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6 **MEETING OF THE SUPREME COURT ADVISORY COMMITTEE**
7 AUGUST 16, 2024
8 (FRIDAY SESSION)
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19 Taken before *D'Lois L. Jones*, Certified
20 Shorthand Reporter in and for the State of Texas, reported
21 by machine shorthand method, on the 16th day of August,
22 2024, between the hours of 9:00 a.m. and 4:38 p.m., at the
23 State Bar of Texas, 1414 Colorado Street, Suite 200,
24 Austin, Texas 78701.
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3 this session are reflected on the following pages:

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2 CHAIRMAN BABCOCK: All right. Everybody,
3 let's come to order. No hugging allowed. There's hugging
4 going on all over the place there. Welcome to our meeting
5 this morning. The Chief will be a few minutes late, but
6 in his absence, we have the very capable Justice Bland to
7 give the Chief's report.

8 HONORABLE JANE BLAND: Good morning. Not a
9 lot to report since our last meeting in June, so I'll be
10 brief. As you all know, the Governor has appointed judges
11 to the business courts and the Fifteenth Court of Appeals,
12 and a member of this committee, Jerry Bullard, is one of
13 them. He just told me -- and I think he's not alone --
14 that he's searching for a staff attorney, so this is a
15 public service announcement on behalf of those judges. If
16 you know of somebody who would be interested in working
17 with either business courts or the Fifteenth Court of
18 Appeals, remind them that there are positions open.

19 So we released final rules for the business
20 courts in June, and they'll take effect September 1. We
21 made pretty minimal changes since the preliminary order
22 that went out in April or May, and we're continuing to
23 work on space issues, which I think largely have been
24 resolved through the Office of Court Administration's good
25 work, and we are also working on the court reporters and

1 how to -- how to manage that statewide. And OCA is
2 working on that as well. I think right now the plan is to
3 hire -- hire a reporter that will be full-time and then
4 contract with others for when there's overlapping need.
5 We also released the fees for the business
6 courts. As you might recall, the legislation has in it
7 that these courts should eventually be self-sustaining,
8 and that's a challenge, because the -- you don't want the
9 fees to be so prohibitive that nobody will use the courts.
10 So, after looking at a nationwide survey of other business
11 courts and what they charge and sort of what the MDL court
12 charges now, the -- and kind of the data that we have
13 about what it might cost to run one of these courts, we
14 ultimately landed on $2,500 for the filing fee, and
15 obviously there's a relief from that based on inability to
16 pay, and there will be additional fees associated with
17 filings made after the -- after the initial filing fee,
18 and that will be about $80. The jury fee is going to be
19 an extra $300. So that order went out about three weeks
20 ago.
21 And then on the Fifteenth Court of Appeals
22 side, those rules have been finalized, and the other
23 courts of appeals have been looking at transfer orders for
24 cases that qualify under the new Fifteenth Court of
25 Appeals legislation and rules that will fall under the

1 jurisdiction. There's a pending case in our Court about
2 that, so stay tuned.
3 Then there's, real recently, like maybe a
4 week ago, we issued an order in connection with licensed
5 paraprofessionals and court access assistants, and those
6 rules are out for public comment. I encourage you -- they
7 did not go through -- they did not go through our
8 committee, like rules often do, but they -- the laboring
9 oar was really over at the Access to Justice Commission,
10 but with a lot of help from some members of this
11 committee, especially Kennon Wooten and Lisa Hobbs, so
12 thank you very much for your leadership on these rules.
13 Kennon, as you might recall, headed up a few
14 years ago -- I was on her committee, probably a decade
15 ago, the commission to expand civil legal services, and
16 one of the things that that group looked at kind of
17 broadly was, you know, could paraprofessionals help in
18 connection with our access to justice problem, and so this
19 is now moving ahead towards implementation of that
20 program. So, you know, as everyone on this committee
21 knows, the justice gap, despite great efforts from members
22 of this committee, the Bar in general, and lots of robust
23 legal aid programs, it continues to grow, and it's of
24 concern, and one of the things that we do often is look at
25 other states and see what they're doing, and so now we're

1 going to launch this.
2 I'm not going to go into detail with the
3 rules, what the rules say today, but it will allow some
4 non -- I mean, some qualified nonlawyers to apply for
5 licensure to help low income individuals, and it's limited
6 scope representation and in areas of practice like family
7 law, debt collection, estate planning, and evictions; and
8 the rules articulate specific tasks these
9 paraprofessionals can perform and, also, you know, talks
10 about the supervisory authority, which will probably be
11 through the State Bar.
12 In addition, a lot of this is targeted
13 towards the justice courts, which, as you know, are
14 nonrecord courts where people are largely self-represented
15 anyway, but they -- they hold a whole lot of cases that
16 are very important to Texans, like housing, consumer debt,
17 and that kind of thing; and so the hope is that this will
18 provide some assistance to those people who are in need.
19 There is another aspect of it that legal aid
20 organizations can take advantage of, which is court access
21 assistance, and these people will be employed by and
22 supervised by lawyers at legal aid organizations, but will
23 work as sort of navigators for specific areas, and the
24 legal aid organization will be responsible for putting
25 together a training program and then making sure that when

1 a lawyer is needed, a lawyer is called.
2 So that's -- that's that program. It's
3 really ambitious. We encourage you all to look at the
4 rules. If you have comments, please send them our way,
5 but we're very hopeful that we will do some good toward
6 the justice gap and in areas where we just don't have
7 enough lawyers who can provide civil legal services at an
8 affordable cost.
9 On a completely other spectrum, sort of an
10 in-the-weeds change to the rules, we have elevated and
11 added bookmarking rules to most of the Rules of Appellate
12 Procedure to assist appellate judges with online review of
13 briefing and the appendix and those kinds of materials.
14 Though most of you-all who practice appellate law know the
15 importance of bookmarking and how it really assists the
16 reader with moving around in a brief, not everybody does;
17 and so we have incorporated that into the rules, mainly to
18 assist appellate courts and their staff in helping to
19 better comprehend your briefs and have easier access to
20 the important record documents that lawyers and judges
21 need to review in deciding the case. There are going to
22 be -- these amendments are also out for public comment.
23 They will become effective December 1st. The deadline for
24 public comment is November 1st.
25 And then, finally, we made some clarifying

1 changes to Rule 621 and Rule 94, and those are just to
2 clarify what is current practice, but there had been
3 questions that had arisen about -- about those rules, and
4 so we just made some clarifying changes. Anybody have any
5 questions? All right.
6 CHAIRMAN BABCOCK: Justice Gray raises his
7 hand.
8 HONORABLE JANE BLAND: Oh, yeah.
9 HONORABLE TOM GRAY: I was going to ask what
10 the going rate for those staff attorney positions were. I
11 might be interested.
12 HONORABLE JANE BLAND: See future Judge
13 Bullard over there. Yeah, no, I hear you. But, yes,
14 please spread the word.
15 Anything else? All right.
16 CHAIRMAN BABCOCK: All right, great. Well,
17 one announcement from our committee. Shiva Zamen, who I
18 think everybody knows for her great work, started law
19 school yesterday.
20 (Applause)
21 CHAIRMAN BABCOCK: So she offered to cut her
22 second day of school to be with us, and I said you do what
23 you want, but I would encourage you to go to your second
24 day of law school, so she did that rather than be with us,
25 but the good news is she's going to keep working for

1 Jackson Walker, although scaled back a little bit from
2 what she has been doing, and she's going to continue, at
3 least for the moment, certainly through the end of the
4 year, with our committee; and if she can handle it, which
5 I'm sure she can, she will continue for -- for the
6 foreseeable future, we hope.
7 Somebody asked me if I inspired her to go to
8 law school, and I said I didn't know, but I doubt it. I
9 do know that one of my daughters was inspired by my
10 practice to go to law school, and then one summer during
11 college she worked for a law firm and quickly moved into a
12 seven-year Ph.D. program in psychology, which she didn't
13 pursue, thank goodness, but, in any event, we're all
14 inspired by different things, and Shiva is going to have a
15 great career after law school. So with that said --
16 HONORABLE JANE BLAND: Can I say one thing,
17 off the record?
18 CHAIRMAN BABCOCK: Off the record.
19 (Off the record)
20 CHAIRMAN BABCOCK: Chief Justice
21 Christopher, bringing back remote proceedings rules and,
22 specifically, civil procedure Rule 176.
23 HONORABLE TRACY CHRISTOPHER: Yes, and
24 Quentin Smith from our committee is going to present the
25 new draft.

1 MR. SMITH: I volunteered as tribute for
2 this presentation, so, all right, so last meeting we
3 presented some proposed changes for Rule 176 and received
4 some great feedback from the committee, and then after the
5 meeting, we also received some helpful comments from Jim
6 Perdue, Tom Riney, and Giana Ortiz. We incorporated all
7 of those comments, and we believe what we have is a more
8 clear Rule 176. We have a specific reference to Rule 21d,
9 made distinctions between depositions and in-court
10 testimony, and for in-court testimony, we made it clear
11 that you still do need to ask for leave from the trial
12 court if you're going to have a hearing or you're at
13 trial.
14 We also suggest adding a comment that says
15 that nothing in this rule affects Rule 21d, and finally,
16 we tried to account for the 150-mile limitation in Rule
17 176.3 and CPRC 22.02. So hopefully the committee likes
18 the changes, and we would be happy to answer any
19 questions.
20 CHAIRMAN BABCOCK: Yeah, why don't -- if
21 it's all right with you, why don't we go one by one and
22 see if anybody has comments on 176.2? Would that be okay?
23 MR. SMITH: Sounds good.
24 CHAIRMAN BABCOCK: Okay. Anybody on 176.2?
25 The record will reflect silence, which means

1 you got it perfect. How about 176.3? Or the comment?
2 Shiva forgot to order coffee, apparently,
3 but that's okay.
4 Yeah, Justice Miskel.
5 HONORABLE EMILY MISKEL: No, just
6 clarification. It says "a subpoena from an issuing
7 county." Is there a reason that "from an issuing county"
8 was included, or does that -- was it meant to include just
9 normal subpoenas from attorneys?
10 MR. SMITH: Normal subpoenas from attorneys.
11 HONORABLE EMILY MISKEL: Okay. Do the words
12 "from an issuing county" add meaning or --
13 MR. SMITH: No, it's one of the suggestions
14 we received. I'm not feeling that strong about that one.
15 We could just omit it.
16 CHAIRMAN BABCOCK: You could say "an issued
17 subpoena" rather than say who from. Yeah, somebody --
18 yeah, Pete, or, no, Robert.
19 MR. LEVY: This is more of a question about
20 the difference between a deposition and a trial. If
21 somebody is testifying remotely for a trial and subpoenaed
22 to do so, is there any provision, or should -- shouldn't
23 we consider provisions about what are the circumstances by
24 which a witness is going to testify? And what I'm
25 speaking to is let's say opposing counsel wants to be in

1 the room with the witness, one of the opposing counsel.
2 Should that be permitted? Is it a public event? Does the
3 public have the right to sit in the room with the witness,
4 or are they sitting in the courtroom?
5 You know, doing remote trial testimony
6 becomes a little bit more complex and challenging because
7 of these circumstances. I would certainly think that an
8 opposing counsel should have the right to be in the room
9 with the witness, but, you know, maybe that's not
10 practically possible, and -- but I do think there should
11 be some consideration about that being an issue the court
12 could address or might need to address.
13 CHAIRMAN BABCOCK: And, Robert, would the --
14 would the suggestion that opposing counsel be there be
15 because that would be the one that would be
16 cross-examining the witness?
17 MR. LEVY: It could be the one
18 cross-examining the witness. It could be one that wants
19 to be there because, you know, one of the concerns about
20 remote testimony is that a witness can be coached off
21 camera, and they -- you know, one way to deal with that is
22 to have another lawyer there to make sure that doesn't
23 happen. There are other possibilities as well. If a key
24 witness is going to testify remotely, I might want a
25 camera, you know, some view of the room to make sure that

1 it's not happening or some other way to make sure, to
2 understand the context in which the witness is testifying.
3 It's just a different dynamic, and I think these types of
4 questions could come up.
5 CHAIRMAN BABCOCK: Would -- would you be
6 able to have a -- as an alternative to flying somebody to
7 El Paso to sit in a remote room to make sure that nobody
8 is holding up "yes" or "no" signs off camera, could you
9 say that the witness had to be alone?
10 MR. LEVY: You could -- yes, you could say
11 the witness -- no lawyer representative of the other side
12 is in the room. It might just be the witness. That might
13 be an alternative.
14 CHAIRMAN BABCOCK: And would the public
15 aspects of it be handled by the fact that presumably the
16 testimony is going to be shown in the courtroom --
17 MR. LEVY: Right.
18 CHAIRMAN BABCOCK: -- which the public can
19 attend?
20 MR. LEVY: That probably would work from the
21 public aspect, but I could envision somebody saying, well,
22 if this is a public proceeding, then I can be there where
23 the witness is, versus having to go to Houston to watch
24 the trial. That might be a concern that's not really
25 likely to happen, but it is an issue.

1 CHAIRMAN BABCOCK: Well, but the exception
2 is sometimes when it's important, so, yeah, great comment.
3 Yeah, Quentin.
4 MR. SMITH: So I think a lot of those
5 concerns were handled by the fact that you have to ask for
6 leave, and so when you ask for leave, opposing counsel can
7 raise whatever objections they have, if they want to be in
8 the room or have a camera on the room, so I think that
9 asking for leave handles those concerns.
10 MR. LEVY: I -- if I can respond, I agree,
11 except it might be helpful to add language, "obtains leave
12 of court pursuant to 21d under any limitations or
13 requirements that the court sets." Some language to that
14 extent, so that if there's an issue, that the leave of
15 court is not just to permit the remote testimony, but how
16 that testimony will be taken, will it be by Zoom or some
17 other -- by telephone. You know, that still is, you know,
18 a potential situation, and so the judge has the power not
19 only to approve the remote testimony, but the conditions
20 of that testimony.
21 CHAIRMAN BABCOCK: Professor Hoffman.
22 Excuse me, Professor Hoffman.
23 PROFESSOR HOFFMAN: Thanks, Chip. Robert,
24 if I heard you right, your last comment seemed to me to be
25 one that made a little bit more sense. In other words,

1 rather than --
2 HONORABLE TOM GRAY: The first one made no
3 sense at all.
4 HONORABLE KENT SULLIVAN: Spoken like a law
5 professor.
6 PROFESSOR HOFFMAN: I just like the idea of
7 just sort of generally imbuing the judge with, you know,
8 whatever boundaries to figure this out. I mean, the last
9 time I coached a witness, you know, that happened without
10 me being in the room. I mean, right, there's so much
11 technology that we can do this stuff, and so it seems like
12 it may be --
13 MR. LEVY: True.
14 PROFESSOR HOFFMAN: I just sort of like the
15 gist of your last comment, which is let's just make sure
16 the rule kind of imbues the trial court with paying
17 attention in these things, and over time, presumably we'll
18 figure out the scofflaws from the not and the bad habits
19 from the good ones.
20 CHAIRMAN BABCOCK: Chief Justice
21 Christopher, and then Kent.
22 HONORABLE TRACY CHRISTOPHER: If the
23 committee wanted to move forward with that, I think the
24 change would be to 21d, not to the subpoena rule.
25 MR. LEVY: That's probably accurate.

1 CHAIRMAN BABCOCK: Okay. Kent.
2 HONORABLE KENT SULLIVAN: I found a number
3 of categories that others across the country have looked
4 at and -- but I'll only focus on three. One is witness
5 environment, the notion that it ought to be specified that
6 it be a private location, free from distractions, and with
7 some way to assure that the witness is alone and not being
8 coached.
9 Number two was the issue of document
10 handling, which is, perhaps, more of a technology issue,
11 but one can see that for cross-examination purposes, or
12 also for direct examination purposes, presuming that the
13 witness hadn't been supplied with, you know, copies of the
14 exhibits for direct examination in advance. It would be a
15 concern and a consideration trying to set some minimum
16 baseline so that if someone is going to testify remotely
17 there's a way to use documents, assuming it's a case
18 involving some documents, to facilitate the
19 cross-examination of the witness.
20 And three was just cross-examination
21 capability generally, and that is a more broad-based
22 consideration of whether or not -- because, presumably,
23 the opposing counsel will be at the greatest disadvantage
24 under those circumstances, and it was just this question
25 of trying to make arrangements and create a minimum

1 baseline so that there's some assurance that the witness
2 can be effectively cross-examined. And, again, the other
3 thing that I think we sometimes lose track of is
4 considering proactively what the minimum technology
5 requirements for this kind of event should be, because I
6 think across the state we have 254 counties, and the
7 technology expectations vary significantly, and setting a
8 minimum baseline for technology requirements for remote
9 testimony I think would be an important discussion to
10 have.
11 CHAIRMAN BABCOCK: Yeah, Robert.
12 MR. LEVY: Something that Judge Sullivan or
13 Commissioner Sullivan --
14 HONORABLE KENT SULLIVAN: Whatever title you
15 like.
16 CHAIRMAN BABCOCK: He's got so many titles
17 we can't figure it out.
18 MR. LEVY: Reminded me on -- I think that
19 the rule -- I agree, and I think these issues probably are
20 maybe more appropriate for 21d, because they're going to
21 involve all of the issues under 21d, but there is one
22 other point on the language of 176.2. Apologies for going
23 back, but is it doesn't provide for a circumstance where
24 the witness wants to be remote for good cause versus the
25 subpoenaing party. So should there be a circumstance

1 where a witness has the right or the -- you know, opposing
2 party has the right to request that their witness appear
3 remotely, even though the subpoena says appear in person?
4 And one other point that I did want --
5 CHAIRMAN BABCOCK: Before you leave that
6 one --
7 MR. LEVY: Yeah.
8 CHAIRMAN BABCOCK: Are you saying when the
9 witness is within subpoena range --
10 MR. LEVY: Correct.
11 CHAIRMAN BABCOCK: -- but doesn't want to
12 travel 149 miles, or whatever it is, to the courthouse?
13 MR. LEVY: Right. The witness is going to
14 be at their child's wedding in Colorado, and they don't
15 want to miss it, and they can appear remotely, and it
16 makes sense that they should be able to, maybe, under 21d,
17 but, nope, you've been subpoenaed, and we have no out --
18 out on this.
19 MR. SMITH: So we already have these
20 problems. I mean, this is not just a subpoena problem, so
21 you can object, file a protective order, and so this is
22 just to allow for remote proceedings, and so I think
23 that's just an issue that exists right now.
24 MR. LEVY: Yeah, but the way the rule is --
25 well, this is a subpoena rule, I accept.

1 CHAIRMAN BABCOCK: Reluctantly.
2 MR. LEVY: Yes, very, but, you know, maybe
3 that's a 21d issue also. I'm not sure. Is there an
4 opportunity for a witness to request to appear remotely?
5 MR. SMITH: I think that exists right now.
6 They can just file an objection, move for protective
7 order.
8 CHAIRMAN BABCOCK: Justice Miskel.
9 HONORABLE EMILY MISKEL: That's what -- I
10 haven't had a chance to pull up the rule, but is it my
11 recollection that if a subpoenaed party is objecting to
12 the time and place of a subpoena that they can get an
13 automatic stay if they suggest a different time and place?
14 MR. LEVY: Of depositions, yes.
15 HONORABLE EMILY MISKEL: Oh, but you're
16 saying for a hearing.
17 MR. LEVY: Hearing or trial, right.
18 HONORABLE EMILY MISKEL: But I think this
19 happens all the time. I agree that this is something that
20 currently exists with, you know, our practice of doing
21 discovery or hearings.
22 MR. LEVY: Chip, if I could, the one
23 other --
24 CHAIRMAN BABCOCK: Yeah, I'm sorry, I
25 interrupted you and didn't mean to.

1 MR. LEVY: No, no, that made sense. I did
2 want to point out, we had talked, though, at the last
3 meeting about where the federal rules are on this, and
4 there have been proposals in the Federal Civil Rules
5 Advisory Committee about remote testimony. There's
6 nothing specific that they're looking at right now in
7 terms of proposed language, but I did want to point out
8 that yesterday the judicial conference issued preliminary
9 rules for public comment and hearings that will take
10 place, I think in January, on proposed amendments to
11 bankruptcy rules, which are instructive, I think, to us on
12 these issues.
13 The bankruptcy rules have their own rules
14 about trial and hearings, and they do have many contested
15 matters, as the comments note, that a lot of time the
16 testimony that takes place is very short and can involve
17 multiple witnesses that what they're doing is kind of
18 trying to align the bankruptcy rules to the current
19 federal rules in terms of taking testimony, but there is a
20 new proposed Rule 901.4 on contested matters that does
21 provide for the potential of remote testimony, but it,
22 again, is aligning to the current federal rules standard
23 that a witness -- testimony on a disputed material fact
24 issue "must be taken in open court, unless the federal
25 statute, the Federal Rules of Evidence, these rules, or

1 other rules adopted by the Supreme Court provide
2 otherwise. For cause and with appropriate safeguards, the
3 Court may permit testimony in open court by
4 contemporaneous transmission from a different location";
5 and that "for cause" language I think is -- currently
6 matches what is in Federal Rule of Civil Procedure 43,
7 which is the longtime standard for permitting remote
8 testimony under very specific circumstances.
9 So I'm just pointing this out that it might
10 be interesting to see what the public testimony on this
11 and the comments will be over the next six months to
12 determine whether there are -- there's any warnings to be
13 had from that process on the federal side in terms of what
14 might be instructive to us in the state rules.
15 CHAIRMAN BABCOCK: Justice Bland.
16 HONORABLE JANE BLAND: Yes, so just an
17 update. Yesterday, I was on a committee meeting --
18 CHAIRMAN BABCOCK: By Zoom?
19 HONORABLE JANE BLAND: By Zoom, for the
20 federal rules and examining Rule 43, which is their --
21 it's not really equivalent to our Rule 21, but it's sort
22 of where this remote testimony issue is percolating, and
23 then Rule 45 is their subpoena rule, and they have the
24 same -- there's the same tension with kind of separating
25 out the requirements for a subpoena and the requirements

1 for remote testimony, and I shift up to those committee
2 members our rules, some of the process we used in adopting
3 those rules, you know, that -- you know, they call it the
4 Texas experiment, where we've had over four million remote
5 proceedings in Texas as of the last time we checked for
6 this project, but all of that is to say that the committee
7 is meeting in October, and this is going to be a
8 discussion item and is prompted by the bankruptcy courts
9 and the change in the bankruptcy rules, and then it's also
10 prompted by a Ninth Circuit case called Kirkland, which
11 probably read the rule as it exists too narrowly, and so
12 what to do about that.
13 And I think the federal courts are a lot
14 more reticent, because they haven't had the degree of
15 experimentation with remote proceedings that we have had,
16 and I do think their work can inform our work on
17 subpoenas, and in particular, I think their -- their view
18 that, you know, judicial oversight of anything remote is
19 important, with -- in connection with the exercise of
20 subpoena power. So I just give that to you as an update.
21 There's no definitively proposed language yet. There may
22 be by the time we get to October, but there's a lot of
23 discussion about what to do. With some judges thinking,
24 you know, federal courts are not meant to have remote
25 proceedings, and some judges -- in particular, the

1 bankruptcy courts, who I think have a more
2 consumer-directed, consumer-focused practice, they see it
3 as an access to justice issue, similar to what we've seen
4 in connection with child support cases and consumer debt
5 cases and that it has opened the door to participation to
6 many who otherwise wouldn't be participating in their own
7 court proceeding.
8 CHAIRMAN BABCOCK: One question on that
9 topic. Have you-all, on the federal side, talked about
10 Rule 45, which permits for trial statewide subpoena power,
11 which in a state like Texas, you know, is way beyond 150
12 miles? Rhode Island, not as big a deal, but --
13 HONORABLE JANE BLAND: Well, and in some
14 cases, with respect to parties, it's even broader than
15 that, and so then that becomes the issue. The Kirkland
16 case out of the Ninth Circuit I think involved a party
17 that resided in the Virgin Islands, and the judge ordered
18 the deposition -- or, I'm sorry, the remote testimony of
19 that party when they -- you know, it became clear that
20 they weren't going to appear, and the Ninth Circuit, as
21 you-all know, it's very rare for federal courts to
22 exercise extraordinary mandamus power, and they mandamused
23 the judge and said open court means the party must attend
24 in person in court. I'm not doing justice to the analysis
25 of that opinion, so I'm going off of memory, so go and

1 read it, and if I've said it wrong, I stand to be
2 corrected.
3 CHAIRMAN BABCOCK: No, over the lunch hour,
4 you go --
5 HONORABLE JANE BLAND: Anyway, so, yeah, so
6 45 is subpoena power, and when you look at it through the
7 lens of remote proceedings, it's very broad, and 43 is
8 about, you know, allowing people to appear remotely for
9 good cause, or they even have further guardrail,
10 extraordinary circumstances, I think -- Robert's nodding
11 -- is the term. So -- but they have the same issue of,
12 you know, how do we separate those two, talk about
13 subpoena power and what that should be, and then what it
14 should look like in the context of what will be allowed
15 for remote attendance.
16 MR. LEVY: It's compelling circumstances.
17 HONORABLE JANE BLAND: Compelling
18 circumstances.
19 MR. LEVY: But I did want to ask, Justice
20 Bland, since you raised it, is it possible that you can
21 make the Federal Civil Rules Advisory Committee meetings
22 more fun like these, because they are much more stated?
23 HONORABLE JANE BLAND: Yeah, we are light
24 years -- it did make me feel good as sort of a state judge
25 appointee that this committee is just really terrific, and

1 we move, believe it or not, at the speed of light in
2 comparison.
3 CHAIRMAN BABCOCK: Well, and I bet you the
4 federal side does not have a contest, as we will have
5 today, on who has the most luminescent attire. Marcy,
6 Kennon, Chief Justice Christopher are the candidates, and
7 we'll -- oh, Judge Miskel, I missed her, but we'll have a
8 vote over the lunch hour on that as well. Kennon.
9 MS. WOOTEN: This is just a suggestion that
10 when, and if, this proposal is actually put onto an order
11 from the Supreme Court of Texas that there be an effort to
12 align the terminology in it with what's in 21d. 21d
13 refers to "electronic means" as opposed to saying "remote
14 means," and 21d has a definition of "court proceedings,"
15 whereas this proposal refers to "proceedings under this
16 rule." So I would just say make them aligned before
17 they're proposed to the public for comment, if they are.
18 CHAIRMAN BABCOCK: Pete.
19 MR. SCHENKKAN: Perhaps I simply haven't had
20 enough coffee this morning, but in 176(b) and 500.8(b),
21 I'm confused about the relationship between the "to
22 extent" clause and the "notwithstanding" clause. They
23 look like two different sentences to me.
24 PROFESSOR HOFFMAN: Pete, say it again.
25 What section?

1 MR. SCHENKKAN: I'm looking at page two of
2 the subcommittee's remote proceeding task force
3 suggestions, and the (b) at the top of the page and the
4 (b) at the bottom of the page, it seems to me we've got
5 two thoughts in these (b)'s. One is notwithstanding the
6 150-mile limitation, you can serve the subpoena any place
7 to command the person to proceed; and then I think the "to
8 the extent" clause is saying, but if that subpoena
9 requires you to do some traveling, the travel can't be
10 more than 150 miles; and if that is what is intended, I
11 would, respectfully, I know it's -- I suggest we break it
12 into two sentences, because, otherwise, I don't know what
13 the relationship is here.
14 MR. SMITH: We can change the comments with
15 a period.
16 CHAIRMAN BABCOCK: Okay. Yeah, Richard.
17 MR. ORSINGER: So the phrase in 176.3(b) and
18 again in 500.8(b), telephone or by other remote means, I
19 wonder if we could eliminate "telephone" and just consider
20 it to be part of "other remote." I'm also troubled by the
21 "issuing county." That's confusing to me when the lawyer
22 issues it, and then most --
23 CHAIRMAN BABCOCK: Wait a minute, why do you
24 want to knock out telephone?
25 MR. ORSINGER: Because telephone is remote.

1 CHAIRMAN BABCOCK: It is, but it's also got
2 years and years of thinking about, and remote is becoming
3 like Zoom. I mean, people think remote is Zoom now.
4 MR. ORSINGER: Okay. Well, to me
5 telephone -- telephone is remote. The difference between
6 the telephone and something else, I mean, some people even
7 join Zoom conferences by telephone, so it's not a big
8 deal. It just seems redundant to me and that we ought to
9 roll it together, but the most important thing to me is I
10 wish we would give some thought to the 150-mile range.
11 Back when we didn't have the technology and the ability to
12 have someone appear in a hearing or a trial remotely, or
13 efficiently, by video deposition or whatever, 150 miles
14 was a compromise to get someone in the courtroom where
15 they had to be in order for their testimony to be
16 presented, but nowadays, it's so much more convenient to
17 present testimony either through video deposition or by
18 remote means during the hearing or trial.
19 Do we really need to force people 150 miles
20 away to come to the courthouse, or should we reduce it to
21 a hundred miles or 90 miles? I just want to throw that
22 thought out, because the balancing of privacy rights and
23 inconvenience and participation is slightly different now
24 with the new technology.
25 CHAIRMAN BABCOCK: Well, but there's new

1 forms of transportation now, too. I mean, you can hop on
2 a -- on a Southwest flight and be almost anywhere in the
3 state within an hour, so --
4 MR. ORSINGER: Well, that might argue that
5 you can increase it, but to me, it would be -- my thought
6 would be we could actually reduce the 150 miles because
7 electronic presence is such an adequate substitute, or, at
8 least, in some minds.
9 CHAIRMAN BABCOCK: Yeah, got it. Thanks.
10 Anything else?
11 Quentin, do you have anything you want to
12 say in response to all of these comments, some good, some
13 bad, some indifferent?
14 MR. SMITH: I'd have to look at the CPRC on
15 the 150 miles, because I think that's a statutory issue,
16 but we can check the language and make sure we've got it.
17 CHAIRMAN BABCOCK: Yeah, good point. Roger.
18 MR. HUGHES: Well, this is, I guess, you
19 might say, a point of information. I don't have to deal
20 with this problem very often, so I ask people who do. Do
21 we have a problem with judges who feel like under the
22 current rules they don't have any discretion to shape the
23 conditions under which a witness will appear remotely to
24 give testimony in court? I mean, if there's not a
25 problem, I'm not sure why we want to -- right now I would

1 think -- and common sense is a poor guide in the
2 courtroom, but I would think most judges would assume that
3 they have a fair amount of discretion to, you know,
4 protect the witness, prevent witness coaching, et cetera,
5 and they don't need to -- and the lack of a rule wouldn't
6 cabin them in any way, but maybe I'm wrong. Maybe judges
7 are going, well, the rule doesn't give me any discretion.
8 I just guess I have to allow it.
9 CHAIRMAN BABCOCK: Well, we have some
10 distinguished trial judges here. Any of you-all -- and it
11 stretches from Fort Worth to Amarillo to Houston, so any
12 of y'all have concerns about that, or reactions to Roger's
13 comment? Judge Schaffer.
14 HONORABLE ROBERT SCHAFFER: No, I feel like
15 I do have that kind of discretion. I will tell you I've
16 never been asked to use it, and so I sometimes wonder,
17 too, why this is an issue looking -- a rule looking for an
18 issue, but it does make sense, though, because I do get
19 complaints sometimes that people are worried about some
20 coaching in remote depositions, but never had anybody
21 bring that to my attention where it actually happened.
22 CHAIRMAN BABCOCK: Judge Wallace, you or
23 Judge Evans have anything in Fort Worth like that?
24 HONORABLE R. H. WALLACE: I have nothing to
25 add to that.

1 HONORABLE DAVID EVANS: I have less to add.
2 CHAIRMAN BABCOCK: Thank you. Finally.
3 HONORABLE DAVID EVANS: I will just say
4 this: If you have -- coaching hasn't been a problem for
5 me to tell when somebody was being coached and prompted,
6 but it may not be dealing with people who are
7 sophisticated enough to --
8 CHAIRMAN BABCOCK: When they're on camera
9 and they look over there, and they go, "no."
10 HONORABLE DAVID EVANS: Yeah, it's pretty
11 much.
12 CHAIRMAN BABCOCK: Judge Estevez.
13 HONORABLE ANA ESTEVEZ: So are we dealing
14 with the deposition part or the hearing part? Because I
15 am still allowing a lot of Zoom witnesses, so when people
16 ask for it, if -- I usually allow it. If there's
17 objections, then we deal with the objections. We have
18 quite a bit of objections in criminal cases.
19 CHAIRMAN BABCOCK: Uh-huh.
20 HONORABLE ANA ESTEVEZ: And so those are
21 usually sustained, depending on the issues. On the civil
22 cases, do people get coached, yes. Do I stop proceedings
23 sometimes and say, "Can you show me everyone in your
24 room?" It's usually a family law case when hubby or
25 boyfriend or somebody is standing there telling them what

1 to say. So do I have concerns, yes. Do I think a rule
2 would be helpful? A rule is always helpful.
3 CHAIRMAN BABCOCK: Why did you point at
4 Quentin?
5 HONORABLE ANA ESTEVEZ: Because, you know,
6 once they turned the camera, there he was, so I was
7 worried about his coaching. No, but, you know, does some
8 coaching -- you know what, what you don't realize, for
9 most of the cases we hear, they're not as sophisticated as
10 the ones you do, and so the fact that someone is being
11 coached really doesn't matter, because they're just going
12 to tell you, hey, you forgot you need to tell them this or
13 this, and so hearing all of it ends up being more like a
14 pro se type of case than anything else, and so we end up
15 having a messier hearing, but the reality is, at the end,
16 we hear the same amount of information, and we end up
17 getting the same amount of proof. You might not have
18 gotten your gotcha moment, but we heard what happened.
19 So you may not turn out as the best attorney
20 in the world because they were lying the whole time, but
21 the reality is I found out that they lied because the
22 document did come in, and it was -- I get the same
23 information, even when they're coached. They don't
24 usually coach them to lie, and if they did, they coached
25 them before the deposition to lie, too, so it's not going

1 to make a huge difference.
2 CHAIRMAN BABCOCK: All right.
3 HONORABLE ANA ESTEVEZ: But it does upset me
4 when someone else is testifying, so I make them get out of
5 the room or stop or sit in front of the camera, too, so I
6 can see.
7 CHAIRMAN BABCOCK: Yeah. So you can capture
8 the scowl if they're scowling, so but you're talking, it
9 sounds like --
10 HONORABLE ANA ESTEVEZ: Hearings.
11 CHAIRMAN BABCOCK: -- hearings and trials,
12 or not trials?
13 HONORABLE ANA ESTEVEZ: I have -- I allow
14 remote people for different circumstances, when someone
15 brings it up and the other side isn't opposed, I mean,
16 that happens a lot, but, you know, in our criminal cases
17 they're usually experts, and our issue is more of a
18 confrontation type of issue, and it depends. If it's the
19 defendant's witness, then usually the State doesn't oppose
20 it, because they don't want to ask for, you know, a
21 continuance or something like that, but if it's the
22 defendant's witness, then they're not going to be arguing
23 the confrontation issue, because it was their witness.
24 CHAIRMAN BABCOCK: Yeah.
25 HONORABLE ANA ESTEVEZ: And the State

1 doesn't have that right, technically, so we have
2 different -- different issues coming up.
3 CHAIRMAN BABCOCK: Have you ever dealt with
4 an issue where the objection to the remote testimony,
5 either at hearing or trial, is based on "I can't do as an
6 effective cross-examination remotely as I could be -- as I
7 could live"?
8 HONORABLE ANA ESTEVEZ: In a criminal case,
9 I have.
10 CHAIRMAN BABCOCK: Okay. And how do you
11 resolve that?
12 HONORABLE ANA ESTEVEZ: I resolve it
13 constitutionally, so we didn't do it unless we had it --
14 they gave me a case that showed that it wasn't going to
15 get reversed. I'm not going to try it twice.
16 CHAIRMAN BABCOCK: Okay. And have you had
17 it come up in civil cases?
18 HONORABLE ANA ESTEVEZ: No.
19 CHAIRMAN BABCOCK: Yeah, Pete, Robert,
20 Justice Miskel, unless she's doing a fashion adjustment.
21 Okay. Pete, Robert, then Justice Miskel.
22 MR. SCHENKKAN: Listening to Judge Estevez
23 and some of the other comments, I'm wondering if a lot of
24 what we're working on right here is better addressed by
25 best practices education at the Texas judicial conference,

1 you know, calling on large scale trial judge audience
2 participation, to improve the next year's or the next six
3 month's presentation rather than in the rule.
4 It seems to me there's so many different
5 fact situations that I'm hearing, that I had -- most of
6 which I had never encountered, that would go into what
7 would be the most appropriate way to deal with the
8 possibility of coaching and whether it's really material
9 or not, and -- and the constitutional limits and so forth.
10 For example, one thing that occurred, listening, is if we
11 were going to try to do this by rule, instead of best
12 practices, maybe the rule should say if there's anybody
13 else in the room they have to be visible in the camera.
14 CHAIRMAN BABCOCK: Okay. Robert.
15 MR. LEVY: So a couple of issues. I
16 definitely like bringing Rule 21d into play, and I think
17 it's the appropriate rule to provide the instructive
18 limits and requirements. There is one concern about 21d,
19 because 21d(a) talks about court proceeding, and 21d is
20 appearances at court proceedings, and "court proceedings"
21 is defined as "an appearance before the court such as a
22 hearing or trial."
23 Because we're also using 21d for
24 depositions, tying into 176.2, do we need to amend
25 21d(a)(1) to include depositions? I think that will

1 create a potential tension point, because if you say that
2 the subpoena is not consistent with 21d, then the lawyer
3 seeking the testimony might say 21d isn't applicable to a
4 deposition, it only matters at trial.
5 The -- the one interesting thing, as 21d(d)
6 is the objections, and it does state that a party may
7 object to any method of appearance, stating good cause for
8 the objection. And that probably is broad enough to cover
9 the types of issues that I was mentioning for remote
10 testimony. It seems like it might be broad enough to
11 cover the method, which would include the -- you know, the
12 situation where the witness is, as well as the technology
13 being used and the other issues, and the factors under (e)
14 talk about factors that the court, considering good cause,
15 should consider, also includes issues of technological
16 restrictions, whether method of appearance is best suited,
17 other issues.
18 It might be helpful, though, if we do amend
19 21d, if the Court could include a supplemental note, the
20 advisory note, to explain that these types of issues, such
21 as where the witness is and the setup for the witness,
22 could also be the subject of a discussion before the
23 court.
24 One quick small comment on the draft. I
25 just wanted to mention on 176.2, just a drafting little

1 nit. The first part of (a), "attend and give testimony at
2 a deposition hearing or trial," that should not be
3 underlined. That is the current rule, and just to make
4 clear, we do -- you know, if the Court publishes this,
5 that that's the current language.
6 CHAIRMAN BABCOCK: Okay. Yeah, Justice
7 Gray.
8 HONORABLE TOM GRAY: I was just sitting here
9 reading this 150-mile limitation that's in 176.3 versus
10 the one that's in 176.3(b), the (a) versus the (b), and
11 then down in 500 point -- and they're not consistent. One
12 is 150 miles from a county. A county may be 50 miles
13 wide, and so suddenly you're 200 miles from the place
14 you're going to have the deposition; whereas, the others
15 are more specific, and it's 150 miles between the place
16 that it's going to occur and the -- where the person
17 resides or is served, so that may require some attention,
18 but --
19 CHAIRMAN BABCOCK: No, that's a great point.
20 Is there any lawyer in the state that will figure that
21 out, subpoena somebody 200 miles away from the courthouse,
22 but 150 miles from the county line?
23 HONORABLE TOM GRAY: There's probably
24 somebody down in -- is it Brewer County that's about a
25 hundred miles across? So, you know --

1 CHAIRMAN BABCOCK: Yeah. All right. Good.
2 Yeah, Tom.
3 MR. RINEY: It's easier for me to follow if
4 we keep them separate, because on a subpoena, subpart (e)
5 of 176.6 talks about protective orders, but it's broader
6 than just deposition. It says "A party appeared" -- "to
7 appear at a deposition, hearing, or trial may ask for
8 protection, including under Rule 192.6(b)," which it'S
9 pretty broad. It gives the court discretion that
10 discovery -- I understand that wouldn't be necessarily
11 hearing or trial, but discovery be undertaken only by such
12 method or upon such terms or conditions at the time and
13 place directed by the court. That seems to me about as
14 broad as we need for subpoenas in terms of relief sought
15 by the witness.
16 I think in terms of what the parties
17 require, it's necessarily going to need to come under 21d,
18 and I think as time goes on, just from experience, we're
19 probably going to need to modify that, but I think 176, we
20 already have taken care of the witness and have given the
21 court enough discretion to take care of any complaints
22 from the witness. And we deal with other issues under
23 21d, but I think we should keep them separate as well.
24 CHAIRMAN BABCOCK: Okay. Kent.
25 HONORABLE KENT SULLIVAN: Just very briefly,

1 there have been a number of comments talking about the
2 role of discretion, the standard of good cause, as opposed
3 to a vetting, something more specifically in a rule; and
4 my concern is if you have highly qualified lawyers, very
5 experienced judges, you don't need many rules, quite
6 frankly, but we have 254 counties. The spectrum that our
7 judges represent, very different, very uneven with respect
8 to background, experience, training. Some are very
9 inexperienced, and I think that speaks for the need for
10 minimum standards in setting baseline expectations for
11 things like this.
12 This is an area that is fraught with
13 potential for abuse. In most cases, it won't matter,
14 because in most cases it's probably going to be handled by
15 agreement and the witness probably isn't going to be
16 terribly consequential, but in some cases, some limited
17 circumstances, it could be very important, and it could be
18 subject to abuse and manipulation, so I really think we
19 ought to think about minimum standards and explicitly
20 embed it in the rule.
21 CHAIRMAN BABCOCK: Okay. Justice Miskel.
22 HONORABLE EMILY MISKEL: So this is a
23 discussion that's come up from several places in this
24 meeting, and also when we get to 18c, recording and
25 broadcasting of court proceedings, like, preview, we're

1 going to have that same discussion again about rules
2 versus standards, and so just to preview something that we
3 talked about in connection with recording and
4 broadcasting, an approach that we thought might be
5 productive in that scenario was for the Supreme Court --
6 and I think in that rule it specifically, actually,
7 already refers to standards promulgated by the Supreme
8 Court, but we can have sort of bare minimum rules.
9 I don't like when we micromanage courts in
10 lengthy rules because there's so much variation between
11 case types and courts, but to have -- I agree it might be
12 helpful to have some -- a document that has standards
13 that's much more easy to update and revise from time to
14 time and teach in Texas Center for the Judiciary and all
15 of that and have our rules still be very minimal, because
16 it needs to stretch to encompass so many types of parties
17 and litigation.
18 CHAIRMAN BABCOCK: Okay. Good. Well, I've
19 got a comment, if I may, and this is really more for
20 almost-Judge Bullard rather than everybody else, but a lot
21 of the cases I deal with are, admittedly, a very thin
22 sliver of our civil justice system; but they also involve,
23 oftentimes, a lot of money, like sometimes in the billions
24 and, in my practice, sometimes constitutional rights; and
25 I have observed that this remote proceeding option has

1 become a tactical maneuver by some sophisticated lawyers.
2 For example, I have a case, not in Texas, but every key
3 witness that the other side has, they want to do remotely.
4 Now, why do they want to do it remotely?
5 Because it is -- it lessens the effectiveness of
6 cross-examination, in my view, and it helps them -- maybe
7 they're not holding up signs saying "yes" or "no," or
8 saying, "honey," like that, but -- and keep your elbows
9 away from Quentin. Okay. But there's an advantage to
10 them being there and the cross-examining lawyer not being
11 there, and I've also seen judges' approach to that in
12 exercising their discretion in vastly different ways.
13 Some judges, predominantly on the federal
14 side, absolutely say, huh-uh, remote is the exception, in
15 person is the rule, even with depositions, and not to
16 mention trial. And then there are other judges, more
17 state court and, frankly, typically younger, who say,
18 yeah, of course, anything is remote, it will be easier, it
19 will be less expensive, and let's do it that way. So I
20 make this comment only to highlight something from a law
21 practice that is not probably more than one or two percent
22 of what we face in courthouses in Texas, but I think it's
23 a real -- it's a real issue, and it's going to become
24 exacerbated as we have more remote depositions and trials.
25 And I finally got the chartreuse -- what color is that?

1 MR. HARDIN: It's green.
2 CHAIRMAN BABCOCK: It's green, it's not
3 green. More like a popcicle next to me, Mr. Hardin.
4 MR HARDIN: We'll be serving ice cream at
5 the break. I could not agree more, but I think part of
6 this has to do with the generational thing. Obviously,
7 Chip and I are not 35, 40 years old.
8 CHAIRMAN BABCOCK: Speak for yourself.
9 MR. HARDIN: Well, all right, but the point
10 being is, is that I've seen it at a different practice
11 than Chip's. Rarely on a constitutional issue, never with
12 billions, and never with usually with hundreds of
13 millions, and so it just -- and different types of civil.
14 We're about 85 percent civil, so I see it happening on
15 both sides, though. I've had a witness remotely in a
16 criminal trial, and both sides had to give in to do it for
17 practical reasons, but the cross was worthless, and it was
18 our witness, so that was a good thing as far as I was
19 concerned.
20 But routinely on civil depositions I'm
21 delighted when the other side wants to do it remotely. I
22 don't care what anybody says, if you try enough cases, the
23 cross-examination is twice as or three times or four times
24 as ineffective remotely. It's just a fricking fact, at
25 least in my experience, and it is tactical. I mean, every

1 time I get a notice where the other side wants to do it
2 remotely for our guy, I'm there, that's great. I love it,
3 and rarely, rarely, do they get a good deposition.
4 Now, I have had other friends who have tried
5 many, many cases, as many as I do or so, and they say, no,
6 no, I had a great deposition cross-examination, and all I
7 think is I would like to have been there to see it,
8 because I don't think they were probably right, I mean,
9 and it's almost across the board. And this falling in
10 love with it remotely is gathering steam, as Chip is
11 saying, and I don't know quite what the solution is to it,
12 if it's the rules, but it is a thing that is changing away
13 -- it is taking away from the ability of advocacy to
14 affect what's going on in litigation.
15 CHAIRMAN BABCOCK: Quentin, as a younger
16 member of this committee.
17 MR. SMITH: I'll just say, this is a
18 subpoena rule, and so if you're issuing the subpoena, you
19 don't want to do your remote deposition or remote hearing,
20 just don't put it in there and don't ask for leave, and so
21 I think that is going to be an issue that exists right now
22 presently. For people that want to respond to a subpoena,
23 I think that's the issue, and I don't think that needs to
24 be addressed in this rule.
25 CHAIRMAN BABCOCK: Yeah, that's a good

1 reminder. Thank you.
2 Anything else? All right. Any other
3 comments at all about this rule before we put it to bed?
4 All right. Speak now.
5 All right. This one is done. Thank you,
6 Chief Justice Christopher. Thanks, Quentin. Nicely done.
7 Now, we'll go to something that's not
8 controversial at all, recording and broadcasting court
9 proceedings, and Orsinger was here -- there he is. Are
10 you leading this charge, or is somebody else?
11 MR. ORSINGER: Well, I would be happy to
12 start. We do have a task force recommendation that was
13 out there for us to comment on, and so my subcommittee,
14 which is Rules 15 through 165a, considered the issues
15 generally as they appeared to us, and then we specifically
16 responded to the proposed rule changes and the comments
17 that were done in the task force. One of the first things
18 that we were -- had a consensus on is that whatever we --
19 whatever language we use and concepts and policies that we
20 use in the trial court, we need to compare to the
21 appellate court. Clearly, appellate courts are different,
22 because you don't have witnesses testifying and you have
23 lawyers only and judges speaking.
24 On the other hand, the comment was made that
25 sometimes appellate justices can feel more conversational

1 or engage lawyers more in a colloquy when there's no
2 expectation of publicity, but, at any rate, yes, the
3 factors are different, but there should be some
4 correlation in the choice of language and in the standards
5 that we promulgate, particularly if there are universal
6 standards of public access that would be equivalent.
7 The second thing is the current rule was
8 clearly drafted in an era when we were talking about TV
9 cameras, television cameras, and cables all across, and I
10 remember the Billie Sol Estes U.S. Supreme Court case,
11 where they had cables crisscrossing and the jury had to
12 step over them, and he got that conviction reversed just
13 because it had interfered with his due process of law.
14 CHAIRMAN BABCOCK: Don't forget the
15 cameraman who went right up to the witness with a flash
16 bulb.
17 MR. ORSINGER: Oh, my gosh, I didn't realize
18 that. Well, it's a case for the ages, but --
19 MR. LEVY: Chip was there.
20 CHAIRMAN BABCOCK: I was the witness.
21 MR. ORSINGER: I'm surprised you didn't
22 disappear, if you were a witness in that case.
23 CHAIRMAN BABCOCK: Yeah.
24 MR. ORSINGER: So at any rate, one of the
25 first things that the task force commented on was that

1 consent may be required or to what extent is consent
2 required, because in the Rule 18c, as it exists, there are
3 three grounds. One is when broadcasting, televising,
4 recording, or photographing, and the parties have
5 consented, and consent to being depicted or recorded is
6 obtained from each witness whose testimony will be
7 broadcast, televised, or photographed. So there is a leg,
8 a prong of this standard, that requires the parties to
9 consent and requires the witnesses to consent to their
10 testimony being broadcast, televised, recorded, or
11 photographed, but it's just one of three different
12 alternatives.
13 The third one is investiture or ceremonial
14 proceedings, and the first one is in accordance with
15 guidelines promulgated by the Supreme Court for civil
16 cases, and unless I am wrong, I have been informed the
17 Supreme Court has never promulgated those standards for
18 civil cases. Is that agreed upon?
19 MS. DAUMERIE: Yes, that's correct.
20 MR. ORSINGER: Yes. So that exception
21 doesn't exist; and in the absence of them, perhaps,
22 consent is required, but if the Supreme Court, at this
23 juncture, issues guidelines that are promulgated, then any
24 court operating in compliance with the guidelines does not
25 require the consent of the parties or the consent of the

1 witnesses. So --
2 CHAIRMAN BABCOCK: Before we -- before you
3 go on from that.
4 MR. ORSINGER: Yeah.
5 CHAIRMAN BABCOCK: I had thought, but this
6 may be dated information, that -- that counties could pass
7 local rules, which the Supreme Court could bless,
8 providing for televised proceedings.
9 MR. ORSINGER: Well, you know, the task
10 force report, Chip, has attached Travis County as an
11 example. I am not that familiar with what it's like
12 around the state, and so I guess the possibility you're
13 mentioning is that if the Supreme Court approved the local
14 rule, that constitutes guidelines promulgated by the
15 Supreme Court?
16 CHAIRMAN BABCOCK: Yeah, I think -- I know
17 for a fact in Dallas County there have been televised
18 proceedings, both criminal and civil.
19 MR. ORSINGER: Right. Well, I think that's
20 a plausible argument, but I think it would be -- it would
21 be better if the Texas Supreme Court --
22 CHAIRMAN BABCOCK: It's not an argument.
23 It's just factual.
24 MR. ORSINGER: Okay. It's a fact -- it's a
25 fact event that we have local rules that may have been

1 approved by the Supreme Court back in the day when the
2 Supreme Court was approving local rules. So --
3 CHAIRMAN BABCOCK: Is that an implied
4 criticism?
5 MR. ORSINGER: No, but I think that that
6 rule has become -- or the rigidity of Supreme Court
7 approval has been relaxed, because now we have, you know,
8 standing orders and things that are not local rules, and
9 they're running the way the court system is going, and
10 without Supreme Court --
11 CHAIRMAN BABCOCK: Richard, would you let
12 Justice Miskel ask a question?
13 MR. ORSINGER: I'm sorry, yes.
14 HONORABLE EMILY MISKEL: I was just going to
15 -- I think you guys were talking in cross-purposes. So
16 Richard pointed out that the current Rule 18c requires the
17 consent of the parties, so it requires unanimity, which
18 none of the judges on the subcommittee were aware of,
19 because we're all coming up in a system where Dallas
20 County, Collin County, it's kind of left up to the
21 individual judge, and each judge will do like an order
22 governing how the media may film and all of that stuff.
23 So I always thought it was on a
24 judge-by-judge, case-by-case determination, and then
25 Richard called to my attention that, actually, no, it

1 isn't, under the current way the rule is drafted. And
2 then so, Richard, it's not that it was a standing order.
3 It was that it was literally an order in that particular
4 cause number in the case, so it wouldn't have been blessed
5 even under the rule, is my understanding of how that's
6 generally worked.
7 CHAIRMAN BABCOCK: Does Collin County have
8 rules on broadcasting, that the court has approved?
9 HONORABLE EMILY MISKEL: So we have talked
10 about this topic, and some judges, like, want Dateline to
11 be able to come and film a criminal trial in their court
12 and have done it. Other judges are against any filming
13 whatsoever, and so we -- every time we revisited the
14 topic, we agreed to leave it to a court-by-court decision,
15 so generally in Collin County our rule is you can't bring
16 cameras inside the secure areas of the courthouse, unless
17 approved by the judge in your case.
18 CHAIRMAN BABCOCK: Is that practice approved
19 by the Supreme Court?
20 HONORABLE EMILY MISKEL: So I can't remember
21 if -- I think it may actually be in our standing orders,
22 because -- that you can't bring cameras into the secure
23 areas, and then I think it's in there unless a particular
24 judge approves it for your case.
25 CHAIRMAN BABCOCK: Okay.

1 HONORABLE EMILY MISKEL: Because, for
2 example, we approve it for people who want to film
3 adoptions, you know what I mean, and stuff like that.
4 CHAIRMAN BABCOCK: Right, sure.
5 HONORABLE EMILY MISKEL: So that's another
6 example of benign recording and broadcasting.
7 MR. ORSINGER: Chip, I could be wrong, but I
8 think that the standing orders that are proliferating
9 around the state are not considered local rules that need
10 to be approved by the Supreme Court. I'm not sure.
11 MS. WOOTEN: Well, neither the local rules
12 nor the standing orders have to be approved by the Supreme
13 Court anymore under the amended statewide rule.
14 MR. ORSINGER: Okay.
15 HONORABLE ANA ESTEVEZ: Now it's the
16 presiding judges.
17 MR. ORSINGER: Okay, so --
18 CHAIRMAN BABCOCK: Let me ask one more
19 question, Richard. Are the local rules in a number of
20 counties still in place, or have they been abrogated by
21 the Court?
22 HONORABLE ANA ESTEVEZ: No. Presiding
23 judges now have to look at them and make sure that they're
24 not inconsistent with the rules and then OCA posts them on
25 their website.

1 CHAIRMAN BABCOCK: No, I'm talking about the
2 specific rules on broadcasting proceedings. I know Dallas
3 County had one. I haven't invoked it lately. Jackie
4 knows.
5 MS. DAUMERIE: So when the Court --
6 CHAIRMAN BABCOCK: Jackie is the fount of
7 all knowledge.
8 MS. DAUMERIE: When the Court changed the
9 procedure so that the Court is no longer approving local
10 rules, the Court said in their order that anything that
11 had been approved is no longer approved, unless it is then
12 put on OCA's website, and rules have to be consistent with
13 the Rules of Civil Procedure. So, you know --
14 CHAIRMAN BABCOCK: So you think that wipes
15 out the previous local broadcast rules?
16 MS. DAUMERIE: Unless the court has --
17 unless the local court has now gone and posted it on OCA's
18 website and those rules aren't inconsistent with the Rules
19 of Civil Procedure.
20 CHAIRMAN BABCOCK: Well, if the rule says
21 consent of the parties and the local rule said you don't
22 need consent of the parties, that would seem to me to be
23 inconsistent.
24 MR. ORSINGER: Okay. So I think that's a
25 point.

1 CHAIRMAN BABCOCK: Sorry I took us on a
2 detour that we didn't need to take.
3 MR. ORSINGER: No, it's an important point,
4 which is there are good reasons for the Texas Supreme
5 Court to adopt rules in this area, and that leads you to
6 the debate of whether they should be rules or whether they
7 should be standards. The -- and that raises the debate of
8 whether there should be a uniform rule or whether
9 individual judges or individual counties should be free to
10 make their own rules that they think is best, and those
11 are significant public policy discussions that need to be
12 made, and some people, like just in our subcommittee, some
13 people think there's an advantage to having a uniform rule
14 across the state, and there's others that say every single
15 judge should be able to make a decision of what happens in
16 their court, which would be inconsistent with the uniform
17 rule, but, like we did in 76a, which has to do with public
18 access to records, court records that were filed, the
19 court could promulgate standards rather than rules. the
20 Court could put in place a presumption in favor of public
21 access.
22 So there's a lot to be discussed there. We
23 can't maybe discuss it all right on this first page of the
24 report, but those are important questions, and I can tell
25 you that there are some people that really want uniformity

1 and other people that want individual discretion by the
2 trial court, and perhaps a compromise is standards, like
3 we envisioned in 76a. But let me -- let me say, since
4 we're using -- going to have to use this phrase, the
5 phrase "broadcasting, televising, recording, and
6 photographing" is perhaps a little antiquated.
7 As best I can tell, broadcasting was
8 differentiated from televising because it was radio, and
9 if you actually look up the definition of broadcasting,
10 you're going to find that that does mean radio and not
11 televising, so I don't think -- I mean, yes, I guess there
12 is a difference, but in our view, with the video with the
13 voice, you know, it's just the same. So we have to wonder
14 whether we need to keep "broadcasting" and "televising."
15 And then in the modern era, with the internet the way it
16 is, if we're going to have public access to a trial across
17 the internet, by definition, broadcasting or televising is
18 recording; and if you -- official policy is you can't
19 record, the practical reality is that all of these people
20 on the internet are going to be recording, even if it's
21 illicit. So I don't know that we should differentiate
22 broadcasting, televising, recording.
23 And then we have photographing. I have more
24 experience photographing of individual witnesses, but not
25 in the courtroom, just coming and going out of the

1 courtroom, getting off of the elevator and walking smack
2 into a camera. Perhaps photographing should be managed
3 separately if we're going to have rules, and then later on
4 we even see depictions, which I assume would be a
5 courtroom sketch artist, so we have all of these different
6 ways to allow the public to have access to what's going on
7 in court and some of them are more disruptive than others,
8 but the truth is, with the technology we have today,
9 televising and recording is just really not disruptive.
10 You can do it very quietly with cameras that are recessed.
11 There's no noise. There's no really obvious off and on.
12 So I think we should just realize it when we're redoing
13 this rule, we're leaving behind the cameras and the cables
14 and the bright lights, moving to something much more
15 subtle.
16 CHAIRMAN BABCOCK: Richard, on sketch
17 artists --
18 MR. ORSINGER: Yes.
19 CHAIRMAN BABCOCK: I had one do a sketch of
20 me three weeks ago in trial, and it was awful, didn't look
21 anything like me, so would you deal with that, please?
22 MR. ORSINGER: I think we should probably
23 require consent of the lawyer.
24 CHAIRMAN BABCOCK: Yeah, preapproval or
25 post-approval.

1 MR. ORSINGER: Okay. So point number three
2 in the memo is the discretion point. The current Rule 18c
3 gives the trial court discretion on whether to permit the
4 broadcasting, televising, recording, or photographing, so
5 that appears to make the default no recording, no
6 broadcasting, because it's up to the court to decide
7 whether to allow it, and the public policy question is,
8 should we mandate any of this? Should we mandate
9 electronic remote access? Should we mandate broadcasting,
10 or should we have a presumption in favor of that and let
11 the trial judge deviate from that? That's a matter for us
12 to -- or for the Supreme Court, ultimately, to decide and
13 whether we have rules or whether we have standards or
14 whether we have guidelines and whether we have
15 presumptions.
16 I've already commented on paragraph four on
17 considering the participants. The following the
18 guidelines of the Supreme Court is an escape clause from
19 the consent requirement, but if there are no guidelines
20 from the Supreme Court, there is no escape clause, and,
21 therefore, we either need to soften this requirement of
22 consent, which may be difficult to get in some instances.
23 We have to discuss about particular witnesses, perhaps if
24 a witness is under age, like a child will occasionally be
25 required to testify. Maybe a special consideration should

1 be given for that. But we do -- it does seem to me that
2 we are in a practical situation where consent is required
3 because we have no guidelines to follow.
4 So five is subsumed in our comments. The
5 cameras in the courtroom, we don't experience that,
6 especially TV cameras anymore, so I'm not sure that any of
7 that is really what we should be addressing in a revised
8 rule, but clearly we don't want intrusive, abusive
9 presence of camera operators and cameras focusing in the
10 courtroom, so perhaps the rule should consider that, but I
11 think a larger question is what about this remote access
12 across the internet with cameras that are invisible? We
13 need to be sure that our rule addresses that.
14 Paragraph seven is the question of whether
15 the right to access to a proceeding in a civil matter, how
16 do you describe what is it. The OCA memo that was in the
17 materials that was written by -- at least originally
18 written by Judge Roy Ferguson, has some very broad
19 language in it about the public's right to access to civil
20 proceedings; but in my past research on the subject, the
21 U.S. Supreme Court has held forth most strongly on
22 criminal proceedings; and to my knowledge, and correct me
23 if anyone is more current than I am, they have extended
24 those same standards to the public's right to know on
25 civil proceedings. The reasons are pretty different.

1 We need to have public access to criminal
2 proceedings to be sure that due process of law is being
3 afforded, and that's less of a consideration in civil
4 matters. Furthermore, in a criminal proceeding, the State
5 is the moving party or the proponent in every case, which
6 gives the public participation there, and -- but then we
7 have privacy rights for victims, which in a criminal case,
8 there are constitutional issues about confrontation with
9 witnesses that weigh into the privacy, but someone who's
10 been a victim of a violent crime having to go through
11 cross-examination on the subject matter, you know, that
12 may be in a criminal proceeding the weight is greater on
13 public access and the right to know, but in a civil
14 proceeding, not necessarily so.
15 If it's a matter of public interest, then
16 more important to have public access. If it's a matter of
17 private interest only, such as a family law case,
18 considerations there. Something about family law cases
19 that comes up quite frequently that's not in general civil
20 litigation is that matters that are within the zone of
21 privacy that the U.S. Supreme Court and the Texas Supreme
22 Court have set out for families and spouses, they are --
23 the evidence is more inside that zone than a normal civil
24 litigation; and many times in family law matters,
25 information that is privileged is used in the courtroom;

1 and so the question arises, well, the privilege may not
2 exist between these litigants, but the privilege may exist
3 as to the rest of the world. So that raises the question
4 of should family law cases be treated differently from
5 general civil cases, like they were under Rule 76a.
6 Justice Christopher, I know you wanted to
7 say something before I go on.
8 HONORABLE TRACY CHRISTOPHER: Well, I was
9 just -- you are right about that the only way under the
10 current rules, that there has to be consent, or local
11 rules, at least according to the First Court of Appeals.
12 There's actually a case about it. Galveston, a judge in
13 Galveston ordered that a trial be publicized. The parties
14 mandamused the trial judge, because there was not consent.
15 The judge said, well, I'm going to follow Harris County's
16 media rules because there aren't any Supreme Court rules,
17 and the First Court said you can't do that, because you,
18 Galveston, don't have rules that have been approved by the
19 Supreme Court. On the other hand, Harris County had rules
20 that were approved by the Supreme Court. So it was kind
21 of an interesting case, if anybody is interested in it.
22 MR. ORSINGER: Well, that was exactly Chip's
23 point, but when we -- how do we translate that to this day
24 and time when local rules are not necessarily approved by
25 the Supreme Court?

1 HONORABLE TRACY CHRISTOPHER: Well, it's a
2 problem. I mean, you know, I don't know why the Supreme
3 Court never adopted rules under this rule when it, you
4 know, first came about. You know, so you adopt a rule
5 that doesn't require consent. Well, that seems
6 inconsistent with the current rule, right, and then, of
7 course, during COVID, when it was the only way to have
8 open courts, people just kind of quit worrying about it.
9 I mean, really, that's what happened.
10 MR. ORSINGER: Well, you know, perhaps
11 everything kind of went along okay for a long time, but
12 with the internet, the worldwide web, with people posting
13 live comments under the YouTube broadcast of an ongoing
14 trial and starting, you know, firefights on the internet,
15 it's a different world, and so we're going to have to, you
16 know, consider whether we need some standards, and if so,
17 what are they? And they're not going to be as simple as
18 76a in 1991. It's going to be much more complex, because
19 I was going to mention this in a minute, but the concept
20 of practical obscurity, which is a concept that comes from
21 archival law, but when you have to get in your car or get
22 on your airplane and fly somewhere and wait in line and
23 get inside and wait for the file to be brought and then
24 look through the file and then try to take notes, that's
25 access. That's public access, but when it's on the

1 internet and anyone in the world, whether you're Russian
2 or Chinese or Korean or whatever, can have access access
3 to it, especially when you have live testimony in an
4 important trial that's of public interest, and now you
5 have software that can cause other words to come out of
6 people's mouth when it's their same image and their voice,
7 you know, we live in a different world today.
8 And so the idea of practical obscurity was
9 that, really, public access was so difficult that it was
10 only limited to those who really were motivated to access
11 that information. Now, any casual observer can come and
12 Zoom bomb any meeting that they -- I mean, in Bexar
13 County, where we have central docket, all of the lawyers
14 have to turn off their input until the judge calls the
15 case and they raise their hand or whatever. I'm not sure
16 exactly how they control it, because there were outsiders
17 that would come in and interfere with the conduct of the
18 docket.
19 We just live in a different world
20 technologically. There is no such thing as practical
21 obscurity anymore to protect us, and so we have to write
22 the rules to protect us, and let's remember that the only
23 people that are going to be following the rules are the
24 lawyers and the judges, not the rest of the world. So,
25 anyway, I got a little ahead of myself.

1 CHAIRMAN BABCOCK: If the rules apply to
2 them, they better, but anyway, it's enough to make your
3 head explode. One thing, Richard, that you may or may not
4 know about, but, you know, for a long time there was a
5 cable channel called Court TV --
6 MR. ORSINGER: Oh, I used to watch that.
7 CHAIRMAN BABCOCK: -- and they were trying
8 to get into courts all the time to film it, and, of
9 course, they went away and became something else, but
10 fairly recently, in Travis County, you know, the
11 Alex Jones defamation case?
12 MR. ORSINGER: Sure.
13 CHAIRMAN BABCOCK: The judge there allowed a
14 documentarian to film it, so there was a camera. You
15 know, it was not broadcast live, but there was a camera in
16 the courtroom filming the proceedings, all of them.
17 MR. ORSINGER: Yeah, you know, and what is
18 that, Dateline, I think is a show that comes on where they
19 sometimes get consent to record the participants and
20 recreate a criminal trial or whatever.
21 CHAIRMAN BABCOCK: Right.
22 MR. ORSINGER: I know that that's there, but
23 I think that that's kind of a waning approach to it, given
24 the internet, and especially if we have gavel-to-gavel
25 coverage, so to speak, of trials on Zoom or YouTube.

1 CHAIRMAN BABCOCK: Right.
2 MR. ORSINGER: People are going to
3 appropriate that information for their own purposes, and
4 so it's definitely, I think, time for us to seriously
5 consider how we try to contain things and keep them from
6 going in the wrong direction.
7 Let me -- so that was under the paragraph of
8 whether open courtroom satisfies public access, and, you
9 know, there were situations where I was involved in
10 hearings where the court would not put it out on public
11 Zoom -- YouTube, I'm sorry, because the courtroom was
12 open. So there we have a little practical obscurity in
13 action, right. My courtroom is open because you can go in
14 my courtroom and see the entire proceeding, but in
15 reality, the proceeding was occurring electronically, and
16 it especially calls into question when the court, the
17 judge, is not in the courtroom, the judge is in chambers,
18 and walking into the courtroom doesn't show anything. So
19 the only public access is going to be electronic access to
20 the remote proceeding, and so, you know, do we recommend
21 or does the Supreme Court pass a rule that says the court
22 must conduct online hearings in the open courtroom so that
23 someone who's there can hear and see, or is the judge
24 allowed to do that from chambers or from home, and you
25 have to allow public access by allowing someone to sign

1 in?
2 If we do allow public access, is it anyone
3 can sign in if they want, or do they have to get the
4 court's permission, do they have to identify themselves?
5 In the proceedings I have been in, the courts have
6 required someone who is listening, eavesdropping on the
7 proceeding, to put their video on, identify who they are,
8 and then the judge will make a decision, which I've never
9 seen anyone excluded, but the judge would make a decision
10 whether that person is allowed or not allowed. So this is
11 all too much detail to go into a rule, and perhaps where
12 we end up is maybe some standards or some rules with some
13 guidelines for the Court that are not rule-based, along
14 the lines of what we've done a couple of times, like with
15 the use of restraints on minors in court proceedings. I
16 think we came out with guidelines, a pamphlet, judicial
17 education. Those are all alternatives, but we need to be
18 thinking about them, because the landscape we're in is so
19 different from the past. The sensitive --
20 CHAIRMAN BABCOCK: Judge Estevez, did you
21 have your hand up?
22 HONORABLE ANA ESTEVEZ: Well, he just made a
23 comment, and, you know, the presiding judges, regarding
24 the remote proceedings, at this point should have every
25 judge, unless it's a child support judge, because they

1 have a special statute. They are all conducting, as far
2 as I know in my region, all remote proceedings sitting on
3 the bench. So and I think that's for the whole state, and
4 if it's not, then I don't -- I don't know, I guess
5 somebody needs to let their presiding judge know so they
6 can correct that to make it consistent with what we -- we
7 did whenever the COVID issue was over.
8 MS. BARELA-GRAHAM: Those judges are,
9 though, allowing live hearings, too, when you request
10 them. For example, if it's a contempt issue and the only
11 way you're going to be able to get somebody in jail is if
12 they show up, so it's incumbent upon the lawyers then to
13 ask for that live hearing.
14 CHAIRMAN BABCOCK: Richard.
15 MR. ORSINGER: So is the rule that there is
16 a requirement that all remote hearings that the judge be
17 stationed on the bench?
18 HONORABLE ANA ESTEVEZ: Unless they gave you
19 notice that they were somewhere else and so someone could
20 object to it in the notice.
21 MR. ORSINGER: So it's optional, subject to
22 objection?
23 HONORABLE ANA ESTEVEZ: No, not really. I'm
24 going to let -- I'm going to give it to David. David was
25 the one in charge of getting all of our --

1 HONORABLE DAVID EVANS: You can designate an
2 adjacent county as a hearing location, and if it's not
3 objected to, you can be there. Now, I know you're really
4 just making a distinction between chambers and the --
5 archival law? I didn't realize I was going to learn that,
6 but this obscurity, this problem, really, though, does --
7 if you're going to be back in chambers and it's going to
8 be open, yes, it's got to be -- and you're going to follow
9 that memo and say that is going to require public access,
10 you're going to have to find a way to broadcast that and
11 have it available.
12 Now, I'm not as far up to date and trying to
13 get back up to date, but the defect I thought that came in
14 the emergency orders, and it's one that was just a
15 necessary evil of the time, was that you ended up with a
16 YouTube account in the judge's own name, private property.
17 And you were requiring a judge -- it wasn't the access.
18 The Zoom access was a contract with OCA and Zoom, but the
19 YouTube broadcast required a YouTube account, an account
20 that was not a government account, and the cost of this
21 Zoom proceeding, this online access, is one of unintended
22 consequences on the counties, because they'll be the ones
23 that bear the cost, with except for my friend Jerry, for
24 online access.
25 It's a legislative solution in the end.

1 Because it is going to pay us on a tax problem, and any --
2 any system where online access requires a judge to sign up
3 for his own account, I don't -- I'm very cautious about.
4 MR. ORSINGER: You know, I'd like to follow
5 up with that, but, John, I'm sorry to lob you a ball
6 without notice, but can you share your experience about
7 the judge that had the -- had the Zoom account on the
8 child support judge?
9 HONORABLE DAVID EVANS: Well, I have one.
10 We both have one. I had one that tried to monetize it.
11 MR. ORSINGER: Well, you know, advertising.
12 HONORABLE DAVID EVANS: And then that was
13 halted before he monetized it. Yes, and it's a
14 rebroadcast. There's always a problem with it. If you're
15 going to be communicating to the outside as a trial judge,
16 you need to have government -- it needs to be a county or
17 state facility that is the online broadcaster, that has
18 the account. They control the access to it, and the rules
19 -- spectator access on YouTube can be controlled, and
20 there's a way to do that, and I think that -- I think it
21 requires a real long-term study on technology, because it
22 would have to be system-wide for all of the districts, all
23 of the statutory county courts, all of the statutory
24 probate courts, and then you start working through
25 municipalities and JPs.

1 CHAIRMAN BABCOCK: Justice Miskel, and then
2 Kent. I'm sorry, Judge, were you done?
3 HONORABLE DAVID EVANS: No, access to a
4 courtroom comes at a cost. It has always come at a cost.
5 It comes at the -- in the traditional world we were --
6 most of us were raised in, it came at a cost of having
7 security at the door, having the lights on,
8 air-conditioning, HVAC, and a building, and all of that.
9 If we're going to have online access, then
10 it's a government cost. It just simply doesn't happen,
11 and I think we're way -- we're way away from -- we're way
12 premature on trying to dictate that, until we can work out
13 the structure of it ethically and how it's going to be
14 controlled. That's just my gut level on it, and that's
15 not about remote appearances of witnesses or anything
16 else. It's just about this. And that's different from
17 having somebody come in and film the courtroom and do
18 everything else.
19 It's this broadcast a proceeding online. It
20 cannot happen right now without the judge, I believe,
21 having his own separate YouTube account. And I need to go
22 back and check with Megan over there, and I'll tell the
23 Chief Justice and Justice Bland it's been a while since
24 I've been back through that, but that's my recollection of
25 where we were 90 days ago, so --

1 CHAIRMAN BABCOCK: Thanks, Judge. Justice
2 Miskel, then Kent.
3 HONORABLE EMILY MISKEL: I don't know
4 whether we want to pick up this thread now or put a pin in
5 it for when we get to it in your memo, but you had raised
6 the issues about court proceedings being on a judge's
7 personal account and potentially being able to monetize it
8 or not monetize it, and I was going to draw the connection
9 to the specific concerns that were identified in the
10 referral letter. Do you want to address --
11 MR. ORSINGER: Yeah, let's go ahead and do
12 that now.
13 HONORABLE EMILY MISKEL: Okay. So the
14 referral letter reported some specific concerns, that
15 being judicial commentary and remarks made in connection
16 with recorded or broadcasted proceedings; prolonged
17 availability of proceedings in cases involving sensitive
18 data, so posting online and leaving it up; permitting the
19 posting of public comment in reaction to official court
20 proceeding and judicial responses to such commentary; and
21 the acceptance of financial compensation in connection
22 with posting official court proceedings. So that's what
23 was in our referral letter.
24 As our subcommittee was meeting, we realized
25 that all of those concerns are more ethical concerns for

1 judges than Texas Rules of Civil Procedure. So I can go
2 into, like, one specific example that we identified in our
3 district of some -- or two examples of those particular
4 things, but overall, it didn't make sense for the Rule 18c
5 to address it. It probably needs to live in the Code of
6 Judicial Conduct, that -- because you're already not
7 supposed to be engaging with the public about your case.
8 We just have a new way of doing it, right, and you're
9 already not supposed to be profiting in other ways from
10 your judicial service, but now we have a new way of doing
11 it.
12 So the two examples that we are aware of
13 from Dallas County that we talked about in our
14 subcommittee was, number one, technologically, if a court
15 is broadcasting the Zoom meeting on YouTube, you have to
16 go like four menus deep to turn off the comments, and so
17 not every judge was technologically capable of turning off
18 the comments, and so there was a high profile case in
19 Dallas County during COVID where the judge had not turned
20 off the chat by the side of the YouTube video, and so
21 people were in there commenting live, and it just seems
22 tacky, right. So that's one issue.
23 Then I guess the issue of the judge hopping
24 back in to respond. I'll tell you something that happened
25 when I was a judge in an in-person proceeding, but between

1 day one and day two of trial, the expert witness from day
2 one got on Facebook and was saying derogatory things about
3 the lawyer. The lawyer starts responding and tags me, the
4 judge, in it, as they go on to go back and forth about
5 their disputes from what happened on day one of trial. So
6 the morning of day two -- I untagged myself, but the
7 morning of day two, I had to address on the record the
8 fact that they involved me in their Facebook dispute the
9 night before.
10 So, again, that's a second thing, and then a
11 third example that we talked about in our subcommittee,
12 one of our recently elected judges, when she was a private
13 attorney she had a quite entertaining YouTube channel
14 called "Child Support Court," which was not actual court
15 It was for entertainment purposes, and it was quite
16 popular. She made money on it. Then she became an actual
17 judge, but her episodes of Child Support Court from when
18 she was just an attorney remain online, and I'm assuming
19 she's capable of monetizing them if she wanted to. I
20 don't know whether she is or not, but I think all three of
21 those examples are examples of things that are really more
22 ethical guidance to lawyers that you shouldn't be
23 monetizing your government service, you shouldn't be
24 getting in fights with people on the internet about your
25 government service, and you need to have the technology

1 capability -- if you're going to be taking it upon
2 yourself to do this, you need to then do it then properly.
3 So as to specifically our assignment from
4 the referral letter, most of those things should actually
5 be revisions or comments in the Code of Judicial Conduct.
6 Generally, I hate to do -- to make
7 rule-making decisions based on I heard a story that one
8 time somebody I know told me that this happened, right.
9 So what I would like for us to do is if we're hearing of
10 horror stories, let's specifically talk about the horror
11 stories that someone has firsthand knowledge that actually
12 happened, and then, Richard, was there something else you
13 wanted to say about that specifically ethical concerns and
14 the horror stories?
15 MR. ORSINGER: Well, no, I mean, I think you
16 pretty much covered everything, unless there's more that
17 you want to add.
18 HONORABLE EMILY MISKEL: Was there any
19 broader discussion we wanted to have about what is the
20 solution for the horror stories, and probably the solution
21 is more specific guidance in the judicial conduct or
22 judicial ethics rules?
23 MR. ORSINGER: Gosh, or at least some ethics
24 opinions. I don't know if there's even an ethics opinion
25 function for judges, but we have some rules in there that

1 might be adapted to this application, but it's not ever
2 come up before. Like monetizing through advertisements or
3 through endorsements.
4 CHAIRMAN BABCOCK: Kent is next, and then
5 Judge Estevez.
6 HONORABLE DAVID EVANS: Well, there --
7 firsthand, pretty well investigated. During the height of
8 it, there were judges making videos of themselves ruling
9 from their YouTube, saving it, and then using it in
10 meetings to show how they ruled.
11 Now, this is at a district level. Yes, you
12 could control that ethically, but there are problems with
13 putting a judge on a camera in the acidic political
14 environment we have in some counties. And that happens.
15 And they cease to rule on the merits and cease to -- and
16 begin to rule on the politics of the particular district.
17 Now, that, of course, happens in a closed
18 courtroom that's not online. That has always been a
19 problem, but it is accentuated, and its corrosive effect
20 is greater because it's -- it has greater publicity. But
21 it still underlines the basic problem of the assumption
22 is, is because we can technologically do it, we should do
23 it, but we have not figured out the cost of it or the
24 methodology of it, and we do not have a control by
25 political agency that we would normally have in almost

1 anything else.
2 If I lose papers in state district and
3 county district court, heavily regulated by the Government
4 Code and by the rules that govern the clerks. Security
5 access, Government Code regulation. The degree of public
6 access is, in large part, in some courts, a matter of the
7 court's choice. But I'm hard-pressed to believe that you
8 should give such leeway to every individual district court
9 judge and statutory court -- statutory county court at law
10 judge that's out there, and especially if the medium is
11 not controlled by either the county, the district, or the
12 state.
13 That's what really bothers me, is that
14 technical regulations and abuse that can occur, because
15 some of that, yes, you could control that through
16 judicial, but you could just control it by your contract.
17 You can't make a clip out of your court hearing. That's
18 how you contract with somebody, and you have it in those
19 regulations and in your RFP. And that's my view on it,
20 so --
21 CHAIRMAN BABCOCK: Kent, now you have
22 additional stuff to comment on.
23 HONORABLE KENT SULLIVAN: My theme today, I
24 guess, is I think we need bright line minimum standards
25 that are specific to the activities that we're attempting

1 to regulate. I mean, I noticed in the committee's
2 submission Tab E, page four, I'm just going to read one
3 sentence. "We are aware of reports that a few judges have
4 permitted live chat and commentary on their livestreams
5 and even engage with viewers or audience members by
6 responding to their comments during livestreamed court
7 proceedings."
8 Another member of the committee shared with
9 me that a judge was conducting a criminal trial and at
10 night engaging with the general public about the criminal
11 trial on Facebook. I don't think that the Code of
12 Judicial Conduct is apparently adequate to get to judges
13 of this caliber. That seems to be apparent. Apparently
14 the Code of Judicial Conduct and the ethical
15 considerations are an abstraction, and so I think you need
16 relatively specific standards for such people. It turns
17 out that the lowest common denominator in the Texas
18 judiciary is, unfortunately, very low; and so I think
19 relying on abstractions like the -- you know, the ethical
20 rules and considerations to get self-regulation that will
21 be adequate is simply -- it's not going to work.
22 So I -- again, I would just suggest that we
23 need to think about dealing with the lowest common
24 denominator here, and we do have significant evidence that
25 there is that kind of problem.

1 CHAIRMAN BABCOCK: Okay. Judge Estevez.
2 HONORABLE ANA ESTEVEZ: I was on the
3 subcommittee, and we, frankly, did not consider some of
4 the comments that Judge Evans made, and I think those are
5 actually very, very strong, and the one that I really like
6 is for the YouTube channels not to belong to us, because
7 then if OCA takes control of all of the YouTube and it's
8 just -- maybe the ethical rule is very clear that said
9 we -- that the judges shall not have their own individual
10 YouTube channels that deal with any court proceedings,
11 period. Then OCA can take off the chat. OCA can make
12 regulations, whether it is no broadcasting shall occur
13 unless there is a hurricane or other natural disaster that
14 closes our courtroom. I mean, it could be that simple.
15 Anybody that wants to be in a remote
16 proceeding or hear about a remote proceeding can always
17 find that feed, and I know that somebody could come in and
18 try to do something special on that Zoom, but they can get
19 the Zoom invite. We still give that out to other people
20 who want to watch and just ask them to turn off their
21 cameras, because we don't broadcast. We continually
22 perform remote proceedings, hybrid proceedings, whatever
23 proceedings they need, since we're further out. It
24 usually takes people more time to get to our location for
25 their hearing than, you know, than the hearing takes. I

1 mean, probably 10 times more. The hearing might be 30
2 minutes, and it takes them nine hours, round trip, to get
3 back home.
4 So I just -- I think that's a brilliant
5 solution to 90 percent of the problems, because then if
6 there is a broadcast and there is money that comes in, it
7 should go to the State of Texas, because that YouTube
8 broadcast belongs to the State of Texas, and maybe we --
9 maybe we allow it, and we allow them to make money off of
10 it, and it goes to the indigent defense fund. I don't
11 know, but, I mean -- but it would belong to them, because
12 that's who owns the YouTube channel.
13 So I think that's a good idea we should look
14 at as well. I mean, I know that's not part of this rule
15 today. I do believe that this is an ethics issue, and I
16 strongly suggest, as others of the subcommittee members
17 suggested, that we should deal with it in the ethical
18 rules and have some more specific standards so that it's
19 clear, even to the least of the judges of however their
20 ethics work, so it's very clear to them that it would be
21 an ethical violation.
22 CHAIRMAN BABCOCK: Okay. Before we take our
23 morning break, I will note that Judge Evans is blushing,
24 having been called brilliant by you.
25 HONORABLE ANA ESTEVEZ: I call him brilliant

1 all the time. I don't think he's blushing at all.
2 CHAIRMAN BABCOCK: Well, it looks to me like
3 he's blushing.
4 HONORABLE DAVID EVANS: It's a holdover from
5 the pandemic when we had our biweekly meetings with the
6 Chief and OCA during that. My personality just doesn't
7 wear well day-to-day.
8 CHAIRMAN BABCOCK: All right. We'll be in
9 recess until 11:05.
10 (Recess from 10:49 a.m. to 11:13 a.m.)
11 CHAIRMAN BABCOCK: All right. We're back on
12 the record, and we're going to take a brief detour from
13 Richard Orsinger's report to hear from Lamont, who is
14 going to report that he has nothing to report before
15 lunch, and then he's going to leave, but he's also going
16 to make a comment about Richard's topic. So, Lamont, fire
17 away.
18 MR. JEFFERSON: All right. Yeah, just
19 real quickly, so we have -- our subcommittee has the
20 assignment for the transfer on death deed forms, and it's
21 a very important topic, but our subcommittee has not yet
22 had the chance to meet. That's the bad news. The good
23 news is our task is basically to review the work of a
24 committee appointed by the Supreme Court, actually in
25 2016, on all of the forms. That was part of that same

1 committee, and one of the chairs, or maybe the chair of
2 the committee, was Polly Jackson Spencer, who has been a
3 probate judge in San Antonio, now retired, extremely
4 well-respected. She knows her stuff. She's lived this
5 her whole career, and they've been working on these forms
6 since shortly after 2016, so we've got a big body of work.
7 That's not to say we're not going to
8 deconstruct it completely, but we'll all take a look at
9 it, and hopefully, we can get something in the hands of
10 the Supreme Court by the next meeting, so our subcommittee
11 will get together between now and the next meeting and
12 hopefully we'll have something to report at the next
13 meeting.
14 CHAIRMAN BABCOCK: Thank you. And, Lamont,
15 you also have a comment on the recording and broadcasting
16 court proceedings, so let's hear it before you vamoose out
17 of here.
18 MR. JEFFERSON: Well, so in listening to the
19 discussion and what -- Richard is right, everybody is
20 right, obviously, that this is a whole new world, and I
21 don't know the history of open courts, I mean, what it is
22 we're trying to -- what public policy benefit we're trying
23 to achieve here. I assume that it's so that the public
24 can see what's happening in our court, there's not secret
25 courts, so that disinterested parties can observe court

1 proceedings and report on what they see and make public
2 policy recommendations and that sort of thing.
3 That's what open courts means to me. It
4 doesn't -- and that's -- I assume that's what it meant
5 when someone came up with the idea that we want to have a
6 constitutional principle that our courts are open to the
7 public. But where we've gone is not just the public gets
8 reasonable access to our courts, but that courts can be
9 available instantaneously worldwide, which is different.
10 That is a totally different thing than the benefits that
11 you get from having just what we consider to be open
12 courts, so that, you know, the courts can be appropriately
13 criticized and that sort of thing, and I -- so I'm
14 listening to Kent's comments, and, you know, what is the
15 minimum? So that's really where we should start from, and
16 that should be the default.
17 The default should be the minimum to have an
18 open court, not it's either you've got to go to the
19 courthouse or it's worldwide. I mean, there should be
20 something there that accomplishes whatever the goal is for
21 having open court in the first place, as opposed to we
22 have to have as wide a dissemination as possible as fast
23 as possible, and even live. It's got to be instantaneous,
24 which seems crazy to me. Even if it were just -- and I'm
25 just scattered here, obviously, but --

1 CHAIRMAN BABCOCK: But keep on going.
2 MR. JEFFERSON: -- it seems to me you would
3 accomplish -- you would accomplish the open courts
4 objective without having any -- with the default being
5 there's no online anything in court. There is no
6 automatic online anything, where, you know, you can access
7 it, anybody, anywhere, can access what's going on right
8 now. You could accomplish it just even if it's -- even if
9 a judge were not live with an open courtroom, you could
10 have a closed circuit video room where disinterested
11 people could come and watch proceedings live, you know,
12 that would accomplish the same thing.
13 We're talking about worlds different between
14 having someone being able to go to courtroom and someone
15 being able to sit in Bangladesh and watch what's going on
16 in Bexar County.
17 CHAIRMAN BABCOCK: So I have a question for
18 you. If we're proud of our justice system, as I think
19 most of us are, why wouldn't we want somebody in
20 Bangladesh watching?
21 MR. JEFFERSON: That's not the question.
22 CHAIRMAN BABCOCK: That's my question.
23 MR. JEFFERSON: Well, I mean, there's a lot
24 of reasons why, if I've got a private dispute, why I
25 wouldn't want the whole world watching my private dispute.

1 I mean, you know, and it doesn't serve a purpose, and it
2 exposes me to -- to risks that I can't even -- I can't
3 even fathom. I don't know what the reaction is worldwide
4 to if someone is watching even something that I think is
5 innocent, because there's now no -- you know, there's -- I
6 just would not want my whole life exposed to the entire
7 world, and, you know, even if it is a public -- a
8 so-called public proceeding.
9 I mean, you know, from a systems standpoint,
10 I could see why someone in Bangladesh would like to
11 understand our system. I have no problem with that, but
12 they don't have to have a live feed to my hearing to
13 understand our system.
14 CHAIRMAN BABCOCK: Okay. Yeah, Judge
15 Estevez.
16 HONORABLE ANA ESTEVEZ: I think it will
17 cause -- you know, if we went to the extreme and required
18 broadcasting, it's a chilling effect on litigation. I
19 totally agree wholeheartedly that our default should be no
20 broadcasting by the judges. If OCA takes it over, let
21 them determine what needs to be broadcast because it is of
22 such a public nature and so important that the whole world
23 needs to hear it, I think that's fine, but if I was
24 someone that was in a family law case, I would be the same
25 way.

1 I would not want anyone -- if I was the
2 litigant, I don't want anyone in my business, and so I
3 would feel forced to settle the case, because if my judge
4 was saying we're going to broadcast this for everyone to
5 hear whatever they say, whatever someone else says about
6 me, because somebody is going to say -- let's say it's
7 some sort of child custody issue, or whatever it might be,
8 at some point, it's going to have a chilling effect on
9 litigation and our actual, you know, whole system.
10 I mean, if they come in and I can see who
11 they are, and that's a lot different than wondering who's
12 watching me and what I look like and what am I doing and
13 having an extra thing to worry about it. The judge is
14 worried about something they shouldn't be worried about.
15 The attorneys are worried about things they shouldn't be
16 worried about, and now the litigants are worried about
17 things they shouldn't be worried about. And it shouldn't
18 be about that. It should be about just that moment, what
19 the truth is, finding what needs to be done for justice to
20 prevail, and it won't be about that anymore, and that's
21 what broadcasting is doing. It is taking away the focus
22 to how everyone else appears to everyone else in the world
23 instead of what is the best thing for these litigants
24 today.
25 CHAIRMAN BABCOCK: John.

1 MR. WARREN: I kind of agree with
2 everything, but we also have to think about -- well,
3 first, we are broadcasting for the purpose of -- and
4 that's the blank we fill in. I can give you a number of
5 examples of cases that should be, Texas Seven, the Botham
6 Jean case with Amber Guyger, some others, that where
7 there's a public interest, but not every case needs to be.
8 If there is a public interest, yeah, I guess there should
9 be, but beyond that, I don't think so, without any
10 parameters, because 15 years from now, what would be the
11 discussion about broadcasting court proceedings?
12 We are now incorporating artificial
13 intelligence. That's one of the things that we will be
14 discussing today, but you've got to start addressing the
15 parameters about maintaining the control so that people
16 understand 15 years from now why those rules or policies
17 are in place as it relates to the parameters around
18 broadcasting.
19 You're right, not everything needs to be
20 broadcast, and certainly, a lot of people don't want their
21 business -- I mean, while they need to have issues
22 resolved through litigation, that doesn't mean that it has
23 to be publicized, allbeit an open court, but people won't
24 go to an open court because it's going down to a physical
25 courthouse. But if it's made available on TV or on -- if

1 it's made available on YouTube, everybody will be going
2 there for entertainment, and we don't want the judicial
3 system to be entertainment.
4 So there has to be parameters around why --
5 what is the role, or should I say, what's the purpose of
6 us doing it, except with the exception of something that's
7 in the public's interest.
8 CHAIRMAN BABCOCK: Okay. Justice
9 Christopher, then Justice Miskel.
10 HONORABLE TRACY CHRISTOPHER: Well, I think
11 if we remember back when open courts provisions began, the
12 judicial system was entertainment. All right. Everyone
13 went to the courthouse to watch everything. When the
14 judge was there, everybody in the town went, and, you
15 know, there would be 20 cases called. There could be
16 divorces. There could be, you know, paternity problems,
17 and it was all known to the people, right, and that's what
18 it was designed for. So I'm an open courts person. Like,
19 I always thought that the U.S. Supreme Court was
20 ridiculous for not allowing tape recording of their
21 arguments.
22 You know, finally during COVID, they started
23 allowing, you know, the broadcasting just of the oral
24 communication, and, you know, they've kept that up, and,
25 you know, has the -- has the world fallen apart because of

1 that? No. When the Texas Supreme Court started putting
2 all of their arguments, you know, on the web, did the
3 world fall apart? No.
4 I do understand that in certain
5 circumstances you don't want it to be public, and I
6 certainly don't want people to profit off of, you know,
7 what happens in a courtroom, certainly not a judge. That
8 just, you know, seems crazy to me, but I am a open court
9 person. And it's interesting that apparently David was
10 saying somebody was using it for political reasons, and,
11 of course, a video is a lot more compelling than just a
12 written word, but when I was a brand new trial judge and
13 you were involved in some political case, let's say, or a
14 high interest case, I was told have everything in the
15 courtroom, have a court reporter there, explain yourself
16 on the record so that there's no, you know, question about
17 what you're doing, because the record is your friend. So
18 that's kind of my mindset.
19 I mean, I do understand that, you know, if I
20 was involved in a divorce, I would not want that
21 broadcast. I do understand that, but I certainly would
22 not have a rule that prohibited it.
23 CHAIRMAN BABCOCK: Well, we're going to
24 exempt family law, just like we do everything else.
25 MR. ORSINGER: That's the safest thing to

1 do.
2 CHAIRMAN BABCOCK: Justice Miskel.
3 HONORABLE EMILY MISKEL: I just want -- in
4 case everyone is afraid that somehow there is a proposal
5 to mandate broadcasting of trial court provisions, no one
6 is recommending that. That is not part of what this
7 subcommittee recommended. No one wants that.
8 So looking at our three levels of court, the
9 Texas Supreme Court records, broadcasts, and leaves posted
10 online all of their arguments. We did ask the question,
11 is it worth requiring the courts of appeals to record,
12 broadcast, and leave online their oral arguments like the
13 Supreme Court does? You could feel yes or no about that.
14 We had a variety of opinions, but then trial courts,
15 specifically, no one thought it would be a good idea to
16 mandate the broadcasting of trial court proceedings.
17 That's not on the table. So if you were panicking about
18 that, you can relax.
19 In fact, one of our committee members wanted
20 to add a rule that said, in fact, you must -- a trial
21 court must not leave posted online any trial court
22 proceeding, so if a trial court chooses to record or
23 broadcast, it must be for a live only broadcast and
24 removed immediately, right. We didn't -- that's not like
25 a recommendation that we made, but that is something we

1 talked about. So before everyone panics about a statewide
2 mandate that every trial court must broadcast everything
3 that they do, I'm not aware that anyone thinks that's a
4 good idea.
5 CHAIRMAN BABCOCK: Lamont, you started this
6 fight.
7 MR. JEFFERSON: Well, just real quick, so a
8 few years ago we were involved in that case with the
9 scientology, Church of Scientology in Comal County, and no
10 one -- well, not no one. None of the defendants wanted
11 that case televised. The judge decided he did. It was,
12 you know, a sensational case, why not just have some
13 cameras in the courtroom for a while, and there wasn't a
14 rule we could lean on to say, "Judge, you can't do that,
15 you need our consent to do that," and I was representing
16 the Church of Scientology, along with other lawyers, but
17 as a result of that, they were harmed by just the public
18 exposure of this sensational kind of a trial.
19 You know, it's still an open court. The
20 record is there for everybody to see. The reporters, news
21 reporters, could be in the room, and certainly were, and
22 that's an open court, but to mandate or to even allow the
23 judge the discretion to say, "I'm going to livestream this
24 on the internet" seems bizarre to me and jeopardizes
25 people's rights, with, you know, with no recourse, at

1 least in that situation, and I'm sure that happens in
2 other situations. If a judge wants to be famous or if the
3 judge just thinks that, you know, this is a case that
4 everybody ought to see, but the litigants don't think so,
5 there ought to be something where the litigants get to say
6 that I shouldn't be subject to this if I don't want to be.
7 CHAIRMAN BABCOCK: Justice Miskel.
8 HONORABLE EMILY MISKEL: But why should
9 private litigants --
10 CHAIRMAN BABCOCK: Oh, I'm sorry, Robert.
11 I'll get to you.
12 HONORABLE EMILY MISKEL: -- get to determine
13 the public policy of our state? I object to that decision
14 being left up to the private litigants. It either needs
15 to be up to the discretion of the particular judicial
16 officer, or we need to have some standards or guidelines
17 or whatever, because I think private litigants don't get
18 to determine what our state's interests are in recording
19 and broadcasting court proceedings.
20 MR. JEFFERSON: That's where I started.
21 What are we trying to accomplish by this open courts
22 thing? What interests are we trying to preserve? And,
23 yeah, we can make rules about it, or maybe the Legislature
24 needs to act on it, but that's -- that ought to be the
25 guidepost. It shouldn't just be, you know, open courts

1 means everybody gets to see everything.
2 CHAIRMAN BABCOCK: Robert had his hand up
3 first, Rusty, and then you and then Quentin.
4 MR. LEVY: I wanted to jump on a comment
5 that Richard made about one of the concerns that the
6 committee had regarding private information, and it is a
7 significant concern. It's a concern that we've raised in
8 the federal rule context as well because of the fact that
9 federal rules really don't have any provision for
10 protecting private information, and the difference between
11 private information being talked about in an open court
12 versus private information being broadcast is significant,
13 particularly if it includes information about an
14 individual, where they live, other details, and the
15 medical history, their psychiatric history.
16 Many items can be very, very sensitive in
17 the context of a proceeding, and while it's open, it is
18 different. And I agree with Lamont's comment about the
19 distinction between an open court where people can come
20 and attend versus a broadcast or webcast, you know,
21 version of -- or, you know, cameras in the courtroom
22 following every witness.
23 I will also point out and I suggest that the
24 rules should acknowledge and note that there is an
25 additional concern about information that comes up in

1 court cases that is very sensitive commercial information,
2 proprietary information, that is the subject of the case
3 or the subject of testimony; and while, at points, that
4 information is important and necessary for the
5 adjudication of the dispute, there is the risk that if
6 that information is disclosed, that the value, the
7 proprietary value, will be prejudiced or impaired.
8 And the -- I think that the rules and the
9 guidance should address that point so that the court
10 should consider that as well, either in terms of whether
11 to allow the broadcast of the entire proceeding or whether
12 there should be a procedure where certain parts of the
13 proceeding maybe would not be broadcast, so that you would
14 be able to say -- and it could be a witness, and it could
15 be the parties to say, can we not broadcast this part of
16 the testimony to address those issues, because of the risk
17 that, you know, while somebody could go and get the
18 transcript, it is a materially different situation than
19 somebody, you know, in China or Russia or wherever can
20 access it on the internet.
21 CHAIRMAN BABCOCK: Rusty.
22 MR. HARDIN: I mean, it's been said several
23 times, as Lamont said, but I disagree, Judge, about
24 private litigants shouldn't have -- be able to control
25 policies such as that, because we're not talking about

1 open court. Judge Christopher said she's for open courts.
2 I suspect everybody in here is for open court. This is
3 not about whether the court is going to be open or not.
4 It's a technology issue. It is simply now, in this day of
5 technology, how are we going to allow that to be used to
6 be spread across the whole world.
7 I'd regularly counsel now, whenever we're
8 the plaintiff's lawyer, you need to understand. What I
9 would be saying now is everybody in the world is going to
10 hear everything about this case. Let's take, for
11 instance, a defamation case, and we all know that that
12 opens up the reputation and history and past. A person
13 might be willing to go to court if it's going to be
14 strictly that court. It will be a public record and
15 everything, but the idea that everything is going to be
16 spread across the world, and it is going to keep people
17 from exercising their right of access to the courts,
18 because they're not going to want this all over the world.
19 And I'm more concerned about how broadly the
20 dissemination is. I used to be the throwdown person
21 against cameras in the courtroom, and I finally had to
22 surrender, and the reason was, is the inhibiting factor it
23 had on the participants. We would talk about the jury,
24 would they be unduly affected, if so. The research seems
25 to show that's not true, but if you talk about a human

1 being that's going to be a witness that's going to be on
2 the internet for the rest of the world, and now with
3 artificial intelligence, what you're going to be able to
4 do to take that image of what happened and change it
5 around and make it a totally different result, if somebody
6 who wishes ill wants to.
7 Some clown can be sitting in some other
8 country, and they happen to see this, and say, "Oh, well,
9 I'll play with it," and ruin people's lives, and it never
10 goes away. It never ever goes away. Any lawyer here
11 that's represented anybody that was unfairly accused or
12 unfairly sued and ultimately there was a trial or so, it
13 doesn't matter, when you hit that same allegation and
14 everything comes up. So how broadly do you want to
15 disseminate?
16 And you can't convince me, to answer Chip's
17 question, what's wrong with someone in Bangladesh
18 watching? Well, if the person in Bangladesh wants to come
19 over and watch, they can, because we have open courts.
20 HONORABLE ANA ESTEVEZ: Amen.
21 MR. HARDIN: But to get the person in
22 Bangladesh to sit there, and some guy just wants to sit
23 there and play around and do harm, the potential for it
24 being unfair. I think people have a right to go to court,
25 and they shouldn't have to worry if whether they're going

1 to be the poster woman or poster guy for somebody to
2 misuse technology to ruin their lives forever.
3 So this is all very helpful. I think this
4 discussion is tremendously helpful. I'm just urging
5 people, private litigants do have rights, and we don't get
6 to just sit up here and decide because we want to be able
7 to say the entire world can hear all of this, private
8 litigant, ruining your life is a secondary concern.
9 That's not right, folks.
10 CHAIRMAN BABCOCK: Quentin.
11 MR. SMITH: Well, I think there is a
12 solution, which is arbitration, if you don't want the
13 world to hear your -- arbitration is available, even for
14 family law disputes, but, also, what's to prevent, you
15 know, me from going to any courthouse, typing everything
16 down, and leaving and going to my live YouTube channel and
17 just disseminating what I heard and just talking about
18 everything I've seen? And I don't think anybody can stop
19 that, so, I mean, we still have this problem, even if you
20 don't livestream it. So I'm not one of the biggest
21 livestream advocates, but I don't think you're going to
22 solve this problem by shutting down livestreaming.
23 CHAIRMAN BABCOCK: Justice Christopher, and
24 then Justice Miskel, and then Richard.
25 HONORABLE TRACY CHRISTOPHER: Well, I mean,

1 we get -- at the appellate court, we get requests for
2 transcripts, right, and it's a public record, and we give
3 it to people, right. So if you were sued for defamation,
4 Rusty, and someone came in and said, "I want your
5 transcript," we give it to them, right. If it hadn't been
6 sealed, it's a public record. We give it to them. They
7 could take that. They've got plenty of pictures of you on
8 the internet. They could dub in language, you know, I
9 mean, right now, they can take your picture and make you
10 say anything.
11 MR. HARDIN: But why make it easier for
12 them? Why make it easier, Judge, for people to abuse the
13 process?
14 HONORABLE TRACY CHRISTOPHER: Well, I
15 actually think it might protect you if the real video is
16 there and available, you'd be able to say, "This is what
17 really happened, not this craziness that somebody has come
18 up with." I do under -- I mean, I tell my interns, get on
19 the Harris County website and look at trials going on in
20 Harris County, because in the Harris County system they
21 have -- well, they did during COVID, and I think some
22 judges still do this. You can just watch a trial, right,
23 and it is a great teaching tool for young lawyers. You're
24 right, they should go down to the courthouse.
25 I absolutely agree with you on that, but we

1 all know that it would be hard to wander around the
2 courthouse till you found somebody who was, you know, in
3 trial doing something interesting. You can watch. You
4 can watch a cross-examination. You can watch somebody
5 picking a jury. It is a great teaching tool, and in a
6 way, it provides accountability for the judges. Okay. Is
7 this judge working? Is this judge in the courtroom?
8 I mean, you know, right now the court of
9 appeals is being criticized for not having enough oral
10 arguments. All right. And some of us are like, well,
11 that's a good criticism, and, you know, we're going to
12 have more oral arguments because we're getting criticized
13 for it. That is accountability.
14 CHAIRMAN BABCOCK: Chief Justice Hecht.
15 CHIEF JUSTICE HECHT: Chief Justice
16 Christopher asked earlier or she mentioned earlier that
17 the Supreme Court could make rules and standards on this
18 and she wasn't sure why. This is why. It's just a lot of
19 disagreement and a lot of things that, if we're going to
20 get there, we would have -- we've got to plow through all
21 of that.
22 CHAIRMAN BABCOCK: Justice Miskel, and then
23 Richard, and then Judge Evans, and then Judge Estevez.
24 HONORABLE EMILY MISKEL: So we have talked
25 about some of the harms that can happen when court

1 proceedings are broadcast, but the purpose of our
2 committee is to make rules, so our choice is, option
3 number one, make a rule banning the broadcast of any court
4 proceeding. So we're just going to have none. It is one
5 option that we could do.
6 The second option then is do it in some
7 cases and not others, and that is the one that our
8 subcommittee thought we were in, and so if you are not
9 banning everything, then how do you decide who gets to
10 make the decision of when it's broadcast and when it's
11 not? I think everybody is starting from the presumption
12 that by default they're not broadcast. So if somebody
13 wants one thing broadcast, whether it's the party, the
14 judge, whoever it is, for whatever reason, how will the
15 process of that decision be made?
16 So, again, if we're not -- if we're going to
17 do anything other than a complete ban, then we need to
18 talk about, yes, these harms exist, and if we're going to
19 allow broadcasting in some cases and not others, how are
20 we going to address are we going to have rules, are we
21 going to have standards, who makes the ultimate decision?
22 CHAIRMAN BABCOCK: Richard.
23 MR. ORSINGER: This is slightly off topic,
24 but I want to be sure this is in the record and in your --
25 in your thoughts. There are privileges that we all

1 recognize. Some of them go back even before the
2 foundation of western civilization. Okay. So they're
3 recognized, they're perennial, and when they come -- when
4 they arise in our legal system, they usually arise in a
5 discovery dispute, that this information is not
6 discoverable because it's privileged, but we have several
7 exceptions to privileges for use in a particular lawsuit,
8 because it's relevant to a claim or a defense or because
9 the husband or wife privilege doesn't apply in litigation
10 between the husband and wife, so we have a number of
11 exceptions that allow privileged information to be shared
12 with the other party.
13 When you put that sharing of the other party
14 in a trial or when you put it in the document that's filed
15 at courthouse, we don't have those standards there. We
16 have Rule 76a on what's filed, and it doesn't really
17 relate at all to whether the information was privileged,
18 except for a litigation exception, and now we are even
19 seeing it in a more robust manner, which is if this
20 information is privileged except between two litigants, do
21 we want the entire world now to see it simply because
22 they're fighting each other in court? And so let's be
23 sensitive to the fact that we may have policy reasons for
24 exceptions to privileges that are long-term and widely
25 accepted, but that's for the fairness of the trial itself,

1 and just because you're in a trial, does that mean that
2 your privileges against the rest of the world has to be
3 breached?
4 And so in my experience, during COVID
5 especially, in some family law cases, there would be
6 certain kinds of testimony where the judge would cut off
7 the YouTube feed, on request or otherwise; and if you have
8 a court-appointed child psychologist that's done a child
9 custody evaluation, you're going to have confidential
10 information, you're going to have HIPAA information,
11 you're going to have professional information that's
12 doctor-patient, mental health privilege. There's all
13 kinds of privileges that are going to be broached,
14 particularly if children are involved. So my question is
15 don't we need to address the scope of the breach of these
16 privileges when we allow litigants to have access to
17 information through discovery and present in court?
18 Should we not close off that privileged information to
19 everyone that's not within the exception, the litigation
20 exception?
21 And I've meant to say that for a long time.
22 I wanted to get that in the record. I think it's a
23 factor. It doesn't necessarily support closing totally,
24 but selective closing, like when the psychiatrist is going
25 to testify or when the child's therapist is going to

1 testify, selectively maybe that's when we shut it down.
2 CHAIRMAN BABCOCK: Judge Evans.
3 HONORABLE DAVID EVANS: The -- I agree with
4 Judge -- amazingly, although Tracy might not agree that I
5 agree with her. I believe in public access, and I'm in
6 full favor of it. It's the means by which the public gets
7 it and who controls the means and how it's paid for.
8 There was a break on public access when, for many years,
9 that had to do with whether an event was newsworthy or not
10 and whether the reporting of it met with journalistic
11 standards, so universal broadcasting doesn't have any kind
12 of standards of newsworthiness behind it. It's simply a
13 sampling of whatever you can find on the web. That's one
14 issue. No one in Bangladesh ever voted for me, Chip,
15 because they're not in my district.
16 HONORABLE TOM GRAY: You sure about that?
17 CHAIRMAN BABCOCK: Absentee voting.
18 HONORABLE DAVID EVANS: I'm positive. I
19 checked the rolls, and I know no one voted in Tarrant
20 County in Bangladesh, and it's one thing to talk about
21 voter access, constituent access, to public proceedings of
22 an elected official or a public servant judge, but
23 worldwide web, I agree with Lamont. It doesn't seem
24 necessary to me.
25 The second part of it is, by history

1 standpoint, how we got here, how we got on the YouTube,
2 was we had an emergency order that banned travel. I have
3 a clear recollection of the meeting. Travel was banned.
4 You couldn't go to a courtroom. Under that circumstance
5 and under that, I believe, the Court with input, proper
6 court input, put in that you had to broadcast on YouTube
7 and that the judge was required to go get a YouTube
8 account; and if they were going online, they were going to
9 have to have a simultaneous of not only the Zoom account
10 provided by the State, but a YouTube account provided by
11 the individual judge over their Gmail account. There just
12 simply wasn't time to talk about video record storage, who
13 owned the video, what would happen to those on the YouTube
14 accounts. They were just out there. There was plenty of
15 safeguards inside the Zoom framework on retention, but it
16 was on the YouTube.
17 As the pandemic lifted, the orders changed
18 step by step, and eventually you came to the fact that you
19 did not have to -- and the PJs did not have to enforce an
20 order that you would broadcast if you had an open
21 courtroom. But it didn't say you shouldn't stop
22 broadcasting, and it didn't tell a judge that he couldn't
23 stop broadcasting. So what's the difference between me
24 having a private YouTube account and saying I'm going to
25 have a recusal hearing here, and we're going to do it by

1 Zoom, and we're going to -- also, Tracy, I want you to set
2 up and link it to YouTube so it's broadcast on YouTube,
3 and everybody can access it through my YouTube account.
4 What's the difference between me having a videographer
5 come in and just videoing me while I do the proceeding and
6 I do it through a different YouTube account? I get a
7 better camera angle. I get the whole thing.
8 So my -- my problem has been the means by
9 which this might be broadcast and the standards under
10 which it would go. So I want to make that -- and I just
11 don't think that the emergency that gave rise to it exists
12 anymore for that, and I would like -- I think the
13 Legislature gets to weigh in as to what kind of cost we
14 have and who keeps these videos forever and do they
15 conflict with the reporter's record. I think those are
16 the issues that concern me most; and, yes, you have not
17 required anybody to broadcast, but you have not said under
18 what circumstances they can broadcast; and right now
19 there's a lot of judges that want to broadcast and use the
20 OCA open courts memo and some of the order language to --
21 I say a lot. Ones I'm personally familiar with, Judge. I
22 don't go over into Collin County and check. I stay in my
23 region, but they're broadcasting.
24 And if I'm running a recusal hearing right
25 now, just because of the strength of the prior orders, and

1 I'm in chambers in Tarrant County, I put it on YouTube.
2 What has happened, though, is you can't even have a
3 scheduling conference with two lawyers now on the
4 telephone without worrying about whether or not you're
5 supposed to have outside access.
6 So there is a need for orders in here. The
7 things that we used to do all the time, you can't do
8 anymore without sitting back scratching your head and
9 saying, well, am I violating an open courts provision or
10 not, and this is going to cost money for counties to put
11 in that structure and then that kind of recordkeeping, and
12 does the district clerk keep the video record? Or does
13 the court reporter keep the video record? Or does the
14 State of Texas keep the video record? And not the Zoom
15 record, but the broadcast record. So that's where I am.
16 Thank you.
17 CHAIRMAN BABCOCK: I think Judge Estevez had
18 her hand up, and then Justice Christopher, and then John,
19 and then we'll go to you.
20 HONORABLE ANA ESTEVEZ: Well, again, I agree
21 with the brilliant Judge Evans over there.
22 CHAIRMAN BABCOCK: Stop it, you're making
23 him blush again.
24 HONORABLE DAVID EVANS: Aww.
25 HONORABLE ANA ESTEVEZ: You know, I'm not

1 ashamed to say that my vote is for a ban of broadcasting.
2 I don't think anything good is happening from the
3 broadcasting; and outside of the ban, then I think that
4 you should have consent of the parties and the judge
5 before you can broadcast; and if you don't get the consent
6 of all of the parties and the judge, then you can perhaps
7 go to OCA and put in a motion to have something broadcast,
8 but why does it have to be the judge that broadcasts? I
9 mean, if it is so important, we have lots of newspeople
10 that still come in and still want to broadcast whatever is
11 going on, so they can come in and petition the court and
12 we can go forward with whatever we did before, and let's
13 not allow the judges to make all of these bad choices
14 because we told them they couldn't do what -- what we're
15 complaining about they're abusing.
16 I think it's disingenuous to call it an open
17 courts issue. It's not an open courts issue unless the
18 court is closed. The courts are all open. If a court
19 closes for some reason, then I think, at that point, that
20 would be one of the exceptions that could come out, saying
21 if a court closes, you are allowed to go into, you know,
22 for an -- under emergency procedures. And, obviously, we
23 can go back, because it was a very helpful tool, and it
24 was an emergency tool, and it was because we didn't really
25 know how we could protect the open courts provision, and

1 that's what we used it for, but now the courts are open,
2 and so it's not an issue.
3 It shouldn't even be talked about as an open
4 courts issue. This is only a policy issue, and you wanted
5 to know why I care if someone in Bangladesh is watching
6 me. Maybe I don't care if they're watching me, but
7 apparently I'm supposed to care if they're watching
8 someone in Harris County, because my salary is based on
9 what happens in Harris County, and so -- and so I want to
10 say that the problem becomes when we're dumbing down the
11 judiciary, we're dumbing down everything we do. When
12 someone comes in my court they have to be dressed
13 appropriately. They need to stand up. They don't get to
14 sit or lay down, and when we do all of these other things
15 and they think that's what's going to happen when they hit
16 my court, that's not going to happen when they hit my
17 court. So we are not giving them the impression -- unless
18 you're going to tell everyone to follow the same rules of
19 what a courthouse is in the State of Texas, and if I'm
20 going to be judged by the least common denominator, then I
21 don't want it broadcast all over the world.
22 CHAIRMAN BABCOCK: So there. Chief Justice
23 Christopher, and then John, and then Quentin.
24 HONORABLE TRACY CHRISTOPHER: I understand
25 everyone's concerns, and I do think, like, the record is

1 a -- you know, is an issue, especially in the day and age
2 of not having court reporters, you know, having court
3 recorders, you know, and -- but, well, we've got this
4 video now, so what do we do with that video, in terms of
5 -- of records? I understand all of that, and I agree with
6 Judge Miskel that the question here is do we require
7 everyone to broadcast? No. Do we -- do we say there is
8 no broadcasting? No. So what is the middle ground? I
9 mean, that's where we are, what is the middle ground, and
10 I'm not sure we have one here.
11 CHAIRMAN BABCOCK: John.
12 MR. WARREN: I just want to go back to Judge
13 Evans' comment. It would not be the responsibility of the
14 clerk to maintain videos. We're the custodian of the
15 record, not the custodian of the court proceedings. That
16 falls under the court reporter, who I might add, in a lot
17 of counties the court reporter is not given resources by
18 the county. So that's something else to address.
19 HONORABLE DAVID EVANS: Exactly, John.
20 CHAIRMAN BABCOCK: Thank you. Quentin.
21 MR. SMITH: I was going to say there are a
22 few proceedings where the courtroom is not big enough for
23 all of the litigants to fit inside, and so in those cases,
24 there probably should be other ways for people to view and
25 get access to what's going on in their case, and so I do

1 think there needs to be some allowance for video.
2 CHAIRMAN BABCOCK: Well, you say the
3 litigants, but sometimes there's so much interest there's
4 not enough room in the courtroom for the public to watch
5 it.
6 MR. SMITH: That's right.
7 CHAIRMAN BABCOCK: So you sometimes have
8 auxiliary courtrooms, and the proceedings are fed by video
9 into that space. Judge Wallace.
10 HONORABLE R. H. WALLACE: We're talking
11 about mostly broadcasting and disseminating, but the rule
12 covers recording, just recording. What about the guy that
13 says, "Judge, I want to record these proceedings. I don't
14 trust the court reporter, I don't trust you"? And this is
15 not hypothetical. This happened. This has happened, and
16 you know that there's a nefarious purpose behind all of
17 that somehow, or you strongly suspect it, let's put it
18 that way.
19 At that time, the rule was if any party
20 objected, they couldn't do it. Well, one party objected
21 to it, and that solved my problem, but that's the
22 situation where, I guess, this rule would cover, and I
23 would certainly like for the judge to have some discretion
24 to be able to say "no," because they can look at these
25 factors that the judge can consider, and every one of

1 those, they can turn to their favor and say, well, it's in
2 the interest of public integrity and the court's integrity
3 and all of that, but anyway, I just throw that out real
4 quick. That's the situation where they're not asking to
5 broadcast anything yet. They're just saying, "I want to
6 record it."
7 CHAIRMAN BABCOCK: Judge Miskel.
8 HONORABLE EMILY MISKEL: So it may be
9 premature to talk about what we actually talked about as
10 far as rules and revisions to 18, but I've heard a number
11 of different threads, like will it be considered part of
12 the record, what if it's the media and not the Court, and
13 so I just want to give the outline of what we talked about
14 for our rules, because I think we addressed some of these,
15 and it might be useful to have sort of vocabulary words.
16 So if you turn to page 14 of the PDF, this
17 was a previous proposal that our subcommittee was asked to
18 look at. I don't remember who was on the previous
19 subcommittee that made this Exhibit A, but it basically
20 has six moving pieces, and so I think everything that
21 we're talking about that's a problem or a policy decision
22 probably falls into one of these six categories.
23 So 18c.1, when we looked at that, we
24 realized that probably refers to recording of court
25 proceedings by others, like by the media, so a trial court

1 may permit courtroom proceedings to be recorded or
2 broadcast, et cetera, et cetera, so that's when other
3 people want to record and broadcast, 18c.1.
4 18c.2 is the trial court may record and
5 broadcast. That's when the court itself is choosing
6 whether something is going to be recorded and broadcast.
7 So it may be helpful to think about those two things
8 separately, other people wanting to record and broadcast
9 versus the trial court itself recording and broadcasting.
10 18c.3 is a procedural rule talking about how
11 does the court notify you that a proceeding may be
12 recorded and broadcast and can you object and how you do
13 that, so notice and objection and opportunity to be heard
14 is the third part.
15 The fourth part is basically those standards
16 and guidelines that we were talking about that the Supreme
17 Court is already empowered to do under the rule, but what
18 kind of public policy factors should be considered.
19 Then 18c.5 clarifies that video and audio
20 recordings are not part of the official record, and then
21 18c.6 says the court can punish people who violate these
22 rules. So in our subcommittee work, when we met, we kind
23 of did some revisions to this, which start on page 43 of
24 the PDF. So we kept the same kind of conceptual layout,
25 and we just broke it out more specifically to recording

1 and broadcasting by the court, recording and broadcasting
2 by others, a procedure for getting notice and objecting.
3 And there are a variety of ways we could go
4 about this, so we could put everything into the rule and
5 have a very long and detailed rule. Another option that's
6 reflected on page 43 and 44 is we said, okay, if a trial
7 court is going to allow recording and broadcasting, they
8 need to have a written policy. So we're not going to put
9 into the rule the same policy that has to apply to every
10 court across the state, but if you're going to do it, you
11 have to have a written policy, so we might say what the
12 policy needs to include, but we don't require every court
13 to do it the same way.
14 So that's, essentially, if you compare
15 page 14 to page 43, you see the work that our subcommittee
16 had prepared to present to this committee, and I don't
17 mean to foreclose the discussion of the bigger factors and
18 the harms and all of that, but I just thought it would be
19 useful to give you an outline of what we talked about as
20 far as rulemaking.
21 CHAIRMAN BABCOCK: All right. Robert, and
22 then Jim. Sorry, Jim.
23 MR. LEVY: I wanted to just go back to a
24 comment that Quentin made earlier about the issue of
25 arbitration. It is an important point. In a sense, our

1 court system competes with private dispute resolution
2 systems like arbitration, and, obviously, there are many
3 organizations that are making a lot of money with those
4 procedures, and I think and I fear that we are losing the
5 battle, and for me, we should be -- in my view, we should
6 be resolving our disputes in court. It has a critically
7 important mechanism to enable citizens to get their
8 disputes resolved in a method and manner that they feel is
9 fair, equitable, and efficient.
10 And arbitration, obviously, is a different
11 process, and it's less accessible. It's, obviously,
12 mostly confidential, and issues like this are reasons why
13 people are turning to arbitration and other dispute
14 resolution forums to address disputes, and I suggest that
15 we have to be mindful of that factor among all of the
16 other fascinating issues that we've discussed in this
17 context in trying to make the right call, the best call,
18 in terms of keeping courts open and accessible, but also
19 not making them such a risk and concern that parties will
20 choose to resolve the disputes privately.
21 CHAIRMAN BABCOCK: Robert, were you done?
22 MR. LEVY: Yeah.
23 CHAIRMAN BABCOCK: Okay. Jim.
24 MR. PERDUE: I was -- I just wanted -- on
25 behalf of Anna Nicole Smith, I was shocked at Rusty

1 Hardin's comments.
2 CHAIRMAN BABCOCK: Yeah, me, too.
3 MR. PERDUE: Because for Rusty to argue that
4 you should not have access to a public proceeding such as
5 that, which made himself so known, is a disservice to her
6 memory and his success, but we teach young lawyers how to
7 try cases by watching people like Rusty Hardin, and the
8 access to that does serve a public purpose. And, frankly,
9 the parties to that proceeding, which somehow allowed a
10 courtroom in that probate court in Houston, Texas, to
11 record all of it, weren't undermined by that. The
12 process, and, in fact, the system, probably was served by
13 it.
14 There's a livestream of a case in Harris
15 County -- you can pull it up right now. The 234th is
16 livestreaming a case in Harris County right now, with the
17 disclaimer, because, to your point, Judge, there's a
18 distinction, and Judge Miskel just hit it. There's a big
19 distinction between the record in a livestream and that
20 the livestream prohibits recording by the public, and that
21 doesn't change somebody taking their phone and holding up
22 to this and doing all of this stuff, but it is -- it is a
23 contempt proceeding with a disclaimer, "Any person found
24 to be in violation of this order faces contempt
25 proceedings, including a fine of up to $500, a sentence of

1 confinement in jail for six months," as I sit here and not
2 really pay attention to whatever direct examination is
3 going on.
4 But Judge Miskel's point on the rules that
5 are in front of the committee is well-taken, because this
6 conversation seems to act in a vacuum, not just completely
7 divorced from Rule 76a, which is a policy choice about
8 closing things down and the heightened burden that is
9 responsible for closing things down, but this conversation
10 is acting like -- in Kentucky, the record is the video.
11 Everything is videoed, and you can go to Courtroom Video
12 Network and see livestreams of court proceedings across
13 the country. Every single county in Oregon, every trial
14 is livestreamed. So if I'm just sitting here, and I'm not
15 in Bangladesh, I'm in this room, I can find livestreams of
16 states that have done this across the country.
17 This is not some bizarre outlier experience.
18 This is done all the time, every day, for the public, for
19 the interest of open courts, across the country.
20 Successfully, without deep fakes, without AI, without
21 destruction of the video record. Now, your point on a
22 fiscal note is really well-taken, right?
23 HONORABLE DAVID EVANS: Those states have
24 done that.
25 MR. PERDUE: Those states have made that

1 fiscal decision --
2 HONORABLE DAVID EVANS: The political entity
3 has done it.
4 MR. PERDUE: -- has made a policy decision,
5 which is well-taken, but from a perspective of just the
6 public and, quite frankly, litigants, because I echo Judge
7 Christopher's point, if you were in a defamation case and
8 your defense was truth, don't you want the record to
9 establish the truth as opposed to putting it behind a
10 locked door? That's what courts are supposed to do, and
11 that's what the public purpose of the courts serve. Not
12 just the individual litigants, but the entire system,
13 which increases faith in the system, I think, not
14 decreases respect and faith for the institution, which is
15 the competing policy to what Robert was arguing about,
16 about people locking the door in arbitration.
17 So I just put those out there for
18 consideration and that this is not an outlier, that this
19 conversation is not like it's -- we're going somewhere
20 that is completely foreign in the United States of
21 America.
22 CHAIRMAN BABCOCK: Rusty.
23 MR. HARDIN: Both -- all of the parties in
24 the Anna Nicole Smith case objected to being televised.
25 The Judge decided to do it anyway. I, since I joined this

1 committee, have been consistently a proponent of judicial
2 discretion. I have no problem with the judges making that
3 decision. Nobody, I can't -- I'm just shocked that my
4 friend would talk about shutting down the system when
5 nobody here is talking about that at all. Everybody has
6 made clear that we favor an open court. Everybody has
7 made clear that we're not going to turn our back on any
8 type of technology to where it's not disseminated or not
9 public when the parties or the judge decide it's
10 appropriate.
11 What I'm urging is the fact that I want the
12 litigants to be consulted and have something to say,
13 because we're forgetting of all of the really frivolous
14 lawsuits out there, and if all it takes for a person to
15 ruin somebody is to file a lawsuit and then it's going to
16 be distributed to the whole world and never be able to
17 recover it, that's something that's got to be considered.
18 I agree with the Chief Justice, for them to
19 sit down and make a rule for this or this or that, I don't
20 know how they would ever do it, just as our conversation
21 is doing, but if we suggest that it's just an absolute
22 fact that we are going to -- we're only talking about the
23 way the information is disseminated. Lamont wasn't
24 talking about closing the courts. He wasn't talking about
25 no technology. We were talking about, as someone has

1 already said -- I think it was Judge Miskel -- who makes
2 the decision, and how do they get there?
3 But I don't think anybody -- I never heard
4 anybody in this room saying we're not going to have any
5 ability ever to livestream it or anything, but when we
6 just start treating it as an absolute that everybody in
7 the world gets to know everything about every private
8 litigant that exercises their right to access to the
9 courts, we're ignoring one part of the equation, and that
10 is individual people who take advantage of or brought in
11 on the litigant.
12 We all have cases where there's somebody in
13 this courtroom, they didn't want to be there, and they may
14 be right in that particular situation, and if all it takes
15 to ruin somebody is just to drag them into court, I mean,
16 I'm seeing these cases all the time; and if that's the
17 case and if we just have a rule that says because we all
18 feel good about letting the world know and Chip and all of
19 his clients can talk about everybody in the world gets to
20 know any time you've got a dispute, that, I don't think
21 that's right. And so I would think, as we make it, the
22 decision ultimately should be by the individual judge.
23 That judge needs to have standards, and the will of the
24 parties should be heavily considered, and that's all any
25 of us are saying, and, yeah, the fact that I was in a case

1 that was helpful to my career doesn't change the whole
2 fricking question, does it, really?
3 CHAIRMAN BABCOCK: Well, it does for you.
4 MR. HARDIN: It has nothing to do with how
5 somebody else did or didn't do. It has to do with whether
6 or not when people use our courts they have a chance to be
7 treated fairly and not exposed to the whole world against
8 their will and not at least be heard on it. If I'm --
9 somebody sues me and I've got to decide what to do,
10 whether to pay a bunch of money to avoid the embarrassment
11 of everything, surely judges ought to take all of those
12 things into consideration in deciding whether they -- and
13 to what degree they're going to allow the dissemination.
14 That's all I'm asking.
15 CHAIRMAN BABCOCK: Well, I would follow up
16 with what Chief Justice Christopher said -- I'll get to
17 you in a second, Connie -- vis-a-vis a lot of your
18 clients, Rusty, because you -- a lot of your practice is
19 representing celebrities, and if there's going to be a
20 defamatory accusation or some false -- I mean, you know,
21 take the Cleveland Browns' quarterback, where many
22 accusations were made about him, which I think he and you
23 believed were totally false, but let's --
24 MR. HARDIN: We didn't say totally.
25 CHAIRMAN BABCOCK: Huh?

1 MR. HARDIN: We didn't say totally, but go
2 ahead.
3 CHAIRMAN BABCOCK: Pretty much false.
4 Pretty much false. If there had been a trial, wouldn't
5 you have preferred a accurate record of what the evidence
6 was about -- about his conduct, as opposed to what you
7 got, which was, you know, all sorts of media reports? I
8 mean, I've tried cases, you know, both with cameras there
9 and without; and when there's no cameras, especially if
10 there's a gag order, the reporting from the trial is
11 wildly, wildly inaccurate, more often than not. Not
12 always. I mean, there are some -- there are some accuracy
13 in reporting, but -- but a lot of times it's not, but when
14 there's a -- when there's a camera there, it is much more
15 accurate in terms of what is reported.
16 Following up what -- and, Justice Miskel, I
17 applaud your effort to try to bring us back to what we're
18 here to talk about, and if I gathered what you were
19 saying, we are unlikely, I hope, to go to either extreme.
20 I understand Lamont's position, very well-stated, that
21 there should be a complete ban, and, frankly, the federal
22 courts have a complete ban.
23 MR. JEFFERSON: I was just arguing for a
24 default, not a ban.
25 CHAIRMAN BABCOCK: Okay.

1 HONORABLE ANA ESTEVEZ: My ban, I just want
2 to be clear, is for the judge to do it.
3 CHAIRMAN BABCOCK: Okay.
4 HONORABLE ANA ESTEVEZ: I don't think a
5 judge should be broadcasting.
6 CHAIRMAN BABCOCK: Okay. There you go.
7 Thank you. Thanks for that friendly amendment.
8 So nobody is in favor of a ban, and nor is
9 -- I don't think there's any appetite in this room or with
10 the Court, if I can speak for it, to mandate broadcasting.
11 So Justice Miskel's point is well-taken. Where do we --
12 you know, where do we meet in the middle, and we meet in
13 the middle by, of course, taking into account the parties'
14 wishes.
15 Rusty is a very able advocate, and if he
16 doesn't -- if his client doesn't want it broadcast, then
17 he's going to make that well-known, and if the other side
18 agrees, then the judge will have that, but there is a
19 third interest there, and that's the public's interest.
20 Sometimes it is not represented. Sometimes only the judge
21 can protect the public interest in having a full video
22 record of the proceedings, but the court ought to have
23 discretion about how to exercise that. But sometimes the
24 public is represented by the media, and the media comes in
25 and tries to advocate on behalf of the public and make

1 their arguments, and in that circumstance, I think, Rusty,
2 you would agree, that the judge ought to have some
3 discretion about whether to allow it or not.
4 And that is where these -- these countywide
5 rules, of which there was a lot of work done, you know, a
6 long time ago, but they -- but that's carried forward
7 until very recent times. Those work pretty well, and
8 there was a lot of work done, and, to me, the place where
9 there was most disagreement was on where the presumption
10 was, where the judge had to -- which side of the fence he
11 or she had to fall on, was there a presumption of access,
12 not open courts, open access to the courts, because
13 Richard is very right. We live in a world of practical
14 obscurity.
15 I mean, the public doesn't really know, as
16 they did when, as Justice Christopher said, in the old
17 days when you would go down to the courthouse and watch
18 it, and people did that, and our whole democracy is built
19 on our public knowing how our government functions, and
20 they learn how our government functions by watching it.
21 And today the people can't watch our justice system, by
22 and large, or they get snippets from news reports or
23 secondhand reports or people blogging or people talking on
24 social media, but they don't get the actual -- they have
25 the opportunity in many cases to get the actual view.

1 So, to me, we come down to what the
2 presumption is going to be. Is it going to be in favor of
3 access, as 76a dictates, or is it going to be presumption
4 against access? Or is it going to be neutral? That, to
5 me, is the heart of the matter, and so --
6 MR. HARDIN: Or no presumption.
7 CHAIRMAN BABCOCK: Huh? Or no presumption,
8 right. And since I'm the Chair and I get to give the last
9 word if I want, we'll break for lunch for an hour.
10 HONORABLE ROBERT SCHAFFER: You left out
11 Connie.
12 CHAIRMAN BABCOCK: Oh, I did leave out
13 Connie.
14 HONORABLE ROBERT SCHAFFER: You said you
15 would call on Connie.
16 CHAIRMAN BABCOCK: Connie, the Chair
17 exercises his discretion to not end on my high note, but
18 to end on your even higher note.
19 MS. PFEIFFER: All right. I'll take it and
20 be brief, because we have heard a lot and I don't want to
21 repeat. I do want to strongly endorse Rusty Hardin's
22 concerns and Robert Levy's concerns about how this will
23 drive litigants to arbitration or private methods if they
24 have this fear of being public figures because a case is
25 broadcast like this, and I did want to say I think we

1 should expand our mind to what kinds of cases are
2 inherently embarrassing or difficult for people to put it
3 in the public like this, and that's not to say the
4 courtroom has to be closed, but it's to say putting it in
5 a very accessible way is going to chill use of our system.
6 And just think about a personal injury case,
7 you know, somebody has to get up on the stand and testify
8 about loss of consortium or their mental anguish or very
9 difficult treatments and their health history. A breach
10 of contract case can oftentimes be recast as fraudulent
11 inducement, and all of the sudden it's about character and
12 lies, and it's not just a breach of contract. It's broken
13 promises and reputation of truth and all sorts of things
14 that can be embarrassing for just an ordinary commercial
15 case.
16 It seems to me like this isn't just about
17 the trial parties consenting or the trial judge thinking
18 it's a good idea, but also the witnesses, and the current
19 Rule 18c, subsection (b), requires the consent of the
20 judge, the parties, and the witnesses, and I think that
21 would address the concerns we've all been discussing,
22 where if everybody in the process can agree that they
23 would be comfortable with this kind of public
24 dissemination, then that might be the appropriate case for
25 it. But that's probably going to be a relatively narrow

1 range of cases, but at least that's protecting the people
2 and the process from all of these concerns we've talked
3 about that, true, are currently inherent in our court
4 system, but not to the degree they would be if things were
5 very publicly broadcast.
6 CHAIRMAN BABCOCK: Great. Well, let's break
7 for lunch. Thanks, Connie.
8 (Recess from 12:19 p.m. to 1:24 p.m.)
9 CHAIRMAN BABCOCK: Okay. We are back on the
10 record, and if David Keltner will turn around and pay
11 attention.
12 HONORABLE DAVID KELTNER: I have not been
13 able to overcome the urge to be silent, so I'm going to
14 pass. There may become a time that I'll be called to
15 action.
16 CHAIRMAN BABCOCK: Well, we're all going to
17 die, but now we're ready for your comments.
18 HONORABLE DAVID KELTNER: Seriously, well,
19 here's what we're talking about. We're not talking about
20 Star Chamber. We're not going to be talking about
21 broadcasting the O.J. Simpson trial, so somewhere is going
22 to be in between. We've said that before. One of the
23 questions I worry about and I think the Legislature may be
24 interested in, and the Court has to pay attention to
25 relations with the other branch of government, is going to

1 be some degree of transparency, especially in a day and
2 time where there -- there are people, a part of society,
3 upset with even the highest court in the land and with all
4 of the courts underneath that, and transparency has worked
5 for the courts in the past when people believed that they
6 didn't really work, and transparency showed that it did,
7 with the *United States vs. Nixon* and other things that
8 came out during that period of time.
9 Transparency, to Chief Justice Christopher's
10 point, is not a bad thing for the legal profession. It
11 just really isn't. People who are involved in jury duty,
12 we get great reports back that they say the system works.
13 We have people who go through experiences in the courts
14 that generally have very good experiences.
15 Arbitration, Robert, to your point, is not
16 enjoying the same favorability currently, even in some of
17 the highest boardrooms in the country. They are looking
18 at other ways, maybe our business courts, the opt-in to
19 business courts, is going to be an answer to those things,
20 but one of the things I think we need to think about is
21 that issue.
22 The one thing, when I looked about trying to
23 get back to a little bit about what we are discussing and
24 whether we're going to do anything, whether the Court
25 wants to do anything, is I'm looking at 18c.4 on page

1 five. No, page seven, I'm sorry, or 15 of 193 of the
2 report that the committee has given us, and it's 18c.4.
3 I think we would do well, to Rusty's point,
4 to emphasize some of the privacy concerns that aren't
5 here. I can imagine why they are not there, and I'm going
6 to guess that someone brought up the right to privacy, and
7 perhaps there was a discussion of maybe there's not a
8 recognized right to privacy, and there was that
9 discussion, but the privacy interest is something to
10 balance in here, if we're giving guidelines of, yes, we're
11 going to broadcast, or, yes, we're going to do something
12 that takes it outside the courtroom. Surely a privacy
13 interest is something that should be a major factor in
14 these 15 that we have, and it's currently not in there in
15 that way, and if I were a judge reading this, I would note
16 that is an exception, that I would -- that I might not be
17 able to think about, so I would put that in.
18 But, again, I want to turn, just one more
19 time, to transparency. We're in a service business. We
20 sell resolution of disputes, with people doing it
21 commercially now under situations in which arbitration
22 really isn't looking for the truth. Arbitration is
23 looking for a quick way to resolve an issue on things we
24 know now. That's why there's a limitation or no discovery
25 in arbitration issues, and that's getting worse instead of

1 better, if you're watching the AAA rules. Now, the truth
2 of the matter is we sell resolution of disputes after
3 trying to determine the truth. That is a valuable thing.
4 Transparency is good for that, and I hope, I hope, in our
5 discussions we don't forget that. That's it.
6 CHAIRMAN BABCOCK: Great. Thanks. Richard,
7 I think after the brief interruption by Lamont an hour and
8 a half ago or so, we're back to you.
9 MR. ORSINGER: Back on track. So I'm on
10 page 38 of 193 of the subcommittee memo, paragraph eight,
11 about sensitive and protected information. We have
12 several areas where there's already been landmarks laid
13 down for us on how we might go about controlling or
14 protecting certain kind of information. The first one I
15 want to mention is Rule of Procedure 21c, which has to do
16 with privacy protection for filed documents, and you are
17 supposed to redact a driver's license number, passport
18 number, Social Security number, tax ID number, bank
19 account number, credit card number, financial account
20 number, birthday, home address of any person who was a
21 minor when the suit was filed. That is a protocol for
22 documents you file with the clerk of the court.
23 We don't know for sure that applies to
24 exhibits that are marked and offered in a hearing, and we
25 don't know whether that applies when someone is going to

1 testify to these very same facts. If we were to take this
2 as a privacy standard, then we would say exhibits are
3 governed by the same redaction requirement, and testimony
4 should be made private or not -- at least cut off a feed,
5 if not empty the courtroom for testimony that requires
6 that.
7 Let's move on to 21c. It's entitled
8 "Restriction on Remote Access," and it says, "Documents
9 that contain sensitive data in violation of this rule must
10 not be posted on the internet." Now, I don't know, from
11 the clerk's standpoint, maybe John can talk to us about
12 that, but if someone were to file something that was like
13 this, somehow, the clerk, I suppose is supposed to see
14 that and not put it on the internet if the court records
15 are otherwise on the internet, but I just want to point
16 out that our Supreme Court has already said that it
17 doesn't want this kind of protected information, which
18 would be very easy to simulate somebody's identity or to
19 get information on them, is not going to be on the
20 internet, even if somebody files it in violation of the
21 rule.
22 Now, moving on to the discovery arena, Rule
23 of Procedure 192.6 has to do with what's the scope of
24 discovery and protections for discovery, and it says that
25 any party who is affected by discovery requests can move

1 for a protective order to -- and I'm going to quote
2 this -- "protect the movant from undue burden, unnecessary
3 expense, harassment, annoyance, or invasion of personal
4 constitutional or property rights." So there it is.
5 David, it's right there in black and white, invasion of
6 personal constitutional or property rights. That's
7 already been recognized as a basis to limit the scope of
8 discovery.
9 But let's assume for a moment that because
10 of the nature of the lawsuit, the court has decided that
11 the other party should be able to do discovery of this
12 information that otherwise would invade personal
13 constitutional or property rights for purposes of the
14 litigation. It's one thing to say that my adversary can
15 have access to personal constitutional or property rights
16 information, and it's another thing to say that because my
17 adversary has it and plans to use it, that, therefore, it
18 becomes in the public domain. So we have to recognize
19 that we've made some assessments here and ask how they
20 apply to our situation.
21 The third thing to cite is Rule 76a on
22 sealing court records. Court records, loosely, is
23 anything filed with the court. We don't know for sure
24 that that applies to exhibits that are marked in a
25 hearing, and this is the standard for that rule. You have

1 to -- in order to seal a court record, you have to show a
2 specific serious and substantial interest, which clearly
3 outweighs the presumption of openness and any probable
4 adverse effect that sealing will have on the general
5 public health or safety. Now, that's another standard
6 only for written documents filed with the clerk, possibly
7 with the court reporters. I'm unclear on that, and
8 certainly, it clearly doesn't apply to testimony about
9 these very same things. So that's yet another group of
10 standards for us to consider if we're talking about what
11 is going to be made public or selectively can be made
12 confidential in the middle of a hearing or trial.
13 The last one to look at is in the trade --
14 Uniform Trade Secrets Act, and it's actually very limited.
15 It's only when a -- it only applies when there's a
16 proceeding brought under the code section, which is the
17 suit for damages for violating the trade secret, but these
18 are very strong restrictions compared to anything that our
19 courts have adopted.
20 Steps the court can take to preserve secrecy
21 by issuing a protective order, that may include provisions
22 limiting access to confidential information to only the
23 attorneys and their experts, which means not the clients,
24 holding in camera hearings, sealing the records of the
25 action, and ordering any person involved in the litigation

1 not to disclose an alleged trade secret without prior
2 court approval. The court even permits -- pardon me, the
3 statute even permits the court to exclude a party and the
4 party's representation or limit their access to alleged
5 trade secrets of the other party. So this is, by far, the
6 most robust protection of a particular right, but it's in
7 a very limited context, but it's still the standard out
8 there for us to keep in mind when we're talking about what
9 the standards for broadcasting and publicizing.
10 Now, both the task force and our
11 subcommittee agree that the remote proceeding rule that
12 was adopted during COVID was necessary, but is no longer
13 necessary, and it raises the question, also, that was
14 discussed briefly, what if there is no physical courtroom?
15 What if the judge is in chambers? What if the judge is in
16 a remote location and there's nothing but a remote hearing
17 or a remote trial? So we definitely need to address -- I
18 don't know that anyone is suggesting that we have to
19 require that every judge take every judicial action from
20 the bench in their courtroom, but if they are not going to
21 be in the public courtroom, the public courtroom is not a
22 place where the public can see, so what accommodation do
23 we make for a purely remote proceeding? And the question
24 arose for -- on the task force of, well, what is the
25 public's right to access to civil proceedings in the first

1 place?
2 And the memo, the OCA memo that was in our
3 materials, originally written by Judge Roy Ferguson, has a
4 lot of comments in it that were not supported by citation
5 to litigation. But my work on Rule 76a convinced me that
6 the U.S. Supreme Court has never announced the robust
7 public right to know in civil proceedings like they have
8 in criminal, so we have to fall back on circuit court
9 decisions and state court decisions, and I'm not aware of
10 a Texas Supreme Court decision that has spoken to the
11 issue of whether the public has a constitutional right to
12 know about court proceedings. Whether they do or don't is
13 something that would affect the rules that we adopt.
14 The point 11 in the memo is that the new
15 technology gives us a greater opportunity to disseminate
16 information, but that presents not only advantages and
17 rewards, but also risks; and, remember, the days of
18 television cameras, we had, first of all, a focus on truly
19 significant cases, not just your run-of-the-mill case
20 where everybody's private lives are going to be made
21 public, and then whatever came out was subject to the
22 discretion of professional journalists, editorial
23 discretion; and when you have just unsupervised
24 dissemination of information of what's going on in trial,
25 there will be no intervening journalistic ethic or any

1 double -- it's just going to be out there for anybody to
2 use. So we don't have the safeguard we used to have that
3 professional journalists were actually the ones who were
4 transmitting the information to the public, and there was
5 a discussion there about practical obscurity.
6 Moving on to paragraph 12, what is the
7 impact of recording and media on the trial process? We've
8 discussed some of that. We certainly, in the old days,
9 didn't want to disrupt it by having flashbulbs go off in
10 the face of witnesses and things of that nature, but let's
11 think about the impact today. We have the self-promoting
12 judge problem. We have the showboating lawyer problem.
13 We have the problem of a reticent witness, who either
14 doesn't want to testify or won't testify completely,
15 frankly, and fully when they feel like they're being
16 recorded and broadcast.
17 My personal concern is the greatest negative
18 effect of this is on the voir dire jury selection process,
19 because that is an area where people are brought against
20 their will. They have no stake in the outcome. They're
21 being asked personal questions, sometimes intensely
22 personal questions, and if -- you do this in order to be
23 sure you have a fair jury and you have legitimate
24 challenges for cause and peremptory challenges, but if
25 people are afraid to talk about their own personal

1 feelings, beliefs, or their past experiences, whether they
2 were a victim of violent crime or whatever, you're not
3 going to get honest answers in voir dire, and it's going
4 to completely warp the jury selection process.
5 So regardless of what we say about all of
6 the trial court proceedings being this or that, there is
7 good reason to say that the voir dire jury selection
8 process should be either off limits across the board or at
9 least a presumption in favor of no broadcast or at least
10 an important consideration that reflects the privacy
11 interests of these individuals, and apart from respecting
12 the venireperson's personal rights, there's also the
13 danger that we won't get full and fair frank answers in
14 jury selection, and, therefore, our jury selection process
15 is going to be impaired.
16 I don't need to say much more about rules
17 versus standards. If you look here at this proposed rule
18 that has, what is it, 12 or 15 subparts, you know, if you
19 write a rule, I don't know how you would write a rule.
20 Even if you write standards, you're going to have so many
21 standards that it's very difficult. One thing I do notice
22 about these standards that were in the task force proposed
23 rule, though, is that they seem to be very case-oriented
24 and not something that you could easily implement a
25 standard for openness or closed across the board, because

1 so many of those factors you're considering have to do
2 with the specific parties, the case, the issue, the degree
3 of public interest.
4 In all of the rules -- well, our proposed
5 rule subcommittee, as well as the task force, the idea is,
6 is that the judge is either going to have a standing
7 policy to allow recording and broadcast or a standing
8 policy not to, so someone is either going to be asking not
9 to publish or not to broadcast or someone else is going to
10 be asking for permission to broadcast.
11 And it isn't always the media. It might be
12 a party that's concerned about the fairness of the
13 proceeding might wish for a court that normally defaults
14 to nonpublicity to say we would like it, but I, in my
15 cases in my practice, frequently encounter someone using
16 it as a tactical advantage to feel forced to settle, out
17 of fear that the dissemination to the public is going to
18 cause permanent damage to that person's reputation, job,
19 family, or whatever, and I don't -- I don't like to see it
20 used for that purpose. So that's just a factor, as there
21 may be lots of different parties, or third parties, who
22 have a motive to either get the judge to rule that it will
23 be open or get the judge to rule that it won't be open.
24 And so we have proposed -- the subcommittee
25 has proposed a rule. I have comments in this memo about

1 the task force report, but I think in terms of the time
2 and considering the depth of the discussion, we can go
3 ahead to talk about our proposed rule, and it was --
4 Justice Miskel already addressed it, but perhaps we could
5 have a -- Emily, if you're there, we're getting to the --
6 I'm kind of skipping over the subcommittee's comments on
7 the task force rule, which I think we could leave until
8 later reading, and go through our proposed rule and talk
9 about why we think it's preferable.
10 And I want to publicly acknowledge that
11 Justice Miskel is the one who wrote this rule for us,
12 synthesizing our discussion, did a great job, and so I'd
13 like to engage with you in a back and forth. Let's go
14 through them. I know you did briefly before, but item
15 one, I think that an important point there is that in the
16 task force they were talking about "the parties may" in
17 this first rule, and the second rule is the court, right?
18 HONORABLE EMILY MISKEL: Right, and --
19 MR. ORSINGER: And what difference does that
20 make? Are the standards different, or do they mold
21 together into the same thing?
22 HONORABLE EMILY MISKEL: Yeah, that's a
23 decent question, right, and, just as a general rule, I
24 tend to get confused when we're mashing together two
25 things that have differences, like when we talk about

1 depositions versus hearing subpoenas, so I thought the
2 group may have a different feeling if a trial court is
3 deciding to broadcast certain types of courtroom
4 proceedings versus outside media is coming in to request.
5 We might treat those requests differently, or we might
6 not, but to my mind, they are different, and so I thought
7 we might separate them out into two types of requests.
8 So broadcasting by the court, what you see
9 in 18c.1(a) there -- I mean, all of this renumbering can
10 be done however we want it, but we were trying to be
11 responsive to the pending rule that was on the table. (A)
12 there includes the concerns identified by Judge Evans,
13 which is this rule text says that the broadcast will be
14 via a court-controlled medium, and so we could say does
15 that mean, you know, the YouTube channel owned by the
16 judge's personal Gmail address? We could say yes or no,
17 or we could say court-controlled means like the county
18 website that they can post it on or whatever it might be.
19 So I did want to flag the use of the word
20 "court-controlled medium" there. That would be subject to
21 definition.
22 MR. ORSINGER: Let me comment on that. To
23 me, court-controlled medium means more than just that. It
24 also means the court can selectively turn on and off a
25 feed, and some judges do that in family law matters,

1 particularly involving children, when the child
2 psychologist or a therapist is going to get up to testify.
3 They'll cut off the feed. So to me court-controlled means
4 the judge also has the option of selecting portions of
5 testimony or entire witnesses to cut off the feed, so to
6 me, that's part of court-controlled. So let's go on to
7 (b) then, or is there anything separate to say about (b)?
8 HONORABLE EMILY MISKEL: No. I think (a)
9 and (b) are currently very similar in the rule we have
10 now, just because we didn't know whether the group would
11 think there might be different considerations for the
12 court doing it versus media requesting it.
13 MR. ORSINGER: So then item (c) is notice
14 and objection, and so we're assuming that if -- if there's
15 a uniform rule, it's going to default to either open or
16 closed. If it's a court-by-court rule, each court will
17 probably default to open or closed, and so if anyone wants
18 to deviate from the default, the idea is they should have
19 the opportunity to file a motion or file an objection.
20 Now, if the court doesn't make it clear in
21 advance by some kind of standing order, or whatever, that
22 it's either going to be recorded and disseminated or not,
23 the rule would require notice. If your standing rule
24 doesn't indicate for you, you have to give notice if
25 you're going to record and disseminate, and the notice can

1 be given by written policy, but it also needs to be
2 available on a case-by-case basis. If the judge has no
3 policy, I guess we have to decide, is the default no
4 recording and you give notice if you are, if the default
5 is recording and you give notice that you're not?
6 HONORABLE EMILY MISKEL: I think that's only
7 a hypothetical default. I don't think I've heard any
8 single person argue for a default being that things are
9 broadcast unless they're closed down, so I think every
10 single person I've talked to is either against
11 broadcasting entirely or thinks the default is the no
12 broadcasting and you, you know, notify that you will be
13 broadcasting.
14 MR. ORSINGER: So if we accept the default
15 is no broadcast, that means broadcast will occur when
16 someone requests it and then --
17 HONORABLE EMILY MISKEL: Or the court does
18 it.
19 MR. ORSINGER: Well, but if the court's
20 going to do it without a motion being filed, the court
21 needs to give notice so someone can file an objection,
22 right?
23 HONORABLE EMILY MISKEL: Right.
24 MR. ORSINGER: Or a court might say, "I'm
25 not going to record this," but the idea is the parties

1 should have an opportunity to respond, and there was one
2 instance, I think Chief Justice Christopher talked about,
3 where there was even a mandamus regarding whether it was
4 going to be publicized or not.
5 So, now then, the exception for ceremonial
6 proceedings and investitures is odd to me. It may not be
7 odd to anyone else, but why would that not -- to me, that
8 would be of more public importance than, you know, your
9 typical discovery motion or something like that, if
10 somebody is being sworn in as a judge or a justice, so I
11 just thought it was kind of odd. Why is there no public
12 right to see something that's of ceremonial and symbolic
13 importance to our government? So I don't know if that
14 resonates for --
15 HONORABLE ANA ESTEVEZ: That was the
16 exception, so you can broadcast it.
17 MR. ORSINGER: No. You did not have to have
18 consent of the parties.
19 HONORABLE ANA ESTEVEZ: Oh, yes.
20 MR. ORSINGER: In other words, you can --
21 there was no limitation on failing to broadcast a
22 ceremonial, or are you in disagreement with that? So we
23 can go back --
24 HONORABLE EMILY MISKEL: I thought (d) was
25 in there to say that the judge can broadcast, no matter

1 what, a ceremonial proceeding.
2 HONORABLE ANA ESTEVEZ: Yes, and allow it.
3 MR. ORSINGER: But without regard to any
4 standards, including Supreme Court standards, and, like I
5 said, that's odd to me. Most of the ones that I have been
6 to are nice matters with good things being said about the
7 judge that's coming in or whatever. Just, all right, just
8 to mention it. We'll move on.
9 Written policy, each court must have a
10 written policy governing recording and broadcasting that
11 is posted at the top of the website maintained by the OCA.
12 So that's assuming that we're going to have individual
13 discretion, not just some general rule.
14 HONORABLE EMILY MISKEL: That was the sense
15 of our subcommittee as we talked about it. The difficulty
16 of having a universal rule that applies to thousands of
17 courts across the state that have different dockets,
18 different judges, different buildings, et cetera, seemed
19 to be an enormous task, and also one that, you know, would
20 please no one. And so what -- the direction we ended up
21 going in our subcommittee was to say, rather than trying
22 to import every requirement into the rule, we'll just say
23 each court must have a written policy, and your written
24 policy can be we don't do it, right, but you have to have
25 some written policy, and if there's Supreme Court

1 standards, they've got to be stapled to the back of it,
2 and it's got to be on your website.
3 So that way, at least there's something in
4 writing so if somebody is challenging it or it's going up
5 on mandamus or whatever, each court can do it their own
6 appropriate way, given their own docket and their own
7 historical court building, but it has to be written down
8 MR. ORSINGER: Okay. So then skipping on to
9 page 44 of 193.
10 HONORABLE EMILY MISKEL: Can we go through
11 those comments, though?
12 MR. ORSINGER: Okay. Go right ahead.
13 HONORABLE EMILY MISKEL: So one of the
14 things that came up during our subcommittee meeting was
15 that we interpret these words differently. So recording,
16 courts make their own recording, like a court reporter
17 will have an audio recording of the court proceeding. You
18 can't get it. You can't send a discovery request to the
19 court because it's protected by Rule 12, anything that's
20 related to a case is not subject to public disclosure, or
21 you know, like a public record request. So we didn't
22 intend for these prohibitions on recording to apply to the
23 courts on internal recording for the court's own use.
24 We also had a difference of opinion about
25 the word "broadcasting." So some folks understood

1 broadcasting in the sense of a live broadcast, meaning
2 it's only available while it's live, and you can't look it
3 up later; whereas, other people interpreted broadcasting
4 to be broadcast or, like, posted on the website, and you
5 can look it up later. So we might have a different
6 feeling, for example, if you go to the top of the next
7 page, will we require trial courts to take down the
8 recordings, right? So it might assuage some of the
9 concerns to say you can only watch it live, you can't look
10 it up on court's website a week later.
11 But that is something -- so we need to maybe
12 be careful about how we use "broadcast" and be careful how
13 we use "recording," given that those words can be
14 interpreted differently. And then (c) at the top of page
15 nine is defining "court-controlled" is also part of that
16 discussion.
17 MR. ORSINGER: So then we are in agreement
18 with the task force that the video or audio reproductions
19 are not considered part of the official court record, and
20 maybe we should go even further, if there's a duty to
21 maintain them at all or can they be destroyed? Are they
22 available to the public? If they are, only under the
23 supervision of the court and not already out on the
24 internet. So nobody wants this kind of recording to be
25 part of the appellate record or part of any appellate

1 brief or anything of that nature. And then the question
2 is, well, is it even really an official record? Is it
3 something that must be maintained for 20 years or
4 whatever?
5 The last one, 18c.6, violations of rules, is
6 that if someone violates the court's rule about -- about
7 recording or disseminating, that they can be punished. I
8 have doubt about what it means, "subject to disciplinary
9 action by the court." I know lawyers are subject to
10 disciplinary action by the Bar and judges are by the
11 governing body for judicial ethics, but I don't know what
12 it means to say that a member of the public is subject to
13 disciplinary action, but I do understand what contempt
14 means, and so it seems to me that maybe we ought to just
15 delete that whole -- that whole idea. Now --
16 HONORABLE EMILY MISKEL: I kept -- I kept
17 that language because that was in Exhibit A that was
18 circulating, so it came in just for safety.
19 MR. ORSINGER: Well, you know, if it means
20 anything to somebody, then we can leave it, but I'm not
21 sure what disciplinary action against some member of the
22 public would constitute.
23 Now, I don't want to overlook the fact that
24 the Family Law Council chair and executive committee were
25 advised of this referral from Chief Justice Hecht, and

1 they were on a fast track with two committees and gave us
2 back a memorandum in a very short period of time that I
3 was very impressed with. I thought they did a great job
4 with the work they did in the time that they had, so it's
5 in here.
6 I don't know that we want to take the time
7 to cover it in detail, but most of the referral letter
8 they had no opinion on, but they did on a couple of
9 issues, and on this particular issue, I just wanted to
10 highlight the -- on page 49 of our agenda materials, out
11 of 193, they talked about and made the comment in bold,
12 "We strongly believe that Rule 18c should be split into
13 separate and discrete categories for discussion and
14 consideration in order to be most effective and to avoid
15 confusion and problems." And so they talk about digital
16 recording, public access to the physical courthouse,
17 testimony excluded from broadcast, livestream, which is a
18 word they use, probably something that should find its way
19 into the rule.
20 The next category, on page 50 of 193, is a
21 publication of sensitive information. I think they're
22 picking up on the same thing that was in my memo. We have
23 different concepts. We have, you know, a rule filing
24 about Social Security numbers and dates of birth, but we
25 have another rule -- and we have actually four different

1 rules that conceivably could be guides for us, but there
2 naturally is the family law section of the State Bar.
3 They are concerned with ensuring the safety and welfare of
4 children and preserving and protecting extremely sensitive
5 images and especially financial information, but also
6 medical, psychiatric, and psychological information.
7 So at the Rule 76a stage in 1991, the
8 complexities of the litigation involving the family had
9 advocates all the way from Rusty McMains to a justice on
10 the Supreme Court, and what they decided to do was to just
11 leave the Family Code proceedings out of Rule 76a, and
12 that doesn't mean that there isn't sealing, that doesn't
13 mean that there aren't fights over sealing, but that just
14 means that they're not governed over the presumptions or
15 the proof requirements, if you will, of Rule 76a. So as
16 Chief Justice Hecht said earlier, perhaps it would be a
17 possibility to exclude family courts or proceedings under
18 the Family Code, which could be in county court in some
19 counties, and leave them outside of any kind of mandatory
20 rule, but if we're going to go with individual court
21 discretion, maybe we don't need to treat family courts
22 differently or maybe we do.
23 I think that those of us who practice family
24 law and have seen the negative effects of allowing private
25 information to go public, especially for children, who

1 later on will grow up and may have access to information
2 about their own family breakup that they don't need to
3 have, maybe it should be a special exception to the
4 general rules, even if we do have local judge control.
5 CHAIRMAN BABCOCK: Richard, hold on for one
6 second. At this end of the table, we think that I said to
7 exclude it from family court, not the Chief.
8 MR. ORSINGER: Oh, I'm sorry.
9 CHAIRMAN BABCOCK: I may well have said --
10 MR. ORSINGER: Dee Dee, would you go ahead
11 and substitute Chip's name for Chief Justice Hecht's? I
12 don't want to tarnish him in any way.
13 MR. SCHENKKAN: But Chip will.
14 MR. ORSINGER: I move for permission to
15 amend the record.
16 CHAIRMAN BABCOCK: We'll leave the record as
17 it is.
18 MR. ORSINGER: Oh, okay, I have to fall on
19 my sword. That was my mistake. I'm sorry. So I did not
20 mean to impugn.
21 CHAIRMAN BABCOCK: No apologies necessary.
22 He may have said it. We just don't remember it.
23 MR. ORSINGER: Okay, very good. All right.
24 They noticed the same comment about monetizing, and live
25 commentary, we've discussed that already, and retention

1 policies, we've discussed that as well. I would encourage
2 you to read the memo, because I think it's very well
3 written. And so, with that, I think we've clarified
4 everything, haven't we, Chip?
5 CHAIRMAN BABCOCK: I think we're ready for a
6 vote.
7 MR. ORSINGER: Oh, my God, I haven't even
8 thought of how to frame -- how to --
9 CHAIRMAN BABCOCK: Justice Christopher.
10 HONORABLE TRACY CHRISTOPHER: Well, I don't
11 think we should change the rule unless we have standards
12 adopted by the Texas Supreme Court, because that just, you
13 know, leaves things open-ended. So what I think we need
14 is standards, and if the standards are these are the types
15 of cases that are not suitable, that's, you know, what it
16 should be.
17 With respect to voir dire, for example, you
18 can call jurors by their names and not -- or by their
19 number and not their names and make it public and not put
20 the camera on them, right? The camera is only on the
21 lawyer, not on the jurors. I mean, that's a pretty common
22 rule that most courts have with respect to jurors. So, I
23 mean, I think there are some things that we could all
24 agree on as potential standards that, you know, at least
25 we should have that before any rule change is made.

1 CHAIRMAN BABCOCK: Robert.
2 MR. LEVY: I do also think, along the lines
3 of Chief Justice Christopher's comment, that the proof is
4 in the pudding, and with Richard involved, I was going to
5 go into the etymological history of that phrase, but --
6 MR. ORSINGER: You mean the proof of the
7 pudding is in the eating? Is that what you mean?
8 MR. LEVY: Exactly. And I wonder whether we
9 are shirking our duty to the Court by not actually
10 considering what the standards should look like.
11 Obviously, it's up to the Court whether they want that
12 level of guidance, but I do think that's going to really
13 be the key place to address this. But I do have some
14 comments and suggestions with respect to the proposed
15 rule.
16 One is that who has the right to request the
17 ability to record, the outside party? Is it anyone? If I
18 want to start a business of broadcasting or webcasting
19 court proceedings, can I ask? What happens if I ask and
20 then NBC comes in and says they want to do it? Does
21 everyone have the right? Is it first come, first serve?
22 Are there any -- is there any guidance that the Court
23 should apply and -- or is it certain types of entities
24 would be eligible?
25 The other issue is notice and objection, and

1 that provision, 18c.1(c), I would recommend that you also
2 give the opportunity for a witness or anyone else who
3 might be impacted by the testimony or -- not the
4 testimony, the proceeding, to have the opportunity to
5 object. One example would be, obviously, a witness who is
6 uncomfortable about having their testimony on the web, but
7 it also could be a situation where two parties are
8 fighting over a contract and a relationship, and within
9 the context of that contract, there are documents that
10 came from a third party, who is not involved in the case,
11 but they might claim that that document is very sensitive,
12 proprietary, whatever it is, and that the broadcast would
13 impair their rights.
14 So suggestion is to make that a little bit
15 broader. And another question is -- and maybe, again,
16 this is something that goes into the guidance and not the
17 rule, is what do you do about the broadcast of bench
18 conferences during the course of a trial? Is that part of
19 the expectation? Do you have to exclude, you know, get
20 the jury out of the room and publicize the bench
21 conference? Is that a concern about, you know, the public
22 seeing these lawyers up in front of the judge talking
23 about some secret stuff and then, all of the sudden, the
24 trial goes in a different direction?
25 Similarly of concern is, again, on a

1 question of guidance or the rule, should there be specific
2 rules about portions of a trial that are not in front of
3 the jury? So let's say you're doing a Rule 702 prove-up
4 on an expert, and the expert's going to -- and he
5 testifies, you know, outside the hearing of the jury about
6 her or his opinion and offers a devastating opinion about
7 the defendant's product, and the judge decides that that
8 testimony does not meet the standards of 702, and he
9 excludes or she excludes the testimony.
10 Well, the jurors -- the juror doesn't hear
11 this, but the public does, if it's a big case, and, you
12 know, juror three's husband is, you know -- hears excluded
13 testimony. It's a problem. It's a risk. And should that
14 be part of the process? For all the reasons that we want
15 open courts and access to the broadcast, there are also
16 some real challenges there.
17 A similar question comes up with voir dire.
18 Is that process -- should there be separate guidance on
19 whether that should be public? I did want to also make
20 one other parenthetical note with respect to the privacy
21 section of your memo. As you might recall, we spent some
22 time looking at potential rulemaking with respect to
23 Chapter 98 of the Civil Practice and Remedies Code that
24 talks about victims of human trafficking, and the
25 consideration that your memo didn't seem to cover,

1 specifically, is that it's not just the broadcast or the
2 revelation of names, addresses, and so-and-so, but images
3 count also.
4 You have Jane Doe testifying in court. The
5 transcript never says her name or address. She's always
6 Jane Doe, but her face is personally identifying
7 information and could be devastating, and so it suggests
8 some, you know, notation that it's not just the words that
9 come out of people's mouth, but it is, in fact, their
10 images that could be impacted. Thank you.
11 CHAIRMAN BABCOCK: Good. Pete.
12 MR. SCHENKKAN: I want to make a slightly
13 more radical version of the detailed argument that Robert
14 just made. I think all of these things have to be decided
15 as matters of State of Texas public policy. I think that
16 the only way to secure a constitutionally valid and
17 conceivably publicly acceptable regime under which these
18 issues have been fought through and decided, is to have
19 standards adopted for the court-controlled medium. It's
20 not a court-controlled medium. It's the State of Texas
21 broadcasting, and so I -- I believe -- and I believe
22 that's the best way to force us, the bigger us, not the 50
23 people in this room today, or the nine who would vote on a
24 rule, but we really are talking about the State of Texas
25 deciding what we're going to tell all of the world about

1 what's happening in our courts.
2 I think we have to own that, and so I think
3 this requires legislation. The legislation certainly
4 should delegate the critical decisions about what kinds of
5 individual interests, whether it's, you know, jurors in
6 voir dire or witnesses or images, to the court, but we
7 shouldn't get here at all unless the State of Texas is
8 willing to make a substantial commitment to a new venture,
9 which is livestreaming in court proceedings.
10 CHAIRMAN BABCOCK: Okay. Yeah, Roger.
11 MR. HUGHES: Well, I echo that.
12 CHAIRMAN BABCOCK: Okay.
13 MR. HUGHES: I will agree with that
14 wholeheartedly, and I think we may have to start
15 rethinking about what we mean by public access, because up
16 to now it's just been, you know, come to the courtroom,
17 see what goes on. He talked about practical obscurity,
18 practical obscurity. I think a couple of things need to
19 be teased out here. One of it is access when we are
20 talking about something passively observing, and maybe
21 having your voice heard at the ballot box is one thing,
22 but that's not what a lot of young people think today
23 about access. They think of access as participation, and
24 participation means they want the court to know what they
25 think of the proceeding while the proceeding is going on,

1 and as long as the State doesn't control the media of the
2 transmission, they're going to demand that the private
3 carrier let them express their opinion somehow, and it's
4 going to get out.
5 The other thing, as I understand in a lot of
6 high visibility cases, privacy, as we understand it, kind
7 of disappears. Cameras go off around the courtroom, et
8 cetera, et cetera, but that's for the high visibility
9 cases. But for a lot of the people who come and go in the
10 courtroom, they don't expect that. They don't expect that
11 there's going to be a TV camera outside the courtroom when
12 it's just their divorce and it doesn't matter to anybody
13 else but them. They don't think that there's going to be
14 a livestream of the divorce proceedings that can be
15 watched by their children's high school friends,
16 literally, in class, which, as we all know, they carry
17 their phones around and watch this sort of thing.
18 And so when it was just the public figures
19 who had to worry about all of the shenanigans that go on
20 and broadcasting and televising what goes on in the
21 courtroom, that was one thing, but now it's everybody.
22 Everybody who comes to the courthouse could suddenly find
23 their lives disrupted for no purpose other than, what,
24 entertainment? You know, we're not -- at this point, it's
25 not so much educating the public. It's kind of like mass

1 entertainment.
2 So I think, number one, I agree. I think,
3 essentially, the only way to have this is for the State to
4 control the media of transmission and not just merely
5 authorize it; and the second is we're going to have to
6 have some serious rethinking about what we mean by public
7 access for what goes on in a courtroom, because when it
8 was just a few people who put themselves in the public
9 eye, they get what they get; but if it's everybody, I
10 mean, everybody who comes to the courtroom can suddenly
11 become media fodder and topics of conversation, and not
12 just the litigants, but the jurors.
13 We can talk about juror numbers and all of
14 this. That's going to be a problem. I think we're just
15 going to have to rethink what we mean by transparency
16 about what goes on in the courtroom. You know, the
17 example was given here earlier. The jury doesn't hear
18 certain pieces of evidence, but the discussion of whether
19 the evidence will be excluded or not goes on in public.
20 Well, if that's going to be out in the media for everybody
21 in the world to see, how are -- how have we kept it from
22 the jury? What good does it tell them to -- that the
23 exclusion becomes an exclusion in name only, and it's out
24 there, and it's going to -- whether it's on YouTube or
25 whatever. I mean, and not just -- not just in a high

1 visibility, high profile, big media cases, but in
2 everybody's cases. That's what I think. That's my
3 opinion.
4 CHAIRMAN BABCOCK: Judge Estevez.
5 HONORABLE ANA ESTEVEZ: I just want to make
6 a comment regarding Roger's comments, because I think
7 people think, well, we're not doing that presumption that
8 everything is going to be broadcast, but depending on how
9 we've phrase this rule, there may be judges that choose to
10 broadcast everything, and so for those judges, we need a
11 ban from broadcasting everything, or at least consider
12 that, and then so that that's the general rule. So the
13 presumption is we won't broadcast. Because if you just
14 say that, and then there's a judge that's self-promoting
15 and wants to broadcast everything --
16 CHAIRMAN BABCOCK: Or campaigning.
17 HONORABLE ANA ESTEVEZ: Or campaigning.
18 Then those are the litigants that he's talking about that
19 came in and just thought they were going to have a
20 divorce, and now they find that their friends are making
21 fun of the fact that their parents are fighting over
22 something that their friends don't even know about. I
23 checked their phone, and she said she loves so-and-so,
24 and, you know, it could cause a social nightmare for kids
25 if everything they wrote on their cell phones is on social

1 media and their little -- you know, it just keeps growing
2 and growing and growing.
3 So I just mention that, because every time
4 we say everyone, everyone, well, then it comes back to say
5 we're not saying that everything will be broadcast, but if
6 we have one judge in the State of Texas that decides to
7 broadcast everything, then it is everyone.
8 CHAIRMAN BABCOCK: Would you be in favor of
9 not allowing the -- some government entity to broadcast,
10 but rather leave it up to private -- you know, because
11 before Zoom, before the pandemic, really, if NBC thought
12 that there was a good trial going on, they would file a
13 motion with the court. The parties could weigh in, and it
14 would be either granted or it wouldn't be granted. If it
15 was granted, then NBC would tell them.
16 HONORABLE ANA ESTEVEZ: Well, and Dateline,
17 you guys can go watch The Pink Gun that i in my court. I
18 am the judge, and I -- it was a capital murder case, and I
19 talked to the attorneys and the defense attorney said, "I
20 don't want to concentrate on anything or think about
21 anything except my guy's life," and so he said he didn't
22 want the cameras, and so the cameras weren't inside. They
23 drew the sketches. I did not see if I looked good or not,
24 so I don't know.
25 CHAIRMAN BABCOCK: Yeah, see, that would

1 change your mind.
2 HONORABLE ANA ESTEVEZ: I might look better
3 on paper on a sketch, but it doesn't matter. But the
4 whole point is it should always be -- I mean, we should be
5 considering how good an attorney is going to -- you know,
6 what do we want? At the end of the day, we want everyone
7 to concentrate on those facts and what's going to happen,
8 and that's what's the best for our system.
9 CHAIRMAN BABCOCK: I get that, but -- but
10 you were addressing your comments about a
11 government-controlled broadcaster basically, like a judge
12 of whatever court says, "Everything in my court is going
13 to be on streaming"; and what I was trying to say was,
14 well, would you be in favor of not allowing that, but
15 saying on a case-by-case basis, if somebody thought Rusty
16 was in trial or it was a celebrity or it was an
17 interesting fact pattern, they would petition the judge.
18 So it would be more limited. In other words, I'm trying
19 to see if you think that would be better.
20 HONORABLE ANA ESTEVEZ: I think that's how
21 it is now, and I think that leaves it in the court's
22 discretion on a case-by-case, and if there's no reason to
23 broadcast it, then it shouldn't be broadcast, so yes.
24 CHAIRMAN BABCOCK: But you think that would
25 be -- the court's discretion, as it is now, the practice

1 now, would be preferable to allowing a judge to stream
2 everything?
3 HONORABLE ANA ESTEVEZ: I don't think it --
4 I don't think it -- yes. I think an outside party is
5 better than a judge at any time, and if, for no other
6 reason, it's kind of like that whole fight about whether
7 or not attorneys should be able to advertise. I think it
8 just minimizes the judicial system.
9 CHAIRMAN BABCOCK: Yeah. Robert -- and I'll
10 get to you in a second, Harvey. Robert's point, I think,
11 one of his points, one of his excellent points, was if
12 you're going to go -- if you're going to have sort of the
13 current system versus a judge has the discretion to do
14 everything, you're going to need some more standards and
15 rules. For example, if you look at the Tarrant County
16 rules that are in the materials here, you'll see there are
17 a whole lot of them, like, for example, if more than one
18 type of media, like the networks, for example, well, there
19 can only be one, so the one camera in the courtroom. That
20 type of -- those types of details. Is that what you're
21 getting at, more or less, Robert?
22 MR. LEVY: Yeah.
23 CHAIRMAN BABCOCK: Okay. Harvey, sorry.
24 HONORABLE HARVEY BROWN: No. I wanted to
25 echo what Chief Justice Christopher said that I think we

1 need the Texas Supreme Court to adopt some standards. It
2 seems like, to me, it's just unusual for us to spend a lot
3 of time saying here's a rule, and the rule incorporates
4 these standards, which are unknown, and it's a lot of
5 work. I mean, I, frankly, didn't realize how complicated
6 this was until hearing all of this and reading the
7 materials. So I think it would be helpful for the Court,
8 given all they have to do already, to either get Richard
9 and Emily's committee to, you know, put out a draft of
10 standards for the Court or for the Court to appoint a task
11 force, but I don't think we can wait until the next
12 legislative session for a couple of reasons.
13 One, courts are already struggling with
14 this. We already have at least one court in Harris
15 County, as I understand it, who livestreams everything.
16 If that's true, you know, there's no standards for that
17 judge, and there should be some standards for that judge,
18 so we, I don't think, can keep waiting and putting off
19 this issue. And I think it will be helpful for the
20 litigants to have some standards to know exactly what they
21 can do, because we have talked about things that people
22 might not even think of. I hadn't thought about the
23 Rule 702 hearing before. It was just mentioned. I
24 thought, oh, that's a great point.
25 So I think we need to work on those

1 simultaneous with the rules, and I think the Court is best
2 off and lawyers are best off drafting this first rather
3 than punting it to the Legislature. Yes, it's a policy
4 decision, but we've seen how these things play out in the
5 courtroom. We know it a lot better, even if it's just a
6 proposal we put out for the Legislature to consider or to
7 tweak or the Court puts together a draft and gets
8 legislative buy into it or input into it, but to just wait
9 for the Legislature seems to me like that's a mistake,
10 because there's just too much to be done, and we need to
11 use the expertise of people like in this room and on the
12 Court.
13 CHAIRMAN BABCOCK: Just curious, Harvey, or
14 anybody, but how is the Harris County -- what kind of
15 equipment is he using to livestream the proceedings?
16 HONORABLE HARVEY BROWN: Zoom.
17 HONORABLE DAVID EVANS: YouTube and Zoom.
18 HONORABLE ANA ESTEVEZ: No, it's --
19 THE REPORTER: Whoa, whoa.
20 CHAIRMAN BABCOCK: Hold on, one at a time.
21 HONORABLE HARVEY BROWN: I believe it's the
22 Harris County Zoom. Jim was watching it, so Jim could
23 tell you.
24 MR. ORSINGER: Can I ask a question? Is the
25 camera over the judge and just shows the advocates and the

1 witness, or does the camera show the judge in the
2 courtroom? Can you tell?
3 MR. PERDUE: At least for livestreams of
4 trials, it is at the podium and one at the witness. Now,
5 for the Zoom system for hearings, for example, the minor
6 prove-up or something on a hearing docket, there is
7 usually a webcam for the judge, because the judge is
8 operating the waiting room.
9 MR. ORSINGER: So when you say at the
10 podium, that means that the camera is pointed at the bench
11 with the seal of Texas overhead?
12 MR. PERDUE: No. No. It's the webcam is in
13 front of the judge.
14 MR. ORSINGER: So it's showing the advocate
15 and the counsel table and the audience.
16 MR. PERDUE: So Harris County is -- there's
17 an ELMO podium and two counsel tables on either side.
18 MR. ORSINGER: Okay.
19 MR. PERDUE: So it's just a wide shot, and
20 then there's one on the witness.
21 MR. ORSINGER: Okay.
22 CHAIRMAN BABCOCK: How does the camera
23 switch back and forth between the podium and the witness
24 and the judge?
25 MR. PERDUE: You've got two windows.

1 MR. DAWSON: Split screen.
2 MR. PERDUE: It's a split screen. You've
3 got a window on the left of the witness and a window of
4 the -- but you can't make anything out. You can make the
5 audio out, but it's such a wide shot, you can't -- you
6 know, as far as it comes to counsel. Now, the witness,
7 you can see, but as far as counsel, you can't see.
8 MR. ORSINGER: So, basically, it's just like
9 a sports broadcast.
10 CHAIRMAN BABCOCK: It's like the Sunday
11 Ticket, the NFL Ticket, or maybe the NFL Red Zone.
12 MR. ORSINGER: I wonder what the signing
13 bonuses are.
14 CHAIRMAN BABCOCK: Pete.
15 MR. SCHENKKAN: Accept a friendly amendment
16 that we really ought not to be having people doing
17 anything without standards at all. Starting from that
18 premise, I would suggest that the rule that's adopted for
19 now is no livestreaming permitted until and -- unless and
20 until the Supreme Court or the Legislature, and/or the
21 Legislature, adopts appropriate standards and funding for
22 a State-controlled broadcast.
23 I agree that we shouldn't wait to try to
24 address the problem, but we have problems that are not
25 capable of being addressed right now without a major

1 institutional structure, and so the rule that ought to be
2 adopted now is stop until there has been a considered
3 decision by the State of Texas, whether it's the Texas
4 Supreme Court or the State of Texas Legislature or some
5 combination of the two that includes the standards and the
6 procedures that go down this full list of all of these
7 problems that have been identified just by the people in
8 this room today, and who knows how many more are yet to
9 have to be wrestled with. We really ought to stop and do
10 it right.
11 CHAIRMAN BABCOCK: But you're not -- you
12 mean we ought to recommend to the Court that the rule
13 should say "stop"?
14 MR. SCHENKKAN: Yeah. No livesteaming until
15 we have standards.
16 CHAIRMAN BABCOCK: Until we have a comment,
17 publish it in the Bar Journal, and then get comments and
18 then next year have a rule that says "stop"?
19 MR. SCHENKKAN: Well, does it have to go
20 through that lengthy process to do it? I mean, I believe
21 we've done some emergency orders otherwise.
22 CHAIRMAN BABCOCK: Okay. Yeah, Quentin.
23 MR. SMITH: I, personally -- I, personally,
24 like livestreaming, and a lot of people have identified
25 problems that are problems with open courts. So if you

1 have a divorce and you file it right now, your friends can
2 go read the petition, read all of the files. You're
3 filing a motion, trying to exclude an expert, they can
4 read that as well. So can the jury. And so there are
5 problems with having open courts on online systems, and
6 those exist right now. What we're talking about is just
7 simply having a livestream.
8 Former President Trump was in trial in New
9 York, and everybody knows exactly what happened every
10 single day, despite there not being a camera in the
11 courtroom. So, I mean, I think these problems exist. So
12 I just want to push back on, like, the fear that this is
13 going to be the end of the world if we allow
14 livestreaming.
15 CHAIRMAN BABCOCK: Okay. Roger, and then --
16 oh, Judge Evans had his hand up first.
17 HONORABLE DAVID EVANS: Well, I just wanted
18 to make one comment about Harris County. Yes, you can
19 join Zoom as a party, and that's the State-sanctioned
20 system, but the streaming for the public spectator is
21 through an IBM video stream, which is a different solution
22 than Harris County chose. As I recall it, the rule that
23 was suspended during the pandemic forbid broadcasting
24 without consent, and it was suspended by emergency order,
25 and I believe those emergency orders are over.

1 But because of the strength of the memo that
2 Richard mentioned, some trial judges still believe they
3 can livestream or should livestream or are required to
4 livestream in proceedings where they're not in open court.
5 Or that they can do it from open court, but I thought the
6 current rule was back in place once the emergency orders
7 were over, and I'm not sure what the authority is now to
8 stream, but I do know that one complaint before the
9 Judicial Conduct Commission centered on the fact that
10 there was the memo, the emergency orders, and nothing
11 clearly set aside the directives regarding YouTube
12 streaming when you weren't available.
13 So that's as I understand it, and
14 admittedly, Judge Miskel, that's in part, not firsthand,
15 but from reading the complaints and the response. I'm
16 just saying, we got here because of a pandemic, and we had
17 a rule in place, and if that pandemic is over and if those
18 orders are suspended, those rules are back in place. And
19 that joins with what Pete's been saying. Gosh, Pete, for
20 you and me to agree, I'm not sure I can get home tonight,
21 but I'll work on it.
22 MR. SCHENKKAN: I'm honored to be in your
23 company.
24 CHAIRMAN BABCOCK: Professor Carlson.
25 PROFESSOR CARLSON: Yeah, I was just going

1 to say this reminds me of several other previous
2 situations dealing with technology, nonuniform systems
3 throughout the state.
4 HONORABLE DAVID EVANS: Yes.
5 PROFESSOR CARLSON: And unintended
6 consequences. We've dealt with this before when we were
7 looking at the county clerk who -- district clerk who
8 uploaded all of the files, and we're like, oh, wait a
9 minute, people are mining this data; and the Supreme
10 Court, you did say, "Stop, we've got to figure this out,"
11 and then we -- you brought in and rolled in electronic
12 filing and some control over that system, and we don't
13 have -- or we haven't had a uniform computer system, like
14 federal government, because we can't print money, but it's
15 better at the front end to try and figure this out, and I
16 know we're not at the very front. We're already down the
17 path of it, but I think that's -- I think Pete is wise in
18 saying we ought to really look at what's going on and have
19 a long-term plan and not Band-Aid it.
20 CHAIRMAN BABCOCK: Sorry. Justice Gray.
21 HONORABLE TOM GRAY: It's been hard for me
22 not to say anything.
23 CHAIRMAN BABCOCK: I can tell.
24 HONORABLE TOM GRAY: And it's one of
25 those -- and what Elaine just said sort of gave me a

1 segue, so thank you, but the rest of y'all can blame her
2 later, but the problem is even all of our conversation is
3 about the elephant, and we haven't started talking about
4 the pieces of the elephant yet.
5 CHAIRMAN BABCOCK: Not to mention the
6 circus.
7 HONORABLE TOM GRAY: The circus, too. The
8 idea here is if we want to eat the elephant, you've got to
9 cut it up into pieces, and the first part, the one that
10 has been dealt with the easiest and the most definitive,
11 is the Supreme Court currently records and broadcasts
12 their proceedings. The first thing we need to do, I
13 think, is separate those concepts of recording and
14 broadcasting. Because, for years, they recorded their
15 proceedings, and you could get a copy of it, and -- but
16 they weren't broadcast in the sense of either radio or
17 television or the broader concept that we think of as
18 broadcasting now.
19 The second -- I mean, I'm not sure exactly
20 what the CCA does, but I think they also record and
21 broadcast, but the Supreme Court used a outside entity for
22 the broadcasting part. I don't know if St. Mary's was
23 also doing the recording. I assume that they were also
24 doing the recording, but not the audio recording that was
25 done before that.

1 My point is there is no way to start talking
2 about a rule until you start breaking this up, separate
3 the broadcasting from the recording, because -- and then
4 you've got to talk about the -- to separate who is doing
5 it, third party or the judge, or the court, or a state --
6 other state agency. Because, while there's been a lot of
7 discussion and comments made about the YouTube video
8 channel organized through OCA, I never viewed that as my
9 YouTube channel. I always thought it was the State's
10 channel, and when we resorted to the YouTube channel to
11 have an open court during the pandemic, under the
12 emergency orders, it was livestreamed on YouTube for the
13 open court provision, and it was received with such
14 fervor, people liked it so much, that we continued to do
15 it.
16 The only other time we had allowed recording
17 of our oral arguments is when we were on a college campus
18 and there was -- the room was too small to hold all of the
19 people that wanted to attend, and we had a remote room in
20 which it was broadcast live at the same time, and then I
21 found out later that there was, in fact, a recording made,
22 and the faculty member wanted to know whether or not they
23 could use that in the future to teach students with, and
24 so we took it up at court and approved it and sort of
25 cobbled together something on the rules, but we still

1 record and livestream our oral arguments on YouTube, and
2 they stay out there until YouTube kills it or I
3 accidentally delete it.
4 But the point is all -- and I'm -- after the
5 conversation today, I'm a little bit scared as to whether
6 or not I have violated the rule, because I didn't have a
7 motion, and we didn't have maybe permission to keep them
8 forever, and we certainly didn't ask the parties if they
9 wanted to be videoed and recorded and livestreamed. We
10 told them we were going to do that, but I go back to Judge
11 Miskel's earlier effort to draw it back to the rule, is
12 the first thing I put around, started marking up on 18c,
13 on the proposal, is that you've got a rule here with four
14 issues in the first two subsections, recording and
15 broadcasting by the court and by others. And I don't see
16 any reason to change what we are doing now on the
17 recording and broadcasting by others.
18 What we're -- have spent most of the
19 conversation about today has been about recording and
20 broadcasting by the court or other state entity, and if
21 you start separating it a little bit, I think we can focus
22 our conversation. And I do have to at least address the
23 concept of if it is a state agency that is recording it
24 and has a recording of it, and this sort of jumps forward
25 maybe to other conversations that we will have, that is

1 not a judicial record, but it is certainly a government
2 record, and it is covered by the -- in our case, the
3 Court's document retention policy and state law on when
4 things can be destroyed or otherwise disposed of, and for
5 archival purposes, and there are records. I mean, about
6 -- or laws about how long we have to keep some records
7 that are related to cases. So a lot of other things I
8 wanted to say along the way that I'll skip, but I'll stop
9 there.
10 CHAIRMAN BABCOCK: Sounds good. Kent.
11 HONORABLE KENT SULLIVAN: I appreciate
12 Justice Gray's comments. At the same time, I assume that
13 he would acknowledge that there's a huge difference
14 between the appellate courts and oral argument at the
15 appellate courts and the trial courts and the potential
16 implications, the fallout, the potential problems
17 associated with handling jurors, venire panels, unwilling
18 witnesses, all of that. So I just -- I do think that's
19 worth noting. Otherwise, I you know, understood and
20 appreciate his comments.
21 I want to speak to Pete's comments briefly,
22 which I understood just to be concise and plain language
23 about it. I understood it to be that in the absence of
24 some clear interim rule, that we're potentially in the
25 wild west right now, and the Harris County example is an

1 example of that. One judge in one county out of 254
2 counties has unilaterally decided something --
3 CHAIRMAN BABCOCK: How many counties are
4 there in Texas, again?
5 HONORABLE KENT SULLIVAN: 254. I'll count
6 them up for you. And decided that. And that's the
7 problem, and this suggestion is shut it down for now.
8 And, you know, increasingly, as I'm thinking about it, you
9 know, I think I would join what seems to be the
10 Schenkkan/Carlson/Evans axis of that ought to be at least
11 the default rule. It ought to be clear. It probably
12 needs to be done on an expedited or emergency basis, with
13 the idea that it ought to be a high priority to consider
14 the policy considerations that go into a comprehensive
15 rule and start the time line right away, by way of a task
16 force or some group that has to get on it now and begin
17 moving that log. So, you know, maybe at least by the
18 first quarter of '25, or something like that, you could
19 have a thoughtful comprehensive rule dealing with it.
20 So, for what it's worth, I think there needs
21 to be real consideration to an interim and more or less
22 immediate solution to this before something really bad
23 happens.
24 CHAIRMAN BABCOCK: Marcy.
25 MS. GREER: Is he volunteering?

1 CHAIRMAN BABCOCK: I think, yeah, he's the
2 cochair of the task force now. Justice Miskel.
3 HONORABLE EMILY MISKEL: Well, I'm just
4 going to be a devil's advocate on that, because I think
5 the whole point of our third branch is that we, you know,
6 litigate actual cases in controversies. We don't try to
7 presolve all of the problems in advance of problems
8 occurring. We wait until problems occur and then we,
9 under our common law system, make the rule then.
10 So there's an internet law called
11 Cunningham's Law that says the fastest way to get an
12 answer on the internet is not to post a question, it's to
13 post the wrong answer; and I think, similarly, here, we
14 might get to our solution faster by coming up with an
15 imperfect solution and letting it be tested or a first
16 try, or whatever it might be, than to stop everything
17 while we wait to predetermine a perfect solution, untested
18 yet in the real world, if that makes sense.
19 CHAIRMAN BABCOCK: Is there a -- is there a
20 word called unactionable?
21 HONORABLE TOM GRAY: There is now.
22 MR. LEVY: You can ask.
23 CHAIRMAN BABCOCK: No, to her point, one of
24 our associates put that word all through this appellate
25 brief. It's still in draft form. I said I've never heard

1 of unactionable, and I looked it up, and it's a word from
2 the 1600s, and it means, of course, not actionable. Yeah,
3 Kent.
4 HONORABLE KENT SULLIVAN: My concern about
5 that, I hear what Justice Miskel is saying, is that then
6 you've relegated the people who suffer the fallout in the
7 interim, if they're just collateral damage to all of that,
8 and I think that's very problematic. It's one thing for
9 all of us, sitting kind of in the cheap seats here, to
10 talk about taking that sort of approach, but I think there
11 are real people who are potentially really at risk. I
12 mean, the comments made by the several others before me
13 convinced me of that. I think we need to be very cautious
14 about this.
15 CHAIRMAN BABCOCK: Yeah, I think, though,
16 there's probably a middle ground between you and Justice
17 Miskel, because there are problems that we know are going
18 to crop up, like what if 50 people want to record, and,
19 you know, what if they want to show the jury, and, you
20 know, all of those things. I mean, there's some things
21 that we can deal without deciding, you know, a
22 hypothetical question, or hypothetical question. Since I
23 invoked her name, Robert, can I call on Justice Miskel?
24 HONORABLE EMILY MISKEL: And I was going to
25 say, that's -- so when we said each court must have a

1 written policy, I don't think the sample written policy
2 made it into our materials, but when I became a judge, the
3 Texas Center for the Judiciary gave me a sample media
4 policy, if the media wants to record, and it addressed
5 things like what if multiple people want to record or what
6 if more people want to sit in the gallery than there are
7 seats, how do you manage this.
8 And so what I will say is it's sample
9 written -- so we might have standards. We might have a
10 sample written policy. There might be ways to have a more
11 organized way to have courts thoughtfully deciding these
12 things, but those are all examples of things that
13 currently already exist in these types of written policies
14 that we're recommending, so if we're working on this
15 another meeting, I'll make sure that that example written
16 policy gets into the materials, because it talks about
17 things like not filming the jurors and not filming -- you
18 know, all of these sorts of things that are coming up are
19 what we were envisioning would be in the Court's written
20 policy, just not needing to be taking up four pages in the
21 rules, if that makes sense.
22 CHAIRMAN BABCOCK: Sure. But wouldn't you
23 want to distill all of those sources of information into
24 one document and refer to that in the rule or --
25 HONORABLE EMILY MISKEL: Right, so that's

1 what we were -- that's what our proposal was, is to say
2 the rule says you must have this document, and then so,
3 for example, on page -- PDF page 14, it lists those, like,
4 16 considerations to consider. Okay. So I'm thinking out
5 loud. It's not very organized yet, but I think our
6 subcommittee -- I don't want to volunteer everybody, but I
7 think we could convert that into some standards, right?
8 These are the things you have to look at when you're
9 deciding to make the decision of is this going to be
10 publicly disseminated or not, and then as far as the
11 mechanics of how will it be publicly disseminated, that
12 would be each court's written policy with the standards
13 stapled to the back. There you go, everyone knows about
14 it in advance. They can object with their notice and
15 opportunity to be heard, and because I think it's too
16 much, too fine-grained, too detailed to be in a rule, but
17 it is valuable information that should exist. So I guess
18 we're essentially making a local rule on that for every
19 court that wants to do it.
20 CHAIRMAN BABCOCK: Yeah, and, of course,
21 you're going to run into the objection we hear all the
22 time, well, you know, people won't know where to find it,
23 and they won't know how to handle it unless it's in a
24 rule, but --
25 HONORABLE EMILY MISKEL: But like, for

1 example, using our COVID pandemic, there was a point in
2 time where you couldn't reopen unless you had a written
3 reopening plan, and so each court had to have their -- or
4 county, or whatever it was, had to do their plan and had
5 to post it on the OCA website. So we have a -- and
6 everybody figured out how to get it done, I guess, right.
7 So we have a precedent of saying you can't do X unless you
8 have a written plan and it's posted on the website. So we
9 say maybe you can't broadcast unless you have a written
10 plan and it's posted on the State website.
11 CHAIRMAN BABCOCK: Yeah. Robert, and then
12 Justice Christopher, and then Rusty, who may be combing
13 his hair.
14 MR. HARDIN: I was scratching my head.
15 MR. LEVY: So at this point, from my
16 perspective, as we continue to sit here I'll come up with
17 other issues that we should maybe consider for the
18 standards or the rule. One of those relates to, I think
19 an interesting question, about is the recording itself
20 evidence that could be used in the later trial or
21 proceeding as, you know, I want to use the recording to,
22 you know, use for hearsay purposes or for other purposes,
23 and what is the evidentiary effect of that.
24 Additionally, your proposed rule makes very
25 clear that the recording is not the record of the

1 proceeding. However, what happens when you have the
2 transcript that says the witness testified, "I did not,
3 you know, run the light" or whatever, and yet the
4 recording seems to indicate that the word "not" was not
5 uttered, and that there might be a transcription error,
6 but is the recording evidence of the transcription error,
7 such that you could use that to seek to alter the
8 transcript of the proceeding? And, again, this is getting
9 into the details that a standard would probably need to or
10 maybe should address, versus the rule, but it will keep
11 going.
12 MR. ORSINGER: If I could add to that, Chip.
13 When you're having testimony in translation, you're going
14 to have the original language and then you're going to
15 have a translator translating it into English, and I can
16 envision that there could be quite a number of disputes
17 that arise later of whether the translation was accurate
18 or at least fair.
19 CHAIRMAN BABCOCK: But when you have a video
20 deposition you can always use the video at trial, can't
21 you?
22 MR. ORSINGER: The rule says for all
23 purposes.
24 CHAIRMAN BABCOCK: That's what I thought.
25 MR. ORSINGER: I mean, it says the

1 deposition is for all purposes, and the video is part of
2 the deposition.
3 CHAIRMAN BABCOCK: Right. If you noticed
4 it.
5 MR. ORSINGER: But if we have a rule that
6 says this is not part of the official record, and then it
7 turns out the official record is inconsistent with the
8 video, Robert is asking does it have the standing to move
9 to modify the official record or is it --
10 MR. LEVY: Right.
11 MR. ORSINGER: -- is it unusable, even if
12 it's true?
13 MR. LEVY: Or let's say there's some defect
14 in the official record, the court reporter had a problem,
15 flood, whatever. Can the recording be used to supplement
16 the official record, or does it have any -- any impact?
17 MR. ORSINGER: You have to be careful about
18 the wording, because we don't want to rule out legitimate
19 use. We don't want it to be -- we don't want the court
20 reporter's official record to collide with the video --
21 MR. LEVY: Right.
22 MR. ORSINGER: -- unless there's a special
23 case where you can show that the record is inaccurate.
24 CHAIRMAN BABCOCK: Justice Christopher had
25 her hand up, and then Rusty's head scratching, and then

1 Harvey.
2 HONORABLE TRACY CHRISTOPHER: I do think
3 that the draft rule here needs to be tightened up. I'm
4 totally in favor of having standards promulgated in
5 connection with this rule, and I want the trial judge to
6 have to follow those standards. Okay. So if the standard
7 is jurors will not be videotaped, then I want that. You
8 know, that's the standard. The trial judge cannot change
9 their mind on it. So I think there's too much wiggle room
10 in the way this is currently written.
11 CHAIRMAN BABCOCK: Harvey.
12 HONORABLE HARVEY BROWN: While we were
13 talking about other potential uses of this that would not
14 be part of the appellate record but might have some
15 utility later, we had a case recently where we asked to
16 film the trial because we knew there was going to be a
17 second and third trial with different plaintiffs, and
18 there was the possibility that some of the witnesses at
19 the first trial wouldn't be able to make the second trial.
20 So do you want to read the testimony from the first trial
21 or play, at least, the proceeding, and we thought it would
22 be much better for the jury, obviously, to have the video.
23 So if we do write something about that, you know, other
24 uses other than the official appellate record, we might
25 want to consider that as well.

1 CHAIRMAN BABCOCK: Roger.
2 MR. HUGHES: Well, please understand it. I
3 never favored livestreaming being the gold standard and
4 that's what we're going to do and then you have to get an
5 exception. I really think it ought to be the other way
6 around. And if that means that what we have to do is
7 simply ban livestreaming and stick with Rule 18 until we
8 can come up with standards, I think that's a good idea,
9 because I bet every one of us -- I know I have -- has
10 heard four or five things today we never even thought were
11 a problem and wouldn't think about how to solve,
12 especially if we got confronted with it for the first time
13 that day in court.
14 So I'm thinking the standards would be
15 useful, not just to have a guideline, but to have -- but
16 to help each court not have to reinvent the wheel. I
17 mean, how many of these things did each of us not think
18 about until today, and why should a judge have to go
19 through that? So I think that would be valuable.
20 The one thing I will leave for you, as they
21 say, everything old is new again. We've talked a lot
22 about the right of privacy, which sent me back 140 years
23 to when Brandeis wrote his article, which everybody cites
24 as the basis for the modern rules about the rights to
25 privacy. Well, what he was writing against was the rise

1 in technology. Cameras and mass distribution of
2 newspapers had, in his mind, had ruined having a private
3 life, and it made what had previously been private or
4 purely domestic life, fodder for newspaper tabloids and
5 also cameras that intervened in what we today would say
6 stealing one's likeness, protecting one's image, and he
7 likened this kind of invasion to an almost physical
8 assault on a person.
9 Well, once again, the -- because we now have
10 an internet where we can livestream everything, this has
11 created a -- it comes with benefits, but it's also, once
12 again, changed everything, and I don't think -- it may
13 mean that we may have to rethink what is the value of
14 privacy again, as well as what -- how to protect the
15 integrity of our system. I mean, I've always thought of,
16 you know, the open courts provision as a way of allowing
17 the public to make sure that judges did what they're
18 supposed to do. I don't think it was intended to create
19 entertainment to watch at 3:00 o'clock in the morning when
20 you can't sleep. So I'll leave it at that.
21 CHAIRMAN BABCOCK: All right. Thank you.
22 I'm usually done by midnight, but Cindi.
23 MS. BARELA-GRAHAM: So only because you
24 opened up that door, Roger, I'll tell you I've been
25 sitting here thinking, well, in my world it's not as big

1 as y'all's world because I deal with family cases, and we
2 are not talking about the same sorts of things; but you
3 have people, and their number one fear is public speaking,
4 right, generally. And so when you have witnesses coming
5 or you have litigants coming to this court where would be
6 open to the public in their county, right, and people
7 might come there, but if you livestream it, then you're
8 talking about a different set of facts totally, and what's
9 that going to do to people and how they're going to
10 testify and what they're thinking about, and not to
11 mention what sort of nerve-wracking thought it is.
12 It was actually -- it's law school, Alistair
13 Dawson. It's *New York Times vs. Sullivan*. It's a public
14 official, public figure, versus a private figure. And,
15 Quentin, you're younger than probably the majority of us
16 in this room, and so, of course, livestreaming is not as
17 offensive, but I'm thinking, I've always thought,
18 particularly since that first year of law school, what's
19 our privacy rights here? So you have a public figure out
20 there, but is everybody who is then livestreamed at some
21 point in time made a public figure, and I guess it depends
22 on what are they saying, and is now this person who had a
23 very private matter, are they now meme'd everywhere and
24 their meme is available for sale somewhere?
25 And so that's the other thing I think we

1 have to think about, is we have a duty, too, to the public
2 and to protect the public, too, and we don't want to
3 unknowingly add to what may be a problem for them.
4 CHAIRMAN BABCOCK: Rusty, and then Peter.
5 MR. HARDIN: I've listened to all this, and
6 we can talk about it. Doesn't it really depend upon what
7 you think the courts were for? I mean, to put it in
8 perspective, so Quentin goes, the world didn't come to an
9 end when we started televising all of this and all and
10 everything works fine, but that's not -- that's not
11 talking to the litigants. That's talking about it from
12 the perspective of society as a whole. They get to see
13 and hear everything they want to hear.
14 If the courts are, as I always thought,
15 where litigants come to resolve -- if we talk about civil
16 disputes, and then it's a whole different world in
17 criminal cases, but they come to resolve -- why isn't the
18 court about them? And this open courts provision is to
19 make sure that the courts are open and run correctly, but
20 that's not what was created. It was open courts for
21 litigants' disputes, and the reason I was always against
22 cameras in the courtroom and in spite -- in spite of any
23 cases that I've had, I've always been opposed to them
24 because of the impact it has on witnesses. Granted, that
25 they figured out a way to pick a jury, and the jury is

1 okay. I've never been worried about the jury so much, but
2 just the litigants. It's members of the public. It's the
3 litigants and the impact it has on them. It's the
4 witnesses and the impact it has on them.
5 I mean, Connie's talking about a thing that
6 I didn't even bother, because I think it's so obvious, but
7 people who have been harmed very much who are not in the
8 system voluntarily on the criminal side, but on the civil
9 side they chose to sue, but they're still entitled to some
10 kind of deference and protection and not be held up to
11 ridicule by everybody, and one only has to go on the
12 internet to see how mean everybody is and how that's used
13 about people and issues they don't like, and I thought the
14 courts were for the people who have this dispute.
15 And over on the criminal side, I'll
16 guarantee you there are witnesses who get dragged into
17 court. They weren't there voluntarily. They happened to
18 see something that day when they were doing something, and
19 now they're going to be on the internet, and people are
20 going to be talking about how -- what their hair looks
21 like, what they're like, how they're not arcticulate, what
22 a dumbass they are, and they're just citizens like
23 everybody in this room that caught up in the system.
24 That's not the way much of this conversation has gone.
25 Much of this conversation has gone about

1 making sure the public's right to know. The public has a
2 right to have a fair judicial system, and the public has a
3 right to have open courts. This is not about, as we've
4 said a million times, this isn't about open courts, and I
5 really come at it from the standpoint of the litigants and
6 the witnesses and the citizens that get dragged into it,
7 and I think these comments about a local -- I grew up in a
8 town of 9,000 in North Carolina. Actually, may be the
9 only person who grew up on party lines on the phone,
10 right, and so they know everything that's going on. All
11 right. And to hold them up to ridicule just because
12 there's a dispute they get dragged in, may not even be
13 theirs. Anyway --
14 CHAIRMAN BABCOCK: Madison said, Rusty, that
15 if I had a choice between government with no newspapers
16 and newspapers with no government, I would choose the
17 latter.
18 MR. HARDIN: I think that is the most unfair
19 kind of comment you can make. Because this -- it's not
20 about -- this is not about closing it, and it's not about
21 keeping information from the public, but it is also about
22 looking at and trying to protect the rights of the
23 litigants and the public that gets dragged into it. This
24 is not talking about a secret Star Chamber proceedings.
25 And even as chairman, that's bullshit.

1 CHAIRMAN BABCOCK: Well, that will be
2 overruled. Justice Christopher.
3 HONORABLE TRACY CHRISTOPHER: Well, during
4 the pandemic, obviously, we did broadcast a lot of court
5 hearings, and I am not aware of -- maybe they're out
6 there, but I am not aware of cases where people thought it
7 was unfair, done poorly, caused them great ridicule, made
8 them, you know, some internet sensation, et cetera, except
9 for the cat video. Okay. That's the only one that I'm
10 aware of where, you know, the poor guy got a lot of flak
11 for not being able to turn off the cat face.
12 But having said that, I do appreciate all of
13 the comments here, including some of the ones that say we
14 need to stop until we have standards in place, and I think
15 that can be done by an order from the Supreme Court that
16 basically says, hey, trial judges, you know, the emergency
17 pandemic is over, even for the court to broadcast you must
18 follow current Rule 18c, which requires consent of the
19 parties. I mean, I think that could be done easily by the
20 Court. And I listened to Judge Evans about, you know,
21 judges using it for political reasons. I don't like that.
22 You know, and perhaps, maybe we do need to do a stop until
23 we have something a little more concrete in place.
24 HONORABLE DAVID EVANS: We have -- I'm
25 sorry.

1 CHAIRMAN BABCOCK: Go ahead, yeah.
2 HONORABLE DAVID EVANS: We have juvenile
3 detention hearings. We have juvenile detention hearings
4 that got broadcast. What right does -- and under 52, a
5 juvenile representative could tell the trial judge, "No, I
6 don't consent to you broadcasting me through your system."
7 Right now, if you have criminal trials in Harris County
8 going on, the warning the trial -- there is a impact here,
9 and I'm just thinking it through. Now I've got to think
10 about what warning do you give the witness when you get up
11 on the stand? Do you swear to tell the truth, the whole
12 truth, and nothing but the whole truth, and by the way,
13 the fan club in Bangladesh, the Rusty Hardin fan club --
14 CHAIRMAN BABCOCK: No, it's Lamont's fan
15 club.
16 HONORABLE DAVID EVANS: -- and Chip Babcock
17 fan club in whatever land, and we'll just say a foreign
18 land like New Mexico, in New Mexico, has designated this
19 as the trial of the week, and you are now going to be all
20 over the internet. And then there's the judges like
21 myself, slightly overweight, I'll have to get a bigger
22 robe. I mean, self-deprecating.
23 There's some safeguards built into this
24 existing rule that protect individuals who are
25 participating in the legal system and -- but there are

1 examples during the pandemic and now that I am -- that I
2 am concerned about.
3 CHAIRMAN BABCOCK: All right. We've got
4 Judge Estevez, Justice Miskel, Pete.
5 HONORABLE ANA ESTEVEZ: Okay. Should the
6 Supreme Court decide to stop the broadcasting until we
7 have guidelines, that's fine. I did want us to point out
8 that everyone, including me, did feel like the court of
9 appeals could continue broadcasting, continue recording,
10 and that we just didn't have the same issues as you do in
11 the trial court. So should they choose to shut down the
12 trial courts, we are not suggesting that the same thing --
13 and I don't know how Pete feels about it for the court of
14 appeals, but we didn't feel like that was anything that,
15 you know -- I think once you're there, anybody can get it
16 at any time normally, and so there wasn't any type of
17 additional harm.
18 CHAIRMAN BABCOCK: Justice Miskel.
19 HONORABLE EMILY MISKEL: My point has
20 passed. Next.
21 CHAIRMAN BABCOCK: Your point has passed.
22 Pete. His time has passed. Go ahead.
23 MR. SCHENKKAN: Definitely I was referring
24 only to trial courts. I agree.
25 HONORABLE ANA ESTEVEZ: Because the rule --

1 MR. SCHENKKAN: I think the appellate court
2 separation is quite different. I do think that the stop
3 order, essentially, first, is just clarification that we
4 are currently back in the regime of existing Rule 18c.
5 I do think that existing Rule 18c needs a
6 pretty quick fix that should be not too difficult, with
7 whatever the limits are on how fast the Texas Supreme
8 Court can make a rule, that says a trial court may permit
9 in these three cases, but must provide an opportunity for
10 objection, notice and opportunity for objection, and that
11 the wording on that ought to make it clear it's not an all
12 or nothing decision. The objection hearing can be
13 limitations, you know, sort of an in limiting.
14 MR. LEVY: Does it have to be broadcast?
15 MR. SCHENKKAN: That was not nice. But
16 also, I want to emphasize that I know there is a tendency
17 here to say, well, this is the judicial branch of
18 government and, you know, taking care of its own business,
19 and it is, and that's why we do it through the standards
20 first and then allow action under the standards, but,
21 also, in this case, there's a whole lot of stuff that just
22 has to be done by the Legislature that the Court can't do.
23 And one example has already come up earlier in the
24 discussion, and it just tied it back in, and that was in
25 -- Richard, in your overall presentation.

1 The proposed rule had that language about if
2 anybody does anything in this whole broadcasting or
3 livestreaming world without approval, in accordance with
4 this rule, may be subject to disciplinary action by the
5 court, of which there is none except contempt, which does
6 not apply to someone snatching the image off the line and
7 doing a deep fake. Artificial intelligence, you know, and
8 make up an entire conspiracy.
9 CHAIRMAN BABCOCK: We're going to get to
10 that.
11 MR. SCHENKKAN: The Legislature, however,
12 can make that a felony, and maybe we would be more
13 comfortable with some things if abuses of them were
14 subject to really meaningful sanctions that only the
15 Legislature can impose. So I think the first thing is to
16 restore the statutory.
17 Second thing is to build in some measure of
18 required effort, at least case-by-case, notice and
19 opportunity to talk before we do broadcast anything from
20 this particular case, what the issues are later, and then
21 take seriously the notion that, yeah, we may have to say,
22 Legislature, we have some good ideas, but you really need
23 to address the funding of the State-broadcasted part of
24 this thing and to make sure that it isn't up to individual
25 judges who may be profiteering or share voting and to make

1 sure there's some sanctions for abuses of the people who
2 will take advantage of whatever is out there.
3 CHAIRMAN BABCOCK: Okay. Thanks. Richard,
4 we're going to have to bring this back to the next meeting
5 on November 1, and in the interim, I think there's plenty
6 for the subcommittee to talk about. And, you know,
7 absent -- and I'll consult with the Chief and Justice
8 Bland, but absent further direction from the Court, y'all
9 just try to work through this stuff, and we'll talk about
10 it again on November 1.
11 MR. ORSINGER: Okay.
12 CHAIRMAN BABCOCK: All right.
13 MR. ORSINGER: Let me tell you, it's not
14 going to be any easier for us, as it was today.
15 CHAIRMAN BABCOCK: Well, it's not an easy --
16 it's not an easy comment.
17 MR. ORSINGER: Yes, right. This is why
18 there are no existing standards.
19 CHAIRMAN BABCOCK: But, I mean, there's been
20 a lot of things talked about today that you could put into
21 either a rule or in a document that the rule references,
22 so --
23 MR. ORSINGER: And maybe the -- one thing we
24 could do was useful, would be a rule from one perspective
25 at one end of the spectrum and a different rule at the

1 other end of the spectrum that we don't necessarily agree
2 on and then some standards as an alternative.
3 CHAIRMAN BABCOCK: Yeah.
4 MR. ORSINGER: Rule, rule, standards. Okay,
5 Ana?
6 HONORABLE ANA ESTEVEZ: Well, do you need
7 one on -- does anyone believe that we should broadcast
8 everything? So I think maybe we don't need one of the
9 extremes. I think we need the standards and then just a
10 presumption of not -- you know, exceptions to not being
11 able to broadcast.
12 CHAIRMAN BABCOCK: Yeah. I think --
13 HONORABLE ANA ESTEVEZ: Maybe we just fill
14 out (a) what the standards would have been.
15 CHAIRMAN BABCOCK: To me there is somewhat
16 of a fundamental issue of whether or not the government
17 should be in the business of publishing.
18 HONORABLE ANA ESTEVEZ: I don't think it
19 should.
20 CHAIRMAN BABCOCK: I'm pretty sure I know
21 what your view is on that, but others may have different
22 views, and that's a threshold question, in a lot of ways,
23 because if the government is going to be a publisher, then
24 you have one set of issues; but if you are leaving it to
25 private parties to be publishers, like your news media or

1 your bloggers, or, you know, all of the things that exist
2 today that didn't, you know, five months ago, then that's
3 a different set of problems, and maybe you approach it
4 that way.
5 HONORABLE ANA ESTEVEZ: Can you take that
6 vote? Do you mind kind of taking the overall philosophy
7 of our group on whether they believe the government --
8 whether a judge should be the one publishing? Or you
9 don't want to?
10 CHAIRMAN BABCOCK: Oh, I don't -- I suppose
11 we can, and we can call for a vote.
12 HONORABLE ANA ESTEVEZ: I'd like one.
13 CHAIRMAN BABCOCK: I was going to propose
14 are we better off with the pandemic or without the
15 pandemic, in terms of the justice system, but we won't
16 vote on that. Justice Gray.
17 HONORABLE TOM GRAY: There was one vote that
18 you promised us that I don't think you held, and that was
19 who was going to win this contest about --
20 CHAIRMAN BABCOCK: Well, I was soliciting
21 private paper votes, which are going to be published on
22 the internet and --
23 HONORABLE TOM GRAY: With comments?
24 MR. HUGHES: Is this a mail-in ballot thing,
25 sort of? Is this a mail-in ballot, or do we have to

1 register first?
2 CHAIRMAN BABCOCK: Yeah, well, you've got to
3 show ID for sure.
4 HONORABLE ANA ESTEVEZ: No, seriously, would
5 you -- I think it would help, at least for me, to be able
6 to do a better job on what we're finally going to
7 accomplish if I had a better idea on what everyone --
8 CHAIRMAN BABCOCK: Okay. And your vote that
9 you would like to take would be should the Supreme Court
10 tell the government, be it the judge, OCA, or some other
11 governmental entity, that they should not be in the
12 business of publishing a video of proceedings, under any
13 circumstances?
14 HONORABLE ANA ESTEVEZ: Under limited
15 circumstances. Well, because you said OCA -- so I can,
16 you know --
17 MR. DAWSON: You've got to know what the
18 circumstances are to vote.
19 PROFESSOR CARLSON: I don't understand.
20 MR. SMITH: You have livestreaming in the
21 appellate courts right now. So that's --
22 HONORABLE ANA ESTEVEZ: I'm just talking
23 about the trial courts.
24 CHAIRMAN BABCOCK: Go ahead, Quentin.
25 MR. SMITH: No, that's -- we're drawing kind

1 of an arbitrary --
2 CHAIRMAN BABCOCK: Do we have only one young
3 guy on this committee? I think so. Judge Miskel.
4 HONORABLE EMILY MISKEL: And I'll say I am
5 technically a millenial, so I count as quasi-young, but
6 that was -- that's the same question that I guess I was
7 posing earlier, right, nobody is -- I have not heard a
8 single person in favor of all of the streaming unless an
9 objection is proven, so our choices are a ban, meaning,
10 you know, in other words, what you're talking about, the
11 government should never be the publisher.
12 CHAIRMAN BABCOCK: Right.
13 HONORABLE EMILY MISKEL: Or in some cases,
14 but not others, and we all disagree about which cases. So
15 I was even thinking that Judge Estevez was closer to the
16 ban, but it still sounds like you have in come cases, but
17 not others.
18 HONORABLE ANA ESTEVEZ: If I had an
19 obligation to publish, I would not want to mess that up
20 and then worry about my judicial immunity and worry about
21 everything else on top of it, so I do -- I want a full ban
22 on the government being the publisher, unless there's a
23 pandemic and this is why I'm opening the courts.
24 CHAIRMAN BABCOCK: Got it. Giana.
25 MS. ORTIZ: If we're going to take a vote on

1 this issue, I just want to make sure I get this comment
2 out there, and that is that it would seem that the
3 government being the publisher, i.e., like the Harris
4 County that's constantly streaming, is going to be more
5 akin to actual court access in that you have to know where
6 your case is filed, when it's going to trial, in order to
7 log in to see. Whereas, if the NBC affiliate is
8 livestreaming it, then it's going to pop up on my Facebook
9 feed, click here, watch now, and I will see the comments,
10 and that's where you get the meanness and the hatefulness,
11 is on the private streams, not on the Harris County
12 stream, which does not allow comments. So that is a
13 reason to continue to permit the courts to do that and not
14 force it to the private journalists.
15 CHAIRMAN BABCOCK: Thanks, Giana. Yeah,
16 Pete.
17 MR. SCHENKKAN: On this question of the
18 taking a vote on whether the government should do it, I
19 think it's premature because we do need to talk about what
20 we mean by the government doing it. What I have in mind
21 by saying doing it is essentially C-SPAN.
22 CHAIRMAN BABCOCK: Sorry, what?
23 MR. SCHENKKAN: Is essentially C-SPAN for
24 the courts, so, you know, there are very severe limits on
25 flexibility to this, aimed at audience approval.

1 CHAIRMAN BABCOCK: Yeah. So OCA is C-SPAN
2 for the court?
3 MR. SCHENKKAN: Exactly. And so -- and
4 that's just a premature discussion. There are too many
5 things that need to be talked through to know whether
6 that's even a good idea. I don't think we're ready for a
7 vote on this, and I would urge it, and I'm going to have
8 to miss the vote, if there is one. I have something that
9 I --
10 CHAIRMAN BABCOCK: You're leaving?
11 MR. SCHENKKAN: I must, I'm sorry. I'm not
12 boycotting the group. This has been fascinating, but I've
13 got to bug out.
14 MR. ORSINGER: Why don't you leave a proxy?
15 Pick one of us to vote.
16 CHAIRMAN BABCOCK: We don't do that.
17 MR. ORSINGER: We don't do that?
18 CHAIRMAN BABCOCK: We don't do proxies.
19 But, you know, OCA subject to rules or just OCA gets to do
20 whatever they want?
21 MR. SCHENKKAN: No, OCA subject to rules,
22 standards, definitely. Definitely.
23 CHAIRMAN BABCOCK: All right. Should that
24 be the vote? I don't have a handle on what the vote is
25 supposed to be.

1 MR. SCHENKKAN: So this would take -- what
2 I'm trying to address is this would take the fear of the
3 judge, of Judge Estevez, your concern about being
4 responsible for it yourself. That is not my proposition.
5 My proposition is judges would do that in the same sense
6 they do it now. They would make their decisions about
7 what we're going to decide out of the presence of the jury
8 and what we're going to decide in and how we're going to
9 manage that; and the broadcasting, the livestreaming
10 standards and practices, would be designed to protect the
11 same interests that those rules already protect in an
12 actual physical courtroom.
13 CHAIRMAN BABCOCK: Chief Justice
14 Christopher.
15 HONORABLE TRACY CHRISTOPHER: OCA has too
16 many jobs and not enough money, and we don't want to give
17 them another one, so I am opposed to delegating to OCA
18 this idea. I mean, they were very helpful during the
19 pandemic, you know, with ideas and helping the counties,
20 but ultimately it was up to the counties, right, to my
21 understanding, at the trial court level to get the work
22 done. So that's where it should be, the county level.
23 CHAIRMAN BABCOCK: Yeah. Good point.
24 Connie, I know you've got to go in 15 or 20 minutes, maybe
25 18 minutes, and I promised that we would take up one of

1 your topics. You said that the court of appeals opinions
2 would be a short one and you wanted to be here for that.
3 Do you want to take that up now, or do you want to --
4 MS. PFEIFFER: That's the one that we
5 discussed deferring to the next meeting and then taking
6 up --
7 CHAIRMAN BABCOCK: We did discuss that.
8 MS. PFEIFFER: Right.
9 CHAIRMAN BABCOCK: I just didn't know if the
10 fact that we had 18 minutes would change your mind.
11 MS. PFEIFFER: I think we could do the error
12 preservation one, and that would actually help our
13 committee to get some feedback.
14 CHAIRMAN BABCOCK: Okay. So we're going
15 to talk about error preservation next, which is Roman
16 numeral VIII on the agenda, and, Connie, you're going to
17 take it away.
18 MS. PFEIFFER: Thank you, Chip. So our
19 committee, the appellate subcommittee, was presented with
20 a request from the State Bar Rules Committee to adopt a
21 new rule; and what's interesting about it is that this
22 request came in 2015, and we aren't really clear on why
23 we're just now taking it up nine years later; but that,
24 actually, kind of sets up our reaction to it, which was
25 our entire committee, we had six people present, had a

1 very thoughtful discussion about it, and we weren't quite
2 sure that there was a need for this new rule.
3 So let me present it, and what we really
4 would like feedback on, first of all, is do we think we
5 need this rule. But it's a proposal to make express and
6 explicit in the Rules of Appellate Procedure that parties
7 are required to cite to the record where they preserved
8 the error below and that that would be a stand-alone
9 section in the brief, not counting against the word
10 limits, and would not include argument, and I think --
11 I'll say this, I mean, we're all appellate lawyers on this
12 committee. Two of the people that we're talking about
13 were former appellate justices, and we all sort of looked
14 at this and said, well, isn't this obvious that you have
15 to cite to where the error was preserved; and if the
16 appellant doesn't do it, usually the appellee would do it,
17 because they're incentivized to point out that there was
18 no preservation.
19 I know I'm going to get different opinions
20 from the judges, but you just wait your turn, but we all
21 thought this is just something very basic that happens
22 already, do we really need this expressly required in the
23 rules, and I think maybe our reaction was a little bit
24 more to the proposed form than the concept, and so I'll
25 leave a placeholder for that, but the proposed form of

1 having this in a stand-alone section with no argument and
2 not against the word count, we had a strong reaction that
3 that doesn't sound like a great idea to us, because
4 preservation sometimes is very clearcut and black and
5 white where you can just cite to a record, you know, page,
6 and it's easy.
7 Sometimes preservation is gray, and it can
8 be more a matter of advocacy and argument and there's room
9 to debate whether something was really preserved.
10 Sometimes it's not so clear because there's an implied
11 ruling, so there's not a page to cite where the ruling
12 happened, but you can infer from various parts of the
13 record that it's implied, and that kind of takes some
14 argument and some explanation, and so we see a lot of room
15 for mischief if this becomes a stand-alone section with no
16 word limits that it could become, you know, a thing unto
17 itself of argument and advocacy; but we also think this is
18 already happening in the context of the argument of the
19 briefs, and courts are free to ask whether preservation
20 happened or reject an issue because the appellant hasn't
21 met their burden to adequately cite to the record and
22 present the issue by failing to identify where it's
23 preserved.
24 So the appellate rules already have a rule
25 on preservation. They already -- and how that's

1 established, and they already have a rule requiring
2 citations to authorities and to the record, as
3 appropriate, and so our initial reaction was we're not
4 quite sure this is necessary, but we wanted to open that
5 up for debate; and if the group says, though, we really do
6 need this, we might want to revisit our proposal before we
7 try to vote on the proposal, because we gave that kind of
8 short shrift. So, I mean, let me -- with that setup, let
9 me just if I could get the group reactions; and if the
10 other members of the subcommittee wanted to add on
11 anything, please do.
12 CHAIRMAN BABCOCK: Is there anybody else
13 from the subcommittee here? Professor Carlson.
14 PROFESSOR CARLSON: I have nothing to add.
15 I'm --
16 CHAIRMAN BABCOCK: Nothing to add. Rich.
17 MR. PHILLIPS: Nothing to add.
18 CHAIRMAN BABCOCK: Nothing to add. Marcy.
19 MS. GREER: I'm not on the committee.
20 CHAIRMAN BABCOCK: You're not on the
21 committee. Skip's not here.
22 MR. PHILLIPS: David.
23 CHAIRMAN BABCOCK: David. You're on the
24 committee.
25 HONORABLE DAVID KELTNER: Nothing to add

1 either. The only thing is we have an alternative that
2 would be an easier way to accomplish the purpose, if the
3 committee thinks it's needed.
4 CHAIRMAN BABCOCK: Okay. Richard.
5 MR. ORSINGER: In the old days, for the
6 previous generation prior to Justice Miskel, we had -- we
7 had points of error practice, and you had to point to a
8 ruling, and you had to prove that the ruling was
9 reversible error, and that was very precise, and usually
10 you had to show what the ruling was that you were
11 complaining was there. We switched to the issues
12 presented, and I find in a lot of my cases -- I'm not
13 talking about a specific ruling. I'm talking about a
14 legal principle. I'm talking about some standard that the
15 court -- and adjudicating, not admitting evidence or
16 something like that, and this is the issue, where we want
17 to know whether this rule of law applied or whether the
18 rule of law applies in this way.
19 So I think we've gotten completely away from
20 the idea that we have a precise focus for the appellate
21 court on the specific ruling that we say is
22 reversible error, and instead we've moved on to what the
23 essential issues are in the brief, and so I really don't
24 feel like this is necessary, and I wonder if it is not
25 going to result in us having to return to the point of

1 error practice, where you have your issue presented and
2 then you have your point of error underneath that, with
3 the specific reference cite on where that precise broad
4 issue was brought to head in one ruling. So I really feel
5 like it's a return to a practice we got away from, and I
6 wouldn't support it.
7 CHAIRMAN BABCOCK: Marcy.
8 MS. GREER: I would agree with that. I
9 would also strongly suggest that we not return to the
10 point of error practice. I don't think anybody is really
11 wanting to do that, but I think that when there is a
12 preservation issue that is necessary, it really needs to
13 be brought up in the context of the legal argument that's
14 being made and putting it in a section of the brief, or
15 even adding to the rule of requirement is not necessary.
16 If it's been waived and there's an argument that it's been
17 waived, somebody is going to bring it up, I think.
18 CHAIRMAN BABCOCK: Thanks, Marcy.
19 Justice Gray.
20 HONORABLE TOM GRAY: I think My Cousin Vinny
21 said it the best about what my learned colleagues just
22 said --
23 CHAIRMAN BABCOCK: Wow. Opening statement
24 or closing?
25 HONORABLE TOM GRAY: Opening.

1 CHAIRMAN BABCOCK: Okay.
2 HONORABLE TOM GRAY: And he only made one
3 opening statement. The rest of it was the closing
4 argument, but the point being, the briefs that y'all
5 write, okay, go pick out any 20 cases that I have to read,
6 not the ones y'all wrote, any other 20 cases, and I'll bet
7 you there is going to be at least half of them in which
8 you struggle to find the issue or the point of error that
9 is the complaint in the record. I'm just telling you,
10 y'all don't write the briefs that we see the bulk of, and
11 a simple reference making the litigant that's filing the
12 brief think about the connection to the trial that that
13 brief is supposed to be, if you're doing it anyway, it
14 counts against your page limits, you know, or your word
15 limits, so no skin off of anybody's teeth. But to the
16 people -- the briefs that we see, the blocking and
17 tackling type brief at our level, it needs to be there.
18 Remember, also, this is mostly civil. That
19 rule, because it's in the TRAP, would apply to criminal
20 briefs as well. So --
21 HONORABLE DAVID KELTNER: Right.
22 HONORABLE TOM GRAY: It's just y'all don't
23 see what we see, and I'm telling you it would be
24 beneficial. I grew up in the point of error practice,
25 and, you know, a classic example in a civil case would be

1 in a termination case, a legal sufficiency in a jury
2 trial, and there was no motion for new trial. Not
3 preserved. But we get that issue regularly, and we're the
4 ones that wind up raising it. We might would wind up with
5 an Anders brief, frivolous appeal brief, if they couldn't
6 raise those issues. So, yeah, I think there's a lot of
7 reason to do it now, even nine years after the fact, and
8 maybe more so because of actually what --
9 MR. ORSINGER: Richard.
10 HONORABLE TOM GRAY: -- what Richard talked
11 about, the drift from the error practice, the point of
12 error, to this broad issue concept, kind of touchy feely,
13 you know, it's -- we think something went wrong here,
14 because we lost. So, yeah, I think there's --
15 CHAIRMAN BABCOCK: Chief Justice
16 Christopher.
17 HONORABLE TRACY CHRISTOPHER: Well, I agree
18 with Justice Gray, and I just wanted to point out that we
19 are not supposed to rule on something that wasn't
20 preserved, right, and those people in this room think, oh,
21 well, of course. But those are not the briefs we see,
22 and, you know, it is not unusual for an appellee to fail
23 to bring up that they didn't preserve it. So, you know,
24 making someone think, oh, I really hadn't preserved this
25 issue to begin with when they file their appellant's brief

1 would be useful to us.
2 CHAIRMAN BABCOCK: Justice Miskel.
3 HONORABLE EMILY MISKEL: Yeah, again, I one
4 thousand percent agree with both of all of that, and
5 anyone who is on this committee is fancy enough that
6 they're not the problem, but lots of times we don't even
7 get an appellee's brief, and I think that adding this
8 maybe to 38.1, where it says the requirements for the
9 appellant's brief, would help, because, first of all, it
10 would help the appellant know that they're actually
11 supposed to do it, so maybe they might. And then even if
12 they didn't, then it would let us send them a letter
13 saying you failed to do it, and then when they don't
14 respond to that letter we can strike it, instead of us
15 having to do a bunch of homework because we can't even
16 figure out what their brief is saying, right. So it's not
17 like it's very clear that they failed to preserve it.
18 It's like what are they talking about, I can't figure it
19 out?
20 So I think I don't approve of anything
21 without a word limit, but I think if we added something
22 that's required, it helps in both of those ways, helping
23 the appellant know to -- that that's something that
24 they're supposed to do and then letting us strike it more
25 easily if they don't do what they're supposed to do.

1 CHAIRMAN BABCOCK: Oh, I'm sorry, Roger. Go
2 ahead.
3 MR. HUGHES: Well, first, I want to say
4 thank you for answering my second question here, which was
5 is there a problem? And if the appellate justices here
6 say in the garden variety briefs there is a problem
7 with error preservation not being addressed and sort of
8 being left to one side, then there's a problem.
9 I think the old point of error system, the
10 one virtue of it did have is that the way the rule said
11 this is what a point of error is, it required you to
12 identify an error made by the trial judge and where in the
13 record to find it, and I think a simple sentence in --
14 saying that about requiring you to make a -- state your
15 issues and then state where, you know, just one sentence
16 saying "and state where the error can be found in the
17 record," and we don't need to get into all of this where
18 was the error raised and where did the judge rule on it,
19 where did you preserve error. I don't think that's
20 necessary. Just where the record -- where it can be found
21 in the record. I think that's all the change that would
22 be necessary.
23 I think what the State Bar proposed was
24 interesting, but it was overkill, and I think that's the
25 way to do it without having to interfere with page and

1 word limits. We have an elegant way under the old -- and
2 I'm sorry, Richard, now, I'm forcing -- to disagree, I
3 thought the way the old point of error system, the one
4 virtue it did, was it required you to identify an error
5 that was reversible and where can I find that error in the
6 record, and that's the something that keeps getting lost
7 today because the issue -- people can get lost in the
8 issue statement and often do. So I think that would -- it
9 might be a useful change to simply require the statement
10 of the issue to include where in the record you find it.
11 CHAIRMAN BABCOCK: Okay. Fair enough. Does
12 anybody have an opinion about whether or not the alternate
13 proposal that the -- our appellate subcommittee put
14 forward is superior to the State Bar? Yeah, Marcy.
15 MS. GREER: Yes, it is. I think it's -- it
16 gives flexibility to raise the error preservation in the
17 context that makes it helpful.
18 CHAIRMAN BABCOCK: Okay.
19 MS. GREER: And I don't think it takes that
20 many words to deal with it, but I think the idea of having
21 a separate section is unwieldy.
22 CHAIRMAN BABCOCK: Okay. Does anybody
23 disagree with that?
24 HONORABLE TOM GRAY: I thought the
25 subcommittee wanted it to go back to them for

1 consideration, if possible, if we thought that the rule
2 needed to be adopted.
3 MS. PFEIFFER: Yes, and let me summarize,
4 because based on just the comments, I think the group's
5 consensus where we are and were on this, if we do this, we
6 like it counting against the word limits, being part of
7 the argument, not some stand-alone section, and proposing,
8 just like Judge Miskel had suggested, putting the rule in
9 the brief requirements for the argument. So I think we
10 can do this, but we probably want a chance to meet, with
11 more time as a subcommittee to work on the wording; and I
12 will say, this isn't a panacea, because there are types of
13 errors that don't have to be preserved; and this is not
14 going to be quite so clean-cut; but I do think appellants
15 who, you know, read the rule will say, oh, yeah, I'm
16 supposed to talk about preservation, too. That might help
17 to some degree. So it's not going to hurt. It's not
18 necessarily going to solve the problem, but it probably
19 won't hurt.
20 HONORABLE EMILY MISKEL: And I was going to
21 say, like I had talked to you on the break about, well,
22 sometimes it's, you know, implied and this and that, and
23 the fact that you even know what that is means you're not
24 the problem, right. So, like, it's great if we say
25 "record cite or other reason" that it -- you know,

1 whatever it is, because then you're going to bring the
2 fancy argument about this particular subgenre of whatever,
3 but requiring something about preservation to be in there
4 helps us weed out ones that are, you know, really legally
5 insufficient to bring that issue before our court.
6 CHAIRMAN BABCOCK: Chief Justice
7 Christopher.
8 HONORABLE TRACY CHRISTOPHER: Yeah, I don't
9 like the way it's currently worded, "and if required." I
10 would say, "The brief must contain, unless..."
11 CHAIRMAN BABCOCK: Got it. Okay. I think
12 the consensus seems to be that we like the alternative
13 proposal, but it needs some tweaking, and the subcommittee
14 is volunteering to consider it further and bring it back
15 at our November 1 meeting. Would that be a fair
16 recitation --
17 MS. PFEIFFER: Yes.
18 CHAIRMAN BABCOCK: -- of where we are? In
19 that case, we'll take our afternoon break for 15 minutes
20 and be back at 3:45.
21 (Recess from 3:30 p.m. to 3:48 p.m.)
22 CHAIRMAN BABCOCK: Okay, everybody, let's
23 go. All right, we're going to talk about artificial
24 intelligence.
25 HONORABLE HARVEY BROWN: All right.

1 MR. SMITH: Uncontroversial.
2 CHAIRMAN BABCOCK: Noncontroversial, and a
3 topic for late in the day.
4 HONORABLE HARVEY BROWN: This is, obviously,
5 a very hot topic of discussion. The State Bar had a task
6 force for --
7 CHAIRMAN BABCOCK: Marcy.
8 MS. GREER: I'm helping him get a law clerk.
9 CHAIRMAN BABCOCK: Go ahead.
10 HONORABLE HARVEY BROWN: The State Bar had a
11 Task Force for Responsible AI that issued a report, and
12 the Texas Supreme Court asked the subcommittee Rules 1
13 through 14c to look at it and see if we needed to amend
14 Rule 13 to address the use of AI in pleadings. In
15 addition, the task force report talked about two other
16 rules, or one other rule that was within -- not within our
17 purview, but we are going to talk a little bit about just
18 briefly today, and that is they have asked us to look at
19 not just Rule 13, but also the Rules of Evidence for
20 AI-generated documents and for the potential for deep
21 fakes. So that would be Rules 901 and 902.
22 We have made a recommendation for
23 consideration on that, but we are suggesting that it not
24 be considered by this full committee, but that it go by
25 our normal procedure for the Rules of Evidence, which

1 would be that we take this recommendation here on the
2 Rules of Evidence, give it to the State Bar evidence
3 committee to look at first, and then they would give it to
4 the evidence committee of this committee and then we bring
5 it. So, in other words, we're asking for probably another
6 four or five months or so to take up Rules 901 and 902,
7 and one advantage to that is the federal rules are also
8 looking at this right now. I don't think they'll have a
9 decision this year, but they may be able to give us some
10 more guidance to see what they're thinking about it.
11 So we are suggesting a punt on that, and
12 then the second thing is something that we came up with on
13 our own, and that is that Rule 226a, we think should be
14 considered for amendment to inform jurors about not using
15 AI and that we should update some of the language in 226a
16 not to discuss, for example, MySpace or whatever it's
17 called.
18 HONORABLE ROBERT SCHAFFER: Yeah, they get a
19 kick out of that.
20 HONORABLE HARVEY BROWN: Again, that's not
21 within our subcommittee's set of rules, so we're
22 suggesting that go to the rules subcommittee that
23 addresses 226a.
24 CHAIRMAN BABCOCK: Okay.
25 HONORABLE HARVEY BROWN: So if we could

1 defer on those two things, we would only be focusing today
2 on Rule 13.
3 CHAIRMAN BABCOCK: Richard had an
4 interruption.
5 MR. ORSINGER: Yes, I wanted to know if
6 you've asked ChatGP to generate a proposed rule for us to
7 consider.
8 HONORABLE HARVEY BROWN: We have not, but
9 you will see something very interesting, and that is,
10 Robert was appointed to our committee, and Robert
11 graciously agreed to take the lion's share, like 99
12 percent of the lion's share, of putting together a memo on
13 this, and he asked the -- it wasn't ChatGPT.
14 MR. LEVY: Copilot.
15 HONORABLE HARVEY BROWN: Copilot, to help
16 him write his memo.
17 MR. ORSINGER: This memo?
18 HONORABLE HARVEY BROWN: This memo he's
19 written here, which is over a dozen pages, is partially
20 written by Copilot. In fact, there's one page that's
21 almost a complete from Copilot, which is very well
22 written, by the way.
23 MR. ORSINGER: The implication of that is
24 that in 15 or 20 years artificial intelligence will
25 replace this committee.

1 CHAIRMAN BABCOCK: But they won't have as
2 much fun.
3 PROFESSOR CARLSON: But we're real
4 intelligence.
5 HONORABLE HARVEY BROWN: So, Chip, if it's
6 okay with you, then we will skip the Rules of Evidence and
7 Rule 226a, and I'll turn it over to Robert to make a
8 presentation about Rule 13.
9 CHAIRMAN BABCOCK: Okay. Before we make a
10 final decision about skipping --
11 HONORABLE HARVEY BROWN: Yes.
12 CHAIRMAN BABCOCK: We can skip it for now,
13 but, Robert, the floor is yours.
14 MR. LEVY: Thank you. Hopefully, the memo
15 was of some interest. It obviously went into a little bit
16 of additional detail and background, including providing a
17 bit of perspective on AI issues and how AI artificial
18 intelligence, particularly generative AI, could have
19 significant impacts, both use within the courtroom as well
20 as the output of generative AI, and it is interesting. I
21 should have thought about asking it to draft a rule, but I
22 did ask it to talk about why rule-making might be
23 appropriate, and I included that quote within the memo.
24 And the background on this, in terms of the
25 referral from the Court, was the work of the TRAIL or the

1 Responsible -- Texas Responsible Use of AI in the Law Task
2 Force, which was appointed both pursuant to statutory
3 enactment by the Legislature and then by the State Bar
4 itself, and the referral referenced the interim report
5 that was provided to the State Bar in December and the
6 recommendations that are contained within that, and that
7 was included in the materials that are attached with the
8 package today, and you did also receive a memo that is the
9 end of year report of the task force that was provided to
10 the State Bar in May of 2024, and that -- that year-end
11 report is a little bit more instructive and helpful in
12 terms of really crystallizing the recommendations that
13 the -- that the task force is offering to the State Bar,
14 and in that, its referrals or recommendations to the -- to
15 this committee.
16 I will point out that we also received very
17 interesting and helpful input from the family law
18 committee that Richard circulated last week. We did
19 review that, and I'm happy to address their
20 recommendations. They did, in fact, cover many of the
21 same items and issues that were discussed with the
22 subcommittee, and we appreciate their input.
23 Focusing on the issue of amending Texas Rule
24 of Civil Procedure 13, the concerns that are identified in
25 the task force report, as well as in some of the other

1 material and other state court rules that were included,
2 is ensuring that attorneys and, in particular,
3 self-represented parties are aware of the risks and
4 concerns of the use of AI in connection with their
5 preparation of submissions, whether pleadings or motions
6 or other written submissions to the court, and the risks
7 that AI might create a inaccurate information.
8 The kind of the poster child situation for
9 this is discussed in the memo, which happened as a result
10 of a lawyer, an unfortunate lawyer in New York in a
11 federal court case, that used a -- he was writing a
12 response to a motion to dismiss, and he asked ChatGPT to
13 provide case citations to defend against the motion to
14 dismiss. They looked great. They were right on point.
15 They were going to win him the argument, and so he
16 transposed them into his response, and the lawyers for the
17 defendants noted and researched the cases, which, I'm sure
18 when they saw it they realized, wow, these are really good
19 cases, why didn't we find them?
20 Well, those cases were completely made up.
21 They did not exist. It wasn't even a misquoting of prior
22 case law. They were just made out of whole cloth, and
23 that is one of the many challenges with AI. It's almost
24 like you ask for what you want and you'll get it, whether
25 what you want is really factually appropriate or not; and

1 the model of ChatGPT, when it came out, was such that it
2 would give you the answer that you were looking for,
3 whether there were facts to support it or not.
4 And one other perspective that I think is
5 instructive with respect to this situation, it's really
6 kind of interesting and instructive in terms of how
7 quickly this issue has become a topic. In late November
8 of 2022, ChatGPT was released, and as I noted, within
9 weeks there were millions upon millions of references to
10 it on the internet and uses of the tool. It was a dynamic
11 that really changed the landscape of computing, and
12 importantly to note is that artificial intelligence has
13 been around for years. All of us who have used Westlaw
14 and Lexis are using artificial intelligence, and many of
15 other aspects of our practices of law incorporate
16 artificial intelligence tools, tools like Grammerly or
17 other items that you're used to using, utilize elements of
18 artificial intelligence and machine learning. But the
19 advent of generated AI is particularly significant in
20 terms of what it's brought to both the practice of law and
21 to information that courts will have to deal with, and
22 that, a little bit more of a discussion of that is
23 incorporated in the appendix.
24 The concerns that the proposal in the task
25 force's discussion regarding Rule 13 focus on the fact

1 that if a litigant is using artificial intelligence to
2 discover information and conveys that information to a
3 court, that the litigant is responsible for the content of
4 that submission, and if that submission is wrong, then the
5 litigant could be subject to Rule 13 sanctions. The point
6 that the task force discussed was shouldn't we make that
7 part of Rule 13 to make clear to litigants that you need
8 to make sure that what you put in chat -- or what you put
9 in your written materials is, in fact, accurate; and the
10 subcommittee, in reviewing that, felt that that was not
11 really the right answer in terms of addressing the
12 concern.
13 Number one, Rule 13 does not provide a
14 warning list of all of the things that litigants need to
15 avoid doing in order to not be subject to sanctions. It
16 simply states that you are responsible for your written
17 work in the case, and the concerns about AI are just one
18 of many, many aspects of what a litigant, a lawyer, or a
19 self-represented party would do in the course of their
20 case, that they need to be aware that they're responsible
21 for their submissions.
22 The potential that this is an issue is, I
23 think, an accurate point, particularly as it respects to
24 the awareness of the problem; and the task force I think
25 correctly noted that the way to address that issue more

1 effectively is through both education, particularly
2 suggesting that lawyers need to receive education on
3 technology; and, in fact, there had been a prior ethics
4 opinion from Texas that notes that attorneys need to be
5 aware of technology and familiar with the issues that
6 technology brings to the practice of law and their
7 responsibility to ensure that they're using that
8 technology appropriately.
9 And their -- the task force also submitted a
10 request for an additional ethics opinion that will focus
11 on the ethical obligations pertaining to the use of
12 generative AI, and the expectation or the hope is that
13 that will be forthcoming, that in the next months that
14 will provide attorneys with additional guidance.
15 There are other suggestions which are not
16 before this committee regarding mandating CLE on
17 technology issues in particular. We didn't understand
18 that the Court was asking for our guidance on that. It is
19 another interesting question in terms of whether we need
20 to mandate specificity in the type of CLE attorneys
21 receive, but it's certainly well-considered.
22 So our view was that, with respect to any
23 Rule 13 concerns from the attorneys' perspective, we
24 didn't think that the way to solve that problem is in Rule
25 13. In discussing the issue with respect to nonattorneys,

1 self-represented parties, the concern is, well, they're
2 not subject to the ethics rules, so shouldn't we need to
3 tell them that they're subject to Rule 13 sanctions? They
4 still are, and the -- any proposed language that would
5 address that issue probably wouldn't change or materially
6 impact that dynamic in the perspective of the
7 subcommittee.
8 We did, however, include for consideration a
9 proposed rule amendment on Rule 13, to the extent this
10 committee decides that that's the direction to head. The
11 subcommittee felt that the better way to approach the
12 Rule 13 issue from the perspective of self-represented
13 parties is to potentially provide them with materials that
14 would cover a variety of topics to be an aid to the
15 self-represented litigant when they filed their lawsuit,
16 so that they can be aware of this and perhaps many other
17 issues that are important to people that are not
18 experienced in courts, and it could include a discussion
19 about the use of AI in preparing and submitting pleadings
20 and the fact that you might ask a question in artificial
21 intelligence tools, you can't be sure that the answers are
22 actually accurate. You need to do, you know, independent
23 research to be sure, and you are responsible for what you
24 submit to the court.
25 One of the other perspectives that we

1 considered with regard to whether to amend Rule 13 is
2 that, maybe a cynical perspective, that it's probably
3 likely that a self-represented litigant is not going to
4 read Rule 13 anyway, so if we amend the rule, it's not
5 going to accomplish the purpose that we want to
6 accomplish.
7 So we felt like a packet that would be given
8 to a litigant would perhaps be a more effective way to
9 address that, that issue, if, in fact, it does appear that
10 litigants will use AI to help them draft their
11 submissions. If you -- you can go to page 15. We also
12 included it in the summary of the memo. If we do feel
13 that an amendment to Rule 13 is appropriate, we suggest
14 adding language that reads, "The use of generative
15 artificial intelligence in connection with any signed
16 pleading, motion, or other paper must comply with this
17 rule," which again, doesn't tell a lot, but it at least
18 highlights the issue, and then more explanation would be
19 included in the notes and comments to explain that. And
20 we did add a sample or suggestion on a note for a change
21 if we include artificial intelligence in the rule.
22 And just in terms of the family law
23 committee's approach, their approach was a little bit
24 slightly different direction in terms of language. Their
25 suggestion, in paraphrasing it, was that if you use -- the

1 use of AI is not an excuse for violation of Rule 13, and
2 so what I read from that was a suggestion that, you know,
3 you can't -- if you violate Rule 13, you can't blame it on
4 AI; and that's not -- we felt that that was not a very
5 clear way to define the issue or address the issue.
6 I do want to note one thing that the family
7 law committee discussed, and we also referenced it a bit
8 in our memo. There was another task force report, we call
9 it the summit report, which described a summit meeting of
10 various parts of the task force that occurred in February;
11 and in that summit report, the task force noted a
12 potential discrepancy between Rule 13 and the Texas Civil
13 Practice and Remedies Code code, Chapters 9 and 10, which
14 both Chapters 9 and 10 provide for sanctions for filing
15 pleadings that are inaccurate or misleading; and the issue
16 was not really clear to the subcommittee in terms of what
17 they were focusing on in that summit report and where they
18 saw the difference between Rule 13 and Chapters 9 and 10
19 of the code. It reflected an issue about who has the
20 burden, but, in any event, it would not be before us to
21 propose changing the Civil Practice and Remedies Code, as
22 that is a statutory enactment. So we did not address that
23 discussion in the task force's summit report.
24 Just quickly, we did include in the memo a
25 discussion of the rule, Rules of Evidence discussion

1 that's taking place, and we did recommend, as Harvey
2 noted, that the issue should be sent to the State Bar
3 committee on evidence. There are some very interesting
4 and challenging questions that relate to the concept of
5 deep fakes, which is the concern that technology through
6 AI can be used to alter photographs, recordings, other
7 audiovisual materials, such that you would not be able to
8 easily discern that it is a fake or change, that the
9 technology has gotten to that point, that it represents a
10 concern about determining authenticity under Rule 901 and
11 the related Rule 902, and that is another interesting
12 discussion.
13 We did also try to point out in the memo
14 some of the other areas where generative AI will impact
15 courts, and they're noted on page six of the memo. To me,
16 they're fascinating, and that is just a -- you know, the
17 list. At that point in time, the number of different
18 issues will continue to come up that courts are going to
19 have to deal with, litigants will have to be -- will have
20 to deal with; and it -- we will, I think, see court
21 decisions that will provide additional guidance on those
22 points into the future.
23 So that is it, unless I missed anything,
24 Harvey.
25 HONORABLE HARVEY BROWN: No. So to

1 summarize, we gave you three options on Rule 13. One is
2 to do nothing, just with the rule itself, and ask the
3 State Bar to promulgate some type of form for
4 self-represented individuals. Two would be to put in one
5 sentence into the rule about this, along with a comment,
6 and then a third option would be not to change the rule at
7 all, but just to have a comment.
8 CHAIRMAN BABCOCK: Okay. Any discussion on
9 that? I sense a vote imminent. Justice Christopher.
10 HONORABLE TRACY CHRISTOPHER: I don't think
11 the proposed sentence does what the committee hopes that
12 it does. And I actually kind of like the idea from the
13 family law section that the idea is that if you use AI,
14 it's not an excuse for violating this rule. So I don't
15 know where I would vote.
16 CHAIRMAN BABCOCK: Okay. Confused.
17 Jerry Bullard.
18 MR. ORSINGER: That's unusual.
19 MR. BULLARD: A question I had, and maybe
20 the subcommittee considered it, but I saw where the Fifth
21 Circuit had this concept just going through their review,
22 but is there any sort of sense about disclosing that AI
23 has been used to generate a document, or what was the
24 thought process behind that?
25 MR. LEVY: Yes, we did talk about that, and

1 the memo discusses it. Immediately after the New York
2 case came out, there was a flurry of state and federal
3 judges issuing local rules or standing orders requiring
4 the disclosure of the use of AI. That quickly became
5 somewhat impractical, because of the pervasive use of AI
6 in so many aspects of what we do when drafting documents,
7 research, and the like, and so everything has got AI,
8 or -- and also, the fact that you used AI doesn't really
9 tell you anything. It depends on how you used it as to
10 whether there's some question about authenticity.
11 I did use AI in connection with the draft
12 memo, but I hope and believe that I validated every
13 factual statement through other information, so it
14 hopefully did not detract from the veracity of the points
15 of fact that are in there. So a disclosure rule doesn't
16 really seem to scratch the itch, and it would be, I think,
17 impractical.
18 And to Justice Christopher's point, it just,
19 I guess, from our perspective, we felt like saying "watch
20 out" doesn't really seem to fit the tenor for structure of
21 Rule 13 at all; and, you know, you could say that about
22 many things. You know, if you miscite a case, that's not
23 a -- you know, if you make a mistake about a case cite,
24 that's not an excuse. There are a lot of things that a
25 lawyer or self-represented party can do and that would,

1 you know, would be innocent mistakes, but they're still
2 always responsible for the information that they submit.
3 HONORABLE TRACY CHRISTOPHER: Well, my
4 concern was the way it's written. If I may, it says, "The
5 use of AI must comply with this rule," and the rule is you
6 should not file an instrument that is groundless or
7 brought in bad faith. I don't see those two butting up
8 against each other correctly.
9 MR. LEVY: Well, so the concern there, I
10 think, is that to really address the issue, is that you
11 would have to actually somewhat broaden Rule 13 a bit to
12 address that any information that you cite to a court
13 should be independently verified through reliable means to
14 ensure that it's accurate.
15 What I mean by that is if you put a case
16 cite in that you got off of Justia -- I think that's how
17 it's pronounced -- and you list the holding of a decision,
18 how do you know that's accurate? Do you know that Justia
19 is a accurate reference point? If you use the State Bar
20 reference point online, is that accurate? How much
21 independent validation would a lawyer need to go through
22 to ensure that that case cite is, in fact, what the court
23 said in the case; and if you read a Bloomberg Law summary
24 of the decision and you cite to the case, is that
25 sufficient? And all of those things are, I think,

1 inherently involved in Rule 13, but if we start to really,
2 you know, describe your obligation in that level of
3 detail, then it becomes potentially problematic.
4 And talking about the reference that the
5 family law committee suggested, that might be helpful in a
6 note, but in terms of using AI, it's not an excuse, it
7 might not be an excuse, but it might be information that's
8 relevant to how you prepared the brief. You might cite to
9 an AI output as this is the output and it's from ChatGPT.
10 Now, whether the court considers that reliable, that's up
11 to the court to decide. But if you cite it correctly, is
12 that a violation, or is that something you shouldn't do?
13 Those are -- it seems to suggest more
14 complexity. I guess I'll just pose to you the fundamental
15 question that is do we really need to fix this issue in
16 Rule 13?
17 HONORABLE TRACY CHRISTOPHER: No.
18 MR. LEVY: Okay.
19 HONORABLE TRACY CHRISTOPHER: That's my
20 thought.
21 CHAIRMAN BABCOCK: Well, that does it.
22 HONORABLE TRACY CHRISTOPHER: It's just --
23 and I understand it. The way I see problems arising --
24 and I watched a really interesting presentation where
25 three different search engines were asked a pretty simple

1 legal question that had a definite answer, and most of the
2 time they got it wrong. Okay. So if a pro se says, "I
3 want to file a lawsuit for wrongful termination," and they
4 draft something for them for wrongful termination, they're
5 probably not going to get the correct law in Texas. All
6 right. They're probably not going to get it. You know,
7 maybe they will, but maybe they won't. And then the
8 question to me, was, well, does that excuse them from
9 filing a groundless petition. So I understood the family
10 law's question, really. I'm not sure it belongs in
11 Rule 13, but that's the question.
12 MR. LEVY: But the problem with that also is
13 -- so I didn't use AI to file my lawsuit that's
14 groundless, but I did search on Google, and I got a nice
15 law firm that told me what the standard was. I didn't
16 realize it was the wrong state, but I did it in good
17 faith, and is that an excuse? It might be, and I'm not
18 sure what a judge would decide, so, you know, it's not
19 just AI that's going to be part of that problem.
20 HONORABLE TRACY CHRISTOPHER: Sure.
21 MR. LEVY: So if you're dealing with that,
22 it's better with more explanatory guidance versus Rule 13.
23 CHAIRMAN BABCOCK: Judge Schaffer.
24 HONORABLE ROBERT SCHAFFER: I think what
25 we're doing is real important as far as learning more and

1 more about AI and its uses and how it can be abused and
2 how it can be used incorrectly and everything that goes
3 with it. I know that what we're trying to do here is to
4 do that and to make sure people don't use, you know, bad
5 AI. *Mata vs. Avianca* shouldn't happen here. But I don't
6 think changing the rule is the way to go.
7 If you want to tweak the rule to make sure
8 that the person who is using it confirms that the facts
9 are accurate and the legal authorities are accurate, that
10 would just make Rule 13 a little bit stronger. So if you
11 put something in there specifically relating to generative
12 artificial intelligence, in five years, when they're
13 calling it something else besides generative artificial
14 intelligence, then we're having to go through and redo
15 this rule again. So I don't think changing the rule is
16 necessarily the way to go, unless you want to beef up the
17 part about confirming the facts are accurate and
18 authorities are accurate.
19 I don't necessarily have a problem with
20 putting something in the comment to make people aware of
21 the fact that you've got this issue relating to artificial
22 intelligence, and I certainly don't have a problem with
23 encouraging the Bar to do something -- to provide some
24 information. Information is a wonderful thing. Everybody
25 should have information, but I just don't think amending

1 Rule 13 is the way to go in this particular instance.
2 CHAIRMAN BABCOCK: Well, let's split that up
3 then. Let's forget about the comment for a moment, and
4 let's vote on whether or not we should amend Rule 13 in
5 the way that is suggested here in the subcommittee
6 proposal, or something like it. I mean, not totally
7 wedded to these words, but should we leave 13 alone or
8 should we amend it? Everybody that thinks we should leave
9 Rule 13 alone, raise your hand.
10 All right, everybody taking the opposite
11 view.
12 So that would make it unanimous. Now, let's
13 talk about whether we should have a comment. Anybody got
14 views about whether we should have a comment? Richard.
15 MR. ORSINGER: It seems to me with the
16 concern we have with AI is not false facts, but false
17 authorities, citation to cases that don't exist or
18 statutes that don't say what it says, and if that's true,
19 if we're not too worried about them making up facts, maybe
20 we should have a comment that this -- our current rule is
21 less addressed to legal authorities and citation legal
22 authorities than it is assertions of causes of action and
23 factual foundations. So it seems to me like we, maybe in
24 the comments, should say we are concerned about your
25 verifying the authorities that you're citing, and you

1 stand behind them.
2 MR. LEVY: Well, Richard, I --
3 CHAIRMAN BABCOCK: Jeff, go ahead. Harvey,
4 I mean.
5 HONORABLE HARVEY BROWN: I think the initial
6 publicity has been about legal authorities --
7 MR. ORSINGER: Right.
8 HONORABLE HARVEY BROWN: -- but people have
9 used it also for researching facts, like how does this
10 product work, what's this chemical's composition,
11 et cetera, and so I don't think we can limit it to just
12 legal authorities, even though that's been the thing
13 that's been written about the most so far.
14 CHAIRMAN BABCOCK: Yeah, I was going to make
15 that point myself. Yeah. Roger.
16 MR. HUGHES: Well, I echo that. I had a
17 case recently where the other side filed a brief with a
18 historical analysis of the text of -- and I won't go into
19 it, and they cited a number of newspaper articles,
20 et cetera. Well, when I went and read the newspaper
21 articles, I'm going, I'm not sure we're reading the same
22 newspapers here, folks. I -- and what I'm saying is, is
23 that if the use of these to hunt down articles and tell
24 people, you know, you know, this historical material will
25 support your argument and you don't go read the historical

1 material or maybe you just take it at face value, I think
2 it's across the board.
3 I'm not sure we -- you know, I was on the
4 side of don't amend the rule. I think the real question
5 here is are we going to say, you know, reliance on a
6 search engine alone or ChatGPT or generative AI, whichever
7 is the electronic genie of the day, is that going to be
8 alone a reasonable inquiry? Because that's the difference
9 here in the rule. You get sanctioned if your belief that
10 it's not groundless is based on a reasonable -- it's not
11 based on a reasonable inquiry. And I'm not sure how you
12 would express when reliance -- the use of these electronic
13 tools is a reasonable inquiry or not, but I think at bare
14 minimum, you know, you might want to say you actually read
15 the source material that's quoted here, might be it, but I
16 think that's something that's better fleshed out by case
17 law than by a rule.
18 CHAIRMAN BABCOCK: Yeah, well, we're not
19 going to change the rule. That's been the vote 21 to
20 nothing, the Chair not voting, by the way.
21 MR. HUGHES: I'm not sure a comment is going
22 to do us any better.
23 CHAIRMAN BABCOCK: So you're anti-comment,
24 too.
25 MR. HUGHES: I don't know what you would say

1 in a comment that would --
2 CHAIRMAN BABCOCK: That's okay.
3 MR. HUGHES: -- be clear enough to cover all
4 of the evils, because somebody is going to say, well, the
5 comment didn't address that, so that must be okay.
6 CHAIRMAN BABCOCK: Got it. Robert.
7 MR. LEVY: Again, you can tell I've got some
8 energy for this topic. So on the issue, Roger, that
9 you're talking about -- and this goes, again, to what
10 Justice Christopher was saying. At some point in the near
11 future, you will be able to have a generative AI tool that
12 will tell you that they won't make up cases, they won't
13 make up facts, that they're just taking all of the
14 information that's in a large language model and giving
15 you the answers and giving you the source material, and so
16 the problem that was in the New York case won't happen
17 again, in that -- using that tool.
18 So you might have a generative AI tool that
19 is more reliable than Westlaw or Lexis, and I think we all
20 trust Westlaw and Lexis in terms of the output that we
21 get, and it just tells us that this dynamic is changing so
22 frequently, and that it might be absolutely appropriate to
23 use AI in some aspects of a case, if you're using an
24 appropriate and reliable AI tool.
25 The other point to Richard, and just others

1 have made the comments, but I wanted to give you one
2 example of where this could be a real issue. So one of
3 the common uses of AI in the business cycle is you have
4 Zoom running and then Zoom has a feature, if you want to
5 use it, where it will give you a meeting summary as the
6 meeting is taking place.
7 MR. ORSINGER: You've got to be kidding.
8 MR. LEVY: And so you're going to have that
9 meeting summary, and is that a business record? Judges,
10 you're going to have to decide that probably. But let's
11 say you file a lawsuit based upon the meeting summary that
12 says this issue was decided one way, and you file your
13 lawsuit based upon that meeting summary. Well, it turns
14 out that there's a recording of the meeting, that they did
15 record it, and the meeting summary is wrong. Is that in
16 bad faith? Did you -- were you obligated to validate the
17 AI information that's in the business record, if it is, or
18 is that -- do you have to go behind that to understand
19 what the true facts were and not rely on the AI-generated
20 output? That makes it very sticky, in terms of trying to
21 draft a rule of duty around the use of a tool that the
22 parameters of which are not -- are constantly changing.
23 CHAIRMAN BABCOCK: So you're against a
24 comment?
25 MR. LEVY: I think the comment will be

1 difficult to be instructive, and I also -- I'm not sure
2 that there's any precedent to amend a comment if you're
3 not amending the rule. I don't know if that -- and I was
4 going to ask Richard if that's ever been done.
5 CHAIRMAN BABCOCK: Why would he know?
6 MR. ORSINGER: I'm the informal historian.
7 MR. LEVY: But our suggestion was that the
8 State Bar guidance -- actually, I think Harvey's suggested
9 the State Bar do it, and that makes a lot of sense.
10 They're well-equipped to provide that guidance that can be
11 updated and changed as the technology changes, would be
12 more effective to describe some of these types of concerns
13 and -- but I was disappointed, Richard, that we didn't get
14 the history of Rule 13 as part of the discussion.
15 MR. ORSINGER: We didn't have time. It's
16 too late in the day.
17 CHAIRMAN BABCOCK: No, we can stay over if
18 you want. So I'm sensing a consensus that nobody wants a
19 comment. Does anybody want to speak in favor of a
20 comment?
21 Nobody has got their hands up, so the
22 recommendation to the Court is don't change Rule 13, we
23 don't need a comment, and so now let's get to the
24 evidence. Harvey, remanding it -- Justice Gray.
25 HONORABLE TOM GRAY: If I could ask a

1 question before we move off the pleading question, which
2 would include briefing. We had a brief filed in our court
3 that was generated by AI, or at least we have every reason
4 to believe it was. The State identified it before we did,
5 went through the same analysis that they did in Mata of no
6 authority exists on this page, it doesn't discuss this
7 topic; and it was, otherwise, a well-written brief and
8 read well, but it was completely fictitious case
9 authority.
10 We ultimately dismissed it as inadequately
11 briefed, and as Justice Christopher points out, our court
12 was criticized for not striking the brief and allowing
13 rebriefing, but the State had already pointed it out, what
14 the problem was, and basically, the appellant had the
15 opportunity to fix it and didn't even respond, and so that
16 was the course of action that we -- could you write a rule
17 that would -- that explains or puts upon the party and/or
18 the judge the duty to do something, and if so, what would
19 the judge -- what would you have had the Court do
20 differently than what we did?
21 CHAIRMAN BABCOCK: Well, doesn't the court
22 have the power, either specifically or inherently, to
23 strike the pleading if it's --
24 HONORABLE TOM GRAY: Well, yes, but I'm
25 talking about from a rules perspective, telling us what to

1 do could be an answer to instead of amending Rule 13 or
2 some other deal, is that if we identify it, then what are
3 we to do with it?
4 CHAIRMAN BABCOCK: Okay. Are you advocating
5 such a rule?
6 HONORABLE TOM GRAY: I am not. But I would
7 like direction. But I only need a little bit of
8 direction, about four months' worth.
9 CHAIRMAN BABCOCK: Anybody advocating
10 such -- is anybody advocating such a rule? Justice
11 Miskel.
12 HONORABLE EMILY MISKEL: I'm not voting.
13 I'm asking a follow-up question. So I know that on the
14 appellate court -- I haven't been there long enough to be
15 an expert in it, but there is the feeling that if we give
16 you the opportunity to rebrief it or whatever then we're
17 just helping you; whereas, if you were the one who turned
18 in a substance-free brief because you decided to use AI,
19 then you should experience the consequences of your
20 choices. So was there any -- you said you got some heat
21 for it. Was there any legal authority for the heat or
22 just a sense of unfairness?
23 HONORABLE TOM GRAY: Sense of unfairness.
24 HONORABLE EMILY MISKEL: Okay.
25 HONORABLE TOM GRAY: That the -- that we

1 dodged the issue, in effect, and just took to a quick exit
2 to dispose of the case.
3 HONORABLE EMILY MISKEL: So follow-up
4 question, let's say it was a pro se appellant's brief with
5 no appellee's brief. Would you have sent a letter saying
6 it's deficient and give them an opportunity to turn in
7 something and then dismiss, or would you have handled it
8 differently in that sense?
9 HONORABLE TOM GRAY: That would be a
10 hypothetical question based upon an event that may come
11 before the court. No, we don't typically identify
12 briefing inadequacies in advance. We felt pretty strong
13 on that one because the inadequacy had been identified in
14 the appellee's brief, and so we went ahead and dismissed
15 it. I don't think we would have, but it would be nice to
16 have guidance, to me, would be my feeling on this.
17 So I guess, Chip, maybe I would advocate a
18 rule that says, you know, a court or a party that
19 identifies this is obligated to point it out.
20 CHAIRMAN BABCOCK: Okay. Harvey, getting
21 back to your proposal to remand the evidence issues to the
22 226a with instructions, to remand to the State Bar, I
23 don't mind the first part, remanding to the 226a,
24 particularly since you're the chair of that subcommittee,
25 so you're remanding it to yourself.

1 HONORABLE HARVEY BROWN: You mean the
2 evidence committee?
3 CHAIRMAN BABCOCK: The evidence committee.
4 I'm sorry. Elaine has got 226. You're going to get that
5 one, Elaine.
6 MR. LEVY: We did include a recommendation
7 on how to fix it.
8 CHAIRMAN BABCOCK: Get going. Harvey has
9 got to leave, that's why I'm -- on the evidence committee,
10 I think it's fine if this issue is remanded to the
11 evidence committee. I don't think -- I don't think under
12 our secret unwritten rules of this committee that it's
13 appropriate to remand it to the State Bar.
14 HONORABLE HARVEY BROWN: Okay.
15 CHAIRMAN BABCOCK: If the Court's referred
16 it to us, we've got to deal with it. So if the evidence
17 subcommittee would deal with that issue, then that would
18 be great.
19 HONORABLE HARVEY BROWN: We'll do it.
20 CHAIRMAN BABCOCK: And since you're the
21 chair of the evidence subcommittee as well as this
22 subcommittee, you're a five tool guy.
23 HONORABLE HARVEY BROWN: All right. We'll
24 get it done.
25 CHAIRMAN BABCOCK: And Rusty is going to

1 take you to the airport if you want to go.
2 HONORABLE HARVEY BROWN: That would be
3 great.
4 CHAIRMAN BABCOCK: Do we have any more --
5 any more discussion about AI? Robert, do you and Richard
6 want to go to another room and talk about how AI started?
7 MR. LEVY: We're going to have AI. We're
8 going to have ChatGPT talk to Copilot, and they'll figure
9 it out together.
10 CHAIRMAN BABCOCK: And hope the plane
11 doesn't crash.
12 MR. ORSINGER: I would love, just for
13 nothing else, for humor, just to see what kind of rule
14 they would come up with.
15 CHAIRMAN BABCOCK: The AI rule?
16 MR. ORSINGER: If they wrote a rule for
17 themselves, to apply to their use.
18 HONORABLE JANE BLAND: I think you can ask
19 Justice Boyd about that.
20 MR. ORSINGER: Oh, really?
21 HONORABLE JANE BLAND: I think Justice Boyd
22 had made such an inquiry once upon a time.
23 MR. ORSINGER: Well, he hasn't made it
24 public yet.
25 HONORABLE JANE BLAND: No, no. It wasn't

1 for official purposes. It was just out of curiosity.
2 CHAIRMAN BABCOCK: It was for fun. Unlike
3 our federal counterparts, this committee is all about fun.
4 All right. I think -- and we'll bring this
5 back, Elaine, your part, tell Harvey his part --
6 PROFESSOR CARLSON: Got it.
7 CHAIRMAN BABCOCK: -- will be brought back
8 for November 1, so we'll basically redo the whole agenda
9 for this meeting November 1. And if there's no further
10 business, is there? Then we will be in recess. Thanks,
11 everybody.
12 (Adjourned)
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2 **REPORTER'S CERTIFICATION**
MEETING OF THE
3 SUPREME COURT ADVISORY COMMITTEE

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8 I, D'LOIS L. JONES, Certified Shorthand

9 Reporter, State of Texas, hereby certify that I reported

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