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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

APRIL 5, 2024

(FRIDAY SESSION)

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Taken before *D'Lois L. Jones*, Certified
Shorthand Reporter in and for the State of Texas, reported
by machine shorthand method, on the 5th day of April,
2024, between the hours of 9:00 a.m. and 4:57 p.m., at the
State Bar of Texas, 1414 Colorado Street, Suite 101,
Austin, Texas 78701.

INDEX OF VOTES

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

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TRCP 563.3	35946
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1 chaired my first meeting, which took up the parental
2 bypass rules, a nice topic to have to kick off my tenure
3 with. The prior chair, a very close friend of mine and a
4 terrific chair, Luke Soules, had a view that no matter
5 what kind of communication we got from any member of the
6 Bar or the public, we would study it and then discuss it
7 and then report it to the Court.

8 I changed that practice, because we were
9 doing a bunch of work on things that -- that the Court
10 was -- was not concerned about. So now, and for the last
11 25 years, we only take up projects when the Court refers
12 them to us. In other words, we're only working on things
13 the Court cares about. That does not mean that any member
14 of this committee or the public or the Bar cannot suggest
15 a problem; but infrequently I get e-mails which I will
16 pass along to the Chief and to Justice Bland and say,
17 "This is what I've been told, there's this issue"; and if
18 the Court's interested in having us look at it, we're
19 happy -- we're happy to do that; and sometimes the Court
20 says, "Yeah, that's a good idea," and other times, they
21 don't.

22 The other -- the other change that I
23 instituted from my predecessor was that at the beginning
24 of this meeting, as you will find out in a second, we get
25 a report from the Chief and Justice Bland on happenings at

1 the Court, with an emphasis on what has happened to our
2 work product. There were complaints way back when, almost
3 three decades ago, that we would do work, and it would go
4 into a big black hole at the Court, and we would never
5 hear about it again. Part of that was because we were
6 doing a lot of work that the Court wasn't all that
7 interested in, and so we didn't hear anything, but that
8 was frustrating to some members of the Court (sic). So
9 now our liaison, and the liaison for as long as I've been
10 on the committee, Chief Justice Hecht, starting when he
11 was just plain old Justice Hecht, reports on what is
12 happening with the Court and what's happening with our
13 work.

14 We also have a tradition that in the
15 December meeting before the Legislature, so every other --
16 every other year, we have a meeting which I have called
17 and has now become known as our "deep thoughts meeting,"
18 and that is somewhat of a free-for-all about just
19 anybody's thoughts about what we could do to improve the
20 justice system in Texas. And last year we had a number of
21 speakers that came in and presented various topics to us,
22 and we had a -- we had a lively meeting; and anybody on
23 this committee, or anybody, really, who wants to suggest a
24 topic for our deep thoughts meeting, by all means do so;
25 and we've got one coming up in December.

1 A number of years ago we started another
2 tradition, and that is memorializing our happy faces in a
3 photograph that we take after the first meeting of the new
4 term, so that will take place tonight, right, Shiva? At
5 the reception at Jackson Walker, 100 Congress, the 11th
6 floor, and everybody is invited to that, and hopefully
7 everybody has already received an invitation. So we'll --
8 we'll have a reception there and at some point a
9 photograph, which will look like all of the other
10 photographs, because they're taken in the same place, and
11 that -- what happens to the photographs, I don't know, but
12 they exist somewhere, somehow.

13 The only other thing to mention -- and
14 everybody who's been on the committee forever knows this,
15 but we try to be respectful of each other. In all the
16 years I've been chair, and even in the time prior to that,
17 I can only remember two times where I thought our decorum
18 was breached, and I spoke to the person that I thought was
19 a transgressor, and in one instance the person said, "You
20 want me to resign from the committee?" And I said, "No,
21 when I want you to resign, I'll tell you. Just, you know,
22 tone it down a little bit," which doesn't mean we don't
23 have lively discussions. We do, but we have to be
24 respectful of everybody on this committee, and the people
25 that have been on for many years have earned that respect,

1 and you newcomers have earned it by virtue of the work
2 you've already done on behalf of the State.

3 So, welcome, and it's great to have you
4 here, and I frequently tell people that professionally
5 this is the best thing I do. I learn more at these
6 meetings than all of the CLEs put together, and I
7 generally like all of the people I serve with in the
8 service of the State. So, with that, we will hear a
9 report from Chief Justice Hecht, as usual. So top that.

10 HONORABLE NATHAN HECHT: Yeah. Well,
11 thanks, everyone, for being here, and thanks to our new
12 members, and we look forward to working with you. The
13 committee is in its 84th year. It was convened nine
14 months after the Texas Rules of Practice Act passed in
15 1939 and has continued ever since; and throughout that
16 period of time, the Supreme Court has come to rely very
17 heavily on the counsel of the committee. We call it the
18 advisory committee for that reason, and we are interested
19 in the debate and all of the various different takes that
20 you have on pending rules, because you're in the field and
21 you appreciate what's going on, and we're not, and we need
22 to know -- we need to know at the end of the day, the
23 bottom line is that our work product is actually going to
24 work, and so we really rely heavily on the counsel of the
25 committee.

1 We welcome back to our -- on deck again,
2 Jackie Daumerie, who is the Court rules attorney, and now
3 Mother Daumerie, mother of Juliet Michelle, who is 104
4 days old today, I think; and if you want to see a picture,
5 you have to get in line over here, and she'll be glad to
6 show it to you.

7 In December, we finalized changes in the
8 supersedeas and disciplinary rules in response to
9 statutes. House Bill 4381 mandated there be alternative
10 security for certain judgment debtors worth less than
11 \$10 million, so we changed TRAP 24 to make that -- make
12 that the same. And then the disciplinary rules were
13 changed, again per statute, to provide who has standing to
14 bring a successful grievance against a lawyer.

15 Then we have adopted rules that allow an
16 appendix to be filed on appeal in lieu of a clerk's
17 record, again in response to statute, House Bill 3474.
18 The intent of that was to reduce the cost of appeal, and
19 we hope it will, and it is still a goal of the Court, I
20 think, to eventually, with e-filing now that we're
21 comfortable with that and more e-records being generated,
22 for the entire record on appeal to just be electronic, so
23 there wouldn't have to be a separate assembly of it. The
24 briefs, the record, everything would be available to
25 courts and their personnel electronically.

1 We put out the business court rules and
2 Fifteenth Court of Appeals rules for comment, and comments
3 are due May 1st. The committee worked very hard on those,
4 and we appreciate Marcy and her group, Marcy Greer and her
5 group, and they'll be talking about some of the comments
6 that we've heard back from them. It's very important to
7 the Court that the courts hit the ground running on
8 September 1st and that there not be any lag time or
9 wandering around or trying to find our bearings. The
10 Office of Court Administration is working very hard to
11 find space for the judges, chambers space, office space,
12 but also hearing rooms and courtrooms around the state to
13 conduct their dockets. So all of that's being done, and
14 the Office of Court Administration, Megan LaVoie, have
15 been working on that for months; and we expect to have all
16 of that in place well before September 1st so that the
17 Governor's nominees can get to work on the first day.

18 We've changed the briefing rules a little
19 bit. We've eliminated the need for paper copies, so you
20 can file things completely electronically these days. The
21 automated certificate of service that's generated by
22 your -- your e-filing service provider will serve as the
23 certificate of service in e-filed documents; and,
24 importantly for us, for our Court, we've added a provision
25 for a new section in petitions for review to call it an

1 introduction or reasons to grant. The Bar has been using
2 this. Most of the lawyers who are familiar with the
3 Supreme Court practice have been using this for years.
4 It's very helpful to the Court and I think helps to focus
5 everybody on the issues that we'll be looking at in
6 petitions.

7 Post Dobbs, everyone continues to worry
8 about court security, and this is true across the country
9 and every state and in the federal courts. In Texas, we
10 have legislation directing training and policies in all of
11 the courts regarding court security, so our Court has
12 adopted one. We put it in the Rules of Judicial
13 Administration, and we've directed all of the courts in
14 the state to come up with their own. We hope courts will
15 coordinate in working out these policies and trainings.
16 The -- but there are enough differences in a big state
17 like ours that there may be some local differences. So,
18 anyway, this is -- this is just -- the importance of this
19 just cannot be stressed enough that the Court's -- it's
20 just critical to the integrity of the courts and the rule
21 of law that the deliberations of every court, from the
22 trial courts on up, be confidential. So that's being
23 done.

24 And two other things, we expanded rules
25 regarding the temporary licensure of military spouses to

1 include active duty military service members, so if --
2 we'll try to see that that gets the publicity it should so
3 the people who qualify for that can take advantage of it.

4 And, finally, you've already seen the State
5 Bar's e-mails regarding the ongoing referendum on 12
6 changes to the disciplinary rules. The votes are due by
7 April 30th. If you haven't voted, look the changes over
8 and please vote. The State Bar Act requires the Court to
9 deliberate publicly on any rules that pass, so we've
10 scheduled that for May 6th in the courtroom, in our
11 courtroom, right before or after the State Bar budget is
12 presented. So if you haven't voted, please vote. And
13 that's what I have, Chip.

14 CHAIRMAN BABCOCK: Thank you, Your Honor.
15 Justice Bland.

16 HONORABLE JANE BLAND: Chip, I have nothing
17 to add.

18 CHAIRMAN BABCOCK: All right. I thought we
19 would -- for the new members who are here, I'm going to
20 call on you alphabetically, so, John Browning, get ready,
21 so that you can introduce yourself and just tell us a
22 little bit about it, and I don't know what to call John.
23 He's a professor -- currently a professor, formerly a
24 judge, and a roustabout in his earlier life. So,
25 Professor Browning, tell us about yourself. And raise

1 your hand so everybody knows who you are.

2 HONORABLE JOHN BROWNING: Thank you. I'm
3 John Browning. As Chip mentioned, former justice of the
4 Fifth Court of Appeals, long-time practitioner, 35 years,
5 mainly several large national firms, but I had my own
6 small, tiny firm for about 10 years. So I've looked at
7 life from both sides now, as a famous singer would say;
8 and now, despite my attempt to escape the world of keeping
9 track of my life in six-minute increments, I'm still
10 practicing in state and federal courts in Texas and
11 Oklahoma; but as Chip mentioned, full-time I'm a professor
12 of law at Faulkner University Law School, one of Alabama's
13 three law schools, and loving life. So still, you know,
14 splitting my time between Texas and Alabama, so enjoying
15 that. They asked me who I was going to root for, Roll
16 Tide or War Eagle, and I said, "Hook 'em Horns," and now
17 that Texas has joined the SEC and we're going to get a
18 chance to, you know, back up what my mouth has been
19 saying.

20 CHAIRMAN BABCOCK: Can't get better than
21 that. Thank you.

22 HONORABLE JOHN BROWNING: I also serve as
23 chair of the State Bar's AI Task Force, so if there comes
24 a time when this body is considering AI, I may weigh in
25 with a few comments there. It's good to be here.

1 CHAIRMAN BABCOCK: Thanks so much.

2 A former speaker at our deep thoughts
3 meeting, Jerry Bullard.

4 MR. BULLARD: I'm Jerry Bullard of Adams,
5 Lynch & Lofton in Grapevine, Texas. It's a six-lawyer
6 shop, but we have a statewide practice. I do a fair share
7 of appellate work and trial support and represent some
8 institutional clients and school district superintendants,
9 and I have a pretty varied practice, so I'm enjoying
10 getting to do that, and I did speak -- I'm not sure if it
11 was -- any thoughts I provided were deep a few years ago,
12 but I keep track of the Legislature in my spare time, as
13 far as what they do in terms of passing legislation that
14 affects the judiciary and civil justice.

15 So I guess, what else, a member of the State
16 Bar board of directors as a section rep, former appellate
17 section chair. So I've been doing a lot of Bar stuff, and
18 but I look forward to serving with this group. There's
19 lots of mentors and colleagues and friends in this room,
20 and I'm honored to be a part of it.

21 CHAIRMAN BABCOCK: Great, thanks, Jerry.
22 Judge Chu has contributed to this committee in the past as
23 a non-member, and great to have you as a member. Judge.

24 HONORABLE NICHOLAS CHU: Thanks, Chip. Hi,
25 everybody, I'm Nick Chu. I am the statutory probate

1 judge, or one of them, in Austin. Before that, I was the
2 justice of the peace in Austin and basically did a bunch
3 of random things. I chaired the COVID-19 task force for
4 the justice courts, was on the Remote Proceedings Task
5 Force, and then also on the Access to Justice Commission,
6 and so now I'm here, and it's really a real pleasure to be
7 here and looking forward to the work we're doing.

8 CHAIRMAN BABCOCK: Thank you, Judge.

9 Cindy Barela Graham, and we're really glad
10 to have her in our group because she has experience in
11 family law, and you will keep Orsinger from getting away
12 with things, as he has done for decades now with "Well,
13 the family bar says."

14 MS. GRAHAM: And we do. I am Cindy Graham,
15 and I live up in Amarillo, Texas. I'm excited to be on
16 this committee, and thank you for appointing me. I have
17 been involved in State Bar stuff for as long as I can
18 remember. It's kind of sick, really, when you think about
19 it, because I started off as Young Lawyers, and I was
20 secretary of the Young Lawyers at some point in time, and
21 I've been a director for the State Bar as well, and now I
22 currently serve as chair of the TBLS board, which is a
23 huge honor, and I love that board. It's a great board.
24 It's fun, too, because I went to law school with Professor
25 Browning and also Alistair Dawson, wherever he is, I don't

1 see him.

2 But anyway, so I practice family law. I was
3 a prosecutor, started out as a prosecutor, was in a small
4 firm for a little bit and became a solo practitioner, and
5 that's really all I've done. I love family law stuff, and
6 we're weird lawyers that group together typically, and
7 it's fun because we see every side because you never know
8 which side we're going to have, right? So it's a little
9 bit different than being a prosecutor, little bit
10 different than being an insurance defense attorney or a
11 plaintiff's attorney because we are always -- you never
12 know, depends on who brings you the money first, right, so
13 that's what we do. I look forward to working with all of
14 you, and I'm honored to be here.

15 CHAIRMAN BABCOCK: Thanks. Thanks, Cindy.
16 If you are as weird as Orsinger, we're in trouble, but I
17 don't think anybody can be as weird as Richard, so --

18 MS. GRAHAM: We're special people.

19 CHAIRMAN BABCOCK: So Giana Ortiz, all the
20 way up in the back there.

21 MS. ORTIZ: Yes, good morning, and thank
22 you. Giana Ortiz. I practice at a small office in
23 Arlington and do school law, both for and against school
24 districts and in the school districts as well as in the
25 Texas Education Agency, State Board of Educator

1 Certification, and in the courts. Before that, I worked
2 at a couple of national law firms and have been involved
3 with the Bar for many years, as a lot of us have,
4 including with many people in the room, Jackie and Martha
5 and Allen at the State Bar Court Rules Committee, was on
6 that committee for many years, served as its chair, and I
7 am the current chair of the school law section of lawyers
8 for the State Bar and very happy to be here.

9 CHAIRMAN BABCOCK: Great. Thanks, Giana.
10 Quentin Smith, all the way back down here,
11 as far away from you as he can get.

12 MR. SMITH: Good morning, everybody.
13 Quentin Smith from Houston, Texas, where I practice at
14 Vinson & Elkins. I practice commercial litigation. It's
15 a pleasure to be here. I actually had the privilege of
16 being on the Remote Proceedings Task Force for several
17 years and got to join a very spirited debate of this
18 committee in a Zoom meeting several years ago, so I'm
19 happy to actually be on the committee now.

20 CHAIRMAN BABCOCK: Great, nice to have you.
21 And, finally, I think the last new member
22 who is here, although there are others who are not here,
23 Macey Reasoner Stokes.

24 MS. STOKES: Thanks, Chip. I'm a partner of
25 Baker Botts in Houston and head of our appellate section.

1 My practice is all civil appeals, although I do a lot of
2 appellate assistance at trial, error preservation. I'm a
3 former chair of the State Bar Appellate Section and
4 president of the Supreme Court Historical Society, and I'm
5 grateful to be here and excited about the committee.

6 CHAIRMAN BABCOCK: Great, nice to have you.
7 Have I missed any new member? Is there any
8 new member here that I haven't called on?

9 All right. We'll go into the agenda, which
10 is civil rules in municipal courts, and Judge Estevez will
11 take us through that.

12 HONORABLE ANA ESTEVEZ: All right. Well,
13 I am thrilled to start this discussion, since we had this
14 assignment since 2019, and when we started we actually had
15 a different subcommittee, and I want to just recognize
16 that Judge Chu just jumped right in and was already in our
17 Zoom meetings and had a lot to contribute, so I want to
18 thank him for just being on for a month and already
19 contributing to the discussion.

20 But back in 2019, we were asked to look at
21 municipal rules. Then we -- after meeting, we discussed
22 having a task force, a working group. A working group was
23 assigned. That working group included Justice Bonnie
24 Goldstein, which she -- I really wanted her to be here,
25 she really wanted to be here. She had a conflict, and she

1 was so gracious, knowing how long it's been that we
2 haven't had it on the agenda, that she wanted it to be
3 presented. So we are going to go ahead and go forward
4 without her, but I do want to recognize she had a whole
5 bunch of work that she did in this working group, chairing
6 that committee, but I do have two people that are going to
7 be kind of taking over the questions and most of the
8 presentation, because they are so familiar with municipal
9 court rules that I would be -- I would just be wasting
10 most of your time, compared to the expertise that they
11 have, and so I want to recognize them.

12 I have Judge Ryan Henry, who has five
13 municipal courts, and also Regan Metteauer, who is the
14 Deputy Director of the Texas Municipal Courts Education
15 Center, and both of them were on the task force, including
16 Judge Michael Acuna and Ross Fischer. So that was the
17 group overall.

18 And you have in your materials an e-mail
19 that initiated the whole project, and that was from Ryan
20 Henry, who is going to be talking to you in a little bit,
21 so if you've had a chance to read that, that kind of gave
22 an overall view of the need for some rules, the need for
23 uniformity, but then also, as you'll hear from their
24 presentations, of the disparity throughout different
25 jurisdictions, different cities, and, in addition, just

1 the resources they have and the type of courts they have.
2 It doesn't always make sense to have the same thing apply
3 to everyone, because of financial problems in addition to
4 just whether or not they're courts of record.

5 So I've given you some statutes as well,
6 since they're just referred to in the materials, and I
7 don't want you to have to go Google them to see if there's
8 something special in there. You can just refer to them
9 there. We've got an executive summary that is very, very
10 helpful, so if you had a chance to review that, and then
11 after that we also have the full rules that they have --
12 the task force had provided to our subcommittee to review
13 and a comparison with that with the justice rules.

14 So the issues that I think that we need to
15 kind of come up with recommendations, the first one is do
16 we want uniform court rules for municipal courts. Number
17 two, who would those apply to. There would be a simple
18 solution. You know, the simple solution is just amend
19 Rule 2, which is also included in there. Rule 2, just you
20 would put the word "municipal" and be done, and then any
21 time it doesn't apply to a municipal court case, you can
22 just in that specific rule say "except for municipal
23 courts." So that is an easier solution; however, they did
24 come up with full rules for 560.

25 And then our recommendations, if you look at

1 the second page of the memo, we thought they don't need
2 any summary dispositions. Go ahead and give them their
3 rules, because if they want to change things, tweak
4 things, expand who it's going to apply to, they can do
5 that easily through their own rules.

6 Now, the only problem with these rules is
7 they start with 560, and so I'm only in the subcommittee
8 of 500 to 510, so you may have to change the name of that
9 subcommittee, but I'm going to go ahead and give this over
10 to Judge Ryan Henry, and he's going to present the issue
11 of -- or each issue and then, I guess, we can determine
12 what kind of votes you want to have.

13 CHAIRMAN BABCOCK: Okay, great. Thanks,
14 Judge. Judge Henry.

15 HONORABLE RYAN HENRY: Thank you. Thanks,
16 everyone, for considering the proposal and the committee's
17 time on this. We appreciate it. This has been going on
18 since about 2019. Some of these issues came up. We -- it
19 was a lot of collaboration with several members of the
20 work group as well as a lot of different municipal court
21 judges, the TMCEC did some surveys and actually talked to
22 other municipal court judges that have these kind of
23 issues come up to just kind of get as much feedback and
24 buy-in as possible with us presenting this.

25 One of the issues, though, that comes up

1 that the work group was very concerned about, when I'm
2 going through it, was the fact that, unlike a lot of the
3 courts, other types of courts out there, municipal court
4 jurisdiction is not the same, depending on where you go,
5 and we have different kinds of municipal courts. We have
6 courts of nonrecord. We have courts of record. We have
7 both kinds that could be in a city -- a general law city,
8 which has different powers than a home rule city; and the
9 Texas Legislature has actually allowed city councils,
10 through ordinance, to influence the jurisdiction of the
11 courts that they host; and so having, you know, uniformity
12 across all courts just -- just because of the statutes,
13 doesn't work. However, that doesn't mean that, you know,
14 guidance isn't needed.

15 One of the overarching or umbrella themes or
16 intents of this proposal is the fact that there are lots
17 of municipal judges out there that don't have any guidance
18 when it comes to them finding themselves in situations
19 where they're having to exercise civil jurisdiction. Some
20 municipal courts have very little civil jurisdiction,
21 almost nonexistent. Others have a lot. It just kind of
22 depends on a variety of factors.

23 So, in the memo, there is a set of three
24 questions. The first question, I was trying to think of
25 the most efficient and succinct way to answer that

1 question, and I think the most succinct way to do that is
2 to actually reframe the question a little bit to basically
3 say, you know, is there need for guidance for the
4 municipal courts that exercise the most civil
5 jurisdiction, and that's actually the courts that have the
6 least amount of guidance. Because what happened -- the
7 courts that typically will have the most in civil
8 jurisdiction that can be triggered for them are municipal
9 courts of record when they're exercising concurrent
10 jurisdiction under Chapter 30 of the Government Code.

11 With district courts and county courts at
12 law, for subchapter B of Chapter 54, Local Government
13 Code, which is essentially the code that says a city can
14 bring suit to enforce its ordinances; that is, certain
15 kinds of ordinances, mainly the health and safety
16 ordinances, a lot of that turns on injunctive relief. A
17 lot of that turns on declaratory relief, and it's not
18 normally a monetary damage aspect. It's a compliance
19 aspect. And so those are the ones, because they share the
20 same jurisdiction as the district courts, the district
21 courts already have rules. The rules aren't spelled out
22 for the municipal courts, but they're exempt under Rule 2
23 to those rules, and I'll let Ms. Regan address kind of why
24 the second question of just amending Rule 2 doesn't work
25 either.

1 But for the other civil jurisdictions that
2 are kind of hodgepodged out there, I don't exactly want to
3 say patchworked, but maybe disjointed in the way that they
4 are applied, those are created by statute, and usually
5 they're very subject matter specific, such as truancy or
6 dangerous dog hearings. And in those statutes, the
7 statutes themselves provide some level of guidance. They
8 provide certain procedures. They provide deadlines. It's
9 just the -- the subchapter B of Chapter 54 doesn't provide
10 anything. And so a lot of municipal judges don't know
11 where to start, they don't know what to do; and so kind of
12 refocusing the question, is we believe, the work group
13 believes, that there is a need for rules, and it's the
14 basics. You know, how do you calculate time, how do you
15 do service of process, what goes into a subpoena. You
16 know, the simple things that we kind of take for granted
17 don't technically apply.

18 And so providing those rules or those
19 guidance as a starting point for them, while allowing some
20 flexibility, just because they will vary, depending on
21 area and what the ordinances do and things like that, and
22 they can adjust the rules specifically, but the basic ones
23 are still there for everyone to those courts. And there
24 was a lot of discussion in the work group about not
25 wanting unintended consequences, not wanting consequences

1 that would overly burden certain courts, not wanting
2 consequences that kind of put them in a bad position.

3 State law also allows cities to create what
4 are called alternate administrative procedures and then
5 assign those to their municipal courts. The work group
6 kind of viewed those as the judges are acting more like
7 administrative hearing officers through that
8 administrative process, when they're the ones that are
9 hearing it. However, some cities, instead, they will
10 leave their judges as judicial officers, but they're
11 hearing appeals from the assigned judicial or
12 administrative hearing officer. And so instead of -- we
13 didn't want to necessarily interfere with those systems,
14 because they're created specific for the city, and there
15 are some cities that have spent a lot of time and a lot of
16 effort creating systems for that, and so these rules
17 specifically are intended not to apply for
18 administrative -- from the administrative angle or
19 standpoint. And so it's -- they really are intended to
20 kind of start with providing those basics, so we do
21 believe there's a need for that. You just have to be very
22 careful about walking the line to make sure there isn't
23 any unintended consequences or interference with the way
24 that the courts are working.

25 I'll let Regan talk about Rule 2 or the

1 second question that's on the list, unless there's
2 questions about what I've mentioned so far.

3 CHAIRMAN BABCOCK: Well, an observation,
4 this is way too complicated for our committee. We have
5 limits here.

6 HONORABLE RYAN HENRY: Yeah, well, honestly,
7 for those of us that live in the municipal court world,
8 there's a general understanding that you don't understand
9 municipal court unless you're in municipal court. Just
10 because it's a very odd creature.

11 MS. METTEAUER: And we're weird, too.

12 HONORABLE RYAN HENRY: Yes, we are very
13 weird in that regard. But, yes, ma'am.

14 HONORABLE EMILY MISKEL: So Justice
15 Goldstein, who is not able to be here today, was telling
16 me a little bit about this, and I had not appreciated how
17 complex this is. Can you just start with like a 101
18 version of, if I went to a municipal civil court of
19 record, what type of business would I see going on; and
20 you said compliance with ordinances, so like what are
21 those types of cases, if you can just generally summarize
22 like the current lay of the land, like Dallas County, I
23 went into that type of court --

24 HONORABLE RYAN HENRY: Uh-huh.

25 HONORABLE EMILY MISKEL: -- what would I be

1 seeing and what are the problems? Like, why are we asked
2 to do this now?

3 HONORABLE RYAN HENRY: So a lot of the
4 times, the ones specifically under Subchapter B of
5 Chapter 54, those are generally compliance-driven.

6 HONORABLE EMILY MISKEL: But like a specific
7 example.

8 HONORABLE RYAN HENRY: Right, right, so a
9 specific example would be you have a zoning code
10 violation. You have someone operating a --

11 CHAIRMAN BABCOCK: Strip club.

12 HONORABLE RYAN HENRY: -- auto repair shop
13 in a residential neighborhood. If you have dilapidated
14 buildings, if you have sanitation issues, if you have
15 building code violations, people are not following the --
16 you know, the code requirements, and for safety elements.
17 While municipalities often will also criminalize those, so
18 the local prosecutor could seek a Class C misdemeanor, the
19 problem with that is the authority in the criminal realm
20 of a municipal judge if there's a conviction, is they can
21 just fine them. They can't order them to fix it. They
22 can't order them to clean it up. So you need a civil
23 process in order to do that and issue an injunction.

24 Additionally, in the civil process, the
25 property itself can be brought into suit through an in rem

1 proceeding, and a lot of the times that's necessary
2 because these are -- you can equate them to nuisances.
3 They're allowed -- Chapter 54 allows the inclusion of
4 nuisances, and the property owner may not know they're the
5 property owner. Kind of the example is you have the nice
6 old lady who lives down at the end of the street. She
7 passes away. There aren't any known heirs. The property
8 is starting to deteriorate, or it's having high weeds or
9 grass, or it's having other particular ordinance problems
10 with it, and you can't issue criminal citations, because
11 the person that you know is dead, but you still have to
12 get it fixed, but somebody still owns it.

13 And so Chapter 54 has specific processes
14 that are designed to allow kind of a faster turnaround.
15 We provide notice through the -- whoever is designated on
16 the tax records, and there are certain procedures that
17 have to be followed in that scenario, but you're allowed
18 to address them much faster if you bring the property in
19 as, like, along with the expected property owner.

20 CHAIRMAN BABCOCK: Judge, are there other
21 kinds of cases other than enforcement that typically go
22 into municipal court, like just examples of that?

23 HONORABLE RYAN HENRY: Not so much under
24 Chapter 54. On some of the other kinds of civil
25 jurisdiction, as I mentioned, truancy is one that is

1 expressly by statute a civil process.

2 CHAIRMAN BABCOCK: So if my kid doesn't go
3 to school, somebody can go to municipal court and --

4 HONORABLE RYAN HENRY: Yes.

5 CHAIRMAN BABCOCK: -- say, "Hey, kid, get
6 back to school."

7 HONORABLE RYAN HENRY: Yes.

8 CHAIRMAN BABCOCK: Okay. So that would be a
9 second kind.

10 HONORABLE RYAN HENRY: And it's not a
11 criminal matter, so it's not hurting them recordwise.

12 CHAIRMAN BABCOCK: Well, you don't know my
13 kids, but --

14 HONORABLE RYAN HENRY: There are dangerous
15 dog issues. There are issues regarding -- I mean,
16 sometimes you have to go to, like, junk vehicles and
17 removing them, especially -- removing them from public
18 right-of-ways is an easier process, but removing them from
19 private property is a lot harder. Junk airplanes is
20 actually kind of an interesting one, but that goes into
21 municipal court.

22 CHAIRMAN BABCOCK: So in municipal court, it
23 sounds like a governmental entity, the city, is one party,
24 and then there's a private party that's a defendant.

25 HONORABLE RYAN HENRY: Yes. They're kind of

1 unique in that regard because the only entity, the only
2 party, that can initiate is the city.

3 CHAIRMAN BABCOCK: Okay.

4 HONORABLE RYAN HENRY: And so in pretty much
5 all instances, it's the city that is the initiating
6 entity.

7 CHAIRMAN BABCOCK: So the docket has the
8 city as a common party.

9 HONORABLE RYAN HENRY: Yes, sir.

10 CHAIRMAN BABCOCK: And then private
11 individuals typically as -- as defendants or as the other
12 party.

13 HONORABLE RYAN HENRY: Yes, sir. Yes, sir.

14 CHAIRMAN BABCOCK: Okay.

15 HONORABLE RYAN HENRY: And so these rules
16 envision that it's the city initiating, and so it doesn't
17 factor in that there's a different plaintiff.

18 CHAIRMAN BABCOCK: Got it. Justice Miskel,
19 does that answer your question?

20 HONORABLE EMILY MISKEL: I just wanted
21 everybody to have a more concrete picture of why we're
22 talking about this, because if you haven't had day-to-day
23 experience in municipal court, like when she -- when
24 Justice Goldstein told me, well, you know, we were tasked
25 with looking at should we just copy/paste the justice

1 court rules onto municipal court, but that actually
2 doesn't work because it's this special unicorn that has
3 concurrent jurisdiction with district court sometimes, and
4 so I hadn't really appreciated that, so I just wanted to
5 make sure everyone had a more concrete picture of why
6 we're going there.

7 CHAIRMAN BABCOCK: Yeah. That was a great
8 question. Yeah, Judge Estevez, and then Justice
9 Christopher, then John.

10 HONORABLE ANA ESTEVEZ: I was just going to
11 suggest that if you guys look at Tab F, that is the
12 Subsection B of Chapter 54 that the subcommittee was going
13 to recommend that -- if you choose to adopt these rules,
14 that it will apply to those cases. So that has a nice
15 listing of them, and I include them in the materials
16 because I would have had that question.

17 CHAIRMAN BABCOCK: Regan, we're going to get
18 to you in a minute, but Justice Christopher.

19 HONORABLE TRACY CHRISTOPHER: So in the
20 current situation without rules, the governmental entity
21 sues someone for whatever violation. They don't have to
22 answer -- there's no answer requirement. How does the
23 case proceed? You just give them notice, go to trial?

24 HONORABLE RYAN HENRY: So normally, the way
25 the majority of them work, is you would provide notice.

1 You have to provide notice before you actually initiate
2 the suit. You then initiate the suit. You have to
3 actually serve them. Many times you have to serve them
4 through alternate means, which would be through
5 publication, or something else like that, which, again, if
6 Rule 2 doesn't apply, how do we do that, and in order
7 to -- we can't just necessarily go and take a default,
8 because it still has to be proven up --

9 HONORABLE TRACY CHRISTOPHER: Because that
10 really is my question, looking at the draft rules --

11 HONORABLE RYAN HENRY: Yeah.

12 HONORABLE TRACY CHRISTOPHER: -- is a
13 default judgment really appropriate in these lawsuits?

14 HONORABLE RYAN HENRY: So the way that it
15 normally works is you don't want to stop going through the
16 fix or correcting the health and safety or sanitation
17 issues simply because they don't want to show up, but what
18 you do is you go through kind of a default injunction
19 aspect, and you still have to prove up to the judge the
20 need for it and what it is that you are seeking to enjoin
21 or correct a requirement on.

22 Normally what happens is the -- the owner or
23 the property is ordered to come into compliance and given
24 a specific deadline to come into compliance; but if no one
25 is showing up, the time period for that, you know, may not

1 be any good; but the aspect is that the city can then go
2 in and clean it up; and the city can enter onto the
3 property and basically pay for up front and fix whatever
4 health and safety issues there are. They then put a lien
5 on the property, that's -- would be collected through the
6 authorized foreclosure process.

7 HONORABLE TRACY CHRISTOPHER: Okay, but --

8 CHAIRMAN BABCOCK: Yeah, go ahead.

9 HONORABLE TRACY CHRISTOPHER: In a
10 traditional default, when someone doesn't answer they have
11 admitted the truth of the pleading.

12 HONORABLE RYAN HENRY: Yes, ma'am.

13 HONORABLE TRACY CHRISTOPHER: Do we want
14 that kind of default in these cases? I mean, you're
15 telling me that currently they go in and prove their case.
16 It seems like we should still require the municipality to
17 prove their case and we shouldn't have a traditional
18 default. Perhaps I'm wrong.

19 HONORABLE RYAN HENRY: The -- again, the
20 aspect is, you know, the pleadings have to be -- if you're
21 seeking a -- an injunction that allows the city to go in
22 and correct things, the way most courts do it, again,
23 because there's not a set rule for it, but it will be by a
24 verified pleading. And when they go in, they go in with
25 kind of the -- at least at minimum the elements necessary

1 to show they are not in compliance with the ordinance,
2 what the problem is, and what the relief solves.

3 HONORABLE TRACY CHRISTOPHER: So currently
4 they don't bring a witness. They just rely on a verified
5 pleading?

6 HONORABLE RYAN HENRY: If there's no answer.
7 Now, normally what I do, not as the judge, but if -- I
8 also serve as city attorney for several cities. If I go
9 in there, I go in with affidavits and evidence and
10 everything. I have a notebook that's given to the judge
11 that actually kind of proves up all of the elements, and
12 so it's in the record, but an important thing to remember
13 about when you're seeking compliance issues is you're not
14 getting a default as far as, okay, you owe, you know, a
15 set amount of money, or we're taking the property, or
16 we're doing anything like that. The default is to allow
17 the city to go on and bring it into compliance.

18 Now, the worst case scenario in that
19 scenario would be a demolition, but you -- normally a
20 municipal court judge that is experienced enough with it,
21 they're not going to allow a demolition unless there's
22 proof that it can't be brought to compliance, and they
23 will give them enough, kind of, time period or grace to
24 get there. But you've got to have some -- again, some
25 guidance to let them know that's kind of -- that's the

1 best way to go about doing it. And so that's kind of why
2 the default system is in there the way that it is, because
3 of what the relief that's allowed is not the same as like
4 a normal civil lawsuit.

5 CHAIRMAN BABCOCK: Got it. John, did you
6 have a question?

7 MR. WARREN: I did, but this is getting more
8 and more complex. Judge Miskel mentioned that the
9 municipal courts would have concurrent jurisdiction with
10 the district court, but municipal cases are appealed to
11 the county courts. Is there a jurisdictional limit as it
12 relates to the dollar value of a case for a municipal
13 court case?

14 HONORABLE RYAN HENRY: The municipal court
15 cases, and honestly, again, it depends on which statute
16 you're looking at. If you're looking at 214, that
17 actually appeals directly to district court. If you're
18 looking at Chapter 54, that appeals to county court at
19 law, but the -- because it's a court of record, the appeal
20 to county court at law, and even to district court, is not
21 a de novo. The county court at law is acting as an
22 appellate court, and so it's just looking at the -- the
23 record to determine were there errors of law in the
24 record, and so it's not so much a jurisdictional issue,
25 but you're still not really dealing with monetary amounts

1 where you're going to hit a cap issue on your -- for your
2 county courts at law.

3 The worst -- the only monetary amounts that
4 normally are triggered is, under Chapter 54, you're
5 allowed to assess a civil penalty, and the civil penalty
6 is no more than a thousand dollars a day for time periods
7 after notice and after certain procedures, the things that
8 remain out of compliance.

9 MR. WARREN: So that civil penalty that you
10 just mentioned, if this is one, and you use the example of
11 if it was someone who passed away and there are no known
12 heirs, so that civil penalty goes to the estate of that
13 deceased individual?

14 HONORABLE RYAN HENRY: Technically, the
15 civil penalty has to be assessed against the property
16 under Chapter 54. It's not a personal debt. It's
17 assessed against the real estate.

18 MS. PFEIFFER: Are there normally pleadings
19 for attorney's fees?

20 HONORABLE RYAN HENRY: Under Chapter 54,
21 attorney's fees are not allowed. Under Chapter 214,
22 attorney's fees are allowed, but that's -- again, that's a
23 different process and not the one we were thinking these
24 rules would apply to.

25 CHAIRMAN BABCOCK: Richard.

1 MR. ORSINGER: What constitutes the record
2 on appeal?

3 HONORABLE RYAN HENRY: It's essentially the
4 same. It's a clerk record and a transcript of the --
5 which is normally a recording. The way Chapter 30 of the
6 Government Code works, a municipal court, if it doesn't
7 have a stenographer, and most don't, they record --
8 there's an audio recording of everything, and the
9 appellant has to pay for the transcription of that.

10 MR. ORSINGER: Okay.

11 HONORABLE RYAN HENRY: But that's the
12 record.

13 CHAIRMAN BABCOCK: Okay. Yeah, Judge Chu.

14 HONORABLE NICHOLAS CHU: To go back to
15 Justice Christopher's comment about the default, I just
16 wanted to point out on Rule 563.1, it assumes a situation
17 where if somebody defaults it's still -- the rule still
18 requires proof --

19 HONORABLE RYAN HENRY: Yes.

20 HONORABLE NICHOLAS CHU: -- and prove up in
21 a hearing.

22 HONORABLE RYAN HENRY: Yes, that's correct.

23 HONORABLE NICHOLAS CHU: Yeah.

24 HONORABLE RYAN HENRY: So it's not an
25 assumption that they -- because they didn't answer, they

1 did it wrong or they admit everything. It still does
2 require --

3 HONORABLE NICHOLAS CHU: And just for
4 purposes of making it a little bit clearer on the record,
5 for Jackie's sake probably in this, is if we adopt the
6 committee's -- subcommittee's recommendation to not do the
7 summary disposition section, then the proposed Rule 563.2
8 would be deleted out, and then 563.3 would have to be
9 renumbered, and everything else would need to be
10 renumbered.

11 HONORABLE RYAN HENRY: Yes, that would be
12 correct.

13 CHAIRMAN BABCOCK: Regan, you got anything
14 to say? Roger is behind you, sneaking up behind you.

15 MR. HUGHES: Okay.

16 CHAIRMAN BABCOCK: You're stealing her
17 thunder now, Roger.

18 MR. HUGHES: I had a question, because
19 there's an interesting comment under Rule 560.3 about
20 local ordinances that create procedures for their own
21 courts.

22 HONORABLE RYAN HENRY: Right.

23 MR. HUGHES: And I was unable to determine
24 whether by enacting the rules, all of those cities are
25 going to have to go back and reenact their ordinances in

1 order to keep them. I mean, if I were a city attorney, I
2 would be scratching my head, going, well, did the new
3 rules trump my -- my city's ordinance? Do we need to go
4 back and write it, just to reenact it, or what?

5 HONORABLE RYAN HENRY: Yeah, and so there
6 was some kind of discussion of that. The discussion of
7 that, that concept, was really when we were looking at can
8 we do one for all kinds of civil jurisdiction that they
9 might have, realizing, you know, half of these it wasn't
10 going to be possible. So to the extent that there is a
11 statute or an ordinance where there's, you know, a
12 substantive law in place, we were going under the -- kind
13 of the principle that, you know, the rule is serving it to
14 a statutory adopted deadline or procedure, or things like
15 that, and so it wouldn't necessarily change those aspects
16 if they are adopted by ordinance.

17 Now, but the truth of the matter is a lot
18 of -- like most of the time when a city adopts procedural
19 aspects through an ordinance, they're doing so as part of
20 that alternate administrative process, so they've created
21 a separate administrative procedure that's just handled
22 differently, which these rules weren't intended to apply
23 to, but to the extent that their ordinance does have a
24 rule for that kind of operation, that -- just like with
25 the state law of statutes, you know, those deadlines and

1 things are envisioned to control.

2 CHAIRMAN BABCOCK: Professor Hoffman.

3 PROFESSOR HOFFMAN: Thank you. What do we
4 know about how often a defendant shows up, and what do we
5 know about how often they're represented?

6 HONORABLE RYAN HENRY: And that's a very
7 good question. I mean, we don't have statistics on it.
8 Statistics like that aren't kept by the courts, but I can
9 say I've been doing this a really long time, and when
10 you're talking about like a Chapter 54 suit, more often
11 than not defendant shows up. If it's an heir or if it's,
12 you know, the defendant itself or, you know, if they're
13 looking at -- while they may not show up for, like, the
14 Class C citation if there was a criminal charge, they show
15 up for the injunction hearing. They show up for those
16 matters.

17 Now, again, more often than not, they're not
18 represented, and so there was some discussion in the work
19 group about that kind of scenario. We don't want even,
20 you know, an impression or the optics of you're just
21 dealing with a lot of pro se individuals, but that doesn't
22 necessarily mean we don't need to get the things
23 addressed. It's just that a lot of times they don't show
24 up represented because they don't necessarily understand
25 the process for what's going on with it, and so many times

1 what happens is they'll show up, and they'll either agree
2 to bring it into compliance and they just want time to do
3 so, from a lack of logistics standpoint, or they ask for
4 time to go get a lawyer. And regardless of whether or not
5 the city attorney likes that or doesn't like that, every
6 single municipal judge I know would say, "Well, you're
7 going to get time to get a lawyer," and they reset things,
8 but they give them a certain amount of time to get
9 representation.

10 PROFESSOR HOFFMAN: And then if I could,
11 Chip, one follow-up question is, as I'm looking at the
12 subcommittee's report, the April 2nd short memo, so I'm
13 just looking at the working group, and I don't know names
14 as well, so were there any folks on the working group who
15 we would -- would be from, you know, some sort of an
16 interest group that would represent interests of
17 homeowners or of kind of private citizens, so kind of
18 folks who are likely to end up on the defense side of
19 this? I see that there's this TMCEC group, but that
20 sounds like a -- kind of a judicial education arm.

21 HONORABLE RYAN HENRY: Yes. That's where
22 Ms. Regan is from.

23 PROFESSOR HOFFMAN: And so, I guess, maybe,
24 therefore, it would have been TMCEC there was sort of that
25 perspective. I'm trying to get a sense of did the working

1 group have more than just the perspective of municipal
2 lawyers and municipal judges and to what extent were other
3 folks in this room.

4 HONORABLE RYAN HENRY: Yeah, so Ross Fischer
5 is on the group. He -- he is an individual that he had
6 his own law firm. His kind of expertise is more in
7 ethics, but he is familiar kind of with both arenas. And
8 he had some good comments about -- largely from his
9 ethical perspectives, but about making sure that whatever
10 process is adopted is balanced, and honestly, Justice
11 Goldstein, in a former life, was a municipal court
12 prosecutor and worked on the State attorney's side, and
13 she's seen the negative consequences of those aspects were
14 not having factored into whatever process you're doing,
15 and she was very insistent on certain things being there
16 to protect defendants and the process.

17 There was -- just as an example, the -- she
18 has encountered different situations where if there is a
19 lack of someone showing up in certain circumstances, do
20 you need to appoint an ad litem, and she actually -- we
21 had a lot of discussion about that kind of scenario; and
22 ultimately, for that specific issue, the result was, well,
23 that's not something that goes in the rules. That's
24 something they have to do or else -- you know, the city
25 would have to do, or else they risk a judgment kind of

1 getting reversed and not being able to enforce it if the
2 owner wasn't represented in some fashion or form in those
3 specific scenarios.

4 So there was a lot of discussion. Now, was
5 there a nonmunicipal lawyer who was just there for
6 property owners? No. That wasn't true. I can say that
7 even with Justice Goldstein's perspectives, for what it's
8 worth, I had varying perspectives on it. I'm also the
9 president of my homeowners association, and I know for
10 sure some of the proposals would not have gone over well
11 with members of my homeowners association, so those kind
12 of things were factored in by most of us, but between
13 Justice Goldstein and Mr. Fischer, I think we had a fair
14 enough balance.

15 CHAIRMAN BABCOCK: Shall we let Regan speak?

16 MS. METTEAUER: Great questions.

17 CHAIRMAN BABCOCK: Yeah. The floor is
18 yours. Take about an hour, by the way, so even things up
19 here.

20 MS. METTEAUER: I will not be doing that, I
21 hope. Well, we'll see. So the second question posed had
22 to do with whether to just add municipal courts to Rule 2
23 or to adopt these proposed rules. Of course, we worked on
24 the proposed rules, so it's our sincere hope that the
25 proposed rules will be adopted. It would make sense, and

1 I don't think there would be an issue if you did adopt the
2 proposed rules that the municipal courts could be added to
3 Rule 2 because then they would be mentioned in the rules,
4 and it would provide the exceptions.

5 It would be problematic, based off of what
6 we learned from the work group, and one of those work
7 group members came to us from the Texas Municipal Courts
8 Association and from courts that we spoke to, it would be
9 problematic to apply -- to have full application of the
10 Texas Rules of Civil Procedure, even in this narrow
11 instance to these courts, for several reasons. One being
12 just they don't have the infrastructure to do that. Some
13 of you may -- may have been around or be familiar. Ten
14 years ago, municipal courts were exempted from e-filing
15 and for similar reasons. They just don't have the
16 infrastructure that other courts have.

17 I call it the tale of two cities, so you've
18 got courts that are in large cities that, due to the
19 volume, they're not going to be able to do that, and then
20 you've got the cities that -- the smaller cities that host
21 courts that would lack the staff or the resources to do
22 it. In addition, you'd be imposing probably more burden
23 than would be necessary for a small amount of cases. So
24 even though it's growing, municipal courts of records are,
25 the number of them are increasing, if you look at OCA's

1 statistical reports, civil cases, even though they're not
2 as high as they were five years ago, those are growing.
3 It's still a small percentage of what municipal courts do.
4 They mainly do criminal cases and traffic, is the bread
5 and butter of what they do.

6 So we walked a fine line in the work group
7 of there is a need for rules, but not making them so
8 burdensome that they can't exercise their civil
9 jurisdiction based on whatever situation that they're in.
10 So one is infrastructure. Also, as you touched on,
11 because there haven't been rules, a lot of cities have
12 adopted their own local rules, and those rules have been
13 in place for decades. So the work group did not want to
14 cause exactly what you said for them, for the city
15 attorney, to think that they had to completely, you know,
16 do away with what they already had.

17 So there is addressed in the rule that you
18 pointed out, so in 560 -- let me get to the very first
19 one. 560.3(a), application of these rules, the very last
20 sentence, "Where a municipality enacts political
21 procedures" -- "political procedural rules published under
22 Texas rule" -- "under Rule 3a," then they'll have full
23 force and effect if they follow that, if they post them on
24 OCA's website and they're not inconsistent with the rest
25 of the rules. So another reason why we wouldn't want all

1 of the civil rules to apply is because we -- the work
2 group did want to protect those local rules, assuming that
3 we don't want them to be inconsistent, but for them to be
4 able to follow those rules, while at the same time
5 providing some framework to the courts that don't have any
6 rules.

7 And I was telling Judge Henry, in our
8 report, at the time when we did our report, there were
9 about 180 municipal courts of record, but as of, I think,
10 May of 2023 -- and the OCA's statistical report hasn't
11 come out yet, but they do have a list of municipal courts
12 of record, and there were over -- there was, I think, 204
13 on the list, so it is growing. So you would have courts
14 that don't -- you have courts that have local rules that
15 they've been following for decades, but then you've also
16 got brand new municipal courts of record that are recently
17 going to exercise the civil jurisdiction and would need
18 the framework to work from. So we wanted to have some
19 rules, and you'll see that they -- the intent was that
20 they be workable. We preserve those local rules, but then
21 for those that wanted to follow what we've proposed, that
22 they would be workable within the vast variety of
23 municipal courts and their jurisdiction.

24 And then one other thing I would point out
25 is that, under Chapter 54, because we're dealing with

1 sanitation or a dangerous building, or those kinds of
2 health and safety ordinances, they're required to -- those
3 processes are required to be expedited, and whereas, those
4 rules apply to district and county courts at law, too;
5 however, those courts are used to -- they are very
6 familiar with the rules and can understand very easily how
7 to apply those; whereas, the municipal courts do not. So
8 it would be helpful to expedite those cases if the
9 proposed rules were adopted.

10 Those are just the things I wanted to
11 highlight for the second question.

12 CHAIRMAN BABCOCK: Thank you. One of our
13 former members, Justice Peeples, would always ask the
14 question, do we need rules, you know, do we need to do
15 this, because the more rules we have, the more complexity
16 you interject into the -- into the jurisprudence. So are
17 there advocates for these rules? I mean, are there people
18 crying out for these rules or not?

19 MS. METTEAUER: I think Judge Henry is.

20 CHAIRMAN BABCOCK: Besides him.

21 MS. METTEAUER: That's one example.

22 HONORABLE RYAN HENRY: There is a mixture.
23 All right. As with any rule, you're going to get some
24 that say, "Thank you, we needed this." You're going to
25 get some that say "Oh, my God, what are you doing to us?"

1 CHAIRMAN BABCOCK: Yeah.

2 HONORABLE RYAN HENRY: And that hate them,
3 and you're going to get a lot of them that, you know,
4 they're going to use them to see if, you know, there's
5 something that -- you know, they're fine with them there;
6 they're fine with them, like, not there. The concern, and
7 one of the reasons for the need for the rules, is a lot of
8 the basics are not present, including basics on plenary
9 power, including basics on, like I said, something as
10 simple as, you know, how do you calculate time for your
11 deadlines, and when -- as more and more courts go from
12 nonrecord to record, and there is a current trend to do
13 that. They're increasing in number. A lot of the courts
14 where the judges are in a nonrecord court transitioning to
15 a record court, their background is in criminal law,
16 because that is a big bulk of what they're doing.

17 CHAIRMAN BABCOCK: Right.

18 HONORABLE RYAN HENRY: But city councils are
19 moving to courts of record in a large part to take
20 advantage of the concurrent jurisdiction under Chapter 54,
21 because they're finding that the criminal processes that
22 would have been used to enforce ordinances are just not as
23 effective, and it's too expensive to go over to the
24 district courts for those kind of processes, so every time
25 you have to deal with a -- you know, a dilapidated

1 building or a sanitation issue or a building code issue.
2 And so as that -- the number increases, you're going to
3 have more and more confused judges, is really a lot of
4 what the issues are.

5 CHAIRMAN BABCOCK: Got it. Are there
6 examples of harm that the lack of rules, that the absence
7 of rules, has caused? I mean, can you say, oh, yeah,
8 look, I've got 20 cases where the Court didn't know if it
9 had plenary jurisdiction and refused to exercise any -- I
10 mean --

11 HONORABLE RYAN HENRY: Yes.

12 CHAIRMAN BABCOCK: Things like that.

13 HONORABLE RYAN HENRY: Yes. I don't have
14 statistics for you. I have anecdotal evidence or
15 information, and without sounding biased about it, one was
16 me. Because, when I was appointed, my first appointment
17 to my first bench, I was appointed specifically just to
18 handle the civil docket, because the presiding judge at
19 the time didn't want to do the civil stuff, and so I was
20 brought on specifically for that. My very first case, I
21 was brought on kind of after the case had ended. The
22 associate judge there before had tried the case, ruled
23 against the city, and then promptly resigned, and I became
24 appointed. The city filed a motion for new trial. I
25 granted the motion for new trial and got mandamus.

1 The mandamus aspect was turned on when did
2 the plenary power of the court end, because the rules
3 really didn't apply, and the -- the Travis County
4 administrative judge, at the time, looked at it and said,
5 "Well, I agree with you, the rules don't apply"; and so
6 she borrowed from the plenary power aspects that are found
7 in the Code of Criminal Procedure for the criminal plenary
8 power, because there really wasn't any other guidance for
9 plenary power; and, you know, that's an example that could
10 be solved, you know, more easily with just a rule that
11 kind of defined that.

12 CHAIRMAN BABCOCK: Okay. Great. Justice
13 Miskel.

14 HONORABLE EMILY MISKEL: One of the things
15 that I heard from Justice Goldstein, because I asked her
16 the same question, like, well, do we need rules at all,
17 and her example was some cities will tell you, especially
18 the bigger city, "We don't need rules. We handle this all
19 the time. We're doing it fine." And then she asks,
20 "Well, how come you're getting sued so often?" So her --
21 her -- I believe she is in favor of the creation of rules.

22 HONORABLE RYAN HENRY: Yes.

23 HONORABLE EMILY MISKEL: I don't want to
24 misstate her opinion, but that's what her take is.
25 There's a lot of irregularities in the processes that go

1 on now, and perhaps it's time when it's reaching this
2 level to have some standardization of the process.

3 HONORABLE RYAN HENRY: And if I may,
4 another, I guess, personal anecdotal aspects, I -- while I
5 sit on five different courts, my regular job is I own a
6 law firm, but I focus on representing governmental
7 entities, cities in large part; and I am kept very busy
8 with a portion of that being asked to help cities convert
9 their courts of nonrecord to courts of record; and a good
10 portion of that normally includes, at the city's request,
11 training of the judge and the clerk on how to operate a
12 court of record; and I get to see the frustration and
13 anxiety that is caused by -- with the judge and the clerk,
14 kind of regularly, when they realize what power they've
15 just been given and they don't know what to do with it.

16 And so, currently, the way -- there isn't a
17 direct guidance. The only guidance that really exists in
18 Chapter 30 is a sentence that says -- you know, it
19 basically says Rules of Appellate Procedure and Criminal
20 Procedure apply for a lot of their criminal jurisdiction
21 and the court may adopt any -- or rules of regular
22 practice and procedure for -- to facilitate trial, and so
23 courts have used that to basically say, okay, I can adopt
24 my own rules, but a criminal judge, a judge whose
25 background, and everything, is in the criminal side,

1 because that's the bulk of what they're doing, when
2 they're suddenly given civil rules that they have to
3 figure out and adopt, they don't know where to start.

4 And so it really goes back to that
5 overarching concept of guidance and to provide -- you
6 know, the work group did discuss what would happen if the,
7 you know, committee is disinclined, or the Supreme Court
8 is disinclined, to adopt rules, and we've discussed what
9 kind of things might happen to help with that guidance,
10 but that those procedures and those -- one would be -- and
11 even with the rules, there's going to need to be training,
12 which is one of the big things that the TMCEC would end up
13 doing. They typically will provide, like, model standing
14 orders and model complaints and model jury charges, and
15 things like that, and so may have to delve into model
16 rules for potential adoption, but then you're -- again,
17 you're getting into situations where the judges aren't
18 necessarily going to know or understand all of the
19 intricacies of what they've just been handed; and the
20 concern is really to minimize problems, minimize courts
21 getting in trouble, minimize judges getting into trouble,
22 and give them some guiding principles so they know where
23 to go; and it's much easier to say, you know, "The Court
24 told me this is what I've got to do."

25 CHAIRMAN BABCOCK: Yeah, got it. Justice

1 Miskel.

2 HONORABLE EMILY MISKEL: In a municipal
3 civil court of record, do those judges have to be lawyers
4 or they're nonlawyers?

5 HONORABLE RYAN HENRY: They have to be
6 lawyers.

7 HONORABLE EMILY MISKEL: Okay.

8 HONORABLE RYAN HENRY: It is required.

9 CHAIRMAN BABCOCK: Okay. Richard.

10 MR. ORSINGER: I'm not exactly clear on what
11 the negatives are to having uniform rules. I know if you
12 adopt a set of rules that vary from the current practice,
13 there's always going to be some adjustment period and some
14 complaints associated with that --

15 HONORABLE RYAN HENRY: Yes.

16 MR. ORSINGER: -- but, eventually, we'll
17 have a uniform system statewide, even though we have all
18 of these varieties. What is the argument against having a
19 uniform system statewide eventually?

20 HONORABLE RYAN HENRY: Because Texas is so
21 big, right, and I know you deal with this in different
22 places and times, you end up with kind of different
23 aspects that happen with the different regions, and each
24 city has been given the authority to influence or make
25 adjustments to the jurisdiction of their individual courts

1 to a certain extent. Not, you know, blank check, but they
2 have the ability to influence exactly how much of
3 Chapter 54 they can use, and so that's one of the bigger
4 concerns. Yes, ma'am.

5 CHAIRMAN BABCOCK: Judge Estevez.

6 HONORABLE ANA ESTEVEZ: Well, Judge Michael
7 Acuna, who couldn't come, asked me to just make sure I
8 tell you that it's muddy, and they can't implement it
9 because someone will come up to do something, and there is
10 no clerk to take whatever document, and there is no --
11 there's no infrastructure at all. It's a one-person show,
12 and they just cannot do it, so --

13 HONORABLE RYAN HENRY: And that clerk is
14 also the city secretary --

15 HONORABLE ANA ESTEVEZ: -- this is for Judge
16 Acuna.

17 HONORABLE RYAN HENRY: -- wearing multiple
18 hats.

19 HONORABLE ANA ESTEVEZ: And I think you had
20 something to say, too. I can tell.

21 MS. METTEAUER: Oh, you can tell.

22 HONORABLE ANA ESTEVEZ: Yes.

23 MS. METTEAUER: Well, I think, no, I think
24 you covered it. Yeah, the jurisdiction varies because
25 they're so different. Each court is different, and money

1 is definitely a fact -- now, did you mean uniform rules
2 for all courts, like all of this?

3 MR. ORSINGER: Well, see, okay, so we have
4 the same problem at the district court level, which is
5 that their practices vary all over the state, but we do
6 have a set of uniform rules. They have deadlines, they
7 have standards, there's procedures that you can adapt to,
8 and they vary locally because of local rules, and whatnot,
9 but we make it work. And the nice thing about it is that
10 no matter what court you go into in Texas, fundamentally,
11 you're going to have notice, you're going to have
12 deadlines, you're going to have terminations; and right
13 now it's just haphazard at the municipal level, and,
14 admittedly, there's a difference between, say, Houston and
15 Fort Stockton.

16 CHAIRMAN BABCOCK: Really?

17 MR. ORSINGER: Yeah. But, you know,
18 reasonable time periods, three weeks, 21 days' notice,
19 termination of plenary power at the end of 90 days, these
20 are things that are so basic that seems to me you could
21 make them uniform and still have some variety to allow for
22 local practice.

23 CHAIRMAN BABCOCK: Yeah, Judge Estevez.

24 HONORABLE ANA ESTEVEZ: And I do want to say
25 that in our subcommittee meetings with our working group

1 that everyone wanted to start off with 54(B) and, if it
2 went well, consider expanding it, but they wanted to see
3 how it went with the smaller group with the courts of
4 record that already have more resources, and then I think
5 that the overall goal will be that if it all goes well --
6 and I don't know what they anticipate will happen if it
7 doesn't go well, but I agree with you. But I think that
8 the people that are there in those municipal courts have
9 the experience of thinking there are going to be a lot of
10 things that go wrong, probably because there are so many
11 courts that have adopted their own rules and aren't going
12 to want to change them right away.

13 CHAIRMAN BABCOCK: John.

14 MR. WARREN: So, basically, what I am
15 hearing is that the working group's proposed rules,
16 because you guys have gone through every possible scenario
17 of every instance of every situation that would occur in a
18 municipal court, you have crafted the rules to address
19 those issues; whereas, Rule 2 does not, will take some
20 more refining. But, also, are you proposing that you kind
21 of scale this down where it initially starts in larger
22 jurisdictions, you customize it, and fix it so that --
23 because it's a money issue for the courts, municipal
24 courts in a smaller jurisdiction, you're able to craft it
25 to meet the needs of those smaller jurisdictions that

1 don't have resources?

2 HONORABLE RYAN HENRY: To -- not so much
3 larger jurisdictions, but --

4 MR. WARREN: But that's where the majority
5 of the volume would be, right?

6 HONORABLE RYAN HENRY: No.

7 MR. WARREN: It would be in smaller
8 jurisdictions?

9 HONORABLE RYAN HENRY: It's kind of in the
10 medium jurisdiction. The large jurisdictions like Houston
11 and Dallas, they're using the alternate administrative
12 procedures to handle a lot of those things, and that's
13 where they've dedicated their efforts. So it's really
14 kind of the medium level jurisdictions that this would
15 apply to, but --

16 MR. WARREN: I'm sorry. Medium level, give
17 me the name of a city.

18 HONORABLE ANA ESTEVEZ: Irving, I think. He
19 said he was high, high volume.

20 HONORABLE RYAN HENRY: Yes, Irving is high
21 volume. I mean, I sit in Westlake Hills in Austin, and
22 the population of the town is not that great, but it is a,
23 you know, court of record that they're utilizing Chapter
24 54 on.

25 MR. WARREN: Uh-huh.

1 HONORABLE RYAN HENRY: Right now, the small
2 town -- one of the cities I'm in is the city of Point
3 Venture, which is a really tiny city over on the lake, and
4 they're in discussions. The council is talking about
5 whether they want to go to a court of record or stay a
6 court of nonrecord, specifically for their ordinance
7 enforcements.

8 MR. WARREN: Okay. Is there required
9 continuing education for municipal court judges?

10 HONORABLE RYAN HENRY: Yes. Yes,
11 absolutely.

12 MR. WARREN: So for those that are saying
13 that this would be difficult or the why are you doing this
14 to me, these are great why are you doing this to me kind
15 of -- wouldn't that continuing education resolve the issue
16 with them understanding what the new process would be with
17 your proposed rules?

18 HONORABLE RYAN HENRY: We understood that by
19 doing these rules, you know, the TMCEC would need to take
20 on -- because they're the ones who do the continuing
21 education.

22 MR. WARREN: Uh-huh.

23 HONORABLE RYAN HENRY: And so they would be
24 the ones that would do the training, and so there are
25 plans in place, I guess, or plans -- contemplated plans

1 for training, depending on what you ultimately adopt, but
2 there will need to be an education period regarding that.
3 I'm sorry, I didn't mean to steal your thunder.

4 MS. METTEAUER: Oh, absolutely. Yeah.

5 CHAIRMAN BABCOCK: Hayes.

6 MR. FULLER: Could these proposed rules be
7 viewed as model rules to be adopted by those
8 municipalities that feel the need for them?

9 HONORABLE RYAN HENRY: They could, yes.

10 MR. FULLER: Moving towards uniformity, you
11 know, as they become widely -- more widely accepted?

12 HONORABLE RYAN HENRY: Yes, sir. They
13 could, and as I mentioned, that was one of the
14 discussions, if the --

15 MR. FULLER: Because that might --

16 HONORABLE RYAN HENRY: -- council is not --

17 (Simultaneous crosstalk)

18 CHAIRMAN BABCOCK: Whoa, whoa, just don't
19 talk over each other.

20 MR. FULLER: Okay.

21 CHAIRMAN BABCOCK: Go ahead, Hayes, now you.

22 MR. FULLER: I'm just thinking that that
23 might be a way -- I mean, I can see where there's going to
24 be all kind of turf war resistance to something like this.
25 I mean, good Lord, it's change with a capital C, but it

1 seems to me that if you make it voluntary, people might
2 start looking at a model set of rules as we don't have
3 them, let's use them, and eventually that's going to be
4 the majority of the municipalities, and they can kind of
5 ease into it.

6 CHAIRMAN BABCOCK: Pete, did you have
7 something?

8 MR. SCHENKKAN: Yeah. There were questions
9 asked earlier about kind of what kind of cases are we
10 dealing with and how many of them are there, and at
11 Footnote 2 in the -- in the executive summary memorandum,
12 it gives us a little bit of OCA's statistics, and I think
13 they are -- to me, they were kind of sobering for this
14 purpose. The municipal courts account for 34 percent of
15 all of the 1.3 million annual civil filings, and then the
16 JP courts account for another roughly 34 percent, or a
17 little bit more, I guess, 39 percent. So between them,
18 the municipal courts and the JP courts, are three quarters
19 of all of the civil business that the legal system does in
20 Texas, so we really better get this right.

21 CHAIRMAN BABCOCK: Yeah.

22 MR. SCHENKKAN: We don't want to fix
23 something that isn't broken, and we don't want to go about
24 fixing things that are broken in a way that lots of people
25 aren't going to like, especially if their reason for not

1 liking it is a good one like this will cost my town money
2 we don't have and you are not going to furnish me with it.

3 And then the second thing is I thought there
4 was a statistic in here somewhere about the pro se
5 representation in these courts, but I can't seem to find
6 it, but I assume it's overwhelmingly pro se.

7 HONORABLE RYAN HENRY: Yes, it is
8 overwhelmingly pro se.

9 MR. SCHENKKAN: And so we also have to be
10 mindful of we're not going to be teaching pro se people
11 what to do with this. That isn't going to happen. All of
12 that is by way of backing up things that I think several
13 of us are feeling our way into here, which is how much of
14 this problem is already being dealt with by,
15 Ms. Metteauer, your entity, people who teach people how to
16 do this and are providing the resources. I have no
17 understanding of that at all. I know that, in general, we
18 gather the, I think it's the district court judges or
19 maybe all of the trial judges, twice a year for kind of
20 CLE and training. Could you describe what you do and how
21 many people participate and what other kinds of resources
22 are available to them? Other than coming to meetings,
23 what's available online or in publication, that sort of
24 thing? That's the other alternative here, is to work
25 better on the guidance and the resources.

1 MS. METTEAUER: Certainly. Now, in general,
2 what we provide is extensive. If you're asking about
3 this --

4 MR. SCHENKKAN: No, in general.

5 MS. METTEAUER: Okay, in general. Okay.

6 MR. SCHENKKAN: In other words, I don't have
7 enough understanding just yet to get all of that
8 specifics.

9 MS. METTEAUER: That would be important as
10 well, so I will tell you that as well. But, generally,
11 they -- judges have to get -- municipal judges have to get
12 16 hours. You know, when they're a new judge, they have
13 to get a lot more than that. They have to get 32 hours,
14 but, generally, each year it's 16 hours. We provide that
15 to them through in-person seminars that we go all over the
16 state. We have regional seminars, and then we have
17 special topic seminars. We've had one on ordinances or
18 mental health, or we have a -- an initiative that has to
19 do with city councils and that communication, so we have a
20 regional seminar that has a vast range of topics, some
21 that, whether it be legislatively mandated or just basics
22 or something that we've picked up on through our 800 line,
23 that we take -- we take legal calls from judges and court
24 staff, and we provide guidance that way. They can call
25 and ask questions.

1 We have numerous publications online and
2 printed. We have a website that has a lot of resources.
3 We do online training, primarily through webinars, and
4 we're just starting to do online courses as well, so --
5 and they can find specific topics. We have a bench book
6 where they can go through a checklist of all different
7 procedures, because almost half of our judges are
8 nonattorneys, not in the context we're talking about here,
9 but with their regular jurisdiction, municipal courts,
10 around half are nonattorneys. So our education is -- I
11 mean, it's important no matter what, but ours is -- our
12 target is a lot different as far as that goes.

13 MR. SCHENKKAN: If I may follow up, are
14 those desk books kind of comprehensive? Are they like
15 counterparts to our annotated, you know, Rules of Civil
16 Procedure code, or something like that, where you really,
17 if you're -- if you have a question about some rule of
18 procedure, you know which book to go to, if you even can
19 remember what the rule is or the statute you can go right
20 to it and see what the case law is, and here we're talking
21 about stuff that --

22 MS. METTEAUER: Yeah, when I talk about a
23 bench book, it would be practically step-by-step. I'm
24 going to do magistration or I've got a juvenile or a
25 pretrial trial, so we have -- there is very step-by-step,

1 basic, I just took the bench, I'm not a lawyer, how do I
2 do this, so that's what a lot of our resources are. We've
3 got a trial handbook. It has scripts in it, so we try to
4 have.

5 HONORABLE RYAN HENRY: It has quotes that
6 tell us exactly what to say.

7 MS. METTEAUER: Yeah, say this, don't go
8 rogue.

9 CHAIRMAN BABCOCK: All right. Judge Chu.

10 HONORABLE NICHOLAS CHU: Yeah, I think
11 stepping back from this, just to give us a scope of what
12 the issue is, I just want to bring this as if I went to
13 everybody and told you -- because most of us do litigation
14 in district court, for example. There are a hundred
15 district courts in the State of Texas with completely
16 different ways of calculating time, when to do citations,
17 who is supposed to get notice at whatever time, you would
18 automatically say, oh, we need to fix that, right? Like
19 we would not accept that principle, and I think the only
20 difference in this situation is that a court that we
21 usually don't practice in or it's usually in our
22 background, but in my practice in JP courts, I have seen
23 unless we create a mandate of this is the basics of where
24 you start out with and then you can innovate with your own
25 local rules, then you would get completely variation --

1 complete variations of -- of how people calculate time or
2 what process is done. And I think that would provide a
3 different set of justice based upon what city you live in,
4 and I -- I think there would -- I think there -- yeah,
5 there would probably be best practices with some judges in
6 creating following model rules, but the vast majority
7 either wouldn't do it, because they're just happy with
8 whatever they are, and focus only on their jurisdiction
9 and not really the big picture of courts in general, and I
10 think also, too, that some of these things have to be kind
11 of enacted probably by municipal courts and -- or
12 municipal -- or city councils, and they don't really care,
13 because they're not in the trenches on this. And so it
14 really is -- it's important for the Supreme Court to -- to
15 create a basic rules of the road so that we can all
16 operate there and then -- and then create those
17 variations.

18 CHAIRMAN BABCOCK: The subcommittee
19 recommends that the Court should adopt uniform Rules of
20 Civil Procedure in municipal courts rather than just amend
21 Rule 2. That's your recommendation, right?

22 HONORABLE ANA ESTEVEZ: Yes.

23 CHAIRMAN BABCOCK: Was there any dissent in
24 the subcommittee on that?

25 HONORABLE ANA ESTEVEZ: I wouldn't consider

1 it a dissent.

2 CHAIRMAN BABCOCK: Okay. So --

3 HONORABLE ANA ESTEVEZ: A concurrence.

4 CHAIRMAN BABCOCK: If there was any dissent,
5 it was light. So let's talk about that issue. It sounds
6 to me, from the comments that have been made, particularly
7 by the people that know what they're talking about, that
8 perhaps we think that there ought to be a uniform set of
9 rules and not just amend -- in other words, we agree with
10 the subcommittee. That's my sense of our committee. Am I
11 wrong about that?

12 HONORABLE MARIA SALAS MENDOZA: You're not
13 wrong.

14 CHAIRMAN BABCOCK: We don't need to take a
15 vote on that, do we? Okay. By consensus then we -- we
16 will recommend what the subcommittee recommends. So why
17 don't we go on to the next thornier recommendation, number
18 B, which is Rule 563.2, summary disposition of the
19 proposed rules should be eliminated in its entirety. And,
20 Judge, or judges, one of you want to tell us --

21 HONORABLE ANA ESTEVEZ: I'll start, just one
22 second just to tell you that I think this was really
23 important, again. I just want to voice the opinions and
24 thoughts of those that are not present, but Judge Acuna
25 was very strongly against having summary dispositions

1 because it actually slows down the court. They have such
2 high volume, if they have to deal with these other ones in
3 between when they have so much to do, it just makes it an
4 extra process for them.

5 CHAIRMAN BABCOCK: Okay. Any other comments
6 about -- about this issue?

7 HONORABLE RYAN HENRY: The working group, we
8 added the summary disposition during discussion, but on, I
9 would say, further reflection, a little later on down --
10 because this had been going on for a while. While there
11 are varying opinions about it, everyone agreed that as
12 long as it's not, you know, you're prohibited from doing
13 certain things, and like ruling on issues of law, so to
14 speak, that the work group was fine with it being removed.

15 CHAIRMAN BABCOCK: Okay. Any other comment
16 on that?

17 All right. The third topic that the
18 subcommittee suggested we discuss, and they have a
19 recommendation, which is the Rule 560.3(a) should be
20 amended to read, quote, "These rules must apply to cases
21 under Chapter 54 when a municipal court exercises
22 concurrent jurisdiction with a district court and may
23 apply when a municipal court exercises jurisdiction under
24 any other section." I don't think we've talked about that
25 yet. What's the theory behind that?

1 HONORABLE ANA ESTEVEZ: So that was what we
2 were talking about regarding courts of record, Chapter 54,
3 those are all courts of record cases.

4 CHAIRMAN BABCOCK: Right.

5 HONORABLE ANA ESTEVEZ: And if -- we would
6 be restricting it to those cases first, so that we can
7 then tweak any type of issues that come up in anticipation
8 of perhaps in the future having everything uniform, and if
9 not, then we'll keep it the way it is; but any other court
10 that isn't a court of record or isn't exercising any
11 jurisdiction over 54 can still use those rules, so if they
12 want to adopt them, it encourages them to adopt them under
13 their city ordinance if they choose to, knowing that
14 that's where we're going to go.

15 So I'll let them speak as to that, but we
16 went ahead, since -- when we started our first
17 subcommittee meeting with our task force, it was clear --
18 and we had additional people when we first started in our
19 meetings, so we had some prosecutors that weren't part of
20 the task force. We added some other people. They
21 weren't -- they were all homeowners, but they weren't
22 representing any type of homeowners association.

23 CHAIRMAN BABCOCK: Right, okay.

24 HONORABLE ANA ESTEVEZ: And so we were
25 considering their objections as well, and the issue was

1 always -- it always seemed to come up that it would just
2 be very difficult for different reasons, and those are
3 really, really set out well in this executive summary, so
4 if you read that, it just shows disparities of
5 municipalities and their resources and different issues
6 they have all just throughout the whole entire state, but
7 this was a way to compromise that everyone seemed to be
8 okay with.

9 CHAIRMAN BABCOCK: Okay.

10 HONORABLE ANA ESTEVEZ: So it gets us to a
11 point of somewhere to start to satisfy some of the
12 concerns, and then if he chooses to use them in all five
13 courts, even though they're not all of record, then he can
14 have uniformity in all his courts.

15 CHAIRMAN BABCOCK: Okay. Any other comments
16 about that?

17 MR. SCHENKKAN: This is on the third
18 recommendation. What does "may" mean in this context?
19 We're saying --

20 HONORABLE ANA ESTEVEZ: If you want to --

21 MR. SCHENKKAN: -- that, in effect, it's a
22 signal to whoever is reading the rules, you need to look
23 up and see if they have been adopted already. Is that
24 what that means?

25 HONORABLE ANA ESTEVEZ: No, it just means if

1 you're the judge and you're reading that and you don't
2 know whether or not you have to follow those, if you're
3 under Chapter 54, you have to follow them, and if you
4 don't, then you can have different rules.

5 CHAIRMAN BABCOCK: Right. That's how I read
6 it.

7 MR. SCHENKKAN: Okay.

8 HONORABLE RYAN HENRY: An example would be
9 the Transportation Code for junk vehicles, which doesn't
10 fall under district court, but if you're getting an appeal
11 from an administrative hearing officer that appeals into
12 your municipal court and you think these rules are helpful
13 and you want them, you say these work for me, and so you
14 just adopt them.

15 HONORABLE ANA ESTEVEZ: It's probably
16 unnecessary, but it helps to kind of get the mindset going
17 of this is where they're going if that's where they end
18 up.

19 CHAIRMAN BABCOCK: Right.

20 HONORABLE ANA ESTEVEZ: End up later.

21 CHAIRMAN BABCOCK: Okay. Any other comments
22 about -- about that issue? No, okay. Yeah, Harvey.

23 HONORABLE HARVEY BROWN: I don't know
24 whether we're ever going to go through the whole proposed
25 list, but in 560.3, the one we were just talking about,

1 the last sentence where it talks about a municipality can
2 enact its own rules and they'll have the same full force
3 and effect, I think we need a provision that talks about
4 what if there's a conflict between those local rules and
5 whatever rules are adopted by us.

6 CHAIRMAN BABCOCK: Yeah. Yeah, I was going
7 to open up the entirety of the rules after our break.

8 HONORABLE HARVEY BROWN: Okay. Sorry.

9 CHAIRMAN BABCOCK: But -- but we can talk
10 about them any time, but we're about to take our break
11 because Dee Dee's fingers are getting tired, not to
12 mention her straining to hear some of our more softspoken
13 members, so if we're -- if we're through the three
14 recommendations, which I think we are, do you need any
15 more guidance on that? Jackie, do you need any more
16 guidance on that?

17 MS. DAUMERIE: I'm good.

18 CHAIRMAN BABCOCK: She's good. You're
19 always good, though, so that's -- so we'll take our
20 morning break and be back in 15 minutes, and I think it's
21 Tab H, if I'm correct, that is the proposed rules; is that
22 right?

23 HONORABLE ANA ESTEVEZ: I think so.

24 HONORABLE NICHOLAS CHU: Yeah, H.

25 MR. ORSINGER: Page 37.

1 CHAIRMAN BABCOCK: Yeah. Okay. So Tab H,
2 page 37.

3 HONORABLE ANA ESTEVEZ: Yes.

4 CHAIRMAN BABCOCK: And we'll take that up
5 after the break, and the break is 15 minutes. So see you
6 in 15 minutes. Thanks.

7 (Recess from 10:36 a.m. to 10:54 a.m.)

8 CHAIRMAN BABCOCK: All right, Judge, you're
9 out of Dee Dee's pit, and we're back to -- back to these
10 rules, but before we start, Regan, as I recall -- or not
11 as I recall, but as I'm informed, you, or some of your
12 colleagues, did a survey of all of the municipal judges or
13 at least you sent one out, right? So they know this
14 effort is underway.

15 MS. METTEAUER: Correct.

16 CHAIRMAN BABCOCK: And tell us about the
17 survey and what it revealed, if anything.

18 MS. METTEAUER: Yes, we did send out a
19 survey --

20 CHAIRMAN BABCOCK: Keep your voice up.

21 MS. METTEAUER: We sent out a survey to all
22 of our constituents, so that would be -- I don't think we
23 limited it to judges, because I think we also sent it to
24 courts -- I mean, to clerks as well. We gave them a copy
25 of the proposed rules, and then we had some questions,

1 giving -- some open-ended giving them the chance to share
2 their thoughts to help us. Before we submitted them, we
3 wanted to have their feedback, so we -- it was not --
4 there wasn't an overwhelming response, which may or may
5 not surprise you, and we actually -- we learned a lot from
6 the survey, that there is probably a lot of confusion on
7 what -- what civil jurisdiction they actually have or
8 think they have, but most of what I learned was that there
9 is confusion there as well, and there -- I think of the
10 negative comments I think it was -- I don't even remember
11 what Candice's -- what her comment -- there was one
12 person, but I think -- did she get to come to the call?
13 Or was it Judge Adams?

14 HONORABLE ANA ESTEVEZ: The prosecutor, yes.

15 MS. METTEAUER: Yes.

16 HONORABLE ANA ESTEVEZ: Yes, she was at one
17 of our meetings.

18 MS. METTEAUER: Okay. So she was able to
19 come, and I apologize, I don't even remember. She had
20 definitely -- that was something that she did. She's a
21 prosecutor, and this is a world that she operates in, and
22 so but, again, I don't even remember what her comments
23 were, but there were two people that had concerns that
24 were able to come to the subcommittee.

25 HONORABLE ANA ESTEVEZ: But I think that's

1 why we tweaked it.

2 CHAIRMAN BABCOCK: Uh-huh. Okay. So about
3 how many surveys did you send out?

4 MS. METTEAUER: We would have sent them out
5 to -- we have over 900 courts, so -- and we sent them to
6 every court in our system. We would have sent it to the
7 judge and any clerk, or I think we probably did court
8 administrators, so might have doubled that.

9 CHAIRMAN BABCOCK: So two things for that.
10 One, certainly everybody knows about this effort --

11 MS. METTEAUER: They should.

12 CHAIRMAN BABCOCK: -- if they bothered to
13 read their mail. And how many did you get back?

14 MS. METTEAUER: I don't remember.

15 HONORABLE RYAN HENRY: It was maybe --

16 MS. METTEAUER: It was nominal.

17 HONORABLE RYAN HENRY: Yeah, maybe 10, at
18 most.

19 MS. METTEAUER: Yeah. I was thinking maybe
20 11. It was very -- and out of those --

21 CHAIRMAN BABCOCK: So either they don't read
22 their mail or they don't care.

23 MS. METTEAUER: Well, I mean, they're used
24 to receiving communications from us.

25 CHAIRMAN BABCOCK: Yeah.

1 MS. METTEAUER: And then I think you also
2 shared it with the city attorneys.

3 HONORABLE RYAN HENRY: I shared it with the
4 City Attorneys Association at their annual conference
5 about -- about two years ago now. One of the versions --
6 and so the city attorneys are the ones that go in -- not
7 necessarily the prosecutor, although many times it's the
8 same person, because the city is the party as opposed to
9 the State being a party on the criminal side, and they
10 were the ones that we got -- we got several comments from.
11 I'll say that's closer to maybe 12 or 15 comments back --

12 CHAIRMAN BABCOCK: Yeah.

13 HONORABLE RYAN HENRY: -- from them, but
14 that was just -- was given out at the annual conference,
15 which had about 300 attendees, and the majority of those
16 were in favor of them. The few that had negative
17 comments, it was more negative because they didn't quite
18 understand, again, what -- what the rules are intended
19 to -- the confusion seems to go around -- turn on you
20 shouldn't give us civil jurisdiction. Well, they've got
21 civil jurisdiction, whether they like it or not.

22 CHAIRMAN BABCOCK: Okay.

23 HONORABLE RYAN HENRY: This is just helping
24 guide them on how to use it.

25 CHAIRMAN BABCOCK: Right.

1 HONORABLE RYAN HENRY: And so the negative
2 comments that I remember that I got from city attorneys
3 was geared more towards that. They just didn't quite
4 understand what the -- how the connection was there.

5 CHAIRMAN BABCOCK: Okay. Got it. Let's go
6 to the rules themselves, which is Tab H, and I have a
7 question right off the bat on Rule 560.2(a). It says an
8 answer, it must be filed, and that is carried forward in
9 562.4, so you must file an answer, and I saw that there
10 was no provision for a motion --

11 MR. HARDIN: Motion to dismiss.

12 CHAIRMAN BABCOCK: -- to dismiss to
13 challenge venue or jurisdiction or some of the things that
14 you might say as an initial matter the court has to look
15 at and think about it. Was that deliberate, and, if so,
16 why, and if it wasn't deliberate, should it be in there?

17 HONORABLE RYAN HENRY: There was a -- I
18 remember a discussion -- Regan, correct me if I'm wrong --
19 in the work group, because you get so many pro ses, a lot
20 of times, at least on the criminal side, they don't file
21 anything. They just show up to court.

22 CHAIRMAN BABCOCK: Yeah.

23 HONORABLE RYAN HENRY: And their arguments
24 to you are always verbal, and so some judges will require
25 them if they're going to do a motion to dismiss, like on a

1 motion to quash, like a criminal complaint, they tell them
2 they have to be in writing, but we didn't want to kind of
3 restrict what normally happens with pro ses, and so if
4 they want to show up and orally say, I want to dismiss
5 because of X, Y, or Z, the judge is going to be used to
6 hearing and dealing with those right then.

7 CHAIRMAN BABCOCK: Yeah, but you're telling
8 the pro se that they must file an answer.

9 HONORABLE RYAN HENRY: Yes. And so the --
10 the answer -- there was a discussion about what does an
11 answer constitute or what constitutes an answer.

12 CHAIRMAN BABCOCK: Okay.

13 HONORABLE RYAN HENRY: And so because the
14 pro ses often show up and announce it verbally, since it's
15 a court of record, that, you know, we basically count that
16 as an answer and appearance. Go ahead, Regan.

17 MS. METTEAUER: Just something to keep --

18 CHAIRMAN BABCOCK: Regan.

19 MS. METTEAUER: -- in mind as we're going
20 through these is that the foundation for these rules are
21 the JP rules.

22 HONORABLE RYAN HENRY: Right.

23 MS. METTEAUER: And so we took those -- that
24 was a wise suggestion by Justice Bland and Judge Acuna,
25 who was on our work group. He took those, and so we

1 started with his draft, and then we have -- Judge Estevez
2 included a chart for you that shows you where we had to
3 make changes based on jurisdiction or the specific type of
4 case. So based on that chart, we can verify, but my
5 assumption is that the -- it's that way because that was
6 the way the JP rule was.

7 CHAIRMAN BABCOCK: Okay. But just to the
8 point that Judge Henry is making, this Rule 562.4 says the
9 answer must be written, so it doesn't allow for the oral
10 practice that you were talking about. If we adopt these,
11 whoever it is, whether it's pro se or not, must file a
12 written answer. So that's one point.

13 HONORABLE RYAN HENRY: Yes, sir.

14 CHAIRMAN BABCOCK: But the question then is,
15 should there also be an ability to file, in lieu of a
16 written answer, a motion to dismiss? So that's -- yeah,
17 Judge.

18 HONORABLE ANA ESTEVEZ: I was just going to
19 suggest I think you made a really good point, and we
20 should suggest changing it to "may."

21 CHAIRMAN BABCOCK: Okay. And if -- if
22 it's -- if it's "may," and they say, "Okay, well, I'm not
23 going to file an answer," how do you -- can you default
24 them?

25 HONORABLE RYAN HENRY: Well, I think it

1 would be you must submit an answer, and it could be
2 written or oral.

3 CHAIRMAN BABCOCK: The problem that I had
4 with it was that it seemed to exclude a pleading that
5 challenged the court, the fact that this is the right
6 place to resolve this dispute.

7 HONORABLE RYAN HENRY: Yes, sir. And I
8 think these rules, again, being basics, they don't prevent
9 someone from doing that.

10 CHAIRMAN BABCOCK: Well, except that if you
11 must file a written answer and you -- and you want to
12 challenge the court, you've got to do it in some other
13 pleading.

14 HONORABLE RYAN HENRY: I see what you're
15 saying.

16 CHAIRMAN BABCOCK: So in the normal -- in
17 the normal, either the state or the federal rules, in
18 district courts, if you file a -- you can file a motion to
19 dismiss and an answer, but you don't have to. So
20 that's -- that's what we're getting at. Harvey.

21 HONORABLE HARVEY BROWN: Well, 500.2 in the
22 JP rules, just so you know, has the exact same language,
23 but it seems like to me this would be an easy fix just to
24 add at the end of the clause something like "if some
25 pretrial motion is not otherwise filed" or some language

1 about referencing a pretrial motion.

2 CHAIRMAN BABCOCK: Yeah. Yeah. Judge Chu.

3 HONORABLE NICHOLAS CHU: Another fix could
4 just be on Rule 562.4, on the definition of -- or the
5 requirements of the answer, put like in between (b) and
6 (c), after "General Denial," a new (c) that says, "include
7 any other challenges to venue, motions to dismiss for
8 jurisdictional purposes," anything like that, and then
9 that would be -- then you would require it to be in
10 writing. It would be on there, and so the judge can
11 figure that out and say let's put that on a pretrial
12 conference setting and hear that, or let's just take that
13 up before we go through trial.

14 CHAIRMAN BABCOCK: Yeah. Yeah, Professor
15 Browning.

16 HONORABLE JOHN BROWNING: Or we could put
17 "answer or other responsive pleading."

18 CHAIRMAN BABCOCK: Yeah. People okay with
19 that? Yeah, Judge Schaffer.

20 HONORABLE ROBERT SCHAFFER: Just a side
21 note. I think in the citation that you're served with,
22 the citation says, "You have been served and you must file
23 an answer" or some language consistent with that.

24 CHAIRMAN BABCOCK: So if they're reading
25 their citation, they don't care what -- what the

1 definition in 560.2 says. They go, oh, I've got to do
2 this, because the citation said it.

3 HONORABLE NICHOLAS CHU: The answer does --
4 is helpful administratively for clerks, just for the sense
5 of then somebody puts down their e-mail address and
6 contact information, so that -- that's why I would say if
7 we just said "or other pleading", there wouldn't be this
8 set requirement that a pro se would say, oh, I also have
9 to include all of this stuff. They would just say, "I
10 want this case dismissed," signed, defendant.

11 CHAIRMAN BABCOCK: Yeah, and maybe it's not
12 needed. Maybe this motion to dismiss concept is not
13 needed. I mean, how often do you challenge venue or
14 jurisdiction of the -- of the municipal court? I mean, is
15 that a common thing or not?

16 HONORABLE RYAN HENRY: Absent a sovereign
17 citizen, never.

18 CHAIRMAN BABCOCK: Yeah. Well, maybe you
19 don't need to worry about it then.

20 Yeah, Judge, did you have anything to say?

21 HONORABLE ANA ESTEVEZ: I just know of one
22 instance where it's a county versus a city problem.

23 CHAIRMAN BABCOCK: Yeah.

24 HONORABLE ANA ESTEVEZ: But I don't know
25 that it happens --

1 CHAIRMAN BABCOCK: There would be no reason
2 and I guess you couldn't put in your answer that, you
3 know, "I deny the allegations, and by the way" --

4 HONORABLE ANA ESTEVEZ: "I'm not in the
5 city."

6 CHAIRMAN BABCOCK: "We're in the wrong
7 homeroom." Justice Miskel.

8 HONORABLE EMILY MISKEL: I was going to
9 support Judge Chu's suggestion that it can all just be in
10 the answer, because I don't think we want to import due
11 order of pleadings requirements into like pro se municipal
12 court litigation.

13 CHAIRMAN BABCOCK: Yeah.

14 HONORABLE EMILY MISKEL: So I would just say
15 keep it simple and put all of your problems in your
16 answer.

17 CHAIRMAN BABCOCK: Yeah. Okay. Thanks.
18 Makes some sense, which makes it a long shot, but any
19 other comments on that issue?

20 All right. Any other comments on the
21 definitions? Anybody see anything they want to raise
22 about those?

23 All right. How about Rule 560.3,
24 application of rules in municipal court cases? Yeah,
25 Harvey.

1 HONORABLE HARVEY BROWN: This is where I
2 mentioned that I thought we need a provision --

3 CHAIRMAN BABCOCK: Yeah.

4 HONORABLE HARVEY BROWN: -- to say if
5 there's a conflict, which controls, the local rule or
6 these rules.

7 CHAIRMAN BABCOCK: Yeah. Regan.

8 MS. METTEAUER: It references Rule 3(a), and
9 Rule 3(a) says that they must -- they can't be
10 inconsistent.

11 CHAIRMAN BABCOCK: Could you speak up a
12 little bit? Sorry.

13 MS. METTEAUER: I apologize. This rule
14 references 3(a). Maybe we could take a look at 3(a),
15 because it mentions that the rules can't be inconsistent
16 if they're -- if you're going to do local rules, they
17 can't be inconsistent. I mean, you might still want to do
18 more, but I just wanted to point -- point that out.

19 CHAIRMAN BABCOCK: Does that solve the
20 problem, Harvey? I'm not sure it does.

21 HONORABLE ROBERT SCHAFFER: He's reading it
22 right now.

23 HONORABLE HARVEY BROWN: It does say they
24 must not be inconsistent, so it would seem like it
25 probably does.

1 CHAIRMAN BABCOCK: But what if they are?

2 HONORABLE HARVEY BROWN: But what if they
3 are is going to be my question. What if it slips through
4 somehow and they are inconsistent?

5 CHAIRMAN BABCOCK: Yeah.

6 HONORABLE HARVEY BROWN: It seems like one
7 should control.

8 CHAIRMAN BABCOCK: Justice Christopher.

9 HONORABLE TRACY CHRISTOPHER: Well,
10 especially if the subcommittee's recommendation that this
11 rule is limited to only one type of case or, you know,
12 court, then it seems weird to have this in here, because
13 we're going to have a lot of local rules that are going to
14 continue to govern that could be inconsistent with these
15 rules, because these rules don't cover that. Because it's
16 a "may" situation, not a "must" situation. I just think
17 that has to be all rewritten if we limit the cases.

18 HONORABLE ANA ESTEVEZ: That's probably
19 true, because they weren't written to limit at the time.

20 CHAIRMAN BABCOCK: Right.

21 HONORABLE ANA ESTEVEZ: So there may be some
22 tweaking that needs to be done.

23 CHAIRMAN BABCOCK: Yeah, good point.
24 Anything else about 560.3 or the comments thereto?

25 All right. If anybody spots anything, bring

1 it up either on a break or just we'll go back. We'll go
2 back to that. 560.4, representation in municipal court
3 cases, seems fairly straightforward. The part about a
4 corporation, that carries forward the -- yeah.

5 MS. HOBBS: The Access to Justice Commission
6 recently submitted some proposals to the Supreme Court on
7 representation in JP court, and I would just urge the
8 Court to make sure that this new 564 -- 560.4 is
9 consistent with our recommendations there about
10 representative -- representations by justice court and the
11 like.

12 CHAIRMAN BABCOCK: Okay. How is it
13 different, Lisa?

14 MS. HOBBS: You're testing my memory here,
15 but we have created something called a justice worker that
16 would be able to assist low income Texans in JP court.

17 CHAIRMAN BABCOCK: Okay.

18 MS. HOBBS: And I don't know if there's a
19 need for that in municipal court, but if there -- because
20 municipal courts were off of our radar then, but if there
21 is a need for that, then I just want the Court to kind of
22 think about it in terms -- and I don't know enough about
23 the municipal courts' civil jurisdiction to know if there
24 is a need, but I just want to just point that out as let's
25 just make sure we're consistent --

1 CHAIRMAN BABCOCK: Okay.

2 MS. HOBBS: -- between what nonattorneys can
3 do in JP court and municipal court should probably be a
4 line.

5 CHAIRMAN BABCOCK: We have -- we have talked
6 before, not in this context, about 560.4(b), where a
7 corporation, or other legal entity, must be represented by
8 an attorney. When you're -- when you're here in this
9 context, you have a homeowners organization, association,
10 or you have a Subchapter S, you know, corporation, or some
11 family corporation. I mean, you're not talking about
12 AT&T. Is this -- I know what the Bar would say about
13 this, yes, absolutely we have to have it, but, yeah,
14 Judge.

15 HONORABLE RYAN HENRY: More and more,
16 especially with Airbnbs and short-term rentals, you get a
17 lot of full corporate entities that own property in
18 residential zones. Plus you are talking about compliance
19 with stuff not just for homes, but for any kind of
20 property, including commercial properties.

21 CHAIRMAN BABCOCK: Right.

22 HONORABLE RYAN HENRY: So you will get full
23 corporations, corporations that are incorporated in
24 Delaware and other locations. This language, if I
25 remember correctly, it's --

1 MS. HOBBS: I think it's from the civil
2 procedure rules and not the JP rules.

3 HONORABLE RYAN HENRY: Yeah. Plus, when --
4 to keep things consistent, on the criminal side, if you
5 are citing a corporation for a criminal matter, this is
6 also the language.

7 CHAIRMAN BABCOCK: Uh-huh.

8 HONORABLE RYAN HENRY: And so it's something
9 that the municipal judges are going to be familiar with,
10 as far as who comes in.

11 MS. HOBBS: So by statute, a landlord or a
12 tenant, so a landlord will often be a corporation or can
13 be a corporation --

14 CHAIRMAN BABCOCK: Right, sure.

15 MS. HOBBS: -- not often is. They, by
16 statute, can have a nonlawyer representative in the JP
17 court.

18 CHAIRMAN BABCOCK: In JP court, that's
19 right.

20 MS. HOBBS: Yeah. And so we kind of
21 expanded that concept to representation in JP court
22 outside of the landlord-tenant context, and y'all are
23 taking a back step there. I'm not feeling sorry for the
24 corporations, no offense to my friend sitting right next
25 to me here, but I just -- I just think it's worth looking

1 at just to make sure we're being consistent in
2 representation, and it may be that the JP courts say that
3 because of the statute. I can't really remember how
4 that's in the JP rules, but this is inconsistent with the
5 JP rules.

6 CHAIRMAN BABCOCK: Judge Chu, you may know.

7 HONORABLE NICHOLAS CHU: Yeah, I think the
8 reason why it's different in the JP rules, and in this
9 rule, is because in the JP world it's not a court of
10 record, so -- and then when you appeal from a JP court to
11 a county court, you are going into a court of record de
12 novo, and so then you have to be represented by counsel
13 there. And then in this instance here, it really only
14 applies to municipal court of records right now, so those
15 have to be -- those are de novo -- or not -- error
16 appeals, non-de novo appeals to county court. So, really,
17 these -- essentially, the idea is if you're a court of
18 record, you have to have a lawyer.

19 MS. HOBBS: Okay.

20 HONORABLE NICHOLAS CHU: For corporations or
21 other entities.

22 CHAIRMAN BABCOCK: Justice Christopher.

23 HONORABLE TRACY CHRISTOPHER: I understand
24 the desire to have it, but is it -- is it really good
25 policy? I mean, if we're talking about a lot of things

1 involving land, and you've talked about where people don't
2 know who the owner is, and so, you know, we have multiple
3 names, you know, potentially. And, you know, my brother
4 and I own property together. Can't I appear for my
5 brother, you know, owning that property together in this
6 municipal court? Or, let's say, it's in a trust, you
7 know. Do we have to have a lawyer representing the trust
8 in this action?

9 I just think -- I mean, I do understand why
10 we have the rule the way we do, but maybe we should be
11 thinking outside the box to expand self-representation.

12 CHAIRMAN BABCOCK: Yeah, you bring up a
13 great point. A lot of -- a lot of homes, residential
14 homes, are now put in trusts for tax reasons and
15 inheritance tax reasons. So that's a legal entity.
16 That's not an individual owning that. So, you know,
17 you --

18 HONORABLE TRACY CHRISTOPHER: You know, I
19 just did -- if right now they all have to get lawyers,
20 they have to get lawyers, but, you know, is that something
21 that we really want to enshrine in these cases.

22 CHAIRMAN BABCOCK: Yeah. Well, how do you
23 feel about it?

24 HONORABLE TRACY CHRISTOPHER: I don't know.
25 I mean, I don't do the cases. I think the judges that do

1 the cases should be the ones that -- I mean, judges
2 generally like to see lawyers instead of pro ses.

3 CHAIRMAN BABCOCK: I was going to say it's
4 easier for the judge if there's a lawyer that shows up.

5 HONORABLE TRACY CHRISTOPHER: Yeah. Yeah.
6 I mean, it's kind of like when somebody does a pro se
7 appeal up to our court and they sign on behalf of other
8 entities, we reject, and so then the next signature page
9 we get everybody has -- you know, everyone has signed it,
10 despite the fact that brother wrote it, you know, and now
11 sisters are signing off as, you know, as if it's theirs.

12 CHAIRMAN BABCOCK: Yeah.

13 HONORABLE TRACY CHRISTOPHER: So just
14 something to think about.

15 CHAIRMAN BABCOCK: Yeah. Judge Estevez.

16 HONORABLE ANA ESTEVEZ: So I was just going
17 to tell you how I feel about it.

18 CHAIRMAN BABCOCK: Go ahead.

19 HONORABLE ANA ESTEVEZ: I feel like if I am
20 the only person that is in charge of that legal entity,
21 then I should be able to go as the representative, not
22 being the lawyer, but as a person, I should be able to be
23 pro se. I also feel that if I was a partner in some sort
24 of legal entity and I found out that somebody got sued and
25 then went and answered and lost a lawsuit that's going to

1 cost me a lot of money and I never even had to know about
2 it because that person went pro se, that I would be very
3 upset. So I think this is really meant to protect
4 shareholders and other partners, so I feel that we should
5 preserve the pro se opportunity to save money and to make
6 these things go cheaper. Maybe we put something in
7 between that says unless all corporate -- all partners or
8 members or shareholders agree, so they all have to sign
9 off so that they can have one person represent them so
10 that way you kind of have a blend where you can help that
11 indigent person that has a structure.

12 Let's say they had a business. Now they're
13 in bankruptcy, and their business was incorporated, and
14 now they can't go -- they have to go hire a lawyer, and
15 they have no money to deal with relating to dangerously
16 damaged or deteriorated structures or improvements that
17 they couldn't deal with, because they didn't insure the
18 building that caught on fire. I don't know.

19 CHAIRMAN BABCOCK: Yeah.

20 HONORABLE ANA ESTEVEZ: But I think there
21 should be something in between that protects those that
22 are part of a legal entity from finding out that things
23 went wrong without them, but still allows the people that
24 actually are indigent or the corporation is indigent or
25 the LLC that's indigent to go forward and have someone

1 represent them.

2 CHAIRMAN BABCOCK: Yeah, Judge Chu.

3 HONORABLE ANA ESTEVEZ: Because I've had to
4 kick out people and throw out answers, and they're a
5 one-person corporation. Makes no sense.

6 CHAIRMAN BABCOCK: Yeah. Yeah. Judge Chu,
7 how does it work in the landlord-tenant? I mean, you've
8 got -- you have a corporation that owns the -- the three
9 bedroom apartment or three apartment building.

10 HONORABLE NICHOLAS CHU: Yeah.

11 CHAIRMAN BABCOCK: Do you ever have any
12 problems with the representative, nonlawyer
13 representative, showing up?

14 HONORABLE NICHOLAS CHU: No, not really,
15 because they're -- it follows essentially like standard
16 business agency rules of this person, this -- this is the
17 property owner, or the property manager, and they have
18 clear authority to represent the entity.

19 CHAIRMAN BABCOCK: Yeah.

20 HONORABLE NICHOLAS CHU: It would be 500.4,
21 and essentially, it would probably -- what Judge Estevez
22 has mentioned would probably just be a copy and paste of
23 500.4, deleting out (b)(2), because that talks
24 specifically about evictions, and allow for employee,
25 owner, officer, or partner of an entity who is not an

1 attorney to be their representative or an attorney.

2 CHAIRMAN BABCOCK: Yeah.

3 HONORABLE NICHOLAS CHU: And I think most
4 times when that happens, we have to follow kind of agency
5 rules of, okay, you're here, you're speaking for the
6 corporation, right? Okay, great. Like let's move on.

7 CHAIRMAN BABCOCK: Anybody else? Yeah,
8 Richard.

9 MR. ORSINGER: I don't know the exact
10 history or the source of this, but I always thought that
11 this was an effort to curtail the unauthorized practice of
12 law by people who were maybe not affiliated with the
13 organization appearing purportedly pro se on behalf of the
14 entity and getting a fee, but they really are not an
15 owner, not an officer, other than for purposes of the
16 lawsuit. So it does seem to me that we should limit the
17 pro se representation to someone who has a bona fide stake
18 in the organization, either as ownership or not just for
19 purposes of the lawsuit they've been made an agent.
20 Otherwise, I'm afraid it may open the door to unauthorized
21 practice of law, whether you do that in this rule or a
22 comment or I don't know where. I just want to express
23 that concern.

24 CHAIRMAN BABCOCK: Yeah, Judge Estevez.

25 HONORABLE ANA ESTEVEZ: So I was just going

1 to give the analogy to the district court. I've had
2 entities that were sued, that the president of the company
3 filed an answer, individually and for the corporation, and
4 then the next thing, I have a motion to strike the answer
5 because it's not a lawyer.

6 CHAIRMAN BABCOCK: Right.

7 HONORABLE ANA ESTEVEZ: And I have to strike
8 the answer because it's not a lawyer, so then it opens it
9 up to default because there's no answer, and, I mean, how
10 is that fair?

11 CHAIRMAN BABCOCK: Yeah, Richard.

12 HONORABLE ANA ESTEVEZ: That's the law.
13 That's the law.

14 MR. ORSINGER: I don't have a problem with
15 pro se representation or pro se self-representation. I
16 just -- I have a concern about the unauthorized practice
17 of law, and we need to be sure there's a bona fide
18 connection between the representative and the entity and
19 not someone who basically is practicing law without a
20 license.

21 HONORABLE ANA ESTEVEZ: I absolutely agree
22 with him, too.

23 CHAIRMAN BABCOCK: Judge Schaffer was
24 nodding while you were talking, Richard, and now he's got
25 his hand up, waving his fingers, the record should

1 reflect.

2 HONORABLE ROBERT SCHAFFER: Thank you very
3 much. That was important, I know. I look at this a
4 little bit differently, in that if you're representing a
5 legal entity, you are representing interests other than
6 yourself. If you're only representing your own interest,
7 that's one thing, but if you're representing the interest
8 of others who may or may not know you are there acting as
9 a lawyer in this particular instance, I don't think that's
10 right. I don't think you should be able to do that, and
11 it is, as Richard said, if not actual close to the
12 unauthorized practice of law, it's just like a husband
13 filing an answer for a wife, which we see frequently and
14 we have to disallow that, but if you're representing a
15 legal entity and you are the only interest holder, that's
16 one thing, but in most cases you're not the only interest
17 holder. You may botch up the whole thing. And other
18 interest holders are going to take a hit because of that.
19 So I don't have as much problem with (b) as others might.

20 CHAIRMAN BABCOCK: Any other -- any other
21 comments about it? Yeah, Robert.

22 MR. LEVY: I agree with Judge Schaffer. I
23 think that we need to be clear that including that
24 corporations or other entities should be represented by
25 counsel and in the courts of record.

1 CHAIRMAN BABCOCK: Yeah. Yeah, Judge
2 Estevez.

3 HONORABLE ANA ESTEVEZ: I just think that
4 that should be something that could be waived by all of
5 the stakeholders. That's all.

6 CHAIRMAN BABCOCK: Yeah. Richard.

7 MR. ORSINGER: In case we go that route, I
8 just wanted to point out that, technically, a trust is not
9 an entity like a partnership or corporation or LLC. In
10 the Trust Code, it's a fiduciary relationship between the
11 trustee and the beneficiary, and it's not an entity. So
12 the trustee, if you're going to sue a trust, you have to
13 sue the trustee. If the trust is going to sue, the
14 trustee has to be the plaintiff, so let's not -- let's be
15 careful that we don't think we're curing the trust problem
16 when we mention entity, because that's going to create an
17 uncertainty that will require litigation to straighten
18 out.

19 CHAIRMAN BABCOCK: So if the -- if the
20 municipality sues a trust that owns a house, which has got
21 a lot of garbage that they're not picking up.

22 MR. ORSINGER: They have to name and serve
23 the trustee.

24 CHAIRMAN BABCOCK: Okay.

25 MR. ORSINGER: And the trustee is the

1 individual owner of that property, the trustee, not --

2 CHAIRMAN BABCOCK: May not be. May not be.

3 MR. ORSINGER: No. It would be a trust
4 relationship. If you didn't have legal title in the
5 trustee.

6 CHAIRMAN BABCOCK: Right, but that
7 doesn't -- well, I guess the trust owns the property now.

8 MR. ORSINGER: Well, there is no trust.
9 That's the problem. It's kind of like money in the bank.
10 Do you have money in the bank? No. You have a claim
11 against the bank because you're a creditor. We simplified
12 things in our mind back in the days when we carried money
13 in our pockets. It's the same thing with trustees. The
14 trustee is the owner. Now, it can be complicated because
15 the trustee may be an LLC, but the bottom line is the
16 trustee is the owner, and you have to sue and be sued by
17 the trustee.

18 CHAIRMAN BABCOCK: You know we are in
19 municipal court here.

20 MR. ORSINGER: Tell me whether you agree.
21 Okay. I'm not alone on this.

22 HONORABLE EMILY MISKEL: You're right.

23 MR. ORSINGER: I'm not being weird. I'm
24 just being accurate.

25 CHAIRMAN BABCOCK: Which is the exception

1 here.

2 HONORABLE JANE BLAND: You can be both.

3 CHAIRMAN BABCOCK: Justice Christopher.

4 HONORABLE TRACY CHRISTOPHER: Well, and
5 actually, that would be a jurisdictional argument. Okay.
6 If you've sued the trust, you have to sue the trustee.
7 So, I mean, I agree. You have to sue the trustee. That's
8 what the law says.

9 MR. ORSINGER: My concern was that the title
10 of subdivision (b) is "Representation of a Corporation or
11 Other Entity."

12 CHAIRMAN BABCOCK: Yeah.

13 MR. ORSINGER: And because I'm getting from
14 the conversation that there are a lot of trusts that are
15 holding individual residences or small apartment units or
16 something --

17 CHAIRMAN BABCOCK: That's certainly true.

18 MR. ORSINGER: -- then we better be careful
19 that -- we need to understand that "other entity" does not
20 mean trust, and so I would think a trustee can go in and
21 pro se represent themselves, which may defeat the policy
22 that you use. That's all I'm saying.

23 CHAIRMAN BABCOCK: Is there a fix for this,
24 or do we just note it and let Jackie figure it out?

25 MR. ORSINGER: Well, we say "Corporation or

1 other legal entity or trust must be represented by an
2 attorney" --

3 HONORABLE ROBERT SCHAFFER: Yes.

4 MR. ORSINGER: -- if that's what we want, or
5 else we leave trust out, and after the litigation settles
6 we'll realize the rule doesn't apply.

7 CHAIRMAN BABCOCK: Justice Christopher.

8 HONORABLE TRACY CHRISTOPHER: Well, and to
9 make it more complicated, I think there's a dispute
10 between the probate courts right now as to whether or not
11 a trustee can be self-represented.

12 MR. ORSINGER: Oh, okay.

13 HONORABLE TRACY CHRISTOPHER: That you have
14 to have a lawyer to represent a trustee because of the
15 nature of the relationship.

16 CHAIRMAN BABCOCK: You're just bringing the
17 news.

18 HONORABLE TRACY CHRISTOPHER: Right. I'm
19 just bringing the news.

20 CHAIRMAN BABCOCK: Lisa.

21 MS. HOBBS: I just want to go on record to
22 say that you started the discussion on 560.4 with "I'm
23 sure this won't be controversial."

24 CHAIRMAN BABCOCK: I did say that. I
25 retract that now. Yeah, Judge Henry.

1 HONORABLE RYAN HENRY: Just, and I'm
2 learning, actually, a lot about some of these aspects, but
3 for Chapter 54, two aspects to keep in mind from just a
4 practical or logistics standpoint, if we're suing a
5 property, we sue the property itself in rem as well,
6 regardless of who owns it. And so that may be something
7 that can help solve the aspect, which is giving whoever is
8 listed as the owner or the votes, the one in control,
9 notice.

10 Also, Chapter 54, in subchapter (a), which
11 actually does kind of interconnect a little bit, which is
12 a section that says if you send a notice to whoever is on
13 the tax records as the owner, if they're going to disclaim
14 ownership, they have to disclaim it by affidavits within
15 so many days of receipt; and if not, then that person, as
16 a matter of law, for purposes of the suit owns it or has
17 responsibility over it. And so regardless of the -- the
18 legal nature -- part of the issue with these kind of suits
19 is you can't always wait around to find out who
20 technically legally owns it if you're going to go in and
21 clean it up, and so that's why those elements exist, so
22 you -- you give proper due process and notice for the
23 chance for the person most likely to be responsible for it
24 is going to get the notice of it, but it's a little bit
25 different than suing a trust for money or suing a property

1 owner for money or a claim that way, because really what
2 we're suing for is to go on and get them compliant and
3 clean it up.

4 CHAIRMAN BABCOCK: Okay. Any more comments
5 about this, this issue? Rusty.

6 MR. HARDIN: Has the chairman considered
7 recusing himself in light of the number of homes probably
8 under trust in a number of jurisdictions that he has
9 property? Perhaps you should have turned over this
10 question to somebody else.

11 CHAIRMAN BABCOCK: I own no property in
12 trust, let the record reflect, and so I can appear for
13 myself, although my wife may have something to say about
14 that.

15 MR. ORSINGER: Is it community property?

16 CHAIRMAN BABCOCK: Huh? It would be
17 community property.

18 MR. ORSINGER: Okay. You've got my number.

19 CHAIRMAN BABCOCK: All right. Anything else
20 on that? Well, we're moving right along. 560.5,
21 computation of time. Anybody -- anybody have any comments
22 about this? Connie?

23 Oh, I thought your hand was inching up
24 there. Okay. Anybody else?

25 MR. LEVY: Well --

1 CHAIRMAN BABCOCK: Robert.

2 MR. LEVY: I was going back to 560.5. Do we
3 want any reference to the ability to serve via e-mail or
4 other electronic means in terms of timing issue?

5 HONORABLE RYAN HENRY: No, we don't have
6 e-filing yet.

7 MR. LEVY: What about service?

8 HONORABLE RYAN HENRY: So on, like, the
9 computation of time, the way this is written, it's you
10 have to go through the -- the service of process, you put
11 it in the mail, you know, to go out, and so that's kind of
12 when things are started. So when we talked about the
13 timing and the fact that these are supposed to be
14 expedited, we were considering both, you know, how do we
15 get notice to the defendant and the property versus the
16 city receiving notice properly in time for kind of any
17 motions or things that the defendant wants to file. Most
18 of the time, by the time it gets to the point a petition
19 is filed, we would have already gone through a bunch of
20 notice procedures we would have had to do beforehand to
21 basically advise them that if they don't fix it or come
22 into compliance within 20 days or 30 days that we're going
23 to have to initiate suit anyway.

24 MR. LEVY: It's just when you have parties,
25 particularly those that are represented by counsel, but

1 even pro se, you would think that most of the time they're
2 going to communicate and exchange pleadings electronically
3 versus via mail, and you can't file it with the court
4 electronically.

5 HONORABLE NICHOLAS CHU: The 561.4 I think
6 answers your question, which is papers other than
7 citations, other pleadings, you can -- you can send that
8 by e-mail and do the certificate of service by e-mail or
9 the certificate of service on that pleading.

10 MR. LEVY: Okay. So you're right. I
11 apologize for missing that. Would that change computation
12 of time? Under 560.5?

13 HONORABLE NICHOLAS CHU: I don't think so,
14 because 560.5, I think it's basically the same as the JP
15 rule, and the JP rule, in this instance and also in the
16 service of papers other than citations, was the same as
17 the JP rules.

18 MR. LEVY: But under 561.4, Justice Miskel
19 is pointing out, it does seem to be somewhat inconsistent,
20 because it talks about e-mail, service by e-mail being
21 effective if it's sent before 5:00.

22 CHAIRMAN BABCOCK: I'm sorry. Could you
23 repeat what that number was?

24 HONORABLE EMILY MISKEL: 561.4(a)(4).

25 MR. LEVY: We might want to add that to

1 560.5, that same language.

2 CHAIRMAN BABCOCK: Robert, did you say you
3 might want to add that to 560.5?

4 MR. LEVY: The language in 561(a)(4) under
5 citation of service.

6 CHAIRMAN BABCOCK: 560.5.

7 HONORABLE EMILY MISKEL: Okay. So your
8 initial question was about serving noncitation documents
9 by e-mail, and that is addressed by that 561.4(a).

10 CHAIRMAN BABCOCK: Right.

11 HONORABLE EMILY MISKEL: But the one we were
12 looking at is just about calculation of periods of time.
13 Help me understand the problem with that one.

14 MR. LEVY: Well, 561.4(b) says, timing, if a
15 document is served by mail, three days will be added.
16 Notice -- so that assumes that there could be notice via
17 e-mail, which is contemplated under 561.4(a)(4), but yet,
18 computation of time does not acknowledge that possibility
19 under 560.5.

20 CHAIRMAN BABCOCK: Lamont.

21 MR. JEFFERSON: Why is there no electronic
22 filing? And why -- I mean, everybody is doing everything
23 electronic these days, and why are we accounting for mail
24 and fax and, you know --

25 CHAIRMAN BABCOCK: Just for citation, I

1 think. Isn't that what this rule says?

2 MR. JEFFERSON: Well, this is talking about
3 filing. We're on 560.5, right?

4 CHAIRMAN BABCOCK: Yeah, I'm sorry. Yeah.
5 You can -- you can serve by e-mail except for citation,
6 but your point is, yeah, but why would you -- why are we
7 talking about mail and not e-mail, I guess.

8 MR. JEFFERSON: What I hear you say is we
9 don't have electronic filing, we don't do electronic
10 filing.

11 CHAIRMAN BABCOCK: Yeah.

12 HONORABLE RYAN HENRY: Right.

13 MR. JEFFERSON: But you will, I assume. I
14 mean, everybody is going to eventually go to some kind of
15 an electronic system. That's the way of the world, right?

16 CHAIRMAN BABCOCK: Yeah.

17 MS. METTEAUER: From outside of -- outside
18 of this context, just e-filing in general, there are
19 courts that don't -- that are out and have nothing.

20 MR. ORSINGER: Don't have what?

21 MS. METTEAUER: They have nothing. They
22 don't even have -- they wouldn't be able to accept an
23 e-mail. I mean, there are -- there are courts like that.

24 MR. JEFFERSON: I --

25 MR. WARREN: In the context of county

1 government for county and district clerks in smaller
2 jurisdictions, I think OCA provides systems for those
3 individuals, so why not incorporate those?

4 MS. METTEAUER: And I can actually have the
5 original from 10 years ago where we were exempted. I
6 mean, what was submitted that got us exempted. In
7 addition, the e-filing system itself didn't contemplate
8 the way our appeals work. That was one of the -- a major
9 issue, and we're just -- everyone else was connected
10 somehow to a county, and we just -- and we aren't.

11 CHAIRMAN BABCOCK: Yeah, but I think
12 Lamont's point is that if you're computing time when
13 something has to be done, you can compute it if you're --
14 if you get the thing by mail, and there's a formula for
15 that, but what if you get it by e-mail? Shouldn't there
16 be a formula?

17 MS. METTEAUER: Okay. I didn't understand
18 that to be his question. I thought his question was
19 you're going to have to -- municipal courts will have to
20 do e-filing, why can't they do e-filing.

21 CHAIRMAN BABCOCK: You may be right.

22 MS. METTEAUER: I thought that was the
23 question.

24 MR. JEFFERSON: I'll adopt your
25 interpretation.

1 MR. LEVY: I think a way to solve the
2 problem is delete 560.5(b), because the timing rule -- or
3 the filing rule provides for additional three days, so
4 that should already cover. We don't need to mention
5 filing by mail or service by mail. Does that make sense?

6 CHAIRMAN BABCOCK: What do you think about
7 that? Does that work or -- Judge Estevez, do you think
8 that works?

9 HONORABLE ANA ESTEVEZ: I don't think that's
10 what they want. I think that they want the citation to
11 have a special rule. So I think 560.5 was only about the
12 lawsuit and computation -- well, it's not clear.

13 MR. LEVY: It's not.

14 CHAIRMAN BABCOCK: Yeah, it doesn't say
15 that, though.

16 HONORABLE ANA ESTEVEZ: It's not clear. I'm
17 going to see what they want.

18 HONORABLE EMILY MISKEL: I think what we
19 were discussing is that 560.5 talks about how you count
20 days.

21 CHAIRMAN BABCOCK: Right.

22 HONORABLE EMILY MISKEL: And then there are
23 separate sections like 561.2, service of citation, and
24 561.4, service of other papers, that talk about how many
25 days are added for this or that. So does it make sense to

1 delete (b) from 560.5 and just leave 560.5 as a day
2 counting rule and then put your "timely by mail" in those
3 other rules that already talk about when is the service
4 timely.

5 CHAIRMAN BABCOCK: That's what Lamont was
6 saying.

7 MR. LEVY: Yes. I agree.

8 MR. JEFFERSON: See.

9 HONORABLE ANA ESTEVEZ: So remove 561.4(b).

10 HONORABLE EMILY MISKEL: No. Remove
11 560.5(b). Because 561.4 already says when something by
12 mail is timely, and if you need it on the citation one,
13 then I would add it to 561.2.

14 HONORABLE RYAN HENRY: I think --

15 CHAIRMAN BABCOCK: Judge Henry.

16 HONORABLE RYAN HENRY: If you look at the
17 disposition table comparison with the JP rules, this was
18 taken from the JP rules, and so that's -- I guess one of
19 the reasons it was kind of included in, you know, 560.5 is
20 because the 500.5 section for JP lists it that way, and we
21 just didn't want to necessarily have unintended
22 consequences if we were going to delete it --

23 CHAIRMAN BABCOCK: Right, sure.

24 HONORABLE RYAN HENRY: -- you know, without
25 thinking it through.

1 CHAIRMAN BABCOCK: Lisa.

2 MS. HOBBS: I would be careful about
3 removing a thing that says when you put it in the mail is
4 when it's deemed filed. I mean, that's what (b) is
5 saying, right, is if you have a file stamp on your
6 envelope, just like when I mail my taxes on the 15th.

7 CHAIRMAN BABCOCK: Right.

8 MS. HOBBS: I don't do that anymore, but
9 when we used to go to the post office before midnight -- I
10 mean, I pay my -- but you know what I mean. Remember when
11 we used to go to the mailbox --

12 MR. HARDIN: Don't confess in public.

13 MS. HOBBS: -- and, you know, make sure it
14 was stamped on the 15th.

15 HONORABLE ANA ESTEVEZ: Yes. Yes.

16 MS. HOBBS: And now we're just doing it
17 electronically, but like you want a rule that says it's
18 the date on the stamp, and I think that's all (b) is
19 trying to say, right, is like it's when it's marked.

20 HONORABLE ANA ESTEVEZ: There are two type
21 -- there are two different types. One of them is when did
22 you file it. The other is when do you respond.

23 MS. HOBBS: Yeah.

24 HONORABLE ANA ESTEVEZ: So taking one out
25 changes what the other one would be. Because one is a

1 timely filed, so it was, again, how it used to be. The
2 day you filed, you get 10 days. You have to wait those 10
3 days before you default.

4 MS. HOBBS: Yeah, but, I mean, it's saying
5 if you have the stamp, that stamp is the date.

6 HONORABLE ANA ESTEVEZ: Right.

7 MS. HOBBS: As long as it's received within
8 10 days, like so you can't just stamp it and then hold
9 onto it for five days --

10 HONORABLE RYAN HENRY: Right.

11 MS. HOBBS: -- and, like, trick the party,
12 and on day nine actually send it, but, I mean, that's what
13 that is. It's a confirmation of service, just like when
14 we get on e-filing, we get a little note that says you
15 filed it at 9:34 p.m. You know, that's all that is, and
16 you don't want to take away from, like, what the date and
17 time of filing is.

18 HONORABLE ANA ESTEVEZ: And the other one is
19 the one you get an extra three days if it was mailed.

20 MS. HOBBS: Yeah.

21 HONORABLE ANA ESTEVEZ: So those are two
22 different timings.

23 MS. HOBBS: That's just the traditional
24 mailbox rule.

25 HONORABLE ANA ESTEVEZ: Yeah.

1 MR. LEVY: I accept that. So I guess we
2 were wrong, Lamont, but it just seems to me --

3 CHAIRMAN BABCOCK: You shouldn't have let
4 him talk you into that, Lamont.

5 MR. LEVY: -- to leave the impression that
6 filing needs to be done via mail, but that's not the
7 intent of the rule.

8 HONORABLE ANA ESTEVEZ: Maybe we need to
9 rephrase what it's called, instead of calling it "Timely
10 filing by mail."

11 MS. HOBBS: Or get our Legislature to do
12 e-filing for all municipal courts, which would make this
13 so much more simpler.

14 MR. LEVY: I'm not sure they want that.

15 CHAIRMAN BABCOCK: Let's go on to 560.6,
16 exclusion of witnesses. We could just call this "The
17 Rule," but any comments about this? Seems
18 straightforward, but we can always complicate things. All
19 right. 560.7, subpoenas.

20 MR. HUGHES: I've got a question.

21 MR. PHILLIPS: Roger has something to say.

22 CHAIRMAN BABCOCK: Yeah, Roger. Yeah.

23 MR. HUGHES: Yeah, I note that section (a)
24 allows for what we call the corporate rep deposition, but
25 then when you read down, it talks about where when you --

1 where you serve a subpoena, and it just says you serve a
2 subpoena on where the person resides. Now, that suggests
3 that it's -- we don't have a specific provision for
4 serving business entities at all, and because you talk
5 here about a person as opposed to a legal entity, it might
6 cause some head scratching, and I think, you know, we've
7 solved this issue in the Rules of Civil Procedure by if
8 the party is -- if the corporate party is represented by
9 counsel, you serve the -- you may serve their counsel of
10 record. But if they're not, I would suggest that if
11 you're trying to serve a corporation that's not a party, I
12 mean, usually, I just either serve the -- a corporate
13 officer or a registered agent for service, but I'm just
14 wondering what the drafters intended.

15 HONORABLE ANA ESTEVEZ: Where are you? Tell
16 me which part.

17 MR. HUGHES: 60.7. On subpoenas.

18 CHAIRMAN BABCOCK: He's referencing
19 subparagraph (a) where it says you can command a person or
20 an entity. It distinguishes between person and entity.

21 MR. HUGHES: Yeah, but then where it says --
22 the final sentence where it says it could be served no
23 more than 150 miles where the person resides or is served.
24 Well, the person doesn't usually include a corporate
25 entity, so are we -- I mean, it leaves open where do you

1 serve a corporation or a partnership? And et cetera.

2 I don't think that was intended, and perhaps
3 we parallel it to the Rules of Procedure that you serve --
4 if they're represented by counsel, you serve their counsel
5 with the subpoena. You may. I mean, I imagine this is
6 strictly for trial subpoenas, but it's still the question
7 then is what do you do about service on a corporation
8 that's not a party? And when you're talking about 150
9 miles from where they reside, you see the -- you see the
10 head scratching that could go on.

11 CHAIRMAN BABCOCK: I think there's case law
12 on this. I could be wrong, but I think there is.
13 Richard.

14 MR. ORSINGER: This is similar to the Rules
15 of Civil Procedure, isn't it.

16 CHAIRMAN BABCOCK: Yeah.

17 MR. ORSINGER: So we're talking about
18 something that would cross both sets of rules. Well, an
19 issue that has confounded me since we've started having
20 Zoom hearings, which we still have in Bexar County,
21 including for witnesses, is can you subpoena someone in
22 Houston to testify in a Bexar County case, even though
23 they're more than 150 miles, but they're only testifying
24 by Zoom? And I don't have a ruling on that. I don't know
25 if we want to write a rule, but the 150 miles used to be a

1 smaller -- I think it was a hundred miles, maybe even
2 75 --

3 MR. JEFFERSON: 75.

4 MR. ORSINGER: -- at one point, and way back
5 when, you had to ride a horse, so it would take three days
6 to get from Houston to San Antonio. So I can understand
7 the geographical limitations for physical appearance in
8 court, but if you're being subpoenaed to testify remotely
9 by Zoom, I'm not sure that there's a public policy to
10 limit to 150 miles.

11 CHAIRMAN BABCOCK: Yeah, but we're not going
12 to fix that.

13 MR. ORSINGER: I know that. I just wanted
14 to put that out there for people to think.

15 MS. GRAHAM: For December. For December?

16 CHAIRMAN BABCOCK: Yeah, Judge.

17 HONORABLE RYAN HENRY: I believe under
18 Chapter 311 of the Government Code, the Code Construction
19 Act, it defines person to include corporations.

20 CHAIRMAN BABCOCK: Yeah, I think that's
21 right, but we don't have person defined, and we have
22 definitions, but person is not defined.

23 HONORABLE RYAN HENRY: I think the work
24 group, at least, was I guess just relying on the
25 definitions in the Code Construction Act or the --

1 CHAIRMAN BABCOCK: No, I think that's right,
2 but then when you say person or entity, are you -- what
3 are you doing? Are you changing the definition of the
4 Government Code?

5 HONORABLE RYAN HENRY: I don't believe that
6 was the intent, no, and so if it works better to scratch
7 out entity --

8 CHAIRMAN BABCOCK: But Orsinger is going to
9 argue it. See, that's the problem.

10 HONORABLE RYAN HENRY: Yeah.

11 CHAIRMAN BABCOCK: Okay. Any more -- any
12 more thoughts about that? Somebody, Judge Estevez, maybe
13 somebody in your subgroup could look at the case law on
14 this, because I just remember that there's -- there is an
15 issue of whether you're trying a case in Potter County and
16 you've got a corporate entity, but the plaintiff is trying
17 to get the treasurer, who lives in Houston, and subpoenas
18 the treasurer to travel to Potter County, and I think
19 there's case law that says you can't do that under the
20 normal rules.

21 HONORABLE ANA ESTEVEZ: I don't know, but I
22 do know we're doing uniform depositions and the discovery
23 act later that might deal with a lot of the subpoena
24 issues and some other things, so, but I can look at that
25 if you need me to.

1 CHAIRMAN BABCOCK: Well, if we don't answer
2 that question, then this is --

3 HONORABLE ANA ESTEVEZ: I think, for
4 whatever reason, I think that if the corporation is within
5 there, you can subpoena the corporation, and they have to
6 make them appear.

7 CHAIRMAN BABCOCK: Yeah, okay.

8 HONORABLE ANA ESTEVEZ: So I don't think it
9 matters where they live.

10 CHAIRMAN BABCOCK: Roger.

11 MR. HUGHES: Well, I might suggest to
12 eliminate a lot of problems is to allow the corporate rep
13 subpoena to be served on the counsel of record, because
14 we -- if they're a party, because -- and I think in most
15 cases that's what you're talking about, is a business
16 entity or a legal entity that's a party to the litigation,
17 and, you know, you want -- at that point then, if you can
18 serve it on their counsel of record, the whole question of
19 whether the treasurer has to come from Houston to Bexar
20 County becomes a question for a motion to quash, not a
21 question for the legitimacy of the subpoena.

22 CHAIRMAN BABCOCK: Yeah. Richard.

23 MR. ORSINGER: Rather than having
24 differentiated rulings in different courts when this issue
25 arises, it seems to me that we ought to fix it here if we

1 can. And one of the problems that concerns me greatly is
2 that we may have an extraterritorial corporation or entity
3 in a state across the United States, and if you can serve
4 the counsel that's representing them in Texas and force
5 the executive officers or CFO to travel all the way across
6 for this hearing, that's way in excess of what we should
7 do.

8 MR. LEVY: I don't understand that that
9 provision would talk about the person you're serving, like
10 the attorney being in the city, as counting as the
11 150-mile rule. It's the party, so that if the corporation
12 is a New Jersey corporation, they -- unless they reside in
13 that city, you know, then it wouldn't -- wouldn't count.

14 MR. ORSINGER: I had heard a comment earlier
15 that you could -- you could serve the corporation and
16 specify that you wanted an officer or representative to
17 come to the courtroom. Now, that's my problem. I don't
18 have a problem with the company where its headquarters
19 are, but if this is broad enough to mean I can subpoena
20 the corporation to make their CFO appear, then we're
21 talking about way beyond 150 miles.

22 MR. LEVY: Well, Chip, if I could, also --

23 CHAIRMAN BABCOCK: Yeah, Robert.

24 MR. LEVY: -- go to subsection (g) on
25 enforcement, it does seem that this language is taken out

1 of existing rules on enforcement powers, but are we
2 contemplating that in the scenario which is called for in
3 560.8 on discovery, if the judge approves pretrial
4 discovery, then you could take a deposition of a party in
5 a -- somewhere in Texas, outside of 150 miles, by
6 domesticating the subpoena through a district court?

7 HONORABLE RYAN HENRY: Yeah.

8 MR. LEVY: Because enforcement is through a
9 district court, presumably, if the presiding -- or the
10 preceding judge of the municipal court did not have the
11 ability to issue a subpoena for that party. Is that how
12 this is designed?

13 HONORABLE RYAN HENRY: So, if I remember
14 correctly, this one was taken largely from existing rules
15 on subpoenaing people, you know, outside of the --

16 MR. LEVY: Right.

17 HONORABLE RYAN HENRY: -- geographic
18 distance, and so it's basically they can be deemed in
19 contempt if the court subpoena is issued. So it's going
20 to normally be issued by the municipal court, so the
21 municipal court could do it or the district court in the
22 county where the subpoena was served. So if you served
23 them, you know, 300 miles away, it's enforced in the
24 district court over there.

25 MR. LEVY: But we don't have a process for

1 domesticating the subpoena. So if I want to subpoena
2 Richard for a case in Amarillo, I've got to do something
3 to subpoena him there. Do I -- do I get it issued by the
4 clerk of the district court in Amarillo to serve for that
5 subpoena?

6 HONORABLE RYAN HENRY: Yes, that's the way
7 this was written, to just be consistent with what's
8 already there. We didn't want to necessarily burden other
9 municipal courts with the service aspect.

10 MR. LEVY: But it says it can be issued by
11 the municipal court or an attorney, so I just issue it
12 myself. I don't need to domesticate it, but to enforce
13 it, I would file it in the district court.

14 HONORABLE RYAN HENRY: Where it's served.

15 MR. LEVY: Where it's served. And is it
16 in -- it's got to be within that court's jurisdiction?

17 HONORABLE RYAN HENRY: No. That wasn't the
18 intent.

19 MR. LEVY: And are we comfortable that
20 district courts are going to be sitting in judgment on
21 these subpoenas issued primarily, I assume, for
22 depositions for municipal court proceedings? They're
23 going to have to make those decisions to whether a motion
24 to quash or an enforcement, a motion to compel, should be
25 issued.

1 HONORABLE RYAN HENRY: The -- while I can't
2 say that it wouldn't -- you wouldn't have that scenario,
3 that it would be depositions, that would actually be the
4 vast minority from the aspects. Normally, when you're
5 dealing with these kinds of suits, the city has most
6 everything it, you know, needs, and especially if you're
7 suing the property itself or you're suing the aspects of
8 those in control that are inside your jurisdiction. You
9 don't need to summon things or individuals or seek
10 documents from, you know, far away.

11 It's also more costly for them to do that
12 and to do it that method, and so most of the cities try
13 and actually get it -- get what they can for the
14 enforcement aspect, and really it boils down to is it --
15 is the property in a state that's contrary to what the
16 ordinance says, kind of yes or no, which is all local, and
17 so you're not going to have the subpoena aspect.

18 Most of the time if you're going to have to
19 issue a subpoena, you're either going to subpoena your own
20 officer or city employee or you're going to subpoena, you
21 know, someone from the other side that has information
22 that you're going to need there for hearing or for trial,
23 and those are the main times that those come up.

24 Honestly, most of the discovery aspects, the
25 reason that it's left up to the judge, one, that's kind of

1 how the JP rules are written, and, two, discovery really
2 isn't conducted very much in municipal court at all.
3 Before the city moves forward, it's got what it wants, and
4 if it doesn't have it, it's not going to necessarily move
5 forward with stuff. There's no Rule 202 kind of
6 exploratory process, or anything else like that, you know,
7 under the Rule 54 thought process.

8 MR. LEVY: I will point out there is the
9 contemplation that post-judgment discovery could also take
10 place.

11 HONORABLE RYAN HENRY: That is true.

12 MR. LEVY: And that could be a methodology
13 to potentially be used to cause annoyance or difficulty to
14 a landowner, or maybe even a lienholder, or someone like
15 that, that we're giving parties the ability to engage in
16 that discovery under this rule. And then it's going to be
17 up to, eventually, a district court to make that
18 determination.

19 CHAIRMAN BABCOCK: Yeah. I think you --
20 don't you have to sort of trust the court to -- to
21 administer this rule in a common sense way to prevent
22 harassment?

23 MR. LEVY: Yeah.

24 CHAIRMAN BABCOCK: I mean, you can't default
25 to the other, I wouldn't think.

1 HONORABLE ANA ESTEVEZ: Can I ask a
2 question, just --

3 CHAIRMAN BABCOCK: Yes. Ask a question.
4 Ask two questions.

5 HONORABLE ANA ESTEVEZ: Well, I should have
6 probably read all of the rules of municipal court, but can
7 this be removed since it's concurrent jurisdiction? Can a
8 defendant -- like, if you were the attorney that was
9 representing the landowner or the corporation or the
10 trust, can it just remove it to a district court? I don't
11 know the answer. That's my question. I don't know if I
12 should know that answer.

13 MR. LEVY: You might be able to remove it to
14 business court.

15 HONORABLE ANA ESTEVEZ: If it's enough
16 money, but, I mean, there is another court that has
17 jurisdiction and then would have a lot more resources to
18 conduct the discovery and some of these other issues and
19 enforcement, and you're going to -- at some point, the
20 issues that he brought up, we're going to be enforcing it
21 anyway. If we're enforcing subpoenas and we're enforcing
22 some discovery, then why don't we just keep the case?

23 HONORABLE RYAN HENRY: There's no mechanism
24 for removal, but, technically, if the city feels it needs
25 the weight of the district court behind it, it has the

1 option to, you know, basically nonsuit and refile in the
2 district court in the same way.

3 HONORABLE ANA ESTEVEZ: But the defendant
4 can't do it.

5 HONORABLE RYAN HENRY: No, the defendant
6 can't.

7 CHAIRMAN BABCOCK: Justice Miskel.

8 HONORABLE EMILY MISKEL: I was going to say,
9 it's like where county court and district court have
10 similar jurisdiction, if the plaintiff chooses to file in
11 county court, you can't --

12 HONORABLE RYAN HENRY: No.

13 HONORABLE EMILY MISKEL: -- remove it over.

14 CHAIRMAN BABCOCK: Any more comments about
15 discovery?

16 HONORABLE NICHOLAS CHU: Well, I think just
17 to keep in mind, on the post-judgment discovery issues and
18 kind of like the discovery abuse things, if -- if we think
19 about post-judgment discovery, it only happens when the
20 city wins, and so, I mean, if the landowner wins, they're
21 just like, great, I don't have to do what the city told me
22 to do, the end, and I walk away. So I think a lot of
23 stuff just kind of gets worked out in practice because of
24 that.

25 CHAIRMAN BABCOCK: Yeah. Okay. What about

1 citation and service, which is Rule 561.1? Any comments
2 about -- about that? First of all, citation.

3 This carries forward the admonition in
4 subparagraph (c) that you must file an answer. I think
5 we've already decided that's okay. It also suggests that
6 you may employ an attorney, but as we know, that if you
7 are a corporation, then you must employ an attorney. I
8 don't know if that's an ambiguity that's worth worrying
9 about.

10 Yeah, is that Lisa? I can't see.

11 MS. HOBBS: Yeah. I would just make sure
12 that notice is fully accurate, and including it's a
13 cross-reference to the sections of the rule that I'm not
14 smart enough, but I would just double track that and make
15 sure.

16 CHAIRMAN BABCOCK: Which part are you
17 talking about, Lisa?

18 MS. HOBBS: The notice on the subpoena.

19 MR. LEVY: Subpart (c).

20 MS. HOBBS: Yeah, subpart (c).

21 CHAIRMAN BABCOCK: Okay.

22 MS. HOBBS: "For further information consult
23 Part V-A of the Rules of Civil Procedure." They're
24 smarter than me. I just want to make sure that notice is
25 actually accurate if it's going to go on every subpoena.

1 HONORABLE NICHOLAS CHU: Piggybacking on
2 Lisa's comment, I think, if I remember, if I understand on
3 the time line, this was done prior to maybe update in
4 language for the justice court rules, which this was taken
5 out of, so we just need to compare to the justice court
6 reference, and that will give us the quick answer on that.

7 CHAIRMAN BABCOCK: All right. Any other
8 comments about -- about this? Let's go to 561.2, service
9 of citation.

10 PROFESSOR HOFFMAN: Chip. Sorry, I'm back
11 here.

12 CHAIRMAN BABCOCK: Who is that that has his
13 hand up back there? Yeah, Professor Hoffman.

14 PROFESSOR HOFFMAN: I don't know now, and so
15 maybe somebody else can speak to where are we right now
16 with service by publication on a central website? I
17 thought the Legislature authorized that and OCA now
18 mandates it. Am I saying something that is remotely
19 correct?

20 CHAIRMAN BABCOCK: Justice Miskel.

21 HONORABLE EMILY MISKEL: Yes. So there --
22 it's called TOPIC. It's on the the OCA website. If you
23 serve someone by publication, the clerks also post it on
24 the website, and you get a return of service from OCA
25 saying it was posted on the website.

1 PROFESSOR HOFFMAN: So the way the process
2 works now is service by publication is allowed, but
3 there's a procedure by which every time it is allowed, it
4 has to go through -- basically goes through OCA, it gets
5 to OCA, and then it gets posted in this new central
6 repository website.

7 HONORABLE EMILY MISKEL: Yes. It can be in
8 addition to, it can be instead of, but, yes, there is a
9 process, and there's a separate return for showing that
10 that process happened.

11 PROFESSOR HOFFMAN: Thank you. As you can
12 see, I don't know nearly enough about this, but it does
13 seem to me that if we're going to -- and this applies,
14 obviously, beyond the municipal courts, but wouldn't we
15 authorize service by publication? We ought to
16 specifically identify this process. We're trying to raise
17 its prominence presumably. The whole idea behind having a
18 centralized website is so that people will become more
19 familiar with routinely going to that place. I'm a civil
20 procedure teacher who doesn't know about it, so the odds
21 of others knowing about it aren't high.

22 So my overall suggestion is how do we raise
23 the awareness of this now mandated central repository for
24 posting publication notice, and I would think that the
25 answer is both for new rules and when we look at older

1 rules that authorize service by publication, there ought
2 to be a specific reference somewhere in the rule or, of
3 course, at least in the comment accompanying the rule of
4 this website to raise its profile.

5 CHAIRMAN BABCOCK: Judge Estevez.

6 HONORABLE ANA ESTEVEZ: I was just going to
7 say regarding the proposed rules for the municipal courts,
8 they had stated that a lot of them don't -- there's no
9 clerk. They don't have anyone that would be uploading
10 this for publication, so they don't -- again, it's a
11 resource issue.

12 CHAIRMAN BABCOCK: Yeah. Okay.

13 All right. Any more -- any more comments
14 about 561.1? How about 561.2? I guess Lonny's comments
15 were about --

16 PROFESSOR HOFFMAN: Yeah, they were 2.

17 CHAIRMAN BABCOCK: -- 561.2(f). Any other
18 comments about that rule?

19 Okay. 561.3, duties of officer or person
20 receiving citation return of service. Lisa, you look
21 bemused.

22 MS. HOBBS: Robert Levy and I were having
23 funny jokes amongst ourselves.

24 MR. LEVY: We were discussing the language
25 about service is not allowed on a Sunday.

1 CHAIRMAN BABCOCK: All right. Pete, did you
2 have something?

3 MR. SCHENKKAN: Maybe. I'm reviewing this
4 very rapidly, and when you get to 561.3, it talks about to
5 whom process is delivered, and I'm not -- it's not clear
6 to me that we've really told people beforehand what a
7 process is and when it applies. We don't have a
8 definition.

9 CHAIRMAN BABCOCK: Pete, I'm sorry, what
10 part of 561?

11 MR. SCHENKKAN: 561.3, when the officer or
12 authorized person to whom process is delivered. I'm not
13 sure our audience will know at this point what we're
14 talking about.

15 CHAIRMAN BABCOCK: Okay.

16 MR. LEVY: Say "citation."

17 MR. SCHENKKAN: We've been talking about
18 citation, but there is a reference to process server. Do
19 we need to either edit this one or provide a definition
20 somewhere?

21 CHAIRMAN BABCOCK: Yeah. Yeah, good
22 comment. What else?

23 All right. 561.4, service of papers other
24 than citation. That the same issue that you just raised,
25 Pete, in 561.4(c), for officer? Yeah, Lisa.

1 MS. HOBBS: Do our --

2 CHAIRMAN BABCOCK: Are you still kidding
3 around with Robert?

4 MS. HOBBS: Do our JP rules still say
5 service by e-mail after 5:00 will be deemed to have been
6 served the following day?

7 HONORABLE NICHOLAS CHU: Yeah, because that
8 assumes the situation where it's not e-filed. If it's
9 e-filed, then it follows the e-file rules, but if it's
10 pure e-mailed to the court after 5:00, then it's that.

11 MS. HOBBS: If I were the Court, I would
12 discard with all of that nonsense. That's just my
13 comment. I mean, just my recommendation, without specific
14 redlines.

15 CHAIRMAN BABCOCK: What, you think any time
16 up to midnight is --

17 MS. HOBBS: Yeah, I think we should -- when
18 we look at an e-mail and when it was sent and when it was
19 received, it has a date and a file stamp on it, and that
20 should control, and this idea of a legal fiction of after
21 5:00 is the following day, is just confusing and most
22 people don't know it, and I just think we need to stop
23 with that legal fiction.

24 CHAIRMAN BABCOCK: Well, there's other
25 issues, too, if you're in a different time zone.

1 MS. HOBBS: I know. Oh, yeah, I've done El
2 Paso. It's bad. I would just stop. I don't know what
3 benefit it serves, and I think it causes harm.

4 HONORABLE NICHOLAS CHU: I do agree with
5 Lisa on that.

6 MS. STOKES: I do, too. Yeah, I think the
7 electronic, why should it be 5:00 p.m.?

8 CHAIRMAN BABCOCK: Hang on. Macey, are you
9 finished? Were you done?

10 MS. STOKES: I was agreeing with Lisa.
11 Yeah, I'm done. Yeah.

12 CHAIRMAN BABCOCK: Okay. Robert, you want
13 to --

14 MS. STOKES: Sorry I didn't raise my hand.

15 CHAIRMAN BABCOCK: -- make fun of Lisa or
16 agree with her?

17 MR. LEVY: Just to join on that, the issue
18 with the fax has the same problem, and with faxes, it's
19 actually very hard to tell when it was faxed. Is it the
20 time that it was sent or the time that it was received?
21 And you're going to have differing evidence about whether
22 it was before or after 5:00.

23 CHAIRMAN BABCOCK: Yeah. Okay. Richard,
24 and then Judge Henry, and then --

25 MR. ORSINGER: I've been around long enough

1 to remember when we were fighting through the initial fax
2 plus three days period. There's -- back in those days,
3 part of it was that you couldn't get personal delivery to
4 an office after 5:00 o'clock, or couldn't count on,
5 because the door to the building might be closed.

6 CHAIRMAN BABCOCK: Right.

7 MR. ORSINGER: And no one would be there to
8 answer it and then you wouldn't get it until people show
9 up for work the next morning. And that's still a valid
10 concept, even though there's no physical barrier anymore.
11 Is it not a healthy thing for someone to be able to say
12 that the business day is over at this time? I'm either
13 going to go take care of kids or I'm going to go have
14 dinner with my wife or something like that. If you don't
15 have a 5:00 o'clock rule on e-mails, you're going to get
16 something at 11:59 a.m. and now you're only going to have
17 two days to respond to it because you won't find out about
18 it until you wake up the next morning. So even though
19 there's no physical justification for a 5:00 o'clock rule
20 anymore, there is a mental health justification for it.

21 CHAIRMAN BABCOCK: Yeah.

22 MR. ORSINGER: And I think we should
23 remember it, because the psychologists are saying the
24 problem is there's no delineation between work and away
25 from work, and that's causing psychological problems with

1 children, with adults. So, again, I'm being weird. I'm
2 sorry, but it's -- I think there is a rationale that would
3 support the idea.

4 CHAIRMAN BABCOCK: No, there's quality of
5 life. It's all the rage. You're not being weird.

6 MR. ORSINGER: Okay, very good.

7 HONORABLE ANA ESTEVEZ: I agree with you.

8 MR. SMITH: Gen Z.

9 MR. ORSINGER: How about that?

10 CHAIRMAN BABCOCK: You think he's Gen Z?
11 I'm not sure about that.

12 MR. ORSINGER: I'm Gen A.

13 MS. STOKES: I know, but I guess I feel like
14 in the -- in all of the other courts that's not the rule,
15 right? You can file until midnight in the other courts,
16 so we would be making a different rule for municipal
17 court, and I don't think there's a basis for distinction
18 there.

19 CHAIRMAN BABCOCK: I don't think it's
20 uniform in all of the other courts that if you file -- I
21 mean --

22 MS. STOKES: If there's local rules you
23 mean? Yeah, you could have a local rule.

24 CHAIRMAN BABCOCK: Sometimes there's an
25 order --

1 MS. STOKES: Right.

2 CHAIRMAN BABCOCK: -- in a specific case.

3 MS. STOKES: I guess what I'm saying is the
4 Rules of Civil Procedure and Rules of Appellate
5 Procedure --

6 CHAIRMAN BABCOCK: Yeah.

7 MS. STOKES: -- allow you to file any time.

8 CHAIRMAN BABCOCK: Judge Henry.

9 HONORABLE RYAN HENRY: A lot of cities still
10 have to operate under a basis of a 5:00 o'clock deadline.
11 If you're looking at the Texas Open Meetings Act, the
12 Texas Public Information Act, if you submit like a request
13 to the attorney general's office, the postmark actually
14 has to still be postmarked by 5:00 o'clock p.m. on the
15 day, and if it's after that, requests come in or different
16 things go out. So cities are used to dealing with that
17 5:00 o'clock deadline still in a lot of other arenas and
18 for a lot of other statutes. In fact, it's almost like a
19 default for them when they're operating.

20 CHAIRMAN BABCOCK: So you're in favor of the
21 quality of life argument.

22 HONORABLE RYAN HENRY: I am. Yes, sir.

23 CHAIRMAN BABCOCK: Yeah. Chris.

24 MR. PORTER: I would just note, practically
25 speaking, if, you know, you hit somebody at 4:59 with

1 something for 5:00 o'clock, then those folks are going to
2 be, you know, freaking out for the rest of the night
3 working on that. Alternatively, if you wait until 11:59,
4 then the filers are going to be freaking out, who are --
5 the ones who are filing it, that team is going to be
6 staying up late. So it really, to me, it's just a
7 question of who is it going to fall on, right? Right? I
8 mean, it's -- because I know when you have -- when people
9 have until midnight to file, you oftentimes, I'm sure if
10 you check the statistics, you'll see 11:45, 11:50, 11:55,
11 and, you know, those teams that are getting those filings
12 ready are working all the way up until that last second
13 until they get the final signoff, but again, if you filed
14 it at 5:00 o'clock, then the recipients are now going to
15 be freaking out and working on trying to work.

16 CHAIRMAN BABCOCK: Yeah.

17 MR. PORTER: So I don't see that big of a
18 difference between the two.

19 CHAIRMAN BABCOCK: That's a great point. We
20 ought to start a magazine and, like, talk the topics like
21 this in the magazine.

22 MS. HOBBS: Podcast.

23 CHAIRMAN BABCOCK: Like Oprah's magazine or
24 something. Roger.

25 MR. HUGHES: Well, having been old enough to

1 remember when fax machines were invented, I can remember
2 the firm gathering around the fax machine at 4:55 to see
3 what was going to come in, because you always knew
4 something was going to come in, because nobody filed or
5 sent anything before 4:55 at night, and then promptly at
6 5:00 o'clock, we turned the damn thing off. Just like
7 locking the door. Maybe lawyers could put up with these
8 shenanigans and adjust with it. You know, we live in an
9 era now, when clients want to talk to you, they text you
10 and they expect to hear from you, even if it's 9:30 at
11 night.

12 CHAIRMAN BABCOCK: Yeah.

13 MR. HUGHES: And while I fully agree with
14 the quality of life, I like things to slow down at 5:30,
15 you know, clients don't often think that way, and we have
16 to respond that way.

17 My main concern is if the bulk of people
18 operating in these courts are pro se persons, ordinary
19 human beings, I'm not sure they're going to understand why
20 they can't fax something at 5:00 o'clock or 5:30.

21 CHAIRMAN BABCOCK: Well, they can, it's
22 just --

23 MR. HUGHES: And why it's going to change
24 all of these time lines. I mean, maybe the city operates
25 at 5:00, and I understand overtime and statutory deadlines

1 and all of that, but the other side are pro se people, and
2 their world doesn't grind to a halt at 5:00 o'clock, and
3 they -- I'm sure it may not seem intuitive to them.

4 CHAIRMAN BABCOCK: So your argument is Chris
5 is wrong, everybody is freaking out all the time.

6 MR. HUGHES: It's already happening.

7 CHAIRMAN BABCOCK: I like it. Okay. Any
8 other comments about this? Yeah, Robert.

9 MR. LEVY: I just wanted to ask what the
10 task force thoughts might be about this whole enterprise
11 after hearing us debate the 5:00 o'clock rule, among other
12 things.

13 HONORABLE RYAN HENRY: We didn't get this
14 deep into it.

15 MS. METTEAUER: We just copied the rules
16 from the JPs.

17 HONORABLE RYAN HENRY: Yeah, we just copied
18 the rules from the JPs, so that's why we didn't get that
19 deep into it.

20 CHAIRMAN BABCOCK: Okay. Let's move on to
21 562, institution of suit. 562.1, pleadings and motions
22 must be written, signed, and filed. Any controversy about
23 this? You could file it electronically, Richard.

24 MR. ORSINGER: I think that's good.

25 CHAIRMAN BABCOCK: Yeah, Pete.

1 MR. SCHENKKAN: It's a nit, but "Application
2 to the court for an order," comma, "or other form of
3 request must be written." I think we at least need to
4 make clear we're talking about other form of request to
5 the court.

6 CHAIRMAN BABCOCK: Uh-huh. Good point.

7 MR. LEVY: If -- just if I could ask a
8 question.

9 CHAIRMAN BABCOCK: Yeah, Robert.

10 MR. LEVY: We talked about this earlier, but
11 if I come in, I'm a defendant, I'm pro se, and I have not
12 entered an appearance, and I come in and I say I deny
13 these allegations or the claims, or whatever, does that
14 count as an appearance and a defense, or --

15 HONORABLE RYAN HENRY: So the -- really,
16 it's going to, I'll say, fall to the judge to count it
17 that way. The rule is now, the answer is in writing if
18 you have the service. Most judges I know, if you show up,
19 they're going to say, "Okay, write something, you know,
20 just say you're here," and that's what's included. Most
21 of the time they're deferring to that sort of process,
22 because they're not going to be overly concerned about the
23 aspects. It's when they don't show up at all and how do
24 you kind of go back and say, you know, they weren't here.
25 Well, you're going to have a check-in process, and you're

1 going to have the record, and you're going to have those
2 sorts of things, and so the fact that when you have a
3 record the --

4 MR. LEVY: Well, the reason why I'm asking
5 that is if I'm a defendant, and, obviously, a pro se and
6 don't understand, and I show up and I say, I -- you know,
7 I deny everything, or something to indicate a general
8 denial, shouldn't that be sufficient to serve, since it's
9 on the record, as a denial?

10 HONORABLE RYAN HENRY: I believe -- and I
11 may be wrong, but I believe that if it's in the recording,
12 and it's -- that that qualifies.

13 MR. LEVY: That's why I'm saying that
14 that -- under this pleading rule, that would not be
15 sufficient.

16 CHAIRMAN BABCOCK: Right. Because you say
17 it's got to be written.

18 HONORABLE EMILY MISKEL: Right. And also,
19 the default rule, 563.1(a), says if the defendant fails to
20 file an answer --

21 CHAIRMAN BABCOCK: Right.

22 HONORABLE RYAN HENRY: So but, on 560 -- are
23 we on 562.1?

24 MR. LEVY: That's what we're talking about.

25 HONORABLE RYAN HENRY: It says, "Except for

1 oral motions made during trial or when all parties are
2 present." So they can make an oral motion if everybody is
3 there.

4 MR. LEVY: Yeah, but a motion, you've got to
5 know to make a motion, and a motion is not an appearance
6 or denial. It's --

7 HONORABLE NICHOLAS CHU: I think really that
8 there's a practical reason for this, and really, it's for
9 the clerk or whoever is staffing the -- the -- sending out
10 the notices or orders or court papers afterwards. If
11 somebody shows up, functionally what will happen is -- I
12 will just say the clerk will say, "Okay, put down your
13 name, contact information, and just say what you want to
14 say on a piece of paper." But really, it's just we need
15 something in writing so that we have something in the file
16 to say this is this person's address and this is where to
17 send the mail.

18 MR. LEVY: But should -- if the person --

19 CHAIRMAN BABCOCK: Justice Christopher.

20 HONORABLE TRACY CHRISTOPHER: Well, this
21 goes back to us helping pro ses.

22 MR. LEVY: Right.

23 HONORABLE TRACY CHRISTOPHER: Which we do
24 all the time in court. You know, we'll give them -- I
25 mean, like in Harris County, they've got form answers, you

1 know, fill in the cause number, fill in the names, sign
2 your name. You know, fill in whatever you want to say
3 here, I deny it, I'm here, I don't know, and all of those
4 things are answers. And I mean, I think it's pretty
5 routinely done. I'm sure it's routinely done in municipal
6 court, too, so I don't think we should get too picky, too
7 in the weeds on that, because that's what happens. We get
8 something in writing from everybody who walks into the
9 courtroom so that we do have track of them.

10 CHAIRMAN BABCOCK: Yeah. You're in favor of
11 having a writing, you just don't care what it says much.

12 HONORABLE TRACY CHRISTOPHE: Right. Well, I
13 mean, that's what the law says. You can just say
14 anything, and it's an answer.

15 CHAIRMAN BABCOCK: Yeah, right. But we were
16 talking earlier about somebody walks in and orally says,
17 "I deny it," and everybody is fine.

18 HONORABLE TRACY CHRISTOPHER: Well, you
19 don't let them leave until they sign something.

20 CHAIRMAN BABCOCK: Yeah, no, right, I'm
21 agreeing with you. I think that's a right. Justice
22 Miskel.

23 HONORABLE EMILY MISKEL: I was going to
24 respond to why I agree with that, that it's okay to make
25 them do something in writing, because let's say it's one

1 of those where they show up and say, "I want more time to
2 hire a lawyer," and then it's reset. With things that are
3 only announced orally on the record, how will you ever
4 know whether it's a post-answer default later on, right?

5 When I was a judge, I would make a docket
6 entry in my system that I look at saying so-and-so
7 appeared pro se, requested reset, whatever, and then when
8 I come time to do the default, I'm like, oh, wait, I have
9 a note here that he appeared; but in a high-volume docket,
10 you would have no ability to track over time who appeared
11 in person and said something. So I support, even if they
12 show up in person, write your name and address down --

13 CHAIRMAN BABCOCK: Yeah.

14 HONORABLE EMILY MISKEL: -- on this sheet of
15 paper. You know, that's fine because it needs to be
16 somewhere in the written file.

17 CHAIRMAN BABCOCK: Yeah, good. Okay. Is
18 that okay?

19 HONORABLE RYAN HENRY: Yes.

20 CHAIRMAN BABCOCK: All right. What else
21 from the institution of suit rules?

22 MR. SCHENKKAN: 562.3, the wording is
23 confusing to me. I think the intent is that if a
24 controversy occurred, the property is located in multiple
25 municipalities, you can file in any municipal court of any

1 municipality where part of the controversy occurred, where
2 the property is located --

3 HONORABLE RYAN HENRY: Yes.

4 MR. SCHENKKAN: -- from just a word edit.

5 HONORABLE RYAN HENRY: Part of the -- part
6 of the problem with the reason this is necessary is you
7 can have property that may be in three different counties,
8 three different jurisdictions. I have one city where I
9 prosecute, and it's located in three counties, and there
10 are certain crossover points, and so you kind of have to
11 just address it that way and pick one.

12 MR. SCHENKKAN: And I also can't parse the
13 way the reference in the first sentence to the applicable
14 extraterritorial jurisdiction. I'm confused about that,
15 too, but these are word edits, not substance.

16 HONORABLE RYAN HENRY: Extraterritorial
17 jurisdiction is a term of art for --

18 MR. SCHENKKAN: We're saying that if it
19 occurs in the municipality or its extraterritorial
20 jurisdiction.

21 HONORABLE RYAN HENRY: Yes.

22 MR. SCHENKKAN: Okay. We can come back to
23 that.

24 HONORABLE RYAN HENRY: Okay.

25 CHAIRMAN BABCOCK: All right. Any other

1 comments about that? What about 562.5, amendments
2 supplemental and insufficient pleadings?

3 HONORABLE ANA ESTEVEZ: I think you skipped
4 "answer."

5 CHAIRMAN BABCOCK: Excuse me?

6 HONORABLE ANA ESTEVEZ: You skipped it.

7 CHAIRMAN BABCOCK: I'm sorry?

8 HONORABLE RYAN HENRY: 562.4, I think she's
9 saying you skipped.

10 CHAIRMAN BABCOCK: Oh, did I skip 4? Sorry.

11 HONORABLE ANA ESTEVEZ: That's all I said,
12 but then I felt like you did it on purpose, so --

13 CHAIRMAN BABCOCK: Well, we've been talking
14 about it, but, yeah, let's go back to 562.4. Any comments
15 about this rule? Justice Miskel.

16 HONORABLE EMILY MISKEL: To adopt what Judge
17 Chu said earlier, do we want to put any subpart in here
18 that just says, you know, if you have a challenge to the
19 court, put it here.

20 CHAIRMAN BABCOCK: Right.

21 HONORABLE RYAN HENRY: I think that's a good
22 idea.

23 CHAIRMAN BABCOCK: Right. I think that's a
24 good idea, too.

25 HONORABLE NICHOLAS CHU: That would probably

1 be between (c) and (d), and it would be something to the
2 effect of "Any other motions to dismiss, challenge to
3 venue, or other issues" or something like that.

4 CHAIRMAN BABCOCK: Yeah. Richard.

5 MR. ORSINGER: This rule doesn't include the
6 rules that are in the general civil rules about pleadings
7 that must be made under oath, like not liable in capacity
8 in which sued or specified affirmative defenses that have
9 to be pled or they're waived. We don't want any of that?
10 In other words, you can say, "I'm not the owner," and it
11 doesn't matter, you don't have to be under oath. That's
12 fine.

13 CHAIRMAN BABCOCK: Justice Miskel seems to
14 think that's okay. She's vigorously shaking her head --

15 MR. ORSINGER: Yeah.

16 CHAIRMAN BABCOCK: -- at your comment.
17 Judge Henry, what do you think?

18 HONORABLE RYAN HENRY: We kind of steered
19 clear of the verified pleading requirements. The city is
20 the one that would have to, like, verify --

21 CHAIRMAN BABCOCK: Yeah.

22 HONORABLE RYAN HENRY: -- for injunctive
23 purposes, but because of the pro se aspects, we weren't
24 going to make any of those swear.

25 CHAIRMAN BABCOCK: That's the practice

1 today, right?

2 HONORABLE RYAN HENRY: Yes, that is the
3 practice.

4 CHAIRMAN BABCOCK: Any problems that --

5 HONORABLE RYAN HENRY: No, not that I've
6 been told.

7 CHAIRMAN BABCOCK: Yeah. All right. What
8 else?

9 Okay. Now can we go to 562.5?

10 MR. LEVY: I have a question about this.

11 CHAIRMAN BABCOCK: Yeah, Robert.

12 MR. LEVY: When you talk about withdrawing
13 something, is that suggesting that you can withdraw a
14 pleading that's been filed with the clerk?

15 HONORABLE RYAN HENRY: Withdraw the relief
16 requested.

17 MR. LEVY: Okay. I'm not sure -- withdraw
18 might be construed as you have the right to say, "Give
19 that back to me," and I don't think we want to do that.

20 HONORABLE RYAN HENRY: No, that was not the
21 intent. I would agree that we don't want to do that.

22 CHAIRMAN BABCOCK: Yeah, give it back.

23 HONORABLE RYAN HENRY: Yeah.

24 HONORABLE R. H. WALLACE: Could I make one
25 comment?

1 CHAIRMAN BABCOCK: Yeah, Judge.

2 HONORABLE R. H. WALLACE: In my experience,
3 there's a goodly number of lawyers who don't know the
4 difference between an amended pleading and a supplemental
5 pleading, and when you get it in here, I don't know, just
6 if it's necessary here for how that would come into play
7 in municipal court.

8 MR. LEVY: I agree. Richard will tell us
9 the history of both, I'm sure.

10 MS. METTEAUER: Justice Goldstein addressed
11 that in the comment.

12 CHAIRMAN BABCOCK: People are picking on you
13 today.

14 MR. ORSINGER: It started with you, Chip.

15 CHAIRMAN BABCOCK: That's what they call
16 leadership. Yeah, Judge.

17 HONORABLE RYAN HENRY: The comment, Justice
18 Goldstein addressed that --

19 MS. METTEAUER: She said we are not
20 resolving it, but that we didn't --

21 HONORABLE RYAN HENRY: We recognized it.

22 MS. METTEAUER: We recognized it, and we did
23 not address that distinction.

24 HONORABLE RYAN HENRY: Limiting it to the
25 jurisdictions to the courts to figure out what they want

1 to do with it.

2 CHAIRMAN BABCOCK: Okay. Pete.

3 MR. SCHENKKAN: So I'm a little puzzled by
4 (b), "Insufficient pleadings, a party may file a motion
5 with the court asking another party be required to clarify
6 a pleading" that includes --

7 THE REPORTER: Speak up, please.

8 MR. SCHENKKAN: I'm sorry. I'm confused
9 about (b) of 562.5, insufficient pleadings, which appears
10 to apply to answers as well as to plaintiffs' filings and
11 create some procedure by which you can make the defendant
12 say more than a general denial, and maybe I don't
13 understand enough about this to know. Maybe that's, of
14 course, true, but --

15 MS. HOBBS: I think it's special exceptions
16 and I think --

17 MR. SCHENKKAN: So it really is a special
18 exception.

19 MS. HOBBS: That's what I read it, and I
20 think you can special except to a defendant's pleading.
21 Maybe not their answer, but other pleadings.

22 MR. SCHENKKAN: Other pleadings.

23 MS. HOBBS: Yeah. So I wouldn't want to
24 limit it just to --

25 HONORABLE NICHOLAS CHU: This is how -- this

1 is a copy of the JP rule, and it's basically a special
2 exception. What you'll see a lot is a defendant pro se
3 will give an answer that doesn't make any legal sense, and
4 then you need to bring him into court and say, "Hey, what
5 did you mean by that," and say, "Okay, well, you can write
6 that down, and I'll give you a week to do this, and if you
7 don't do it, I'm going to dismiss this answer."

8 MR. SCHENKKAN: Okay.

9 CHAIRMAN BABCOCK: Robert, then Judge
10 Miskel.

11 MR. LEVY: I guess I would just wonder is
12 this really necessary, because the judge will do that
13 procedure without this rule, and do we need a rule to tell
14 a judge that he -- he or she has the power to tell a party
15 to, you know, answer with more -- you know, make it clear
16 or whatever it is?

17 CHAIRMAN BABCOCK: Aren't you really telling
18 the party as well as the judge?

19 MR. LEVY: Right.

20 CHAIRMAN BABCOCK: I mean, if you've got a
21 pro se party --

22 MR. LEVY: Right.

23 CHAIRMAN BABCOCK: -- they may not realize
24 that they have this ability.

25 MR. LEVY: Well, I guess you're right.

1 Yeah.

2 CHAIRMAN BABCOCK: Judge Miskel.

3 HONORABLE EMILY MISKEL: It's already been
4 covered.

5 CHAIRMAN BABCOCK: Thank you. Any other
6 comments?

7 All right. How about default judgment,
8 pretrial matters, and trial? 563.1, if defendant fails to
9 answer. Yeah, Justice Christopher.

10 HONORABLE TRACY CHRISTOPHER: This is not
11 really a default judgment, so I -- I object to the use of
12 the term "default judgment." When I read this rule, the
13 rule requires the plaintiff to come in and present
14 evidence. Okay. That is not a default judgment, unless
15 we're talking about unliquidated damages where they have
16 to put on evidence, but otherwise when someone -- you
17 know, we have this whole body of case law that says if the
18 defendant doesn't answer, he has admitted the facts in the
19 pleading, and so to call this a default judgment is not
20 accurate and I think could lead to problems. That's
21 comment one.

22 Number two is if the plaintiff -- there's a
23 sentence here that says if the plaintiff is unable to
24 prove their case, the defendant -- the judge can render in
25 favor of the defendant at a default stage? I mean, why is

1 that in there? That struck me as odd, but maybe that's a
2 quirk of municipal court practice.

3 HONORABLE RYAN HENRY: So the -- that
4 sentence was in there basically to give the judge the
5 ability -- the only plaintiff you're going to see is going
6 to be the city, and so if the city is coming forward and
7 they don't have their ducks in a row, the judge doesn't
8 have to entertain it any further, and that's really kind
9 of what the purpose of this is. If they're coming forward
10 and saying I'm -- you know, we're ready to go, and they
11 don't have the stuff to show that they have an
12 entitlement, you know, to go in and fix the property, then
13 the judge can basically throw the case out.

14 Now, the thing about these kinds of cases,
15 though, is technically every day a property is not
16 compliant is a separate cause, and so if it remains
17 compliant, they just start again, and so it's not -- it
18 basically allows the judge to make sure the city is doing
19 what it's supposed to do and providing the notices and not
20 coming in ill-prepared and things like that.

21 HONORABLE TRACY CHRISTOPHER: Again, I guess
22 my real problem is calling it a default judgment when it's
23 a totally different procedure. On both sides.

24 CHAIRMAN BABCOCK: Yeah.

25 HONORABLE ANA ESTEVEZ: Can you just ask her

1 what she would call it? Because I agree with her. Like
2 what would you call it?

3 HONORABLE EMILY MISKEL: I disagree, because
4 that is how default judgments work in family cases because
5 the Family Code says the plaintiff pleadings are not taken
6 as confessed. So in family law cases, it's called a
7 default judgment, and the plaintiff does have to come in
8 and prove up their whole case and have, basically, a
9 trial. So I don't think it's confusing to call that a
10 default judgment, because we already have default
11 judgments that look like that.

12 HONORABLE TRACY CHRISTOPHER: But you have a
13 code that if I'm reviewing on appeal, I look at the family
14 court code that tells me it's not a default judgment.

15 HONORABLE EMILY MISKEL: It is a default
16 judgment.

17 HONORABLE TRACY CHRISTOPHER: You have to
18 present evidence. If I am a county court judge looking at
19 this, I'm familiar with the rules of default. There is no
20 code that says you've got to present evidence. Maybe
21 there is and I don't know it, that it would be confusing.
22 That's all I'm saying. It would be confusing.

23 CHAIRMAN BABCOCK: Judge Chu.

24 HONORABLE NICHOLAS CHU: That default
25 judgment terminology comes from the JP Rule 570.3, and in

1 municipal court context and in JP context where there's
2 unliquidated damages, those -- in municipal court context,
3 those are always going to be either injunctive relief or
4 something liquidated, so those will always have to be
5 proven up just like how the JP rule has to be proven up.

6 HONORABLE TRACY CHRISTOPHER: No, they're
7 totally different. The JP rule is talking about a default
8 based on a written document with liquidated damages.
9 Okay. And if you don't have -- if you have unliquidated
10 damages, you have to put on evidence.

11 HONORABLE NICHOLAS CHU: Yeah.

12 HONORABLE TRACY CHRISTOPHER: That's current
13 default law. This writing that you have here is not --
14 it's not code-based. It's not current law-based. I just
15 think it's confusing to call it a default.

16 HONORABLE NICHOLAS CHU: Justice, it's
17 because in municipal court, in these cases there's no --
18 unwritten evident -- liquidated damages. It's straight up
19 going to be what is the damages to the property or what is
20 the injunctive relief being sought by them.

21 HONORABLE TRACY CHRISTOPHER: I understand,
22 but a default judgment, you know, is a normal confession,
23 unless you have a family law where there's a code that
24 says it's not a confession. So that's -- you know, I've
25 said my piece. I think it's confusing.

1 CHAIRMAN BABCOCK: Yeah. Richard had his
2 hand up. Still got it up, and then Pete.

3 MR. ORSINGER: Yeah. I was looking at the
4 clauses that talk about appearing and providing evidence
5 and, if evidence is provided, the judge may render
6 judgment, and if the plaintiff is unable to provide
7 evidence, the judge may render judgment for the defendant.
8 So when we talk about providing evidence, are we talking
9 about making a prima facie showing that you're entitled to
10 relief, or are you talking about a preponderance of the
11 evidence that you've persuaded the court that --

12 HONORABLE MARIA SALAS MENDOZA: Prima facie
13 showing.

14 MR. ORSINGER: Prima facie showing.

15 HONORABLE RYAN HENRY: Yeah.

16 MR. ORSINGER: Okay. So when you say
17 "unable to provide evidence," would you say "fails to
18 provide evidence," because they may be able and just don't
19 get it? See, what is the standard for unable? I've
20 called the case for hearing. You didn't prove what you
21 had to prove. You lose. It's not a question of ability.
22 It's a question of, you know, whether they failed to
23 present it.

24 So I would suggest that we change that, and
25 then I'm still troubled by the idea that you can get a

1 res judicata bar by the plaintiff's failure to provide
2 sufficient evidence to support a default judgment, because
3 the plaintiff's allegations haven't been controverted by a
4 general denial, and I just -- it seems to me like it's
5 going pretty far to say I'm denying your relief, but I'm
6 not going to grant a judgment for the defendant. I'm just
7 going to say you failed. And is that res judicata, if
8 it's a default judgment and your evidence is not good
9 enough? Judge says, "Oh, I'm not going to give you a
10 judgment." Is that a judgment for the defendant, or is
11 that just --

12 HONORABLE RYAN HENRY: Well, if you're not
13 -- most of the judges probably would just reset it and
14 say, "Come back when you have more."

15 CHAIRMAN BABCOCK: Yeah, come back tomorrow.

16 HONORABLE RYAN HENRY: Yeah. And so, and,
17 again, a lot of the aspects are it's not really res
18 judicata when each and every day it's out of compliance is
19 a separate cause.

20 MR. ORSINGER: So they can bring the same
21 lawsuit on the next day, and they're not res judicata
22 barred.

23 HONORABLE RYAN HENRY: Yes.

24 MR. ORSINGER: But does that stop the fine
25 going into the past or something?

1 HONORABLE RYAN HENRY: Yes, it does stop the
2 civil penalties from going backwards, from going in the
3 past. It kind of resets when the civil penalties can be
4 triggered.

5 CHAIRMAN BABCOCK: All right. Pete.

6 MR. SCHENKKAN: I understand, Judge, that
7 this is a really good idea for dealing with what you were
8 describing is usually the case, where this is the city
9 doing this. Are you saying these are the only such cases
10 to which this rule would apply, or are there any cases
11 where it wouldn't be the city as plaintiff, it might be
12 somebody for whom this doesn't --

13 HONORABLE RYAN HENRY: No, only the city.
14 The city is the only plaintiff that would appear.

15 MR. SCHENKKAN: No, to whom this rule would
16 apply.

17 HONORABLE RYAN HENRY: Yes.

18 MR. SCHENKKAN: This rule would only --

19 HONORABLE RYAN HENRY: Only apply to the
20 city.

21 MR. SCHENKKAN: -- functionally only apply
22 to cities.

23 HONORABLE RYAN HENRY: Yes, sir.

24 MR. SCHENKKAN: Okay.

25 CHAIRMAN BABCOCK: Lamont.

1 MR. JEFFERSON: I have a problem with this
2 sentence. I thought you were going here, Richard. "The
3 plaintiff must appear at the hearing and provide evidence
4 of the claim stated in the petition." That's a -- and if
5 it's a prima facie showing, then we're talking about a
6 whole different thing than what this says, and we should
7 say that. We should say what kind of evidence it has to
8 be. It has to be competent evidence, and so the judge has
9 to assess, I mean, because in a default situation, you've
10 got the admission of all of the statements in the
11 pleadings, and so you introduce the pleading, and you've
12 proven your case essentially.

13 I mean, unless -- if you have to offer
14 competent evidence, then you've got to do something more
15 than just what the pleading says, and, but if someone
16 shows up, there's no one -- the city shows up, there's no
17 one on the other side, they just read their pleading into
18 the record, that's evidence, some kind of evidence. It
19 might not -- you know, it might not be enough to sustain a
20 a judgment in another context, but we should -- if the
21 judge is going to evaluate what's offered to the court in
22 support of their -- in support of the city's claims, we
23 should make that clear somewhere here.

24 HONORABLE RYAN HENRY: Would you add "prima
25 facie evidence" instead?

1 MR. JEFFERSON: I think "prima facie proof"
2 would be --

3 HONORABLE EMILY MISKEL: But it has to be
4 preponderance.

5 HONORABLE ANA ESTEVEZ: It's preponderance.
6 I think it was preponderance, from our first meetings from
7 the subcommittee -- and I don't think you were present,
8 but I think Justice Goldstein said it was actual evidence
9 that would support, you know, a finding, as if the
10 defendant had appeared. So it wasn't -- it isn't
11 technically the traditional default judgment. It's more
12 like a post-answer.

13 HONORABLE TRACY CHRISTOPHER: Right. It's a
14 post-answer default.

15 HONORABLE ANA ESTEVEZ: It's a post-answer
16 default, but there's no answer. So I thought we could
17 rename this to just "Failure to answer" instead of calling
18 it default so it's not confusing, but my understanding,
19 because we did discuss this, and I apologize because I
20 don't think anyone here was in that meeting except for me,
21 so -- well, Elaine Carlson was there and the other task
22 subcommittee members, so there were other people there,
23 but just no one that's present here. But we talked a lot
24 about what happens and then the policy about why that
25 happens, and the policy is because the municipality has

1 all the power, all the resources, and they're usually pro
2 se people, and so they didn't think it was fair. Because
3 when we read this, our question was don't you want a
4 traditional default, and the public policywise, those
5 homeowners -- so someone was representing them -- didn't
6 want that. They wanted the municipality to have to prove
7 it.

8 CHAIRMAN BABCOCK: Well, of course.

9 HONORABLE ANA ESTEVEZ: No matter what.

10 CHAIRMAN BABCOCK: Of course that's the
11 position they would take.

12 HONORABLE ANA ESTEVEZ: They have to do it
13 as a preponderance of the evidence. So that was always
14 the city's burden, and I think -- I haven't heard that it
15 was anything less than that until just now, so I will say
16 that everyone at that meeting had represented that the
17 city has to prove it, no matter who shows up, just like my
18 tax cases. I have no one that shows up, but every single
19 time I have tax cases, I mean, one in every 200 tax
20 foreclosure cases I have a defendant that shows up, but
21 usually the county comes, and they prove it up. They give
22 me Exhibit A, Exhibit B, Exhibit C. I take it all. There
23 was no answer. It's proven as a matter of law, basically,
24 or, you know, preponderance of the evidence. Nobody has
25 come and said, "I've paid the taxes." They've shown

1 everything. So it's more like a tax case.

2 CHAIRMAN BABCOCK: So the municipality of
3 Lonesome Dove shows up and complains about Connie's
4 property.

5 HONORABLE ANA ESTEVEZ: Of course.

6 CHAIRMAN BABCOCK: Because she's got garbage
7 all over the place.

8 HONORABLE ANA ESTEVEZ: She doesn't mow her
9 lawn, and it's all the way up.

10 CHAIRMAN BABCOCK: Connie says, "I can't be
11 bothered. I'm not going to show up for court," and so the
12 judge says, "All right, let's see your evidence." And the
13 municipality shows him a photograph from last week, and
14 there's some garbage in the yard, and the judge says,
15 "That's not so bad, I'm not going to" -- "I'm not going to
16 rule for you, municipality."

17 HONORABLE ANA ESTEVEZ: Yes. I would say
18 that they could do that.

19 CHAIRMAN BABCOCK: So that's okay.

20 HONORABLE ANA ESTEVEZ: I think so, just
21 like I can do a tax case and --

22 CHAIRMAN BABCOCK: Even though Connie's
23 blowing them off.

24 HONORABLE ANA ESTEVEZ: Huh?

25 CHAIRMAN BABCOCK: Even though Connie's

1 blowing them off.

2 HONORABLE ANA ESTEVEZ: Yeah, because they
3 can file it again tomorrow apparently.

4 HONORABLE RYAN HENRY: Yeah.

5 CHAIRMAN BABCOCK: So municipalities are
6 recidivists.

7 HONORABLE ROBERT SCHAFFER: Vexatious.

8 HONORABLE TRACY CHRISTOPHER: They do that
9 all the time in tax cases. File again if they're not
10 ready. They nonsuit and file again.

11 HONORABLE ANA ESTEVEZ: They would be
12 vexatious, perhaps, depending, so at some point there may
13 be a finding.

14 CHAIRMAN BABCOCK: Well --

15 HONORABLE ANA ESTEVEZ: But yes.

16 CHAIRMAN BABCOCK: I must say I agree with
17 Justice Christopher that whatever this is, it's not
18 traditional default. It's something else, and maybe for
19 good reason, but it's something else.

20 Robert had his hand up before you, Richard,
21 if that's all right.

22 MR. LEVY: I want to return to a comment
23 that I made before. I think that under whatever we're
24 going to call this rule, I would suggest adding, "If the
25 defendant fails to file an answer or enter an appearance";

1 and I realize that procedurally that might be a challenge;
2 but because this rule has a language that the court must
3 enter, again, default or whatever we call it, if it's not
4 deemed to be an answer, but it was an appearance, that
5 should be sufficient, particularly for a pro se party.

6 HONORABLE RYAN HENRY: And the -- as I've
7 mentioned, normally when I show up in that capacity and
8 most of the city attorneys I know, we show up with a
9 notebook with, you know, evidence in admissible form to
10 give the judge, to hand them and say, "This is it," and
11 that's largely due to kind of, I guess, the mentality or
12 the thought process of if you're getting an injunction,
13 injunctions have to have certain levels of proof, and I --
14 that's kind of the standard I was thinking of or
15 proceeding under. The -- and so if they show up, someone
16 else shows up, they're showing up ready to have a hearing
17 with evidence.

18 MR. LEVY: Yeah. Let me just clarify that,
19 again, Justice Miskel points out under (b) it says, "If a
20 defendant files an answer or otherwise appears in the
21 case, the judge must not enter a default judgment," but
22 that's inconsistent with (a), which says if you don't file
23 an answer and assuming the judge finds service is proper,
24 the judge must render a default. So they should be
25 consistent, and I suggest the language from (b) is the

1 right approach.

2 MR. JEFFERSON: I mean, it seems like the
3 problem is calling it a default. It's not a default. If
4 they've got to show up and prove their case, it's just a
5 trial setting where the other side didn't show up, and
6 you've got to convince the court you're right.

7 HONORABLE RYAN HENRY: I don't think the
8 work group has any ownership of what it's called. They
9 just -- they just want the ability to do that, you know,
10 to be able to issue their orders, so open to any
11 suggestions. A failure to answer judgment is, you know,
12 fine or whatever you want to --

13 MR. JEFFERSON: It's just a judgment.

14 HONORABLE TRACY CHRISTOPHER: Just a
15 judgment.

16 HONORABLE RYAN HENRY: Just a judgment?

17 CHAIRMAN BABCOCK: Richard.

18 MR. ORSINGER: So looking ahead to the
19 post-answer default language on page 18, Rule 563.6, I
20 think that's a much better way to express this concept.
21 It says in the post-answer default, this is 563.6(c), "If
22 the plaintiff proves its case, judgment may be awarded for
23 the relief proven. If the plaintiff fails to prove its
24 case, judgment may be rendered against the plaintiff."

25 That's a lot clearer to me than "provide

1 evidence" or "unable to provide evidence," and this
2 discussion has made it clear to me that a pre-answer
3 default or a failure to file an answer is not really a
4 default. It's more like a failure to participate. So, at
5 any rate, the concept if the post-answer default is if the
6 plaintiff proves its case or doesn't prove its case and
7 since there's really, in my opinion, no distinction
8 between the way the court handles a pre-answer default and
9 a post-answer default, I would prefer that we use the
10 trial language here so it's clear that we're talking about
11 preponderance of the evidence, prove your case.

12 CHAIRMAN BABCOCK: So even though the rules
13 say you must file an answer, there's no consequence for
14 your not filing one?

15 HONORABLE TRACY CHRISTOPHER: Right.

16 HONORABLE ANA ESTEVEZ: Well, there is if
17 you have a defense.

18 MR. ORSINGER: You don't get to call
19 witnesses unless you show up.

20 MR. JEFFERSON: You may not even get notice.

21 HONORABLE ANA ESTEVEZ: I mean, people can
22 prove up something, and it wasn't ever your house.

23 MR. ORSINGER: I think we're in that bubble
24 of a default judgment. Everything you ever knew about
25 default judgment, forget it. It doesn't apply here. What

1 we have here is we have the opportunity for somebody to
2 come into court and prove their case, with no
3 cross-examination and no contrary argument. That's a
4 trial without an opponent. That's not a default judgment.

5 HONORABLE ANA ESTEVEZ: It's like an
6 indictment versus a jury trial. Let's put it that way.

7 MR. ORSINGER: Well, except the grand jury
8 is more compliant than the judge is.

9 HONORABLE ANA ESTEVEZ: But you have to
10 present evidence, and, again, I guess that is the question
11 about how much evidence, but if no one is on the other
12 side, then that little bit of evidence is enough --

13 MR. ORSINGER: Yeah. I think that --

14 HONORABLE ANA ESTEVEZ: -- for a judgment.

15 MR. ORSINGER: I completely agree with
16 Justice Christopher. This is not a default. This is just
17 a trial without an opponent. I happen to like the trial
18 language. I think we ought to use it here.

19 MR. HARDIN: You like trial without an
20 opponent.

21 HONORABLE R. H. WALLACE: Can we just strike
22 out the word "default" in there?

23 HONORABLE TRACY CHRISTOPHER: Yeah.

24 HONORABLE R. H. WALLACE: Just judgment.

25 MR. SCHENKKAN: It's judgment if defendant

1 fails to answer. That's what this is about.

2 MR. LEVY: Or appear.

3 HONORABLE TRACY CHRISTOPHER: Or appear.

4 CHAIRMAN BABCOCK: Let's go to summary
5 disposition.

6 HONORABLE RYAN HENRY: We are recommending
7 that be struck in its entirety.

8 CHAIRMAN BABCOCK: Okay. And why?

9 HONORABLE ANA ESTEVEZ: Because that's how I
10 got everyone to agree we should actually have these rules.

11 CHAIRMAN BABCOCK: Well, there you go.

12 MS. METTEAUER: That, and there's no case
13 law -- it's a made up thing. It would be making up
14 something new.

15 CHAIRMAN BABCOCK: Yeah.

16 MS. METTEAUER: And we didn't think that was
17 wise.

18 CHAIRMAN BABCOCK: Well, that's what these
19 rules are all about sometimes.

20 HONORABLE RYAN HENRY: From my perspective,
21 as she said, it was a negotiated point. Well, I was one
22 of the ones that originally supported this. I recognize
23 this is more of an intermediate as opposed to basics --

24 CHAIRMAN BABCOCK: Right.

25 HONORABLE RYAN HENRY: -- kind of rule, and

1 if the intent is to give guidance and provide basics, as
2 long as the courts can adopt additional aspects to address
3 things as a matter of law --

4 CHAIRMAN BABCOCK: Yeah.

5 HONORABLE RYAN HENRY: -- then I was fine
6 with it being struck, so that's all this ended up being,
7 concurrence that it should be struck.

8 CHAIRMAN BABCOCK: Well, if this was
9 negotiated, then who did you negotiate with? Will they
10 feel betrayed by --

11 HONORABLE RYAN HENRY: No. Justice
12 Goldstein wants this struck.

13 CHAIRMAN BABCOCK: Okay.

14 HONORABLE RYAN HENRY: I was the one that
15 wanted it in here.

16 CHAIRMAN BABCOCK: So you're waiving your --

17 HONORABLE RYAN HENRY: Yes, I'm waiving my
18 objection.

19 CHAIRMAN BABCOCK: Okay. Justice Miskel.

20 HONORABLE EMILY MISKEL: And that was also
21 recommendation (b) that we discussed and approved this
22 morning. Or I don't know if we approved.

23 CHAIRMAN BABCOCK: Right, yeah. Richard.

24 MR. ORSINGER: My concern about summary
25 disposition has to do with the pro ses who may not grasp

1 the complexity of the process. Everybody has seen a TV
2 show, or whatever, where you just get in the courtroom and
3 you argue and testify, but nobody has ever seen a summary
4 judgment except for judges and lawyers, and so, you know,
5 what happens if it's an unsworn response or if the
6 affidavit is inadequate or you don't put the residence
7 address on your unsworn declaration? I mean, there's just
8 so many things you can screw up, and you'll not get your
9 day in court because of a technicality. This -- I think
10 it should be simple enough that somebody can show up at
11 trial and say --

12 CHAIRMAN BABCOCK: So you're in favor of
13 striking it.

14 MR. ORSINGER: I'm in favor of striking it,
15 because I'm concerned that pro ses won't grasp some
16 procedural technicalities and might be deprived of their
17 day in court unfairly.

18 CHAIRMAN BABCOCK: Because they, like you,
19 never watched Boston Legal and saw Denny Crane argue a
20 summary judgment.

21 MR. ORSINGER: No, I did watch it. I never
22 saw him argue a summary judgment. I must have missed
23 that.

24 CHAIRMAN BABCOCK: All right. So anyone
25 against striking this? So see ya.

1 All right. 563.3, settings and notice.
2 Postponing trial, requesting a jury trial. Any comments
3 about this? Roger.

4 MR. HUGHES: We're at 563.3 now?

5 CHAIRMAN BABCOCK: Yeah. Because we just
6 struck 563.2. We eliminated it. Unless I misunderstood.

7 MR. HUGHES: Yeah, on jury trial, subsection
8 (c) requires the demand for jury trial to state specific
9 facts to demonstrate, I guess, a right to trial, or
10 whatever. I -- there seems to be a constitutional problem
11 with having to do anything more than demand a jury trial
12 to be enabled to it, so I've got that problem.

13 The second thing of it is asking a person to
14 state specific facts. You know, as lawyers, we have a lot
15 of trouble trying to figure out what elements are to be
16 submitted to a jury and which ones aren't, and now we're
17 asking probably pro se people to figure out what needs to
18 be tried to the jury, what they need to be asked. I mean,
19 what I can see is some pro se person saying, "I know a
20 fact I want tried. Your city inspector is an idiot. I
21 want that fact tried to a jury," and et cetera. And so I
22 don't think it's appropriate to get into fights pretrial
23 about what are the facts that need to be tried. That's
24 why they have a dispositive motion and the potential for a
25 directed verdict, what we call a directed verdict.

1 And then, finally, the word is facts that
2 demonstrate or you have to demonstrate a specific fact.
3 Well, does that mean they have to just allege them, or
4 does that mean the demand actually has to offer prima
5 facie proof? I mean, I think we're going to get into
6 trouble here all the way around, not just on the
7 constitutional issue, but we're going to get into trouble
8 about what happens when people maybe have a trial, but
9 they don't state the right tryable fact, and then what
10 does it mean to demonstrate? You've got to prove it, or
11 is it just state it, and how specific?

12 CHAIRMAN BABCOCK: Yeah, what's the reason,
13 Judge Henry, for this?

14 HONORABLE RYAN HENRY: So, yes, sir, and
15 there was a lot of discussion in the work group about the
16 right to jury trial aspects for this.

17 CHAIRMAN BABCOCK: Uh-huh.

18 HONORABLE RYAN HENRY: Because what happens
19 a lot of the times is you're -- the city is asking for
20 injunctive relief, and it's injunctive relief that the
21 property or the condition, or whatever, is in violation of
22 the ordinance.

23 CHAIRMAN BABCOCK: Right.

24 HONORABLE RYAN HENRY: And so the way the
25 case law plays out, if the facts are basically presented

1 that they are not in compliance with the ordinance and
2 there isn't any dispute regarding those facts, then
3 there's a duty on the court to actually enforce the law as
4 it's written.

5 CHAIRMAN BABCOCK: Sure.

6 HONORABLE RYAN HENRY: Enforce the
7 ordinance.

8 CHAIRMAN BABCOCK: Like a directed verdict.

9 HONORABLE RYAN HENRY: Yeah, like a directed
10 verdict. And so if the aspects are, okay, your -- you're
11 operating a business in the wrong zone, or if you have
12 trash and debris in front of your property; if they say,
13 okay, I -- I can have trash and debris in front of my
14 property, which more often than not the factual aspects
15 aren't the things that end up getting disputed. It's
16 their agreement or disagreement, you know, with the
17 ordinance.

18 The aspect was just giving the judge a way
19 to kind of keep the system moving without getting bogged
20 down. If the aspects really are kind of undisputed, they
21 don't have the ability to contradict it.

22 CHAIRMAN BABCOCK: Yeah, are there --

23 HONORABLE RYAN HENRY: But you want it to be
24 a very low threshold.

25 CHAIRMAN BABCOCK: Are there jury trials in

1 civil cases in municipal courts now?

2 HONORABLE RYAN HENRY: Very, very few.

3 CHAIRMAN BABCOCK: But --

4 HONORABLE RYAN HENRY: But there are some,
5 yes.

6 CHAIRMAN BABCOCK: There are some.

7 HONORABLE RYAN HENRY: Yeah. And so if the
8 judge basically thinks I need -- if there's a dispute in
9 the facts or they want to give the defendant the right to
10 dispute something specific about it, then they let them.

11 CHAIRMAN BABCOCK: Well, if a party,
12 defendant or plaintiff, within 30 days or wherever,
13 however long, says, "I want a jury," do they get it or
14 not?

15 HONORABLE RYAN HENRY: Most of the time they
16 get it, but the judge will say, "Okay, what are we going
17 to try?" The city will come back and say, you know, "This
18 is the evidence," or, you know, more like an advance look.

19 CHAIRMAN BABCOCK: But they -- but they get
20 it. Presumptively, they get it.

21 HONORABLE RYAN HENRY: Yes, presumptively,
22 they get it.

23 CHAIRMAN BABCOCK: Okay. And there may be
24 some reason why they shouldn't get it --

25 HONORABLE RYAN HENRY: Yes.

1 CHAIRMAN BABCOCK: -- and that will get
2 fleshed out by the judge, but why complicate things by
3 doing -- by just saying if you're entitled to a jury, you
4 can demand a jury, and leave it at that?

5 HONORABLE RYAN HENRY: The -- if I remember
6 correctly, this issue there was quite a lot of discussion
7 on, and so I'm trying to remember the time periods of the
8 things back and forth.

9 CHAIRMAN BABCOCK: Yeah. Well, Judge Chu is
10 going to say it's from the JP rules.

11 HONORABLE NICHOLAS CHU: Luckily not.

12 HONORABLE RYAN HENRY: No, he's not.

13 HONORABLE NICHOLAS CHU: Luckily not. We
14 just give them a jury trial then.

15 CHAIRMAN BABCOCK: Huh-oh.

16 HONORABLE NICHOLAS CHU: We're elected, so
17 I've got to talk to these voters.

18 HONORABLE RYAN HENRY: If I remember
19 correctly, the aspect was you don't want the -- the judge
20 to -- when you're dealing with like the -- on the criminal
21 side, if they want a jury trial, they get a jury trial.

22 CHAIRMAN BABCOCK: Right.

23 HONORABLE RYAN HENRY: And that's kind of
24 the normal --

25 CHAIRMAN BABCOCK: I was limiting my

1 comments to civil.

2 HONORABLE RYAN HENRY: And so the -- the
3 aspects of when you're giving them the civil abilities, we
4 wanted them to understand they didn't necessarily have to
5 default to the plaintiff going through inconveniencing a
6 jury when there's no jury issue for them, and there was a
7 discussion about whether to put that burden on the city or
8 put that burden on the -- you know, the defendant or the
9 property owner, and back and forth, and I -- honestly, I
10 don't remember right now which set of reasoning we had
11 that came down with this wording.

12 CHAIRMAN BABCOCK: Well, I mean, somebody
13 brought up the Constitution. That's always a --

14 HONORABLE RYAN HENRY: Yes. But Justice
15 Goldstein was very adamant that -- you know, about the
16 jury trial aspects.

17 CHAIRMAN BABCOCK: Richard, then Pete, then
18 Justice Christopher, then Lisa, and then we're going to
19 move on to the next subsection.

20 MR. ORSINGER: So, since we're under 563.3,
21 I just want to mention in passing subdivision (b),
22 postponing the trial, "A party may file a motion to
23 request the trial to be postponed." It is not required to
24 be under oath, and I think that's good. Moving on to (c),
25 requesting a jury trial. There's no mention here of a

1 jury fee. Do you have a jury fee requirement?

2 HONORABLE RYAN HENRY: No. Actually,
3 municipal courts are not allowed to charge a filing fee or
4 a jury fee.

5 MR. ORSINGER: Okay. So then instead of
6 "Demonstrate by written submission," out of concern for
7 the pro ses, I would say requesting -- "A party requesting
8 a jury trial must list the specific fact questions."
9 They're not going to know the language we use for
10 submissions to juries, but they may be able to say, you
11 know, fact question as to whether this is excessive or
12 whatever. So, to me, I would prefer listing, but,
13 frankly, I would even more prefer putting the burden on
14 the city to file a motion to strike the jury demand if
15 there are no fact issues, because the lawyer for the city
16 is going to know better than the pro se whether you've got
17 a fact issue or not, and if the -- people can file a jury
18 demand because, by God, it's my right to have a jury.
19 They may not understand that it's only disputed fact
20 issues. The city's attorneys will. Let them file a
21 motion to strike. Don't make all of these people
22 handwrite out things they don't understand.

23 CHAIRMAN BABCOCK: Got it. Pete, were you
24 in the queue?

25 MR. SCHENKKAN: Yeah. The OCA Footnote 2

1 says zero percent were by jury trial. I assume that was
2 rounding to zero, so we really are talking about five.

3 CHAIRMAN BABCOCK: Five.

4 MR. SCHENKKAN: Chief Justices, five, that's
5 five out of 400,000. Okay.

6 HONORABLE NATHAN HECHT: 465.

7 MR. SCHENKKAN: So we are really -- we need
8 to be careful not to let the flea on the tail of the dog
9 drive this thing. Is all we really need here a deadline
10 for you to request a jury? And we got that, 30 days --

11 CHAIRMAN BABCOCK: Right.

12 MR. SCHENKKAN: -- before the trial. And
13 then the question of whether it would help the process in
14 the rare case when somebody -- perhaps prompted by the
15 fact that we have a rule that says you've got 30 days to
16 do this, says, "Well, I want to make sure I have my right
17 to jury trial," at least make them say what it is you
18 think the jury is going to do so that it's easier for the
19 city to say, "That's not a jury trial issue"; and the
20 judge says, "Sorry, this isn't one of the cases where a
21 jury is required." So those two things. 30 days, say
22 what you think the fact question to the jury will say.

23 CHAIRMAN BABCOCK: Justice Christopher.

24 HONORABLE TRACY CHRISTOPHER: If a judge is
25 making a decision that there are no fact questions, that's

1 a summary disposition.

2 CHAIRMAN BABCOCK: Wait a minute, but we
3 can't do that anymore. All right. Lisa. Were you the
4 next in the queue?

5 MS. HOBBS: I think so. I just do not think
6 they need -- I don't want -- I think it should just be a
7 jury demand. I'm amenable to Richard's proposal that the
8 government lawyers could move to strike. I would be
9 amenable to something just at the end of that that says
10 the judge may decline to -- if there are no fact issues,
11 call it -- I mean, not the summary, but there could be --
12 add a line in here that gives the judge acknowledgement
13 that he can direct a verdict or she can direct a verdict,
14 but I would not put in there that the -- that anybody has
15 to list out the jury charge in their jury demand. They
16 have a right to it. Again, I would support Richard's, but
17 it needs to be something that's not -- you should just be
18 able to demand a jury, and then whatever procedure we want
19 to do after that, I would be open to, but not in the
20 demand.

21 CHAIRMAN BABCOCK: Yeah. Okay. Judge
22 Henry, Regan, and newcomers, you are about to be treated
23 to something really special. We're going to take a vote,
24 and then we're going to have lunch. This committee loves
25 to vote. I'm always getting pressure from them to vote,

1 vote, vote, so we're going to vote on this one on whether
2 or not to have the language that is suggested in this
3 563.3(c) for requesting a jury or something else, like
4 what Lisa and others have mentioned.

5 So everybody in favor of this language, as
6 drafted and recommended by the subcommittee, raise your
7 hand.

8 MR. ORSINGER: Is that a default?

9 CHAIRMAN BABCOCK: Raise them high.

10 MR. ORSINGER: Is that a default judgment?

11 CHAIRMAN BABCOCK: All right. Everybody
12 opposed?

13 Okay. Unanimously opposed. And we'll break
14 for lunch and be back in an hour.

15 (Recess from 1:07 p.m. to 2:06 p.m.)

16 CHAIRMAN BABCOCK: All right, everybody,
17 let's get back to it. We had one of our rare unanimous
18 votes right before lunch, so we're going to keep the
19 momentum going. Rule 563.4, pretrial conference. Any
20 comments about that provision? Kennon, I didn't hear you.
21 Justice Christopher.

22 HONORABLE TRACY CHRISTOPHER: Well, back on
23 our summary disposition and what case really needs a jury
24 trial.

25 CHAIRMAN BABCOCK: Yeah.

1 HONORABLE TRACY CHRISTOPHER: Maybe if we
2 included contested issues of fact and simplification of
3 the issues, which is in current Rule 166 --

4 CHAIRMAN BABCOCK: Uh-huh.

5 HONORABLE TRACY CHRISTOPHER: -- we could
6 kind of shoehorn it in that way, so the judge could say to
7 the, you know, person, "Well, you know, what's our fact
8 issue here?" Just a thought.

9 CHAIRMAN BABCOCK: Yeah. Good idea. Any
10 other thoughts about 563.4? All right. Hearing none --

11 MR. LEVY: Well, Chip --

12 CHAIRMAN BABCOCK: 563.5, expedited actions
13 in municipal court.

14 MR. WARREN: Chip.

15 MR. LEVY: Chip.

16 CHAIRMAN BABCOCK: Yes.

17 MR. LEVY: Just making a note that in the
18 pretrial conference rule, number (9) talks about the
19 application of a Rule of Civil Procedure not in part V-A
20 or Rule of Evidence. That doesn't seem to be applicable
21 to these rules. Are the rules -- that's just pulling from
22 the -- the Texas Rules of Civil -- oh, I'm sorry, it is.
23 I apologize. You're right. My mistake.

24 CHAIRMAN BABCOCK: We good?

25 MR. LEVY: Yeah.

1 CHAIRMAN BABCOCK: Okay. Anything else?

2 Okay. Expedited. Anybody got that, any
3 comments about that? Yeah, Lisa.

4 MS. HOBBS: This is really ticky, but in
5 (c) (2), on a party's request -- "On any party's request, a
6 court must set a case for a trial date after the discovery
7 period ends." I wasn't -- I just stumbled over that,
8 whether they can set -- I think what we mean is the trial
9 date should be after the discovery ends, but it was -- I
10 don't know. It's just a little --

11 CHAIRMAN BABCOCK: Suggestive that there's
12 going to be a period in every case.

13 MS. HOBBS: Yeah. It suggests that, and
14 then also what does -- can a party request it before the
15 discovery period? I don't know, I just kind of stumbled
16 over what we were really intending there. It's just some
17 craftsmanship.

18 HONORABLE EMILY MISKEL: I was just going to
19 say, and there is no discovery period.

20 MR. ORSINGER: Right.

21 CHAIRMAN BABCOCK: That's what I meant,
22 yeah. The discovery is discretionary with the court,
23 based on the prior ruling. Yeah, Harvey.

24 HONORABLE HARVEY BROWN: I didn't understand
25 why we needed to tie the judge's hands as much as this

1 rule does. For example, you can't continue the case more
2 than twice. Never? If somebody dies the week before
3 trial, the day before trial?

4 The time limits make perfect sense in 99
5 percent of the cases, you probably never need more than
6 six hours per side, but what if there's that one
7 oddball --

8 CHAIRMAN BABCOCK: Yeah.

9 HONORABLE HARVEY BROWN: -- that says the
10 court can do it on motion and showing of good cause, but
11 only up to six hours. So, I mean, the judge can do this
12 without these rules. The judge can handle these matters,
13 so I didn't know if that was necessary to put it into a
14 rule, unless it helps with pro ses, that was the only
15 reason I can think, is you could turn to the pro se and
16 say, "I would like to give you more time, but I'm not
17 allowed to" or I'd "like to grant your continuance, but
18 I'm not allowed to."

19 CHAIRMAN BABCOCK: Uh-huh. Somebody had
20 their hand up. Was it Roger that had his hand up? No.
21 Lonny? Professor Hoffman, was that you?

22 PROFESSOR HOFFMAN: No. That's okay.

23 CHAIRMAN BABCOCK: Good? Okay, down to
24 Richard.

25 MR. ORSINGER: So on subdivision (c), it

1 says the court may continue the case twice. Is that the
2 same thing as saying the court may not continue the case
3 more than twice?

4 CHAIRMAN BABCOCK: Well, that was the point
5 that Harvey was making, yeah.

6 MR. ORSINGER: It is? So if that's true,
7 we're only going to allow two continuances, then we ought
8 to say it. This doesn't say it. You can infer it
9 perhaps --

10 CHAIRMAN BABCOCK: Yeah.

11 MR. ORSINGER: -- what was meant, but if
12 we're limiting it to twice --

13 CHAIRMAN BABCOCK: I think Harvey was
14 against limiting it to twice.

15 MR. ORSINGER: At all. Are you against
16 limiting it at all or just limiting it twice?

17 HONORABLE ANA ESTEVEZ: What if we get --

18 HONORABLE HARVEY BROWN: I think that's up
19 to the trial judge to decide this matter, and there are
20 rare occasions where something happens at the very last
21 minute that would require a continuance, like a death or
22 something extraordinary.

23 MR. ORSINGER: You could add, you know,
24 "without just cause" or something, but this is expedited,
25 and we're sending the signal to everybody that this isn't

1 going to keep going on forever. So what would you think
2 if we just said "cannot grant a continuance more than
3 twice without good cause" or something like that?

4 HONORABLE HARVEY BROWN: That would be fine
5 with me. In my arbitration orders I put "without
6 exceptional good cause."

7 CHAIRMAN BABCOCK: Not without damn good
8 cause.

9 MR. ORSINGER: Damn good cause, that's the
10 way we talk here in Texas.

11 CHAIRMAN BABCOCK: Judge Schaffer.

12 HONORABLE ROBERT SCHAFFER: Is there an
13 issue in these municipal courts of record of cases going
14 on and on and on such that you may actually need to have
15 an expedited rule? Is that a problem?

16 HONORABLE RYAN HENRY: So the -- it's
17 actually kind of a balance. The statutes say they have to
18 be expedited cases, but in a lot of the instances, because
19 a lot of the times what drags them out is that the pro
20 ses, they want more time. You know, they'll comply, they
21 just need to be worked with, and so we didn't necessarily
22 want to tie the judge or the city attorney's hands from
23 doing that. Some of them can go on for over a year,
24 because they're working with the pro ses or the property
25 owners, or for whatever reason, and so the way this is

1 kind of designated. It's -- the (b) basically says that
2 the judge on its own or the judge at request of the
3 parties can dedesignate it as expedited, like under rule
4 -- if they need more time or they need to work with them.

5 So we were trying to make sure it was clear
6 this is an expedited process, but if the judge thinks it
7 needs to be slowed down, that they can slow it down
8 without necessarily need for good cause motions every
9 single time or for every single continuance. The ones
10 that take longest, honestly, are the ones that when you're
11 trying to work with them, because sometimes they just
12 can't afford immediate clean up response. Does that
13 answer your question, or did I miss your question?

14 HONORABLE ROBERT SCHAFFER: Yes, it does.
15 It doesn't sound to me -- I live in a different world than
16 that. It doesn't sound to me like a year is that long,
17 unless it's dealing with issues that must be resolved
18 within that year.

19 HONORABLE RYAN HENRY: It really depends on
20 what the -- what that health and safety issue is.
21 Sometimes if it's just, you know, they use the wrong code
22 material, that's not a big deal. If it's they've got bugs
23 and ants and --

24 HONORABLE ROBERT SCHAFFER: And a building
25 that's about to fall.

1 HONORABLE RYAN HENRY: Yeah, a building
2 that's about to fall down. That's a bit more of a
3 time-sensitive issue.

4 CHAIRMAN BABCOCK: Richard.

5 MR. ORSINGER: So I wanted to talk about
6 subdivision (4), expert testimony. First of all, there's
7 only -- it says unless requested by the party sponsoring
8 the expert, you can challenge an expert only as an
9 objection to summary disposition, but we are probably
10 eliminating that component, or during the trial on the
11 merits. So I'm trying to reason through this.

12 This expedited procedure is you can only
13 object to an expert during trial, unless the sponsoring
14 party wants you to object prior to trial? Is that what
15 this means? So let's say that I have an expert. I may
16 want to know before trial whether they're going to be
17 qualified or not, so I'm going to file a motion and ask
18 that the other side make an objection or Daubert challenge
19 before trial? Is that what this means?

20 HONORABLE RYAN HENRY: Yeah, and it allows
21 the judge to kind of address that on a case by case basis.

22 MR. ORSINGER: Okay. So basically, as a
23 matter of litigation strategy, a proponent of an expert
24 may want to know enough in advance of trial if they're
25 going to get disqualified so they can try to fix the

1 deficiency --

2 HONORABLE RYAN HENRY: Yes.

3 MR. ORSINGER: -- or get a new expert?

4 HONORABLE RYAN HENRY: Yes. That's right.

5 And in truth, experts are not normal. They're usually the
6 exception, but they do happen, and so we wanted to make
7 sure it was addressed.

8 CHAIRMAN BABCOCK: Judge Chu.

9 HONORABLE NICHOLAS CHU: I was just
10 wondering, do we want (c) (3) with the time limits? As a
11 trial court judge, I always like to make my own time
12 limits, so I don't know if mandating this is going to hold
13 back some judges if they could do it faster.

14 HONORABLE RYAN HENRY: Yeah. I'm trying to
15 remember where those numbers came from. I think they came
16 from the section on expedited proceedings for district
17 courts, like the category ones, is where those came from;
18 but, honestly, there was a lot of angst about holding the
19 judge's or restricting the judge's ability to decide the
20 time period for the trial on their own because some of
21 them may want it faster, some may let them do longer; but
22 that's why we basically said the judge can designate it or
23 dedesignate it if they need to for that purpose.

24 CHAIRMAN BABCOCK: Justice Miskel.

25 HONORABLE EMILY MISKEL: I was going to sort

1 of follow up on what Judge Schaffer was saying, is that my
2 understanding -- so we're talking about rules for
3 Chapter 54 cases. They all seem pretty expedited to me.

4 HONORABLE RYAN HENRY: Yes.

5 HONORABLE EMILY MISKEL: Is there a reason
6 we need to have another subset of them called expedited
7 and have a special rule? Like, what was the committee --
8 why did you think you needed to add this and have a
9 separate subcategory?

10 HONORABLE ANA ESTEVEZ: They made it for
11 everybody first. So then this whole set of rules was not
12 limited to 54.

13 HONORABLE EMILY MISKEL: Okay.

14 HONORABLE ANA ESTEVEZ: So I submitted it
15 how they produced it. Then we voted a little while ago to
16 make -- well, I don't know that we've decided on whether
17 to limit to Chapter 54. We did take out summary
18 dispositions, but if we do decide, or if the Court
19 decides, only to do Chapter 54, then you probably don't
20 need that expedited, but if they choose to make it apply
21 to all of them, then the expedited rules would be the
22 Chapter 54 ones.

23 HONORABLE EMILY MISKEL: Okay. And it has
24 seemed like through consensus that throughout the day
25 we've been talking about this subset of cases where cities

1 are plaintiffs and not all municipal cases, so I think
2 that's kind of where everyone has been assuming we've
3 gone, so --

4 HONORABLE ANA ESTEVEZ: Well, I asked if
5 they wanted to change it before we came in, and they said,
6 no, so I -- I felt like it was their work product.

7 HONORABLE EMILY MISKEL: Let me ask it this
8 way. If that is approved and if that is what we're doing
9 and we're just starting with Chapter 54, then do you think
10 we still need this rule on expedited actions at all?

11 HONORABLE RYAN HENRY: Honestly, I don't
12 think so. If you look at the official comments, it does
13 list Rule 169 for expedited actions, and I think that we
14 wanted to make sure that if this is what we're talking
15 about, though, that the judge has -- it's clear that the
16 judge has the discretion to extend things out or resolve
17 things faster than 60 days in that time period. So to the
18 extent that the judge still has the discretion to control
19 their own docket, then I don't think we necessarily need
20 this section, but the -- the concern would be, because
21 they're expedited actions, if someone is trying to take a
22 Chapter 54 suit and shove it into 169, I think that was
23 part of what some of the concerns were, that we would want
24 to make sure it's separated out.

25 HONORABLE EMILY MISKEL: Oh, like if the

1 Rule 2 option was adopted --

2 HONORABLE RYAN HENRY: Yeah.

3 HONORABLE EMILY MISKEL: -- then Rule 169
4 might apply to these in municipal court.

5 HONORABLE RYAN HENRY: Yeah.

6 HONORABLE EMILY MISKEL: But if we're saying
7 we're not doing the Rule 2 option, then there's no
8 argument that 169 would apply in --

9 HONORABLE RYAN HENRY: Well, there still
10 could be, because Chapter 54 says it's an expedited
11 proceeding, and so it's not in the rule. It's in the
12 statute that it's a -- it doesn't say it's an expedited
13 proceeding, like the same that are under 169, but I think
14 the concern was we wanted to give the judges discretion,
15 because we didn't think the expedited proceedings in 169
16 were really intended for, you know, Chapter 54 suits.

17 HONORABLE EMILY MISKEL: Okay. It says
18 "preferential setting." Does it use the word "expedited"?

19 Oh, it does. Okay.

20 CHAIRMAN BABCOCK: Judge Schaffer.

21 HONORABLE ROBERT SCHAFFER: The difference
22 between this -- or one of the differences between this and
23 169 is that the parties designate the case as a Rule 169
24 expedited proceeding, whereas, here, the judge can do it,
25 right?

1 HONORABLE RYAN HENRY: Yes.

2 HONORABLE ROBERT SCHAFFER: Do the parties
3 have any ability to do that in this scenario here?

4 HONORABLE RYAN HENRY: Yeah. The way that
5 (b) is worded, the court on its own or upon a party's
6 motion can designate it that way.

7 HONORABLE ROBERT SCHAFFER: Well, that's on
8 a party's motion. 169, I file it --

9 HONORABLE RYAN HENRY: Yeah, you file it
10 that way.

11 HONORABLE ROBERT SCHAFFER: -- as an
12 expedited case, and those rules kick in. Here, you have
13 to ask for it, and the judge has to approve.

14 HONORABLE RYAN HENRY: Yes, that's correct.

15 HONORABLE ROBERT SCHAFFER: I think I'm
16 going to echo what Judge Miskel just said. The
17 proceedings are already expedited, right?

18 HONORABLE RYAN HENRY: Yes.

19 HONORABLE ROBERT SCHAFFER: And the judge
20 has the ability to set appropriate parameters, whether
21 there's 565 -- 563.5 or not, right?

22 HONORABLE RYAN HENRY: That's correct.

23 HONORABLE ROBERT SCHAFFER: So what does
24 this rule do for you?

25 HONORABLE RYAN HENRY: Guiding principles.

1 HONORABLE ROBERT SCHAFFER: Okay.

2 HONORABLE RYAN HENRY: Really is it. And it
3 might be that can be addressed if the Court -- and the
4 committee and the Court is inclined to remove this
5 provision, it would just have to be built into the
6 education for the courts that, you know, they still have
7 the ability to make those controlling decisions.

8 HONORABLE ROBERT SCHAFFER: Right.

9 HONORABLE EMILY MISKEL: Yeah, because my
10 concern would be that that limits their discretion rather
11 than expands it.

12 HONORABLE RYAN HENRY: Okay.

13 CHAIRMAN BABCOCK: Yeah, Judge Estevez.

14 HONORABLE ANA ESTEVEZ: I'll just agree with
15 her, you know, if we limited all of these rules to
16 Chapter 54, well, Chapter 54 settings are expedited, so
17 you don't need anything to create an expedited case that's
18 already expedited. So we could probably just remove that
19 whole section, but I think we probably need to rule on --
20 or have a vote on which way they're going, unless the
21 Court wants to have both options. I don't know what the
22 Court is inclined to do.

23 CHAIRMAN BABCOCK: Yeah. Okay. Any more
24 comments about this rule?

25 All right. Let's go to trial. We're all

1 ready, right? 563.6, trial. We alluded to this before.
2 Richard.

3 MR. ORSINGER: Yeah. I made the comment
4 that if you look at the language for the post-answer
5 default on subsection (c), if the plaintiff proves its
6 case, judgments may be awarded. If the plaintiff fails to
7 prove, judgment may be rendered against the plaintiff.
8 That makes good sense to me, and it actually connotes a
9 burden of proof that you need not prima facie showing, so
10 I think we should use this language for the prejudgment as
11 well, as I said before.

12 CHAIRMAN BABCOCK: Okay. Any other
13 comments? All right. Let's go to --

14 HONORABLE ROBERT SCHAFFER: Wait a minute.

15 CHAIRMAN BABCOCK: Judge Schaffer. You've
16 got to be quick.

17 HONORABLE ROBERT SCHAFFER: Well, I didn't
18 wave to you this time.

19 CHAIRMAN BABCOCK: Yeah, see, that's the
20 problem.

21 HONORABLE ROBERT SCHAFFER: (B), "If the
22 plaintiff fails to appear when the case is called for
23 trial, the judge may postpone or dismiss." That's a new
24 theory in jurisprudence, isn't it? Postpone it or dismiss
25 it. Usually if one party or the other doesn't show up,

1 that's the end of their participation in the case. Why do
2 we -- why do we want to have something different?

3 CHAIRMAN BABCOCK: Is there something about
4 the type of proceeding where a municipality, you know,
5 might not show up for innocent reasons and the judge just
6 wants to say, hey --

7 HONORABLE RYAN HENRY: Yes. And the
8 municipal court judges, I mean, we were trying to make the
9 rules functional to what municipal courts are kind of used
10 to doing. They normally will reset things, if a defendant
11 doesn't show up or if the State doesn't show up, they
12 may -- they will do what's called a show cause hearing
13 afterwards to kind of justify why they didn't show up or
14 not, and they'll apply it to both the State or the
15 defendant. And so the aspects of, you know, if it's
16 called for trial, the judges are used to having to kind of
17 do a show cause, or reason hearing, as to why you didn't
18 show up for the trial before they do anything on it.
19 That's kind of what they're trained to do, and so we were
20 just kind of making that go along the same option and
21 letting them know they can postpone it and reset it. Most
22 of them will kind of default to wanting to know why the
23 city didn't show up when it was supposed to, and we want
24 them to know they can postpone it or just dismiss it, but
25 it's up to them how they want to deal with it.

1 HONORABLE ROBERT SCHAFFER: And that goes
2 both ways?

3 HONORABLE RYAN HENRY: Yes, sir, it goes
4 both ways.

5 HONORABLE ROBERT SCHAFFER: The defendant
6 and either can -- either the plaintiff gets postponed and
7 the defendant also can get postponed.

8 HONORABLE RYAN HENRY: Yes. Yes, it can.

9 CHAIRMAN BABCOCK: Yeah.

10 HONORABLE ROBERT SCHAFFER: Not crazy about
11 that one.

12 CHAIRMAN BABCOCK: Put Judge Schaffer down
13 as not crazy. Justice Miskel.

14 HONORABLE EMILY MISKEL: Robert and I were
15 just discussing, if we've decided that the procedure for a
16 default is the same as the trial, it's just that the other
17 side isn't there, do we need to talk about it in two
18 separate places? So we currently now talk about it there
19 and here. If the procedure, we conclude, is going to be
20 the same either way, in other words, the city has to show
21 up and put on their evidence whether the defendant is
22 there or not, do we need to talk about have a separate
23 default section and a trial section, or can we just have
24 one section?

25 HONORABLE RYAN HENRY: I believe the

1 sentiment was essentially since municipal judges are not
2 necessarily used to a traditional default setup, because
3 on the criminal side you don't get a default against the
4 defendant, we want to make sure that they know and
5 understand that's something that can happen, and they're
6 going to want to know what the procedures are. This kind
7 of gives them the authority for that, the default, or
8 trial when defendant doesn't show up section that was
9 labeled differently, was intended to kind of identify for
10 them. They have to make sure service was provided. They
11 have to make sure that they were given notice to be there
12 and they failed to show up. Largely to kind of protect
13 the pro ses in that scenario. This doesn't actually
14 address those things.

15 Now, you could probably merge them, if
16 that's what you're talking about, but the committee or the
17 work group didn't feel strongly that those kind of
18 protections needed to be in there to give guidance to the
19 judges on what to do in the event that they were -- you
20 know, the defendant failed to show up, because while many
21 of them do show up, there was a good number that don't, so
22 they end up having to go through some process to prove it
23 up in the first place.

24 HONORABLE EMILY MISKEL: But, like, so
25 currently, the proposed rules have 563.1, if defendant

1 fails to answer.

2 HONORABLE RYAN HENRY: Uh-huh.

3 HONORABLE EMILY MISKEL: And then we have
4 563.6(c), if defendant fails to appear. Could you just
5 take the you have to check and make sure they were served
6 part of the first one, put it in the second one, and then
7 essentially what we're saying is all cases are set for
8 trial. Whether the defendant's there or not, the city has
9 to put on its evidence, right?

10 HONORABLE RYAN HENRY: Yeah. I don't see
11 any problem with that, but I don't know if that was
12 addressed by the committee.

13 CHAIRMAN BABCOCK: Judge Estevez.

14 HONORABLE ANA ESTEVEZ: I love it, because
15 then we don't have to define default judgment. It just
16 takes care of that issue.

17 CHAIRMAN BABCOCK: Okay. Any other comments
18 before we go to judgment, 564.1? Yeah, Judge Chu.

19 HONORABLE NICHOLAS CHU: So this change
20 happened -- or this draft happened prior, I think, to the
21 update in the JP rules, but 505.1(c)(6) is now in, which
22 is basically a statement that's required in every monetary
23 judgment, that if you are an individual, your property --
24 your property may be protected, blah, blah, blah, blah,
25 blah. So I think maybe we just need to copy that into as

1 a subpoint (5), just if there is a monetary judgment, put
2 that same language in there.

3 CHAIRMAN BABCOCK: Okay. Lisa.

4 MS. HOBBS: There needs to be something that
5 requires notice to the parties of the judgment, like we
6 require in the Texas Rules of Civil Procedure. Like they
7 actually need to give notice to the parties of their
8 judgment, not just sign it and keep it in their clerk's
9 office or --

10 HONORABLE RYAN HENRY: The -- there's not a
11 resistance to that. The problem is sometimes, like,
12 again, you don't know who it is, and you're suing the
13 property, and so notice -- we just have to provide notice
14 the same way we had been giving them notice.

15 MS. HOBBS: Yeah, you need to say that.
16 Everybody needs to -- I know that notice is not always
17 perfect, but it should always be a duty to figure that
18 out, and I would put it in the rule.

19 CHAIRMAN BABCOCK: Robert.

20 MR. LEVY: On .2, enforcement of judgment,
21 it seems a little awkwardly worded, "Municipal court
22 judgements are enforceable in the same method as in county
23 and district court." Could we say "in the same method as
24 any other judgment, except as provided by law"?

25 HONORABLE RYAN HENRY: Because the -- these

1 are triggered for the concurrent jurisdiction with county
2 and district courts, we were trying to kind of be
3 thoughtful of making sure we're talking about that, not
4 just any other judgment. Because there are other
5 judgments out there that don't have to follow those same
6 rules.

7 MR. LEVY: All right. Then I would say "in
8 the same method as judgments in county and district
9 court."

10 HONORABLE RYAN HENRY: Okay. "As
11 judgments."

12 CHAIRMAN BABCOCK: Richard.

13 MR. ORSINGER: Go back to Rule 564.1. Are
14 these judgments, some subject to de novo review and some
15 subject to appellate review, or is this just one or the
16 other?

17 HONORABLE RYAN HENRY: If it's a -- if it's
18 a Chapter 54 suit, it's just subject to appellate review.

19 MR. ORSINGER: But does this apply to cases
20 that have de novo review on appeal?

21 HONORABLE RYAN HENRY: No.

22 MR. ORSINGER: So we're only talking about
23 appellate review here.

24 HONORABLE RYAN HENRY: Yes.

25 MR. ORSINGER: Okay. So then my question

1 would be, I notice down here on the motion for new trial
2 rule that you're requiring that the appealing party have a
3 motion for new trial with points of error, and I'll talk
4 about that in a minute, but my question is do we need
5 findings of fact and conclusions of law for appellate
6 review, or is that an unnecessary complication?

7 HONORABLE RYAN HENRY: That's unnecessary,
8 and a lot of this language was taken directly out of
9 Chapter 30.

10 MR. ORSINGER: Why is it unnecessary?

11 HONORABLE RYAN HENRY: Findings of fact and
12 conclusions of law?

13 MR. ORSINGER: Right.

14 HONORABLE RYAN HENRY: If you have an
15 evidentiary hearing, I mean, the fact finder is the one
16 that makes the determinations, so if you're talking about
17 like the -- you're going to have your injunctive order,
18 which kind of has to spell out the findings of fact and
19 conclusions of law under injunctive standard already.

20 MR. ORSINGER: Under what standard?

21 HONORABLE RYAN HENRY: An injunctive
22 standard.

23 MR. ORSINGER: Which injunctive standard?
24 There's not one in here, is there?

25 HONORABLE RYAN HENRY: No. I think the

1 concept with this was --

2 MR. ORSINGER: Yeah, I had a whole question
3 about that.

4 HONORABLE RYAN HENRY: Yeah.

5 MR. ORSINGER: Because Rule 681 --

6 HONORABLE RYAN HENRY: Right.

7 MR. ORSINGER: -- of the Rules of Civil
8 Procedure and on, you have got requirements for writs of
9 injunction. No mention was made of temporary injunctions
10 and whether you have a bond, don't have a bond, whether
11 you have findings recited.

12 HONORABLE RYAN HENRY: Right.

13 MR. ORSINGER: I'm just curious where are
14 all of the rules that govern injunctive practice, if
15 they're not here?

16 HONORABLE RYAN HENRY: In Chapter 54, 54 has
17 a different standard for injunctions.

18 MR. ORSINGER: Okay.

19 HONORABLE RYAN HENRY: And so the standard
20 for injunctions is not -- it's not what's in Rule 681 --

21 MR. ORSINGER: Okay.

22 HONORABLE RYAN HENRY: -- through 683. It's
23 not as detailed as those rules are.

24 MR. ORSINGER: But there are rules?

25 HONORABLE RYAN HENRY: There are -- I'll say

1 loose rules.

2 MR. ORSINGER: Okay. Well, the reason that
3 this comes up with judgment is we have the option of
4 requiring the judgment to have essential findings in it,
5 which would assist in appellate review, but I don't have
6 an idea whether it's difficult to assess a trial record if
7 you're handling this on appeal, but instead of formal
8 findings and conclusions, we could ask the trial judge to
9 give us the essential findings in the decree, which
10 will -- which will function as the same thing. It will
11 allow the appellate court to focus the review on what's
12 really at issue. Do you see what I'm saying?

13 HONORABLE RYAN HENRY: Yes. And I think the
14 -- Regan, feel free to chime in, but my -- my memory is
15 kind of two parts. One -- and if you're writing different
16 rules, then I don't necessarily think it follows, but I
17 believe there's a rule that says judgments are not
18 supposed to issue or not supposed to contain findings.

19 MR. ORSINGER: Yeah. That's in the civil
20 rules.

21 HONORABLE RYAN HENRY: Yeah. And I think we
22 were just kind of defaulting in part to that, but, also,
23 the way judgments work in municipal court, they are
24 largely form-generated, and the clerks kind of generate
25 them normally through their system, and the judge reviews

1 them and will sign them. And so the time periods when a
2 judgment has to have separate findings are very few and
3 far between, and so it's something that's a bit more out
4 of the norm for municipal court judges, and we didn't want
5 to kind of impose additional burdens on them for that.

6 MR. ORSINGER: Okay.

7 HONORABLE RYAN HENRY: And so that was kind
8 of part of the reason.

9 CHAIRMAN BABCOCK: Yeah, Lisa.

10 MS. HOBBS: I'm trying to reconcile what you
11 just said with 564.1, "A judgment must, (1), clearly state
12 the determination of the rights of the parties and their
13 relief in the case."

14 HONORABLE RYAN HENRY: Right. So if
15 you're -- especially if it's injunctive relief, we have to
16 say, "This is what you have to do. You have to clean up
17 this, this, and this; and if not, this is the relief
18 that's given," blank, blank, and blank, and so it's more
19 of listing out so that the property owner and the -- or
20 the pro se knows exactly what their obligation is, not
21 necessarily the reasoning behind why all of those things
22 are listed.

23 MS. HOBBS: But that doesn't sound like it's
24 form-generated.

25 HONORABLE RYAN HENRY: Oh, it certainly can

1 be form-generated in a lot of the -- a lot of the
2 instances. If not, it's going to be a very short, like
3 statement.

4 CHAIRMAN BABCOCK: Justice Miskel.

5 HONORABLE EMILY MISKEL: To respond to
6 Richard, I was going to say, just as I don't think we
7 should import due order of pleading into these rules, I
8 don't think we should import findings of fact and
9 conclusions of law. It sounds like most of these
10 proceedings are not multi-day proceedings; is that fair?

11 HONORABLE RYAN HENRY: Yes.

12 HONORABLE EMILY MISKEL: Okay, so I don't
13 know that on an appellate review you would find findings
14 of fact and conclusions of law that helpful when you can
15 probably just look at the record.

16 HONORABLE RYAN HENRY: Yeah.

17 CHAIRMAN BABCOCK: Rusty, and then Judge
18 Estevez.

19 MR. HARDIN: Richard, I don't mean this in a
20 demeaning way to municipal judges at all, but I just don't
21 see them writing findings of fact and conclusions of law.

22 MR. ORSINGER: Yeah, and if they're all --

23 MR. HARDIN: I think, practically, they
24 wouldn't do it.

25 MR. ORSINGER: If they're form-generated

1 judgments, they're not going to be meaningful. It's going
2 to be on Justice Miskel to read the record and figure it
3 out.

4 MR. HARDIN: Well, she's up to it.

5 MR. ORSINGER: Yeah, she is. She's just
6 one.

7 CHAIRMAN BABCOCK: Judge Estevez, and then
8 Professor Hoffman.

9 HONORABLE ANA ESTEVEZ: So I'm going off a
10 little bit, back to one of the questions that Richard had
11 regarding what type of cases these apply to. So when they
12 wrote all of these rules, I'm just going to clarify that
13 560.3(a), the way it was written, does apply to -- could
14 apply to a de novo one as well, but the way that we, as a
15 subcommittee, have come forward, we've asked you to only
16 apply it to these Chapter 54 cases, and if you did that,
17 then it would only be for those. Am I wrong? It was just
18 this enforcement actions commenced by petition. Are all
19 enforcement actions --

20 HONORABLE RYAN HENRY: Commenced by
21 petition.

22 MS. METTEAUER: A de novo -- a nonrecord
23 court would not have a petition.

24 HONORABLE ANA ESTEVEZ: They wouldn't have
25 one? Okay, so they always have a record. Okay.

1 MS. METTEAUER: They always have a record.

2 HONORABLE ANA ESTEVEZ: Okay.

3 CHAIRMAN BABCOCK: Professor Hoffman.

4 HONORABLE ANA ESTEVEZ: Never mind.

5 PROFESSOR HOFFMAN: Picking up on what
6 Richard said a few minutes ago, it's an interesting
7 thought that if so much of these cases turns on injunctive
8 relief, and yet there's none of the procedures that are in
9 here that speak about injunctive relief, then the only
10 place they're going to look is in the Local Government
11 Code, Chapter 54, which I just looked it up. There's
12 very, very little in there on that. So I guess my
13 question is for the Court to think about whether the
14 working group should consider whether it would be
15 profitable to spell out some more detailed procedures as
16 to the showings required and whatever else is involved,
17 vis-a-vis injunctive relief, since it sounds so central to
18 what you do.

19 CHAIRMAN BABCOCK: Okay. Giana.

20 MS. ORTIZ: I notice that in the justice
21 rules from which this is modeled, from I believe 505.1,
22 the form of the judgment must also include certain
23 admonishments about rights to appeal in different cases,
24 and in general, and I wonder if it was -- or what was the
25 reason to leave that out, given the number of pro se cases

1 that come up through the municipal court system.

2 HONORABLE RYAN HENRY: The right to appeal?

3 MS. ORTIZ: Right. The justice rule states
4 that in an eviction case it gives the right to appeal by
5 filing in 21 days or making a bond and so forth in
6 different types of cases, and then it has a general
7 admonishment about right to appeal other cases other than
8 that; and given the number of pro se cases that come up
9 through the municipal court system, would it also be
10 helpful to pro se litigants to include that admonishment
11 in the form of the judgment in these case as well?

12 HONORABLE RYAN HENRY: I don't think it
13 would be a problem to include it. One of the reasons that
14 the -- it's included in the justice courts, and, I mean,
15 many times the courts of nonrecord will do the same
16 things, because the appeal is de novo, and it kind of goes
17 up with it.

18 The problem with a court of record is, by
19 the statute, they can't just appeal. They have to file a
20 motion for new trial. They have to set forth certain
21 guidelines in the motion for new trial, and when you try
22 and spell all of those things out inside the judgment
23 notification itself, you're basically just repeating
24 what's in, you know, the statute.

25 Many of the judges will -- not to give legal

1 advice, but they'll say, "An appeal is governed by Chapter
2 30 of the Texas Government Code, and you're invited to
3 look it up," or have a lawyer look it up or something like
4 that. And so you can't include the same things because of
5 the way Chapter 30 is written. That's all.

6 MS. ORTIZ: Okay.

7 CHAIRMAN BABCOCK: Okay, Roger, yeah.

8 MR. HUGHES: I mean, spell me if I'm wrong,
9 but I thought when I was reading the executive memo, there
10 are certain civil actions that the municipal courts can or
11 do hear for which the right of appeal is murky. I mean,
12 whether they -- that might have struck a nerve. You
13 might -- you know, if they don't have an appeal right, it
14 might be hard to tell them about it; and if it's
15 questionable, you know, the judge may be telling them you
16 could appeal and then they get to that court and the court
17 said, "No, you can't." I mean, that's why I'm thinking it
18 might not be a good idea.

19 CHAIRMAN BABCOCK: Well, if it's not a good
20 idea here, why did we put it earlier?

21 MR. ORSINGER: If I may, Chip, I want to
22 skip ahead to the next rule in order to come in on this
23 discussion, because in 564.3(c) we require the party who
24 is appealing to file a motion for new trial alleging
25 points of error in order to perfect the appeal. So they

1 have to know what their points of error in their appellate
2 brief at the motion for new trial stage, and we're not
3 giving -- especially the pro ses, we're not giving them an
4 idea of what the foundation was for the ruling, what are
5 the essential fact findings, what are the legal
6 conclusions that were adverse. So, now, with a judgment
7 that's just printed off of some machine --

8 CHAIRMAN BABCOCK: Form.

9 MR. ORSINGER: Yeah, it's a form. We're now
10 putting on the defendant, you now have to do a motion for
11 new trial with all of your points of error. Now, this is
12 not fitting together to me. Did you say that Chapter 54
13 required the new trial with points of error, because I
14 didn't find --

15 HONORABLE RYAN HENRY: Chapter 30.

16 HONORABLE EMILY MISKEL: Chapter 30.

17 HONORABLE RYAN HENRY: Chapter 30.

18 MR. ORSINGER: And so the Legislature is
19 requiring these --

20 HONORABLE RYAN HENRY: Yes.

21 MR. ORSINGER: -- points of error.

22 HONORABLE RYAN HENRY: Within --

23 MR. ORSINGER: Well, then I would like to go
24 back and revisit the discussion about whether we have a
25 disclosure in the judgment for the foundation. If we're

1 expecting the defendant to be able to put together their
2 appellate points in their motion for new trial as a
3 condition to appeal, I think we have to give them some
4 help, because they wouldn't have any idea what an
5 appellate point looks like, what's a fact issue, what's a
6 conclusion of law. So it seems to me like we ought to
7 revisit the degree to which the judgment is informative to
8 the litigant of why they lost so they can actually do a
9 motion for new trial that says, "I challenge this, this,
10 and this."

11 HONORABLE RYAN HENRY: The motion is
12 required, whether it's criminal or civil, and the way it's
13 arranged now, they're -- I'm not sure that the work group,
14 like, considered that aspect, because they have to do
15 that -- that's the way it works for the criminal process
16 in all municipal courts of record, and so you're
17 differentiating it, you know, from the criminal process,
18 so the judge has to actually write out the reasons, but
19 not for the -- or, you know, for the civil process, but
20 not for the criminal process.

21 MR. ORSINGER: Well, it's not the judge
22 that's going to do it. It's the city attorney, and
23 they're the best qualified of all of them to do it,
24 because they brought the lawsuit in the first place, based
25 on ordinances that they're familiar with, so I don't feel

1 like we're unfairly burdening the judges. They're just
2 going to sign whatever judgment is submitted, if it's
3 consistent with their ruling. The person involved in the
4 proceeding that's best qualified to say, "This is the law
5 that was violated, based on these facts," is the city
6 attorney, not the, perhaps, absent or certainly nonlawyer
7 defendant.

8 So all I'm advocating is if we're going to
9 require -- which I wish we didn't have to, but the
10 Legislature said it, so we have to. They have to put
11 their points of error in the motion for new trial, which
12 is the way we used to practice law back before 1989 when
13 we adopted the Rules of Appellate Procedure. That's gone.
14 So now if we're going to make them do it, let's at least
15 tell them what they're supposed to say.

16 HONORABLE NICHOLAS CHU: Chip, I just had a
17 question about this.

18 CHAIRMAN BABCOCK: Yeah.

19 HONORABLE NICHOLAS CHU: Just practically
20 speaking, like -- in your experience, how many times have
21 people appealed one of these, and then also, like, when
22 does the city usually lose an appeal? Like what is the
23 issue that comes up that they have successfully raised?

24 HONORABLE RYAN HENRY: Yeah, so very few
25 appeals comes from courts of record. More come from the

1 courts of nonrecord because they're de novo. Many times
2 if someone appeals and the city attorney will send it and
3 say, "We're a court of record, that means it's an
4 appellate issue. If you want to withdraw or if you want
5 to proceed forward, you've just got to let the court know,
6 and here's Chapter 30," and, you know, 99 percent of the
7 time they withdraw it, or they don't necessarily appeal.

8 Just because, practically, it's not as
9 beneficial to them for the pro se aspects, but when it is
10 appealed and, you know, it's the property owner or the
11 defendant that's appealing, the times that the city loses
12 really boil down to either the county court at law judge
13 doesn't understand what the ordinance did or the city
14 messed up on some form of either a notice issue -- and
15 usually it's a notice before petition is filed.

16 So under Chapter 54 you have to send notices
17 at least 20 days in advance of kind of filing a petition,
18 and the notices, you have to list out all of the ordinance
19 sections that they're not following and what they have to
20 fix before you initiate suit, and so that kind of
21 communication has already happened before suit is filed.
22 When that kind of gets to that point, if they don't send
23 that stuff, that can affect the county court at law's
24 judgment or their decision with regard to did they follow
25 those proper procedures. Or the city asks for something

1 in the judgment that they didn't actually plead for, you
2 know, in their petition. Those are the -- I'll say the
3 most common ones that I've seen or I remember seeing.
4 Does that answer your question?

5 HONORABLE NICHOLAS CHU: Yeah, I think I was
6 trying to figure out to make sure that -- sounds like on
7 the appellate side, it seems like the errors being
8 reviewed aren't necessarily factual legal sufficiency
9 issues. It's just more, hey, did these boxes get checked.

10 HONORABLE RYAN HENRY: Yeah. That's a large
11 part of -- that's most of all of it. Like I said, for a
12 lot of these cases, the factual issues are not disputed.
13 The property is in the state that the property is in. The
14 type of disputes that come up are going to be who owns it,
15 but that's why you sue the property, because regardless of
16 who owns the property, becomes a party, or whether or not
17 -- like counting of days, if you're going to impose some
18 sort of civil penalty aspect.

19 CHAIRMAN BABCOCK: Okay. Any more comments
20 about this? By this, I mean 564.1. Yeah, Roger.

21 MR. HUGHES: No. No, not 554.1. 564.1.

22 CHAIRMAN BABCOCK: What do you have a
23 comment about?

24 MR. HUGHES: The motion for new trial one.

25 CHAIRMAN BABCOCK: Okay.

1 MR. HUGHES: Not sure we're there yet.

2 CHAIRMAN BABCOCK: We're not there yet.

3 Anybody got anything on 564.2? Somebody talked about that
4 earlier, but --

5 HONORABLE ANA ESTEVEZ: Robert did.

6 CHAIRMAN BABCOCK: Any other comments? All
7 right. Now you're up, Rog.

8 MR. HUGHES: Okay. The motion for new
9 trial, subsection (c). I've got a couple of suggestions.
10 Number one, I think it would be helpful for the judge to
11 rule in writing. The rule does not have a built in
12 deadline to grant or deny, and I'm not suggesting we bring
13 in the automatically overruled as a matter of law into
14 this.

15 MS. HOBBS: It's (d). It's in there.

16 MR. ORSINGER: Already there.

17 MR. HUGHES: It is? Oh, okay. Missed that
18 page. I still think it would be helpful for the judge to
19 rule in writing.

20 CHAIRMAN BABCOCK: Okay.

21 MR. HUGHES: Second, it says, "The judge may
22 grant a new trial upon showing that justice was not done
23 in the trial of the case." And having been long-involved
24 in the whole question about what are legitimate grounds to
25 grant a new trial and whether they have to be legally

1 recognized grounds or just anything that happened, the
2 judge happens to think is justice that day, I am troubled
3 by saying that justice was not done. Because who knows, I
4 mean, that, basically, to my way of thinking, authorizes a
5 completely subjective ground that has nothing to do -- I
6 mean, it could be, gee, I'm just not sure I want this
7 little old widow to suffer after all. Or it may be, you
8 know, that they just made a bad strategic decision during
9 trial, so malpractice, but it was not a very good call,
10 and maybe they ought to get a do-over to zig instead of
11 zag. Who knows. I just am troubled by the, you know,
12 justice was not done. I think it would be better to leave
13 that phrase out or to substitute it for some legally --
14 substitute in some phrase, such as some legally recognized
15 ground for reversal.

16 CHAIRMAN BABCOCK: Okay. Richard. Boy,
17 you've been quiet today.

18 MR. ORSINGER: I know, sorry. I'm curious
19 about whether we have a concept of termination of the
20 court's plenary power and a deadline by which to file.
21 Are they in the statute and not in the rule or what -- is
22 there a time in which the judgment, if not appealed, goes
23 final?

24 HONORABLE RYAN HENRY: Well, that's part of
25 the -- that's why I got mandamused.

1 MR. ORSINGER: Uh-oh, sorry, didn't mean to
2 bring it up.

3 HONORABLE RYAN HENRY: No, that's fine. I
4 had signed the order granting the new trial. The city
5 didn't really file their motion until about 20 days after
6 the judgment was signed.

7 MR. ORSINGER: Okay.

8 HONORABLE RYAN HENRY: Then I granted it
9 about five days later, and the question is, is it a 30-day
10 deadline, or is it a 10-day deadline?

11 MR. ORSINGER: Where did those two numbers
12 come from?

13 HONORABLE RYAN HENRY: Those are in Chapter
14 30.

15 MR. ORSINGER: So do you know which one is
16 plenary power now?

17 HONORABLE RYAN HENRY: Well, since I'm in
18 Travis County, the Travis County administrative judge told
19 me it's the 10 days, but that's not really in the rule.

20 MR. ORSINGER: Well, that makes no sense.
21 We don't overrule the motion for new trial by operation of
22 law until 30 days after the judgment was signed. If you
23 lose plenary power after 10 days, you can't grant a new
24 trial.

25 HONORABLE RYAN HENRY: Well, so you have to

1 file a motion for new trial within 10 days.

2 MR. ORSINGER: Oh, okay.

3 HONORABLE RYAN HENRY: If you do, then you
4 have up to 30 days, and it's overruled as a matter of law
5 after 30 days.

6 MR. ORSINGER: And do you have to send --
7 plenary power ends on the 30th day?

8 HONORABLE RYAN HENRY: Yeah, it ends on the
9 30th day.

10 MR. ORSINGER: And when is the notice of
11 appeal due?

12 HONORABLE RYAN HENRY: It doesn't say.

13 MR. ORSINGER: Aha.

14 HONORABLE EMILY MISKEL: So the tricky part
15 is it says you have to file the motion for new trial not
16 later than the 10th day. The court may, for good cause,
17 extend the time for filing, but the extension may not
18 exceed 90 days from the original filing deadline, and then
19 -- then it's overruled by operation of law after 30 days.

20 MR. ORSINGER: So we have four different
21 dates we can pick from. Okay.

22 HONORABLE RYAN HENRY: And in truth, I mean,
23 one of my personal objectives was to get an answer to that
24 question, but the work group was thinking we're already
25 biting off so much with this version, we'll address the

1 appellate issue at another time, was basically what the
2 conclusion of that discussion was.

3 MR. ORSINGER: Well, that's not fair for you
4 to toss that out here on the floor and then tell us we
5 can't talk about it.

6 HONORABLE RYAN HENRY: Oh, you can talk
7 about anything you want, but just, historically, that's
8 kind of why it's not in these rules.

9 MR. ORSINGER: Yeah. It might be a good
10 time, though, when we're adopting rules to put some
11 structure to the post-judgment timetable, particularly if
12 the judges are not themselves sure about when they lose
13 plenary power.

14 HONORABLE RYAN HENRY: Yeah.

15 MR. ORSINGER: We ought to specify a
16 deadline for Rule 329b motions, whatever they may be in
17 this environment, and then a period of time when they're
18 overruled by operation of law and then a period of time
19 when plenary power ends, with or without a 329b motion,
20 and then an appellate deadline. All of that seems like
21 essential to me.

22 HONORABLE RYAN HENRY: And I think part of
23 the -- part of the reason that it didn't go that way was,
24 one, as Judge Estevez had said, when we had started we
25 were kind of drafting them for all of them, and the

1 different subject matter statutes separately have
2 different time periods in them.

3 MR. ORSINGER: Oh, no.

4 HONORABLE RYAN HENRY: Yeah. Like under
5 214, it's an appeal to district court, and it's a -- I
6 think it's 20-day window, if I'm not mistaken, and so we
7 didn't want to basically attack that aspect in whole, but
8 for limiting it to Chapter 54, it's more narrow. But,
9 also, there was a concern about the interplay between the
10 rule and exactly the way Chapter 30 is written, and we
11 didn't want to interfere with consideration of the rules
12 with just the concern of the way Chapter 30 is written.
13 So we've dealt with Chapter 30 and the way it works and
14 kind of its vagueness for a while, and we kind of felt we
15 could deal with it a little while longer. We were trying
16 to get the rest of the rules kind of in front of the
17 committee and before we tackled that monster.

18 CHAIRMAN BABCOCK: Richard and Chris, Rule
19 564.3(d) says the motion is denied as a matter of law
20 automatically at 5:00 p.m. on the 30th day. On the
21 quality of life issue, would you rather have that be 5:00
22 or midnight?

23 MR. ORSINGER: No, I think I'm okay with
24 that.

25 CHAIRMAN BABCOCK: You're a 5:00 o'clock

1 guy.

2 MR. ORSINGER: If you haven't perfected your
3 appeal at the time you filed the motion for new trial,
4 you're screwed anyway.

5 MR. PORTER: I say give them to midnight.

6 CHAIRMAN BABCOCK: He's a midnight guy.

7 HONORABLE ANA ESTEVEZ: You're not going to
8 look at it until the morning anyway, right?

9 MR. PORTER: No one is going to look at it
10 anyway.

11 CHAIRMAN BABCOCK: He's a late night guy.

12 MR. PORTER: Yeah.

13 CHAIRMAN BABCOCK: Yeah, Roger. You're not
14 going to say something serious, are you?

15 MR. HUGHES: No, but I go back to say that I
16 think the ruling ought -- there's a strong argument to
17 make the requirement a written ruling, because suppose the
18 judge orally grants the motion for new trial. No one
19 reduces it to writing. 30 days goes by, and the parties
20 fall to quarreling, well, did the judge grant it or not.
21 I can't remember what the judge said, and now the judge
22 goes, "Gee, I don't remember either. I don't even
23 remember what I ate for breakfast. You expect me to know
24 what I said in open court 30 days ago?" I just think it
25 could lead to problems.

1 Now, that -- and, that said, you know, it
2 presents a trap for the unwary pro se, because we have a
3 number of cases about where new trials are granted on the
4 record orally by the judge and nobody bothers to submit an
5 order and then the deadline expires. And the cases are
6 all the same, no written order granting the new trial by
7 the deadline when the plenary power expires, it's not
8 granted. I'll leave it to the committee to decide whether
9 they want to make it a written order or whether, for the
10 sake of clarity, or leave it as-is in hopes that we're not
11 creating a trap for an unwary pro se party.

12 CHAIRMAN BABCOCK: Okay. Anything else?
13 Yes, sir. Yeah, Judge.

14 HONORABLE RYAN HENRY: Very briefly. One of
15 the odd things of municipal court and why it is a
16 different creature, while Chapter 30 says the Code of
17 Criminal Procedure applies, there is an aspect of that
18 code that isn't limited to criminal; but what it says is
19 that if the court has an electronic case management
20 system, that an electronic entry, which is essentially a
21 docket entry or entry by the clerk, counts as the order or
22 judgment in the matter; and so you can basically get a
23 screenshot of the -- the oral pronouncement from the court
24 that's recorded, and that technically counts. It's just
25 one of those weird things about the way records are kept

1 in municipal court. So just something to keep in mind.

2 CHAIRMAN BABCOCK: Harvey.

3 HONORABLE HARVEY BROWN: I'm assuming
4 there's a reason that you don't have JNOV rules. I mean,
5 I know there's only been five jury trials. What if? So I
6 just raise the question.

7 HONORABLE RYAN HENRY: It's just easier for
8 the judges to grant a new trial than do the JNOV, because
9 that's what they're going to do.

10 CHAIRMAN BABCOCK: Okay. Any other -- Lisa.

11 MS. HOBBS: I just want to clarify that
12 the -- the requirement in the proposed rule that says you
13 have to state what you're going to appeal, that is from a
14 statute that we cannot change?

15 HONORABLE RYAN HENRY: That is from Chapter
16 30, yes, ma'am.

17 MS. HOBBS: Okay. And do you know if
18 they're wedded to that? Like if I just wrote out "I am
19 planning to appeal because you're dead wrong," period.

20 HONORABLE RYAN HENRY: From what I've seen,
21 that doesn't work. It can be generally -- it doesn't have
22 to be all that much more formal, but "I'm appealing
23 because the judge counted the day wrong, and I filed on
24 time. I filed on this day, not this day." Or "The judge
25 got it wrong because the -- I should be legally excused

1 because my wife is having a baby on this day," or
2 something like that. That's generally what you would find
3 from a pro se that sees it and reads it, and those types
4 of things have been examined to see do they properly list
5 something that legally is a ground for appeal.

6 MS. HOBBS: Okay.

7 CHAIRMAN BABCOCK: All right. Well, Judge
8 Henry, thank you so much.

9 HONORABLE RYAN HENRY: Thank you very much.

10 THE COURT: And, Regan, you, too. Thank you
11 for presenting and providing your insight to us, and the
12 subcommittee as well. This will be submitted to the
13 Court, and I'm sure if it -- if the Court has any
14 questions, we will receive them and deal with them in due
15 course, but thank you. Thank you very much again.

16 We're going to move on to Rule 42 now.
17 We've got at least two people here who wish to speak about
18 that, and I don't know, Richard, whether that -- they've
19 been waiting around kind of a long time. Maybe we should
20 let them speak first.

21 MR. ORSINGER: Okay.

22 CHAIRMAN BABCOCK: I know you would like to
23 hog the spotlight here.

24 MR. ORSINGER: If we haven't gotten
25 completely through it, I would hope we wouldn't close the

1 discussion at the end of the day because we are kind of
2 close, but I think we should let them speak and go about
3 their way, and we'll get down to the task.

4 CHAIRMAN BABCOCK: Yeah. Good. Well, who
5 wants to go first? If anyone.

6 MS. BALLI TORRES: Good afternoon, my name
7 is Betty Balli Torres, and I am the executive director of
8 the Texas Access to Justice Foundation, and so I just want
9 to talk to you a little about who we are. Many of you are
10 familiar with us because you know the IOLTA program, and
11 so we are the administrator of the IOLTA program, but more
12 importantly, we are the largest funder of civil legal aid
13 in the state.

14 We were created by the Supreme Court of
15 Texas to administer legal aid funding, and so through that
16 funding we have various funding sources. We are entrusted
17 by the Supreme Court to administer over \$40 million in
18 legislative and state funding, and so that includes
19 funding for crime victims, sexual assault survivors,
20 veterans, and other people who are in dire need. We also
21 have been entrusted by the Governor's office to administer
22 COVID money, and also the attorney general's office. We
23 administer crime victims for them, and also we administer
24 funds on opioid disorders. And so part of our job and our
25 responsibility is to look at the entire delivery system to

1 determine how funding should be provided in this state.

2 We fund -- and when I say that, I don't mean
3 a small grant today and another grant tomorrow. We
4 sustain over a hundred legal aid offices in this state.
5 Not only do we sustain a hundred plus offices, those
6 offices, they have -- they handle approximately a hundred
7 thousand cases a year. They have something like 50 teams,
8 so think of every substantive area you can handle, legal
9 aid is handling it.

10 Also, there's 80 plus types of cases that
11 they handle. When people think of the Texas Access to
12 Justice Foundation and legal aid, you don't necessarily
13 think of some of the things that we do. We are front and
14 center in disasters, and so, for example, when Hurricane
15 Katrina hit, within a week we secured money and put out a
16 million dollars to the Gulf Coast area to help get that
17 area back on its feet.

18 When there's a mass shooting, you don't
19 think of legal aid as a first responder. They are. We
20 funded efforts in El Paso from the Wal-Mart shooting a few
21 years ago, and then also in Uvalde, which is now a couple
22 of years. We had money that we were able to secure, and
23 we opened up an office in Uvalde, Texas.

24 Our goal is to look at the entire state,
25 figure out where the needs are, and then fund in those

1 areas. Just a minute ago I was looking at an article that
2 came out this morning that says that Tarrant County now
3 has surpassed Austin and Houston in terms of evictions, so
4 I'll go back to my office and figure out what's happening
5 there, what can we do to help support these efforts.

6 And so how does this fit into cy pres? So
7 cy pres funding is something that has not been mandatory
8 funding for legal aid in Texas, but in other states it is.
9 There are rules throughout the country that provides that
10 funding should go to the -- the IOLTA program or to other
11 entities. Out of the 26 states that currently have cy
12 pres rules, 17 go to the IOLTA programs in those states,
13 in whole or in part.

14 And so why is this important? Two reasons.
15 So one is need. When we first started looking at cy pres
16 in 2001, we were meeting 20 percent of the civil legal
17 needs of poor Texans. Abysmal. Abysmal. And so then we,
18 through UTSA, had a study done, and the study showed that
19 we were only meeting 10 percent of the legal needs here in
20 Texas, and that did not include immigrants. So that 10
21 percent was an outlier, and so we didn't understand why
22 our statistics were so different. Well, it turns out that
23 a year ago the federal -- the Legal Services Corporation,
24 which is the federal funder, conducted a study, and it
25 shows that only eight percent of the civil legal needs of

1 poor Texans are being met. Effectively, the courthouse
2 doors are shut for 92 percent of low income Texans in the
3 state. So I thought 20 percent was abysmal. Eight
4 percent is an embarrassment, and that's where we are.

5 So we're always looking for what are the
6 things that we can do to support legal aid and to stop
7 talking about pro se as much, because we actually have
8 lawyers who can represent people. So in looking at the
9 cy pres rule, we've done a couple of things, several
10 things at the foundation. One, back in 2001, we were able
11 to get a bill passed unanimously through -- I think but
12 for one vote, unanimously through the House and Senate
13 with the Texas Access to Justice Commission, and
14 regrettably, it was vetoed by the Governor. You will see
15 your letter from 2002 from John Jones who was there at the
16 -- who was then the chair of the commission.

17 Since then, the foundation has been
18 involved, and we've had pro bono counsel to help us on
19 amicus briefs throughout the country, supporting legal aid
20 for -- cy pres for legal aid. We've also been involved
21 with the National Association of IOLTA Programs. Again,
22 amicus briefs to try to continue making this really a
23 funding that could come to legal aid.

24 So where are we now? The need is immense,
25 and since 2001, we've had the American Bar Association

1 adopt a resolution saying that cy pres funding should go
2 to the legal aid. Last year we had the National
3 Conference of Chief Justices adopt a similar resolution.
4 We've had the National State Court Administrators' office
5 say this funding should go to legal aid, and so it really
6 is a benefit to the justice system when people have
7 lawyers, and they can better navigate when they have
8 lawyers, and so I'm here to ask you to support the
9 commission's letter.

10 So you will see that there is a letter by
11 the Texas Access to Justice Commission, chaired by Harriet
12 Miers. About three weeks ago, in this same room, we had
13 the exact same discussion, not the details about Rule 42
14 so much as a recommendation as to where funding should go,
15 and the Texas Bar Foundation indicated that they feel like
16 some of the funds should go to them. The foundation
17 spoke, and by unanimous decision, the Texas Access to
18 Justice Commission said it should go to the Texas Access
19 to Justice Foundation, and because we really are the
20 entity that looks at the entire delivery system to try to
21 figure out what's the best way for us to support the more
22 than 5 million low income people who need legal services.

23 So I hope that you will revise the rule so
24 that cy pres can go to legal aid, specifically to the
25 Texas Access to Justice Foundation, so that we can start

1 chipping on that eight percent. Eight percent, as I said,
2 is abysmal, but every single dollar that comes into the
3 delivery system, I promise you that our job is to not just
4 make sure where it goes, that it goes to the greatest
5 need, but the other thing that we do is we actually get
6 reports from every program as to what do they do with this
7 money. And we send teams, including fiscal people,
8 programmatic people, to their offices to ensure that they
9 are spending the money the way they're supposed to.

10 So what you get is accountability from us,
11 and you get really the vision of the entire state and what
12 is happening in regards to low income people, and so I
13 appreciate the opportunity to talk to you about the Texas
14 Access to Justice Foundation and about access to justice,
15 which is -- I always love talking about. It's my favorite
16 thing to talk about, I think, and so I am glad to answer
17 any questions right now.

18 CHAIRMAN BABCOCK: Betty, thank you. Any
19 questions? Richard.

20 MR. ORSINGER: Yes, thank you. Ms. Torres,
21 you mentioned that in the past that you were distributing
22 funds for opioid disorders, COVID, crime victims, sexual
23 assault victims. Do you have some responsibility for
24 disseminating for nonlegal purposes? I don't see -- I
25 don't see the connection.

1 MS. BALLI TORRES: We do not. Everything we
2 do is related to the civil justice system.

3 MR. ORSINGER: So let's say the COVID
4 relief. What legal part of the COVID relief was there?

5 MS. BALLI TORRES: So, for example, a lot of
6 people during COVID were isolated with their batterers.
7 They were isolated with the people who were abusing them.
8 They lost their jobs, and so now they're being evicted,
9 and so a lot of the money has gone to eviction. On behalf
10 of the Texas Department of Housing and Community Affairs,
11 we have awarded almost \$45 million in eviction money.

12 MR. ORSINGER: Now, is that rent? That's
13 not legal fees. That's not providing lawyers.

14 MS. BALLI TORRES: It's providing lawyers,
15 not rent.

16 MR. ORSINGER: Okay. So you're saying that
17 you used those funds to get legal representation for
18 people who were being evicted.

19 MS. BALLI TORRES: Exactly.

20 MR. ORSINGER: But did not use the money to
21 pay any past due rent or anything like that.

22 MS. BALLI TORRES: We did not.

23 MR. ORSINGER: Now, what about the victims
24 of, say, assault?

25 MS. BALLI TORRES: Crime victims, right.

1 MR. ORSINGER: Is there -- are you paying
2 for a lawyer to become involved or what -- how is the
3 funding used?

4 MS. BALLI TORRES: Typically what we do is
5 we fund lawyers. So -- and the support team, right, and
6 so on a crime victim, we might help them get crime victim
7 compensation. A crime victim might be a survivor of
8 sexual assault. We might help them get out of their
9 lease. Everything we fund is civil legal aid, civil
10 justice-related. We do not pay for, you know, the other
11 things which are challenging for our clients, but that's
12 our goal, specifically, is to get lawyers.

13 MR. ORSINGER: And what about on the opioid
14 disorders you mentioned? How does the legal process get
15 involved in that?

16 MS. BALLI TORRES: It is really tragic what
17 happens with people with those kinds of addictions, and so
18 you end up having a lot of families who are torn apart,
19 children who go to grandparents, for example, and so we
20 might help the grandparents get custody, or they end up
21 with an aunt, end up with termination cases. You end up
22 with people who no longer pay their mortgage, no longer
23 pay their rent, and so what we're trying to do is
24 stabilize the family when we fund civil legal aid.

25 MR. ORSINGER: And how is a lawyer involved

1 in that stabilizing process?

2 MS. BALLI TORRES: It could be through
3 trying to get the -- it's going to be a lot of family law.
4 It could be guardianships. It could be helping them to
5 get into the school. For example, it could be an eviction
6 or could be a foreclosure. So all of the various legal
7 matters -- all of these societal problems end up
8 ultimately a legal problem, and it cascades, so a person
9 typically does not have one legal problem. They have
10 several legal problems, and it's just this cascade, and so
11 if we can stabilize, we can stop them from continuing down
12 that path.

13 MR. ORSINGER: And that's all through lawyer
14 representation or legal advice?

15 MS. BALLI TORRES: It is all through lawyer
16 representation. It's also through pro bono. We fund --
17 we have 135 sustained grants, not a grant today, you know,
18 a sustained grant, so you can keep your lawyers from year
19 to year. We fund all of the major pro bono programs, also
20 sustained grants. Recently the newest one is SALSA out of
21 San Antonio. We fund almost every law school in the state
22 to have clinical programs so we can get young people
23 involved in legal services, and they either become legal
24 aid lawyers or become pro bono lawyers. So we're looking
25 at the entire delivery system and try to fund so that we

1 can move forward.

2 MR. ORSINGER: Thank you.

3 CHAIRMAN BABCOCK: Any other questions?

4 That was a cross-examination.

5 MS. BALLI TORRES: It really was.

6 MR. ORSINGER: No, it's going to reflect in
7 the policy debate that we engage in later.

8 CHAIRMAN BABCOCK: So you're setting a
9 predicate?

10 MR. ORSINGER: Well, I wanted the legal fact
11 to be --

12 (Interruption by phone virtual assistant)

13 CHAIRMAN BABCOCK: Okay. Betty, thank you
14 so much.

15 So, Geff, are you ready to roll?

16 MR. ANDERSON: I'm really to roll. Thank
17 you, Chip.

18 CHAIRMAN BABCOCK: Okay.

19 MR. ANDERSON: Thank you. We've got two
20 problems or two things here today that are important, and
21 it's sort of like she spoke about earlier, the Tale of Two
22 Cities. This is the tale of two foundations, but the good
23 thing that's going on here today is you have two
24 foundations in the state working their tail off to fight
25 the problems that the impoverished are having getting

1 access to the courthouse. I sat in that room one month
2 ago and argued our position with the Access to Justice
3 Commission, and I can tell you that the people who work on
4 the Access to Justice Commission, although we disagree,
5 are full of energy and effort, know what they're doing,
6 and their executive director is fantastic, and they're
7 busting their tail to help access to justice in Texas.

8 We are, too. I'm the chairman -- I'm a
9 lawyer from Fort Worth, but I'm the chairman of the Texas
10 Bar Foundation. The Texas Bar Foundation started in 1965,
11 about 255 lawyers. It is the largest charitably-funded
12 bar foundation in the United States, which means it's the
13 largest charitably-funded bar foundation in the world and
14 any place that James Kirk could go.

15 Since 1965, we have given \$26 million in aid
16 to persons to advance the rule of law, advance the system
17 of justice, and particularly focused on those who are
18 deprived access to justice. Also, to promote ethics and
19 administration of justice and education about the third
20 branch of government. We've been doing that since 1965.

21 Here are some significant grants that we can
22 point back to to say here's what the foundation did for
23 us. We funded the IOLTA program. We funded the
24 implementation of the Texas Access to Justice Commission.
25 We've been doing it since 1965. \$26 million, and it's not

1 just a hundred different offices. Over that time we have
2 worked with 19 -- almost 1,900 different organizations to
3 forward our mission. In the past year, we gave 1.6
4 million in grants, in grants that we funded to a hundred
5 different organizations. This year we likely will eclipse
6 \$1.7 million in grants to fund our mission statement.
7 Over the past four grants sessions alone, we have put
8 1.7 million toward access to justice, but we do other
9 things, too, and they're important to the people of the
10 State of Texas.

11 We -- we do things that aren't direct access
12 to justice. We can create fiscal plans, we can rebuild
13 the courthouse in Murray (sic) County. We can take people
14 who are rolling out of the foster system and get them
15 acclimated, as long as it's in our mission statement to
16 moving forward and becoming better Texans and avoiding the
17 need for legal problems in the future. Veterans
18 assistance. If you look on our website, which is
19 txbf.org, you'll see our impact statement and the kind of
20 good work we've done for Texans providing access to
21 justice and other sources of help that fall within our
22 mission statement.

23 In this past year alone, a lawyer from
24 Florida, without any contact with us, settling a class
25 action lawsuit, *Heath vs. Insurance Technologies*, went to

1 Judge Godbey in Dallas and said, "We're so impressed with
2 what the foundation does, we want them to get our cy pres
3 funds," and we were the recipient of \$4.25 million in cy
4 pres funds that went into our corpus to continue doing
5 what we're doing to fight for Texans and provide legal
6 assistance.

7 Yet, one week from today, the trustees in
8 the foundation will meet a few blocks from here, and this
9 particular grant cycle we have our highest request ever,
10 \$3.5 million. We only have 800,000 to fund those grants,
11 so we need this cy pres money, but I want you to be sure
12 that, like the executive director of the foundation said,
13 we take care of the money that we award through our
14 grants. We just don't read the grant and send the check.
15 For every grant over \$15,000, two trustees interviews the
16 grant applicant, checks on the grant applicant, and
17 there's an audit done afterward to make sure that the
18 money is spent exactly the way they requested, exactly the
19 way we granted, and the notification is given to the
20 public of the Bar Foundation's involvement in that
21 program, and we see new programs all the time helping
22 Texans all over the state, the entire state, just like the
23 Access to Justice Commission.

24 So what we've got today is a great problem.
25 We agree on what the problem is, and that's access to

1 justice, and we agree that the problem needs to be solved,
2 and both foundations, working as hard as they can, can
3 solve that problem, but we want to be a part of the
4 solution, and as a result, we would like to be included as
5 a potential recipient for cy pres awards under Rule 42 of
6 the Texas Rules of Civil Procedure.

7 Chief Justice, Chairman, thank you very
8 much.

9 CHAIRMAN BABCOCK: Thank you, Geff.

10 Okay. Any questions? Yeah, you going to do
11 another cross-examination?

12 MR. ANDERSON: Oh, wait.

13 MR. ORSINGER: I want to lay a little bit of
14 foundation for the later discussion. The only
15 jurisdiction I could find that did this was the District
16 of Columbia, but they allowed the district court to
17 solicit applications from parties who would like to
18 receive cy pres allocations, and I'm wondering is it
19 feasible, if our Texas Supreme Court were to allow
20 individual judges to accept applications, could your
21 foundation make an application?

22 MR. ANDERSON: Absolutely.

23 MR. ORSINGER: Now then, there are a lot
24 of -- there's a lot of writing and perhaps people on this
25 committee that are concerned with the idea that cy pres

1 was originally going to be as near as possible to the
2 original intent. When you carry that over to the class,
3 you're talking about a group of people that had a certain
4 injury and liability associated with some kind of
5 wrongdoing, right? So if the money goes to a recipient
6 that's very distant from the people who are in the class
7 that got injured, some people start having a concern that
8 we're not really cy pres anymore, now we're just funding
9 charities.

10 Do you have the flexibility in the Bar
11 Foundation if a district judge or a group of plaintiffs
12 and defense lawyers wanted to find as near as possible a
13 group of people that was similar interest to the class, do
14 you think you have some flexibility to where you could
15 look and see what the complaint was, what the class was
16 certified, what the damages were, and see if you have in
17 your portfolio things that could get closer to that as
18 opposed to just funding charity?

19 MR. ANDERSON: Yes, we do, but there are
20 some caveats to that. As a grant cycle approaches, we
21 know at the beginning what the requests are, so it's not
22 like we have -- we don't have a standing group that we
23 always fund. Each grant cycle we have new people coming
24 in, and we like to get them funded and off to seeking
25 other sources and flourishing. So the types of grants

1 that come in in the two grant cycles a year could change,
2 but, yes, we can get things to as nearly as possible under
3 the cy pres doctrine; and we do have funds, like our dues,
4 bar checkoff dues that come to us that go straight to
5 legal access. So we can take the money and send it where
6 it needs to be, yes.

7 MR. ORSINGER: And in the one case where you
8 did already receive a cy pres award you mentioned, was it
9 conditioned on something that was similar to the interests
10 of the class, or was it unrelated?

11 MR. ANDERSON: It was unrelated. It was not
12 sent to us that way. In fact, you know Alistair Dawson,
13 who is on this committee. Alistair had just rolled off as
14 the chairman, and I became the chairman, and we got a call
15 out of the blue that the cy pres award -- that we had been
16 selected as the recipient, which immediately we thought we
17 were -- someone was trying to steal our bank account.

18 MR. ORSINGER: And so you will treat that as
19 just an unconditional bequest to spend whatever way the
20 board, or the committee that awards, you're free to make
21 the decision, wherever it might be.

22 MR. ANDERSON: We have a lot of placement.

23 MR. ORSINGER: And how tied are these
24 grantees to the legal system?

25 MR. ANDERSON: They all fall within our

1 mission statement. I've only seen two -- I've been a
2 trustee for six years. I have only seen two grant
3 applications that were clearly on review outside of our
4 mission statement. We don't fund those. Those are taken,
5 but they're all within our mission statement, which was to
6 enhance the rule of law, the system of justice, promote
7 ethics in legal -- in the legal field, promote education
8 about the third branch of government, and provide victims
9 assistance and help for those who are underserved by the
10 legal system.

11 MR. ORSINGER: Okay, thank you.

12 MR. ANDERSON: Sure.

13 CHAIRMAN BABCOCK: Yeah, Jim.

14 MR. PERDUE: Geff, if -- following up on
15 Richard's question, if -- so those funds are unrestricted
16 into the foundation.

17 MR. ANDERSON: Those funds from the Heath
18 case were unrestricted.

19 MR. PERDUE: But if a judge had a class that
20 was associated with an issue in which the parties,
21 defendant, plaintiff, court as well, felt that the cy pres
22 doctrine would put it closer to a -- a charitable cause
23 closer to the underlying funds that are left over, can you
24 make a restricted grant through the Texas Bar Foundation?

25 MR. ANDERSON: I believe the answer is

1 correct. There are certain restrictions that probably
2 couldn't be made, but what you're talking about, yes, I
3 believe.

4 And, Chairman Babcock, I do want to say that
5 it's been nice to be here, fascinating to learn what we
6 learned earlier. I've got to go home and cut my grass.

7 CHAIRMAN BABCOCK: May I remind you you're
8 still under oath?

9 MR. ANDERSON: But I have not seen Jim
10 Perdue since 1992 when he was in law school and I was in
11 kindergarten, and it has been so nice to spend time with
12 Jim today. Thank you very much.

13 CHAIRMAN BABCOCK: Thank you very much.

14 All right. I think that's everybody who was
15 here, outside speakers to speak, but maybe I'm wrong about
16 that. Anybody else? All right. Eduardo.

17 MR. RODRIGUEZ: I just want to say that next
18 week I will be walking the halls of Congress with
19 Ms. Balli asking them to continue funding legal services,
20 and we've been going every year for several years.

21 CHAIRMAN BABCOCK: Well, good for you. As
22 they say in show business, break a leg.

23 MR. RODRIGUEZ: Thank you.

24 CHAIRMAN BABCOCK: All right. Okay,
25 Richard, having successfully cross-examined and driven one

1 out of the room --

2 MR. ORSINGER: He had something important to
3 do, cut his grass.

4 CHAIRMAN BABCOCK: Yeah, Cindy.

5 MS. GRAHAM: This may be rather just gauche
6 to even ask, I'm not even sure that that's the right word,
7 but if we're talking about these two great organizations
8 who really are looking to be recipients, I think it's
9 rather important -- they both have great causes, but do we
10 know what their overall reserves are? Their capital
11 reserves I think are somewhat relevant for us to consider
12 when they're going to be giving these monies away, and
13 comparatively, I'm interested to know -- is he still here?

14 MR. ORSINGER: No.

15 HONORABLE ANA ESTEVEZ: He ran away.

16 MS. GRAHAM: I'm interested to know what the
17 Bar Foundation's reserves are and then what y'all's
18 reserves are, and I suppose we could probably contact him,
19 or somebody could, to find his answer, but I think that's
20 pertinent information.

21 CHAIRMAN BABCOCK: Okay.

22 MR. ORSINGER: So would you mind turning
23 your computer down so it doesn't interrupt us?

24 CHAIRMAN BABCOCK: That was a big surprise
25 to me, but --

1 MR. ORSINGER: Okay.

2 CHAIRMAN BABCOCK: But just watch what you
3 say, because Siri is listening.

4 MR. SCHENKKAN: Siri could get you.

5 MR. ORSINGER: So you guys will recall that
6 the last time we were here we had a debate at a high level
7 and not the mechanics of what would happen, and we took a
8 vote, and out of the committee of 35, only 19 voted, the
9 Chair not voting, and the vote was 12 to 7 that the
10 Supreme Court should have some rule associated with the
11 award of these cy pres funds. We didn't discuss what the
12 rules were, what the alternatives were, and so that's part
13 of what we're going to do today, but Lonny Hoffman spoke
14 to me earlier in the meeting and made me realize that
15 our -- we really haven't discussed policy as much as we
16 should in order to get down to our specific choices of
17 whether we have a mandatory rule for a hundred percent or
18 50 percent or 25 percent or option with the judges.

19 So the memo is constructed to discuss some
20 of the very high level policy issues that will lead to the
21 choices that we have to make, and just so you'll have it
22 in mind, in case you didn't get a chance to read this
23 agenda, back on page 78 of our agenda, page 10 of this
24 memo, is a ballot that I put together; and it, unlike the
25 previous one that we used at the subcommittee level, went

1 from the best choice to the first choice. I felt it would
2 be most successful or most helpful to the Supreme Court to
3 know the first, second, and third choices; and the reason
4 is I fully expect a split vote on what options, specific
5 options we want; and it may be that our first choice may
6 be one or two votes ahead of somebody's second choice; and
7 it may be useful to find out, if your choice is not
8 favored, which would your second choice be, and if your
9 first two are not favored by the Supreme Court, what would
10 your third be. So that ballot is there just to have in
11 mind, and we'll get to it in a minute.

12 So I'd like to start out this memo that is
13 informative in itself, but it also contains the
14 application from the Texas Access to Justice Commission
15 back in 2002, as well as the one they just submitted a
16 couple of weeks ago, as well as a very insightful e-mail
17 from Pete Schenkkan on our subcommittee, and he gave me
18 permission to reprint, and I have that in there.

19 I've also attached what I thought were
20 representative law review articles or journal articles or
21 institutional website articles about the question of cy
22 pres allocation, and it's not meant to be comprehensive,
23 but it's meant to be representative of different schools
24 of thought. And then behind that I have a table that
25 shows -- starting at page 79, it shows the different

1 approaches that have been taken by the jurisdictions here
2 in the United States; and a number of them are legislative
3 descriptions of what to do with cy pres and others were
4 adopted by their Supreme Court; but they're summarized
5 here for you to read briefly; and we're going to go
6 through those today, time permitting.

7 And then behind that summary chart, I've
8 gone to each one of those sources, and I've taken the
9 statutory language or the rule language, put it in the
10 table, and highlighted in yellow the language that
11 addresses the question of the mechanics of who gets to
12 receive cy pres funds on what basis.

13 So let's dive in then to the policy
14 discussion. The first thing to discuss on page two is
15 where would we put it in our rule, and I think the idea is
16 it best would go into Rule 42(e) on settlement, dismissal,
17 or compromise. Across the country it appears to be that
18 most of these rules appear in the part that have to do
19 with the disposition by settlement or dismissal, and we
20 already have subdivisions (1) (A), (B), (C), and the idea
21 is to add a (D). (A) is the court has to approve it; (B),
22 the material terms notice has to be given to the class;
23 (C), the court can approve or reject; and we would add a
24 (D), "Any residual funds that remain after the payment of
25 all approved class member claims, expenses, litigation

1 costs, attorney's fees, and other court-approved
2 disbursements to implement the relief granted may" -- or
3 you could put "shall" -- "be distributed to," and there's
4 a blank there. And it could be that we don't go that
5 route, we leave it between the lawyers and the judge.

6 It could be that we have one approved
7 recipient, or it could be we could have a list of
8 recipients that are approved, any one of which is
9 automatically going to be okay, but the idea is the best
10 place for us to put this rule then is in 42(e)(D).

11 Now then, I thought on page three a very, I
12 think, insightful analysis of the policy questions here
13 came out of a summary report, committee report, from the
14 House of Representatives on a Class Action Litigation Act
15 of 2017, a federal bill that was approved by the House,
16 but, so far as I can find, was never voted on in the U.S.
17 Senate, but it did represent the voice of the majority of
18 the House of Representatives as recently as 2017, and I'll
19 just read selections.

20 Quote, "Class actions include large numbers
21 of consumers who were satisfied with the product or
22 service at issue and, therefore, have zero motivation to
23 obtain compensation." Skipping down, "While the use of
24 cy pres in class action settlements has benefited numerous
25 organizations, the practice is troubling because it raises

1 serious questions about the purpose of the class action
2 device. As one court put it," quote, "'there is no
3 indirect benefit from the class from the defendants giving
4 the money to someone else.'" And as the Third Circuit
5 Court of Appeals stated in another case, 'Inclusion of a
6 cy pres distribution may increase the settlement fund and,
7 with it, attorney's fees, without increasing the direct
8 benefit to the class.'" And -- end quote. "And cy pres
9 diminishes any incentive to identify class members, since
10 the lawyer will receive the same amount of fees, even if
11 hardly anyone gets compensated. In sum, consumers of many
12 class action lawsuits are not receiving any benefits.
13 Rather, the bulk of the money ends up going to the lawyers
14 and uninjured third party organizations." And what the
15 bill essentially calls for is not prohibitions, but a
16 requirement of notice to the class members so that they
17 can object.

18 Now, more recently, Chief Justice Roberts --
19 well, I say -- in 2013, there was a case that made it to
20 the U.S. Supreme Court, and cy pres was involved. They
21 did not grant cert on the issue, but uniquely and
22 unusually, Chief Justice Roberts wrote a statement
23 associated with the denial of certiorari, and I'll quote
24 it. It's not too long.

25 "I agree with this Court's decision to deny

1 the petition for certiorari. Marek's challenge is focused
2 on the particular features of the specific cy pres
3 settlement at issue. Granting review of this case might
4 not have afforded the Court an opportunity to address more
5 fundamental concerns surrounding the use of such remedies
6 in class action litigation, including when, if ever, such
7 relief should be considered, how to assess fairness,
8 whether new entities may be established, how closely the
9 goals of any enlisted organizations must correspond to the
10 interest of the class." Those are excerpts, not a
11 complete quote.

12 Paragraph six on page four of the memo is a
13 selection of an article from Professor Rhonda Wasserman at
14 the University of Pittsburg School of Law, who's written
15 thoughtfully on the subject, and I'll just -- a few
16 highlights of her article that was published in 2014 in
17 the *Southern California Law Review*. "Cy pres
18 distributions are overused today because defendants prefer
19 them and class counsel do not fight hard enough to
20 maximize cash payments to class members. Too often the
21 courts acquiesce in the party's cy pres proposal."

22 So she goes on to make four pragmatic
23 recommendations. "First, align the interests of class
24 counsel and the represented class. Courts should
25 presumptively reduce attorneys' fees in cases in which cy

1 pres distributions are made. Second, class counsel should
2 be required to make a series of disclosures when it
3 presents a proposed settlement for judicial approval."

4 Number three, "The court should appoint a
5 devil's advocate to oppose the settlement in general, the
6 cy pres distribution in particular, and the request for
7 attorneys' fees by class counsel," and number four, "The
8 court should make written findings in connection with its
9 review of any class action settlement that contemplates cy
10 pres distribution."

11 The next article is paragraph seven is Jay
12 Tidmarsh, *George Washington Law Review*, 2013 and '14, and
13 the title is "Cy Pres Optimal Class Action," and I wanted
14 to highlight there his suggestion that there are four
15 outcomes. Return the unclaimed funds to the defendant,
16 which the downside is a windfall to the alleged wrongdoer.
17 A second option is increase payments to those who file
18 claims. This approach may result in overcompensation to
19 some victims. The third option is to escheat the
20 unclaimed funds to the government. "This solution
21 prevents a windfall to the defendants and overcompensation
22 to the plaintiffs, but the government's entitlement to the
23 funds is weak at best."

24 The final option is "give the unclaimed
25 funds to a group of people similarly situated to the

1 victims, perhaps a consumer advocacy group or educational
2 institution. This final approach is the first use of cy
3 pres relief. It enjoys the advantage of neither providing
4 a windfall to the defendant nor overcompensating the
5 victims, while ensuring that the unclaimed funds will be
6 returned to some purpose generally advantageous to the
7 victims' litigation interests, which an escheat cannot
8 do."

9 Paragraph eight is an article off of the --
10 provided by the Chicago Bar Foundation website, called
11 "The Battle Over Cy Pres Awards." It mentions the Google
12 case, and the Google case has become kind of a poster
13 child, because what happened in Google, as you all will
14 recall, they sent these cars through all of the
15 neighborhoods in America, with taking 360 pictures, which
16 then they put together into their Google views of their
17 maps. But unbeknownst probably to most people at the
18 time, in the process of doing that they were capturing all
19 of the Wi-Fi data of all of the homes and businesses that
20 they went by, and they got tons of information that was
21 confidential and sensitive.

22 So somebody figured the technology of that
23 and they sued the hell out of Google for it, and, you
24 know, basically Google was guilty. They had acquired all
25 of this information through a wiretap, or what would be

1 the definition of wiretap, illegally and tortiously, so
2 liability was clear, but the problem was there's no way to
3 go back and reconstruct whose data was taken and what
4 their damages were. So you had a class, and you had in
5 aggregate you could measure the damage, but there was no
6 way to allocate the funds. So the class settlement was a
7 100 percent cy pres. There was not one injured person
8 that got one penny, and so it became kind of the poster
9 child of why are we having this class action. The lawyers
10 are making millions or tens of millions of dollars in
11 fees. Google has got an infinite amount of liability.
12 They're going to get a res judicata bar by paying this
13 settlement. Everybody that doesn't opt out is going to be
14 barred from suing Google, so it's kind of become a debate,
15 and so anyway --

16 MR. HARDIN: With a resolution.

17 MR. ORSINGER: -- this article by Boies and
18 Finkel goes on to talk about the Google case and suggests,
19 "The court should recognize cy pres awards for legal aid
20 as an appropriate use of residual settlement funds. Legal
21 aid organizations like the class action device itself
22 exist to provide broad access to justice. Because of that
23 access to justice connection, this one category of cy pres
24 recipients always has interests that reasonably
25 approximate the interest of class members."

1 So instead of looking at, well, I got
2 cheated on my insurance or I got cheated on my automobile,
3 they're saying I got cheated and I need a lawyer, but I
4 can't afford with lawyer. Well, that's the whole problem
5 with class actions. The class people can't afford a
6 lawyer, so they get a class lawyer. So these writers, and
7 they're not alone, say that access to justice foundations
8 and organizations are automatically cy pres. Now, that's
9 not an all universal view, and it certainly can be
10 contested, but it does give you an intellectual foundation
11 for a decision to say that legal aid and access to the
12 poor is always cy pres in every lawsuit, no matter who the
13 plaintiffs were and no matter what the damages were.

14 The last -- no, the next, paragraph nine, is
15 *Hawes vs. Macy's, Inc.* It was a Southern District of Ohio
16 federal district judge rejecting a class settlement, and
17 his reasoning was so insightful and so to the point I
18 really wanted to be sure that it was part of our
19 discussion, and I want to read part of the end of the
20 opinion.

21 "In sum, contrary to the parties' argument,
22 the cy pres doctrine does not provide the court with
23 freewheeling authority to dole out class funds to
24 unrelated parties merely because they happen to be
25 charitable organizations. Article III courts resolve

1 cases and controversies. They are not a legislature that
2 appropriates funds in pursuit of the public good.
3 Consistent with that, the court's role is to adjudicate
4 the legal rights of the parties before it. In the class
5 setting, that means the court has an obligation to ensure
6 that settlement proceeds benefit the class. The cy pres
7 doctrine simply allows for a distribution that achieves
8 those benefits indirectly. The question then is not what
9 may be a good use of funds or even the best use of funds,
10 in some generic sense. Rather, the sole question is the
11 next best use from the class perspective, as measured
12 against the direct distribution to absent class members.
13 To clear that threshold, cy pres award must at least
14 benefit the class indirectly, by either, number one,
15 remedying the underlying harm, or, number two, reducing
16 similar harms in the future."

17 And then skipping to the end, he said, "The
18 bottom line is that the cy pres award included in the
19 settlement agreement," which, by the way, was to a public
20 interest research group, a Nader group that advocates for
21 consumer safety. Y'all may remember Ralph Nader, some of
22 you. Anyway, this was a local perk that got the cy pres
23 on it. He said, "The bottom line is that the cy pres
24 award included in the settlement agreement diverts class
25 funds to an unrelated third party, whose use of the funds

1 will not benefit the class's interests here, directly or
2 indirectly. Thus, the court concludes it must reject the
3 settlement."

4 And then paragraph 10 is a article, I won't
5 take too much, but it breaks down, of the jurisdictions,
6 which ones have a rule where the allocation of cy pres
7 funds is left in the hands of the counsel and the court or
8 if it's mandated to only one provider, typically access to
9 the poor provider, or there's a percent that's mandated
10 and the rest is discretionary. And as I said earlier, the
11 District of Columbia actually allows the courts to solicit
12 applications for the funds in that particular case.

13 So that brings me to the sample ballot, and
14 before we engage in a policy debate, I would like to just
15 put this before you. The ballot is on page 78 of the
16 agenda, or 10 of my memo, and this is an arbitrary
17 allocation, but I've tried to be as fair as I could.
18 Number one is leave Rule 42 unchanged, which means there's
19 no direction from the Supreme Court, and it's the Wild
20 West, the judges can do whatever the lawyer agrees to,
21 whatever they agree to.

22 Number two is distribute to class members
23 who did file claims. This is the unused funds that either
24 they can't be identified and given away, or they're so
25 small that it's not practical to give everyone notice and

1 mail it out. So the idea is, okay, well, we don't know
2 who all of the unknowns are. We do know who filed a
3 claim, so we're going to just go ahead and pay them twice
4 or three times their damages.

5 The third option is return the excess funds
6 to the defendants, because it's not going to compensate
7 anyone's harm. The argument against that, of course, is
8 that part of this is punishment. Part of this is you did
9 a bad thing and you should pay for it.

10 Number four, distribute to an entity serving
11 interests as nearest possible to that of the class. That
12 was the pure cy pres concept here, but the question is who
13 chooses that, because if you leave it up to the lawyers to
14 choose it, then they're going to make a deal that is okay
15 with them and not necessarily the benefits of the class,
16 and then the judge may reject it, like this district
17 judge, but because we know this district judge has
18 associations with certain charities, we're going to be
19 sure that part of these cy pres funds go to that charity.
20 And so what you end up, if you read a lot of these cases,
21 is very questionable motives for how the allocation was
22 made; and some of them are very arbitrary, like a local
23 American Board of Trial Advocates.

24 One study showed that a lot of the alumni,
25 these were lawyers who are alumni of law schools, their

1 law schools got disproportionately recognized for cy pres
2 funds, and we know that had nothing to do with the merits
3 of the law school compared with every other law school.
4 So the problem with leaving it up to the lawyers and the
5 judge is that the lawyers do what they do, not necessarily
6 with the public or even the class' interest, and the trial
7 judges don't provide supervision, and I can't find a
8 single case where an appellate court has ever reversed a
9 trial court. I may be wrong and someone may know of one,
10 but I think essentially there's no appellate oversight of
11 whatever the two trial teams and the trial judge does,
12 which is one of the deficiencies here, is that nobody is
13 really supervising.

14 Number five is -- I just said number five.
15 Lawyers pick the donee, subject to trial court and
16 appellate review. Number six is for the Texas Supreme
17 Court to give a list of approved people, institutions or
18 organizations, and if you pick off that list, you know,
19 it's automatically okay. Or maybe you can require them to
20 pick off that list and say you can't go to anyone but
21 these people, all of your cy pres funds have to go to
22 either one or two or three or four.

23 Item seven is 100 percent to the Texas
24 Access to Justice Foundation. All of the people that I'm
25 aware of that are affiliated with that like that because

1 this is an essential source of funding for the work that
2 they do, and that was very important for me to ask and
3 find out are they going to go for legal services and not
4 for social -- social worker services, because if there is
5 no limitation even to providing legal representation or
6 legal advice, then we've really kind of left the realm of
7 cy pres and we're in the realm of funding government
8 services.

9 So that's one option, and you'll see in a
10 minute here that a lot of courts have gone and
11 legislatures have gone with the option of either 100
12 percent for access to justice or 50 percent access to
13 justice and 50 percent discretionary with the lawyers or
14 25 percent. So we could do 50 percent required to a
15 particular one or two designated recipients that are
16 preapproved, and then the other half could either go to
17 whoever the lawyers and judge agree on or to some other
18 institution on the list.

19 Number 10, escheat to the State for a
20 specific purpose. Number 11 is escheat to the State for
21 restricted purpose, and number 12 is anything that anyone
22 comes up with. So what's behind here is the history of
23 what the states have done legislatively and with rules;
24 and so with that background, Chip, I thought it would be
25 good to have a little bit of discussion about the policy

1 level, because once we have an understanding of the
2 positions on the policy, we can go to this ballot and I
3 think more easily decide whether we just want to have one
4 recipient or two recipients or a list of recipients or
5 just let the lawyers and the trial judge do it.

6 CHAIRMAN BABCOCK: Yeah, before you do that,
7 how did you interpret our vote last time?

8 MR. ORSINGER: The vote last time, which I
9 quoted in the memo was --

10 CHAIRMAN BABCOCK: I know what the vote was,
11 but how do you interrupt it?

12 MR. ORSINGER: Okay. Well, let me read it.

13 "CHAIRMAN BABCOCK: So who thinks that the
14 Supreme Court should have the authority to designate who
15 gets the unclaimed money?

16 "MR. ORSINGER: Exercise the authority.

17 "CHAIRMAN BABCOCK: Whatever. Supreme
18 Court. Okay. How many people think the parties and the
19 judge? Okay. Supreme Court wins on that one, 12 to 7,
20 with the Chair not voting."

21 So 12 people out of 35. 35 that didn't vote
22 or weren't here or whatever.

23 CHAIRMAN BABCOCK: Right.

24 MR. ORSINGER: Twelve people said the
25 Supreme Court ought to decide, and that's the end of it.

1 Seven people didn't want the Supreme Court to make the
2 decision, and I don't know whether that's because they
3 wanted the lawyers to do it or whether they wanted the
4 court to be free to solicit applications or whether they
5 only wanted 50 percent of it to be mandatory and 50
6 percent discretionary. We don't have those details, and
7 we can't write a rule until we do.

8 CHAIRMAN BABCOCK: Yeah, so your
9 interpretation of the vote is that it was less than clear
10 and too few people voted.

11 MR. ORSINGER: Well, 12 out -- out of 19
12 people, 12 wanted the Supreme Court to adopt a rule,
13 didn't know -- didn't say what the rule was.

14 CHAIRMAN BABCOCK: Majority of the people
15 voting, okay.

16 MR. ORSINGER: Yes, it was. It was less
17 than two-thirds, and it was about one-third of the
18 committee, so but, yeah, I don't think the Supreme Court
19 is controlled by our vote. They're controlled by our
20 debate and the choices that we offer them, and that's why
21 I think it's important.

22 CHAIRMAN BABCOCK: I know, but our votes are
23 so sacred, but Professor Hoffman.

24 PROFESSOR HOFFMAN: So I was not at that
25 last meeting, and so I'm kind of coming at this a little

1 bit --

2 CHAIRMAN BABCOCK: How would you have voted?

3 Never mind.

4 PROFESSOR HOFFMAN: I'll say more about
5 that. And I think the first thing I want to say to kind
6 of orient my comments is that, while I understand,
7 Richard, what you were trying to do with this sample
8 ballot, I think it has a quality of sort of distorting in
9 some ways the sort of where the conversation should be,
10 and so the way I would maybe suggest some kind of earlier
11 thinking on this is I think there's an initial question to
12 ask, which is should there ever be cy pres awards in class
13 suits or not? Now, I don't mean to suggest that this
14 committee should answer that question. We don't have the
15 authority to answer. You know, that's above our pay
16 grade.

17 CHAIRMAN BABCOCK: We don't have authority
18 to do anything, but we can advise the Court.

19 PROFESSOR HOFFMAN: Right, but even the
20 Court is not going to probably by rule ban -- I doubt they
21 would ban cy pres awards based on a rule. It might come
22 up in a case, right? It might be here's a constitutional
23 challenge to them or something like that, but, yeah, no, I
24 don't know, but -- but even just thinking about that first
25 question for should there ever be a cy pres award or

1 should there not be raises a question about if we did
2 decide that, you know, since they still exist, that
3 there's no Supreme Court decision telling us that we can't
4 do it, to amend the rule might very well require -- 42 may
5 require putting in some language to give guidance to trial
6 courts about sort of what their options are, and the
7 options aren't the eleven that are listed here.

8 I mean, at a much broader level, those
9 options are -- Richard's mentioned them, but just to
10 highlight them, they're reversion to the defendant.
11 They're escheating to the State, or they're what's
12 referred to as pro rata. So, in other words, you take the
13 group of people who actually have filed for a claim.
14 Among the many who could, you take the group that actually
15 filed for one, and you give them more. You give them
16 more. They almost -- but, anyway, almost never going to
17 get to a hundred percent anyway. The primary complaint is
18 always fearing of overcompensating them, but that never
19 happens.

20 Anyway, so one open sort of starting point
21 is to ask that question of cy pres or no cy pres? Again,
22 there are limits to how much we can do, but once we're in
23 the world that I think we are, kind of, our conversation,
24 which is if we're going to have cy pres awards, what
25 should we be putting there? And it seems to me what

1 Rhonda Wasserman is talking about, in her article that
2 Richard spent some time on -- a little bit of time on, are
3 really some of the more interesting questions to think
4 about, which is rather than thinking about this problem
5 only in terms of whether it should be the access to
6 justice or some other foundation, courts should probably
7 be thinking about what sort of limits or procedural
8 safeguards they should include, along with considering
9 giving a cy pres award.

10 And so just to just say a little more about
11 what Richard said quickly, so these are Rhonda Wasserman's
12 ideas, not mine, but what she's talking about is, number
13 one, maybe lawyer fees shouldn't be based on all of the
14 award, the total amount of the settlement, but rather
15 there should be some significant reduction based on the
16 amount that's actually claimed, and so the way that
17 reduces it, if it goes to a cy pres, the lawyers would get
18 less, and the idea behind that is to try to more
19 incentivize the interest of the class counsel with the
20 absent class. Because if the lawyers get paid the same
21 whether the class members get the money or not, then the
22 theory is they don't have as much incentive to fight for
23 absent class members to get the money, just give it all to
24 whoever, access to justice or someone else, and they get
25 to reap the full amount of their fee. So that's an

1 important one, but she has some others.

2 One of -- the second one she mentions is
3 more required disclosures by the defendant. She's mostly
4 talking about notices that go to absent class members to
5 kind of maximize the likelihood they will participate.
6 The third one is a really provocative one that she didn't
7 originate, but Bill Rubenstein and others have talked
8 about for years, which is the appointment of kind of like
9 a devil's advocate, objecter, to kind of question whether
10 a cy pres award is an appropriate thing. Of course, you
11 can do that for other parts of the class as well, and then
12 finally, having judicial findings in writing that sort of
13 justify why the cy pres award is needed. So to use the
14 Google example that Richard just gave, if you happened to
15 have a case where it's just impossible to give anyone any
16 money, then that might be exactly the kind of case in
17 which you want to have a cy pres award, because, again,
18 the alternative is nobody gets anything and the defendant
19 just keeps all of their money, but the court should sort
20 of lay all of that out in their findings.

21 And so the upshot of all of Wasserman's
22 comments is to say that, separate from the debate about
23 whether this group, this group, should get the money, how
24 closely affiliated they should be to the underlying
25 allegations of wrongdoing in the case, all of which are

1 perfectly good and important questions to have, there are
2 these other procedural safeguards that we should be
3 thinking about, and so I think, to the extent I'm
4 contributing anything of value to this conversation, I
5 think what I'm trying to say is if we're going to amend
6 Rule 42 to talk about cy pres awards, this seems like
7 exactly the time and the right place that we would want to
8 give more guidance to trial courts to consider some of
9 these procedural safeguards that should go along with it,
10 as opposed to just saying the money should go to or
11 consider giving the money to access to justice. So those
12 are some of my thoughts.

13 CHAIRMAN BABCOCK: Yeah, I think the judge
14 had her hand up first, Marcy, and then you.

15 HONORABLE ANA ESTEVEZ: Mine isn't related
16 to what he said. Mine is more related to what Richard
17 spent a lot of time working on, and even if we're not
18 going to use it, I think it would be helpful if everyone
19 will spend one minute and fill out that survey for him,
20 because he spent a lot of time, and he wants to know, and
21 I think we all need to know what is the overall thought
22 process of this committee, because it's probably overall
23 the thought process of the whole legal community.

24 CHAIRMAN BABCOCK: You want a vote on
25 whether we fill out the survey or not?

1 HONORABLE ANA ESTEVEZ: No, I just want
2 everyone to fill it out because it would take less than --
3 it wouldn't even take a minute. We wouldn't even have to
4 talk about it, and then just hand them to Richard, and
5 Richard could do whatever he wants with them, if wants to
6 put it in our report when we come back. I mean, my -- I,
7 frankly, did not read the transcript, but I actually
8 thought we were done with Rule 42, because I thought that
9 when we were done voting last time, we had voted that the
10 Texas Supreme Court was going to be able to give out the
11 money, whether that was -- and then we just had to decide
12 who was going to get it, but I should have reviewed the
13 transcript -- well, I don't know. I still don't know.

14 CHAIRMAN BABCOCK: Or crawled inside of his
15 head.

16 HONORABLE ANA ESTEVEZ: No, because I sent
17 him a little e-mail saying I thought we were done with
18 this and it's back on the agenda, and he sent me an e-mail
19 that had a follow-up on drafting, but I think we never did
20 really know where we landed.

21 CHAIRMAN BABCOCK: Yeah.

22 HONORABLE ANA ESTEVEZ: So I don't think it
23 will hurt to fill that out.

24 CHAIRMAN BABCOCK: More information is good.

25 HONORABLE ANA ESTEVEZ: I think so.

1 CHAIRMAN BABCOCK: Yeah. Marcy.

2 MS. GREER: Well, I think that -- I don't
3 disagree with what you're saying, and I don't disagree
4 with what Professor Hoffman is saying either, but I don't
5 think there's a one-size-fits-all in terms of class action
6 settlement. They are very -- they're some of the most
7 difficult cases to settle. They are very complex, and I
8 actually have had a case where all of the class members
9 were compensated a hundred percent, and had there been a
10 redistribution in that case -- and it went before your
11 court, and had there been a pro rata distribution, they
12 would have been overcompensated. So these things do
13 exist.

14 I've seen every kind of -- I've settled so
15 many class actions and written settlement agreements, and
16 so I've dealt with these issues. I've negotiated them,
17 and each one is completely different, and each one needs
18 to be thought of separately.

19 A cy pres award is -- is not all of the
20 things on this list. A cy pres award is a very specific
21 grant of unclaimed property or uncashed checks, I should
22 say, that goes to a -- some sort of third party who is not
23 a member of the class for a purpose that gets cy pres as
24 close as possible to benefiting the class members. So
25 like, you know, for example, we had one that involves Fair

1 Credit Reporting Act violations, and the money -- the cy
2 pres money, what was left over, and there always is money
3 left over, and it's surprising how much money is left
4 over, regardless of how hard you try to get it in the
5 hands of the class members. There's money left over, and
6 something should be done with it, and I love the idea of
7 access to justice, and I think access to justice and these
8 foundations that provide legal services, to Richard's
9 point, I think the need to provide legal services is
10 always going to be an appropriate cy pres recipient of any
11 uncashed checks, because that money is going to provide
12 legal services, and this is a class action, the point of
13 which is to get -- to redress harm on a wide scale basis.

14 So I think that that's a great opportunity,
15 but I think that there needs to be some flexibility in
16 this process, because sometimes a pro rata redistribution
17 to the plaintiffs makes sense if the people who
18 participate are only getting 30 percent of what they would
19 have recovered in a full settlement, you know, or in a
20 full claim, then maybe you do a redistribution. If
21 there's money -- if there's a -- a cy pres recipient is
22 always a good way to handle this, but it's not the only
23 way, and I think that you've really got to look at the
24 various pieces, and when the lawyers come -- I know
25 there's a lot of talking about collusion and all of that

1 kind of stuff.

2 As a practical matter, there are people
3 called objectors, and they show up in large quantities,
4 and they talk about, you know, the things that are wrong,
5 so they become the adversary. I don't know -- I mean, if
6 there is no objecter, and I have had a couple of
7 settlements where there were no objectors, but for the
8 most part, there are objectors, and they're there being
9 very loud and very vocal and very adversary to scrutinize
10 the process. And I think that's good, because it helps
11 the judge make the right decision and really think about
12 the benefits that are being provided for the class.

13 What's tricky is that you're never going to
14 be able to compensate them as if you went to trial. I
15 mean, it is a compromise, and so there are different ways
16 to deal with it. There are certain things, like if the
17 most important thing to the class is to remediate the
18 problem and adopt specific practices within your company
19 that change how they do their employment practice, that
20 could be significantly important, and it's not going to be
21 a monetary recovery, but it's worth a lot in some cases.
22 You have to take that into consideration, and as to the
23 idea of reducing the attorneys' fees to reflect the
24 cy pres award, that's a great idea in theory, but it's
25 never going to work, because you pay the attorneys' fees

1 after judgment, and you don't defer the attorneys' fees
2 for two years or three years, or in one case I had, the
3 claims process took about five. You don't defer the
4 attorneys' fees until that point. So as a practical
5 matter, you're not going to know that number up front.

6 I think that the important thing is, at the
7 time, the judge makes the best decision that they can
8 based on all of the information presented to them, and
9 they need the different tools, including what the
10 adversary parties are recommending and what any objectors
11 might say about it. I -- my recommendation would be to
12 the Court, if the Court wants it, would be to have -- to
13 basically sanctify -- maybe that's not the right word --

14 CHAIRMAN BABCOCK: Sanction.

15 MS. GREER: -- but preapprove certain
16 recipients, if the Court and the parties and everybody
17 agrees it should be cy pres, because, again, the class
18 action is presented to the court, and the court makes an
19 up or down vote. There is no line item veto. I mean,
20 there is the if you change this, I might approve it kind
21 of thing, but for the most part, it's an up or down vote
22 on the entire settlement, which is the entire pieces. The
23 court's not going to know what was most important, except
24 through what the parties present. So the court should
25 take all of this information into account; and if the

1 class is fair, reasonable, and adequate, if the settlement
2 to the class members is fair, reasonable, and adequate,
3 then they approve it. But I think trying to do anything
4 that says this is the presumptive way to handle this is --
5 is a really bad idea, and instead, the most I would
6 recommend is that the Court say, here are -- access to
7 justice is preapproved, basically, as a cy pres recipient.

8 Maybe that's a comment. I'm not sure how to
9 handle it, but I do think that's worth a lot, because a
10 lot of times people are looking for who is the proper
11 recipient, and having that kind of gold standard from the
12 Court would be a great benefit, because it helps in
13 talking to your client.

14 You know, Richard was asking me if my client
15 would have agreed to go with access to justice, and I
16 think if the -- especially if the Court said that's, you
17 know, who we like or 50 percent should go to access to
18 justice, I think that they would have been comfortable
19 with that. They just didn't want the money to escheat to
20 the State, and I've got to tell you, I feel very strongly
21 and, of course, disclaimer, that was my case, I don't
22 think -- I don't think any benefit comes from that money
23 going to the unclaimed property funds, because nobody can
24 get it out of there, and so if we're going to benefit
25 people, it ought to be access to justice or one of these

1 other alternatives.

2 CHAIRMAN BABCOCK: The -- I have a question,
3 but go ahead, Connie.

4 MS. PFEIFFER: I have a question for Marcy.
5 Do you know whether there are any tax consequences for the
6 defendant, depending on how this cuts?

7 MS. GREER: The defendant does not get a tax
8 consequence if it goes to a cy pres. We looked into that.
9 That was important in our case, because, you know, of
10 course, our client would have liked the tax deduction, but
11 they do not get it because of the way it's set up, because
12 the money actually goes into what he is called a QSF, a
13 qualified settlement fund, which is a separate entity. So
14 there is no -- when the cy pres award is paid, the
15 defendant does not get a benefit.

16 CHAIRMAN BABCOCK: Judge Estevez.

17 HONORABLE ANA ESTEVEZ: I have a question
18 for Marcy, too. You were talking about whether or not
19 some of the funds could go back to plaintiffs in the end.
20 What do you think about amending the rule that to state
21 once the plaintiffs have been fully reimbursed, then -- so
22 that way you can -- they can double dip or triple dip
23 before it goes into the other funds.

24 MS. GREER: I don't think that's a really
25 good idea, because, as a practical matter, you're only

1 going to get to really do one -- maybe one, possibly two,
2 pro rata distributions. The cost of doing that through
3 the settlement administrator, the transactional cost is so
4 expensive, and so little of it actually gets to the class
5 members that it really doesn't make a lot of sense. You
6 know, there's a point at -- because, theoretically, you
7 could keep redistributing and redistributing, and no
8 matter how -- I mean, these people have participated,
9 they've filed proofs of claims, they get more money, and
10 they still drop off the face of the earth. It just
11 happens.

12 CHAIRMAN BABCOCK: Can I ask Marcy a
13 question?

14 MS. GREER: Sure.

15 HONORABLE ANA ESTEVEZ: Of course.

16 CHAIRMAN BABCOCK: What about Richard's
17 survey? Do you like it or not like it?

18 MS. GREER: Well, I mean --

19 CHAIRMAN BABCOCK: Okay, that's enough, you
20 don't like it.

21 MS. GREER: No, I mean, I see why he did it.
22 I think it's brilliant in terms of a great way to kind of
23 get information, but again, I don't think there is a
24 first, second, and third choice overall. I think there
25 are choices to be made based on the specifics of the class

1 action settlement that's before you.

2 CHAIRMAN BABCOCK: One other question.

3 Suppose you have a class action settlement whereby each of
4 the consumers who have spent \$35 for a defective product
5 get their 35, they get their \$35, plus attorneys' fees and
6 whatever administrator costs, so that's the settlement,
7 and then certain of the consumers don't -- don't claim, so
8 you have a fund of unclaimed money.

9 MS. GREER: Uh-huh.

10 CHAIRMAN BABCOCK: Does, as Richard laid out
11 the options, 1 through 11 on what could happen to that
12 money? Of course, he's got number 12, other, which is his
13 attempt to cover himself.

14 MR. ORSINGER: Well, somebody might have a
15 great idea.

16 CHAIRMAN BABCOCK: Yeah.

17 MS. GREER: I mean, these are -- there are
18 really four different options. These are variations on a
19 theme, and I appreciate your having done that, because
20 like, for example, the lawyers pick any donee, and, you
21 know, five and six are very similar, for example. Seven
22 and eight and nine are very similar. They're just
23 different variations on the same thing, and then 10 and
24 11, so it's really those are the four different options.
25 But, again, I just don't think it's a good idea to say in

1 every case this is what we're going to do.

2 CHAIRMAN BABCOCK: Yeah. Justice
3 Christopher.

4 HONORABLE TRACY CHRISTOPHER: Well, if you
5 weren't going to say that, how would you write it? Would
6 you say these are the goals to be considered on the cy
7 pres remainder?

8 MS. GREER: Well, again, the cy pres -- cy
9 pres is specific just to that fourth -- or that one of the
10 choices. So I want to be careful about not -- the
11 remainder --

12 HONORABLE TRACY CHRISTOPHER: I'm not sure I
13 understand what you said.

14 MS. GREER: Okay. Well, the remainder is
15 what's left in the QSF. Okay. So it's in that -- it's
16 like a trust. The money that's there is the remainder,
17 and I think these options all deal with the remainder. Cy
18 pres is only one option, and that is to basically donate
19 it to a charity, a 501(c)3.

20 HONORABLE TRACY CHRISTOPHER: Okay. So then
21 two and three are distinct. Right?

22 MS. GREER: Yes.

23 HONORABLE TRACY CHRISTOPHER: We give it to
24 the class members or we give it back to the defendant or
25 we give it to some sort of charity.

1 MS. GREER: Right.

2 PROFESSOR HOFFMAN: In fact, two, three, 10
3 and 11 are the same. So two, three, and 10/11 are all
4 different. They are the other -- that's what I was saying
5 before, and what Marcy is saying. There are four options
6 here. You can -- the money can revert to the defendant.
7 The money can escheat to the State. You can give it to a
8 charity, or -- actually there are three options. There
9 are only three options.

10 CHAIRMAN BABCOCK: No, there are four.

11 MS. GREER: There's four.

12 (Simultaneous crosstalk)

13 PROFESSOR HOFFMAN: The defendant can have
14 the extra money back. The extra money can go to the
15 people who have made claims, or the money can go to the
16 State.

17 MS. GREER: Or the money can be cy pres.

18 PROFESSOR HOFFMAN: Or it can go to a
19 charity.

20 CHAIRMAN BABCOCK: Yeah, right.

21 MS. GREER: So those are the four options,
22 and, I think, like the principles of aggregate litigation
23 talked about the four, and they kind of ranked them in
24 order with reverter to the defendant being the last
25 preference. That I think could be helpful. I also think

1 precertifying, if you will, access to justice as an
2 approved cy pres recipient is a good idea or the Texas Bar
3 Foundation. I mean, or however you want to do that, or 50
4 percent. Those kinds of things I think would be helpful
5 to come from the Supreme Court.

6 CHAIRMAN BABCOCK: Judge Wallace, and then
7 Kennon, and then Professor Hoffman.

8 HONORABLE R. H. WALLACE: I have a question,
9 really for Marcy. What is -- is it the standard practice
10 more or less in Texas today that on all class settlement
11 agreements address what will be done with unclaimed funds?

12 MS. GREER: Well, there aren't a lot of
13 class actions in Texas. Let's start with that.

14 HONORABLE R. H. WALLACE: But in your
15 experience, because that's what I'm wondering. Are there
16 settlements where unclaimed funds are not addressed, and
17 if so, what happens?

18 MS. GREER: Rarely. Rarely.

19 HONORABLE R. H. WALLACE: Okay.

20 MS. GREER: We try to address them, because
21 anybody who's done a class action knows that there's --

22 HONORABLE R. H. WALLACE: Okay. All right.

23 MS. GREER: -- going to be a residue.

24 HONORABLE R. H. WALLACE: That answers my
25 question. The other one is, on lawyers' fees, why

1 couldn't the class action settlement say you're going to
2 get 30 percent of whatever money is distributed to class
3 members, and you can come in every month and make an
4 application for attorneys' fees by showing us how much
5 money has been distributed?

6 MS. GREER: I mean, I guess you could do
7 that, but it's going to -- the process of claims
8 administration takes years sometimes. It often takes a
9 long time, and so that's just going to be in the courts.
10 It's very expensive. The claims administrators have
11 become very expensive, and they charge for everything. I
12 mean, down to the --

13 HONORABLE R. H. WALLACE: Well, but --

14 MS. GREER: So, I mean, what you don't want
15 to do is use up all of the money that could be given for a
16 good purpose paying the claims administrator to keep
17 administering the class and the court time to have to go
18 and approve these applications every so often.

19 HONORABLE R. H. WALLACE: Okay. I probably
20 don't appreciate the complexity, but it seems to me just
21 knowing how much money has been paid out and how much
22 checks have been cashed is not something that would be
23 hard to determine. Maybe I'm wrong, but --

24 CHAIRMAN BABCOCK: It's a matter of timing.

25 HONORABLE R. H. WALLACE: Huh?

1 CHAIRMAN BABCOCK: It's matter of timing.

2 HONORABLE R. H. WALLACE: Yeah. I mean, you
3 know, there's other things that lawyers do that they have
4 to come into court and apply for attorneys' fees
5 periodically, so, because I really like that idea of the
6 class counselor not getting the benefit of money that goes
7 to class -- that does not get distributed, so --

8 MS. GREER: Well, but you could also --
9 being devil's advocate, and I've been on the defense side
10 for the most part, but being devil's advocate, I could see
11 a class counsel saying that we got a benefit for the
12 class, we can't control whether or not people cash their
13 checks. You know, they don't have the means to
14 communicate with all of these class members to encourage
15 them to cash their checks and tying the result that they
16 got to that. You know, it might be problematic, because
17 you look at that at the time of the settlement as a whole.

18 CHAIRMAN BABCOCK: Yeah, class counsel says,
19 "We brought Google to their knees, and they're going to
20 have to pay for what they did that was so bad, so we ought
21 to be compensated for that." That's the argument that you
22 hear from them.

23 Kennon has been waiting patiently, and not
24 trying to do that, like Schaffer up there.

25 MS. WOOTEN: I was doing that inside. So

1 one thing that's coming to mind in regard to the option of
2 escheating funds to the State is this. We have, of
3 course, in Texas unclaimed property provisions. My
4 assumption is that they do not apply to this particular --

5 MS. GREER: No, that's -- that's the issue.
6 Escheat to the State is the unclaimed property fund.

7 MS. WOOTEN: But so then the question comes
8 to mind, you know, if -- if the statutory provisions apply
9 and these are unclaimed property, at what point is there
10 no choice? In other words, these funds are unclaimed
11 property that must go to the State.

12 MS. GREER: Well, the Highland Homes
13 decision explains where the boundaries are on that.

14 MS. WOOTEN: Okay.

15 MS. GREER: Because that was exactly the
16 claim that the State made, was that these checks were made
17 out to people, they were clearly known to these people,
18 because they could be identified that money should have
19 gone to the unclaimed property fund.

20 MS. WOOTEN: That's right, and so when they
21 can't be identified --

22 MS. GREER: Well, but, I mean, even then the
23 Court said, no, the settlement was made on behalf of the
24 class. And so once -- the fact that they were then
25 weren't cashed, it wasn't their claim unless they followed

1 the procedure to get the check.

2 MS. WOOTEN: Okay. Okay.

3 MS. GREER: To cash the check.

4 MS. WOOTEN: So one of the things that's
5 coming to mind is the complexity of unclaimed property and
6 the fact that it's different and the provisions are
7 different from state to state, and I don't know, in the
8 assessment of looking across the various jurisdictions,
9 whether the particular statutory provisions there
10 compelled a certain outcome, and in here, like, if it's
11 not going to compel that outcome, how much flexibility
12 there is with the overlay of the Unclaimed Property Act,
13 but I hear you have to go to that.

14 MS. PFEIFFER: Well, I was just going to
15 clarify for the record that I had the exact same question
16 as Kennon and was doing research, and this *Highland Homes*
17 *vs. Texas* decided by the Supreme Court in 2014 decided 5-4
18 that they do get to do this, because it didn't make sense
19 to me that this would be a judicial branch decision. So I
20 think under the Supreme Court case, that is something that
21 they can decide, unless the Legislature overrules this.

22 MS. GREER: Well, also, I mean, even if the
23 unclaimed property fund doesn't apply, I mean, the Court
24 could still stay, "We think it should go to the State." I
25 mean, that could be a stated preference --

1 MS. PFEIFFER: Right.

2 MS. GREER: -- irrelevant, I think it's a
3 bad idea, because I don't think the money should go to the
4 State. The State --

5 MS. PFEIFFER: But right now is it that the
6 default is residual funds go directly to the Texas
7 Comptroller, unless parties specify otherwise?

8 MS. GREER: No. I don't believe so.

9 MS. PFEIFFER: Where do they go?

10 MS. GREER: Unless the parties specify, I
11 mean, I guess -- I guess I have not had a class action
12 settlement where we didn't deal with this issue, because
13 it comes up, and most people who have done class action
14 settlements, it's going to come up. So I can't answer
15 that question where it hasn't been done, because I'm just
16 not aware of that.

17 CHAIRMAN BABCOCK: Judge Schaffer, and then
18 Pete.

19 HONORABLE ROBERT SCHAFFER: I think this is
20 an --

21 CHAIRMAN BABCOCK: And then Lonny.

22 HONORABLE ROBERT SCHAFFER: I think this is
23 an issue that should be decided in the trial court. Every
24 case is going to have different issues that deal with the
25 particular case that's going to be a different type of

1 distribution. I've been involved in -- that I can recall
2 as I'm sitting here, two class actions, one as a judge and
3 one as a lawyer. The one as a lawyer was the Dalkon
4 Shield class action from many, many years ago, and there
5 were three distributions, and if you think for one second
6 the women who got distributions were adequately
7 compensated by that class action, you're painfully wrong.

8 It was not a very good compensation package
9 for those women, but I think this should be decided within
10 the case itself and let the parties make suggestions to
11 the court, give the court the benefit of the information
12 that each of the parties have developed over time.

13 I think escheating to the State is a bad
14 idea. I agree with Marcy on that. It is very difficult,
15 if the money was not written to you, it is very difficult
16 to get that money out of the State, and it's just going to
17 stay there, and so I don't know who's going to make a
18 claim for the unclaimed property, if what you're saying is
19 the State will make a claim for it, well, they've already
20 got it, so no big deal, right. But if someone else is
21 going to make a claim for it, how they're going to prove
22 their connection to the case, to that money, which is
23 something that I believe you have to prove to get money
24 out of the unclaimed property, is very, very difficult,
25 and I don't know how you're going to do it under the

1 scenario we have here, without there being a change in
2 some kind of legislation to allow for that type of
3 distribution.

4 CHAIRMAN BABCOCK: Judge, under your model
5 where the district judge makes the decision, you could
6 envision a situation where there's a consumer class
7 action, it settled, each member of the class gets some
8 amount of money, modest, the lawyers get paid, and then
9 the lawyers, with judicial approval, could say the excess
10 goes to a consumer advocacy group.

11 HONORABLE ROBERT SCHAFFER: We would have
12 that discussion, and regretfully, it wouldn't go to my
13 favorite charity, but that's how that works, right?

14 CHAIRMAN BABCOCK: Well, but you would have
15 control of it. That would be your model.

16 HONORABLE ROBERT SCHAFFER: That was a joke,
17 by the way, for the record.

18 CHAIRMAN BABCOCK: And he was wagging his
19 fingers when he did it, too.

20 HONORABLE ROBERT SCHAFFER: Yeah.

21 THE COURT: But that's the model you're
22 talking about.

23 HONORABLE ROBERT SCHAFFER: Yes. That's
24 exactly the model I'm talking about.

25 CHAIRMAN BABCOCK: Pete, Lonny, Justice

1 Christopher, Connie, Richard.

2 MR. SCHENKKAN: I want to strongly urge
3 that -- that we amend Rule 42 to provide and that the
4 undistributed or unclaimed funds go to the Texas Access to
5 Justice Foundation, and we're going to start from first
6 principles, which is the statute that controls class
7 actions, which is Texas Civil Practice and Remedies Code,
8 Section 26.001, et seq., and (a) requires the Court to
9 adopt rules to provide for the fair and efficient
10 resolution of class actions.

11 Thus, there is no question in my mind, no
12 fair question, but what the Texas Supreme Court, as long
13 as it does not abuse the concepts of fair and efficient,
14 can decide will be done with unclaimed class action
15 settlement funds. Both the class counsel who filed the
16 class action to start with and make the case for its
17 certification going in and the defendant when it puts its
18 first settlement offer on the table know that that's the
19 rule, that whatever isn't -- doesn't get distributed under
20 our settlement agreement, that's where it's going to go.
21 And I think that actually simplifies the settlement of
22 class actions quite a bit and removes some of the
23 remaining potential for at least the appearance of
24 favoritism toward class counsel and their charities or the
25 defendant and its charities or the judge and his or her

1 charities.

2 Second, as a substantive matter, under the
3 concept -- we talk about the cy pres doctrine as if it
4 were a doctrine in the common law sense that there are
5 certain categories of cases where if you're in that
6 category of case, that's the law, that's the way you do
7 it. That's not what we're talking about here. This is a
8 concept that is only actually required by the law in Texas
9 in one part of the wills and probate context -- wills and
10 trust context. Other than that, it's just a concept. It
11 is not obligatory on anybody anywhere to do it that way.
12 Here, where we have a statute that says the Court can
13 decide what it says is a fair and efficient resolution of
14 the statute, if we're going to use the concept of as near
15 as possible, the Court can decide what that concept is.

16 My respectful suggestion is the concept here
17 is as close as possible to helping people who can't, in
18 fact, afford to pay lawyers to litigate cases that are
19 otherwise meritorious. That's the category we're actually
20 in when we're doing class actions, and we're just saying
21 some of the money from ones that can be generated in cases
22 where you can get class counsel, because they're going to
23 get some money based on recovering some, or at least the
24 class members who cash their checks, we're saying that's
25 what we're going to do with the rest of it. We're going

1 to help other people who cannot afford to pay lawyers to
2 represent them in civil matters where they need a lawyer.
3 And I just think we're making this way too complicated.

4 CHAIRMAN BABCOCK: Okay. I'm sorry.

5 MR. SCHENKKAN: A couple of other comments,
6 though, about the issues of the attorneys' fees, the
7 attorneys' fees issue one. We have a slightly different
8 situation on that in Texas than anywhere else or than
9 almost anywhere else. I haven't kept up. As a result of
10 the statute passed in Texas that included that language,
11 the -- in Texas, the approval of the attorneys' fees is to
12 be done by referencing the lodestar, the hours at standard
13 hourly rates, and then considering a multiplier, which can
14 be as little as one quarter of the lodestar or as much as
15 four times the lodestar. It isn't just a matter, as it is
16 in so many other places, of where class counsel comes in
17 and says, "We think we should get 50 percent of the
18 money," and someone -- one of the objectors says, "No, you
19 should only get 10 percent of the money," and the judge,
20 out of what I respectfully describe as thin air, picks
21 some other number, some other percentage. It's at least
22 intended to be a somewhat more disciplined effort to look
23 at what work went into the case and then to decide how
24 much premium or deduction there ought to be on -- from
25 that, based on the results.

1 But that's not on the table for us now here
2 in Texas. That's been decided by the statute and the
3 rule. We really can focus only down to these are two sets
4 of folks who are being represented by paid counsel.
5 They've agreed on a package of money and other things
6 supposedly of value, by which the defendant is going to
7 buy res judicata against all of the class members who opt
8 out. They really shouldn't be in a position to be
9 deciding what happens to the rest of that money, and I
10 think it is far better, respectfully, to have the Texas
11 Supreme Court say this is how it's going to be done than
12 asking every individual trial judge everywhere in the
13 state, if they happen to get one of these cases, and for
14 many of them, it will be their first and only. It won't
15 happen that often. To say how do I go about deciding
16 this?

17 It just seems we have a massive problem with
18 access to the civil justice system for what we just heard
19 earlier today are five million Texans. We have enough
20 money apparently to help those -- to help eight percent of
21 400,000. Let's -- I don't know how many more dollars are
22 going to come out of how many class action settlements in
23 Texas, but let's send it directly to the people who will
24 reduce the 92 percent who aren't getting it to maybe to 88
25 percent or -- I'm -- I'm a little frustrated, as you can

1 see.

2 HONORABLE ANA ESTEVEZ: I was about to say
3 -- I think I'm going to call you Munzinger, and I'm going
4 to say thank you and I'm going to clap. That would have
5 made him very happy.

6 CHAIRMAN BABCOCK: And what I'm going to
7 note is the red light right in front of you went off a
8 minute ago, but Professor Hoffman.

9 PROFESSOR HOFFMAN: So interesting, I could
10 just as easily have heard Richard say, "It's not the money
11 of the access to justice people. It's the class members'
12 money." Okay. If we're going to amend -- if the Court is
13 going to amend the rule, I think the advice that I would
14 offer would be that it has -- it ought to do so, aware
15 that this is a thorny area, that class actions themselves
16 raise all sorts of collusion issues, and the existence of
17 cy pres awards magnifies the problem. And so if you're
18 just going to amend the rule and say, "We recognize Access
19 to Justice or for the Texas Bar Foundation as a -- as a
20 presumptive recipient," you -- you don't give any guidance
21 to trial courts; and so I'm with Judge Schaffer and with
22 Marcy and with my earlier comments in saying this is a --
23 a very individualized and specific sort of problem; and
24 it's -- and so if you're going to attempt to write a rule
25 where judges tend to need a lot of discretion, you're

1 going to have to write a lot of rules; and some are going
2 to be just as important as -- so that doesn't leave me
3 against the idea that the Access to Justice Foundation or
4 some other charitable organization should be a presumptive
5 recipient, but if you're going to make that rule change,
6 it ought to go with clarity, actually, for folks who don't
7 routinely operate in this space, to realize what the
8 various choices are.

9 So, for instance, the choice of distributing
10 more money to people who have made claims would not be
11 apparent at all if the Court just makes a rule change. In
12 fact, it would have the opposite effect. We would
13 essentially eliminate pro rata consideration, or -- or --
14 or, for instance, if you're going to have a cy pres award,
15 should it go to an entity that does some work that's a lot
16 closer specifically in subject to the nature of the claims
17 asserted, if that's possible, which again, on a case by
18 case basis may not be true. That issue ends up being
19 passed over, because what will happen is judges will just
20 routinely grant the cy pres award to the presumptively
21 recognized organization. So I'm not against doing that.

22 I am in favor. I have participated -- and I
23 don't mean to sound like -- I'll say this, which so I
24 won't quote myself on this. Northwestern, Marty Redish,
25 who really is the first academic. You cited all of the

1 articles, Richard, in this space, but you left off the
2 fellow who wrote the first and most important article on
3 it. He has a line in his article where he says, "I hate
4 coming across as like as if I'm the Grinch or the Scrooge
5 on this issue." I'm not against giving money to
6 charitable causes, nor am I against giving cy pres excess
7 awards to charitable causes; but a change the Court makes
8 would be an unusual change, it seems to me, kind of given
9 the prevalence of these other issues, given Chief Justice
10 Roberts' recent comments that Richard cited in that
11 Facebook case; and so I just think it's terrain in which,
12 if you're going to do this, you either have to do it more
13 fully, or you ought to do something less than a rule
14 change, which is possible, right. The Court could issue
15 any number of other advisory ways of guiding. So --

16 CHAIRMAN BABCOCK: Thank you. Connie, then
17 Justice Christopher, if you still want to talk.

18 MS. PFEIFFER: Sure, well, I have a big
19 class action judgment in Oklahoma, so I think I've been
20 coming at this with assumptions about how it works there,
21 and I appreciated Marcy's comment that there really aren't
22 many class actions in Texas, but maybe it would help to
23 clarify exactly how this works right now, so what would we
24 be changing? Like what is the default right now if
25 there's unclaimed funds? Do parties get to work that out

1 with the trial court?

2 PROFESSOR HOFFMAN: Yes.

3 MS. GREER: Yes.

4 MR. ORSINGER: Yes. And if they don't, we
5 don't know what happens.

6 MS. GREER: And then the trial court looks
7 at the entire class action settlement as a whole and says
8 up or down. And I want to thank Pete for bringing up that
9 excellent point about the attorneys' fees, because you're
10 absolutely right, and I hadn't even thought about that,
11 but the attorneys' fees takes care of itself, but -- and
12 that's usually handled at the time of the class action
13 settlement approval hearing. You go ahead and get it all
14 taken care of, so the judge can sign the orders, and it's
15 a final judgment, done.

16 MS. PFEIFFER: So what we're talking about
17 is the degree to which you would require the parties and
18 the trial court to do a certain thing. It's really how
19 much flexibility they have, lots of flexibility or a
20 directive from the Court.

21 MS. GREER: Exactly.

22 MR. ORSINGER: Or a combination of the two,
23 because some of the states, Kentucky says set aside 25
24 percent to access to justice, a half dozen of these say
25 set aside 50 percent to access to justice, and the rest

1 could be discretionary with the lawyers and the trial
2 court. So it's not always -- it doesn't have to be a
3 hundred percent or zero.

4 CHAIRMAN BABCOCK: Justice Christopher.

5 HONORABLE TRACY CHRISTOPHER: I think the
6 first goal should be to distribute to class members, to
7 the extent that they were not compensated and that
8 redistributing money is financially feasible. I think
9 that should be the first goal. And then the second goal
10 should be access to justice, and just, you know, leave it
11 at that. I -- I mean, I do understand the idea of --
12 that, you know, the lawyers or the defendant might want to
13 have a hand in it, but I think it's a lot cleaner if we
14 have those two goals.

15 CHAIRMAN BABCOCK: Yeah. Rusty, and --

16 MR. HARDIN: Yeah, we've only done it once,
17 it wasn't my case. It was one of the other partners, but
18 I think it sort of crystallizes why I agree with Judge
19 Schaffer, and we've had all of these other things -- and
20 maybe I'm too Pollyannish, but I still always come down on
21 discretion of the judge. I just think the facts and
22 circumstances are too different. For instance, this one,
23 I wrote to make sure I had the facts right to the partner
24 that handled it, and in their class action the lawsuit was
25 against payday loan companies, who prey on the

1 underprivileged, as you know.

2 The settlement wasn't that much, because the
3 amounts of those that they could trace in the settlement
4 -- the area were small, and so the big one -- but a
5 quarter of it was unclaimed. And -- and our guy
6 recommended Texas Appleseed, and the reason he picked
7 Texas Appleseed was not just because they did things for
8 the indigent, but one of their programs was to go after
9 payday loan companies on behalf of the poor. So he had a
10 case in which the -- it kind of mixes the kind of things
11 we're talking about. The first one was Judge Mazzant, who
12 had two different hearings about it. I wasn't totally
13 involved in it, and it was proposed by us, who were the
14 plaintiffs, and it was accepted by the other, but the
15 judge carefully thought about it, considered other areas.

16 I just think any time we start talking
17 about -- maybe this is just my bias against absolute
18 rules, that every time we start trying to say something
19 fits, everything fits one answer, I get uncomfortable, and
20 I think that the imagination of lawyers and judges can
21 more appropriately sometimes allow to the exceptions. I
22 mean, I think most of us in here, we certainly have, and I
23 suspect everybody else here has, always supported Access
24 to Justice. I really believe strongly in it. Texas Bar
25 Foundation, the same, but there are going to be different

1 fact circumstances that somebody can come up with an
2 imaginative solution to, and I think that should be
3 allowed for. Now, whether you have presumptions, I just
4 am not sure, and I go to what really Connie's question
5 was, so are we essentially trying to limit discretion for
6 fear that it will be misused? And that's really where
7 it's coming from, right?

8 MR. ORSINGER: I think so.

9 MR. HARDIN: And I'm not sure that the cure
10 is not worse than the disease.

11 CHAIRMAN BABCOCK: Lamont.

12 MR. JEFFERSON: I'm going to speak in
13 agreement with Pete Schenkkan, and I mean, I think this
14 is --

15 MR. HARDIN: Even though we sit next to each
16 other?

17 MR. JEFFERSON: Even though we sit next to
18 each other. I know. I think there are a couple of
19 problems here. One is if you do it on a case by case
20 basis, we're not going to -- the issue about where the
21 money is going to go is not going to be the subject of a
22 trial. It's going to be the subject of a hearing. Maybe
23 an afternoon, a couple of hours, two or three hours. And
24 there will be mistakes. You get only so much information
25 in a short hearing where you're trying to make a decision

1 about a couple of different options that the parties in
2 front of you are putting in front of you.

3 Now we have the opportunity. If we gave
4 every dime of cy pres money to access to justice, no one
5 would regret that. No one would say that's been a mistake
6 for the last five years. If we decided right now or if we
7 took another two months to decide what would be the right
8 approach for this, and we decided, yes, it should go to
9 access to justice, it should go to serving the legal needs
10 of those who can't afford it, we're not going to -- that's
11 going to be a sound, well-reasoned decision choice that no
12 one is going to ever look back on and say that was a bad
13 idea. Whereas, if you do it on an ad hoc basis, based on
14 the headlines, based on politics, based on favoritism,
15 based on whatever happens to be the winning argument of
16 the day, there are going to be a lot of times where the
17 money gets misspent.

18 So it's an imprecise deal, and the last
19 thing I'll say is class actions aren't always settled
20 because the class -- so-called class victims were harmed.
21 And I think the justices make that point. There are a lot
22 of folks who are very satisfied with the product, but
23 lawyers do a good job of advocating in a class action
24 environment, and they get a big settlement, and now
25 there's a whole lot of money, but that doesn't necessarily

1 mean that the so-called class victims are actually victims
2 or are outlined.

3 CHAIRMAN BABCOCK: Great. All right. I saw
4 Harvey's hand up first, I think, and then, Jim, did you
5 have your hand up?

6 MR. PERDUE: You beat me to it.

7 CHAIRMAN BABCOCK: Yeah. It was close,
8 though.

9 HONORABLE HARVEY BROWN: I don't think we
10 should have a rule that sets a presumption or a rule that
11 says you have to go in this order, but I think, as a trial
12 judge, I had one settlement, and I don't remember knowing
13 nearly as much during that hearing as I've learned over
14 our debate today and last time, and I think it would have
15 helped me to have had factors. So if we had something
16 that said a judge should consider the following factors.
17 One, the amount of compensation that's gone to the
18 plaintiffs compared to the alleged harm. Two, what other
19 organizations are available that are aligned with or serve
20 the interests aligned with those plaintiffs, and then
21 three, groups like the two groups we had here today.

22 I think if I just had that in front of me,
23 it would have helped me at least wrestle through the
24 issues and ask the right questions and think about it, but
25 telling me nothing let me feel like I could do whatever I

1 wanted to, and in retrospect, that's probably not good,
2 because I might have a bias towards certain groups that I
3 particularly liked.

4 CHAIRMAN BABCOCK: Yeah. Now Jim.

5 MR. PERDUE: I was trying to stay out of
6 this, but respectfully, Lamont, the class vehicle is used
7 by defendant every bit as much as the plaintiff's bar.
8 Defendants seek resolution and closure to an issue through
9 class, and they -- defendants embrace classes when it's
10 certified because they get resolution. So the idea that
11 every class is abusive and every class is getting money
12 from people that don't have injury is just -- it's just
13 undermining --

14 MR. JEFFERSON: I didn't say that, Jim.

15 MR. PERDUE: Well, it was close.

16 MR. JEFFERSON: It wasn't intended to be
17 close.

18 MR. PERDUE: But there are very few class
19 actions in Texas since 2003. The tort reform bill of HB4
20 had the Civil Practice and Remedies Code. It mandated the
21 Court issue the rule. Court issued the rule. You have
22 lodestar -- setting aside the fee issue, but most of these
23 generally are commercial transaction. They're fees
24 nowadays, and the idea that every single class of
25 unclaimed money, a hundred percent of that, as a policy

1 decision from the Texas Supreme Court choosing winners and
2 losers says that all goes to access for justice, the Court
3 has that authority apparently under the Rule, but
4 recognize the Court is asserting its authority to take
5 money that, more often than not, a defendant has committed
6 to get closure that may, if you had people with diminished
7 value of Volkswagons who had diesels with false diesel
8 monitors, can be directed to public interest and
9 charitable organizations by a court and by the parties'
10 decisions that serves the public interest cy pres, as
11 close as possible to the underlying cause of action. Just
12 as with Appleseed and payday lenders. It's a lot closer
13 to the remedy involved in the case.

14 So you can do rough justice and say a
15 hundred percent every time goes to the IOLTA or access to
16 justice, but that's not what cy pres is supposed to be,
17 and the Court can pick this winner as a policy decision,
18 but recognize that what y'all are voting on or suggesting
19 or whatever this body recommends or whatever the Court
20 finally does, we've got two groups in just this room that
21 is competing for dollars, right? And so there's always a
22 competition for dollars. Is that -- should that be left
23 to the parties and the judge who is in front of the cause
24 of action, the actual cause of action that's in front of
25 the court, or should that just be a hundred percent policy

1 decision of the State, which is what I thought Richard was
2 getting at his question, which is why I was enjoying the
3 questions, but that's the policy decision.

4 CHAIRMAN BABCOCK: Okay. Quentin has got a
5 comment and then we're going to -- I'm going to say
6 something. Quentin.

7 MR. SMITH: I was just going to say I think
8 there should be at least some limits, because maybe the
9 organization should at least exist at the time you're
10 discussing the settlement, and so if there's no limit,
11 then there could be misuse of the funds, right. People
12 could open up their own nonprofit at the time, and it
13 could go to places that you might not want it to go. So I
14 do think there should probably be some discussion of
15 limits.

16 MR. ORSINGER: Can I make a point that
17 Quentin just made? The Illinois statute --

18 CHAIRMAN BABCOCK: Can I stop you?

19 MR. ORSINGER: It's appropriate. The
20 Illinois statute defines eligible organizations to receive
21 these cy pres funds, and the criteria is must be -- have
22 existed and be tax exempt for three or more years with a
23 principal purpose of promoting or providing services that
24 would be eligible funding under the Equal Justice Act. So
25 I'm not talking about the IOLTA part of that. I'm talking

1 about the three years. So you can't create a foundation
2 just to receive this fund and then be suspect. That's an
3 option.

4 CHAIRMAN BABCOCK: Okay. Here's what I want
5 to say. We've got Richard's survey, and I know Richard
6 and consider him a dear friend, and if we don't fill out
7 his survey, he's going to go home and beat up his dog or
8 something, but nobody is required to fill out this survey.
9 What I have done is I have handwritten out -- and I've
10 signed it, and I'm going to give it to him, so he's going
11 to get at least one response. Anybody else who wants to
12 do that, go ahead, and after the meeting is over,
13 everybody will congregate around Richard, which will make
14 him feel good, and if you don't have a piece of paper,
15 then you can do it electronically so you'll get -- you'll
16 get your survey results, so that would be good.

17 And the other thing I'd like to do as we
18 wind down this afternoon, on a schedule that is way
19 different than what I thought it would be, is we're going
20 to have a vote. It's obviously not binding, just
21 something I'm curious about, and it will be a vote for the
22 Schaffer model, which is allowing the district judges to
23 have discretion about how to handle this, or the Schenkkan
24 model, which will direct these funds to a particular
25 organization, the Texas Access to Justice, one of the two

1 groups or maybe both of them, and the Court will decide --
2 the Supreme Court will decide, as we decided last time.

3 HONORABLE ANA ESTEVEZ: Will you let me add
4 a third model?

5 CHAIRMAN BABCOCK: No.

6 HONORABLE ANA ESTEVEZ: Please? Can I just
7 say it for the record so they can consider it? So what if
8 you allowed the judges to hear it, and then if they say
9 no, it's not an up or a down, and the default is IOLTA.

10 CHAIRMAN BABCOCK: That can be an "other,"
11 if you want to vote for "other."

12 HONORABLE ANA ESTEVEZ: Okay. I just wanted
13 to say that.

14 PROFESSOR HOFFMAN: So we have the option to
15 vote for "other"?

16 CHAIRMAN BABCOCK: You can vote for other.

17 PROFESSOR HOFFMAN: All right.

18 CHAIRMAN BABCOCK: So that will be our
19 three. "Other" will be our third. So everybody in favor
20 of the Schaffer model, raise your hand.

21 HONORABLE ROBERT SCHAFFER: Now I know who
22 my friends are.

23 CHAIRMAN BABCOCK: Okay. And everybody in
24 favor of the Schenkkan model, raise your hand.

25 And everybody for "other."

1 MR. HARDIN: Wait a minute. Wait a minute.

2 HONORABLE ANA ESTEVEZ: You know, that was
3 the compromise. That is where I'm willing to go.

4 PROFESSOR HOFFMAN: That's what I told her.

5 HONORABLE ANA ESTEVEZ: When you eliminate
6 one then I go to the other one. So that's not my
7 preference. That's just a thought.

8 CHAIRMAN BABCOCK: So here's just something
9 to illuminate it. The Schaffer model picked up 11 votes.
10 The Schenkkan model picked up 12 votes.

11 HONORABLE ANA ESTEVEZ: How many "others"?

12 MR. HARDIN: I want a recount.

13 CHAIRMAN BABCOCK: "Other" picked up three.
14 So don't anybody go away. We're going to go off the
15 record for a second.

16 (Off the record)

17 CHAIRMAN BABCOCK: We may have to come back
18 with this issue the next time we meet, but for now we're
19 going to leave it and listen to Marcy for 10 minutes about
20 business courts and where we are on that, and so now we're
21 back on the record.

22 MS. GREER: Okay. Well, I'll give a shout
23 out to Professor Lonny Hoffman, and this came out. I had
24 it yesterday.

25 MR. HARDIN: And it's good, too. It's good.

1 MS. GREER: It's a great discussion of the
2 various aspects of the business court. I was asked to
3 report, and we got our subcommittee together yesterday and
4 kind of went through the preliminary comments on both the
5 business court rules and the proposed rules that the
6 Supreme Court has, I guess, promulgated -- is that the
7 right word?

8 HONORABLE JANE BLAND: Preliminarily
9 approved.

10 MS. GREER: Preliminarily approved, okay,
11 thank you. Has preliminarily approved for the business
12 court and the Fifteenth Court of Appeals. What was
13 extraordinary about the comments for the business court is
14 that there is one, as of this date. Now, granted, they
15 have until May 1, so but there was only one, and it's from
16 Carlos Soltero here in Austin, and he is basically asking
17 if there would be a consideration of changing the rule
18 regarding jury trials being in person, changing the
19 standard instead of extraordinary circumstances to -- I'm
20 sorry, I don't have it in front of me. Thank you.

21 Okay. "Absent extraordinary circumstances,"
22 to "absent good cause," and we kind of talked about that,
23 and felt like, although I think it's a good idea for a
24 number of reasons, I'm not sure the statute really
25 supports that. The statute is very clear about this, and

1 so we -- but, I mean, that's kind of our preliminary
2 assessment of it.

3 There were a lot more comments on the
4 Fifteenth Court of Appeals, and Chief Justice Christopher
5 did a great job of lining out some real serious
6 considerations that need to be thought about. The first
7 one is how these cases are going to get to the Fifteenth
8 Court of Appeals, because, you know, I was thinking, I
9 think a lot of people were thinking, well, the notice of
10 appeal, it says in the rule that you have to designate
11 which court the case is going to go to; and I think what
12 I'm hearing is that that rule is honored in the breach,
13 that requirement, and that a lot of people don't put which
14 court the appeal is going to, because if they did, that
15 would probably take care of it, because you'd say either
16 the Fifteenth Court -- "This appeal is going to the
17 Fifteenth Court" or the First or Fourteenth or the Third;
18 but since that's not being done, I think that is something
19 that we need to give some consideration to, how are
20 district clerks supposed to handle it when there is no
21 designation and it's not clear from the notice of appeal
22 whether or not the case is going to the Fifteenth Court.
23 And we don't have a proposed solution at this point, but
24 it's something that we're going to talk about a little bit
25 more. I think it's very much worth raising and appreciate

1 your doing so.

2 The second comment was whether -- she
3 suggested it would be a good idea to have the appealing
4 party state in the notice of appeal that the court case
5 should or should not transfer to the Fifteenth. Are you
6 talking about before September 1 on that one?

7 HONORABLE TRACY CHRISTOPHER: No. I mean, I
8 think what would probably fix it, is if we said in our
9 notice of appeal requirement it either goes to the
10 Fifteenth Court or to the local court. That would be, you
11 know, clear, that they would have to specify one or the
12 other. And I'm talking about new filings. The old
13 filings we're just transferring.

14 MS. GREER: Okay.

15 HONORABLE TRACY CHRISTOPHER: Yeah. I mean,
16 because, like I said, I just don't think people will do
17 it. People are not doing the docket sheets. They're
18 doing them incorrectly. They -- they are not even
19 identifying themselves as governmental entities when they
20 are, so, you know, it's just kind of -- people are not
21 really aware that some of their cases are supposed to go
22 to the Fifteenth Court.

23 MS. GREER: Do you think one possibility --
24 because it is in the rule that you're supposed to specify
25 which court you're taking the appeal to, and unless it's

1 the First and Fourteenth and then you say one or the other
2 of those, but would it be helpful if the clerks kicked out
3 a notice, kicked out something -- you don't want to lose
4 your appeal because it gets rejected, but kicked out a
5 notice and said, "You need to amend this to state which
6 court," because I really think that the parties ought to
7 fix it.

8 HONORABLE TRACY CHRISTOPHER: I think that
9 would be more work for the clerk.

10 MS. GREER: Okay.

11 HONORABLE TRACY CHRISTOPHER: Personally,
12 you know, because, like I said, if you look at most
13 notices of appeal, they're -- you know, they don't have
14 all of the requirements in them, but they're still
15 considered notice of the appeal, and we don't want to get
16 into the position of making, you know, people redo them
17 over and over again. You know, maybe enough people will
18 be savvy to say, "This one goes to the Fifteenth Court of
19 Appeals," but I don't think so.

20 MS. GREER: Well, I think the lawyers should
21 know that.

22 HONORABLE TRACY CHRISTOPHER: Yeah, but --

23 MS. GREER: I mean, a lot of times -- a lot
24 of times they'll get a staff member to kind of put it
25 together, and they base it on the last notice of appeal

1 that was filed and, you know, things don't get done, but I
2 think it's a legitimate question. Should there be a
3 default that it goes to the local court of appeals if it
4 doesn't say the Fifteenth Court?

5 HONORABLE TRACY CHRISTOPHER: Yes.

6 MS. GREER: And then that raises your
7 question of what happens when you get it, and now it looks
8 like it could go to the Fifteenth Court, how does that
9 process get handled?

10 MS. PFEIFFER: Wouldn't this be -- should I
11 be called on?

12 CHAIRMAN BABCOCK: Yeah, go ahead, Connie.

13 MS. PFEIFFER: Wouldn't this be very much
14 like a jurisdictional screening where the court's, at the
15 outset, looking to see if you're in the right place?

16 MS. GREER: I mean, it would be. It's going
17 to add a whole layer of complexity that I don't think is
18 necessary. I mean, lawyers ought to know if they want it
19 to go to the Fifteenth Court or not, and I'm just trying
20 to figure out how to make that happen. It's not -- it's
21 going to be a consideration for -- it should be a
22 consideration for every lawyer when you file a notice of
23 appeal of should this go to the Fifteenth Court.

24 CHAIRMAN BABCOCK: Great. Thanks, Marcy.

25 Don't forget we're going to have a little

1 cocktail party and the photograph of our committee at
2 Jackson Walker. Shiva has sent everybody directions.
3 It's 100 Congress. She's also sent you directions for
4 parking, and so we will see you then.

5 Don't forget to give Richard your ballots,
6 if you choose, and, thanks, everybody, for a fun-filled,
7 action-packed meeting, and we're off the record.

8 (Adjourned)

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REPORTER'S CERTIFICATION
MEETING OF THE
SUPREME COURT ADVISORY COMMITTEE

* * * * *

I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above meeting of the Supreme Court Advisory Committee on the 5th day of April, 2024, and the same was thereafter reduced to computer transcription by me.

I further certify that the costs for my services in the matter are \$ 2,422.00.

Charged to: The State Bar of Texas.

Given under my hand and seal of office on this the 2nd day of May, 2024.

/s/D'Lois L. Jones
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