circumstances. So it's very rare and should
11 rarely be granted.

12 The issue we're facing is the current Rule
13 49.3 provides that panel rehearing -- and we are only
14 talking about panel rehearing today, not en banc -- may be
15 granted by a majority of justices who participated in the
16 decision, otherwise it must be denied; and as you know in
17 the last election cycle, we had tremendous turnover in
18 some of the appellate courts; and the result was that when
19 parties came and asked for rehearing, there was no longer
20 a majority of the panel members who participated in the
21 decision; and so all of these motions for rehearing that
22 were filed were required under the rule to be denied.

23 To my knowledge we've never had a lot of
24 complaints about this rule in the past. It's been in
25 place since 1986, but in this particular language only

1 since 1993, and as a result there were a lot of complaints
2 because people were basically being denied panel rehearing
3 and could only seek en banc consideration, which was
4 probably not going to happen. So even if there was a
5 mistake in the opinion, it couldn't be corrected.

6 Both Justice Christopher and the court rules
7 State Bar committee sent proposals into the Texas Supreme
8 Court. Those were referred to our committee, and those
9 are the two proposals that we're going to be talking about
10 today. They are attached to your September 2nd memo.
11 They do differ in their approaches, and let me just set
12 them out briefly for you.

13 Justice Christopher's proposal would be
14 that in the event that a majority of the justices who
15 participated in the decision in the case are no longer on
16 the court and a remaining justice who was -- who authored
17 or joined the majority believes that the opinion should be
18 revised in light of the motion for rehearing, then that
19 justice can ask for two new justices to review the motion,
20 and the new justices can then decide the motion by
21 majority.

22 The key elements of that proposal are listed
23 on page two of the memo. There must be only one justice
24 left, so if you have three panels, if you still have two
25 panel members or you end up with zero panel members, her

1 change would not apply. That justice must have been in
2 the majority or the author, and only that justice can ask
3 for additional justices to be involved in rehearing. It
4 was unclear from her proposal to us, and I guess we could
5 ask her since she's sitting next to me, how the justices
6 to be added to the panel would be selected. We decided
7 that maybe the use of the word "new" just means that the
8 justice filling that particular justice position number
9 would step in. And I think, as I said before, two members
10 remain, then those two will decide rehearing and no
11 justices would be added, and if no members then it has to
12 be denied.

13 The State Bar court rules committee took a
14 slightly different approach, and their approach would
15 basically be there will always be three justices sitting
16 on rehearing. So if one or more justices cannot
17 participate, the chief justice will ensure that sufficient
18 are added so that it can be decided. The key elements
19 there are on page three of our memo. There must be two or
20 fewer justices. The court will always ensure that there
21 are three, and the chief justice will determine how that
22 assignment is made.

23 Our subcommittee identified what we thought
24 were three issues for discussion. Do we -- should we
25 change the rule to address the situation when one or more

1 members of the original panel are no longer sitting on the
2 court, and then if so, under what circumstances would we
3 suggest that extra justice can be assigned. Should it be
4 in all cases, whether we're short three, or should it be
5 two or fewer, or should it be when there's only one and
6 that one was in majority and so on and so forth. So there
7 are a lot of variations on what the rule could provide on
8 that. And third, if additional panel members are to be
9 added, how is that to be accomplished? Do you just put in
10 the new slot justice, do you do it by random draw, do you
11 let the chief justice appoint.

12 So those are complicated questions. Our
13 subcommittee has been completely stressed out for -- or I
14 have been by this because all of these questions are very
15 politically fraught, and some of the considerations are is
16 what weight do we give the original opinion. Right now
17 the rule seems to give dignity to the original opinion
18 over rehearing, and then what kind of procedure looks fair
19 or is fair in adding additional panel members on
20 rehearing.

21 So those are kind of the issues. We are not
22 coming to you with a particular recommendation on any of
23 these rules. We really wanted to hear the discussion of
24 this group first before we came up with specific language
25 or specific recommendation between the two proposals. I

1 know that Kennon is here, and she was on the court rules
2 committee that wrote this. Justice Christopher is here.
3 Cindy Kent had been very involved in the court rules
4 subcommittee, but she said that Kennon could adequately
5 represent their views.

6 So I open it up for discussion I guess. I
7 think the first question is do we want to make a change,
8 and if so, do we want to ensure three justices in all
9 cases, or do we want to have some kind of scale for two or
10 more?

11 CHAIRMAN BABCOCK: Okay. Kennon.

12 MS. WOOTEN: I'm going to hold my tongue
13 until others speak up.

14 CHAIRMAN BABCOCK: Whoa. Anybody have
15 comments? Professor Carlson.

16 PROFESSOR CARLSON: I have a question. What
17 percentage roughly of cases do motions for rehearing are
18 granted?

19 HONORABLE TRACY CHRISTOPHER: Well, I did
20 a -- a quick Westlaw search, and I -- I'm not vouching for
21 its complete accuracy, but in the past three years, the
22 Fourteenth Court had withdrawn an opinion and issued a new
23 opinion on panel rehearing approximately 28 times. The
24 First Court had done it approximately 47 times, and the
25 Fifth Court had done it 12 times.

1 PROFESSOR CARLSON: Okay.

2 HONORABLE TRACY CHRISTOPHER: Over a
3 three-year period. So not huge, but, you know, a number
4 of cases, and I'm not saying that the result changed, just
5 the opinion changed.

6 PROFESSOR CARLSON: Thank you.

7 HONORABLE TRACY CHRISTOPHER: So I'll give
8 you just a little -- little background on why I -- I've
9 set out to write this rule and why I wanted it to be a
10 limited rule rather than a complete panel rehearing rule.
11 So a case came in that -- that we got -- a rehearing came
12 in on a case where two judges were gone, and I was the
13 remaining panel member, and the panel motion -- the
14 rehearing motion says, "You forgot to address this very
15 important subpoint," and I'm looking back at the opinion,
16 and yep, sure enough, we had forgotten to address this
17 very important subpoint. So what was I going to do with a
18 missed point? All right. I mean, we got the main brief,
19 but it was a subpoint, and it was an important subpoint,
20 but in my opinion it didn't meet the criteria for en banc
21 reconsideration. All right.

22 So -- but if -- and I hadn't worked through
23 this subpoint in my head yet in terms of the results. If
24 it should have caused a different result, you know, I felt
25 that it was being unfair to the litigants. Okay. This --

1 this subpoint. So I -- we sort of kept it -- we kept the
2 en banc motion pending for a long time while I worked
3 through it, did the research on the point. I ultimately
4 ended up not asking for en banc, but I did -- and I know
5 this has no precedential value. I did an opinion
6 concurring in the denial of en banc where I addressed the
7 point. All right. So that the -- the lawyers at least
8 knew that one judge had looked at the -- at the point and
9 addressed it, and they could use that when they went up to
10 the Supreme Court.

11 So to me that would have been a really good
12 one to be able to get two new panel members on, corrected
13 at the panel level, because in my mind it didn't meet the
14 en banc criteria. If I had gotten to the point where I
15 thought it was going to reverse the decision of the panel,
16 I might have tried to argue, yes, it really was en banc
17 worthy at that point, but I didn't have to get to that in
18 my head because I decided that it -- you know, I was going
19 to handle it that way. So, you know, things like that
20 happen, and so I thought about, well, under what sort of
21 situation would I want to create a rule to be able to
22 address that, and I came up with the limited review.

23 And my idea was, one remaining judge, looks
24 at the panel rehearing, says, yeah, you know, we missed
25 something or the opinion misstates something. It doesn't

1 really meet en banc criteria. I would like to get two
2 other judges to decide the matter with me, and I don't --
3 I don't put any restrictions on how the other judges --
4 you know, if we ended up reversing the case because of the
5 missed point we end up reversing the case. If I end up
6 being in the dissent because the new panel members
7 thought, you know, something different made, that was
8 fine. You know, I thought it would be a complete do over
9 with two new -- with a full panel.

10 The reason why I'm against a complete redo
11 for all panel rehearing motions is that it does require a
12 lot of work to review a panel rehearing motion, if you
13 were not on the original case. So to adequately rule, in
14 my opinion, on a panel rehearing motion when you were not
15 originally on the panel, you would have to read all of the
16 briefings, all of the briefs, the opinion, the motion, you
17 know, maybe even do some record checking yourself to, you
18 know, come to a conclusion on that panel rehearing motion.
19 When you are already on the panel and the panel rehearing
20 motion comes in, you have done all of that work, so it's a
21 simpler process.

22 Now, I was in the trial court, and I
23 recognize that in the trial court when a new judge comes
24 in, you know, they ask all the time for rehearings of what
25 the old trial judge did. Old judge -- old trial judge

1 denied a motion for summary judgment, let's see what the
2 new trial judge thinks about it. You know, old trial
3 judge granted a summary judgment. Let's file a motion for
4 rehearing on it and see if we can get it changed, and
5 there's no limit obviously in the -- in the trial court,
6 although as a older -- I was taught as a young judge don't
7 start rehearing what the old judge did. When I became an
8 old judge and new judges came in, I told them the same
9 thing, don't start doing it because, you know, it will
10 just be a floodgate and you'll have to rehear that your
11 predecessor did in the last six months. So, I mean, I can
12 understand the court rules committee's desire to have it
13 for all panel rehearing motions. I just think it would be
14 quite a lot of work put on the appellate court if we did
15 that.

16 CHAIRMAN BABCOCK: Okay. Any other
17 comments?

18 MS. WOOTEN: I will speak just a little bit.

19 CHAIRMAN BABCOCK: Oh, Kennon will speak
20 now.

21 MS. WOOTEN: I will speak. In terms of the
22 court rules committee thought process on having the chief
23 justice involved, there was recognition that that could
24 entail some politics, but also recognition that existing
25 Rules of Appellate Procedure give to the chief justice of

1 the courts of appeals some power to deal with things when
2 there's a lack of consensus, for example. So you already
3 have in the existing rules provisions that give the chief
4 justice power, and so we didn't feel like giving the chief
5 justice power to do something here was just so political
6 and fraught with peril that it ought not be considered.

7 And in terms of -- of having the three
8 justices participate, the thought process, to my
9 recollection, was we want the parties moving through the
10 system in the wake of change to have the same right that
11 any other parties would have in the absence of that change
12 in composition of court, so it was desired to be as fair
13 as possible. I will say that I don't recall a discussion
14 about just how much work that might entail. It's a very
15 practical, real consideration to be -- to be taken into
16 account. It was more focused on what's equitable and who
17 should be making the decision after there is a change in
18 composition of the court.

19 CHAIRMAN BABCOCK: Okay. Yeah,
20 Professor Hoffman.

21 PROFESSOR HOFFMAN: So my instinct is with
22 Tracy on the sort of more limited review, but in the event
23 that the Court is more inclined to the court rules
24 committee, I think my instinct is it's a mistake to give
25 that to the chief justice. The optics of it by themselves

1 seem to counsel more in favor of just doing a wheel.

2 MS. WOOTEN: A wheel, can you explain what
3 you mean?

4 PROFESSOR HOFFMAN: So, in other words,
5 however the judges are assigned on any court is a random
6 process, and it seems to me you would want to follow that
7 same random process if only for the optics of -- of it
8 rather than giving that to the chief judge, particularly
9 in the case when there's a rehearing issue, so it's
10 already controversial.

11 MS. WOOTEN: And that is refreshing my
12 memory of additional discussion about different courts of
13 appeals having different procedures internally for
14 assigning cases.

15 HONORABLE TRACY CHRISTOPHER: Yes.

16 MS. WOOTEN: And when drafting we were
17 trying to think of something that could be done across the
18 board in light of the reality that we have different
19 practices now in the Texas courts of appeals.

20 PROFESSOR HOFFMAN: Like Tracy's comment
21 much earlier today that there are all sorts of topics that
22 perhaps should be on our agenda.

23 HONORABLE TRACY CHRISTOPHER: Well, I mean,
24 and, you know, I thought about, well, we could say -- you
25 know, because we all run on a place number, and so if

1 place five is defeated, new place five gets substituted in
2 on -- on the decision, subject to any potential conflicts
3 of interest that place five has, you know, with respect to
4 that case. That's how we do it internally at the
5 Fourteenth Court. I'm telling you a big secret, but --
6 and I think anybody who had cases pending that got the new
7 reassignment notice, they could have easily put two and
8 two together that place five old is now place five new in
9 terms of resetting the case, but I don't think that all
10 courts of appeals set the same way, and some of them do
11 give more power to the chief justice, and some of them do
12 have sort of an ability to choose their case, too, so
13 everybody is a little different.

14 PROFESSOR HOFFMAN: This sounds like the
15 next John Grisham novel, the cases of significant import
16 right at the point of an election, the party who's lost is
17 now funding the judge who is going to replace the -- you
18 know.

19 HONORABLE TRACY CHRISTOPHER: You know
20 that -- that, I mean, an allegation of that has happened
21 certainly in Harris County at the trial court level, that,
22 you know, a particular lawyer was very unhappy with a
23 judge's ruling and defeated that judge, because there were
24 a series of cases involving that lawyer in that judge's
25 court, so that the judge was going to be continuing to,

1 you know, rule against that lawyer.

2 HONORABLE LEVI BENTON: I think I once sat
3 on that court.

4 HONORABLE TRACY CHRISTOPHER: What?

5 HONORABLE LEVI BENTON: I think I once sat
6 on that court.

7 HONORABLE TRACY CHRISTOPHER: You might
8 have.

9 MR. DAWSON: Hey, you might have.

10 HONORABLE TRACY CHRISTOPHER: You might
11 have.

12 CHAIRMAN BABCOCK: Pam.

13 MS. BARON: You should also remember that
14 this rule is written not just for change in personnel
15 because of an election. It would also include retiring
16 judges, death of a sitting judge, or situations where
17 there may be an appointment there might be a delay. The
18 position might not be filled, so you might not be able to
19 fill the vacancy with the new person in that place, so it
20 does get a little complicated when you think of it in
21 terms of a rule that involves any kind of change in
22 personnel of the panel.

23 CHAIRMAN BABCOCK: Justice Gray, did you
24 have your hand up? You did?

25 HONORABLE TOM GRAY: I did. May I speak?

1 CHAIRMAN BABCOCK: You may speak.

2 Permission granted.

3 HONORABLE TOM GRAY: To echo what the two of
4 them just said, they both took points that I was going to
5 try to make, one about the position. That came about in
6 about 2002 or '03 where we got position assign -- 2003 we
7 got position assignments on the courts. If you do it by
8 position assignments, the beauty of it is immediately upon
9 the election of the replacement, the appointment of the
10 replacement, or the fact that there is no replacement, you
11 know who your panel is; and if you're trying to counsel
12 your client in October, November, December, about whether
13 or not to spend the money to do a motion for rehearing or
14 a petition for review then you already know who the panel
15 is, you can do your risk analysis potentials and run it,
16 and so there is a high level of predictability of who that
17 panel is going to be. It may not be any more predictable
18 about what the result is going to be. There in all
19 probability will be less, and it can be done with a fairly
20 simple tweak to the existing rule, and there is no -- even
21 though as the chief I could reach out and say that's a
22 good rule, I like to take the guesswork out of it and just
23 make it happen, and this is not just a big court issue.

24 It happens every time a judge is replaced on
25 any court for any reason, and so the three judge court, we

1 just -- at the same time they were going through an
2 election process, we had a judge retire and a new
3 appointment, so we struggled with these same issues, and
4 fortunately our retiring judge was able to continue to sit
5 on the rehearings, and so we didn't have that problem as a
6 problem, but I would favor a tweak, and I'll read the
7 language if anybody is interested about how you could
8 simply make it about the positions that were on the court
9 that decided the case would be the ones who decided the
10 motion for rehearing. So --

11 CHAIRMAN BABCOCK: Okay. Munzinger had his
12 hand up.

13 MR. MUNZINGER: The El Paso court of appeals
14 only has three justices. One just retired because of
15 health reasons, and she has been replaced, but the rule
16 contemplates the original panel handling the motion for
17 rehearing, so the replacement judge can't act on that
18 panel that's considering a pending motion for rehearing.
19 If you had two judges, or a disqualification or something
20 else, whoever is drafting the rule needs to bear in mind
21 that not all courts have panels from which a justice may
22 be selected to sit, and the chief justice may be sick, and
23 you may have to go outside the court of appeals to get
24 your panel.

25 HONORABLE TOM GRAY: And --

1 CHAIRMAN BABCOCK: Orsinger, and then
2 Justice Gray.

3 MR. ORSINGER: Let him respond.

4 CHAIRMAN BABCOCK: Justice Gray, go ahead.

5 HONORABLE TOM GRAY: In fact, I authored an
6 El Paso opinion that came out last week and have sat on
7 another El Paso case, and that does create a problem from
8 my proposal because I'm not in a position on the El Paso
9 court. I'm sitting by assignment, so --

10 MR. MUNZINGER: Well, we now have three
11 justices. The Governor appointed a new justice, but he
12 can't participate in a motion for rehearing. I'm a party
13 to a motion to rehearing that is pending before the two
14 judge panel. It's not going to be a problem because there
15 are two judges there and they can resolve it, and I don't
16 think they would split, but they can resolve it, but it
17 doesn't take too much to think about that one of them
18 could leave or have a problem, disqualify or otherwise,
19 and the idea that you can select somebody from a panel of
20 10 judges in the Fourteenth District or First District or
21 however many of you there are, doesn't apply to El Paso.
22 That's my only point.

23 CHAIRMAN BABCOCK: Any other comments?
24 Richard Orsinger.

25 MR. ORSINGER: So I just wanted to work

1 through the mechanism a little bit of Justice
2 Christopher's proposal. First of all, I'm a little
3 concerned about the use of the word "the opinion being
4 revised." I think we should say "a new opinion be
5 issued," because if the -- both changes, it's really not a
6 revision, if it's just clarifying some misstatement of a
7 statement of the factual foundation, so I think we ought
8 to put "issue a new opinion" or "new opinion be issued."

9 But a couple of the procedural things I want
10 to mention is that under Justice Christopher's proposal,
11 two justices could be granting the rehearing or denying
12 it, so there's no guarantee that there's three, and so
13 that presents the question of a litigant losing a
14 potentially, or at least theoretically, valuable
15 participation of a third justice through no fault of their
16 own, and so I think an argument could be made that it
17 should be a three judge decision, even if that does
18 increase the workload.

19 The second thing I note, and I believe I
20 understand the mechanism correctly, justices, is a
21 dissenter is not permitted to trigger the chief justice
22 replacing; and that troubles me, too, because even though
23 the dissenter by definition was in a minority and it could
24 have been a concurring and dissenting, and I'm worried
25 about disempowering a justice whose judgment is of equal

1 importance as every other justice, but was outvoted or was
2 outvoted on some issues and not other issues, because
3 sometimes there -- there's concurrence on some points and
4 dissent on another point. So I would be inclined to say
5 that the dissenter should be empowered to trigger a full
6 panel.

7 And then under subdivision (4), if no member
8 of the original panel remains then your only recourse is
9 en banc, and this troubles me, too, because a litigant has
10 lost a valuable right of a panel rehearing because the
11 standards for en banc rehearing are different and more
12 limited, and so they've been deprived of a valuable
13 procedural right through no fault of their own, just by
14 happenstance, and in my -- my inclination is to say the
15 litigant should have the full complement of rights no
16 matter whether it was resignations, deaths, replacement by
17 election, or whatever.

18 And then I am troubled, just like Lonny
19 said, about the chief justice after a decision has come
20 down being allowed to pick the replacements, knowing who
21 was elected, knowing what they think, is too much power
22 for the chief justice. I think it should be either
23 required that the -- what Justice Gray called the position
24 replacement, that if place three got replaced and was on
25 that panel then the new place three judge is on that

1 panel, or it ought to be random, but you shouldn't empower
2 the chief justice to even have the possible choice of
3 putting someone on a panel to achieve a certain result.

4 So having -- having said that, I'm not sure
5 if any of the changes I propose are made to
6 Justice Christopher's proposal, it becomes pretty close to
7 the committee proposal, but I'm just really speaking as a
8 principle, I hate to see litigants lose rights for events
9 that have nothing to do with them and have to do with the
10 workings of the judicial system.

11 CHAIRMAN BABCOCK : Why do you think the
12 chief shouldn't be able to do it?

13 MR. ORSINGER: Well, of course, I practiced
14 law in a day when we didn't have all completely neutral
15 judges. Yeah. And so there were --

16 CHAIRMAN BABCOCK: Theoretically they were.

17 MR. ORSINGER: There was lots of
18 controversy. There was even controversy about the
19 reassignment of cases from one court of appeals to another
20 court. There was some public reprimands I think from the
21 judicial -- or at least there was some investigations. I
22 can tell you that I became aware of them, and sometimes
23 was participating in the defense.

24 CHAIRMAN BABCOCK: Because of past
25 experience --

1 MR. ORSINGER: So what I'm saying is that we
2 can't always count on having a completely neutral
3 judiciary, and that's why we build neutrality into our
4 system, so we don't -- as I understand it, most of the
5 courts don't let the chief justice or some majority vote
6 decide who's going to be on the panel. I think they do
7 that by random. I think that's universal, but it may not
8 be. No, it's not universal? Okay.

9 Well, maybe I'm wrong. So maybe there
10 ought to be some other changes I'm not aware of, but I
11 would certainly say that a neutral process that doesn't
12 allow a particular individual to attempt or have the even
13 possibility of attempting or influencing the outcome of
14 the decision would inspire more confidence in the
15 neutrality of our judiciary. So random assignment to the
16 panel or allowing the voters decide who's going to be in
17 place three or place five to me is better than allowing
18 the chief justice to decide that -- and this was a two to
19 one vote, and I'm going to put this guy in here, and it's
20 probably going to flip the other way. I'm not accusing
21 anybody would do that, but since it's possible, it could
22 happen, and in the past, it might have happened. So I
23 think I'm in favor of a neutral process where all the
24 litigants get all of their rights when something about the
25 judiciary changes that's not their fault.

1 CHAIRMAN BABCOCK: Okay. Kennon.

2 MS. WOOTEN: There's a provision that I
3 hadn't really thought about before that you, Justice
4 Christopher, may have considered, but it's 41.1(b) of the
5 Texas Rules of Appellate Procedure, and it states that "If
6 after argument for any reason a member of the panel can't
7 participate in deciding a case, the case may be decided by
8 the two remaining justices."

9 HONORABLE TRACY CHRISTOPHER: That's only
10 for oral argument cases.

11 MS. WOOTEN: Right, but I'm just wondering
12 whether in light of what you said about all of the work
13 required, if there's a consensus that we need three here
14 or if this might be a circumstance where two would
15 suffice.

16 HONORABLE TRACY CHRISTOPHER: Well, I mean,
17 I think two -- if two are still from the original panel,
18 they can decide the motion for rehearing. I mean, and to
19 me if you're going to open it up to a complete panel
20 rehearing, I would just go with the three, because it's
21 possible with two to have a split.

22 MS. WOOTEN: And when the two have a split,
23 to your point, Richard Orsinger, in the existing rules,
24 the chief justice of the court of appeals can designate
25 another justice of the court to sit on the panel to

1 consider the case. There are also other options in the
2 rule, but one of them is to give the chief justice the
3 power.

4 MR. ORSINGER: Okay. So if a dissenter --
5 as a result of an election if we have two justices left
6 and they're on opposite sides of the vote, then the chief
7 justice is required to appoint a third justice; is that
8 right?

9 HONORABLE TRACY CHRISTOPHER: No.

10 MS. WOOTEN: This is --

11 HONORABLE TRACY CHRISTOPHER: No. If you
12 had oral argument and one judge is no longer available,
13 then two judges can decide the case, but if they split
14 then a third judge gets named to decide it.

15 MR. ORSINGER: Well, that's different from
16 what you're left with is one who --

17 HONORABLE TRACY CHRISTOPHER: This is
18 original decision.

19 MR. ORSINGER: -- voted in the majority, one
20 who voted in the dissent, and there's not a third, and
21 that's not --

22 MS. BARON: Yeah, this is original.

23 HONORABLE TRACY CHRISTOPHER: Original.

24 MS. BARON: Original vote before opinion,
25 you can you bring in new members if there's a deadlock,

1 and there are procedures in the rule that address how you
2 do that, and there are three different ways of resolving
3 it. The chief justice can appoint additional panel
4 members, the court can take it en banc, or they can ask
5 the Chief Justice of the Texas Supreme Court to bring in
6 somebody else, but there are no parallel provisions
7 addressing rehearing.

8 MR. ORSINGER: And if it's a three judge
9 court, do we just automatically take the new judge and put
10 them on, or do we say they can't come on, and we have to
11 stick with two?

12 MS. BARON: Well, I think the rule says if
13 you don't have a majority of the original panel, rehearing
14 is denied. That's how it's written right now.

15 MR. ORSINGER: So you're forced into a
16 rehearing en banc, which has different grounds.

17 MS. BARON: Correct.

18 MR. ORSINGER: But that's only if you lose
19 two judges off of your three judge court.

20 MS. BARON: Yes. If they split one/one on
21 rehearing, though, I would assume the rehearing would be
22 denied, right?

23 HONORABLE TRACY CHRISTOPHER: Yeah.

24 MS. BARON: Because you don't have a
25 majority of the original panel voting for rehearing, so it

1 is denied under the rule.

2 MR. ORSINGER: Okay. I would -- regardless
3 of what we do in this other situation, I would think we
4 should allow the third judge to participate or do
5 something rather than just have a default denial because
6 of someone retired, died, or there was an election.

7 MS. BARON: You may have situations, though,
8 other than elections where you don't have, especially on a
9 small -- on seven of the courts have only three justices.
10 If there is a delay in the appointment process, there
11 won't be a third judge available.

12 HONORABLE TRACY CHRISTOPHER: But, I mean,
13 you know, just like Judge Gray helped out El Paso, that's
14 what happens. The Chief Justice of the Texas Supreme
15 Court --

16 MS. BARON: Not on rehearing.

17 HONORABLE TRACY CHRISTOPHER: No, not on
18 rehearing.

19 MS. BARON: There's no provision in
20 rehearing to do that, right?

21 HONORABLE TRACY CHRISTOPHER: Right.

22 CHAIRMAN BABCOCK: Okay. We done with this
23 rule?

24 MS. BARON: Well, I would like -- I guess we
25 would like a sense of the committee, one, whether we want

1 to change it. Two, if we do change it whether there
2 should always be three panel members on rehearing or
3 whether if there are two of the original panel still in
4 place do we let it go, or whether we go with Justice
5 Christopher's proposal, which is it only kicks in if
6 there's only one justice who is in the majority that wants
7 to do something, so --

8 CHAIRMAN BABCOCK: One or less, I would
9 think.

10 MS. BARON: Huh? One or fewer.

11 CHAIRMAN BABCOCK: One or fewer.

12 MS. BARON: I mean, if there's zero left, do
13 we -- right, do we want to have a whole new panel.

14 MR. ORSINGER: Are you suggesting that if
15 there's zero left, there's automatically the rehearing is
16 denied without any judge looking at it?

17 MS. BARON: Correct, and that's actually
18 what just happened. If you look on your materials we
19 attached, certainly in Dallas they denied a motion for
20 extension of time to file panel rehearing because there
21 was no longer a majority of justices from the original
22 panel who had decided.

23 MR. ORSINGER: Wow.

24 MS. BARON: And it had to be denied, so --

25 CHAIRMAN BABCOCK: Munzinger.

1 MR. MUNZINGER: I share Richard Orsinger's
2 concern about the importance of a motion for rehearing.
3 Appellate panels, the numbers that Judge Christopher found
4 were not insubstantial where new opinions were issued.
5 That isn't to say that they all were changed, but they may
6 have been changed in a way that could affect whether the
7 Supreme Court grants a petition, whether the jurisprudence
8 of the state is sufficiently affected to get the Supreme
9 Court's attention. I don't know, but we all know that
10 appellate courts can make mistakes, can overlook a point,
11 can do something else, and a motion for rehearing ought to
12 have the same dignity, if at all possible, as the original
13 briefing; and if it requires that -- I can see where two
14 judges of a court could issue an opinion.

15 But to simply say, well, circumstances
16 require that we overrule the motion for rehearing and
17 there is no motion for rehearing, that doesn't sound right
18 to me. I don't think that's justice to the parties,
19 because right now our rules contemplate a motion for
20 rehearing, a second chance for the judge to -- judges to
21 make up their minds on the point, to brief it, and what
22 have you. I agree with Richard. I think it's a real
23 problem that you just can't just slough off a motion for
24 rehearing because very often they're very important.

25 CHAIRMAN BABCOCK: Well, Pam says she wants

1 guidance on a number of questions, one of which is the
2 chief justice versus, you know, some other method of
3 filling the vacancies.

4 MR. MUNZINGER: Well, the rules as they're
5 drafted say the chief justice. Does it mean the Chief
6 Justice of the Supreme Court, or the chief justice of the
7 court of appeals?

8 CHAIRMAN BABCOCK : Court of appeals.

9 MR. MUNZINGER: Well, the chief justice of
10 the court of appeals may or may not be appointed and may
11 or may not have another panelist to appoint. That's my
12 point about the court of appeals in El Paso. It's just a
13 drafting problem where you have -- I don't know, did you
14 say there were seven courts that had three justices only?
15 That's a statewide problem.

16 CHAIRMAN BABCOCK: Yeah. Justice Gray.
17 Chief Justice Gray's court.

18 HONORABLE TOM GRAY: There's actually only
19 five that have three judges.

20 MS. BARON: Is that right?

21 CHAIRMAN BABCOCK: But who's counting.

22 HONORABLE TOM GRAY: But who's counting.

23 MS. BARON: Well, I looked at -- I looked at
24 all the places today on the internet, but maybe --

25 HONORABLE TOM GRAY: There are five that

1 have five, two that have four, two that have six, two that
2 have seven, two that have nine, and one has 13.

3 MS. BARON: You probably know better than I
4 I do. I was just counting the justices on the websites,
5 and maybe they just didn't want to be on there. I
6 think -- Chip, if we could just take a vote, one, should
7 we change the rule? First vote, yes or no. If we change
8 it, second vote, should there be three justices for all
9 panel rehearings or not?

10 CHAIRMAN BABCOCK: Okay.

11 MS. BARON: And then once we get past that
12 we can start -- if that doesn't pass, we can see how many
13 fewer judges people are willing to accept.

14 THE COURT: All right. I think that's
15 great. Let's start with number one. How many people are
16 in favor of changing the rule?

17 Is your hand up, Pam?

18 MS. BARON: No.

19 CHAIRMAN BABCOCK: Okay. How many people
20 are against changing the rule?

21 Now, your hand's up. Nineteen to two in
22 favor of changing the rule. Okay. Now, the second vote,
23 Pam, is how many?

24 MS. BARON: Should there be three justices
25 sitting on panel rehearings in all cases.

1 CHAIRMAN BABCOCK: Should there be --
2 everybody in favor of having three.

3 HONORABLE TOM GRAY: Can I add a friendly
4 amendment?

5 MS. BARON: Yes.

6 CHAIRMAN BABCOCK: Probably.

7 HONORABLE TOM GRAY: Unless there's only two
8 judges living on the court. It needs to be worded so that
9 if a judge dies and there's a motion for rehearing and
10 there's no appointment --

11 HONORABLE TRACY CHRISTOPHER: No, because we
12 can always get Justice Hecht to appoint somebody. I mean,
13 I think it should be all or nothing and not carve out --

14 MR. ORSINGER: No friendly.

15 HONORABLE TRACY CHRISTOPHER: No friendly.

16 HONORABLE TOM GRAY: No friendly.

17 CHAIRMAN BABCOCK : No friendly fire.

18 PROFESSOR CARLSON: You've been unfriended.

19 HONORABLE TOM GRAY: I think unfriended is
20 the better expression.

21 CHAIRMAN BABCOCK: All right. Everybody in
22 favor of three?

23 MS. BARON: In all cases.

24 CHAIRMAN BABCOCK: In all cases.

25 Against three. Well, in a squeaker, 9 in

1 favor, 10 against. The prior vote, by the way, whether we
2 should change the rule, 19 in favor, 2 against, the chair
3 not voting in either instance. So what's our next vote,
4 Pam?

5 MS. BARON: Okay. Assuming we don't have
6 three in all cases, I would guess that people would say if
7 we had zero or one, that, yes, we're going to add more.
8 Well, you wouldn't. I wouldn't, but -- all right. Let's
9 just start with if there are two, are we okay with letting
10 those two decide it? Right?

11 CHAIRMAN BABCOCK: So how would you frame
12 the vote? If you're in favor of, raise your hand. What's
13 the "of"?

14 MR. MUNZINGER: Can I ask a question real
15 quick, Chip?

16 CHAIRMAN BABCOCK: Yeah, sure. While she's
17 thinking.

18 MR. MUNZINGER: What happens if the two
19 disagree and there's no majority opinion?

20 MS. BARON: Then it's denied. That would be
21 my feeling about that.

22 MR. YOUNG: But couldn't there be an
23 intermediate where two could decide if they agreed, but
24 then you would need the third if they disagree? The last
25 vote was you have to have three no matter what.

1 MS. BARON: I don't want to draft that rule,
2 so --

3 CHAIRMAN BABCOCK: I think that gives under
4 the circumstances some room to move.

5 MS. BARON: We could do that. I mean, I
6 think that, you know, generally when you have a tie on a
7 court and there's a motion pending, then that motion is
8 denied. If there are -- you know, if the Supreme Court
9 splits four/four on a case, then it is affirmed.

10 MR. YOUNG: Never reversed.

11 MS. BARON: Well, it doesn't have to be.

12 CHAIRMAN BABCOCK: Hey, take your appellate
13 stuff outside. Don't be doing that.

14 MS. BARON: So let's just -- let's start
15 with just -- we'll do this in two votes. One, you know,
16 if there are -- I guess we've already decided that if two
17 are left that they can decide it.

18 CHAIRMAN BABCOCK: Right.

19 MS. BARON: Because we rejected three in all
20 cases.

21 CHAIRMAN BABCOCK: Right.

22 MS. BARON: So if there are two left and
23 they disagree, do we think a third member needs to be
24 appointed in that situation?

25 CHAIRMAN BABCOCK: All right. All in favor

1 of a third member being appointed if the two on the panel
2 disagree, raise your hand.

3 All right. All opposed? Well, that one
4 passed 12 to 9, the chair not voting. Any other voting
5 you want to do?

6 MS. BARON: Yes, let's keep going. So as we
7 go down that decision tree, if the two disagree and the
8 third needs to be appointed, how are we going to do that?

9 CHAIRMAN BABCOCK: Whose going to appoint?
10 All in favor of the chief justice appointing, raise your
11 hand.

12 HONORABLE TRACY CHRISTOPHER: Of the Texas
13 Supreme Court or --

14 CHAIRMAN BABCOCK: No, no, no. Of the court
15 of appeals.

16 HONORABLE TRACY CHRISTOPHER: Okay.

17 HONORABLE R. H. WALLACE: What's the
18 alternative?

19 CHAIRMAN BABCOCK: That it's done by some
20 other method.

21 MR. ORSINGER: Like a random method or
22 something, or placement?

23 HONORABLE R. H. WALLACE: Placement.

24 MR. ORSINGER: Placement.

25 THE COURT: Placement, wheel.

1 HONORABLE LEVI BENTON: Chief justice.

2 CHAIRMAN BABCOCK: There's lots of things.

3 HONORABLE LEVI BENTON: The clerk of the
4 Supreme Court using the wheel and putting the names of all
5 judges in the wheel.

6 CHAIRMAN BABCOCK: You could do that, but
7 there may not be any more. So everybody in favor of the
8 chief justice of the court of appeals where the motion for
9 rehearing has been filed appointing the missing judge
10 or -- justice or justices, raise your hand.

11 MR. ORSINGER: The problem is the chief
12 justice is going to do it in every case unless there isn't
13 one, but the question is whether it's random or whether
14 it's discretionary.

15 CHAIRMAN BABCOCK: So you're against.

16 MR. ORSINGER: No. The chief justice has to
17 do it, no matter what.

18 HONORABLE TOM GRAY: No. It can be
19 automatic.

20 HONORABLE LEVI BENTON: That's what we're
21 voting on.

22 CHAIRMAN BABCOCK : That's what we're voting
23 on.

24 MR. ORSINGER: Automatic? Who has the power
25 to appoint the other justice?

1 HONORABLE TOM GRAY: You're missing the
2 point.

3 CHAIRMAN BABCOCK: We're going to have a
4 rule that says --

5 MR. WATSON: We're creating power.

6 HONORABLE LEVI BENTON: We could say
7 Richard Orsinger has the power.

8 MR. ORSINGER: I don't get this. This is
9 not making sense.

10 CHAIRMAN BABCOCK: It's getting late, we're
11 getting punchy. Everybody in favor of the chief justice
12 appointing? Everybody against?

13 All right. One in favor, 21 against. All
14 right. You got any more votes you want to take?

15 MS. BARON: Sure, we can vote until the cows
16 come home. All right. On if the chief justice doesn't
17 appoint, our other alternatives are by place or by wheel.
18 Right?

19 PROFESSOR CARLSON: What was the second one?

20 MR. ORSINGER: Wheel, like random.

21 MS. BARON: By place or by random.

22 HONORABLE LEVI BENTON: Question.

23 CHAIRMAN BABCOCK: Levi.

24 HONORABLE LEVI BENTON: Will you clarify how
25 the wheel is constituted?

1 MS. BARON: It would be whoever is not
2 sitting on your panel that's sitting on your court.

3 CHAIRMAN BABCOCK: Yeah, I think we're
4 getting down into the weeds.

5 MS. BARON: I know. This rule is nothing
6 but weeds.

7 MS. WOOTEN: I think we have visited the
8 weeds.

9 CHAIRMAN BABCOCK: I know, but now the bugs
10 are starting to -- the gnats are out.

11 MS. WOOTEN: The gnats.

12 CHAIRMAN BABCOCK: I don't have any gnat
13 spray.

14 MS. BARON: Do this one last vote.

15 CHAIRMAN BABCOCK : Buddy.

16 MR. LOW: One suggestion of the operating
17 procedures of the Court, I mean, and that could be, I
18 guess different for each court.

19 CHAIRMAN BABCOCK: For each court, yeah.

20 MR. LOW: That's one option. I'm not
21 suggesting that at all. I just read it.

22 CHAIRMAN BABCOCK: Not a bad idea, though.
23 Justice Gray, what do you think?

24 HONORABLE TOM GRAY: I'm sorry? I was asked
25 a specific question here so --

1 CHAIRMAN BABCOCK: Buddy.

2 MR. LOW: The internal -- I don't know how
3 to do the --

4 CHAIRMAN BABCOCK: Why don't we default to
5 the internal operating procedures of the court?

6 MR. LOW: And each court has theirs.

7 HONORABLE TOM GRAY: Because we revoked all
8 of ours, and we don't have any.

9 CHAIRMAN BABCOCK: Okay.

10 HONORABLE TOM GRAY: I mean, so they may not
11 address the situation.

12 CHAIRMAN BABCOCK: Evan.

13 MR. YOUNG: There are different
14 circumstances, and sometimes it's because the justice has
15 left the court, sometimes it's because the justice is on
16 the court but might be recused, for example, so couldn't
17 the option -- it doesn't have to be one or the other. It
18 could be if the reason for the justice who is on the panel
19 can't sit for rehearing is because someone else now has
20 that job, that could be the default, but if there's a
21 different reason, the justice is recused, there is no
22 replacement, et cetera, then why not use whatever method
23 the court uses in case of recusal?

24 CHAIRMAN BABCOCK: Yeah. Pam.

25 MS. BARON: Well, I think the -- one of the

1 objectives here in not having the chief justice have the
2 power to appoint is to have a neutral check in place, and
3 if you default to internal rules or rules for recusal,
4 that varies among our courts, and in many cases that does
5 default back to the chief justice to do it, so you're back
6 to what we just voted 21 to 1 against. So I think the
7 options if we're going to try and do this in a neutral
8 nonappointment by the chief justice way would either have
9 to be by place number or by random draw of some sort.

10 CHAIRMAN BABCOCK: Well, what's the argument
11 against place number, Richard? Do you have a problem with
12 that?

13 MR. ORSINGER: No, I don't. In fact, you
14 know, that's the most democratic because basically unless
15 it's a retired judge, the sitting judge has been replaced
16 by a majority vote, or if it was retired, then the voters
17 had to choose between two or three candidates, and they
18 picked the one they wanted the most. So to me, the most
19 democratic -- and maybe that's not our goal here, but most
20 democratic thing is to let the people's choice take the
21 vote.

22 CHAIRMAN BABCOCK: He could be appointed,
23 too.

24 MR. ORSINGER: Now, we may not trust the
25 people's vote, in which event we shouldn't be electing

1 judges in the first place, which we may not be after the
2 next session, but --

3 CHAIRMAN BABCOCK : Evan Young.

4 MR. YOUNG: That doesn't answer the
5 situation where that seat is occupied by somebody who's
6 been recused. That's why I'm saying it can't be this "or"
7 bring it up, this "and." So the seat, if that kind of
8 answers the case, whether be appointment or by election,
9 that's a neutral principle. Nobody can say that there's
10 something that is improper about having that same seat in
11 the case, but that isn't always going to answer it, and if
12 that justice is there but cannot participate or there's
13 nobody there so nobody can participate, then the choice
14 would be either to do whatever the court's rules are for
15 dealing with recusals, or I would be perfectly fine with
16 it being a neutral random selection, but it can't be the
17 place. That cannot be an answer because that will not
18 address any number of circumstances. Like disability.
19 Like the Governor not appointing somebody.

20 CHAIRMAN BABCOCK: Yeah. Empty place.
21 Okay.

22 MS. BARON: Okay. I guess the other
23 question I have, can we vote on the Christopher approach?
24 Do you want to vote on that?

25 HONORABLE TRACY CHRISTOPHER: Yeah. It's

1 going down, but it's all right.

2 CHAIRMAN BABCOCK: All right. Do you want
3 to articulate the Christopher approach?

4 MS. BARON: There's no one better to do it
5 than Justice Christopher.

6 HONORABLE TRACY CHRISTOPHER: So we've
7 already decided two judges, we've voted the two judges can
8 hear the rehearing motion that were on the original panel.
9 So now we have to figure out what to do if there's one
10 judge left or zero judges left, because I don't -- I don't
11 think we have votes on either one of those scenarios.

12 MS. BARON: Right, yes.

13 HONORABLE TRACY CHRISTOPHER: So my
14 suggestion on the one judge left is if -- if that judge
15 was in the majority on the original opinion and that judge
16 can ask for the appointment of two new judges to hear the
17 panel rehearing. However we want to appoint it, it
18 doesn't really matter to me. I mean, I was envisioning,
19 you know, new places, but I can see that there could be
20 problems in some of the smaller courts that way. So if
21 there's only one judge left, the judge that is left gets
22 to decide whether or not to ask for more judges for panel
23 rehearing.

24 MR. ORSINGER: But that's only if they were
25 in the majority?

1 HONORABLE TRACY CHRISTOPHER: Yes.

2 That's -- and that's my original position.

3 MS. BARON: Are you willing to take the
4 Orsinger amendment and let it just be --

5 HONORABLE TRACY CHRISTOPHER: Yes.

6 MS. BARON: -- any time that one judge.

7 HONORABLE TRACY CHRISTOPHER: Yes.

8 MS. BARON: And not make them be a majority.

9 HONORABLE TRACY CHRISTOPHER: Yes.

10 HONORABLE TOM GRAY: Oh, sure, you'll take
11 his friendly amendment and not mine.

12 HONORABLE TRACY CHRISTOPHER: Your friendly
13 amendment was messing up the vote. I'll take his friendly
14 amendment. Yeah, so if there's one judge left, that judge
15 gets to decide whether to ask for two new judges to be
16 appointed for the rehearing.

17 CHAIRMAN BABCOCK: Okay. That's the
18 Christopher proposal.

19 HONORABLE TRACY CHRISTOPHER: Yes, as
20 modified.

21 CHAIRMAN BABCOCK: Everybody in favor of the
22 Christopher proposal, raise your hand.

23 Wait a minute, you can't vote late.

24 Everybody against the Christopher proposal. Nothing
25 personal. All right. The Christopher proposal passes 16

1 to 6, the chair not voting. This is more votes than we've
2 ever taken on any rules.

3 MR. DAWSON: I move that we suspend the
4 voting.

5 MS. BARON: Well, do we want to take one on
6 if there's nobody left?

7 CHAIRMAN BABCOCK: I wouldn't quit now. Why
8 quit now?

9 PROFESSOR CARLSON: If there's no one else,
10 turn off the lights.

11 MR. ORSINGER: It's a world record.

12 CHAIRMAN BABCOCK: We've already broken the
13 record so let's --

14 MS. BARON: This is why the subcommittee --

15 HONORABLE LEVI BENTON: This could be called
16 the Munzinger rule, which it's giving the litigants the
17 rights they ought to have, irrespective of the --
18 irrespective of the electorate.

19 CHAIRMAN BABCOCK: Okay. What -- how would
20 you frame this vote, Tracy or Pam, or somebody?

21 MS. BARON: I guess it's if there's no
22 members on the court do we just deny rehearing?

23 MR. ORSINGER: Is this qualified they have
24 to join in the majority?

25 HONORABLE TRACY CHRISTOPHER: No. No.

1 MR. YOUNG: Zero of them are left.

2 MR. ORSINGER: Oh, no members left.

3 HONORABLE TRACY CHRISTOPHER: Nobody is
4 left.

5 MS. BARON: Do you get a whole new panel.

6 CHAIRMAN BABCOCK : No members on the panel.

7 MS. BARON: You either get denied or you get
8 a whole new panel, which --

9 HONORABLE LEVI BENTON: Or a whole new court
10 in the case of a three member court.

11 PROFESSOR HOFFMAN: I think we already voted
12 on this. Our very first vote was a vote that --

13 MS. BARON: You don't always get three.

14 PROFESSOR HOFFMAN: That we are not going to
15 deny rehearing, which would be the effect of this.

16 MS. BARON: Right.

17 PROFESSOR HOFFMAN: I think you already have
18 our guidance on this.

19 MS. BARON: Okay.

20 PROFESSOR HOFFMAN: Which is there should be
21 some rehearing.

22 MR. ORSINGER: Can we take a vote anyway?

23 MS. BARON: That means if you have one left,
24 you get worse or better treatment than if you have zero
25 left.

1 HONORABLE TRACY CHRISTOPHER: Yeah, that's
2 true.

3 MR. ORSINGER: Or if your justice is in the
4 majority -- or the minority, dissent.

5 HONORABLE TRACY CHRISTOPHER: Either way.

6 MS. BARON: Okay. That's fine.

7 CHAIRMAN BABCOCK: Okay. So you're going to
8 rewrite this rule and bring it back to us?

9 MS. BARON: It will be about six pages long.

10 HONORABLE TRACY CHRISTOPHER: No.

11 CHAIRMAN BABCOCK: Justice Gray.

12 HONORABLE TOM GRAY: I thought I would
13 provide the committee a little anecdotal levity here on --
14 that actually shows that this has real world consequences
15 under the existing rule. We have issued an opinion in
16 four cases, and the litigant has now filed a motion to
17 recuse all three judges in all four cases. So if we
18 recuse ourselves under the existing rule, his motion for
19 rehearing that is also pending will automatically be
20 denied.

21 PROFESSOR CARLSON: Does he know that?

22 HONORABLE TOM GRAY: Hell no, he doesn't
23 know it.

24 THE COURT: Okay. What are we going to call
25 this game, court of appeals trivia?

1 MR. ORSINGER: Chip, I think that we should
2 all recognize that we have had a record vote on a
3 presentation from a subcommittee chair that was against
4 any change. And this is why. Because she's got to go
5 back and translate all of this into a new rule.

6 CHAIRMAN BABCOCK: Well, it's -- I feel
7 special, so based on what we've done today. Hey, Bill,
8 can we knock the next one out in 20 minutes?

9 HONORABLE BILL BOYCE: Yes, we can.

10 THE COURT: Let's do it.

11 HONORABLE BILL BOYCE: Last topic,
12 mechanisms for obtaining a trial court ruling. To skip to
13 the punch line, the subcommittee is requesting guidance on
14 two points, and I'll circle back and explain it. The two
15 points to think about as we go through this are, number
16 one, do we want to target the specific circumstance
17 that -- that was identified by Chief Justice Gray, and
18 we'll unpack that a little bit, or do we want to address
19 this more broadly for other circumstances in which there
20 may be an inability to get a ruling. Question number one.

21 Question number two, guidance, a sense of
22 the committee as a whole about how to approach that.
23 We've sketched out some alternatives that were suggested.
24 There may be others that the full committee has an idea of
25 that we didn't think of, but those are the -- those are

1 the two things that we're going to ask for guidance for at
2 the end of this discussion, but to get there, the specific
3 circumstance that gave rise to this referral is -- is
4 something that happens not infrequently in the courts of
5 appeals, particularly in connection with a incarcerated
6 litigant's petition for post-conviction DNA testing under
7 Chapter 64 of the Code of Criminal Procedure.

8 A request is made. Nothing happens.
9 Petition for writ of mandamus is filed to compel a ruling.
10 Petition denied because, A, it likely has multiple
11 procedural deficiencies; B, there is a difficulty in
12 demonstrating that the trial court has been made aware of
13 the request for a ruling and still failed to act on it;
14 and it comes up in this specific context because by
15 definition you're talking about somebody who is
16 incarcerated, who is likely doing things by mail, and
17 cannot take other steps to demonstrate that the trial
18 court has been made aware of this pending ruled on request
19 and has failed to rule on it. Mandamus denied, or
20 sometimes there are other approaches to this. Chief
21 Justice Gray may want to elaborate on that, that will
22 prompt a ruling, but even in the best case scenario, a
23 mandamus had to be filed and court of appeals resources
24 were used to compel a ruling, which is not a tremendously
25 efficient or desirable way to go about things.

1 That was the specific circumstance that gave
2 rise to this referral, but there are other circumstances.
3 Justice Christopher has identified some -- I'm sure
4 everybody in the room may have anecdotal experience with
5 difficulties in other circumstances of how to get a ruling
6 made, how to -- how to force that through appellate
7 process when there is not -- there's not an ability to
8 otherwise get the ruling made. So, again, the -- what
9 this leads to is a threshold question that the
10 subcommittee asked for guidance on. How big a bite do you
11 want us to take? Do we want to focus in on this
12 particular issue that's been identified with respect to
13 Chapter 64 motions? Do we want to be more ambitious
14 and try to address other circumstances where there may be
15 a failure to rule?

16 Relatedly, what is the sense of the
17 committee as a whole about an approach to take to this?
18 If you go to page three of the memo, you'll see a couple
19 of approaches sketched out that the subcommittee
20 discussed. Potential ones. One is creating a universal
21 request for a ruling form that when submitted would start
22 the clock running. Another might be called administrative
23 shaming, to require reporting and use that reporting
24 perhaps to create a presumption after a set period of time
25 that something has been denied by operation of law because

1 it's been pending a while. There may be collateral
2 mechanisms involved, if there's a -- a continuing and
3 manifest failure to rule on things. Perhaps that's
4 something that gets elevated into some other kind of a
5 process.

6 Another approach, reliance, expanding what
7 already appears in the rules in a number of respects in
8 terms of denials by operation of law after X number of
9 days, familiar to you through now motion for new trial
10 that is not expressly ruled on. There are other examples
11 of that. Do we want to expand that?

12 And then the last one is to look for
13 administrative results, administrative approaches to this
14 perhaps through a combination of reporting and getting the
15 presiding administrative judges involved, if there is a
16 continuing and manifest failure to rule on things.

17 So that's the preamble, but I'll certainly
18 ask Chief Justice Gray or Justice Christopher to add
19 anything that I've glossed over.

20 HONORABLE TOM GRAY: It's just a frequent
21 problem. It's not just in the Chapter 64 stuff, but, you
22 know, we've had motions pending in trial courts that we've
23 been asked to compel a ruling on that have been pending
24 for four years in a trial court, and they are -- it
25 just -- it happens, and the question is, how do you

1 balance the efficiencies of, yeah, every once in a while a
2 trial judge is going to drop the ball on getting something
3 ruled on versus having Guido show up at the judge's
4 chambers with a copy of the motion saying, "My cousin
5 that's in jail would sure appreciate a ruling."

6 CHAIRMAN BABCOCK: "Ignore this baseball bat
7 in my hand." Yeah, Frank.

8 MR. GILSTRAP: We're talking about all
9 rulings, not just final judgment, including things like
10 carrying the motion for summary judgment to trial,
11 carrying evidentiary rulings to trial? That type of
12 thing.

13 HONORABLE BILL BOYCE: Well, I think
14 that's -- that's one of the things we want guidance on,
15 which is there are some things that I think there can be a
16 toleration of not having an immediate ruling on, but there
17 are other things that need a ruling. And maybe we can
18 discuss what -- what things really, really need a ruling
19 and what things can be carried without prejudice to due
20 process rights and things like that.

21 MR. GILSTRAP: Getting that definition would
22 take an act of a genius.

23 HONORABLE BILL BOYCE: Well, the good news
24 is Justice Christopher is on the case, so I think we're
25 good.

1 MR. LOW: Chip, maybe there should be --
2 there are other cases besides the prison cases, and I've
3 got a case that's a dispositive motion for a year and a
4 half, but we filed a joint motion for the judge to rule,
5 so he sets it a month later for reargument. I mean,
6 it's -- it's an unusual thing. That's not -- don't get me
7 wrong. It's not a burning issue, but it does occur in
8 other cases, and if it's a dispositive motion, they should
9 make a ruling. Sometimes they need to carry things with
10 them, I understand.

11 CHAIRMAN BABCOCK: Okay. Richard Orsinger.

12 MR. ORSINGER: So at the very least it seems
13 to me like we ought to mandate or permit this procedure
14 for all interlocutory orders that are appealed, because
15 you can't get your interlocutory appeal until you have a
16 ruling, and if you can't get a ruling, you can't get
17 appellate review. So at the very least we should all be
18 able to agree that you can mandamus a ruling on an order
19 that's subject to interlocutory appeal, and then where we
20 go beyond that may be subject to more discussion, but at
21 least we can go that far, can't we?

22 CHAIRMAN BABCOCK: Justice Christopher.

23 HONORABLE TRACY CHRISTOPHER: We've got a
24 big difference -- most of the practitioners here are civil
25 practitioners. The -- in the criminal courts you have a

1 whole different set of rules and considerations. This
2 particular request from Judge Gray involves a criminal
3 motion of a prisoner case, and it's a post-judgment
4 motion, okay. So we've got the post-judgment motions,
5 some of which a trial judge has authority to rule on, some
6 of which they don't, and so they often ignore those
7 motions if they don't have authority to rule on them.

8 We've got -- on the criminal case, we have
9 what are known as dual representation motions. The
10 prisoner has been given an appointed lawyer but he files
11 his own motions. Under our case law, those the judge does
12 not have to rule on them, but the prisoner files
13 mandamuses anyway, and then we have what more people here
14 are familiar with, is problems in getting rulings in civil
15 cases.

16 Another thing to consider when we're looking
17 at the scope of this problem is that there are no rules of
18 procedure that we can revise in criminal courts. Okay.
19 We can revise the Rules of Civil Procedure to deal with a
20 lot of problems that you are having and in terms of a
21 failure to rule, but how do we do it in the criminal
22 context when the only thing that we could really do, I
23 believe, is to do a Rule of Judicial Administration?
24 Okay. And so I just, you know, started thinking about it,
25 if you look at the last two pages of this memo, I got lots

1 and lots of ideas, but it's a very complicated scenario,
2 and I think the -- the first question we have to identify
3 is do we do something beyond just the criminal cases? And
4 if we're going to limit to the criminal cases, we can come
5 up with something.

6 Then we have to look into, you know, what do
7 we want to do in connection with the civil cases. So --
8 and for those judges, I don't think we have a general
9 jurisdiction judge here today, but, you know, they're --
10 they're used to dealing with two different scenarios at
11 all times. So it's just something that this committee
12 needs to be aware of we're trying to make changes, so I
13 think -- I think the first vote perhaps is do we want to
14 only address these -- this particular request for DNA
15 testing, which is a post-judgment motion almost always by
16 an unrepresented inmate that they are entitled to a ruling
17 on. Okay. So versus a lot of other motions that the
18 prisoners file that the trial judge has no jurisdiction to
19 rule on, and I also think that a lot of our problem is
20 education of our judges.

21 So I specifically asked, you know, in our
22 new judges school that just came out, do we have, for
23 example, a section on, you know, post-judgment motions and
24 how to deal with them? Clerks, when they get motions in
25 cases that have been closed for years, they just put them

1 in a file, and I mean, and so you have to educate the
2 clerks. You know, this is the type of motion that has to
3 be presented to the judge to be ruled on. Do we give the
4 clerk the ability to, you know, make that determination?
5 I mean, I started thinking outside the box, that ought to
6 go to like the public defender's office if you're in a big
7 enough county to -- to -- that warrants a public defender
8 to look at it.

9 It's a very complicated thing, and the first
10 issue is criminal versus civil and if we do want to deal
11 with the criminal, we probably need a few more criminal
12 judges to help us on that point.

13 CHAIRMAN BABCOCK: Okay.

14 HONORABLE TOM GRAY: Rusty seemed real
15 excited about this.

16 MR. HARDIN: Well, but I'm kind of
17 rethinking it. I am excited about it because I think the
18 issue you raised is important, but I think that now after
19 listening to everybody, I think that needs to be dealt
20 with separately, but what really got me excited was judges
21 refusing to rule. And in my practice, since I commit
22 malpractice in two areas instead of one, I have exposure,
23 and it's a much bigger problem other than the inmates in
24 the civil side than it is over on the criminal side.
25 There are too many things -- I mean, there are some

1 criminal district judges that dally in making rulings, but
2 I don't know that because a few do that's sufficient
3 reason to address it, but it is a frequent problem with
4 particularly inexperienced judges that, quite frankly,
5 we're experiencing right now; and if there was a way to
6 divide out in addition to doing a problem that you're
7 addressing, the more I think about it, I'm schizophrenic
8 about this whole subject because I've always been a
9 proponent of giving judges almost complete discretion
10 rather than dictating what they can and can't do and
11 trying to bind them by it.

12 On the other hand, they -- we litigants need
13 sometimes that there is a mechanism for making a judge
14 finally rule, and so I guess my suggestion is, is that
15 this committee come up with the proposals for sure for
16 Justice Gray's, which I think is going to be easier to
17 draft based on what both of you are saying than getting
18 off into the hinterland that will probably take up both a
19 Friday and a Saturday whenever we came back with proposals
20 as we all worked our way through it, but -- but what I got
21 really excited about is because it is my frustration of
22 just not being able to get a ruling, and it happens
23 increasingly often.

24 CHAIRMAN BABCOCK: Judge Wallace.

25 HONORABLE R. H. WALLACE: Is it almost a

1 hundred percent the petitions for DNA testing? Is that
2 what we're talking?

3 HONORABLE TRACY CHRISTOPHER: No.

4 HONORABLE TOM GRAY: No, that's actually a
5 small part of it. We're seeing a lot on writs of
6 habeas corpus, refusal to rule, and then on the civil
7 side, although it still arises out of criminal cases,
8 where the -- there's been an order to withhold funds from
9 a prisoner's account and the trial judge then denies the
10 prisoner -- or is asked to review that order of
11 withholding or withholding notice, and under a Supreme
12 Court case that's a civil proceeding related to the
13 collection of fees, and therefore, it needs a separate
14 ruling post-judgment, and so you've got a motion that's
15 sitting there not filed, and we wind up with a mandamus to
16 compel a ruling on those.

17 HONORABLE TRACY CHRISTOPHER: And a judge in
18 a criminal case can do a nunc pro tunc, and sometimes
19 they've got valid ones, but they can't get a -- the judge
20 to rule on it.

21 CHAIRMAN BABCOCK: Scott, and then Buddy.

22 MR. STOLLEY: This failure to rule problem
23 is I think it's a significant problem in the Dallas court
24 of appeals district, that they're issuing a lot of
25 mandamus opinions on this topic, and there are certain

1 judges who are repeat offenders who just don't rule. So
2 I -- I would like to see us do something about this. With
3 respect to the -- the bullet points proposed here, I would
4 venture that the second and fourth bullet points probably
5 wouldn't be well-received by court personnel because it
6 creates more work for them. I personally do not like the
7 first and third bullet points with respect to an automatic
8 default denial, because it's hard to explain to clients,
9 "You mean I don't even get a ruling from a judge? I'm
10 automatically denied?"

11 I might propose that we change number one to
12 create a universal request for ruling form, but the clock
13 that it would start would be the clock that establishes
14 the length of time after which you can then bring a
15 mandamus, because that -- that establishes you have
16 brought it to the court's attention and after a certain
17 amount of time you're able to bring a mandamus to get a
18 ruling. Because that's one of the hard things to prove in
19 these mandamuses, is that you've brought it to the judge's
20 attention. So if you have this universal form, that would
21 at least eliminate that part of the fight, and you could
22 get on with this business. So those are my thoughts

23 CHAIRMAN BABCOCK: Buddy, and then Alistair,
24 and then Roger.

25 MR. LOW: Chip, I'm not suggesting that we

1 take the view of the civil situation like mine, because
2 that's only happened to me one time in 58 years.

3 CHAIRMAN BABCOCK: Right.

4 MR. LOW: I think we need to deal with the
5 criminal, and if we need to do something with the civil,
6 then do that, but I don't think we should take it all
7 together, and I didn't mean by my example to suggest that
8 we need to do something, because I just deal with it.

9 CHAIRMAN BABCOCK: Alistair.

10 MR. DAWSON: So I think we ought to limit it
11 to the criminal circumstance, folks in prison that are
12 filing whatever motions that they're filing for a couple
13 of reasons. One is I don't know how we would craft a rule
14 on when a judge should or should not be ordered or
15 compelled to issue a civil ruling. I mean, as someone
16 pointed out, you know, if they carry a motion for summary
17 judgment until trial, you know, what are you going to do
18 about that. There's all of these areas where the courts
19 properly want to carry motions and you -- I don't know how
20 it -- it would take us forever to try and craft rules on
21 what should be or shouldn't be compelled.

22 And if it really is that important, you do
23 have the right of mandamus, and they -- we've seen it in
24 Houston. Apparently they've seen it in Dallas where there
25 are judges for whatever reason are not issues rulings, and

1 if the appellate court thinks you need to issue a judgment
2 after that jury trial, for example, you know, they -- you
3 have a means of addressing that; whereas, these prisoners
4 really don't have an effective means. I do think we
5 should start and certainly go there, and I would at least
6 in this instance limit it to the prisoner type issue.

7 CHAIRMAN BABCOCK: Roger.

8 MR. HUGHES: Well, I'm going to echo that --
9 that the two remarks that we limit it to criminal. I'm
10 not completely adverse to some sort of administrative
11 report as a check, and I'll tell you why. I can remember
12 back in the early 1990's when everybody was all riled up
13 about the, shall we say, astronomical ad litem fees that
14 were coming out of my neck of the woods, and one of the
15 things they did was pass an administrative rule that every
16 month the district clerks has had to report on who had
17 been appointed an ad litem and how much every ad litem
18 award was. Well, I know that a couple of district clerks
19 kicked and screamed, but they finally got on board, and
20 now every month like clockwork in the counties you can
21 find -- they have a report online. These are the
22 following people that got reported -- appointed as
23 ad litem on which cases and then a listing of each case by
24 ad litem, type of case, et cetera, that they got awarded
25 for a settlement. It can be done, but I would suggest it

1 can only be done if we narrowly define the kind of
2 criminal cases that this report would be required, and
3 then I think that would be helpful to the clerks. That's
4 what I think.

5 CHAIRMAN BABCOCK: Judge Wallace.

6 HONORABLE R. H. WALLACE: Yeah, it sounds to
7 me like it's mainly a problem where people are
8 incarcerated because if they're not incarcerated, if
9 they're represented, they will be calling; and if they're
10 pro se, they will be calling about getting a hearing.
11 It's the people who are -- can't do that, it sounds like
12 is the problem.

13 CHAIRMAN BABCOCK: Sharena.

14 MS. GILLILAND: On the criminal side or for
15 folks who are incarcerated, some of what we see in the
16 clerk's office is gibberish and some of them can write a
17 better brief than some attorneys, and it's very clear what
18 they're asking for, they've identified the rules, they've
19 got --

20 MR. RODRIGUEZ: I want the record to reflect
21 she was not looking at me when she said that.

22 MS. GILLILAND: I did not.

23 CHAIRMAN BABCOCK: Looked to me like she was
24 looking right at you.

25 MS. GILLILAND: But it's not something --

1 but the point being some are very clear in what they're
2 asking for, and some we are debating what do we do with
3 this, is this something the judge needs -- are they asking
4 for anything, or are they just complaining? And in
5 crafting some kind of rule or guidance or report, that's
6 going to be really tough, so it may be an all or nothing
7 kind of thing, you know, based on just some of the stuff
8 that we have coming in. It's not always identified of "I
9 want a rule such and such relief," or "I want relief under
10 this," or "DNA testing." It's just, "I'm not happy with
11 the way things turned out and I'd like a different
12 result," and so from the clerk's standpoint, what do you
13 do with those? Does the judge want to see them, or do
14 they not want to see them?

15 CHAIRMAN BABCOCK: Thank you. Bill, what
16 other direction do you want?

17 HONORABLE BILL BOYCE: I think to wrap up,
18 it would be helpful to have direction around the threshold
19 issue. Are we -- are we talking solely about Chapter 64
20 type cases? Do we want to have the subcommittee look at
21 criminal cases more generally or try to think about an
22 approach that could encompass civil as well? I think -- I
23 think that threshold guidance would be useful to go back
24 to the subcommittee and start in more specific.

25 CHAIRMAN BABCOCK: Yeah. Based on what's

1 been said, my sense of the committee that's here was that
2 it was more on the criminal side than the civil, but --
3 and maybe I didn't hear much at all from the civil side,
4 but I could be wrong. Frank, what do you think?

5 MR. GILSTRAP: Well. Let me ask you this.
6 Justice Christopher, when you say post-judgment, you don't
7 mean something where there's a right of appeal. You mean
8 where they've been -- that they've already been convicted,
9 they've lost their right of appeal.

10 HONORABLE TRACY CHRISTOPHER: Right.

11 MR. GILSTRAP: Well, why can't we -- why
12 can't we start with those kind of cases? Those criminal
13 cases where the person is incarcerated and can't appeal.
14 It seems to me like that's a narrow -- a subset that we
15 could do something with.

16 CHAIRMAN BABCOCK: Justice Gray, that was
17 what kicked this whole thing off, right? That's what you
18 were --

19 HONORABLE TOM GRAY: Well, that happened to
20 be that particular mandamus of probably three or four that
21 was in that month. And I would say we have one of these
22 probably a week, maybe two a month. I -- we've had two
23 since this -- in the last two week, we've had two out of
24 my chamber. I don't know how many from the other chambers
25 that weren't Chapter 64. They were post-conviction -- no,

1 they were pretrial failure to rule on writs. So they're
2 still criminal, they're still inmates, but it happens at
3 different times.

4 MR. GILSTRAP: But once -- I mean, can't
5 they complain about all of that in the appeal from their
6 conviction?

7 HONORABLE TOM GRAY: No. Because they're
8 actually -- in those two cases, they're trying to keep
9 from being tried.

10 CHAIRMAN BABCOCK: What's the Court's view
11 on this? Martha.

12 MS. NEWTON: I don't know.

13 HONORABLE TOM GRAY: Chip, I do think we
14 should circumscribe it with the criminal pro ses
15 potentially. That would capture some civil and pre- or
16 post-conviction motions where the -- they were in a
17 proceeding where they were not otherwise represented by
18 counsel. Now, there's some wrinkles even in that, but --

19 CHAIRMAN BABCOCK: I was going to say that
20 doesn't sound like an easy rule to write, but --

21 HONORABLE TOM GRAY: Just defining what
22 motions would fall within that. I mean, this may be just
23 one of those things where the -- where the efficiency is
24 still with the existing procedures of mandamus. I mean,
25 it may still be there. Actually after I wrote the letter

1 to judge -- Justice Boyd, I started a process where I
2 would send a letter requesting a response and in asking
3 for the response I would point out to them, by the way, if
4 you rule on this before you file your response, just send
5 me a copy of the order. And that disposed of the next two
6 that I got in very easily. I got a copy -- I got a
7 ruling. But Chapter 64's are different because they don't
8 actually get a ruling. They start a process --

9 CHAIRMAN BABCOCK: Yeah.

10 HONORABLE TOM GRAY: -- with the DA, and
11 they have to go find the evidence that has biological
12 material in it and submit it to the DNA testing or file a
13 response that says there is none. You know, it's a
14 different problem with the Chapter 64.

15 CHAIRMAN BABCOCK: Justice Christopher.

16 HONORABLE TRACY CHRISTOPHER: Well, I mean,
17 that was one of my potential suggestions, was that the
18 request for a response should come from the judge in a
19 failure to rule situation, rather than the real party in
20 interest.

21 CHIEF JUSTICE HECHT: We don't get but a
22 couple a year and that's what we do, and usually the judge
23 rules the next day, so --

24 CHAIRMAN BABCOCK: Do we need a rule, or do
25 we need to keep looking at it?

1 CHIEF JUSTICE HECHT: Not for our Court, but
2 I was worried about the courts of appeals.

3 HONORABLE TOM GRAY: We can ask the trial
4 judge for a response. We just -- for some reason they
5 don't pay nearly as much attention to us as they do
6 when -- I'm just saying, you know.

7 CHAIRMAN BABCOCK: Well, we -- we don't want
8 to take up the full committee's time nor the
9 subcommittee's time drafting a difficult rule if -- if we
10 think the problem is not severe, but -- but on these
11 cases --

12 HONORABLE TOM GRAY: We spend a lot of time
13 with these cases, and I was actually hoping that more the
14 trial judges would have ideas about how they manage their
15 docket, sort of best practices and see if we could
16 incorporate that into a rule, but Judge -- Judge Estevez
17 is probably the only general jurisdiction trial court
18 judge we have on the committee, and so I was just -- I was
19 just hoping we could find some solution to keep from
20 having these mandamuses just where we get very little help
21 from the litigant because they can't get out of their cell
22 to do anything.

23 CHAIRMAN BABCOCK: Yeah.

24 HONORABLE TOM GRAY: You know.

25 CHAIRMAN BABCOCK: Well, Bill, what's your

1 thought?

2 HONORABLE BILL BOYCE: I think what I'd like
3 to suggest is take a shot at the specific Chapter 64
4 context that gave rise to this and bring it back to the
5 committee as a whole, and then if we can get satisfied
6 with that, perhaps see if that's a springboard to other
7 discussion to address other failure to rule issues in
8 other contexts, criminal or civil.

9 CHAIRMAN BABCOCK: Anybody opposed to that?
10 Everybody think that's okay? All right. Okay. Well,
11 that's what we'll do. You're only 10 minutes over your
12 estimated time, which is not too bad, and so this means we
13 don't have to come back tomorrow. So thanks for hanging
14 in there until 5:10 on a Friday afternoon, and we don't
15 have the 2020 schedule yet. It's, for some reason,
16 becoming increasingly difficult to put these things
17 together when you figure out space and UT football and
18 schedules and everything else, hotel accommodations, but
19 Marti and Chief Justice Hecht and Justice Bland and I are
20 going to try to get some --

21 MR. DAWSON: All of the Houston people are
22 happy to come back to Houston.

23 CHAIRMAN BABCOCK: Yeah, I bet they are.
24 We'll get that out to you in the next couple of weeks.

25 MR. HARDIN: Marti's cancellation was one

1 minute ago.

2 CHAIRMAN BABCOCK : What's that?

3 MR. HARDIN: I want to know if she canceled
4 it before you said it or if she just canceled it.

5 MS. WALKER: No, I canceled after he told
6 me.

7 MR. HARDIN: It's timed 5:10 or 5:11.

8 PROFESSOR CARLSON: No meetings in December?

9 CHAIRMAN BABCOCK: No, no meetings in
10 December. Happy Thanksgiving, Merry Christmas.

11 (Adjourned)

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2 **REPORTER'S CERTIFICATION**
 3 MEETING OF THE
 4 SUPREME COURT ADVISORY COMMITTEE

5 * * * * *

6
 7
 8 I, D'LOIS L. JONES, Certified Shorthand
 9 Reporter, State of Texas, hereby certify that I reported
 10 the above meeting of the Supreme Court Advisory Committee
 11 on the 1st day of November, 2019, and the same was
 12 thereafter reduced to computer transcription by me.

13 I further certify that the costs for my
 14 services in the matter are \$ 2,143.00.

15 Charged to: The State Bar of Texas.

16 Given under my hand and seal of office on
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