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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

JANUARY 30, 2026

(FRIDAY SESSION)

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 Taken before *D'Lois L. Jones*, Certified
Shorthand Reporter in and for the State of Texas, reported
by machine shorthand method, on the 30th day of January,
2026, between the hours of 9:02 a.m. and 3:54 p.m., at the
State Bar of Texas, 1414 Colorado Street, Austin, Texas
78701.

INDEX OF VOTES

No votes were taken by the Supreme Court Advisory Committee during this session.

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2 CHAIR TRACY CHRISTOPHER: Welcome. We've
3 got an interesting agenda, kind of an out-of-order idea on
4 the summary judgment rule, so we have to sort of handle
5 that, but welcome to everybody, and I'm going to turn it
6 over to Justice Bland.

7 HONORABLE JANE BLAND: Hi, good morning,
8 everyone. So the Court's been busy implementing a lot of
9 your work over the last couple of months, but before I get
10 into that, the first thing I wanted to announce is the
11 investitures of our two newest justices, Justice Sullivan
12 and Justice Hawkins, will be in the House chamber on
13 May 7th, so mark your calendars for that. It will also be
14 an opportunity for a brief, as we call it, swearing out of
15 Justice Jeff Boyd and Chief Justice Nathan Hecht. So it
16 should be a wonderful celebration, and I wanted to let you
17 all know. There will be more information about that to
18 come, but May 7th.

19 So the Court implemented and finalized the
20 rules changing our petition for review process, and so for
21 those of you that practice in the Texas Supreme Court, the
22 processes, like that of the United States Supreme Court
23 and most of the other states in the country, we will now
24 mostly be granting review based off of the petition of
25 review and not requesting briefs on the merits until we

1 have granted review. So through this committee's
2 recommendations, we've tried to -- we've modified the
3 petition for review to increase the word count to 6,500
4 words and, of course, the response to the petition for
5 review, and we've tinkered a little bit with the
6 introduction and the summary of the argument to really
7 emphasize that that is a great place to explain why your
8 case is worthy of review and then with the additional word
9 count talk about why you win.

10 So that -- those rules are now final, and we
11 are looking forward -- we've already started receiving
12 petitions under the new rules, and it's going to be a slow
13 process, but we expect, you know, over the next six months
14 or so we will eventually have a transition to all of the
15 petitions being under the new rules. So, right now, when
16 we get a vote sheet, as we do every week, about half of
17 the petitions are under the old rules and about half are
18 under the new. The one I was looking at yesterday was
19 about half and half. So it will be, internally for us, a
20 little bit of gymnastics to coordinate our docket until we
21 complete the transition, but once we're completed, we're
22 hopeful that this will not change at all our disposition
23 time. If anything, it hopefully will make it even a
24 little bit shorter, and we're hoping that it won't affect
25 practitioners, other than the focus will be more on the

1 petition for review than ever.

2 Okay. Next, we have the motion for summary
3 judgment rules. Our Court put out a preliminary rule, and
4 because this meeting occurred during the public comment
5 period and because this rule is really important and has
6 substantially changed, we thought it would be a good idea
7 for the committee to look at the draft rule and give us
8 your thoughts and tweaks this morning. So it's on the
9 agenda.

10 We also finalized the eviction rules that
11 this committee looked at. We made some changes from the
12 preliminary rule in response to comments that we received
13 up to the date that the rule needed to go into effect,
14 which was December 31, because the law changed on January
15 1, and that public comment period is still open, so if
16 there are people that you know that are interested in the
17 justice court rules and have additional thoughts, they are
18 welcome to send in public comments. The rule is final,
19 but, of course, we can amend the rule even after it's been
20 final if we think that there is a need to. And I think
21 public comments for that are accepted until February 1st.

22 We are also in the public comment phase of
23 the central docket rule, as we've called it. The comment
24 period for that ends March 1st, and then the rule
25 contemplates time for counties to comply with it. It has

1 three main components, and these were all things that this
2 committee discussed and thought about. First, random
3 assignment upon filing. Second, that the originally
4 assigned judge is the judge that's presumptively
5 responsible for the case, absent an official transfer. So
6 that still allows a local administrative judge to transfer
7 a case from the originally assigned judge, but -- but the
8 default is going to be that the judge to whom the case is
9 randomly assigned will be responsible for the case. And
10 that allows flexibility if the judge is, you know, for
11 some reason, unable to manage his or her docket.

12 Then, finally, the exchange of benches,
13 which happens in every county in the state, a judge will
14 hear all or part of a hearing for another judge or all
15 or -- or a particular kind of case. The rule provides
16 that the judge originally responsible for the case can
17 allow another judge to exchange benches, but it will be at
18 that judge's discretion. So the judge originally assigned
19 has to agree to allow another judge to hear all or part of
20 the case, for pretrial.

21 We have a new policy on law school
22 accreditation. So in the 1980s, the Texas Supreme Court
23 passed a rule, an order, delegating -- delegating all
24 accreditation authority to the American Bar Association,
25 and the Court determined that, really, because we're

1 ultimately responsible for licensure, that that probably
2 is -- requires some sort of Court oversight rather than
3 complete delegation of authority, so the Court kind of has
4 removed that delegation and has said, though, that all law
5 schools accredited by the ABA are -- continue to be
6 accredited through the Court, and then the Board of Law
7 Examiners is going to look at whether, in addition to the
8 ABA, there ought to be other accreditation authorities,
9 but that's a longer project. So in this moment in time,
10 all law schools accredited by the ABA are also accredited
11 for purposes of Texas licensure. Okay.

12 We have also been working on Senate Bill
13 293. As you-all probably know, that requires the Supreme
14 Court to adopt rules in connection with judicial
15 timekeeping. And so -- and we anticipate, shortly, having
16 a rule out for public comment that will implement that in
17 a way that we hope is the least intrusive to judges'
18 ordinary management of their dockets, but we have to keep
19 track of it and report it to OCA, and so we've -- we
20 expect to see that draft shortly. It will be out for
21 public comment. I think that rule doesn't have to go --
22 it doesn't have to go into effect until March?

23 MS. DAUMERIE: July.

24 HONORABLE JANE BLAND: July, July. So we
25 have lots of time. We're trying to give a lot of advance

1 notice to judges and others who might be interested in
2 this so we can hear your thoughts. So that is, I think,
3 about all -- oh, and then the last thing is we are in the
4 process of finalizing -- we did -- because of the
5 statutory requirements that go into effect in September,
6 we put out a rule modifying mainly the Rules of Appellate
7 Procedure for bail, because now the State has a right of
8 appeal if they want to challenge bail set by a judge. We
9 received some helpful public comments and worked with the
10 Court of Criminal Appeals. Oh, good morning. And so we
11 are hopeful that we'll have that rule finalized shortly.

12 CHAIR TRACY CHRISTOPHER: So an interesting
13 side note, there has been yet to be a State appeal that we
14 have heard.

15 HONORABLE JANE BLAND: Right. Right. So we
16 are not late with making tweaks to the bail rules, because
17 there hasn't been a bail appeal yet, but there will be one
18 eventually, so we're going to have these rules in place so
19 that everybody, hopefully, will know what to do.

20 Okay. All right. I hand it back to Chief
21 Justice Christopher.

22 CHAIR TRACY CHRISTOPHER: Okay. And Justice
23 Bland said she's going to have to step out to take a quick
24 phone call in the middle, but we're going to keep on going
25 when she is gone. So our first items on the agenda are

1 the repair and remedy forms, and, actually, I think the
2 first three --

3 HONORABLE NICHOLAS CHU: Yeah.

4 CHAIR TRACY CHRISTOPHER: -- items on the
5 agenda will all be discussed together.

6 HONORABLE NICHOLAS CHU: Yeah.

7 CHAIR TRACY CHRISTOPHER: And Judge Chu is
8 going to be in charge.

9 HONORABLE NICHOLAS CHU: Hey, everybody.
10 So when e-mailing Chief Justice Christopher, I told her I
11 think I only need 30 minutes, and that would be a record
12 for SCAC, because the reason why is the repair and remedy,
13 the early lease terminations, security deposit forms are
14 noncontroversial. They've been worked on by a task force,
15 so I really don't think that there is going to be a lot of
16 substantive law discussion, but hopefully that's right.

17 To back up a little bit, back in the ancient
18 times of 2015, the Legislature had passed this law that
19 said that the Court should -- or must create these
20 landlord-tenant forms. The Court had appointed a task
21 force to work on those landlord-tenant forms, and we have
22 been turning it out over the years for various things. If
23 we remember, there was one about eviction process, and
24 then, of course, last legislative session, the eviction
25 process totally changed, so that form needs to go back.

1 But out of that, the repair and remedy, early lease
2 termination, and security deposit forms were pushed out.

3 No legislative changes have affected these
4 forms, which is always a good thing. And I have here
5 Nelson Mock, with -- whose day job is with Texas Rio
6 Grande Legal Aid, to help out in kind of working through
7 these forms with us and giving us a big picture of it. He
8 was a part of the task force. Chair, Judge Carlos Villa
9 was the Chair of the task force. Trish McAllister wanted
10 to be here today, but she had a family emergency this week
11 and is out of pocket, so -- and she did a lot of the --
12 the work, in terms of making sure that these forms comply
13 with the formatting and access to justice requirements of
14 making it easy for self-represented litigants and
15 readability for them.

16 So without further ado, let me hand it over
17 to Nelson to give us a big picture of this and answer
18 anybody's questions.

19 MR. MOCK: Thank you, Chief Justice
20 Christopher and members of the committee. I appreciate
21 the opportunity to talk with you about this. I have about
22 four hours prepared for today, but, no, I promise you I
23 will go as quickly as you would like for me to do, and I'm
24 also happy to answer any questions along the way as I'm
25 talking about this.

1 To give you a kind of a bigger sense of what
2 the committee has been doing over the years, we met in
3 person. We meet almost monthly, for about four hours. We
4 met in person before the pandemic, and then after a brief
5 pause we meet by Zoom, again, almost every month and often
6 for periods of about four hours.

7 I would be remiss if I didn't recognize the
8 efforts of my fellow task force members. Trish McAllister
9 has done an amazing job with keeping us all together and
10 keeping us on task. Judge Villa, whose leadership and
11 persistence and efforts has outlasted his time on the
12 bench. He's actually since retired, but he has stuck with
13 us. Judge Swearingin, who is frequently appreciated in
14 the task force, but also has used some of the forms when
15 he's in court. Rick Melamed, Linley Boone, Roland Love,
16 and others have spent a lot of time drafting the forms,
17 and I'll go through some examples, and then I'm happy to
18 answer any questions.

19 But, of course, this has also included
20 efforts to go back, when the Legislature has changed
21 forms, we've gone back and modified things. I think the
22 evictions, the eviction forms, are probably the best
23 example where a number of changes happened over the years,
24 and so they were presented to the Court, but then
25 withdrawn because, most recently, some of these base

1 changes.

2 CHAIR TRACY CHRISTOPHER: Nelson, I'm having
3 a little hard time hearing you. Could you keep your voice
4 up?

5 MR. MOCK: Oh, sure.

6 CHAIR TRACY CHRISTOPHER: Thank you.

7 MR. MOCK: I apologize. So, yeah, I forget
8 how many toolkits that we have come up with at this point.
9 I think maybe something like around the number of 12.
10 Many of these toolkits we have created and then have gone
11 back either to modify based on changes in the law or just
12 to -- to go over them again to make sure accuracy. When
13 necessary, we have -- we have sought outside assistance
14 from people that have specializations in areas that we, on
15 the task force, have not. And -- and pursuant to the
16 mandate of the Government Code, we've done our best to use
17 language that's easily accessible and understandable.
18 So the kits that are -- we talk about a kit.
19 Basically, what we've attempted to do is to group, by
20 themes, different forms that we've created, and so these
21 toolkits are often a compilation of FAQs, instructions,
22 and the form itself. So the three that are before the
23 SCAC, Supreme Court Advisory, today are the repair and
24 remedy kit, early termination kit, and the security
25 deposit kit, and I'll just go through, very briefly, the

1 groupings of forms and then I'll be happy to answer any
2 questions.

3 If you -- if you look at the repair toolkit,
4 you'll see basically what I'm talking about. The first
5 document in the repair toolkit is just the request to make
6 a repair. The requested repair is a problem, and then the
7 next document is -- is kind of the meat of a lot of what
8 we've done, which is the explanation of the law and
9 explanation of the forms. And these forms are -- as we've
10 gone through and created these forms, a lot of these forms
11 were required by statute for use by either the landlord or
12 the tenant, and so the purpose is to create something that
13 people can use to either use or -- use or create a remedy
14 under the law.

15 HONORABLE NICHOLAS CHU: And something to
16 point out is that in the FAQs, whenever it's citing to a
17 specific action or a deadline or things like that, right
18 now, in the annotations that we have just for the purposes
19 of review, Trish has cited to the rule or the statute that
20 applies. So we just wanted to show our work in terms of
21 it's not us making up law or anything like that. And I
22 think, if not, Jackie has the Word version, so those we'll
23 be able to take out once -- once it goes to the final
24 draft, but I do want to point out, too, that all of those
25 FAQs -- the good thing about eviction law is that it's

1 pretty much settled in most places in terms of it's almost
2 all statutory or rules-based. So the questions are very
3 set in stone. The answers are set in stone. So there are
4 not questions of law that are still out there pending.

5 MR. MOCK: Most of this has come from
6 Chapter 92, Texas Property Code, which have to do with
7 rights and remedies of landlords and tenants in the
8 context of residential leases, and -- and so every --
9 every kit, every toolkit, consists of a form and then the
10 instructions, which basically have three parts. The first
11 part is the -- the general description of what the forms
12 should be used for. The second part is FAQs, frequently
13 asked questions, which is just a way to present the
14 information, and as Judge Chu mentioned, almost every FAQ
15 is going to have a citation for -- for law, and to the
16 extent that there have been issues that the task force has
17 dealt with, for example, contradictions in law, or as in
18 some of the cases that I will discuss a little bit later,
19 where it's not obvious on the face of the statute that you
20 have to look back a couple of statutes, we will include
21 some of those sometimes in the comments.

22 So every instruction includes the first
23 introductory part, the FAQs, and then the actual
24 instructions for the form itself. And so -- and so with
25 regard to the repairs, the forms are the tenant's request

1 for a repair and the FAQs and instructions. There is also
2 a somewhat rarely used process for -- to -- for repair and
3 deduct, and that's the second form, and the FAQs and
4 instructions with regard to that, the landlord affidavit
5 for delay specifically has to do with the repair and
6 deduct process, and then the following form is the
7 tenant's notice of lease termination. If a tenant has
8 made a proper request and if you have gone through the
9 FAQ, you can see that it's a process laden with a lot of
10 pitfalls, thus, the need for kind of walking people
11 through the process.

12 But if they have followed through the
13 process properly, one of the remedies that they have is
14 the ability to unilaterally terminate the lease, and so
15 that form is the ability to -- a notice of lease
16 termination and then the instructions having to do with
17 how to go about doing that and the FAQs.

18 And then the last set has to do with the --
19 the ability to file a lawsuit in justice court to repair
20 and remedy the condition. The statute gives tenants the
21 ability to file a lawsuit, a repair and remedy lawsuit in
22 justice court, which follows the same time line,
23 essentially, as an eviction case, meaning that when the
24 tenant files this case, that the trial is set from between
25 10 and 21 days of the filing of the case, and it gives the

1 judge the ability to order repairs and other potential
2 remedies that the tenant has under the Property Code. And
3 then the last part of that is the proposed order for both
4 repairs or an order that would be in favor of the
5 defendant, in this case.

6 HONORABLE NICHOLAS CHU: Before we move on
7 to early lease termination, are there any questions about
8 those forms? It's always a good thing that Kennon is
9 shaking her head.

10 CHAIR TRACY CHRISTOPHER: Kent.

11 HONORABLE KENT SULLIVAN: I was just going
12 to ask a plain language question, and that is let me start
13 by saying I completely support the work. I think it's
14 some of the most important work we do, trying to
15 facilitate the layperson's rule, and so that is great, and
16 I have absolutely no criticism. It really is just a
17 question, and that is I never assume that the audience, or
18 the intended audience, will read this and understand it
19 the way I do.

20 HONORABLE NICHOLAS CHU: Yeah.

21 MR. MOCK: Agreed.

22 HONORABLE KENT SULLIVAN: And so with that
23 in mind, I'm just curious whether we had somebody look at
24 this from a plain language point of view. It certainly
25 looks plain language to me, that clearly that effort has

1 been made, but I will just give you one example. Not a
2 criticism, but just an example. I look at the first form,
3 and it talks about "Ask your landlord to repair a
4 condition that materially affects your physical health or
5 safety." The question could come up, well, what does
6 "materially" mean?

7 MR. MOCK: Yeah.

8 HONORABLE KENT SULLIVAN: Right? And I
9 don't know whether that would be a problem for laypersons
10 to navigate, but somebody with that expertise can, you
11 know, help with this, and particularly with respect to
12 things like the instructions, right? I mean, so anyway,
13 just a question.

14 HONORABLE NICHOLAS CHU: And I think Trish
15 McAllister, you know, her work was formerly with executive
16 director with the Access to Justice Commission. She was a
17 huge help in terms of making plain language. Nelson, too,
18 and everybody else on the task force. Unfortunately, with
19 some of these things with landlord-tenant law, like the
20 "materially affect the nature," that's a term of art
21 that's required in the statute, so we pretty much plain
22 language as much as we can. The problem is, is that some
23 of it, like, I'm looking at for the early lease
24 termination, things like that, family violence or things
25 like that, are just definitions or things that they have

1 to complete or say specifically. Otherwise, they're kind
2 of out.

3 So, yeah, I think that's -- that's
4 ultimately the problem with this complicated --
5 landlord-tenant is probably one of the more complicated
6 topics and -- and we've kind of brought it down to as much
7 as we can, boil it down to as much as we can, but are left
8 with this kind of --

9 HONORABLE KENT SULLIVAN: The question I
10 think that remains, and it's a larger question that
11 extends beyond this particular project, as several of us
12 were talking before the meeting got started. I think we,
13 as a committee, used to have access to resources that were
14 plain language resources. At least that's what I recall,
15 and I wonder if we might not find the resources to engage
16 that sort of expertise again as we push things through the
17 system.

18 Richard and I were even talking about it
19 with respect to the summary judgment rule, which is
20 obviously not intended for a retail audience. It's all
21 for lawyers, but, still, plain language can help a reader
22 more easily navigate complicated language, and I think it
23 would be a significant value add to this committee
24 generally.

25 CHAIR TRACY CHRISTOPHER: I'll ask Jackie if

1 she has any knowledge of that. I know we have had it in
2 the past, the plain language help.

3 MS. DAUMERIE: There is -- I think I've seen
4 a PDF that has plain language suggestions, but that's all
5 I --

6 CHAIR TRACY CHRISTOPHER: That's all you're
7 aware of, okay.

8 HONORABLE KENT SULLIVAN: My general thought
9 is that, number one, there are people in this space who
10 provide these, and, number two, if the project is
11 important enough, you can run, you know, focus groups.
12 You can gather data if something you know is going to get
13 widespread use and is of significant importance and is
14 worth the potential cost, and I just think we ought to
15 increasingly think more about that and maybe even find the
16 resources or work on that, so that, when necessary, or
17 when useful, it would be available to us. Obviously,
18 otherwise, we do the best we can.

19 CHAIR TRACY CHRISTOPHER: Marcy.

20 MS. GREER: So I agree completely with what
21 you're saying, and in the class action context, there are
22 people who do what we call plain language makeovers, and I
23 know Rust Consulting has kind of a loose partnership with
24 Kinsella Media, and I'll bet they would possibly do it for
25 a reduced rate, but it's amazing. Those horrible class

1 action notices that nobody can read, you know, they
2 transform them with formatting and plain language, and
3 they're experts on this. I've actually put one of them on
4 the stand to testify. I'd be happy to put you in touch
5 and see what we can work out.

6 HONORABLE KENT SULLIVAN: Well, and the
7 other thing I would suggest is my recollection is we had
8 some relationships with academics before that did it, and
9 I think may have done it for nothing, as sort of an
10 extension of either their work, research, whatever. We
11 might explore that as well.

12 MR. MOCK: And I'm sorry that Trish is not
13 here to respond, because I think she has probably the most
14 sensitivity, and I know that she has accessed some
15 resources for this. What I will tell you, and I think
16 this is consistent with what Judge Chu was explaining, was
17 we pored over the language of each of the forms with
18 regard to concerns about plain language. The one caution
19 I would make is that we have seen people make plain
20 language modifications to these, which have then changed
21 the intent of the law.

22 HONORABLE KENT SULLIVAN: Right.

23 MR. MOCK: And so I think we have to be --
24 we have to be careful about that. It wasn't uncommon that
25 what we would do is we would use language specifically

1 that was from the statute itself and then explain it in
2 other words, and so while somebody might, you know,
3 stutter on a term or a specific word, later on we would
4 then explain it. So but it's a constant struggle, I
5 think, in kind of interpreting and presenting law to
6 people who may not understand it.

7 HONORABLE KENT SULLIVAN: This is clearly a
8 great effort. I just want to make that clear, that I
9 think this is a great step forward.

10 MR. MOCK: But it's an excellent point.

11 CHAIR TRACY CHRISTOPHER: So, Kennon, then
12 Judge Miskel, then John.

13 MS. WOOTEN: I recall Professor Wayne
14 Schiess --

15 HONORABLE KENT SULLIVAN: Bingo.

16 MS. WOOTEN: -- at UT Law helping with --

17 HONORABLE KENT SULLIVAN: That's who it is.

18 MS. WOOTEN: -- the jury instructions in
19 226a of the Texas Rules of Civil Procedure, so I suspect
20 he could either help or would know somebody who could help
21 if we wanted to go to academia.

22 The other observation I wanted to make is I
23 agree that straying from the statutory language could have
24 negative consequences, even for people who are not
25 lawyers, because they would read these forms, I presume,

1 and then go to the statute, and they could find that same
2 phrase in the statute, and that might actually help them
3 to have linkage between the form and the statutory
4 language in some context, especially with the explanation
5 you've described being set forth in the forms.

6 CHAIR TRACY CHRISTOPHER: Judge Miskel.

7 HONORABLE EMILY MISKEL: Not to prematurely
8 preview our AI hallucination discussion for later, but, in
9 practice, one of the actual good uses of large language
10 models is rewording things for a different reading
11 audience. So I recently was preparing a piece of writing
12 for self-represented litigants, and I thought I did a
13 pretty good job of putting it in regular people words, and
14 I put it into ChatGPT and asked it to revise it for a
15 sixth grade reading level, and it made so many good
16 suggestions that even I was still doing things in a
17 lawyerly jargoning way.

18 And, of course, to your point, I didn't copy
19 and paste it. I went back and said which suggestions will
20 I accept and which suggestions will I not, which are
21 important. But that's fast and free, so to the extent
22 that it's good enough to be helpful, that's also a
23 resource.

24 CHAIR TRACY CHRISTOPHER: John.

25 MR. WARREN: Not to reinvent the wheel, but

1 Tyler Technologies has an application, Guide & File, that
2 they use for -- that they make available to JP courts for
3 self-represented litigants. So I would recommend looking
4 at that -- looking at that tool by Tyler, and I don't know
5 if there would be any changes or modifications, but that's
6 certainly where I would recommend you start.

7 CHAIR TRACY CHRISTOPHER: Any other comments
8 on the first -- I think I talked to Judge Chu, and his
9 plan was not to go through form by form.

10 HONORABLE NICHOLAS CHU: Yeah. No, no, no.

11 CHAIR TRACY CHRISTOPHER: Just to have sort
12 of a general overview, and so I think the question is do
13 we have any more questions on repair and remedy, and then
14 maybe Nelson could walk us through the next group. Any
15 other questions on repair and remedy forms?

16 Okay. My one question was, really, how
17 often do some of these things happen?

18 HONORABLE NICHOLAS CHU: All the time. Or
19 not all the time.

20 CHAIR TRACY CHRISTOPHER: When the tenant
21 tries to break the lease?

22 HONORABLE NICHOLAS CHU: So when I was a JP,
23 I would probably see one of these cases every month, but
24 realistically, it depends on, like, you know, if you're in
25 a college town, you see a lot more renters and things like

1 that, but, unfortunately, I see a lot more tenants mess up
2 on this than they do do it correctly, because you have to
3 send the notice, then -- you have to send the notice by
4 certified mail. Then you have to wait a certain period of
5 time. The landlord will have to respond back, or
6 sometimes the tenant would just fix it themselves and
7 expect a reimbursement, but that's not right. Or they
8 would withhold rent and things like that, but -- so I see
9 this process happen a lot, but, usually, I would say the
10 majority of times, done wrong, on either the landlord or
11 the tenant's side.

12 CHAIR TRACY CHRISTOPHER: So in connection
13 with Kent's question, I guess my question to your task
14 force is have you sat down with someone, like a tenant
15 with a, let's say, eighth grade education, right, because
16 that's kind of where -- sixth to eighth grade is what we
17 try to write rules at, and have you asked them would they
18 understand what they're doing here?

19 MR. MOCK: I mean, we -- some of us, like,
20 for example, myself, work with tenants all the time in
21 this context, and so to the extent that you're asking
22 about a focus group to that extent, no. But we do -- we
23 are constantly working with -- with tenants and providing
24 them with these toolkits and explaining the law to them.
25 I think part of the problem -- and I think Judge Chu is

1 very correct. Most tenants do not follow this process
2 correctly, and so what we find is that when we provide
3 them with the information, they then do -- it's not that
4 difficult, but there are a lot of traps, and we have found
5 that providing them with the forms and the explanations
6 they need and the FAQs has been very effective, but a
7 focus group or, I mean, addressing the whole plain
8 language and making sure that people understand I think is
9 a really important thing.

10 I really wish that Trish was here, because I
11 know that she has focused on this issue. I know that she
12 looks at the language to determine what level the language
13 is and -- and just to address the understandability of the
14 language.

15 CHAIR TRACY CHRISTOPHER: Okay. Any other
16 questions on the first, repair and remedy forms? Yes,
17 Kent.

18 HONORABLE KENT SULLIVAN: Just one other
19 quick one, and that is just to add one layer, additional
20 layer of complexity here, and that is have we thought
21 about the foreign language issue? In other words, where
22 you may be in an area where you anticipate a significant
23 number of people, you know, might not be able to
24 understand English.

25 HONORABLE NICHOLAS CHU: Yeah, I think what

1 we normally do, and Jackie -- yeah.

2 MS. DAUMERIE: Yeah, so the Office of Court
3 Administration has a interpreter/translator group, and
4 once the forms are sort of finalized, we then get them to
5 translate the forms. So that's in the plan.

6 HONORABLE KENT SULLIVAN: Got it.

7 MR. MOCK: And to be clear, that's actually
8 part of the 22.019 that --

9 THE REPORTER: I can't hear you.

10 MR. MOCK: I'm sorry. That it is actually
11 also part of 22.019 of the Government Code that all of the
12 forms are to be translated into Spanish.

13 CHAIR TRACY CHRISTOPHER: All right. Early
14 lease termination forms.

15 MR. MOCK: So the next set of forms is
16 specifically those contexts in which the tenant can
17 terminate their lease -- their lease early, and there are
18 four different contexts in which that can happen. Again,
19 these are all coming from Chapter 92 of the Texas Property
20 Code.

21 The first is the death of a sole tenant.
22 The form, FAQs, and instructions. The second has to do
23 with family violence, section 92.016 of the Texas Property
24 Code. Again, the form, the FAQs, and the instructions.
25 And then sexual assault or stalking, the ability of a

1 tenant to terminate the lease on the basis of sexual
2 assault or stalking. The FAQs and instructions. And then
3 last, military service, the ability to terminate the lease
4 on the basis of military service, and the form and the
5 FAQs and the instructions, and these are all remedies that
6 tenants have that are directly from Chapter 92 of the
7 Texas Property Code.

8 HONORABLE NICHOLAS CHU: And something to
9 point out is that the -- since the creation of the
10 document, the Legislature has said if you're a -- if
11 you're a victim of sexual assault and stalking, or sexual
12 abuse, it used to be that it would have to happen on the
13 rental property in order for you to terminate, but now the
14 law is, as of today, that it could be anywhere, and so
15 that legislative change is incorporated already in the
16 forms, so that doesn't need to be retooled on there.

17 MR. MOCK: That was a legislative change
18 from the last legislative session, effective, I believe,
19 September 1st, and we changed the toolkit so it reflects
20 that.

21 CHAIR TRACY CHRISTOPHER: Jackie, could you
22 walk us through what happens with these forms in terms of
23 -- if you know.

24 MS. DAUMERIE: Sure.

25 CHAIR TRACY CHRISTOPHER: In terms of, you

1 know, how they get put out.

2 MS. DAUMERIE: Yeah, sure. So once this
3 committee is done with its work on the forms and it's sent
4 to the Court, just like other rules projects, I and
5 Justice Bland and Justice Young will work on the forms,
6 make changes, potentially, and then present them to the
7 Court. The Court then, of course, approves them, you
8 know, usually puts them out for public comment, will
9 revise again, and then once the forms are in final form,
10 translate them. And my understanding is Texas Law Help
11 puts them on their website. They're on the Supreme
12 Court's website. We have a rule that courts can't reject
13 forms that have been approved by the Court or
14 Court-reporting organizations like that, such as Access to
15 Justice Commission, and so that's kind of the process.

16 CHAIR TRACY CHRISTOPHER: Right. And,
17 Nelson, you were saying we had a deadline, or, Judge Chu,
18 you said there was a deadline?

19 HONORABLE NICHOLAS CHU: No, no, no. Just
20 that we've -- all of the statutory changes have occurred,
21 and we accommodate for this, for the three sections
22 already. Yeah.

23 CHAIR TRACY CHRISTOPHER: That are, like,
24 currently about to -- or about to come into effect or just
25 did come into effect?

1 HONORABLE NICHOLAS CHU: Yeah, like
2 everything that is in these forms would be good to go at
3 any time from here forward. It's just if we wait a
4 legislative session, then we're kind of rolling the dice
5 at that point.

6 MR. MOCK: Absolutely.

7 CHAIR TRACY CHRISTOPHER: Which is what has
8 happened for a couple of sessions?

9 HONORABLE NICHOLAS CHU: Yes. And for the
10 eviction one, that was probably the most changing of it.
11 Yeah.

12 MS. DAUMERIE: Yeah. And we had the
13 pandemic, so...

14 HONORABLE NICHOLAS CHU: Yeah. Yeah.

15 MR. MOCK: I think they were actually before
16 the Court right before the pandemic.

17 MS. DAUMERIE: Yes. They came to the Court,
18 and I was working on them right when the pandemic hit, so
19 that sort of changed the entire landscape.

20 CHAIR TRACY CHRISTOPHER: Okay. Any
21 questions on the early lease termination forms, or
22 comments?

23 Okay. You want to go on to security
24 deposit, which more people are probably familiar with?

25 MR. MOCK: Yes. So --

1 HONORABLE NICHOLAS CHU: Yep.

2 MR. MOCK: This is the easiest one.

3 Literally, this is just a form that a tenant can use to --
4 to request their security deposit. The Chapter 92
5 requires that in order for the tenant to get their
6 security deposit back, they have to give a written
7 forwarding address, and, in fact, the landlord does not
8 have to return the security deposit -- you may not have
9 known this -- until this happens, which means that if you
10 have left the property and you have not given your
11 landlord a forwarding address and it has been six months
12 or a year or two years, the landlord does not have the
13 obligation to return your security deposit.

14 Statutory, and so this is the form that a
15 tenant can use and then the explanation in the form of the
16 FAQs and the instructions, and then, last of all, a
17 petition for the -- to be able to file in justice court
18 for the return of that and with judgment.

19 CHAIR TRACY CHRISTOPHER: So a very basic
20 question. Do any of these rights of the tenants have to
21 be given to the tenant when they enter into a lease, so
22 that they know what they have to do to get their security
23 deposit back? That seems to be the one that probably more
24 of us are familiar with from a while back.

25 MR. MOCK: Yes. The answer is, no, there's

1 no requirement that a tenant be told about any of these,
2 and I think the thing that we struggle with at Texas Rio
3 Grande Legal Aid is we frequently have people come who
4 have this issue. They have a security deposit that hasn't
5 been returned. They have a repair. They commonly have
6 repair issues that needed to be addressed, and so, you
7 know, we spend time walking through the process. I've had
8 clients who have come to me and said, you know, "My roof
9 has been leaking for six months," and you know, an obvious
10 problem that needs to be fixed, and my first question is,
11 yes, but did you give them something in writing saying
12 that you've requested that they repair the roof? And if
13 the answer is "no," the landlord had no obligation to fix
14 that issue.

15 So the lack of information, I think, is what
16 a lot of these forms are trying to address, specifically
17 that, and I think the more -- the more widely these are
18 distributed, the better that these issues will be
19 addressed. People will be informed, both landlords and
20 tenants.

21 CHAIR TRACY CHRISTOPHER: But there's -- for
22 example, there's no statutory obligation that these forms
23 be, like, available at the courthouse or available
24 anywhere for tenants?

25 MR. MOCK: So 22.019 requires that once

1 these forms are -- are approved and promulgated, that the
2 clerk of the court shall inform members of the public of
3 the availability of the forms, and there are a lot of ways
4 that that can happen. Texas Law Help is one example. The
5 courts themselves can have these forms. I know, as I
6 mentioned in my introductory statement, Judge Swearingin,
7 the justice court judge, has made a lot of these forms
8 available in the toolkits.

9 HONORABLE NICHOLAS CHU: And that's pretty
10 common in a lot of JP courts these days.

11 MR. MOCK: That's true.

12 HONORABLE NICHOLAS CHU: On their -- not
13 necessarily in their, like, lobby, but on their websites
14 and stuff like that.

15 CHAIR TRACY CHRISTOPHER: Yes, Harvey.

16 HONORABLE HARVEY BROWN: I wonder if it
17 would be worth, once the forms are finished, contacting
18 the Texas Association of Realtors, or whatever it's
19 called, that puts together the form lease that many, many
20 landlords use and say, "Would you add this paragraph
21 advising them of where to find these forms?" I don't know
22 if they would push back on that, but it seems like --

23 HONORABLE NICHOLAS CHU: As nice as I can
24 say this, the Realtor or the apartment association and
25 Realtors have a specific purpose, and providing

1 information that is not contractually obligated may not be
2 in their best interest.

3 HONORABLE HARVEY BROWN: Well, I can
4 understand.

5 MR. MOCK: It is included in some leases. I
6 mean, and some of the statutory language, for example,
7 having to do with repairs, they don't -- it's not required
8 that they be in leases, but some leases do include that
9 information. To the extent that people would be willing
10 to distribute this information and possible forms, it
11 would be wonderful.

12 HONORABLE HARVEY BROWN: I understand it's
13 not in their best interest, but it seems like a agency
14 might consider it. Now, maybe they quickly reject it, but
15 it seems like there's no harm in asking.

16 Then the second question I had is do they
17 have a deadline by which they must give their forwarding
18 address? You said it might be a year or two years. How
19 long does the landlord have to hold that security deposit?
20 I ask for it in five years. Do they have to give it back?

21 MR. MOCK: I think the answer is "yes."

22 HONORABLE NICHOLAS CHU: Technically, as a
23 landlord, you're supposed to hold that security deposit in
24 escrow forever.

25 HONORABLE HARVEY BROWN: Right.

1 HONORABLE NICHOLAS CHU: And then -- yeah,
2 so, something Chief Justice Christopher pointed out that I
3 just wanted tangentially point out, I just want to make
4 sure everybody is clear on. These forms answer questions
5 that are statutory required, so you can't contract these
6 out on a lease. So there's no variation of your lease
7 provisions having a different way of doing these
8 mechanisms there.

9 MR. MOCK: Or to be clear, if there are, we
10 have mentioned that. So you know, if the -- if the law
11 itself allows for the waiver of certain things, we will
12 mention that in the FAQs.

13 HONORABLE NICHOLAS CHU: Jackie, one thing I
14 did want to point out. I just realized this. On the
15 judgment for the security deposit, it doesn't have the
16 statutory -- or the rules requirement of the notice of
17 appeal and then the -- if money judgment, exempt property,
18 in English and Spanish, so that just needs to be added
19 onto it.

20 CHAIR TRACY CHRISTOPHER: Yes, Judge
21 Estevez.

22 HONORABLE ANA ESTEVEZ: I just had a
23 question, just because you were talking about the security
24 deposits. If they don't make a claim, don't they have to
25 send them to Texas for that didn't claim Texas or claim

1 your money Texas? I've noticed that everyone I went to
2 college with has money there, and it's from their deposit.
3 I'm not kidding, but I'm on there, too, but I have other
4 names on there, like roommates.

5 MR. WARREN: You're talking about unclaimed
6 property.

7 HONORABLE ANA ESTEVEZ: Yeah, the unclaimed
8 property. So is that a -- is that a requirement?

9 HONORABLE NICHOLAS CHU: It's not a -- what
10 functionally happens is, you know, if you do it right and
11 there are no deductions, then, yes, you should probably
12 either hold it in escrow forever or just write it off into
13 the unclaimed property, but what really happens for a lot
14 of these landlords is that they'll claim it as, hey,
15 here's these repairs that I had to do and just deduct it
16 out. I mean --

17 HONORABLE ANA ESTEVEZ: Check your name.

18 MR. MOCK: The example that I gave of the
19 delay is I would guess probably not that -- that common,
20 that the more common thing is the landlord will -- will,
21 you know, give the accounting and maybe subtract and not
22 return the deposit, but my point was just to point out
23 that there's not the obligation under the Property Code
24 until that actually happens. It's the gotcha, with
25 respect to the tenant, and this was modified just to be

1 clear, recently, and we made these changes, but this was
2 actually modified in the most recent legislative session
3 with regard to the ability to -- for a tenant to
4 communicate with the landlord by e-mail, if that's a
5 common way that they communicate, so that they -- so that
6 this request and the notice in writing of the forwarding
7 address can take place by e-mail.

8 CHAIR TRACY CHRISTOPHER: And did these
9 forms deal with, you know, a fight over the security
10 deposit? Or is this just a "give it back to me" and then
11 see what happens?

12 MR. MOCK: Correct. It does not address --
13 I mean, it explains the possibility of disputes. It
14 explains how they may be adjudicated, just in terms of a
15 dispute about, you know, whether the security deposit
16 should go or not, but the form itself is simply a "I would
17 like my security deposit back. Here is my forwarding
18 address." And if there's a dispute about that, the
19 ability to sue in justice court.

20 CHAIR TRACY CHRISTOPHER: Yes.

21 MR. LONGORIA: When they're finished, where
22 are they going to be put out by? To the extent I've ever
23 talked to tenants about these disputes, they're always so
24 confused about the pathways to actually get these things
25 on the internet, and I was just curious if you have

1 thought that over.

2 HONORABLE NICHOLAS CHU: So sometimes --
3 Jackie.

4 MS. DAUMERIE: Sure. Yeah, they are
5 available on the Court's website. They are also available
6 on Texas Law Help. Sometimes local courts put them up as
7 well.

8 HONORABLE NICHOLAS CHU: Law libraries.

9 MS. DAUMERIE: Yes, law libraries.

10 MR. MOCK: And Texas Law Help is a good
11 resource as well.

12 MS. DAUMERIE: Yeah.

13 HONORABLE NICHOLAS CHU: I know the Texas
14 Justice Court Training Center, who, by court order, is the
15 entity that trains all of the justices of the peace, they
16 also shoot those out to all of the JPs as well, so those
17 forms kind of get around.

18 CHAIR TRACY CHRISTOPHER: Do we have an
19 internet presence in terms of how to steer people to the
20 right site, or is it -- you know, if somebody's first step
21 is always to go to the internet to say, how do I get my
22 security deposit back, right, and do we optimize -- do we
23 have a search optimization, I guess is the question, on
24 how to get them to the right forms?

25 HONORABLE NICHOLAS CHU: No. And it really

1 is just a question of which entity kind of is in charge of
2 that. Maybe it's an Access to Justice Commission question
3 to kind of look towards that. I know they house -- or not
4 house, but they point to a lot of these documents, but
5 TLSC does a lot of that also, but I don't think there's,
6 like, we're paying for search optimization thing to get
7 that to them.

8 CHAIR TRACY CHRISTOPHER: Okay. Any other
9 questions or comments on the security deposit forms? Yes,
10 John.

11 MR. WARREN: I would just like to say, for
12 my accounting and trust division, before we escheat money
13 to the State, we actually go through all of those
14 accounts, and we actually try to contact those individuals
15 to let them know that they have money, and we will -- once
16 they have confirmed that they are the individual, then we
17 send the money to them, but we try to do that before we
18 send the money to the State, so that may be an option as a
19 business practice.

20 CHAIR TRACY CHRISTOPHER: I don't know if
21 the landlords have to do that.

22 HONORABLE NICHOLAS CHU: Yeah, it's not a
23 requirement under the law or under the Texas Apartment
24 Association lease right now.

25 CHAIR TRACY CHRISTOPHER: Any other

1 questions on security deposit forms?

2 All right. Well, I want to thank the
3 committee for shepherding through this process and,
4 Nelson, for all of your work and your task force group on
5 getting this submitted to the Supreme Court. I know
6 Justice Bland is not here, but they are very grateful that
7 the committee and the task force has done all of this work
8 and is ready to move forward. So I'm sure Jackie will be
9 contacting you-all if there's any fine points that she
10 needs to deal with, but we want to thank you for all of
11 your hard works.

12 HONORABLE NICHOLAS CHU: Thanks.

13 MR. MOCK: Thank you very much, and I will
14 pass that along to the task force members. Appreciate it.

15 CHAIR TRACY CHRISTOPHER: Thank you.

16 MR. MOCK: If I may be excused.

17 CHAIR TRACY CHRISTOPHER: All right. So
18 our next item on the agenda is the new summary judgment
19 rule. We're in a little bit of an odd posture here. Just
20 we've talked about it twice here at the Supreme Court
21 Advisory Committee meeting, and now we have a draft rule,
22 and we're in the comment period, and the summary judgment
23 subgroup that had been working on this started working on,
24 you know, comments, and I asked the Court whether they
25 would like to just see our written comments or whether

1 they would like us to bring it back to the committee for
2 further discussion, and the Court said, yes, let's bring
3 it back to the committee for further discussion.

4 So the subcommittee has gotten the written
5 reports from -- or written comments for the past month, I
6 guess, that we've started to have written comments, and
7 they're pretty entertaining.

8 No, I don't mean that in a bad way. Some of
9 them are like "Why are we making this change? This is
10 terrible." We're just like, okay, there's a new law that
11 says we have to, so people seemed to have missed that part
12 of the introduction on the Supreme Court new rules.

13 But I know the subcommittee has looked at
14 those comments and politely are making some suggestions to
15 tweak the rule, and the Court said go ahead and bring it
16 back for full discussion here, understanding that we are
17 sort of in the tweaking process as opposed to the total
18 do-over process, because the Court has done a lot of work
19 to get a rule in place timely.

20 So with that said, I'm going to turn it over
21 to Richard to start.

22 MR. ORSINGER: Thank you Chief Justice, and
23 we appreciate the opportunity to make this presentation
24 today. Our group is an ad hoc group, so the committee is
25 an informal -- or the subcommittee is an informal

1 subcommittee, and I'm just an acting chair, not appointed
2 by anybody.

3 I do want to say that this is not submitted
4 for Supreme Court's consideration not only politely, but
5 also humbly, because we understand that they have greatly
6 renovated the old rule based on the discussions here, but
7 in those changes there are perhaps a lot of unintended
8 consequences or perhaps some ramifications that may not
9 have been evident to us or to the Court at the time that
10 the decision was made, so I think this is a great
11 opportunity.

12 I want to thank everyone who contributed to
13 our ad hoc committee operations, didn't matter whether you
14 were a member or not, and different people stepped forward
15 at different times, and it made a huge difference, and I
16 want to thank you all, everyone who participated, and
17 particularly those who stepped forward to help in the
18 drafting process.

19 So what I'm going to suggest, Chief Justice,
20 is if there's anyone that would like to make an opening
21 overview comment, we could do that. If there are none, we
22 can dive right into the first section of the rule, but I
23 just wanted to be sure there was an opportunity if someone
24 had something that they felt very strongly that should be
25 considered throughout, that now would be an opportunity to

1 make the statement. Not that you can't say what you want
2 later on, but is there anyone who wants to say anything by
3 way of an introductory comment?

4 Okay. Harvey, go ahead.

5 HONORABLE HARVEY BROWN: I just want to say
6 I think the Court did a great job in reorganizing and
7 polishing it, and I think it's very, very readable.
8 These -- Kent's words earlier, I do think it's a pretty
9 plain language, an easy follow.

10 I think one of the things that we struggled
11 with a little bit is there are a few things that are taken
12 -- that were in the original rule that are not in the new
13 draft rule, and we're not sure if that was intentional, so
14 we've added some of those back in. It may be the Court
15 did that intentionally, but we wanted to err on the side
16 of making sure everybody knew if something may have just
17 inadvertently got cut in the process.

18 MR. ORSINGER: Thank you. Is there anyone
19 else? Okay. Then let's dive right in. Rule 166a summary
20 judgment, subdivision (a), subsection (a), definitions,
21 paragraph (1). And everyone will recall that, originally,
22 we had a rule written for a traditional motion for summary
23 judgment and then along came the no-evidence motion stuck
24 in subparagraph (i) and didn't really integrate with the
25 rest of the rule, and now the Court has accepted our

1 recommendation to treat them as equally, as if they're
2 independent motions, and so the definitions now are broken
3 into traditional motion versus no-evidence motion.

4 Now, in the very first paragraph (a),
5 traditional motion, under the proposed rule, it reads that
6 "Traditional motion is a motion claiming there is no
7 genuine issue as to any material fact of a claim or
8 defense on which the movant would have the burden of proof
9 at trial." Well, that's not completely right in all
10 circumstances, because sometimes someone might file a
11 motion for summary judgment against someone else's
12 affirmative defense, saying that we can -- we can
13 definitively disprove their affirmative defense, so grant
14 a summary judgment. So in a traditional motion, it's not
15 the burden of proof at the time of trial that's
16 controlling.

17 That's really important, obviously, on a
18 no-evidence motion, but the subcommittee's suggestion is
19 rather than on the movant -- "on which the movant would
20 have the burden of proof at trial" is instead say
21 "establishing each element of the movant's own claim or
22 defense as a matter of law or negating an element of the
23 nonmovant's claim or defense as a matter of law." So any
24 comments from anyone? Does that make sense, or
25 suggestions, objections?

1 CHAIR TRACY CHRISTOPHER: So, and I don't
2 know whether you feel comfortable with this, Jackie,
3 because I know that you're the main advocate on whether,
4 for example, that was intentionally left out, or --
5 because some of the things we noticed that the rule left
6 out, and we have put them back in, but we weren't sure
7 whether that was intentional on the part of the Court or
8 not. And I don't know if you feel comfortable giving us
9 that information.

10 The comment says no substantive changes were
11 intended, and we felt -- I know we felt this was a
12 substantive change to only allow the traditional summary
13 judgment on the movant's burden of proof. So I just
14 wanted that, for the Court to understand that's why we
15 added that first sentence in there, because you can get a
16 traditional motion for summary judgment on the other
17 side's claim.

18 Yes, Harvey.

19 HONORABLE HARVEY BROWN: And I just wanted
20 to add that the committee did go through the comments and
21 spent some time going through the comments, and I think at
22 least two people commented on this as well.

23 CHAIR TRACY CHRISTOPHER: That it was --
24 that it seemed to be missing?

25 HONORABLE HARVEY BROWN: Right.

1 MS. DAUMERIE: I think this is a good
2 suggestion. As you know, the summary judgment rule that's
3 currently in effect did not have any definitions, and so,
4 you know, this was an attempt to define it. Perhaps we
5 missed the mark a little bit, and appreciate the
6 suggestions.

7 CHAIR TRACY CHRISTOPHER: We didn't want
8 to -- I mean, some of the suggestions we've made, we felt
9 like it had been deleted from the old rule, and we didn't
10 know whether that was on purpose, so we, you know, are
11 kind of bringing it back, just for you to think about
12 that.

13 MS. DAUMERIE: Yeah.

14 CHAIR TRACY CHRISTOPHER: Yeah. Judge Chu.

15 HONORABLE NICHOLAS CHU: Maybe we talked
16 about this before, but I just kind of didn't see a reason
17 why we had to differentiate between no evidence and
18 traditional as a requirement for the motion when there is
19 no mechanism of if you don't follow that rule what
20 happens, so I don't know if there's really a reason other
21 than it makes it a little bit easier for everybody to
22 figure out what type of summary judgment it is.

23 MS. DAUMERIE: Are you talking about having
24 to title the motion?

25 HONORABLE NICHOLAS CHU: Yeah. Yeah.

1 MS. DAUMERIE: Yeah, I mean, I think that
2 was a suggestion from this committee, just to help the
3 judges know how much time they're going to need and -- you
4 know, when setting the hearing. So I think that was just
5 like getting the judge the information they need very
6 clearly up front, so that they can do what they need to do
7 in terms of meeting deadlines under the statute.

8 CHAIR TRACY CHRISTOPHER: Richard.

9 MR. ORSINGER: So, in my experience, after
10 the introduction of the no-evidence motion for summary
11 judgment, there were -- sometimes there were blended
12 motions, and the lawyers didn't adequately differentiate
13 which part of the motion was traditional and which part of
14 the motion was no evidence, and I think it's important for
15 us to cause lawyers to think through what is my
16 traditional part and what is my no-evidence part, and
17 identifying them differently and having different
18 standards that are plainly stated I think is an
19 encouragement to lawyers not to mix it together, but keep
20 it separate so that everybody understands what's going on.
21 That's my perspective on it. I think it's helpful.

22 CHAIR TRACY CHRISTOPHER: Okay. So any
23 comments on this first suggested change? Yes, Roger.

24 MR. HUGHES: Well, I guess I'm a fan of the
25 way the original -- the rule was originally written, that

1 you could move for a summary judgment if you could
2 establish there was no issue of material fact, whether it
3 was on something you had the burden of proof or whether it
4 was on your opponent's affirmative defense. And now what
5 I see the rule is moving towards is, well, you can only
6 move for summary judgment, a traditional motion, on your
7 claims or defenses, and if you think the other side -- if
8 you want to knock out an affirmative defense on the other
9 side, you're just going to have to file a no-evidence.

10 You know, sometimes you can do both. I
11 mean, you can affirmatively disprove it, and they don't
12 have anything.

13 MR. ORSINGER: So, Roger, I would say it's
14 our purpose in paragraph (1) to make it clear that you can
15 file a traditional motion for summary judgment against an
16 affirmative defense. That's our desire, is that it's
17 clear that it wouldn't have to be a no-evidence motion.

18 CHAIR TRACY CHRISTOPHER: Yeah, Emily.

19 MR. HUGHES: Well, if I was going to finish,
20 I would say I think to make it -- to restore the law the
21 way it was, you would remove the part that you have
22 redlined out, and then the rest of it, that was just case
23 law. I mean, if you file a motion for summary judgment,
24 you have to be familiar with the law, and the law -- the
25 case law has already fleshed this out. All you're doing

1 is enshrining case law in the rule, which sometimes
2 there's a value in that, but I don't see a particular
3 purpose in it at this point.

4 CHAIR TRACY CHRISTOPHER: Judge Miskel.

5 HONORABLE EMILY MISKEL: Not relevant
6 anymore.

7 CHAIR TRACY CHRISTOPHER: Okay. Any other
8 comments on the first suggestion? I'll call them
9 suggestions.

10 MR. ORSINGER: Okay. Thank you. So we'll
11 move on to the second one, which is (a)(2), and this has
12 to do with the definition of a no-evidence motion for
13 summary judgment. "A motion claiming there is no evidence
14 of one or more essential elements of a claim or defense on
15 which" -- and the proposed rule or the preliminarily
16 approved rule says "an adverse party would have a burden
17 of proof at trial," and the suggestion is to change that
18 to "the nonmovant." And, of course, there may be multiple
19 adverse parties, but you may be moving for summary
20 judgment against only one or two, and so I think it's
21 clearer, I think, to say "the nonmovant."

22 Having said that, let me mention that -- and
23 this is not a problem that I think we can solve with the
24 rule, but it's something we should all be aware of. It's
25 not entirely clear under the case law right now when a

1 party has the burden of proof at trial. In some
2 instances, it's evident, like in certain kinds of lawsuits
3 where it's clear that there's no burden shifting, and the
4 Texas Supreme Court handed down a really significant case
5 back in 1981, *Missouri-Kansas-Texas Railroad Vs. The City*
6 *of Dallas*, in which the Court said presumptions and
7 burdens of proof at trial are immaterial to a standard
8 motion for summary judgment.

9 But when we had the no-evidence motion for
10 summary judgment, all of the sudden who had the burden of
11 proof at trial became determinative on how the motion was
12 handled, and we had some problems.

13 Two cases I want to mention is a Fort Worth
14 case, 2019, *In Re: Estate of Klutts*, where there was a
15 lawsuit against someone who had a power of attorney, who
16 was a fiduciary, and there was a claim of undue influence,
17 and the Fort Worth Court of Appeals said that traditional
18 fiduciary law flipped the burden of proof and put the
19 burden of proof on the fiduciary to prove no undue
20 influence. So, now, all of the sudden, the party who was
21 bringing a claim of undue influence didn't have the burden
22 of proof at trial if the burden was flipped, but under the
23 *M-K-T Vs. Dallas* case, the presumptions don't apply.

24 So one of the questions that the courts have
25 to answer, because I don't see how we can answer it in the

1 rule, is when does burden shifting really matter for
2 purposes of no-evidence summary judgment, and it recently
3 came up in a San Antonio Court of Appeals case of *State*
4 *Vs. Wilson*, where a husband filed a motion for no
5 evidence -- a no-evidence motion for summary judgment
6 against the wife, who claimed community funds had been
7 commingled with his separate property funds, and the trial
8 court granted the summary judgment because the wife didn't
9 present evidence of community property, and the court of
10 appeals affirmed that. But the Family Code says all
11 property owned or possessed by a spouse at the time of
12 marriage is community. So the burden should have been on
13 the husband to prove separate, and he shouldn't have been
14 able to use a no-evidence motion to knock out a claim for
15 the community. So I think we still have some questions to
16 answer, but I don't think we can answer them in this rule,
17 but I think we need to answer them through definitive
18 court opinions.

19 So, at any rate, the suggestion I -- any
20 comment then on the idea of substituting "nonmovant" for
21 "adverse party"?

22 Okay. Then let's move on to suggestion
23 (a) (3). The idea is, is that we've now included language
24 or there is language that you can use a declaration
25 instead of an affidavit, which we all know is -- is

1 authorized by the Civil Practice and Remedies Code, and I
2 use it now exclusively, but it -- we were concerned that a
3 pro se litigant might not know the legal definition of
4 declaration and might just think that they can just say,
5 "I declare so-and-so" and stick it on the back of their
6 motion and then that's a declaration. So we wanted to
7 make it clear that, no, no, declaration here has a
8 specific legal meaning that comes right out of the Civil
9 Practice and Remedies Code. We don't try to restate the
10 statute. We just refer them to the statute.

11 CHAIR TRACY CHRISTOPHER: Any comments on
12 that suggested addition? Okay. Roger.

13 MR. HUGHES: Well, this raised, in my
14 opinion, if all you're worried is the pro se litigants
15 aren't going to get it, what an unsworn declaration is, I
16 don't -- there may be other statutes authorizing unsworn
17 declaration. I can remember when I was in the Army and
18 there was a federal statute about overseas soldiers,
19 et cetera. There may be other ones. I think it would be
20 sufficient later on when you talk about what evidence may
21 consider, just say "a proper unsworn declaration" or
22 "unsworn declaration that complies with law" and let it be
23 up to the opposing party to see whether they object or
24 not. But, you know, if you're a pro se litigant, telling
25 them it's in the Civil Practice and Remedies Code, and a

1 lot of them are going to go, "What's that and where do I
2 find it?" I'm not sure you're solving anything by putting
3 this in there.

4 CHAIR TRACY CHRISTOPHER: Judge Miskel.

5 HONORABLE EMILY MISKEL: A different version
6 that the subcommittee considered was, rather than having a
7 definition in (a) (3), is just to change everywhere it said
8 "affidavit or declaration" to say "affidavit or unsworn
9 declaration." So that might address what you're raising.

10 MR. HUGHES: Yeah.

11 CHAIR TRACY CHRISTOPHER: But that still
12 doesn't tell us what an unsworn declaration is.

13 HONORABLE EMILY MISKEL: Well, and I
14 wouldn't say the issue is limited to self-represented
15 litigants, because I certainly see attorneys doing
16 declarations that don't swear to stuff or don't, you know,
17 do anything.

18 CHAIR TRACY CHRISTOPHER: Yes, Kennon.

19 MS. WOOTEN: I second that. I have seen
20 many declarations from attorneys that don't comply with
21 the statutory requirement, so I think this is for
22 everybody, but I do think that any time we put a specific
23 statutory reference in the rule text, we run the risk of
24 it becoming outdated, and so a more general statement
25 might have the added benefit of staying up to date, and

1 you could put the statutory reference in a comment
2 instead, which is easier to change and I've seen done in
3 other contexts. Just a thought.

4 CHAIR TRACY CHRISTOPHER: Okay. Yes,
5 Lamont.

6 MR. JEFFERSON: I agree with that, and I'd
7 just say, in reading this, this definition kind of just
8 looks out of place. I mean, it looks like it's a -- I
9 think you would wonder, if you didn't -- it doesn't
10 comport with kind of the weight of the previous
11 definitions. It just looks like why aren't there more
12 definitions?

13 MR. ORSINGER: If I may, following up on
14 both Roger's comments as well as Lamont's, there's a
15 paragraph (j), discusses evidence included with the motion
16 and response, and that's where we've got a laundry list of
17 things like deposition transcripts, pleadings,
18 authenticated records. If you wanted to consider this to
19 be an evidentiary matter, you could stick it there, and it
20 wouldn't be quite so uniquely identified, Lamont. You see
21 what I'm saying?

22 That's a possibility. Now, we use it
23 throughout the rule, so it's not just in the evidence
24 section. It's going to be mentioned multiple times, so...

25 CHAIR TRACY CHRISTOPHER: Yes, Pete.

1 MR. SCHENKKAN: For solving that problem of
2 moving this definition out, but still having it comply
3 with everything it applies to, you could do that by
4 simply, at the bottom of page four in (j)(1) where you've
5 got (a) through (f), and at the moment (d) is "Affidavits
6 and declarations," you could make "declarations" (e), and
7 declarations would be then declarations that comply with
8 the requirements of the Texas Civil Practice and Remedies
9 Code.

10 CHAIR TRACY CHRISTOPHER: You could put it
11 there. Uh-huh.

12 MR. SCHENKKAN: And then, see, it would be
13 in the place you would want to find it in the evidence
14 section.

15 CHAIR TRACY CHRISTOPHER: Quentin.

16 MR. SMITH: I was going to say I have a
17 problem with the evidence section, and we're not there
18 yet, so I wouldn't want to place it there.

19 MR. SCHENKKAN: Just putting your marker
20 down.

21 MR. SMITH: Just putting my marker down.

22 CHAIR TRACY CHRISTOPHER: Okay. All right.
23 Any other comments on that addition, which we would be
24 glad to -- I think the subcommittee would be glad to have
25 it put someplace else if people think that that would read

1 better that way. Okay, Richard.

2 MR. ORSINGER: Okay. So moving on to
3 subdivision (b) (1) under "Motions," "Party may move for a
4 summary judgment on any claim," rather than "a claim."
5 "Any claim or defense."

6 "A motion may combine both traditional and
7 no-evidence motions." And then this is a suggested
8 addition, "Any cross-motion may not be contained within a
9 summary judgment response, but must be filed in a
10 stand-alone motion," and the reason for that is the
11 timetables for a motion for summary judgment applies
12 motion by motion, and if someone includes in the response
13 a built-in motion, all of the sudden we've got another
14 timetable running that's embedded in the response and the
15 duty to reply to the response, and our thought was this
16 gets too crazy. You can't keep track of what's what when
17 there's a motion for summary judgment included in a
18 response, so we thought the best way to avoid that kind of
19 confusion was to prohibit including a motion for summary
20 judgment in a response and make them file it as a
21 stand-alone motion that has its own time clock.

22 CHAIR TRACY CHRISTOPHER: Judge Miskel.

23 HONORABLE EMILY MISKEL: And, specifically,
24 because the people tracking the deadlines for reporting
25 are clerks, and they can only do things that are

1 ministerial duties, and so we thought it would be not only
2 burdensome but unfair to clerks to have them try to figure
3 out whether a summary judgment response contains a new
4 motion for summary judgment.

5 CHAIR TRACY CHRISTOPHER: Judge Chu.

6 HONORABLE NICHOLAS CHU: To kind of
7 piggyback on that comment, in real world context I'm
8 already seeing this where we're doing this, and almost
9 everybody uses Odyssey or a Tyler Technology product, and
10 in order for us to track it right now, we put a timetable
11 flag, but there's no ability to do that once there's
12 already a timetable flag. So if we don't do it this way,
13 large volume courts will not have a way to adequately
14 track their deadlines.

15 CHAIR TRACY CHRISTOPHER: And we talked
16 about it -- sorry, if I can make a comment. We did talk
17 about in the subcommittee, and it is going to make it a
18 little more burdensome for the lawyers, or it could, just
19 because you might have to have one hearing on the first
20 motion and then two weeks later have another hearing on
21 the cross-motion, but, unfortunately, we didn't really see
22 a good way around it under the statute.

23 Yes, Pete.

24 MR. SCHENKKAN: For that, those purposes,
25 I'm wondering if it wouldn't be a good idea to break

1 (b) (1), in general, out into (b) (1) in general and
2 consistent first two sentences and then have (2) be
3 cross-motions. Really highlight the fact that a
4 cross-motion is a -- what we're saying is it needs to be
5 for our purposes, the court system's purposes, a whole
6 different thing. And then if you really wanted to try to
7 encourage people not to make a complete hash of this for a
8 few years, you might also include that in a new comment
9 that we're now only going to have a comment at the end of
10 the rule that relates to the current rule. We could say
11 cross-motions are in there in a separate heading because
12 they've got their own deadlines under this rule and the
13 applicable statute. Sort of tells everybody why.

14 CHAIR TRACY CHRISTOPHER: Sharena.

15 MS. GILLILAND: As a clerk, we have been
16 talking with the OCA and our colleagues there about what
17 we anticipate reporting might look like, and so kudos to
18 the subcommittee for recognizing this might be an
19 impossibility for clerks to track and report, as well as
20 even working with the court staff on getting hearings set
21 that fits both deadlines so that they can be in
22 compliance. So kudos for recognizing that that could be a
23 potential problem, and we appreciate that.

24 CHAIR TRACY CHRISTOPHER: Judge Miskel.

25 HONORABLE EMILY MISKEL: I also wanted to

1 suggest, kind of like we did for the landlord-tenant
2 matters that we discussed, it might be helpful to have a
3 plain language info sheet to accompany the new rule for
4 lawyers, because when we reviewed the comments, it seems
5 like a lot of people legitimately are not aware of the
6 legislative change and don't understand the purpose of
7 this rule, and there's a lot of stuff in here, like
8 prohibiting cross-motions, that they're going to say what
9 do we need that for, and they don't understand the clerk's
10 reporting duties. And so just as the other resource may
11 benefit by a plain language, simply worded, short
12 explainer, we might consider doing some sort of brochure,
13 or maybe the State Bar could do it, kind of maybe giving a
14 heads-up these are legislative changes that we're trying
15 to comply with.

16 CHAIR TRACY CHRISTOPHER: Harvey.

17 HONORABLE HARVEY BROWN: In the end, we have
18 a comment that we're not making any substantive change,
19 and the committee had some concern that there is two or
20 three places that may be considered substantive change,
21 and this would be one of those. You could do this,
22 obviously, together before, so you might want to
23 reconsider that comment.

24 CHAIR TRACY CHRISTOPHER: Yeah. We were not
25 sure it was correct to say this wasn't substantive.

1 Yeah, Roger.

2 MR. HUGHES: It -- and I'm just trying to
3 think out loud. I see the problem with trying to preserve
4 separate deadlines because you're going to have two
5 trains, related trains, running on different timetables,
6 but they're the same issues.

7 My concern is if you're going to require a
8 separate document for the cross-motion, I think you're
9 going to have to maybe tweak the rule that says the
10 evidence has to be attached to a traditional motion, or
11 included, and I'll come back to that in a moment. I would
12 think that if you're going to say cross-motions have to be
13 separate documents, the person responding and then
14 cross-motioning may not want to file the same evidence
15 twice, and even though we're in the age of electronics, if
16 there's still a document -- an electronic storage issue
17 that comes up at some point, just like when we had paper
18 records. So what I'm thinking is if you're going to
19 require a separate motion, the rule for that should say
20 that the motion can then refer to specifically and
21 incorporate by reference the evidence attached to the
22 motion, to the original response, so that we don't have
23 the person having to file the same voluminous depositions,
24 lengthy documents, that they file with a response, which
25 they would also be filing identically with their

1 cross-motion.

2 CHAIR TRACY CHRISTOPHER: Harvey.

3 HONORABLE HARVEY BROWN: I think we had
4 tried to cover that on page four, (j)(2), where we
5 specifically say evidence can be included by
6 reference. It may not work, but that was what the
7 intention was.

8 MR. HUGHES: Well, it's just that the way
9 that (2)(c) is written, it says "must include any
10 reference" -- "any evidence required to support the
11 motion."

12 MR. ORSINGER: We need to have a separate
13 discussion on that when we get to it. Can we do that?

14 CHAIR TRACY CHRISTOPHER: Yeah. Yeah, let's
15 not skip ahead. I think we wanted to bring to the Court's
16 attention -- and it looks like the clerks have already
17 identified this as a potential problem -- what we do with
18 cross-motions and how we get them separately docketed.

19 Judge Miskel.

20 HONORABLE EMILY MISKEL: Okay, but without
21 skipping ahead, what I hear you to say is (2)(c), at first
22 read seems restrictive, but I will say the rest of the new
23 proposed rule uses the word "include," so, for example,
24 response, (d)(2) in the published proposed rule, it says,
25 "The response must include any evidence." So that's

1 consistent with the wording of the rest of the rule, and
2 so that's why in one place in (j) (2) we tried to define
3 what does it mean to include evidence. Does that address
4 your concern?

5 MR. HUGHES: I suppose it would. I had a
6 problem with (j) listing what evidence that you could --
7 that you're supposed to be filing. It ends up being a
8 grab bag. I'll wait until we get there.

9 CHAIR TRACY CHRISTOPHER: Okay.

10 MR. HUGHES: I think, basically, you're
11 going to have to say "include a reference to."

12 CHAIR TRACY CHRISTOPHER: Yeah, let's wait,
13 if we can. Lamont.

14 MR. JEFFERSON: This may not be a problem.
15 It doesn't happen very often in my practice, but when
16 we're talking about a cross-motion, we have to maybe
17 cross-reference to what is now (h) (4), which says what
18 happens if the motion is not fully adjudicated. The court
19 can still do stuff that's meaningful, and does that mean
20 that if I want the court to do something that's meaningful
21 in the case, I've got to have that in a separate motion?
22 And so the judge has discretion under the rule to make
23 very substantive rulings, and I might say I want that in
24 my response without having to file a separate -- a
25 separate motion. Does that mean -- is that the same as a

1 summary judgment?

2 HONORABLE ANA ESTEVEZ: Yes, it is.

3 MR. JEFFERSON: Well, but this -- but (h)(4)
4 doesn't say it's got to be based on a motion. It's based
5 on -- it's based on the movant, on the movant's motion.
6 So the court listens to the arguments, based on the
7 movant's motion for summary judgment, and the court can
8 make then findings based on the evidence that's before it.
9 And I might say, look, I don't know -- in my response to
10 the motion, I'm not asking for summary judgment, but I am
11 saying these facts are established as a matter of law.

12 MR. ORSINGER: Can I comment?

13 CHAIR TRACY CHRISTOPHER: Yes. Go ahead.
14 Sorry.

15 MR. ORSINGER: The reason we're all talking
16 about this is because the Legislature has established a
17 timetable that starts with the filing of a motion for
18 summary judgment. The relief you're requesting, which is
19 on their motion for summary judgment, tick, tick, tick,
20 tick, on their motion, I want the court to do the
21 following with regard to deciding what the uncontested
22 fact issues are.

23 That request, in my opinion, is not a motion
24 for summary judgment, and there is no clock on it.
25 You're -- if you are, you're leveraging off of their

1 motion, and that's the timetable that counts. So I don't
2 feel like you have to file a motion, like a summary
3 judgment, as a separate motion in order to get a ruling
4 on --

5 MR. JEFFERSON: But Judge Estevez thinks I
6 do.

7 HONORABLE ANA ESTEVEZ: It depends what the
8 issue is. I would. I would. I mean, it just depends,
9 because if you came in and asked for something and the
10 other side didn't even have notice of it, and it's -- I
11 mean, I would need a better example of what you're -- I
12 think some of them, some of them, can be motions for
13 summary judgment, because it might determine an issue in
14 the case that would have been a final determination.

15 MR. JEFFERSON: I mean, it could.

16 HONORABLE ANA ESTEVEZ: Not on all claims,
17 so it would just depend on what you're asking.

18 MR. JEFFERSON: It could be a motion.

19 MR. ORSINGER: We don't want this rule to
20 say that the requesting the court to find which matters
21 are not contested is a motion for summary judgment.
22 Because it hasn't been, up to now. It's just been a
23 remedy that the court can rule on after considering a
24 motion for summary judgment.

25 MR. JEFFERSON: But if my opponent is the

1 one making the request, I'm going to point to the addition
2 and say, "You didn't file a motion. You can't do that."

3 MR. ORSINGER: And do you feel like the
4 language requires that a motion be filed?

5 MR. JEFFERSON: I -- you could easily make
6 the argument that it does.

7 CHAIR TRACY CHRISTOPHER: But this language
8 is in the current rule.

9 MR. JEFFERSON: I know.

10 CHAIR TRACY CHRISTOPHER: (e), right.

11 MR. JEFFERSON: Yes.

12 CHAIR TRACY CHRISTOPHER: And it -- you
13 know, it's been existing alongside our traditional rules.

14 MR. JEFFERSON: That's right. I mean, it
15 doesn't happen a lot. I haven't seen it. At least, in my
16 practice I haven't seen it happen a lot, but it is, for
17 all intents and purposes, a summary judgment ruling that
18 the court has the ability to make without there being a
19 motion for summary judgment on file by the one who wants
20 that finding.

21 CHAIR TRACY CHRISTOPHER: But doesn't
22 that -- isn't that what (h) (4) does?

23 MR. JEFFERSON: All I'm saying is this
24 language, this language, calls into question whether you
25 have to have a motion. It kind of takes away the court's

1 discretion if you don't have the motion on file, right?
2 Cross-motion may not be contained within a summary
3 judgment response. So we're saying this is not a
4 cross-motion, but the court can make findings as if it
5 were. So if the court were -- if the court were to say,
6 I'm going to --

7 HONORABLE ANA ESTEVEZ: Let's do a contract
8 thing.

9 MR. JEFFERSON: That certain facts are
10 established, if I'm the respondent, I'm going to say -- or
11 the movant, I'm going to say, "You can't do that. My
12 opponent didn't file a cross-motion."

13 CHAIR TRACY CHRISTOPHER: But don't we have
14 that same problem in the current rule, when you look at
15 the language of (e) in the current rule? I mean, that's
16 what we were attempting to put back in.

17 MR. JEFFERSON: I don't think that's a
18 problem in the current rule, because the current rule
19 doesn't say you have to have a cross-motion. The problem
20 with this is it says you've got to have a cross-motion on
21 file to get that relief, or arguably, says you have to
22 have the cross-motion on file to obtain that relief.

23 CHAIR TRACY CHRISTOPHER: Okay. Kent.

24 HONORABLE KENT SULLIVAN: I may just be
25 confused, but what I'm hearing is someone's filed a motion

1 for summary judgment, and the response sets out there are
2 certain facts that you believe are uncontested and
3 presumably defeat the summary judgment motion, in which
4 case the desired ruling is simply "motion denied." Game
5 over. That's the end of it.

6 MR. JEFFERSON: No, I don't think -- so (e),
7 the current (e), doesn't -- the current (e) is something
8 less than summary judgment. The judge listens to
9 everybody --

10 HONORABLE KENT SULLIVAN: What is the
11 vehicle before the court that is producing this hearing?
12 As I understand your hypothetical, there is a motion for
13 summary judgment pending. That's causing response to be
14 filed. That's what you're referencing. The only thing
15 for the court to do is either grant the motion or deny the
16 motion.

17 MR. JEFFERSON: Or deny the motion and make
18 findings.

19 HONORABLE KENT SULLIVAN: I don't think so.
20 (Simultaneous crosstalk)

21 THE REPORTER: Wait a minute. Wait a
22 minute.

23 CHAIR TRACY CHRISTOPHER: Wait, wait. One
24 at a time.

25 HONORABLE KENT SULLIVAN: You may be able to

1 do that if you wanted to. The court has all kinds of
2 discretion, but my point is I think the average judge
3 responds to this motion and response, relative to a
4 pending summary judgment motion, with a granted or denied.
5 That's what most judges in state court do, to my
6 knowledge.

7 CHAIR TRACY CHRISTOPHER: Judge Estevez.

8 HONORABLE ANA ESTEVEZ: Well, occasionally,
9 we do get motions. We have a motion for summary judgment,
10 and then it says in the alternative to make certain
11 findings, and so I will make certain findings when they
12 have requested it, but I've never -- I don't recall it
13 ever coming up in a -- just in the hearing and someone
14 tried it by consent. They would then tell me just to deny
15 the summary judgment, so I think the question is just
16 going to be what the pleading is and what that ultimate
17 relief is, but, yes, I have, in a contract case, found,
18 yes, that there is consideration, as a matter of law. You
19 know, and that kept the case alive.

20 CHAIR TRACY CHRISTOPHER: Okay.

21 HONORABLE ANA ESTEVEZ: I don't -- I don't
22 think there's a -- I don't think there's a conflict here.
23 I don't see the conflict, because it's -- it was intended
24 to preserve that in order to make the case go faster and
25 let people focus on what they need to focus on.

1 CHAIR TRACY CHRISTOPHER: Judge Miskel, then
2 Lamont, then Roger.

3 HONORABLE EMILY MISKEL: If I'm
4 understanding what you're saying, you're saying by
5 referencing that if you file a cross-motion, it has to be
6 filed separately, then the implication is everything under
7 our new -- where did we put it?

8 MR. JEFFERSON: (h) (4).

9 HONORABLE EMILY MISKEL: (h) (4), now must
10 become cross-motions; is that right?

11 MR. JEFFERSON: Right.

12 HONORABLE EMILY MISKEL: I'm not sure I read
13 it that way, but we might, you know, continue to discuss
14 whether by mentioning if you want to file a cross-motion
15 you have to do it separately converts the judge's ability
16 to make factual findings while denying a summary judgment,
17 predicated on the existence of a cross-motion.

18 HONORABLE ANA ESTEVEZ: We don't have a
19 deadline for that.

20 CHAIR TRACY CHRISTOPHER: Lamont, and then
21 Roger, and then Elaine, and then Pete.

22 MR. JEFFERSON: I think you're exactly
23 right, that the issue is -- and, again, I'm starting with
24 this doesn't happen a lot, but if there's a judge who
25 really knows the case, he's got a motion in front of him

1 and it's their case, and maybe it's been pending a while,
2 they feel familiar with it, they want to eliminate certain
3 things. They can do that by not fully granting an
4 affirmative motion without there being a cross-motion on
5 file. That sounds a lot -- it looks a lot like the
6 opponent has filed a motion for summary judgment seeking
7 specific findings. And it could be a contested issue, so
8 the fact that this says you have to have a cross-motion on
9 file may, to some judges, say I can't do everything that's
10 in (h) (4) because there's not a cross-motion on file.

11 CHAIR TRACY CHRISTOPHER: Okay. Roger.

12 MR. HUGHES: Well, I think because we're
13 changing the predicate language from (e), the old one, the
14 way I read the opening was, is like I'm going to grant
15 some relief, but I'm not going to grant all of the relief,
16 and now I'm going to tell you what we're going to try at
17 trial, and my -- my classic thought is, you know,
18 defendant files a motion for summary judgment or there's
19 cross-motions for summary judgment on a limitations.

20 Defendant says plaintiff didn't sue until
21 after statute of limitations run, but if he did file on
22 time, he didn't use due diligence to serve me, and after
23 looking at everything, the judge goes, I think it's a
24 matter of law. Plaintiff sued before limitations expired.
25 So the only thing we're going to try at trial is was due

1 diligence used to serve the defendant. That's the
2 situation I see here.

3 I think the draft preserving some of the
4 language that, you know, if some relief is granted, but
5 not all relief is granted and something is going to have
6 to be tried, then the judge can spell out, this is what
7 you -- this is what's established as a matter of law, and
8 this is what we're going to try at trial. I think that
9 was the intent of the rule, and I think perhaps the
10 easiest way to preserve it is simply to say, you know, if
11 the motion is not granted in full and something remains to
12 be tried, then the judge could spell out what's going to
13 be tried, what's been established and what issues we're
14 going to try. That's my thought.

15 CHAIR TRACY CHRISTOPHER: Elaine, Pete,
16 Kent. Elaine first.

17 (Phone ringing)

18 PROFESSOR ELAINE CARLSON: I love the
19 lead-in.

20 CHAIR TRACY CHRISTOPHER: Very dramatic.

21 PROFESSOR ELAINE CARLSON: I'm just trying
22 to think through the timing of the cross-motion. If you
23 had a two-party case and the court grants a summary
24 judgment that disposes of all parties and all claims, so
25 you have a final judgment, then do you file a motion for

1 new trial in your cross-motion?

2 CHAIR TRACY CHRISTOPHER: I mean, it's a
3 good point, but the problem is, you know, we've got timing
4 restrictions on --

5 PROFESSOR ELAINE CARLSON: I know.

6 CHAIR TRACY CHRISTOPHER: -- when things are
7 to be considered. Oh, Pete.

8 MR. SCHENKKAN: I am at -- totally at sea in
9 terms of the substance of this problem, but for clarity
10 and for ease of analysis, I think in (h) (4) we need at
11 least to be very clear whether the court may, in its
12 written ruling on the motion for summary judgment
13 addressed in (i), the next one, may do these things or may
14 do it in a separate order, which seems to be what is
15 suggested by the apparently longstanding rules. And if
16 one or the other of these poses a problem, but the other
17 one poses a different problem, we're going to have to
18 choose which is the least bad solution, but I think at the
19 moment we're sort of shifting back and forth between
20 scenarios in which it really could be done as part of the
21 summary judgment or on the motion that's been filed, and
22 perhaps there are some situations where it couldn't be. I
23 don't know.

24 CHAIR TRACY CHRISTOPHER: Kent, and then
25 Richard.

1 HONORABLE KENT SULLIVAN: I think we, again,
2 have a plain language problem. I think my interpretation
3 of (h) (4) was always as follows, that the court can grant
4 a motion for summary judgment in part and that that is, in
5 effect, what the court would be doing, so that's only
6 going to apply to the motions pending.

7 They're trying to prove various elements,
8 and they say, well, you tried to prove four. You did, in
9 fact, in my judgment, prove two. Those are established as
10 a matter of law. The motion for summary judgment has been
11 granted in part and denied in part. And I think that's
12 all that's intended, but the comments that we've heard
13 this morning I think pretty conclusively show that this is
14 ambiguous, and we probably need to make another run at it
15 in terms of making it clear.

16 CHAIR TRACY CHRISTOPHER: Just speaking on
17 behalf of the subcommittee, we put this section in because
18 it was missing from the Court's draft and --

19 HONORABLE EMILY MISKEL: We just moved it.

20 CHAIR TRACY CHRISTOPHER: Oh, we moved it?
21 Oh, it was in there. Sorry.

22 HONORABLE EMILY MISKEL: Uh-huh.

23 CHAIR TRACY CHRISTOPHER: Where was it?

24 HONORABLE EMILY MISKEL: It was (k). Yeah,
25 it was (k).

1 CHAIR TRACY CHRISTOPHER: Okay. All right.
2 Richard.

3 MR. ORSINGER: I align with Kent in that I
4 consider this to be a partial granting of a summary
5 judgment without disposing of all claims in the case, and
6 if you read (h), it's all requested relief not granted.
7 In other words, someone wanted to win on a summary
8 judgment, and they didn't, but they won on part of their
9 summary judgment. I don't think it has anything to do
10 with the filing of a counter anything, but if we went back
11 to (b)(1), perhaps we could clarify it by saying "any
12 cross-motion for summary judgment may not be contained"
13 which might give you room to say, well, I have a
14 cross-motion for a partial ruling as a matter of law.

15 CHAIR TRACY CHRISTOPHER: Emily. Or Judge
16 Miskel, sorry.

17 HONORABLE EMILY MISKEL: I was also like
18 you, when we first read the rule and it said "facts," we
19 all thought that was weird, because shouldn't it say
20 "element," and so one of our early drafts replaced the
21 word "fact" with "element," and then we looked back to the
22 original rule, and section (e) has not always said
23 "element." It's always said "fact." And so in talking to
24 people, there are a number of circumstances where you
25 might want a fact established as a matter of law, even if

1 it doesn't dispose of a whole element, and so that's
2 apparently what the practice has been the whole time, is
3 that you can have the judge establish a fact that's not an
4 element by itself.

5 So what I would say is your comment reflects
6 maybe an understanding that many of us had, but it doesn't
7 reflect the text of the rule and certain aspects of the
8 practice where -- somebody pointed out that, in business
9 court cases with a lot of contracts or complex contracts,
10 it may be a very useful tool to have a pure fact
11 established, so --

12 HONORABLE KENT SULLIVAN: And the text may
13 have been imprecise for a long time.

14 CHAIR TRACY CHRISTOPHER: True.

15 HONORABLE KENT SULLIVAN: It would not be
16 the first time we have found that to be so.

17 CHAIR TRACY CHRISTOPHER: True. All right.
18 We kind of jumped ahead, but let's go back to --

19 MR. ORSINGER: We'll go to (2) (a) then,
20 because we've concluded (b) (1), don't you think?

21 CHAIR TRACY CHRISTOPHER: Yes.

22 MR. ORSINGER: Okay. So (b) (2), (2) is
23 contents. We're going to talk about contents for a while,
24 and then (a) is the simple suggestion that the new rule
25 requires that you identify your motion as traditional or

1 no-evidence or combined, and the subcommittee thought it
2 would be better to say "combined motion for traditional
3 and no-evidence summary judgment," because we didn't want
4 them to be combined with other claims or combined with
5 something that someone thought might be related. We
6 wanted to be restricted in scope to these two choices.
7 It's either traditional or it's no-evidence or it's both.

8 CHAIR TRACY CHRISTOPHER: Okay. Any
9 comments on that?

10 MR. ORSINGER: So moving on to (b) (2) (B),
11 the hearing request, remember, we talked about and the
12 Supreme Court adopted the idea that there should be a
13 notice given if you want to have an oral hearing, just
14 like there is if you want oral argument; and in an appeal,
15 if you want oral argument, you put it on the front page of
16 the brief; but the idea would be on the cover of the
17 motion, like in the cover of the brief, there is no cover
18 to the motion typically; and so we were concerned that
19 someone might think that they had to create a cover, which
20 no one knows what a cover would be. But, anyway, the idea
21 was that we put it in the title of the motion, so it's
22 going to be in the first thing that the judge reads.

23 CHAIR TRACY CHRISTOPHER: And I think John
24 suggested that we have it in the title, too, as a good
25 spot to find it.

1 MR. ORSINGER: Now, let me just raise a few
2 questions, and these may not need to be answered in the
3 rule, but in a lot of places, certainly where I practice,
4 you get a setting by an e-file, an e-filing of a request.
5 You have a proposed setting, and you leave a blank for the
6 court to fill in, and you indicate whether it's in person
7 or whether it's optional to be remote or whatever, and
8 that's really actually where the setting comes from, is
9 from the filing of the proposed setting.

10 Now, there's no harm in having it in the
11 title, but that doesn't necessarily finish the job if
12 you're required to request a specific setting, and in the
13 rural counties that I practice in, it's all done by e-mail
14 or telephone conversation with the court coordinator or
15 the court clerk, and so that's where the decision is
16 really made to inform the court that there's going to be a
17 request for an oral hearing. And then I have this
18 question, which is, is the request binding, or is it
19 optional with the trial court? It's just an indication
20 that the movant wants it, and I guess you could put it in
21 a reply as well, right? Couldn't the nonmoving party
22 request an oral hearing? So, anyway, go ahead, Emily.

23 HONORABLE EMILY MISKEL: And, actually, this
24 is just occurring to me, because one of the things we
25 struggled with in the draft that we'll get to later is the

1 Supreme Court's proposed order had the court may reset the
2 motion for a hearing if no hearing has been set, and we
3 massaged that in a couple of places that we'll get to
4 later, but here, (b) (2) (B) says "if a movant requests an
5 oral hearing on the motion," and maybe an easy way to
6 address that would be "if a party requests an oral
7 hearing" or "a movant or a nonmovant requests oral
8 hearing."

9 CHAIR TRACY CHRISTOPHER: But the nonmovant
10 requesting it is in there in (d) (2). It's already in
11 there.

12 HONORABLE EMILY MISKEL: Okay. I'll save
13 for later when we discuss resetting from one to the other.

14 CHAIR TRACY CHRISTOPHER: Okay. Any -- any
15 other comments on our minor change to change it from
16 "cover" to "title"?

17 MS. WOOTEN: Good change.

18 CHAIR TRACY CHRISTOPHER: Okay. Yes, Judge
19 Estevez.

20 HONORABLE ANA ESTEVEZ: Well, her last
21 comment made me think, I don't want to wait until the
22 response is filed before I moved it to an oral hearing if
23 they wanted an oral hearing.

24 CHAIR TRACY CHRISTOPHER: I don't think you
25 have to.

1 HONORABLE ANA ESTEVEZ: Well, it just says
2 that -- her (d) (2) or the (d) (2) -- is it (d) (2)? No,
3 whenever we did the response that they had to say that
4 they wanted a hearing.

5 MR. ORSINGER: But here's the thing, the
6 movant may not want an oral hearing --

7 HONORABLE ANA ESTEVEZ: I know.

8 MR. ORSINGER: -- but the respondent may,
9 and you'll never know that until the response is filed.

10 HONORABLE ANA ESTEVEZ: No, I want to know
11 before then, though.

12 MR. ORSINGER: How is the movant going to
13 know whether the respondent --

14 HONORABLE ANA ESTEVEZ: Because they got
15 that motion for summary judgment the same time I did. We
16 all found out, the movant -- the movant and the court
17 found out at the same time. I found out that they filed a
18 motion for summary judgment the same day, hopefully, if
19 our clerk's doing their job, as the nonmovant. So the
20 nonmovant knows that they either put "no hearing
21 requested" or "oral hearing requested," and the minute
22 they see that, that they didn't request one, I would like
23 them to let me know, because I'm not going to have time to
24 go change the date -- I may have time, but I may not,
25 depending on what that date is, but I'm losing -- how many

1 days are we giving them for the response?

2 CHAIR TRACY CHRISTOPHER: 21.

3 HONORABLE ANA ESTEVEZ: 21. So three weeks
4 later I'm going to change it and try to fit it in my 60
5 days?

6 MR. ORSINGER: Okay. So let me say a couple
7 of things. Number one, this rule only requires the moving
8 party to request an oral hearing in the title.

9 CHAIR TRACY CHRISTOPHER: No, no.

10 HONORABLE ANA ESTEVEZ: No. We changed it
11 to the respondent to do it in the title, too.

12 MR. ORSINGER: No, no. I'm talking about if
13 I'm the movant, I don't have the duty to say I don't want
14 a hearing. I just have a duty to say I do want a hearing,
15 and the default is that I don't get an oral hearing.

16 HONORABLE ANA ESTEVEZ: I understand that.

17 MR. ORSINGER: Yeah. Okay. The second
18 thing is I file a motion for summary judgment on day one.

19 HONORABLE ANA ESTEVEZ: Right.

20 MR. ORSINGER: Now, what day do you want to
21 know whether the respondent wants an oral hearing? Day
22 one?

23 HONORABLE ANA ESTEVEZ: As soon as I can,
24 because I'm going to set it on day two for submission, as
25 soon as I know.

1 MR. ORSINGER: We would have to go back to
2 the response and say that you must elect an oral hearing
3 on day one plus one instead of day one plus 21.

4 HONORABLE ANA ESTEVEZ: I'm just saying that
5 I don't want them to think that is the first time they can
6 request an oral hearing. I'm not saying -- it's fine for
7 them to put it in their response, but I don't want that to
8 be what we're saying the rule is, so that the court won't
9 know because no one feels like they should tell the court
10 before then.

11 MR. ORSINGER: Okay.

12 CHAIR TRACY CHRISTOPHER: I'm not sure we
13 can solve that issue, so...

14 HONORABLE EMILY MISKEL: And I was going to
15 suggest that section (b) is specifically referring to the
16 motion.

17 CHAIR TRACY CHRISTOPHER: Right.

18 HONORABLE EMILY MISKEL: So we should not
19 put things in about the response.

20 CHAIR TRACY CHRISTOPHER: Right. Okay.

21 MR. ORSINGER: Going on, then, to (b) (2) (C),
22 traditional motion, "A traditional motion must state the
23 specific grounds in support of the motion," and the
24 subcommittee added "and include any evidence required to
25 support the motion." That's -- everyone knows that you do

1 that, but it doesn't exactly say that, but the problem
2 with the word "include" is that it's really not accurate.

3 And that was brought forth in the recent
4 case the Texas Supreme Court decided, *State Vs. \$3,774.28*,
5 back on May 16th of last year. The nonmovant's response
6 to a non -- no-evidence motion for summary judgment
7 referred to previously filed evidence, and the trial court
8 said, "I won't consider that," and the court of appeals
9 affirmed that, and the Supreme Court said it's not that
10 rigid, if it's been previously filed and it's pointed out
11 in the response, the court should consider it, but you
12 can't just mention it. They said in this opinion that you
13 have to discuss the evidence with some specificity, so
14 it's really not necessary to attach or include evidence in
15 your motion or later on in your reply, and we use this
16 word "include" throughout this rule, three different
17 places, so let's be aware of the fact that "include"
18 doesn't necessarily mean include.

19 CHAIR TRACY CHRISTOPHER: So we attempted to
20 define that in (j), so we'll get to that later, but I
21 think what we had originally thought here is -- and there
22 were several comments to this effect, that there's no
23 requirement that the motion include evidence. So we
24 thought that a traditional motion include evidence, so
25 that's why we added that language.

1 MR. ORSINGER: And that brings to mind, if
2 it's a limitations issue, the plaintiff can plead facts
3 that would indicate that limitations has run, and so you
4 don't really need evidence for that. So I don't know that
5 evidence is always required, but when it is required, it
6 should be in the rule that it's required.

7 CHAIR TRACY CHRISTOPHER: Judge Miskel.

8 HONORABLE EMILY MISKEL: And the reason that
9 we added that to the motion was because the proposed rule
10 published by the Supreme Court mentioned it specifically
11 that the response must include any evidence in support of
12 the response, but didn't say anything about the original
13 motion, and so that was also part of why we copied that,
14 "include any evidence" over to also the original motion.

15 CHAIR TRACY CHRISTOPHER: Harvey.

16 HONORABLE HARVEY BROWN: And we used the
17 word "any" to signal that it may not always be required,
18 to go back to Richard's hypothetical just now, the
19 plaintiff's petition may show limitations on its face. So
20 you might not always need it.

21 I wanted to suggest that we consider after
22 the word "include" having a phrase with commas, comma, "as
23 defined in subpart (j)" because that's what we're trying
24 to do in subpart (j), but I do think some people might
25 read it and not immediately connect those, because the

1 word "include" doesn't have that specific meaning in
2 general language, the word used in (j). I don't think
3 it's necessary, but it may be clearer.

4 CHAIR TRACY CHRISTOPHER: Maybe a comment --

5 HONORABLE HARVEY BROWN: Maybe a comment.

6 CHAIR TRACY CHRISTOPHER: -- would be better
7 there, rather than trying to junk up the rule. Kennon.

8 MS. WOOTEN: I wonder whether a different
9 word should be used, if "include" is not entirely
10 accurate. For example, you could say, "should address any
11 evidence as set forth in subpart (j)," unless that clogs
12 up the rule.

13 MR. ORSINGER: Or maybe "relied upon." That
14 would mean the movant could rely upon unsworn
15 declarations, affidavits, authenticated documents,
16 business records. So that's an option, is rather than say
17 "included" or "attached," or as we say later on in an
18 appendix, we could just say "relied upon" and then that
19 would allow you to go anywhere as long as it's in the
20 record.

21 CHAIR TRACY CHRISTOPHER: I think we were
22 trying to address some of the more recent Supreme Court
23 cases in terms of when you refer to something else as
24 whether that's part of your summary judgment evidence or
25 summary judgment response. So just so the Court

1 understands why we're putting this -- this language in,
2 and we'll let you work on that thought. So...

3 MR. ORSINGER: Can I also add that
4 previously it said "unfiled discovery"?

5 HONORABLE JANE BLAND: It did.

6 MR. ORSINGER: And that was too limited,
7 because it's not necessarily unfiled discovery. It could
8 be a lot of unfiled records that get filed. You see what
9 I'm saying? So that was a beneficial move.

10 CHAIR TRACY CHRISTOPHER: Okay. Go on to
11 (D) now.

12 MR. ORSINGER: Okay. So we go on to
13 (b) (2) (D), no-evidence motion. "A no-evidence motion must
14 state the elements as to which there is no evidence," and
15 the subcommittee would like to add "of the claim or
16 defense," and that's just clarification. Sometimes
17 evidence is not required, but any comments, anyone?
18 Pretty simple. "Must state the elements of the claim or
19 defense as to which there is no evidence."

20 Okay. Want to go on then?

21 CHAIR TRACY CHRISTOPHER: Uh-huh.

22 MR. ORSINGER: So (b) (3), time to file, we
23 made no suggested changes, so unless someone has -- yes,
24 we have some comments.

25 MS. WOOTEN: Just one quick comment. I

1 noticed that in (3) (A) the phrase "adverse party" appears,
2 and that's something you've changed previously.

3 MR. ORSINGER: That's exactly right.

4 MS. WOOTEN: I wonder whether this should be
5 changed as well.

6 MR. ORSINGER: What a great catch. Thank
7 you. "Nonmovant."

8 CHAIR TRACY CHRISTOPHER: We had noticed
9 that both of those words were used interchangeably in the
10 rule, and we think it would be clearer if we just had one
11 term, and I think we thought "nonmovant" was best.

12 MS. WOOTEN: That does seem best, and I did
13 do a search for "adverse party" across the document, and
14 that's the only other reference.

15 MR. ORSINGER: Good. Now we've gotten rid
16 of it. Okay. So then subdivision (3) (B) is the standard
17 concept that you can't file a no-evidence motion until an
18 adequate time for discovery has gone by. No definition of
19 that. That's going to be up to -- yeah, go ahead.

20 HONORABLE EMILY MISKEL: We did get several
21 comments relating to that and suggesting that we set a
22 specific time and give more clarity. We went back and
23 forth in subcommittee. We talked about the end of the
24 discovery period, but sometimes discovery period doesn't
25 close until 30 days before trial, so we went on a long

1 voyage and ended up suggesting no change.

2 CHAIR TRACY CHRISTOPHER: And, of course, I
3 have heard from trial judges with respect to this issue,
4 because they often set out just sort of standard docket
5 control orders that do no-evidence motion for summary
6 judgment can't be filed until, you know, the end of
7 discovery date, which is often 30 or 60 days before trial,
8 which then leads to the problem of will that motion ever
9 get heard. So but that -- that problem exists currently,
10 so we didn't try to fix it, but just so the Court knows.

11 Yes, Pete.

12 MR. SCHENKKAN: And my primitive, and
13 perhaps completely mistaken, understanding of the problem
14 here is that that creates a squeeze at the end that makes
15 the no-evidence summary judgment motion not available as a
16 practical matter, because there won't be time for it by
17 the time it's been declared an adequate time for discovery
18 has passed, without getting a continuance of the trial
19 setting. Is that the practical problem?

20 CHAIR TRACY CHRISTOPHER: Yes. I think
21 that's the practical problem. I think, like a lot of
22 standard docket control orders, you know, put a
23 no-evidence motion for summary judgment, sometimes they
24 say it has to be set 30 days before the trial date.
25 Sometimes they say it has to be filed 30 days before the

1 trial date, so I think that some of the trial judges that
2 I've been talking to are trying to figure out how to
3 massage that within the new deadlines, and ultimately, we
4 decided in the subcommittee we're going to have to let
5 them just figure that out.

6 MR. SCHENKKAN: And I want to just -- in
7 that spirit, just suggest it seems, again, to me as a
8 semioutsider on this, that there are sort of two different
9 situations as to the adequacy of the time for discovery.
10 One is one where it really does take all of the time that
11 the judge in the docket control order intended to allow
12 for the discovery in connection with the trial setting,
13 but the other is when the party that is thinking about
14 doing a no-evidence summary judgment motion knows early on
15 this is an area where my opponent is vulnerable, I think,
16 and ought to be able to do targeted discovery of their
17 own, if needed, to show that there isn't anything. Ask
18 for the documents that would be the relevant to the
19 tolling of the limitations, take the deposition of whoever
20 was in charge of serving the pleading.

21 CHAIR TRACY CHRISTOPHER: So, Pete, kind of
22 early on when the no-evidence motion for summary judgment
23 came out, there were appellate decisions said -- that
24 said, you know, the time for a no-evidence motion for
25 summary judgment is the same time as the close of

1 discovery. So, I mean, that case law has been kind of
2 enshrined, without it actually being in the rule, that a
3 no-evidence motion would be premature before then. Now,
4 maybe we want to -- maybe the Court would want to consider
5 something different, but that is the current case law,
6 that they are one in the same.

7 MR. SCHENKKAN: I just think that flagging
8 that as a practical point is a big important thing to do.
9 The feedback I am getting on this is this is a problem for
10 the use of no-evidence summary judgment motions as an
11 important toolkit in the defendant's -- usually, in the
12 defendant's toolbox, and we are creating a problem when we
13 leave the existing case law with the rules that now have
14 these deadlines. We are defeating a different important
15 goal of getting cases decided faster, when they can be,
16 because there really isn't a material fact dispute by the
17 ones we're trying to solve by making the judges rule
18 properly on the ones where you do have to think about it.
19 And I don't have a solution. I'm just saying I think
20 people are right that this is a practical problem in that
21 subset of summary judgments for some material number of
22 cases.

23 CHAIR TRACY CHRISTOPHER: All right. We're
24 going to need to take a break. Sorry, Dee Dee. You
25 should holler.

1 (Recess from 10:58 a.m. 11:13 a.m.)

2 CHAIR TRACY CHRISTOPHER: Okay. I think
3 we're on (d). No, we're on (c), correct, clerk and court
4 duties?

5 MR. ORSINGER: Yes. We had quite a
6 discussion about this before. This has to do with who has
7 what duty about giving notice when something is filed, so
8 it says, "Upon the motion's filing, the clerk must
9 immediately call the motion to the court's attention. The
10 court must promptly set the motion for submission or
11 hearing, according to this rule." And you will recall the
12 discussion is that the clerk is the one who is going to
13 find out about the filing and has to tell the judge about
14 it. The judge is the one who has to order the setting,
15 whether the setting is done by the clerk or the judge.
16 It's the court to set it, and the question here or the
17 suggestion here is to use the word "written" along with
18 "submission" so that it's clear what the distinction is
19 between a submission or a hearing.

20 We all know that "hearing" means oral
21 hearing and "submission" means written, but it doesn't say
22 that anywhere, and there could be some confusion about
23 what's the difference. And then the clerk must send
24 notice to the parties, as provided in Rule 21(f)(10), so
25 we're now saying that when there is a setting, we're not

1 relying on the movant to inform the respondent. We're now
2 relying upon the clerk to inform all parties that the
3 court has set the motion for submission or hearing on that
4 date. Emily.

5 HONORABLE EMILY MISKEL: And there was one
6 other reason we added -- so the original published rule
7 said "must set the motion according to this rule," and
8 that follows the part where they talk about the movant
9 requesting an oral hearing, and we wanted to make clear
10 that it's the court's discretion to set it for written
11 submission or oral hearing. So we didn't want there to be
12 an implication that the judge was bound by the movant's
13 request, so what we think the rule meant was it has to be
14 set according to the deadlines in the rule, not the
15 previous paragraph about what kind of hearing the movant
16 wants.

17 CHAIR TRACY CHRISTOPHER: Any comments about
18 that? Yes, Kennon.

19 MS. WOOTEN: I wonder how many clerks in our
20 state now send notices to parties and whether this is a
21 really significant change in the norm. I know, in Travis
22 County, the clerk does not send notices of any hearing.
23 In fact, it's incumbent upon the litigants to serve the
24 notices and get them filed, so it's just an observation,
25 really, with a question, I guess, appended to it --

1 MS. GILLILAND: Yeah.

2 MS. WOOTEN: -- as to whether this is a
3 really significant change.

4 MS. GILLILAND: I had some thoughts on that.
5 Other places where the clerk is to send notice of the
6 hearing is usually something that is begun by the judge.
7 Like a DWOP docket, and that does say the clerk is to send
8 notice. Traditional motion practice has been the party
9 filing the motion is to tell everyone, so this is a shift
10 in that burden of who is supposed to tell everybody about
11 the hearing. And maybe this is a good thing, but it is
12 kind of carving out an exception for motions that happen
13 that way.

14 And then the second question I had on this
15 is, if the clerk is sending notice, does it matter or are
16 we envisioning a formal notice, like we might for a DWOP
17 docket, generated by the clerk, or is it sufficient if a
18 party submitted a proposed, you know, order setting
19 hearing or notice, and the court's staff fills that out,
20 is that sufficient to send out from the clerk? Or does it
21 matter, kind of just local practice?

22 MS. WOOTEN: Right. And piggybacking on
23 that, if I may, I don't want to go out of turn. Is that
24 all right, Justice Christopher?

25 CHAIR TRACY CHRISTOPHER: Yes.

1 MS. WOOTEN: Piggybacking on that, I can
2 envision a process in which a party files the notice of
3 hearing and the clerk, by sending the file-stamped copy
4 out, effectively follows through with the duty, and that
5 wouldn't be different -- at least in Travis County, with
6 what we see, the file-stamped copy coming later, but the
7 obligation for drafting and filing, if you will, being on
8 the party that wants the hearing.

9 MS. GILLILAND: I mean, and if that's
10 sufficient, but, you know, once the clerk gets that notice
11 of hearing, it's file-marked. With re:SearchTX now, with
12 attorneys, that's automatically going. It would just be
13 the clerks paying attention to the pro se parties to make
14 sure that they get it, whether by e-mail or paper mail,
15 whatever.

16 MS. WOOTEN: Uh-huh.

17 CHAIR TRACY CHRISTOPHER: Let me let the
18 committee respond and then you, Judge Chu. Judge Estevez,
19 and then Judge Miskel.

20 HONORABLE ANA ESTEVEZ: Okay. First of all,
21 the law is requiring the judge to set it, and so if we
22 don't even get a request from a party, we still have to
23 set it. So what we're doing in the court right now is if
24 they send us an order ready-to-go setting hearing, then we
25 use their order and then it goes through the e-file

1 system, but we're asking the clerk, because there might be
2 pro se people in there that aren't on the e-file system,
3 and so that's why we need the clerk to send it out.

4 We don't want the parties -- we've decided
5 we don't want the parties to be the people to send it out,
6 send out the notice, because they may sit on that date.
7 They don't necessarily have to -- if they call me and I
8 say, okay, I put you down for day 60 or day 58, they can
9 wait until day 20. You still have time to do your
10 response before they send out what that date was. So that
11 will eliminate all of those other issues when I come in
12 and, oh, I didn't get notice, or if there's a reason they
13 didn't get notice, we can also see everything in the type
14 of notice they have.

15 Right now I had a hearing, just a motion to
16 withdraw, and there was no notice given in my file,
17 because they just handed over notice, claimed they sent
18 notice to the party, but they didn't file it. If we go
19 through the clerk and we go through the court, which
20 they're putting all of the responsibilities, and we also
21 are the ones that get -- I don't know what the word is --
22 reprimanded for missing these deadlines, then I think we
23 want to keep it in our -- in our side of the system so to
24 eliminate the problems that happen.

25 Now, I also want to say that right now we're

1 on the Odyssey system. I was showing them earlier. I get
2 a notice from the clerk every single day from Odyssey,
3 where they have pulled out all of the motions for summary
4 judgment that have been filed, so I know every day whether
5 or not a motion for summary judgment was filed. I open it
6 up, and if I see one, my court coordinator gets one, too,
7 and she has been instructed, 60 days out, if it's going to
8 fall on a weekend and it's going to be more than 60, go in
9 and then just send it out right away. If they want an
10 oral hearing, they can ask for an oral hearing at a later
11 time, and we'll figure it out, but I already have my date
12 it's set for submission. I know how much time I have to
13 rule from then, and that's what I'm going to do. Doesn't
14 mean that's what everybody else needs to do, but that's
15 how we're going to handle it, for now.

16 CHAIR TRACY CHRISTOPHER: The statute
17 appears to be put the burden on the court.

18 MS. WOOTEN: Yes. Yes. That's true.

19 CHAIR TRACY CHRISTOPHER: Judge Miskel.

20 HONORABLE EMILY MISKEL: And then, in
21 addition to that, Rule 21(f)(10) currently says
22 "electronic orders, notices, and other documents from the
23 court" and says the clerk must send orders, notices, and
24 other documents to the parties electronically through the
25 e-filing system, so given a court-directed more automated

1 process, we thought that was the correct way for the rule
2 to read.

3 CHAIR TRACY CHRISTOPHER: Judge Chu.

4 HONORABLE NICHOLAS CHU: I think there may
5 be a solution for this, because I am concerned requiring
6 the clerks to do something that the court has to do, but
7 the same time giving proper notice and not relying on the
8 parties. Thinking back to my JP days, there are certain
9 things that we have to set and we set by order from the
10 court, and so I think if the rule required the court file
11 an order setting the case, and whatever that looks like,
12 when the court files that, it goes to e-file, gets the
13 parties all of the notice on that, and then it kinds of
14 solves notice, and whether the clerk or the court is doing
15 that, it's an action of the court.

16 CHAIR TRACY CHRISTOPHER: Judge Estevez.

17 HONORABLE ANA ESTEVEZ: It doesn't cover
18 everyone, because I asked my court coordinator, and she
19 said it wouldn't get any of the pro se litigants that
20 aren't necessarily in there, and there might be other
21 parties that aren't covered in that. I don't know all the
22 ins and outs.

23 CHAIR TRACY CHRISTOPHER: Sharena.

24 MS. GILLILAND: Well, and we're kind of
25 talking for those of us that are on the Tyler software

1 products that have a lot more options. There are a lot of
2 counties that don't have quite that level of interaction.
3 There's some counties that they're still not even
4 integrated with e-file, but they're printing everything
5 after they accept.

6 HONORABLE NICHOLAS CHU: In those
7 situations, though, do you think, because they're not on
8 Tyler, they're probably having less volume, that the court
9 can just e-mail the notice to those folks?

10 MS. GILLILAND: I'm sure there's
11 significantly less volume. I don't want to say if that's
12 more or less burdensome, because then I'll be wrong if I
13 say that.

14 HONORABLE NICHOLAS CHU: Yeah.

15 CHAIR TRACY CHRISTOPHER: And probably the
16 Supreme Court and the court of appeals and their
17 interactions with their clerks are very different than a
18 trial court and their clerk in terms of duties and who's
19 an employee of whom and who's a separate entity, which is
20 why we have written it this way, to put the burden on the
21 clerks, separate elected entities in, you know, the trial
22 court system. So that's just kind of background for
23 people who are not aware of that situation, that we wanted
24 to put the burden on the clerk. We, in the subcommittee,
25 wanted to do that. Lamont.

1 MR. JEFFERSON: Just a question, Richard.
2 And I may have this wrong, but submission, I thought, was
3 just the date when the court is going to consider the
4 motion. Argument is different, right?

5 MR. ORSINGER: No. I think that submission
6 is the day that it's officially submitted to the court,
7 but not necessarily the date the court starts considering
8 it.

9 MR. JEFFERSON: Right.

10 MR. ORSINGER: So for purposes of the
11 timetable, it starts the 90-day clock to rule, even if you
12 don't look at it for 59 days.

13 MR. JEFFERSON: I'm with you there, but I'm
14 just wondering whether -- I mean, once the case --
15 once it's submitted, you have a submission date, and
16 there's a deadline for a submission date, you could have
17 an oral argument or not. But, I mean, you've got a
18 definite submission date when the court's going to -- when
19 the case is submitted to the court, and so then the only
20 question is are you going to have oral argument in
21 addition to the written submission.

22 MR. ORSINGER: I don't think -- all summary
23 judgment motions are in writing, and all responses are in
24 writing, so, in a sense, it's all, quote, submitted, but I
25 think submission means this is the official date that the

1 court will accept the responsibility for disposing of it,
2 and the question is, is the court going to do that after
3 oral hearing, after an oral hearing with argument or
4 without. That's what the intent is. I don't know --

5 MR. JEFFERSON: The way that I was reading
6 the draft is it's one or the other. It's submitted, or
7 there's oral argument.

8 MR. ORSINGER: That was our conception, for
9 sure.

10 HONORABLE EMILY MISKEL: That's HB 16.

11 CHAIR TRACY CHRISTOPHER: Judge Miskel.

12 HONORABLE EMILY MISKEL: So HB 16 says, "The
13 court shall, with respect to a motion for summary
14 judgment, set the motion for a hearing by oral argument or
15 by submission on a date," blah, blah, blah. So HB 16 says
16 it has to be set for hearing by oral argument or set for
17 hearing by submission on a specific date. So that's where
18 that language in the rule comes from.

19 MR. JEFFERSON: Okay.

20 CHAIR TRACY CHRISTOPHER: All right. Any
21 other comments on that one? We'll move on to our
22 suggestions -- oh.

23 MR. ORSINGER: (d) (1), okay.

24 CHAIR TRACY CHRISTOPHER: Pete.

25 MR. SCHENKKAN: Just one, which is I think

1 it's -- it's very clear that this process of getting
2 everyone involved to make this work with this critical
3 early step being done by the clerk, when what clerks do
4 varies so widely across whatever counties and the
5 different tools that are used in different counties, we at
6 least need in the comment section something that
7 highlights for everybody, we realize you're going to need
8 to -- or we're telling you, you need to make sure you do
9 this right under the local rules and practices, something
10 to the effect of it's up to the movant initially and then
11 the respondent to work with the clerk to make this work
12 for the judge or whatever.

13 CHAIR TRACY CHRISTOPHER: It's really up to
14 the judge, under the statute.

15 MR. SCHENKKAN: Well, but as a practical --

16 CHAIR TRACY CHRISTOPHER: So that's why
17 we've written it that way. I mean...

18 MR. SCHENKKAN: If you're the movant and you
19 want to move this along, isn't what you really need to do
20 talk to the clerk?

21 CHAIR TRACY CHRISTOPHER: No. No. I mean,
22 because the deadline starts once the motion for summary
23 judgment is filed.

24 MR. SCHENKKAN: But, I mean, talk to the
25 clerk about making sure --

1 CHAIR TRACY CHRISTOPHER: So it has to be
2 heard within 60 days.

3 MR. SCHENKKAN: Talking about making sure it
4 gets promptly from the clerk to the judge.

5 CHAIR TRACY CHRISTOPHER: Right. Well, that
6 is also an issue, but depending on where you practice.

7 MR. SCHENKKAN: But all I'm doing is making
8 that point, is that movant's counsel needs to try to make
9 sure, for the sake of the judge and the judge's compliance
10 with the deadlines, that the clerk gets that notice to the
11 judge right away and --

12 CHAIR TRACY CHRISTOPHER: Well, that would
13 be nice, but that's not going to happen.

14 MR. SCHENKKAN: Can't even say that in a
15 comment? Okay.

16 CHAIR TRACY CHRISTOPHER: I don't think.
17 Judge Miskel, did you -- okay. Moving on to (d),
18 response.

19 MR. ORSINGER: Yeah, (d) is response. The
20 first one, paragraph (1), is time to file, and the
21 preliminarily approved rule said, "The nonmovant must file
22 any response within 21 days after the motion is filed,"
23 but the idea, "except on leave of court," the subcommittee
24 was uncomfortable that that might indicate that the
25 parties would not have the ability to extend that deadline

1 by a Rule 11 agreement, and the thought was just saying
2 that nonmovant must file any response within 21 days
3 after -- Emily, help me here. Why is that the power of
4 the parties to --

5 HONORABLE EMILY MISKEL: So the proposed
6 rule said, "Except on leave of the court, the nonmovant
7 must file within 21 days." And then we had some
8 suggestion to say, "Except on leave of court or agreement
9 of parties," and then we said, well, we don't actually
10 know whether the Supreme Court meant to rule out agreement
11 by the parties, and so our proposal is, instead of saying
12 both, just leave it silent and then default rules would
13 apply where things can be extended by agreement or court
14 order.

15 MR. ORSINGER: So reading this, though,
16 makes me think, wow, this is a directive from the Supreme
17 Court that it must be filed. It's kind of like there's no
18 exceptions. There's no excuses.

19 CHAIR TRACY CHRISTOPHER: But, I mean, most
20 of our rules are written that way, in terms of deadlines,
21 and everyone knows that you can get an agreement of the
22 parties. I mean, we did discuss -- and I know Harvey
23 wants to, I think, put it in there, "except on leave of
24 court or by written Rule 11 agreement," but we didn't
25 think that that was necessary, but that would be the other

1 option, to have both of those phrases in there.

2 Yes, Kennon.

3 MS. WOOTEN: I read it as a mandate. I
4 think my reading was influenced, in part, by the fact that
5 I had just been reading the discovery rules that expressly
6 say, "Except by order, agreement, or agreement of the
7 parties." So you make a great point, Chief Justice
8 Christopher, that I think the norm is that's not stated,
9 but I had just been reading the discovery rules that were
10 recently amended, and even before that, I think had that
11 phrase in them, so we don't do it consistently, I think,
12 is the issue, and so there could be a question as to
13 whether you could agree otherwise or get an order to a
14 different effect.

15 CHAIR TRACY CHRISTOPHER: I mean, I think --
16 Harvey, I'm not speaking for you, but I think you wanted
17 it that way.

18 HONORABLE HARVEY BROWN: Yeah. I am
19 concerned the word "must" could be construed to mean the
20 parties can't alter it. In reading the rule today, I
21 notice the existing rule does say "except on leave of
22 court." So we would be taking out a phrase right now that
23 is in the rule, both for the response and reply. So that
24 might further an argument that, oh, this is mandatory,
25 because they took out the "except on leave," which was in

1 there before.

2 I think that, since the court is required to
3 set these, quote, promptly after receiving the motion, you
4 know, some of these hearings aren't going to be set until
5 50, 60 days, and then I think the parties could easily
6 say, "Okay, we'll give you another week for the response,
7 we'll give you another week for the reply, and we can work
8 out those dates," but somebody who is approached to extend
9 the date for the response might say, "Hey, I don't have
10 discretion. It says you must file." So I think we should
11 put it in the rule. At a minimum, I think we should put
12 it in a comment, because I do think it could be argued
13 that it's mandatory that it can only be in 21 days.

14 CHAIR TRACY CHRISTOPHER: So, Kennon, remind
15 me what rule language that you just looked at on the
16 discovery rule.

17 MS. WOOTEN: I will get it to you. I know
18 it's in Rule 194 of the Texas Rules of Civil Procedure,
19 but I'll find the precise phrase; and I will also share,
20 for what it's worth, when I saw the edit, I assumed that
21 maybe it was because we didn't want to create more burden
22 for the courts with these motions, filed for them and them
23 having to rule on them; but if you incorporate "or agreed
24 by the parties," of course, you could reduce the number of
25 requests to the court. I'll find the rule right now,

1 Chief.

2 CHAIR TRACY CHRISTOPHER: I think we felt
3 either language was fine, but we didn't want it to be only
4 by leave of court, so -- in our subcommittee.

5 MS. WOOTEN: And one reference to the
6 phrase, Chief Justice Christopher, is 194.4(b), "Unless
7 the court orders otherwise, the disclosures must be made
8 30 days before trial," but there are other areas that
9 refer to agreement of the parties that I'll find.

10 CHAIR TRACY CHRISTOPHER: Okay. Yes.

11 MR. LONGORIA: Was there a reason -- because
12 I'm looking at the response time to file requirement and
13 the reply time to file requirement, and they have slightly
14 different structures. I was wondering was there a reason
15 they don't have a consistent one sentence or two sentence
16 structure?

17 MR. ORSINGER: Let me ask that we defer that
18 discussion, because Justice Brown has a proposal that he
19 is advocating, and let me point out for the record that at
20 the subcommittee level we had probably three different
21 rules to consider and combine together, and then over a
22 series of e-mails over weeks and then, finally, two Zoom
23 sessions, we ended up with a consensus draft, which was
24 not unanimous, and so Judge Brown has a proposal to
25 discuss this whole issue, and I think if you would defer

1 your question until we -- we'll dig into the reasoning why
2 he's making his suggestion about a timetable. Is that
3 okay?

4 MR. LONGORIA: Sure. Yeah.

5 CHAIR TRACY CHRISTOPHER: Yes.

6 HONORABLE DAVID KELTNER: I think the way --
7 I understand the reason why the subcommittee did it this
8 way. I think what is bothering the people who disagree
9 with this is the term "must," and if you could take "must"
10 out and say something like "The nonmovant's response is
11 due within 21 days," that takes the "must" factor out and
12 takes the argument that it's mandatory to do and more
13 susceptible to the Rule 11 type agreement and leave of
14 court. That might be the way to solve that issue.

15 CHAIR TRACY CHRISTOPHER: Jim, sorry, yeah,
16 couldn't see you.

17 MR. PERDUE: I try to avoid seconding
18 people, but I agree with both of those. I greatly fear
19 that the subcommittee has created an unintended
20 consequence by deleting "except on leave of court" when
21 you have this "must" language. There are people galore
22 that are already trying to -- I would say there's
23 compatriots in the appellate bar who love this new draft.

24 CHAIR TRACY CHRISTOPHER: Well, what I think
25 the subcommittee was afraid of, that people wouldn't get

1 leave of court. You know, unlike in the appellate world,
2 people file a motion to extend time to file something, and
3 it's pretty much ruled on within 10 days, but that
4 extension process does not happen in the trial court.

5 MR. PERDUE: Exactly. And especially
6 with -- not to get ahead of Judge Brown's comments, but
7 when you have a timeline that is this 21 days, but you
8 know as of, essentially, the time within a concept here of
9 maybe three days after the filing that you don't have a
10 submission date, except for 50 days or 55 days. That
11 the -- if you take language that suggests, well, I can
12 still hold your feet to the fire and force a reply in 21
13 because you "must," and I think that's unintended. It
14 just -- it pleads for a little bit of gamesmanship that I
15 don't think is necessary in the language that's intended
16 as the goal.

17 CHAIR TRACY CHRISTOPHER: Judge Chu, and
18 then Richard.

19 HONORABLE NICHOLAS CHU: To Jim's point, I
20 feel I'm concerned about the gamesmanship, only because if
21 there's an extension, and if the parties even agree to the
22 extension, it kind of changes the court's ability to set
23 this case and it be ripe for either hearing or submission,
24 and the onus is going to be on us judges, and we're going
25 to see the punishment of that if we're not setting these

1 right. And, you know, maybe the data reporting rule will
2 have exceptions to the categories, but if the data
3 reporting is just how many cases are heard in the 60 --
4 past 60 days, I'll look bad, even though all of these
5 parties have agreed.

6 Now, functionally, sorry to every litigator
7 here, speaking from my ivory tower of being a judge, 21
8 days is the deadline, sounds like everybody has to just
9 toughen up and get that deadline done.

10 CHAIR TRACY CHRISTOPHER: Yeah. I mean,
11 sort of as a practical matter, the motion comes in. Let's
12 say you have a judge who doesn't, say, set it at day 60.
13 You have a judge who sets it at day 40, right? You know,
14 you're going to have to live with the 21-day rule, because
15 if you -- well, I suppose you could extend, as long as
16 you're within the, you know, up to 40, but it just -- I
17 think Judge Chu is correct, and we're trying to look out
18 for the trial judges, who are going to be disciplined for,
19 you know, not putting these motions on submission timely.
20 Richard.

21 MR. ORSINGER: I do have a concern that a
22 Rule 11 agreement, which is probably going to be filed
23 with the clerk, is not necessarily going to be called to
24 the setting clerk's attention or the judge's attention,
25 and the judge may set -- or have a plan to set the hearing

1 without realizing that the deadline for the response has
2 been extended to an unknown date, and so if we allow the
3 parties unilaterally, without the Court's awareness or
4 permission, to move the response deadline, then I think
5 we're going to create potential traps for the judge, and I
6 wonder if there's a -- if there's a way, does it have to
7 be approved by the judge, or is there a time limit it
8 can't be more than between 21 days and no more than 35
9 days? Or I'm a little worried.

10 CHAIR TRACY CHRISTOPHER: Well, I suppose we
11 could say between 21 days and 40, you know, or whatever
12 the number would be, but we would still have the problem.
13 The motion comes in. The judge, in the regular course of
14 business, has, you know, set it, and they -- you know,
15 some judges, like Judge Estevez is just doing 60, but I
16 think some judges might set it earlier than that. Then we
17 have the problem with the no-evidence motions for summary
18 judgment that don't even get filed until the close of
19 discovery. And, you know, I mean, there's just a lot of
20 moving parts on that. Judge Estevez.

21 HONORABLE ANA ESTEVEZ: I'm just going to
22 say that if the judge already set the hearing, which they
23 had to do promptly upon getting the motion, then the
24 hearing date didn't move, so if there wasn't a response,
25 then it considered it based on the motion, and they just

1 deny it, and they can refile another one. I don't -- they
2 can't agree to move -- well, I mean, we get agreed motions
3 for continuances all the time, but they're not going to be
4 able to do that in this circumstance, because it's set by
5 statute. It's not within our discretion.

6 CHAIR TRACY CHRISTOPHER: And I don't think
7 the attorneys understand that yet. Obviously, we're going
8 to have to have a lot of CLEs so that they understand the
9 judges' hands are tied on, you know, what kind of leeway
10 they have on it.

11 HONORABLE ANA ESTEVEZ: Yeah. If you give
12 them 50 days, and you say, okay, I'm going to agree to 50
13 days for your response, well, all you're doing is
14 basically eliminating your reply. I mean, I'm still going
15 to review whatever I have on file on day 60.

16 CHAIR TRACY CHRISTOPHER: And I know the
17 trial judges went to the Legislature and specifically got
18 put into the legislation that the movant can withdraw
19 their motion, right? And that is the only way this train,
20 this timetable train, can be derailed. So, you know, I
21 know it's very -- seems draconian to practitioners, but
22 that's kind of where we are on it.

23 Yes, Giana.

24 MS. ORTIZ: Just to get back to this edit on
25 (d) (1), I think Mr. Perdue's initial comment about I don't

1 think this was intentional, I think he is correct about
2 that. I think that the impetus for this change is just to
3 make sure that lawyers can still agree to extend the
4 deadlines within the time frame, and lawyers will have
5 to -- if the judge is setting them for 45 days, lawyers
6 are going to have to figure it out to work within that
7 submission date or the 60 submission date, but just
8 globally, to make sure the lawyers can still agree with
9 each other otherwise.

10 CHAIR TRACY CHRISTOPHER: Yeah. Kennon.

11 MS. WOOTEN: Two comments. One, this list
12 may be incomplete, but here are some references to rules
13 that specifically identify the ability to get around the
14 default by order of court or agreement of the parties.
15 191.1, 194.1(a), 194.2(a), 196.3(a), and 197.2(c), but I
16 think, without having something else in the rules, we do
17 run the risk of judges being vulnerable to not meeting the
18 mandated deadline, which can lead to discipline. So if
19 there's going to be something in the rules that expressly
20 allows for agreement of the party that the judge might not
21 be privy to, maybe there has to be something else that
22 says the parties cannot agree to something that extends
23 the deadline beyond, whatever we want to put, or some
24 other limiting language so that they know their agreement
25 ability doesn't enable them to take it past a date that

1 would put the judge out of compliance with the statute.

2 CHAIR TRACY CHRISTOPHER: Harvey.

3 HONORABLE HARVEY BROWN: I think that it's
4 important to remember the parties can only agree to change
5 the date of the response or the reply, not the date of the
6 hearing, so everything is going to be tied to that. I do
7 think this gets a little complicated because of the
8 reasons that have been raised just now, and, therefore,
9 I'm thinking that maybe this is best handled by a comment,
10 and the comment could say, you know, that this can be
11 changed by leave of court or by agreement of the parties,
12 but in no event can the response be due later than 14 days
13 before the hearing and the reply never be changed to later
14 than seven days before the hearing.

15 I mean, the goal is the lawyers want more
16 time. They're saying we're not going to need as much time
17 as we're currently getting under the rules. The judges
18 need to make sure they comply with the statute. If the
19 comment says, okay, parties, if there's an extra 20 days
20 sitting around because the judge has set it for day 60
21 instead of day 36, you can use that, and you can agree on
22 that, but you can only agree to it on some limit, and the
23 limit is you've still got to have that response 14 days
24 before the hearing, you've still got to have the reply
25 seven days before the hearing, and that helps the judge

1 and protects the judge.

2 MR. PERDUE: Which is what you wrote.

3 HONORABLE HARVEY BROWN: Well, that's what I
4 wrote for the amendment, right.

5 CHAIR TRACY CHRISTOPHER: Yes, I'm sorry, go
6 ahead.

7 MS. GILLILAND: I like that suggestion of
8 you can agree, but you can't go past the hearing.
9 Probably the practice in most clerks' offices is not to
10 alert judges about Rule 11 agreements, because it doesn't
11 really impact their docket, unless maybe they're saying we
12 agree we don't need this hearing, but usually they're just
13 calling the judge's staff for that. So if it's -- if
14 it -- an agreement can't have any impact on that hard
15 hearing or submission date, whatever agreements they might
16 file by Rule 11 wouldn't necessarily impact the judge that
17 the clerks are needing to now say they agreed to extend
18 the deadline because the judge is not considering it until
19 that already noticed setting.

20 CHAIR TRACY CHRISTOPHER: I mean, I think --
21 I think a comment probably is the best way to go on it,
22 but, I mean, it is a very tricky way to do it, and, you
23 know, some judges, depending upon their docket are going
24 to say, yeah, I can hear this at day 40, right, and set it
25 at day 40. Others will be I'm at the day 60 train, right?

1 But some judges might even look at the motion and see it's
2 a sworn account motion, day 40. It's a really tricky
3 motion, day 60. You know, I mean, just they have that
4 flexibility, so it's kind of hard to write a rule on the
5 extension process. So maybe a comment would be better.

6 HONORABLE HARVEY BROWN: And that comment
7 would help the parties know there's a Rule 11, but you
8 can't just put the judge in this predicament.

9 MS. WOOTEN: Right.

10 CHAIR TRACY CHRISTOPHER: Yeah. And, you
11 know, maybe even the 14 and seven days could be extended,
12 too, if -- I mean, we put that in the rule, I think, as
13 sort of a goal, but the fact of the matter is I'm not
14 looking at it at day seven. I'm looking at it at day
15 minus two or day minus one before I'm reading it. Or I'm
16 looking at day zero. So, you know, if you get everything
17 filed day minus one, I wouldn't care. Okay.

18 MR. ORSINGER: Now, we're not ready to move
19 on, Chief Justice, because Harvey has a suggestion on
20 (d) (1) before we leave it.

21 CHAIR TRACY CHRISTOPHER: Okay.

22 MR. ORSINGER: And I e-mailed that out to
23 the committee yesterday, but I didn't have the most recent
24 draft, and Harvey brought copies. Harvey, have you had a
25 chance to pass any copies out yet?

1 HONORABLE HARVEY BROWN: No. I'll pass them
2 out now.

3 CHAIR TRACY CHRISTOPHER: And we have a
4 couple of just sort of minor things in (2) and (3) that
5 would not impact, right, (1)?

6 MR. ORSINGER: To me, (d)(1) is where Harvey
7 is suggesting a different approach to the response
8 deadline, so it seems to me like this would be a good time
9 to take it up.

10 CHAIR TRACY CHRISTOPHER: Yeah.

11 HONORABLE HARVEY BROWN: All right. So,
12 basically, what I was thinking about, in talking with
13 various people about this and reading the comments, the
14 main comment, other than people not wanting to change the
15 rule at all and don't understand the legislative process,
16 was you're going to federal rule and that federal rule is
17 shortening our time, because as a practical matter, many
18 motions are not set until around 60 days under the current
19 practice. So I had a lot more than 21 days. I have 30 or
20 45 days to respond. We need more time.

21 And then I thought, well, why don't we allow
22 an amended response to be filed, and we could file the
23 response on the 21 days, and then allow an amended
24 response to be filed if the motion is set kind of late in
25 the game, around the 50 or 60 days that you were talking

1 about, Tracy. So that's what I drafted, is to
2 specifically allow an amendment and to give time before
3 that.

4 If we -- I would suggest that that's a good
5 rule, it makes use of the time, it takes advantage of the
6 fact that the court's going to promptly set these,
7 according to subpart (c), so everybody will know those
8 time frames. But if we don't want to do that rule, I
9 think we should say no amendments are permitted without
10 leave of court, because I have talked to people who said,
11 "Well, I'll just amend." Well, the rule says you have to
12 file it within 21 days. I don't think the rule provides
13 for an amendment, and I think people might think they can.

14 And then someone else was mentioning to me,
15 "Well, I'll do a supplement." Well, I don't know that
16 supplements are permitted under the statute or under the
17 rule, and if they're not, I just think, again, that might
18 be a trap. So my suggestion in the language I gave here
19 in the first two paragraphs is we specifically say an
20 amendment is permitted. We allow the response to be
21 amended 14 days before the hearing, or maybe if we could
22 put, as you suggested, Tracy, you could do 10, something
23 like that. And then we would allow the reply to be
24 amended up to seven days before the hearing, or three or
25 four.

1 CHAIR TRACY CHRISTOPHER: Judge Estevez.

2 HONORABLE ANA ESTEVEZ: I just want to let
3 you know the unintended consequence could be that judges
4 that would have set them for 60 will now set them at 35.

5 MR. ORSINGER: Can you explain why?

6 HONORABLE ANA ESTEVEZ: I don't know. I'm
7 just saying that when you give people more time and you're
8 going to have more things, unless there's a specific
9 reason and it's a really big case, you're not going to
10 want to have all of these loose ends.

11 HONORABLE HARVEY BROWN: Well, if judges are
12 reading them two weeks ahead of time, I would agree with
13 you, but my practice as a judge and the judges I practiced
14 with --

15 HONORABLE ANA ESTEVEZ: I don't have any
16 problem with people filing whatever they need to file
17 right before. I never -- I don't think I have ever said
18 "no" to someone who wanted to file something on the day of
19 the motion for summary judgment. I made the other side
20 tell me why it was prejudicial, and if they told me a
21 reason, then I extended the motion for summary judgment
22 hearing and I let them have whatever they felt like they
23 needed to say before their case was going to end up being
24 dismissed forever. So I don't have any problems with
25 this. I'm just saying that there may be judges that,

1 reading this, would then just set it 35 days, for whatever
2 reason. It wouldn't be me.

3 CHAIR TRACY CHRISTOPHER: Yeah. Rich.

4 MR. PHILLIPS: I don't want to retread stuff
5 that's been talked about, but all of this stuff that we've
6 been talking about, couldn't it be fixed by going back to
7 what we do now, which is the -- set the deadline counting
8 back from when the court sets the hearing? Court sets the
9 hearing date. You back up 14 days. Now you know what it
10 is. You don't have to worry about amendments. You don't
11 have to worry about agreements to extend it out or messing
12 with the hearing date, and it's not as big a change from
13 the practice we have now. If the court has to set a
14 submission date quickly after the motion is filed, why not
15 go back to that?

16 CHAIR TRACY CHRISTOPHER: The problem that
17 we thought was that that might not necessarily happen.

18 MR. PHILLIPS: That the judge might not set?

19 CHAIR TRACY CHRISTOPHER: The judge might
20 not promptly set it, and then it's just sitting there
21 without anybody knowing when they have to file a response,
22 and what if the judge gives one week notice of the
23 hearing? I mean, that is where we got to, that we had to
24 keep it on a track like that, rather than a backward
25 track. A forward track, rather than a backward track.

1 But I --

2 MR. PHILLIPS: Could we -- I mean, the one
3 week notice problem could be solved if the judge can't
4 give you just one week notice, right? I mean, the rule
5 could say -- I mean, right now, you have to give at least
6 -- the party had to give at least 21 days' notice of the
7 hearing. You could say the judge has to give at least 35
8 days' notice of the hearing, or however we wanted to say
9 it, and require that. But, and I understand, I don't know
10 how you fix the problem of a judge who just won't set a
11 hearing and set the deadlines. I think the whole purpose
12 of this statute was to require judges to do that, and
13 maybe trying to write a rule to deal with the fact that a
14 judge may not is causing complications that we don't need
15 to deal with.

16 I don't know. Again, I know it's been
17 hashed out. I know you guys talked about it in
18 subcommittee, I'm sure, but just sitting here listening to
19 all of these problems swirling around with trying to
20 extend deadlines and screwing around with the hearing
21 date, it seemed to make sense that it might be worth
22 thinking about going back to the counting back process.
23 But I haven't thought it all the way through, and I know
24 you guys have, so I just wanted to throw it out there, and
25 I don't know if there's any merit to it. But --

1 CHAIR TRACY CHRISTOPHER: Judge Keltner.

2 HONORABLE PETER KELLY: I like Harvey's
3 proposal. The only thing I might change in (d)(1) is to
4 go to a due date and avoid the term "must," as we
5 discussed before. Otherwise, I think this makes sense and
6 is -- it leaves everything on track toward the resolution,
7 which I think is our goal.

8 CHAIR TRACY CHRISTOPHER: But here's the
9 problem. What happens if the hearing is set at -- at day
10 50? You no longer have the benefit of this.

11 HONORABLE HARVEY BROWN: Why?

12 CHAIR TRACY CHRISTOPHER: Well, because --
13 so when would people file? If hearing was set at day 50
14 for day 60, your time to file something at day 14 would be
15 gone.

16 HONORABLE HARVEY BROWN: No. It's 14 days
17 before the hearing, so you would file your original
18 response at 21 days, and then at day, let's see, 44 -- no
19 46, 14 days before the hearing, you could file your
20 amended response if it was set for day 60.

21 CHAIR TRACY CHRISTOPHER: But what if it
22 wasn't set, is my problem?

23 HONORABLE HARVEY BROWN: Oh, if it's never
24 set, if the judge only gives you a week's notice of
25 setting, you don't get any benefit. You're right.

1 CHAIR TRACY CHRISTOPHER: Right.

2 HONORABLE HARVEY BROWN: It's only if the
3 judge does what the statute says, which is to promptly set
4 it, and the judge sets it kind of late in the game. It
5 doesn't give you any added benefit in the promissory note
6 if it's set at 35 days. It's going to be more of the
7 complicated cases the judge has put towards the 60-day end
8 of the scale. Or if the judge sets all of their hearings
9 at 60 days, it lets the parties take advantage of that
10 time frame.

11 CHAIR TRACY CHRISTOPHER: Yes.

12 HONORABLE ANA ESTEVEZ: And I just want to
13 say, that could happen, if, for some reason, we didn't
14 realize that a motion for summary judgment had been filed
15 or we just dropped the ball. Judge was on vacation or
16 court coordinator was, and it didn't get done, and all of
17 the sudden you're coming close to that 60 days, you still
18 want to set it.

19 HONORABLE HARVEY BROWN: Then they don't get
20 to amend. If they only get a week's notice, they don't
21 get to amend. The rule doesn't permit it. It's only if
22 the judge gets the notice out and there's time.

23 CHAIR TRACY CHRISTOPHER: Any other comments
24 on Harvey's proposed addition? Judge Estevez.

25 HONORABLE ANA ESTEVEZ: If it's not the

1 judge, it could be your opposing party will call and say,
2 "Can I have it set at 35 days?"

3 HONORABLE HARVEY BROWN: Yeah.

4 HONORABLE ANA ESTEVEZ: Specifically.

5 MR. ORSINGER: Okay. So (d)(2) then,
6 contents, in the very first four words there, "The
7 response must include any evidence." So we have this
8 issue of inclusion and what do we mean by included, and if
9 that's not defined anywhere, then confusion will probably
10 continue.

11 The suggestion I had earlier was "The
12 response must include any evidence relied upon in
13 support," so I don't -- that still doesn't resolve the
14 issue of what does "include" mean. But anyway, moving on,
15 the proposed rule said, "If the nonmovant requires an oral
16 hearing on the motion, the request must appear on the" --
17 whoops, I had said "cover of the response." Yes, and like
18 we did before, we changed that to "in the title of the
19 response." We have a comment.

20 HONORABLE ANA ESTEVEZ: You know I have a
21 comment.

22 CHAIR TRACY CHRISTOPHER: Judge Estevez.

23 HONORABLE ANA ESTEVEZ: Okay. So as a trial
24 court, I want to know that you want an oral hearing sooner
25 than whenever your response was, so I would just suggest

1 if the nonmovant requests an oral hearing on the motion,
2 the request must be filed within 10 days of the motion for
3 summary judgment, and then they can file the response and
4 put it in the title again if they want, but that will give
5 us at least some time to get that oral hearing set. If
6 not, it's going to be harder to schedule. You would have
7 lost a lot of time.

8 MR. ORSINGER: So if I could elaborate on
9 that, I think what Judge Estevez is suggesting is that not
10 a response is due right away, but notice that you want an
11 oral hearing is due right away, even though it's two
12 weeks, three weeks, before you file your response.

13 HONORABLE ANA ESTEVEZ: Yes. Yes.

14 MR. ORSINGER: And the reason for that is
15 because you want to --

16 HONORABLE ANA ESTEVEZ: Schedule that oral
17 hearing within my time period. Every day that a day goes
18 by, I've filled another spot, another day. You're losing
19 an additional day to get an oral hearing. Our days are
20 full.

21 CHAIR TRACY CHRISTOPHER: Harvey.

22 HONORABLE HARVEY BROWN: I think it's a
23 little problematic to make the respondent decide whether
24 they want an oral hearing and put it in writing early.
25 Sometimes I don't know if I want an oral hearing until I

1 write my response. It might be I think this response is
2 just bang up, bam, really, really good, and going to win
3 this hearing, and I don't want to get in front of the
4 judge orally. It might muck it up. I might have somebody
5 on the other side who's really, really good orally and not
6 so good in writing, and I'm going to just go on the
7 papers.

8 On the other hand, it may be the situation
9 where I say I better get it to him, this is complicated, I
10 think the judge is going to need a hearing, and so you
11 don't make that decision sometimes until you're most of
12 the way through drafting that.

13 CHAIR TRACY CHRISTOPHER: Judge Miskel.

14 HONORABLE EMILY MISKEL: I would be against
15 adding even another deadline into this rule. I think it's
16 complicated enough, and then the other thing is if your
17 deadline is due before your response, as I agree with
18 everything Harvey said, then I'm going to just have to
19 request oral hearings as a placeholder until I get my
20 response done and then maybe waive my oral hearing or
21 whatever, which causes more docket chaos, so I think it
22 might have an unintended consequence.

23 CHAIR TRACY CHRISTOPHER: Giana.

24 MS. ORTIZ: I'm wondering if the issue
25 described by Judge Estevez is something that could be

1 dealt with in a local rule that parties are suggested to,
2 you know, inform the court ASAP if they want an oral
3 hearing consistent with the rules, A. And, too,
4 similarly, I -- sorry to retread back to number (1), but I
5 have not heard about the idea about amending or
6 supplementing summary judgments. I know it happens
7 occasionally now, but if it becomes something that is
8 causing chaos for courts, perhaps that is something that
9 could be dealt with in local rule. If it becomes
10 pervasive, then be added to this rule to create
11 consistency.

12 CHAIR TRACY CHRISTOPHER: Yeah. I mean,
13 Harvey and I have done a lot of e-mail discussion about
14 the amendment process, and I think it's fraught with
15 issues, because the judge is going to be looking through
16 their file. They're going to find the response. They
17 might not keep looking to see an amended response. People
18 are going to try and call it a supplemental response
19 instead of an amended response, and, you know, there's too
20 many moving parts. You know, I would prefer an agreement
21 to put off the date to respond instead, in some way,
22 shape, or form, rather than having the amended process.

23 Judge Chu.

24 HONORABLE NICHOLAS CHU: I feel like I'm
25 going to be the grumpy old judge here, but I feel like it

1 really -- like, if there's a request for oral argument,
2 right, like it's up to the judge still. I think the judge
3 still makes the call on whether we do it or not, you know,
4 though oral argument really doesn't matter in terms of you
5 can't add testimony or anything like that. It's basically
6 just a question and answer period for the judge to
7 understand the briefs. Like, why doesn't the rule just
8 say the judge decides if it's going to be by submission or
9 argument. Like, parties can put that in the brief or not,
10 but it doesn't really matter, because it's ultimately the
11 judge's call, and we don't have to worry about when you
12 can request it or not.

13 MS. GILLILAND: My concern with defaulting
14 anything to local rules or local practice, even though
15 there are local rules and local practice, is with the
16 change of local rules, some counties couldn't agree on
17 what the local rules should be if you had more than one or
18 two judges, and you might have a lot of disagreements and
19 then, therefore, no local rules to go by.

20 And then my second concern would be if that
21 accidentally somehow places a moving target in the
22 reporting requirements or the judges' deadlines, even if
23 unintentional.

24 CHAIR TRACY CHRISTOPHER: Right. Right.
25 Judge Estevez. No? Okay.

1 MR. ORSINGER: I have one final comment.

2 CHAIR TRACY CHRISTOPHER: Richard.

3 MR. ORSINGER: A suggestion was made at the
4 subcommittee level about mentioning special exceptions to
5 the motions, and we decided that this was complicated
6 enough and we would just let it go, but that means that
7 there are no rules on special exceptions, and what happens
8 if they're granted? Does that reset the timetable? I
9 don't know, so at any rate...

10 CHAIR TRACY CHRISTOPHER: I think you've got
11 to deny.

12 MR. ORSINGER: That was mentioned in the
13 past, just so the record reflects. So if we go on to
14 subdivision (d)(3), when evidence is unavailable, the only
15 suggestion the subcommittee had was when we're talking
16 about if evidence is not available, the nonmovant has to
17 file a motion or a request for additional time, and the
18 proposed rule said "affidavit or declaration," and we just
19 suggested adding "verified motion," because that appears
20 to be an option that appears in different places in the
21 rules of procedure and just thought it would be okay to
22 add that here.

23 CHAIR TRACY CHRISTOPHER: Any comments on --
24 any further comments on (d)?

25 MR. ORSINGER: Okay. So if we move on to

1 (e), reply, (e) (1) is the same discussion we had with
2 (d) (1), except, Harvey, does this -- is this a different
3 sequence of time, or is it the same discussion we've
4 already had on (d) (1)?

5 HONORABLE HARVEY BROWN: No, I think it's
6 the same discussion we already had. I tried to use the
7 exact same language for an amended reply that I used for
8 the response.

9 MR. ORSINGER: If you would just briefly
10 assume that there is a desire to amend the reply and not
11 amend, you know, a motion or a response or something, does
12 everybody have the right to amend anything?

13 HONORABLE HARVEY BROWN: The way I drafted
14 it, the reply could be amended even if the response wasn't
15 amended. It's about even-handed. Anybody who wants to
16 amend can do so, as long as it doesn't slow down the
17 train.

18 MR. ORSINGER: And that applies to the
19 motion as well as the response.

20 HONORABLE HARVEY BROWN: It doesn't apply to
21 the motion because, by law, the motion sets forth the
22 parameters of the whole dispute.

23 MR. ORSINGER: Okay. Okay. So unless
24 there's other comment -- oh, yeah.

25 HONORABLE HARVEY BROWN: The only difference

1 then between the reply language and the response language
2 is the response has language about when it's due or must
3 be filed, whereas, a reply is purely discretionary, so
4 that's why we have the word "may" in that section.

5 HONORABLE EMILY MISKEL: I was just going to
6 check in with Emilio, because I think we passed by your
7 earlier question. You had mentioned interest about the
8 phrasing of (d) (1) not being the same as (e) (1) and
9 whether there was a reason they were inconsistent. Can
10 you help me understand what your concern was, if you still
11 have it?

12 MR. LONGORIA: Well, I just think the
13 difference invites an inquiry into why, and so you could
14 parallel the language, in theory. You know, a response is
15 also permissive. You don't have to file a response, so
16 you could also say, "The nonmovant may file a response"
17 and "The nonmovant must file the response within 21 days
18 after." Or parallel them the same, either way.

19 MR. ORSINGER: Yeah. It doesn't need to say
20 "must file a response." Couldn't it just say "may file a
21 response within 21 days"?

22 MR. LONGORIA: Yep. Yeah, either way. I
23 was just of the opinion that there should be consistency
24 between the two time-to-file languages.

25 MR. ORSINGER: Giana.

1 MS. ORTIZ: Another way to create
2 consistency would be to delete that first sentence, "The
3 movant may file a reply," and then just make the second
4 sentence, "The movant must file any reply." That would
5 also fix it, I would think.

6 MR. ORSINGER: Okay.

7 CHAIR TRACY CHRISTOPHER: All right. Tell
8 us about (2), Richard.

9 MR. ORSINGER: Okay. So (2), this is the
10 contents of a reply, "may contain legal arguments
11 responsive to the response and evidence, but can't raise
12 new summary judgment grounds." It doesn't say "all
13 evidence," doesn't say "evidence." It says "grounds." "A
14 reply must include any objections to the evidence
15 supporting the response."

16 So several things are implicated there, not
17 the least of which is when we talk about new summary
18 judgment grounds, and that's different from elements, and
19 that's different from evidence, right?

20 HONORABLE EMILY MISKEL: I think, to back
21 up --

22 MR. ORSINGER: Okay.

23 HONORABLE EMILY MISKEL: Sorry for
24 interrupting. So to back up, the proposed draft rule
25 under (e) (2) said, "Contents. A reply must not raise new

1 or independent summary judgment grounds, other than to
2 address an amended pleading filed in response to the
3 motion for summary judgment," and that "other than to
4 address an amended pleading" got a lot of discussion
5 amongst people and sort of raised a lot of concern.

6 There was a lot of question about how could
7 a reply address an amended pleading, are we allowing new
8 grounds in a reply, are we allowing new evidence in a
9 reply? And so the subcommittee, to be more explicit,
10 broke the proposed (e)(2) into two sections, one just
11 saying what a reply can do. It can contain legal
12 arguments in response, but must not raise new grounds, and
13 because, to match the response, the reply must include any
14 objections to the evidence. So that's just contents of
15 the reply, and then in a separate section that we get to
16 next, we'll attempt how can a reply deal with an amended
17 pleading.

18 MR. ORSINGER: We have comments.

19 MR. JEFFERSON: Is the intent that if you
20 don't raise objections in the reply, you can't object?

21 HONORABLE EMILY MISKEL: Yes.

22 CHAIR TRACY CHRISTOPHER: Yes. Yes, that is
23 the intent.

24 MR. ORSINGER: Well, see, I frequently file
25 objections separately and even have a checklist that --

1 MR. JEFFERSON: Right.

2 MR. ORSINGER: -- granted or denied.

3 MR. JEFFERSON: And they're usually filed on
4 the day of.

5 MS. WOOTEN: Yeah.

6 MR. ORSINGER: So I'm not sure that I
7 comprehended that we were saying that you have to fold
8 everything related to the evidentiary objections into it,
9 but I can see why it would be due at the same time, but in
10 the same document.

11 HONORABLE EMILY MISKEL: It just parallels
12 the language from (d) (2) about the response.

13 CHAIR TRACY CHRISTOPHER: Right.

14 HONORABLE EMILY MISKEL: We just took the
15 response objection language and paralled it over to the
16 reply objection.

17 CHAIR TRACY CHRISTOPHER: Because right now
18 the objections are -- the draft language says the
19 objections have to be there. So we wanted objections to
20 the response to be in the reply, not filed the day of.

21 MR. ORSINGER: So I might -- I might just
22 attach it as an appendix to my reply and still go forward
23 with the checklist, because the judges actually appreciate
24 it, if you have a lot of objections. I have a checklist
25 of granted or not granted/denied.

1 CHAIR TRACY CHRISTOPHER: Quentin.

2 MR. SMITH: A couple of things on the last
3 point. There's a timing issue with the objections,
4 though. So the response is, what, 21 days, and then the
5 reply is only going to have seven days then to get
6 evidence to object. So I don't know if I love, love that
7 disparity.

8 But also, on (2), on -- I know what the rule
9 is trying to say, and I think it's grammatically correct,
10 but the "and evidence" seems like in some circumstances
11 you can attach evidence to the reply, and so I'm not sure
12 exactly how to fix that. Maybe it's just a comma, but it
13 says "a reply may contain legal arguments, response to the
14 nonmovant's response, and evidence," and so I understand
15 it means that it's -- what they're trying to say, but it's
16 not the clearest.

17 MR. ORSINGER: So you're saying that the
18 movant should be able to introduce new evidence?

19 MR. SMITH: No. I'm saying they shouldn't.

20 MR. ORSINGER: Should not.

21 MR. SMITH: But this seems like it, in a
22 certain reading you could --

23 MR. ORSINGER: This would allow that.

24 MR. SMITH: This would allow it.

25 MR. ORSINGER: So we need to make it clear

1 that we're not endorsing the concept that the movant can
2 come up with new evidence in the reply.

3 MR. SMITH: Right. That's right.

4 MS. WOOTEN: You could just add
5 "nonmovant's" before the term "evidence."

6 MR. SMITH: Yep.

7 CHAIR TRACY CHRISTOPHER: Or reverse the --

8 MS. WOOTEN: Or reverse it.

9 CHAIR TRACY CHRISTOPHER: -- order,
10 "Nonmovant's evidence and response," and then you wouldn't
11 have --

12 MS. WOOTEN: Yes.

13 CHAIR TRACY CHRISTOPHER: It would be clear.

14 MS. WOOTEN: That's true.

15 HONORABLE ANA ESTEVEZ: Let me ask -- can I
16 ask a question?

17 CHAIR TRACY CHRISTOPHER: Yes.

18 HONORABLE ANA ESTEVEZ: So if the scenario
19 was I set it 60 days out, it was a motion for summary
20 judgment that was filed. Like, I set the hearing.
21 Quentin has responded, and he objected to an affidavit
22 that Harvey had filed. So he, in his reply, tried to go
23 ahead and fix it. That would technically be new evidence,
24 and, normally, that's not how it's done, but I don't have
25 any time to wait on day 60 for him to ask if he can give

1 me a new affidavit that would clean up whatever your
2 objection was. Do we not want that to be able to happen?

3 Anybody? Does anybody want, if an
4 objection -- let's say he just objected that it was
5 conclusory, and so he gives me a new affidavit and puts it
6 in the reply. It would have satisfied all of his
7 objections.

8 CHAIR TRACY CHRISTOPHER: Well, I wouldn't
9 want you to fix a conclusory affidavit, but I would want
10 you to fix a not verified properly affidavit.

11 HONORABLE ANA ESTEVEZ: Okay. Well, let's
12 say it's not verified. Isn't that new evidence now,
13 because it's a verified affidavit? Don't we want that in
14 the reply, so I don't have to have a motion for file to go
15 beyond and then -- okay. That was it.

16 CHAIR TRACY CHRISTOPHER: Yeah, Harvey.

17 HONORABLE HARVEY BROWN: The very last
18 provision in the rule says late-filed evidence can be
19 permitted by the court. So in your situation where the
20 declaration doesn't have the address of the person on the
21 declaration, so it doesn't comply with the statute, the
22 judge could grant leave.

23 CHAIR TRACY CHRISTOPHER: Richard.

24 MR. ORSINGER: The movant also has a
25 parachute, which is they can withdraw their motion, get

1 the evidence tidied up, and then refile, so it's not like
2 they don't have recourse, and that may be the simplest
3 way, is just say, look, you have an out if you need it.

4 CHAIR TRACY CHRISTOPHER: I think probably
5 CLEs will be telling people that, but, you know, sometimes
6 we can't address every scenario in the rule in a
7 meaningful way, I think.

8 Any other comments on the amended pleadings?
9 And if you could explain why we made this change.

10 MR. ORSINGER: Yeah. So I'm going to call
11 on Emily, if you don't mind, it's a surprise, because I
12 think you understand this better than I do.

13 HONORABLE EMILY MISKEL: So on the amended
14 pleadings section?

15 MR. ORSINGER: Yeah.

16 HONORABLE EMILY MISKEL: So we struggled
17 with this. So, basically, given the tight timeline, the
18 question of how to address amended pleadings in a -- let's
19 say the nonmovant's amended pleadings in a summary
20 judgment reply. So given the tight time frame, you can't
21 really continue it. You can't -- like, again, this ties
22 into the special exception discussion. You can't sort of
23 give a deadline to replead or extend it later and -- so
24 what we said was "New claims or defenses asserted in a
25 nonmovant's amended or supplemental pleading filed after a

1 motion for summary judgment has been filed may be
2 challenged only by a new motion for summary judgment."

3 Okay. And then somebody pointed out to our
4 subcommittee, but you're already able to say that if the
5 same grounds in a summary judgment motion still apply to
6 the amended pleading, you shouldn't have to have a
7 do-over. You should just go forward, and your reply can
8 point out, sure, the nonmovant amended their pleadings,
9 they still can't show it's within the limitations period,
10 or whatever the issue might be.

11 So our draft under number (3) was supposed
12 to address since we now have no longer the ability to
13 reset or delay the summary judgment hearing in response to
14 an amended or supplemental pleading by the nonmovant, we
15 just said, well, that has to be a new summary judgment
16 response -- or, I'm sorry, a new summary judgment filed by
17 the movant, but if you can dispose of it, you don't have
18 to do it twice. That was our best effort to address the
19 specter of amended pleadings in the tight time frame.

20 CHAIR TRACY CHRISTOPHER: Harvey.

21 HONORABLE HARVEY BROWN: So to make this
22 more concrete, somebody amends their petition after a
23 motion for summary judgment is filed. The motion is
24 relying on the statute of limitations. They had three
25 causes of action. We want to make it clear that if the

1 statute of limitations for all of those causes of action
2 is two years and they've already argued statute of
3 limitations, the court can hear that. It's already got
4 the argument before it. The amendment doesn't change
5 anything, but if the summary judgment adds a cause of
6 action that has a four-year statute of limitations, that
7 would have to be addressed by a new motion for summary
8 judgment.

9 CHAIR TRACY CHRISTOPHER: Macey.

10 MS. STOKES: Yeah, I like this change
11 because it's consistent with the case law, which a lot of
12 people are not aware of. There is case law, but a lot of
13 people think, you know, I don't need a new motion for
14 summary judgment, but if they do add a new cause of
15 action, you do, and that would restart the timetables,
16 especially with these new constraints. But it is true
17 that the Supreme Court has held that if your grounds of
18 your summary judgment apply equally to the new claims, you
19 don't have to file a new one. So I like the mechanics.
20 Plus I think because a lot of people are not aware of
21 those and think they can do things in the reply to an
22 amended pleading, because amended pleadings are so common
23 with responses to summary judgments that I like making it
24 explicit.

25 CHAIR TRACY CHRISTOPHER: Okay. Any other

1 comments on that? We can move on to withdrawal.

2 MR. ORSINGER: Okay, so -- oh, yes.

3 MR. LONGORIA: Just a general comment. Did
4 the committee, subcommittee, discuss taking a position on
5 surreplies explicitly and saying they're not allowed
6 without leave of court or something to that effect?

7 MR. ORSINGER: Well, do you have a thought
8 about that? We didn't.

9 MR. LONGORIA: I mean, I imagine many
10 practitioners will be considering a surreply, and it might
11 be good to take a position and say, perhaps, surreplies
12 are not allowed without leave of court or something to
13 that effect.

14 HONORABLE ANA ESTEVEZ: I like surreplies.

15 MR. ORSINGER: You like surreplies?

16 HONORABLE ANA ESTEVEZ: Yeah. I like to be
17 able to read everything, and I'm more capable of being
18 engaged in the summary judgment.

19 MR. ORSINGER: Well, if you like surreplies,
20 do you like sur-surreplies?

21 CHAIR TRACY CHRISTOPHER: It's not in the
22 current rule. Let's not try to add it in. That's my
23 thought on it, you know.

24 HONORABLE ANA ESTEVEZ: I feel like if you
25 think it's important, it's probably important for me to

1 know.

2 CHAIR TRACY CHRISTOPHER: Roger, and then
3 Judge Miskel, and then lunch.

4 MR. HUGHES: Well, it's likely a more
5 radical proposal on (3), but simply to be said that a
6 reply may show why the grounds in the motion apply to
7 timely filed amended pleadings. I think that's about all
8 you need to say, because I think it's fairly obvious from
9 the rule that if you try to amend your way out of summary
10 judgment by adding a new claim or defense, the court can't
11 address it. We already have provisions in the rule, and
12 it's pretty clear. You're limited to the grounds you
13 raise.

14 And so if you have a timely filed -- and,
15 you know, there are cases where people will basically file
16 an amended pleading and worry about it later, whether it's
17 timely or not. Then the court, if you have alleged a
18 whole new cause of action or a whole new defense that's
19 not addressed by the grounds in the summary judgment, I
20 think it's pretty obvious from the rest of the rule and
21 existing case law, that's going to have to require a
22 different motion. And so I'm not really sure that we need
23 to put it in that if you -- if a new pleading is filed
24 you're going to have to have a new summary judgment. I
25 think it's enough to say that a reply may show that the

1 grounds in the original motion apply to any timely filed
2 claim or defense.

3 CHAIR TRACY CHRISTOPHER: Okay. Judge
4 Miskel.

5 HONORABLE EMILY MISKEL: I don't want to
6 stand between everybody and lunch, so I don't have
7 anything else to add.

8 MR. ORSINGER: He did have a comment. Did
9 you have a comment?

10 MR. PHILLIPS: I can wait. I'll defer as
11 well.

12 CHAIR TRACY CHRISTOPHER: All right. We're
13 going to try 45 minutes for lunch. All right.

14 (Recess from 12:19 p.m. to 1:02 p.m.)

15 CHAIR TRACY CHRISTOPHER: All right. Could
16 I get everybody to sit down?

17 We have a real quick one on expedited
18 actions that we would like to jump to and then go back to
19 finish up on summary judgment. So, Judge Estevez, are you
20 presenting this one?

21 HONORABLE ANA ESTEVEZ: Yes, and I just want
22 to present it while we still have some people from our
23 subcommittee, including me, because I don't know when
24 we're going to reach it. And I'm trying to find the page.
25 There's a memo that we presented in November. It should

1 be right after summary judgment.

2 MS. GREER: 106. Is that --

3 HONORABLE ANA ESTEVEZ: Yes. And our
4 assignment was just based on a new House bill. House Bill
5 16 changed the -- the amount in controversy from 250 to
6 325, and the Court wanted us to just see where the rules
7 needed to be amended to reflect their change and also to
8 discuss whether or not we want to make any changes to
9 expedited rules overall, and our subcommittee met by Zoom
10 and discussed it.

11 Interestingly enough, if you look at the
12 recommendation, it's paragraph (6), I did run this through
13 a present value calculator, the 250,000-dollar limit. It
14 was enacted in 2019. Before that, it was less, but it
15 ended up being equivalent to \$322,590 at the time I was
16 reviewing it, so, basically, it's not even a significant
17 change. It's the same value in dollars as the 250 would
18 have been back in 1989.

19 In it, we have -- our subcommittee did not
20 recommend any changes regarding changing any discovery
21 rules or making anything due sooner or the trials to be
22 conducted any time sooner -- any sooner. If you look at
23 the specific rules to change, we would just be striking on
24 Rule 47, 250 to 325 in paragraph (c)(1), (c)(2), and
25 (c)(3).

1 We added a comment, just so everyone
2 recognizes the reason this changed was just to implement
3 the increase in the amount in controversy as required by
4 the statute, and then we would also have to change
5 Rule 169 on paragraphs (a) and (b), and then, again, it's
6 not necessarily needed, but if the Court decided to add a
7 comment, then it would just say that Rule 169 is amended
8 to implement the increase in amount in controversy based
9 on the Texas Government Code and the new statute.

10 Interestingly enough, I will say that, even
11 in our court, in our jurisdiction, we have a county court
12 at law that's got an open seat, and the paperwork that was
13 coming out when they started their campaigning was that
14 they had statutory limits of 250,000. So the sooner we
15 change it, probably the better, so that they at least
16 understand that it has been increased to 325. So I don't
17 know that everyone knows that yet.

18 MR. ORSINGER: Even candidates.

19 HONORABLE ANA ESTEVEZ: Even candidates.
20 They do now, because we actually went out and let them
21 know, hey, there was a statute that passed. So we need to
22 make sure that that gets changed sooner than later.

23 CHAIR TRACY CHRISTOPHER: All right. And
24 the subcommittee didn't see any need to change any of the
25 other rules?

1 HONORABLE ANA ESTEVEZ: No.

2 CHAIR TRACY CHRISTOPHER: Any comments on
3 the proposed rule change?

4 All right. Then we'll move back to our
5 summary judgment.

6 MR. ORSINGER: So we're back on
7 subdivision (f), I believe we are, on withdrawal, and this
8 is wordsmithing probably, but we just wanted to put it in
9 active voice rather than passive voice. So, Kent, your
10 ears should perk up on that one because we're trying to
11 make it -- you know, the active voice is always easier to
12 understand, right.

13 HONORABLE KENT SULLIVAN: It is.

14 MR. ORSINGER: So it now -- it did say "any
15 withdrawal of a motion." It now says, "A movant may
16 withdraw a motion for summary judgment by filing" -- and
17 this is capital, initial caps, "Notice and withdrawal."
18 Not just anything on any kind of piece of paper, but a new
19 notice of withdrawal that identifies the date the motion
20 was filed, and then it's added "The trial court must not
21 rule on a motion that has been withdrawn."

22 So I think the idea is we're trying to get a
23 formal official document that's filed that reflects that
24 it's withdrawn, not just an agreement on the record or a
25 Rule 11 agreement that's filed. I don't know if everyone

1 agrees with that concept, but, Emily, what were you going
2 to say?

3 HONORABLE EMILY MISKEL: I think this was in
4 our subcommittee, or it may have been in a different
5 discussion I had, but, again, since the clerks are the
6 ones reporting these for reporting on judicial discipline,
7 an oral withdrawal of the motion does nothing, because who
8 is going to order the reporter's record and then somehow
9 get it to the clerk to be able to -- it's impossible. So
10 it has to be something that would appear in the clerk's
11 record, and so -- and also, since we're going to have a
12 flurry of multiple motions for summary judgment, it needs
13 to identify the date the motion was filed.

14 CHAIR TRACY CHRISTOPHER: So pretty
15 noncontroversial. Any comments on those changes?

16 MR. ORSINGER: I would just add, this last
17 sentence about how the court shouldn't rule on a motion
18 that's been withdrawn may not need to be said explicitly,
19 but there is a concern that -- I mean, if this is like the
20 nonsuit, all the way up until the second before the judge
21 rules, if you can see that you're headed into a collision,
22 you could just withdraw the motion right before the judge
23 announces a ruling, and that's very frustrating for
24 everybody, but that's the prerogative of the movant,
25 right, is to pull it back at the last second?

1 So this just makes it clear that once those
2 magic words, "Your Honor, we withdraw the motion," so
3 everybody leaves. Okay. So no comment on that.

4 Let's see, on (g), hearing or written
5 submission. We've already attempted to mention the fact
6 that hearing is an oral hearing and submission is a
7 written submission, but the rules that a hearing or
8 submission date must be set within -- and we thought,
9 well, why don't we just go ahead and say the hearing must
10 be held? So the proposed language from the subcommittee,
11 "The motion must be heard or submitted no sooner than 35
12 days after the motion's filing." So it's not when it's
13 set that we're focusing on in the new language. It's when
14 it's heard or when it happens.

15 And then "The motion must be heard or
16 submitted within." So unless the motion is withdrawn, we
17 have this deadline, but if the motion is withdrawn,
18 obviously, the deadline is suspended. And the only change
19 the subcommittee suggested in (g)(1)(B)(iii) was change
20 "if a movant agrees" to "if the movant consents." That
21 may or may not be meaningful to you, but it seemed to be
22 meaningful to the subcommittee to use the word "consent."

23 MS. ORTIZ: That comes from the language in
24 the statute. House Bill 16 says "consent" rather than
25 "agree."

1 MR. ORSINGER: So we're conforming to the
2 legislative language then?

3 MS. ORTIZ: Correct. And since the
4 legislation says that we would not depart or the Court
5 should not depart from that, the words "consent" and
6 "agree" are used throughout the TRCP and may have a
7 slightly different meaning, so we would just go back to
8 "consent," the suggestion is.

9 MR. ORSINGER: Okay. So there's more to it.
10 So moving on to (g)(2), the only issue there was "The
11 court may reset a hearing or written submission." We
12 don't say "oral hearing," which we did earlier on; and
13 maybe we only need to say it once at the beginning of the
14 rule; but, anyway, it's made it clear a hearing, we think,
15 means oral hearing, and, therefore, we thought we should
16 say "written submission."

17 We have the same problem in (d), because we
18 have hearing that says -- it just says "hearing." It
19 doesn't say "oral."

20 And then we move on to subdivision (5).
21 "The court must record in the docket the date the
22 submission was heard or submitted." And I was kind of
23 hoping that Sharena and John would comment for us, what is
24 the docket? You know, we're all electronic nowadays.
25 What used to be a docket sheet is now some kind of

1 computer file. What does it -- I would be curious to know
2 in both of your instances, what does it mean when the
3 court records something in the docket?

4 MS. GILLILAND: That's a great question, and
5 I think that that probably varies by court and county. In
6 Parker County, we have a way of letting the judge record
7 something in the case that looks similar to your events
8 for motions, and then we pull that into a form we created
9 that looks like an old docket sheet, if you wanted to look
10 at it like that. I know that there's some who utilize
11 places for judges to add notes in their system, and
12 whether that's public or not public may vary by
13 jurisdiction.

14 My question is what do we mean? Do we mean
15 docket sheet? Is it noted in the docket if you have an
16 electronic system that keeps track of your hearings? Is
17 that sufficient that you could go back in and say the
18 hearing was on this date? Is that sufficient? And so
19 it's a question of what does compliance with that look
20 like and mean in an electronic world.

21 MR. ORSINGER: And I would ask you, where it
22 says "The court must record in the docket," I'm thinking
23 in the old days, the judge would actually write something
24 in --

25 MS. GILLILAND: Yes.

1 MR. ORSINGER: -- what's called the docket,
2 but it's really the clerk that we're relying on to do all
3 of this stuff, isn't it? Does court mean clerk here?

4 MR. WARREN: No. Actually, there is a --
5 the old docket sheet, paper docket sheet, there is a form
6 of that in our case management system, and it's
7 where the -- I think it's where the judge makes their
8 judicial entries. And so that's part of the case, and
9 it's accessible to the public. It's different from
10 judicial notes, but it's there. I can't remember what
11 it's called. I think it's called judicial summary, or it
12 may be docket entry.

13 HONORABLE ANA ESTEVEZ: Ours is docket
14 entry.

15 MR. WARREN: Yeah. And so that's part of
16 the case management system, where the judge goes in, and
17 whatever they would have written in the docket sheet,
18 they're now typing into that.

19 MS. GILLILAND: But I know that there's some
20 counties -- we're both on the Tyler product. There are
21 some counties that don't have that ability, and they may
22 have a PDF, in their case, that you can edit, kind of like
23 editing in Adobe Pro or something like that.

24 I think the biggest question here is is
25 there an expectation that the judge has the hearing and

1 does something formal to say we had a hearing? Is it
2 something that the clerk should do? Is it necessary, if
3 there's other recordings in the case somewhere that says
4 we did have a hearing, and we did -- or we set this for
5 submission, and go off of that date?

6 MR. ORSINGER: Well, to me, to me, this is
7 not a setting. I'm reading this as a -- as an actual
8 hearing or submission. Do you read that differently?

9 MS. GILLILAND: No. I do -- I read it the
10 same as you. I think that my question is within our case
11 management system, if we have, essentially, an electronic
12 calendar for the court and they have it set that this is
13 being heard orally or by written submission, is that
14 sufficient to be recorded in the docket?

15 MR. ORSINGER: Yeah. So my take on it, and,
16 of course, I'm not a judge at all. I have no idea, but,
17 to me, this is not a question of reflecting the fact that
18 there -- a setting has been set to be heard or submitted.
19 This is an after the fact thing, presumably from the
20 judge, saying the motion was heard or was submitted.
21 That's the way I read this, but I don't know.

22 MS. GILLILAND: So like a confirmation that
23 we actually did it.

24 MR. ORSINGER: That's what I read in this.
25 What does anyone think?

1 CHAIR TRACY CHRISTOPHER: This is a little
2 concerning. We had a discussion within our committee
3 that, like, when things are on a submission docket,
4 certainly in the appellate world, you know, it's submitted
5 on day one, but we might not be looking at it until day
6 30; and as long as a trial judge rules within, you know,
7 the 90 days of day one, they're fine under the statute;
8 and Judge Estevez is worried that a judge would actually
9 have to look at it on day one, on the submission date; and
10 so I don't know what is -- what was intended by the
11 statute or what we can do with respect to recording in
12 today's docket world.

13 Judge Chu.

14 HONORABLE NICHOLAS CHU: I think that if
15 you're looking at it from a Tyler perspective, or also
16 from like a -- the recording perspective of having to
17 report this to OCA eventually, is if you're putting an
18 event code saying hearing held on blank or case submit --
19 motion for summary judgment submitted on blank as the
20 event code, that would trigger all of the reporting
21 timelines that are flags that would happen. And then for
22 OCA to report in part of it, that would kind of capture
23 what you needed in terms of did they meet inside the
24 timeline of submitting the case in time or have the
25 hearing in time and things like that.

1 But, now, on the -- for the counties that
2 don't do it, the smaller counties that are just doing it
3 on their docket sheets, I think it's just like case
4 submitted this date and --

5 MS. GILLILAND: Well, and the reality is for
6 a while we're probably going to have to pull all of this
7 data and analyze it manually to report it.

8 HONORABLE NICHOLAS CHU: Yeah.

9 MS. GILLILAND: Because nothing has been
10 coded yet to trigger.

11 HONORABLE NICHOLAS CHU: Yeah.

12 MS. GILLILAND: I think it's just a question
13 of is it something the judge needs to put in there that
14 says, "I heard it today. I considered it by submission
15 today." Is it something different than that?

16 CHAIR TRACY CHRISTOPHER: And then it gets
17 into the question of, well, what if I'm on vacation that
18 day, you know, but it's still submitted that day, right,
19 and I have 90 days to rule. Am I in trouble as a trial
20 judge by putting down that I submitted it that day when I
21 wasn't there or I didn't read it? I mean, you know, it's
22 a potential issue.

23 I mean, normally, in our orders you would
24 include something like the motion was heard on X date.
25 The motion was submitted on X date, and I am granting it,

1 you know, within a certain period of time, so it's just
2 the submission in the appellate world doesn't mean we
3 actually looked at it that day, and is that the same
4 submission in the trial court world? That's the question.

5 HONORABLE NICHOLAS CHU: I mean, I would
6 think so, just because it just creates the deadlines for
7 everybody, and so it's just this -- the word "submission"
8 for that date is just the -- that's when everything stops,
9 you can't give me anything else, and we're locked in.

10 CHAIR TRACY CHRISTOPHER: Well, that's the
11 way I was taking it, but Judge Estevez was a little more
12 worried about it.

13 Judge Miskel.

14 HONORABLE EMILY MISKEL: Where this comes
15 from is SB 293, which is the previous version of HB 16,
16 talked about the court had to set -- or sorry, the court
17 must hear oral argument on the motion or consider the
18 motion without oral argument; and so in HB 16, it
19 continues to use the word "consider," so it says "heard or
20 considered," but they struck out the part that said
21 "without argument."

22 So we used "submission" in the rule, but
23 "submission" is not a statutory word. The statute used to
24 use the words "oral argument and considered without oral
25 argument," but now what it says the court's obligations

1 are is the court must set the motion for a hearing by oral
2 argument or by submission. Okay. There's a use of the
3 word "submission," by the 60th or 90 day, "must file with
4 the clerk and provide to the parties a written ruling, not
5 later than the 90th day after the motion was heard or
6 considered." So not "submitted" but "considered," and
7 then third, this language in the rule comes directly from
8 the statute. "The court shall record in the docket the
9 date the motion was heard or considered," but the
10 Legislature struck out "without argument." So they've
11 made it ambiguous, and we don't know the answer.

12 CHAIR TRACY CHRISTOPHER: So when I'm giving
13 a CLE on what this means, what am I telling the trial
14 judges that means and what is their obligation?

15 HONORABLE EMILY MISKEL: Yeah, because they
16 use the word "submit" and "consider" interchangeably,
17 question mark, and then your direction to record in the
18 docket was the day you heard it, or it used to say
19 "considered without argument," and now it just says
20 "considered." So is that a different thing? I don't
21 know.

22 CHAIR TRACY CHRISTOPHER: Well, but the
23 "heard or submitted" on 60 days, I mean, I'm just trying
24 to like -- what's it going to mean practically for a
25 judge; and when Judge Estevez started talking about it, I

1 was like, oh, I never would have considered it that
2 meaning, like, and if I record in my docket sheet the case
3 was submitted on day one, but I was really on vacation,
4 right, and I didn't look at it. You know, I didn't
5 consider it. I didn't read it on day one, but that was
6 the official submission date. You know, am I going to get
7 in trouble as a trial judge? And that's the problem that
8 this language is sort of creating, and so I don't know
9 whether we can fix it with a comment or -- Richard.

10 MR. ORSINGER: My thought is that we are, of
11 course, making a recommendation to the Supreme Court, and
12 my thought is that we ought to go on the record here in
13 this hearing that the term "submission" does not -- does
14 not specify the day that the judge lays eyes on. That's
15 just the official date of which it transitions from
16 pleadings to being part of the deliberative process of the
17 judge. If we say that the judge has to enter on the
18 docket the moment that they first look at it, is that
19 really it? Or is it really maybe they just glanced at it,
20 but they didn't really look at it until the next day?

21 It's just impossible. Submission has to be
22 the transition from the trial advocate level to the
23 judicial adjudication level, and I would suggest we either
24 all agree, or we take a vote on it to let the Supreme
25 Court know strongly that we don't want the word

1 "submission" to be interpreted as the judge revealing the
2 day they -- the first day, the second day, or the third
3 day that they looked at the motion.

4 THE COURT: Judge Brown.

5 HONORABLE HARVEY BROWN: I agree with that.
6 I mean, I think the trial judges are entitled to some
7 guidance here. I wouldn't want any trial judge to be
8 reprimanded or any way used against them in a campaign
9 because they were on vacation that day, and the
10 Legislature has asked the Supreme Court to make rules, and
11 to me, that gives the Court some discretion to explain,
12 where necessary, a statutory word, and here the word
13 "submitted" I think needs explanation.

14 CHAIR TRACY CHRISTOPHER: Judge Estevez.

15 HONORABLE ANA ESTEVEZ: So I don't have an
16 opinion of what needs to be done. I'm just going to say
17 what I've done. So I had a motion for summary judgment
18 that I reviewed after the submission date, and I put in my
19 docket entry, "reviewed motion for summary judgment, will
20 grant," and in this case their order had a blank for my
21 ad litem fees, because it was an ad litem that would have
22 been in there, and there was no evidence of ad litem --
23 you know, there wasn't a bill. So I said "will grant,
24 requesting information of ad litem fees."

25 I haven't signed the order. It hasn't been

1 90 days. I can put some consideration -- it was after the
2 submission date. It was like the next day. I don't
3 know -- I considered it that day, and I made my ruling. I
4 don't have a written ruling. I need more information. I
5 think that that should satisfy any and all requirements by
6 the statute, but it may not be what needs to be done.

7 MR. ORSINGER: I don't know if it would be
8 important, but we could take a vote on this issue, because
9 I think probably we would feel unanimous that submission
10 should not have anything to do with the judge's thought
11 process. It ought to be the official time that the
12 judicial process starts.

13 HONORABLE ANA ESTEVEZ: And it wasn't a
14 60-day. They had actually asked for a specific date, so
15 it was after December 4th, but we hadn't hit 60 days yet,
16 so I was still within my 60 days of considering it, but it
17 was after the submission hearing date.

18 CHAIR TRACY CHRISTOPHER: Judge Miskel.

19 HONORABLE EMILY MISKEL: I was going to say,
20 I think the Supreme Court's proposed rule already takes a
21 position on this issue, because the statute says, "The
22 court must record in the docket the date the motion was
23 heard or considered," and "considered" is the ambiguous
24 word, and in the rule, the Supreme Court has not said
25 "heard or considered." The Supreme Court has said, "The

1 judge records the date it was heard or submitted," which I
2 think answers that, takes the position.

3 CHAIR TRACY CHRISTOPHER: So we're taking
4 the position that "submitted" doesn't mean the judge
5 actually has to look at it that day. I mean, that's what
6 needs to be clear. It's submitted on day one, but I don't
7 actually have to read it on day one.

8 HONORABLE ANA ESTEVEZ: But isn't that
9 already in here? That's in here, because it was a notice
10 of hearing that the clerk already had to give, and so it's
11 in the file. They don't need a docket entry for that. So
12 it seems like that couldn't be what they meant.

13 CHAIR TRACY CHRISTOPHER: Yeah, but the
14 statute requires some sort of docket entry, right? That's
15 the problem. And we're trying to figure out what that
16 docket entry means, and we certainly don't want any judge
17 to get into trouble by saying, "I submitted it on X day"
18 if that means I read it that day.

19 Sharena.

20 MS. GILLILAND: So the hearing requirements
21 that say you have to have a hearing, we all understand
22 what we mean by hearing. Is submission, is that being
23 used really as just a deadline without oral argument?
24 Basically, the same -- it's the same placeholder.

25 HONORABLE ANA ESTEVEZ: It is the hearing

1 date. So it would be the day I would normally review it.
2 It's the first day that I can review it, knowing that
3 everything has been done.

4 MS. GILLILAND: So, essentially, it's our
5 deadline, and we're kind of having a hearing but no
6 argument.

7 HONORABLE ANA ESTEVEZ: People, right.

8 MS. GILLILAND: Okay.

9 CHAIR TRACY CHRISTOPHER: But if I'm not in
10 the office or I'm on vacation, then I'm not reviewing it
11 that day, and am I in violation if the docket sheet says
12 submitted when I'm not actually looking at it that day? I
13 mean, we just have to -- I mean, submitted in the
14 appellate world is very different. So, you know, a case
15 gets submitted in the appellate world, and no one thinks
16 that the judge is actually reading it that day. It's just
17 ready. It's ready for us to look at, you know, on that
18 day. I don't know if that -- which is how I would
19 understand the rule, but for this docket entry that the
20 statute requires. Yes.

21 MR. WARREN: Justice Christopher, how is it
22 worded or phrased at the appellate level where there is
23 your interpretation or understanding? Is it -- should it
24 be that we just adopt that same language? Because it
25 wouldn't make sense --

1 CHAIR TRACY CHRISTOPHER: Well, in the
2 appellate world, they ask for oral argument or they don't,
3 and we either send out a notice of oral argument or we
4 send out a notice of submission. Okay. Submitted without
5 oral argument. So everybody knows that's when our time
6 frame starts, but that doesn't mean I actually read it on
7 that day.

8 MS. GREER: There's a docket entry that says
9 "case submitted."

10 CHAIR TRACY CHRISTOPHER: Yeah. There's a
11 docket entry that says "case submitted."

12 MR. ORSINGER: And it's complicated that the
13 courts of appeals sit in panels of three, and I think I've
14 always understood that the submission date is when it --
15 when the files get delivered to chambers, but each judge
16 is going to read it on a different day, and then the
17 judges are going to meet together and conference on that
18 case on yet another day, so what is submission at the
19 appellate level? It's just we have one judge who can --

20 CHAIR TRACY CHRISTOPHER: And an appellate
21 docket entry is very different from the trial court docket
22 entry, just because of who's doing it, for the most part,
23 right.

24 MR. ORSINGER: I don't think anyone imagines
25 that the Legislature wanted judges to say on the docket

1 the day they first started thinking about ruling. That
2 doesn't even make any sense.

3 I'm sorry. What were you going to say?

4 HONORABLE EMILY MISKEL: I was going to say
5 that would be correct if it was the SB 293 language, which
6 made clear what the docket entry is, is the date the
7 motion was heard or considered without argument, which
8 would be more like the submission date, but they took that
9 out and just left the word "considered," which is what's
10 introducing this -- they want a docket entry when it was
11 considered, which we're just sort of conveniently assuming
12 that still means considered without argument, AKA
13 submitted, which is the word they used previously.

14 MR. ORSINGER: So I would ask, well, if
15 consideration occurs over a period of a few days, like the
16 judge reads part of it on one day and part of it another
17 day and part of it another day, which day did the judge
18 consider it?

19 CHAIR TRACY CHRISTOPHER: Giana.

20 MS. ORTIZ: Shifting gears a little bit on
21 part (g) (2), reset permitted, I don't think there was
22 discussion held, or I missed it, it was quick, on (d) (2)
23 where the last sentence of that paragraph was stricken. I
24 would suggest that that sentence is not necessary because
25 you've got it there in (g) (2), and so I think that it was

1 in (d) (2) or is in (d) (2) to allow judges flexibility to
2 set for oral argument, if it had not previously, or to set
3 for written submission if nobody requests oral argument,
4 but I think that that ability is probably taken care of in
5 (g) (2).

6 CHAIR TRACY CHRISTOPHER: So -- and the
7 reason why we're sort of bringing this up is that in --
8 you know, things are not uniform across the state, right?
9 And for some courts, they do everything in an oral
10 hearing. They don't have this submission docket, which is
11 a creature of local rules. I mean, we don't have a rule
12 that talks about what a submission docket is and what it
13 means to put something on submission. I mean, you know,
14 Harris County has certain rules. You know, you have to
15 have 10 days' notice, and you have to respond three days
16 before. I'm sure Dallas has similar. You know, bigger
17 counties have submission dockets, but across the state,
18 I'm not really sure that we have that same process
19 everywhere.

20 So I think it might be nice if we had
21 guidance as to what that meant for the courts. And if the
22 concept is like at the appellate level, it's submitted,
23 paperwork is done, it's now in front of us, but I don't
24 actually have to look at it on that day, but if it's the
25 day I have to actually look at it, then, you know, the

1 trial judge is going to have to be very careful on when
2 they submit it.

3 Yes, Harvey.

4 HONORABLE HARVEY BROWN: I just have a
5 question. Will these docket entries be done by the judge,
6 or will it be done by the clerk? And if it's the clerk,
7 should we say the court or the court's designee, or should
8 we say the clerk of the court? Just raising the question,
9 does the judge have to personally record it.

10 CHAIR TRACY CHRISTOPHER: I mean, I think
11 the statute says the court, right? That's the problem.

12 HONORABLE HARVEY BROWN: Does "the court"
13 just mean the judge, or does it mean the court as an
14 entity, which includes the staff?

15 CHAIR TRACY CHRISTOPHER: This comes
16 straight from the statute, and the question is whether we
17 can tinker with that or provide some explanation for what
18 that means. Yeah.

19 HONORABLE ANA ESTEVEZ: Well, I think some
20 courts have court coordinators put in docket entries. I
21 don't, but I think some of them do, but I would guess if
22 that's their practice, that they're allowed to do whatever
23 their judge tells them to do. It's still the court.

24 CHAIR TRACY CHRISTOPHER: It still doesn't
25 answer the question if I set something on day 60 that I'm

1 out of town.

2 HONORABLE ANA ESTEVEZ: No. No, but he was
3 asking who actually had to physically put it in, and I
4 think it's fine if they have somebody else that's doing
5 these docket entries.

6 CHAIR TRACY CHRISTOPHER: Yeah. David.

7 HONORABLE DAVID KELTNER: I agree there is a
8 significant problem, and we could get judges into trouble.
9 Consider this, and I'm not sure it works, because I
10 haven't -- I haven't had the time in with this you-all
11 have, but if you look at (h), small (i), ruling, now --
12 and, Emily, you were reading this and saying that it is
13 "consideration" is the word that was used in the statute.
14 If you could do this, if you could change that passage so
15 that the written ruling reflects the day it was considered
16 or the day it was heard, that gets entered into the docket
17 anyway. Wouldn't that solve all of the problems?

18 And just change the requirements for the
19 ruling. It's got to be written in in any event. Am I
20 right, that a written ruling is going to be entered on the
21 docket automatically? I think I'm right. Clerks, can you
22 help me with that? But it would seem to me that you could
23 do that, eliminate docket, build it into the ruling,
24 because if it's consideration, it's not submission.
25 Because I think submission, Chief, you're right, the

1 appellate world looks at submission differently, but the
2 submission of a summary judgment without oral argument
3 doesn't mean it has to be decided that day.

4 Now, you can say when you considered it. If
5 it's consideration, I considered it. I decided today.
6 Write that it was considered or heard, and I ruled today
7 on these. Then that gets into the docket, and we don't
8 put judges at risk. Emily, what have I missed?

9 HONORABLE EMILY MISKEL: The only thing I
10 would say is that the statute requires the court to do
11 three things: Set it, file with the clerk and provide to
12 the parties a written ruling, and record in the docket the
13 date it was heard or considered.

14 So I think the statute, in addition to a
15 written ruling, wants a docket entry, but you're correct
16 that nothing requires the docket entry to be made before
17 the written ruling, so you could issue your written ruling
18 and make a docket entry --

19 HONORABLE DAVID KELTNER: At that time.

20 HONORABLE EMILY MISKEL: -- on January 30th
21 that you considered it on November 30th, if that makes
22 sense.

23 HONORABLE DAVID KELTNER: And do it later so
24 you're not having consideration, which is Chief's
25 hypothetical of a judge being out of town or being in the

1 middle of a trial or all of those kinds of things that
2 don't make sense.

3 CHAIR TRACY CHRISTOPHER: Sharena.

4 MS. GILLILAND: I agree with you, and that's
5 a very logical answer, but the statute says that the
6 parties have to be provided a written ruling not later
7 than the 90th day after the date the motion was heard or
8 considered. And so this actual date of the hearing or
9 submission or consideration is what's triggering the next
10 reporting requirement of written order or ruling.

11 HONORABLE DAVID KELTNER: Excellent point.

12 CHAIR TRACY CHRISTOPHER: Well, I mean, I
13 understand. I set it for submission on day one. I have
14 to have a ruling by day 90, even if the first time I look
15 at it is day 80. Okay. The only question is, am I in
16 trouble by not looking at it on day one? That's the
17 question.

18 HONORABLE DAVID KELTNER: If that's the
19 case, comment. I think the comment could probably handle
20 that if the Court would be agreeable to that.

21 CHAIR TRACY CHRISTOPHER: Yes, Rich.

22 MR. PHILLIPS: I don't want to put anything
23 more on the trial courts than we have to, but it seems
24 like at least one way to look at it is the Legislature
25 seems to think you either have a hearing or you consider

1 it, and those are the two alternatives, and if the hearing
2 is when you consider it, then I don't think just saying it
3 was submitted on X date necessarily does what the
4 Legislature seems to be wanting, which is they want to
5 require the trial courts to actually sit down --

6 CHAIR TRACY CHRISTOPHER: To actually look
7 at it.

8 MR. PHILLIPS: -- look at it --

9 CHAIR TRACY CHRISTOPHER: On day one.

10 MR. PHILLIPS: -- on day 60, right, no later
11 than day 60. So I think if we're trying to say you can
12 call it submitted on that day and look at it later, we may
13 be -- the Court could be in the position of changing the
14 statute. The Legislature could have been clearer, but
15 given that they've said it as -- and if you're trying to
16 look at it as a statutory construction lens, they said it
17 as two options; and one option, absolutely, they're
18 considering it because there's an oral hearing and you're
19 looking at it, you're thinking about it, and you have to
20 rule within 90 days. If the other option is oral hearing
21 and they don't say "submitted," they say "consider," I
22 mean, I think that's the way it's written.

23 I don't want to get the trial judges in
24 trouble either, but I'm not sure we can change the
25 statutory term from "considered" to "submitted" if we

1 think "submitted" means that's just when briefings close.

2 CHAIR TRACY CHRISTOPHER: I mean, that's
3 certainly -- from the appellate point of view, that's what
4 "submitted" means, but the question is whether the, you
5 know, statutory language leads us to something else.

6 MR. PHILLIPS: Yeah, because they didn't use
7 that. They used "considered."

8 CHAIR TRACY CHRISTOPHER: Right. Right.
9 Judge Miskel.

10 HONORABLE EMILY MISKEL: Yeah. I will
11 actually throw my vote in with Rich, because I think you'd
12 be safer to only set these on days that you're there and
13 not set them on a day you're on vacation, and if you're
14 sick, use exchange of benches or get a visiting judge or
15 something else to actually have -- have it be set on the
16 day that it's actually set, as if -- the same as if it
17 were a hearing.

18 I understand Houston has some kind of
19 submission docket that's always on a Monday or whatever,
20 but I'm not familiar with that. Like in the counties I
21 practiced in, when you set something, if it's set for
22 hearing or submission, it's just given its place in the
23 court's normal docket. So I wouldn't set something for
24 submission on a day I'm not there, because we're not
25 setting things that day.

1 CHAIR TRACY CHRISTOPHER: Oh, yeah, no. I
2 mean, normal practice in Harris County's submission docket
3 is you just set it on whatever Monday you want, with 10
4 days' notice, and then the judge gets to it when they get
5 to it. You don't actually have to consider it or look at
6 it that day, and the question is whether the Legislature
7 intended judges to be looking at it, by the terminology
8 that they use there, and if so, and if we think that,
9 then, you know, we need to let judges know that that's
10 what that means.

11 Yes, Sharena.

12 MS. GILLILAND: In the statute, the
13 requirement for when the hearing -- it's hearing or by
14 submission date, but then in the same section, a little
15 later when it's talking about the docket entry, it says
16 "heard or considered." So there's both language, both
17 words being used, in the same section.

18 CHAIR TRACY CHRISTOPHER: Okay.

19 (Off the record)

20 CHAIR TRACY CHRISTOPHER: All right. We've
21 exhausted that, and we'll move on. We're using the -- we
22 don't have any particular advice there.

23 MR. ORSINGER: And, apparently, we don't
24 need it either. So subdivision (h) is standards, and the
25 first one is grounds, and this is a moment for people to

1 share their thoughts about this issue, because we talk --
2 the rule talks about "grounds" here. "No judgment shall
3 be granted except on the grounds stated under (b) (2) (C) or
4 (b) (2) (D)," but in other places, like in (a) (1) or
5 (b) (2) (D), we talk about elements of a claim or defense,
6 not grounds. Then (e) (2) we talk about new summary
7 judgment grounds and then in (e) (3) we talk about claims
8 or defenses again. So now, Pete, I know that you had some
9 uncertainty about how this --

10 MR. SCHENKKAN: Well, the question, I think,
11 is maybe one that we should just get out in front of
12 everybody here for anyone to say if they see this as a big
13 problem, and maybe the answer is it's not a problem here,
14 but we do not define "grounds," and we do have at least
15 two different sorts of grounds that we know are legitimate
16 that are described differently. (h) (1), at the top of
17 page four where we started (h), being standards, and (1),
18 being grounds, refers us to you can't grant summary
19 judgment except on grounds stated under (b) (2) (C) and
20 (b) (2) (D).

21 (b) (2) (C) is for traditional summary
22 judgment, and it requires the movant to state the specific
23 grounds. So it requires the grounds, but it doesn't
24 define them. And (b) (2) (D) for the no-evidence summary
25 judgment motion says the movant has to specify the

1 elements of a claim or defense as to which there is no
2 evidence, contends there's no evidence.

3 Then when we get to the reply, page two,
4 this is (e), reply to contents, you can do legal argument,
5 new legal argument, but you can't urge new grounds, so --
6 and then there is this sentence that we have been
7 discussing about amending pleadings affecting whether
8 you're talking about new grounds or just new arguments.

9 The definitions -- I'm sorry, let me see. I
10 thought I had this better organized.

11 HONORABLE DAVID KELTNER: (a) (1)?

12 MR. SCHENKKAN: Yeah. Well, we -- yeah.
13 (a) (1) is where you would think you would look.

14 HONORABLE DAVID KELTNER: Right.

15 MR. SCHENKKAN: And what you find when you
16 get in (a) (1), the definitions, are definitions of a
17 traditional motion and a no-evidence motion, and (a) (1)
18 for the traditional motion requires -- assumes that the
19 argument is that there is an element of a claim or defense
20 that is either established as a matter of law or negated
21 as a matter of law, with no fact dispute involved.
22 Whereas, (a) (2), for the no-evidence summary judgment
23 motion, is a motion claiming there's no evidence of an
24 essential element.

25 So we've got grounds, elements, legal

1 arguments, and material fact issues floating around here,
2 and they are sometimes overlapping parts of each other.
3 I'm not sure we have a problem, but I guess I may be, if
4 nothing else, flagging this for Jackie to see it if we do.
5 But does this bother anybody else? Maybe not.

6 HONORABLE DAVID KELTNER: We talked about
7 this during the break, and let me give you my two cents on
8 this. I think, after looking at it, it is okay, Pete, and
9 here's why I think the definitions in (a)(1) and (2)
10 establish how one can get a summary judgment. I think the
11 term "grounds" refer to what you've raised in the summary
12 judgment, and so, essentially, (a)(1) and (2) may be the
13 basis for the grounds, and then so I don't -- I think it's
14 okay. It's very consistent. They're not referring to the
15 same thing.

16 The grounds are what are alleged in the
17 motion, and you can't change those. So I think it's fine
18 the way it is. We could get into the elements of causes
19 of action. We could get into the facts and the like, but
20 the truth of the matter is the elements of the cause of
21 action is what the rule really deals with, and is because
22 a fact might be essential to an element of the cause of
23 action, so I would leave it as it is.

24 CHAIR TRACY CHRISTOPHER: And I think we
25 just moved (k) into (h), standards. That's what that is.

1 (k) was already in the Supreme Court's draft, so that's
2 just a movement there. Richard.

3 MR. ORSINGER: A possible consideration on
4 (h) (1), instead of "grounds" is just "claims or defenses,"
5 because that's what we're talking about, if you refer back
6 to (a) (1), and so they talk about claims or defenses is
7 what you're moving for summary judgment on. So if
8 anyone -- if there's any discomfort on the Court with
9 introducing a new term, "grounds," we could just go back
10 to "claims or defenses."

11 On (h) (2), all we did was clarify rather
12 than "except as to damages," "except as to the amount of
13 damages." Oh, I'm sorry. Emily, did you want to say
14 something?

15 HONORABLE EMILY MISKEL: So the explanation
16 was the old rule says "amount of damages," and the
17 proposed rule just says "except as to damages," and
18 several people said, "What, you can't get summary -- what
19 if you could get summary judgment on damages? You can't
20 ask for summary judgment on damages anymore?" Like, no,
21 what it means is that can be the only remaining fact
22 issue, and you could still get summary judgment. So we
23 just proposed importing the previous language right back
24 into the rule.

25 MR. ORSINGER: So on number (3), we've

1 already discussed this before, substituting "nonmovant"
2 for "respondent," and then as Chief Justice Christopher
3 pointed out, (k) is -- really the part is located from
4 elsewhere, and when Lamont Jefferson was here, we had this
5 discussion about whether a ruling on -- when the summary
6 judgments are not granted, can the court make a ruling on
7 matters that have been established as a matter of law, and
8 we've already had that discussion.

9 CHAIR TRACY CHRISTOPHER: And it's in the
10 current rule. This language is in our current summary
11 judgment rule, just removed.

12 MR. ORSINGER: So if we move on to (i),
13 which is ruling, the court must -- originally, it said
14 "sign a written ruling," and the subcommittee suggested
15 "issue a written ruling," because signing becomes a little
16 theoretical in our digital world. I know from reading
17 appellate cases that renditions can occur by e-mail as
18 well as orally in the courtroom as well as by letter, and
19 I don't know that it means to say sign a written ruling if
20 it's an e-mail. So rather than to get around all of that,
21 we just thought "issue a ruling," and that would include
22 digitally issuing it in whatever way or entering it into
23 the docket.

24 "The clerk must provide the ruling to the
25 parties as provided in Rule 21(f)(10)." So I think this

1 was mentioned a little earlier. It's the clerk's duty --
2 or the subcommittee is suggesting that the clerk has that
3 responsibility, not the judge.

4 CHAIR TRACY CHRISTOPHER: Rich.

5 MR. PHILLIPS: I know what you're trying to
6 get to with sign and issue, but the rules say all periods
7 run from the day of signing, so why would we change that
8 word?

9 MR. ORSINGER: Because there's no signature.

10 MR. PHILLIPS: I know, but other rules say
11 that deadlines run -- right, this is one way we're
12 different from the feds, right. We don't care what date
13 the federal judge signs something. It's the date it gets
14 entered in the docket. So if it's a week later, your
15 deadline starts running when it gets entered. In Texas
16 court, if the judge signs it on the 1st of January and it
17 doesn't get entered until the 8th of January, your
18 deadlines still run on the date it was signed. So I would
19 stick with "signed," because I think "issue" is going to
20 be confusing. What does "issue" mean? We know what
21 "sign" means, and under -- if they type their name on an
22 e-mail, that's a signature. It's an electronic signature.
23 I wouldn't change it.

24 CHAIR TRACY CHRISTOPHER: Judge Miskel.

25 HONORABLE EMILY MISKEL: And, actually, both

1 words are not what HB 16 says. So HB 16 says "file a
2 written ruling," so I would say not "sign" or "issue" or
3 "render," but it should probably say, "The court must file
4 a written ruling on the motion, and the clerk must provide
5 it to the parties."

6 CHAIR TRACY CHRISTOPHER: Except the judges
7 don't file. The clerks file.

8 HONORABLE EMILY MISKEL: Or the court staff,
9 just like we said the court staff can make a docket entry,
10 the coordinator can file it.

11 MR. ORSINGER: That would certainly make
12 Justice Young happy in *Bachelor Vs. Bizzle (sic)*. He
13 wanted to eliminate this rendition, signing, and entry and
14 replace it with electronically filing, so I know we have
15 three votes for that, because he had two people join him.

16 HONORABLE JANE BLAND: But Justice Hecht was
17 one of those.

18 MR. ORSINGER: Oh, Justice Hecht. We only
19 have two votes.

20 CHAIR TRACY CHRISTOPHER: Yeah, Judge
21 Estevez.

22 HONORABLE ANA ESTEVEZ: I don't need to say
23 it now, but I do want to come back to make one point later
24 on the docket entry. So if you want me to do it later, I
25 can do it later. I just don't want to forget, so I'm

1 bringing it up.

2 CHAIR TRACY CHRISTOPHER: Bring it up now.

3 We will forget.

4 HONORABLE ANA ESTEVEZ: Okay. So House
5 Bill 16, as Justice Miskel stated, part (b) states "The
6 court shall record in the docket the date the motion was
7 heard or considered." And the new draft from the Texas
8 Supreme Court had changed it to "submitted," but if we
9 changed it back to "considered," nothing bad happens to
10 you if you've considered it between 60 days and the extra
11 90 days. So if you considered it the day before you
12 granted it, there's nothing -- I think it's showing that
13 submission is different than consideration, and it is the
14 date that you would have actually read it, because if you
15 heard it, you obviously heard all of the arguments at that
16 point, if it was an oral argument. So you would have
17 considered it in some way during that hearing.

18 So I would suggest that perhaps we change
19 the word back to "considered," and it actually means --
20 not that I like it, but I think that's what they meant,
21 because that's the only thing that makes sense. One day
22 is the date that you're actually having the hearing or
23 you're submitting it, and submitting always meant when
24 everybody got everything together and they put it on your
25 date, and you can start -- that's day one that you can

1 rule on it, unless somebody asks for a continuance. And
2 then considered is when you're actually thinking about it
3 and about to be ruling on it, or you've actually ruled on
4 it and now you're waiting for your final order, and you've
5 got that extra 90 days from that date of your hearing to
6 get that final order, whether it's by e-mail and filed or
7 whether it's a signed order, whatever that means.

8 CHAIR TRACY CHRISTOPHER: All right.

9 MR. ORSINGER: So before we leave ruling, we
10 are -- there are two deadlines that are embedded in this
11 rule. One is within 90 days of the hearing or written
12 submission date the court has to make a ruling and then
13 also the clerk has to send it out, so that's going to be
14 problematic if the judge enters their ruling after the
15 clerk office has closed for that day. I don't think the
16 statute requires the clerk to mail that notice, does it?
17 That's the rule, right?

18 HONORABLE EMILY MISKEL: It says, "File with
19 the clerk of the court and provide to the parties a
20 written ruling on the motion, not later than the 90th day
21 after the date the motion was heard or considered."

22 MR. ORSINGER: And does it say the court
23 should do that? The court shall rule?

24 HONORABLE EMILY MISKEL: Yes.

25 MR. ORSINGER: So we're now saying the clerk

1 gives the notice. Are we comfortable with that?

2 HONORABLE EMILY MISKEL: Yeah, so that also
3 answers the question. The statute says, "The court shall
4 file with the clerk of the court and provide to the
5 parties," so you can't do it after the clerk's office
6 closes, because the parties have to be provided it before
7 the 90th day.

8 MR. ORSINGER: But I'm reading that to say
9 the court is the one who has to send the notice, not the
10 clerk.

11 HONORABLE EMILY MISKEL: Oh, "and provide to
12 the parties."

13 MR. ORSINGER: Yeah. So, in other words,
14 reading the statute literally, the judge has to rule in
15 some form that is official and has to e-mail it out, I
16 presume.

17 HONORABLE EMILY MISKEL: But 21(f)(10) says
18 that when the court sends notices, they're sent by the
19 clerk. I'm rephrasing.

20 Okay. "Electronic orders and notices from
21 the court. The clerk must send orders, notices, and other
22 documents to the parties electronically through an
23 electronic filing system." So I'm still comfortable that
24 the clerk send it is court's ruling.

25 MR. ORSINGER: So the court, basically,

1 can't rule by an e-mail to the lawyers.

2 HONORABLE EMILY MISKEL: Correct. It has to
3 be filed.

4 HONORABLE ANA ESTEVEZ: If we file it, we
5 can.

6 MR. ORSINGER: Once it's filed, you could if
7 you want to.

8 HONORABLE ANA ESTEVEZ: You can file your
9 e-mail.

10 MR. ORSINGER: Oh, file your e-mail.

11 CHAIR TRACY CHRISTOPHER: Which a lot of
12 judges do.

13 MR. ORSINGER: I see. So you send the
14 e-mail to the lawyers and then you file your --

15 HONORABLE EMILY MISKEL: You print your
16 e-mail. You file it, and it goes to the lawyers through
17 the e-filing.

18 MR. ORSINGER: You physically print it and
19 physically file it?

20 HONORABLE EMILY MISKEL: Print to PDF,
21 e-file.

22 MR. ORSINGER: Holy moly. Okay. This is
23 moving too fast for me.

24 CHAIR TRACY CHRISTOPHER: Okay. So I'll
25 talk about (j), since I started this.

1 MR. ORSINGER: Thank you.

2 CHAIR TRACY CHRISTOPHER: So what we did at
3 (j) is that we had noticed that all of the mention of what
4 kind of evidence that had normally been in summary
5 judgment motions had disappeared from the rule, and so the
6 regular 166a included kind of a laundry list of types of
7 evidence, and in 166a(c). So, you know, it talked about
8 deposition, interrogatories, et cetera, pleadings, blah,
9 blah, blah, and that was missing from the Supreme Court
10 draft, and so this section is an entirely new section, but
11 it is based on the types of evidence that had previously
12 been listed in the summary judgment rule.

13 And then so -- and I think the suggestion
14 was that we say what a declaration is there. That would
15 be fine. Move it out of the first part and move it down
16 here. But that's what we were trying to do with (j).

17 Also -- (j)(1). And then (j)(2) was to
18 clarify the addition of evidence by reference, and we
19 believe that the "use of discovery not otherwise on file"
20 no longer needs to be in the rule, because no one does a
21 statement of intent to use discovery. I mean, you know,
22 that's been in the rule forever, but nobody does it. They
23 just attach it with an affidavit that says, you know,
24 "Here's the interrogatory answers of opposing party" or
25 "Here's the document that they produced" in connection

1 with a document production. So that's -- that's why we
2 eliminated use of discovery not otherwise on file and took
3 from other parts of the rule all the different types of
4 evidence that sort of got embedded in the rule that was
5 missing from the Supreme Court draft. So that's why it
6 looks the way it does. Judge Miskel.

7 HONORABLE EMILY MISKEL: So Quentin has
8 registered his objection. I see he's not here, but we had
9 talked over lunch, so I will represent the substance of
10 what we talked about over lunch. So he -- I can't
11 remember what his specific objection was. I think just in
12 general to us doing a list of evidence, but I pointed out
13 that that list is already, as you did, in 166a(c), the old
14 rule.

15 CHAIR TRACY CHRISTOPHER: Right.

16 HONORABLE EMILY MISKEL: And in 166a(c), it
17 is, as I read it grammatically, a restricted list, and
18 interestingly, so what we -- when we moved it over here,
19 we added two things. The old 166a(c) only said
20 "affidavits." We added "affidavits and declarations," to
21 be consistent with the rest of the rule, and we also added
22 what's there, (f), "and other authenticated evidence,"
23 because that is what people do in practice; but, arguably,
24 under the old rule that's not a part of things that can be
25 considered as summary judgment evidence. So we took a

1 restrictive list, arguably, from the old rule, repeated it
2 here, added "declarations" and added "other authenticated
3 evidence." So I think his concern that we have newly
4 created a restrictive rule, arguably, it was always
5 restrictive, and our version as (j)(1)(F) expands the
6 types of documents that could be considered as evidence.

7 CHAIR TRACY CHRISTOPHER: Right. And then
8 we also put in the "Evidence Included by Reference" from
9 the new case law and -- not new case law, but, I mean,
10 that was in the rule, and we just kind of put it back in
11 the rule under this "Evidence." Yes, Richard.

12 MR. ORSINGER: Well, the case I mentioned at
13 the beginning, *State Vs. \$3,774.78*, actually was on this
14 precise point, and the language in our proposed rule is
15 very close to the language that was in the Supreme Court
16 opinion, but the Supreme Court opinion only applied to
17 no-evidence motions for summary judgment, and this is
18 expanding that to apply now to a traditional motion, but
19 it's obviously reasonable. We don't want people to file
20 the same thing over and over again that's already on file.

21 The other thing is I'd like to rest in peace
22 this use of discovery. So much of the responses have
23 nothing to do with what's been produced in discovery.
24 They represent unsworn declarations from expert witnesses,
25 from fact witnesses. They're authenticated documents

1 acquired in various manners, so we've got to leave that
2 behind, and, thankfully, we have.

3 CHAIR TRACY CHRISTOPHER: I think we weren't
4 trying to do anything substantive here, but we felt like
5 the Supreme Court rule had eliminated the types of
6 evidence that had been in the rule, so we put it here. Do
7 we have any comments? Yeah, Roger.

8 MR. HUGHES: Well, I'm always a fan of
9 George Orwell's statement that you use fewer words rather
10 than more, and I looked at (j) (1), and I said once you've
11 said (F), "other authenticated evidence," why do you need
12 the rest? And I looked at it, and I said, well, okay, you
13 might want to say affidavits and unsworn declarations are
14 useful, because, otherwise, at trial they would be --
15 maybe would be refused as hearsay, but I think you can
16 collapse (A) through (F) and really just say "affidavits,
17 unsworn declarations, discovery," because that was what
18 was in the original rule, "and other authenticated
19 evidence." And if -- I think, in one sense, that opens
20 the door a little broader than it was, without creating
21 the potential argument that this is -- this rule is
22 limiting in any way, because I think (1) (F) opens the door
23 wide, and once you've said authenticated evidence, you
24 know, if you authenticated it by affidavit or
25 certification in some way, it's evidence, and it's coming

1 in. And I don't think you need to say any more.

2 CHAIR TRACY CHRISTOPHER: Harvey.

3 HONORABLE HARVEY BROWN: I think saying
4 "discovery" broadly would be problematic, because some
5 parties might think they can then rely on their own
6 answers to interrogatories.

7 HONORABLE DAVID KELTNER: Exactly, or
8 admissions.

9 HONORABLE HARVEY BROWN: Or admissions,
10 yeah, whatever.

11 CHAIR TRACY CHRISTOPHER: All right. Any
12 other comments on that particular (j)?

13 MR. ORSINGER: Okay. So what used to be (k)
14 has been moved back to (h) (4). We've already discussed
15 that. That moves us on to the form of affidavit or
16 declaration, and just a tweak there by the subcommittee is
17 that "Document referred to in an affidavit or declaration
18 that should be attached and either sworn or certified"
19 rather than "and sworn and certified." That could be
20 picky. Maybe you don't like it.

21 And added to the end, "Defects in the form
22 of affidavits or attachments will not be grounds for
23 reversal unless specifically pointed out by objection by
24 opposing party with opportunity, but not refusal to
25 amend." So I think that's existing practice. I'm not --

1 CHAIR TRACY CHRISTOPHER: No, that language
2 that we've added is currently in the rule.

3 MR. ORSINGER: Yes.

4 CHAIR TRACY CHRISTOPHER: And so we don't
5 know whether the Supreme Court intended to delete it, but
6 we put it back in there.

7 MR. ORSINGER: Well, it's certainly
8 beneficial, because we don't want an entire case to be
9 decided on the basis of a technical evidentiary error
10 where there was no opportunity to correct it. Or do we?

11 HONORABLE EMILY MISKEL: Well, you would
12 think so, but the staff attorneys on the Fifth Court of
13 Appeals were happy to see it gone, because they're tired
14 of trying to figure out if something is a defect of form
15 or defect of substance, and they thought the Supreme Court
16 was throwing them a lifeline, so...

17 MR. ORSINGER: Okay. Well, that just goes
18 to show you how desperately it's needed.

19 HONORABLE EMILY MISKEL: So, again, we
20 couldn't tell if it was an intentional omission, as they
21 would hope, or not, and so we put it back in, because
22 that's the place it would go.

23 MR. ORSINGER: Well, I think we should ask
24 the question of do we want defects in the form of
25 affidavits to be the ground for reversal unless it was

1 pointed out by objection? I mean, in trial, don't you
2 have to object to the admission of evidence before it can
3 be reversed?

4 So, in other words, to me, this is just a
5 preservation of error thing. Only it's a preservation of
6 error in an affidavit or rather than in a trial court
7 trial.

8 CHAIR TRACY CHRISTOPHER: I'd like to put
9 this language back in because we have a pretty strong body
10 of law on what it means, and if it disappears from the
11 rule, you know, that will lead to uncertainty. So, to me,
12 it was perhaps an oversight by the Supreme Court. Maybe
13 it was intentional. We don't know. But that is where we
14 think it should go back in.

15 HONORABLE JANE BLAND: Message received.

16 CHAIR TRACY CHRISTOPHER: All I'm saying...

17 HONORABLE DAVID KELTNER: The line of the
18 day.

19 CHAIR TRACY CHRISTOPHER: Okay. Interested
20 witness.

21 MR. ORSINGER: Yes, if we go on, interested
22 witness, that was also in the previous rule, and it's a
23 statement of when does an interested party's testimony
24 establish something conclusively or as a matter of law,
25 because, ordinarily, an interested party is not able to

1 prove something; but there's Texas Supreme Court case law
2 that has a long background and was reflected in this
3 language; and, Chief Justice Christopher, I'm trying to
4 remember right now, the fact that this is all in red means
5 that it was deleted in the issuance of the new rule, and
6 we're recommending putting it back in because it's
7 helpful, right? Or at least some of us are.

8 CHAIR TRACY CHRISTOPHER: Correct.

9 MR. ORSINGER: Ah, okay.

10 CHAIR TRACY CHRISTOPHER: No, I mean, I
11 think we noticed it was missing, so we're putting it back
12 here, and whether the Court wants it there will be their
13 decision.

14 Judge Miskel.

15 HONORABLE EMILY MISKEL: We reimported it in
16 part. So what you'll see is red, which meaning we added
17 that, but what I did was I pasted in the entire sentence
18 from the current 166a(c) and then we struck out "expert
19 witness as to subject matter concerning which the trier of
20 fact must be guided solely by the opinion testimony of
21 experts." I don't know when a fact finder must be guided
22 solely by opinion testimony of experts, but in any case,
23 we thought that language was surplusage. So we reimported
24 the language, but just left it to say simply
25 "uncontroverted testimonial evidence of an interested

1 witness or of an expert witness," if it's "clear,
2 positive, direct," et cetera. So you see that strikeouts
3 language. That's just to emphasize the part of the old
4 rule we're not recommending be brought forward.

5 CHAIR TRACY CHRISTOPHER: Harvey.

6 HONORABLE HARVEY BROWN: And just for the
7 reasoning behind that, was that you can grant a summary
8 judgment based on the uncontroverted testimony of an
9 expert witness, even if it is not an area that the jury is
10 bound by their testimony. For example, a police officer
11 says the defendant was negligent, and that's the only
12 evidence on that summary judgment record. It's clear.
13 It's uncontroverted. A judge could grant a summary
14 judgment on that, even though that could have been opposed
15 and is not binding on the fact finder.

16 CHAIR TRACY CHRISTOPHER: All right.

17 MR. ORSINGER: So before we go on --

18 CHAIR TRACY CHRISTOPHER: Yes.

19 MR. ORSINGER: I would like to say that I'm
20 not supporting the deletion of the "subject matter
21 concerning which the trier of fact must be guided solely
22 by the opinion testimony," because there are instances in
23 which an expert witness might opine on a subject matter
24 that an expert's opinion is not required, and an example
25 of that is the *Estate of Lopez* case decided by the Supreme

1 Court in November of last year, where a retired, or should
2 I say, former family law district judge from Harris County
3 testified in a trial on informal marriage and testified
4 that "I tried these cases all the time. This -- these are
5 the elements of an informal marriage, and in my opinion,
6 an informal marriage has been established by this."

7 That testimony from that expert about -- and
8 her opinion as an ex-judge there was an informal marriage
9 was compounded by emphasis on that argument in the closing
10 argument, emphasis on that testimony in the closing
11 argument. Went to the Supreme Court and the Supreme Court
12 ruled that it was reversible error to admit that
13 testimony, because the jury is not -- was as capable of
14 determining whether the informal marriage would be as the
15 expert witness.

16 So there are instances in which expert
17 witness testimony is not allowed, and the reason I like
18 this language in the old rule is because it -- if you
19 will, it limits the establishment of something as a matter
20 of law to the areas where the expert witness testimony is
21 binding, and to me, that's beneficial. I think it's
22 probably infrequent, but it's been the rule for a long
23 time. It's been recently restated, and I think it's
24 beneficial to have it.

25 CHAIR TRACY CHRISTOPHER: All right. Any

1 other comments on (4)? So then (5), there's no change.

2 MR. ORSINGER: Oh, yeah. Roger.

3 CHAIR TRACY CHRISTOPHER: I'm sorry, Roger.

4 Yes.

5 MR. HUGHES: I was just going to say there
6 are subject matters in which expert and lay testimony are
7 admissible, and it's -- there are subjects which are not
8 solely guided by expert testimony. For example, sanity in
9 probate proceedings. You can have laypeople testify the
10 person was crazy, if you will, and you could also have a
11 psychiatrist come in and say they are -- they are not
12 sane, et cetera. So I don't think this is surplusage. I
13 think if we're going to say you don't get to go in front
14 of a jury and have a jury sort this out as to whether this
15 expert's testimony on this subject is binding or credible,
16 I think that's a useful hedge against it, and that's --
17 that it's not surplusage. It has a meaningful purpose.

18 CHAIR TRACY CHRISTOPHER: Judge Miskel.

19 HONORABLE EMILY MISKEL: I agree that the
20 concept you're describing is not surplusage. I am not
21 clear on how this particular language says that, because
22 this language talks about times where the trier of fact
23 must be guided solely by the opinion testimony of an
24 expert, and I'm like there's no decision that a fact
25 finder makes entirely and solely on the opinion testimony

1 of an expert, unless we're talking about those healthcare
2 liability dismissal affidavits, or, like, when is there a
3 time when the case would be resolved and bound entirely on
4 opinion testimony of an expert?

5 MR. HUGHES: Well, in personal injury cases.
6 You know, let's suppose a person was in an awful accident,
7 and they came out and their arm was obviously broken.
8 That is, it was bending in a place where it didn't, and a
9 witness said, "His arm looked broken to me." Well, do you
10 really need an expert to say that it is the accident
11 caused the break?

12 But, on the other hand, if you're going to
13 say, no, the force of this collision caused the rupture of
14 the disc in their back, that's not something juries can --
15 you can't just say, well, it was a rearend collision,
16 maybe at 10 or 15 miles an hour, and, you know, that's the
17 cause of a ruptured disc in the back. I think you're
18 going to have to have an expert to say something like
19 that. That's why I say it's a useful add.

20 CHAIR TRACY CHRISTOPHER: All right. Any
21 other comments on (4)? No change to (5), and then (6).

22 MR. ORSINGER: So (6) is very simple.
23 Late-filed evidence can be considered, but it requires the
24 written permission of the court. That's something that
25 could be discussed, because a court could orally permit it

1 in a hearing, but this is saying it has to be written
2 permission.

3 CHAIR TRACY CHRISTOPHER: Judge Miskel.

4 HONORABLE EMILY MISKEL: And this is a
5 rephrased version of something that's already in the old
6 rule. The old 166a(c) allowed the court to consider
7 evidence, quote, "on file at the time of the hearing or
8 filed thereafter and before judgment, with permission of
9 the court."

10 CHAIR TRACY CHRISTOPHER: So there is a big
11 body of case law about this late-filed evidence, too.
12 So -- Harvey.

13 HONORABLE HARVEY BROWN: I think that what
14 Judge Miskel said is correct. I wanted to have the
15 language "with good cause" added so that it's not
16 something that surprises somebody, but I did not convince
17 the subcommittee.

18 CHAIR TRACY CHRISTOPHER: And then any other
19 comments? Roger, and then Rich.

20 MR. HUGHES: We're talking about (6)?

21 MR. PHILLIPS: Yeah.

22 MR. HUGHES: There is a whole -- I don't
23 know what you call them -- a number of cases dealing with
24 what do we assume if the evidence was submitted late and
25 nobody says anything and the judge says, "I'm granting

1 summary judgment." Did the judge grant permission? Did
2 the judge not grant permission? If the summary judgment
3 motion order casually says, "I considered it based on the
4 argument and evidence of counsel," did that grant
5 permission? I think to put an end to all of these
6 disputes about whether the judge constructively,
7 implicitly granted permission, I think number (6) should
8 say the permission has to be express and in writing so
9 that we don't get into these arguments of whether
10 permission was granted or not.

11 CHAIR TRACY CHRISTOPHER: Rich, then Kent.

12 MR. PHILLIPS: I'll stand down.

13 CHAIR TRACY CHRISTOPHER: All right. Kent.

14 HONORABLE KENT SULLIVAN: I think this is
15 potentially a big deal, and I think we run the risk of
16 overlooking it. I mean, we've got very clear timelines in
17 a very clear structure that you have to follow, unless you
18 don't. In other words, the late-filed evidence, with only
19 written permission of the court, which, as noted, is
20 potentially ambiguous, I think that's problematic. I
21 would think that you probably would want good cause to
22 have otherwise avoided the deadlines for filing the motion
23 and the necessary proof. Maybe there's something I'm
24 missing here, but it seems to me that, you know, if you're
25 dealing with a party, and perhaps there's a home court

1 advantage, it could be a real problem in terms of the way
2 the process practically plays out.

3 CHAIR TRACY CHRISTOPHER: The current rule
4 allows for late-filed evidence, and perhaps the Supreme
5 Court wanted to delete it and then we don't have the
6 issue. But that kind of gets us to our comment and
7 whether substantive changes were intended or not, so --
8 and that, of course, is up to the Supreme Court to decide
9 whether they intended to make substantive changes to the
10 rule.

11 Pete.

12 MR. SCHENKKAN: One possible duck on that
13 would be to not add the last sentence at the end, which,
14 you know, has the Court affirmatively declaring that it
15 didn't intend, at least, a substantive change in the law
16 when I believe we concluded there were some parts of the
17 existing rule which were wrong under the law, and I assume
18 we have at least taken those out, so we did -- didn't
19 change the law, but we changed the rule in relation to the
20 law. Could we just delete that last sentence and then in
21 the first sentence say, "Rule 166a is written to implement
22 Government Code and to modernize and clarify the rule"?
23 "Clarify" puts it in a perhaps more accurate spirit, but
24 certainly more generous.

25 CHAIR TRACY CHRISTOPHER: And then we also

1 discussed in the committee -- and this is obviously up to
2 the Supreme Court, how you like to keep old comments, but
3 we felt like the old comments were confusing at this
4 point. So we suggested deleting those.

5 MR. ORSINGER: The 1990 comment, by the way,
6 is about unfiled discovery, which we just -- we buried
7 that, I believe.

8 CHAIR TRACY CHRISTOPHER: Well, the Supreme
9 Court had it in there, so they might not take our
10 recommendations.

11 MR. ORSINGER: Oh, this is true.

12 CHAIR TRACY CHRISTOPHER: Kent.

13 HONORABLE KENT SULLIVAN: I just want to
14 note that I think Pete's comment is a good one. I would
15 support it. I suspect there are others that might as
16 well.

17 MR. ORSINGER: You know, that principle
18 applies to a number of different rules. We have some
19 history, perhaps an entire history on some rules. So we
20 could do it here, or the Supreme Court could do it with
21 everything. That's just a thought.

22 CHAIR TRACY CHRISTOPHER: Okay. Anything
23 else on the summary judgment rule? Harvey.

24 HONORABLE HARVEY BROWN: A comment that I
25 suggested based on an experience I've had, you'll see it's

1 redlined on page six. "Rule 166a does not apply to
2 motions to reconsider summary judgment motions that have
3 been previously granted."

4 I had a judge who we could not convince that
5 these deadlines don't apply to a motion to reconsider, and
6 I thought we could clarify that with a comment.

7 CHAIR TRACY CHRISTOPHER: Oh, that's right.
8 Okay. Could you explain that a little bit more and the
9 problems that that has developed into?

10 HONORABLE HARVEY BROWN: We had a motion for
11 summary judgment filed against us. We lost. We filed a
12 motion to reconsider. We couldn't get it set for, like,
13 six months, and then the judge said, "Well, I only had so
14 much time to do it. It's denied because of the statute,"
15 and we said, "Wait, the statute only applies to motion for
16 summary judgment. It doesn't apply to motions to
17 reconsider," and we're still working our way through that.

18 CHAIR TRACY CHRISTOPHER: So we were giving
19 Harvey unsolicited advice on how to retitle his motion.

20 HONORABLE HARVEY BROWN: Now we're calling
21 it a motion for new trial.

22 CHAIR TRACY CHRISTOPHER: Right. Right, to
23 avoid this problem. Judge Miskel.

24 HONORABLE HARVEY BROWN: But I was concerned
25 that, frankly, if we're saying that it has to be named

1 something other than a motion to reconsider, if that's
2 what the intent is, then we need to tell practitioners
3 there that, because I do think people will file a motion
4 to reconsider sometimes, and if that's not effective for
5 some reason, then we should tell the Bar that.

6 CHAIR TRACY CHRISTOPHER: And this is only
7 to ones that have been granted.

8 HONORABLE HARVEY BROWN: Right.

9 CHAIR TRACY CHRISTOPHER: You know, if a
10 summary judgment was denied, then the parties should file
11 a new summary judgment. We've discussed that, but how can
12 a litigant get relief if a summary judgment was granted,
13 and I assume it's just a partial at this point.

14 HONORABLE HARVEY BROWN: Yeah.

15 CHAIR TRACY CHRISTOPHER: Judge Miskel.

16 HONORABLE EMILY MISKEL: I was just going to
17 say, we really wrestled this one to the mat in the
18 subcommittee and reached no agreement on it. In my -- so
19 half -- or I'm not going to represent with numbers. Some
20 on the committee, subcommittee, strongly felt that you
21 cannot reconsider the grant of a summary judgment because
22 the rule requires you to provide the parties a written
23 ruling on that summary judgment motion not later than that
24 deadline, and if, now, four months later, you grant the
25 motion to reconsider and enter an order denying a summary

1 judgment, now you have filed with the clerk a written
2 ruling on a seven-month-old summary judgment.

3 And so we said you just can't call it
4 anything that relates back to the original filing date of
5 the summary judgment motion. So if you call it motion to
6 reopen a fact issue, motion for new trial, motion to --
7 something else, right? Like, it just has to be called
8 something else, but the court cannot, without violating
9 the HB 16, reconsider the grant of the summary judgment
10 outside the deadline. And then other people on the
11 subcommittee felt strongly the opposite, so we had no
12 persuasive recommendation to bring to you other than those
13 two positions, is my recollection.

14 HONORABLE HARVEY BROWN: Yeah. I think
15 that's fair. I will say that I had an alternative
16 position that if there is a colorable or strong argument
17 that you can't file a motion to reconsider, the Bar
18 deserves to know that, because people will fall into this.
19 I mean, I thought when I walked out of that meeting, I
20 thought, boy, I'm so lucky I'm on this subcommittee. So
21 we're changing the title of our motion. I think that's
22 form over substance, but, you know, I don't want to take
23 the risk as a lawyer and do it wrong.

24 CHAIR TRACY CHRISTOPHER: But you had a
25 trial judge that wouldn't consider it because it was past

1 the deadline.

2 HONORABLE HARVEY BROWN: Right.

3 CHAIR TRACY CHRISTOPHER: And the trial
4 judge thought they would get in trouble because it would
5 show that you denied a motion for summary judgment that
6 was filed six months ago.

7 HONORABLE ANA ESTEVEZ: I just don't think
8 it needs to be counted. So I think that you always have
9 discretion to reconsider a motion for summary judgment.
10 It doesn't go back to another motion. You already met
11 your deadline, and it's not a new motion, and it's just
12 like a motion for new trial. Let's say they told me I had
13 to try a case within a year, because that's the next thing
14 that's coming. We have to set all of our times for when
15 all of these cases have to be disposed of. Okay. So if I
16 try a case and I go through a jury trial and it's been one
17 year and I met my deadline, if they ask for a motion for
18 new trial and I retry my case, it is -- I met my first
19 deadline. I do not think that if it takes another year to
20 retry that case that I am now a two-year-out case, so I
21 just don't think it has to go back to anything.

22 CHAIR TRACY CHRISTOPHER: Well, then we
23 should tell trial judges that, I think is Harvey's point,
24 because he has a trial judge that disagrees with you and
25 thinks I cannot grant this motion to reconsider without

1 busting my timelines. So whichever way the Court wants to
2 do it.

3 Yeah, Judge Miskel.

4 HONORABLE EMILY MISKEL: I think the problem
5 is the clerks are the ones reporting this. So the clerks
6 get an order denying summary judgment, and they go, okay,
7 we've got to report it. So it's on a reconsideration, but
8 it's titled "Order Denying Summary Judgment."

9 HONORABLE ANA ESTEVEZ: No, it has to be a
10 granted.

11 MR. ORSINGER: You granted it.

12 HONORABLE ANA ESTEVEZ: It has to be a
13 granted. It doesn't count for a denied. If you deny
14 it --

15 HONORABLE EMILY MISKEL: No, no, no. It was
16 improperly granted, so you want reconsideration, you want
17 it to be denied. So the new late order is denying the
18 summary judgment.

19 HONORABLE ANA ESTEVEZ: The new one is
20 denying.

21 HONORABLE EMILY MISKEL: Yes.

22 HONORABLE ANA ESTEVEZ: Yes.

23 HONORABLE EMILY MISKEL: So then the clerks
24 get an order denying a summary judgment, and they go,
25 okay, that one was filed seven months ago and reported,

1 right? And nobody meant that, but we can't expect the
2 clerks to know about reconsideration and all of this, you
3 know. So that was my reason that it just has to be called
4 something else that doesn't make the clerks think it's a
5 summary judgment ruling and have to go back to the
6 original filing date of the summary judgment.

7 HONORABLE ANA ESTEVEZ: But their clock is
8 closed, because you had your open clock, and then when you
9 got the first order, your clock closed. And so you
10 already reported it to OCA as timely.

11 HONORABLE EMILY MISKEL: But how will they
12 know not to then report the second one --

13 HONORABLE ANA ESTEVEZ: Because if there's
14 nothing open. There's nothing open.

15 (Simultaneous crosstalk)

16 THE REPORTER: Wait a minute, wait a minute.

17 HONORABLE EMILY MISKEL: I'm sorry.

18 MS. GILLILAND: Right now the software
19 available isn't that fancy to say that the -- that you can
20 look at a case and say this issue is closed. I think the
21 problem I would worry about is a clerk saying we've
22 already reported it, but now we're going to report it
23 again as noncompliance. So we've been compliant, and now
24 we're going to report noncompliant, which isn't really
25 fair to the judge, and I think what's being anticipated is

1 that we report quarterly of what's happening.

2 HONORABLE ANA ESTEVEZ: But when you report,
3 let's -- I'm going to go to the criminal world, because
4 it's a lot easier to think it. So we've made it nonactive
5 because there wasn't -- the warrant's outstanding. Then
6 you picked him up, so now we're active again. So if you
7 get a motion to reconsider and you now grant the summary
8 judgment, why can't you just open it and then close it the
9 same day and count as a different summary judgment?
10 Clockwise.

11 HONORABLE EMILY MISKEL: But in the criminal
12 case, the whole case is inactive and then the whole case
13 is reopened. We're talking about the partial grant of a
14 summary judgment, so from the clerk's perspective nothing
15 was ever closed.

16 HONORABLE ANA ESTEVEZ: But they're making
17 new clocks, so you can't -- you're opening and closing the
18 clock for a summary judgment. You're going to -- Odyssey
19 is going to give you an internal clock for that.

20 MS. GILLILAND: Well, I think that's making
21 a rule based on software that's not being utilized in that
22 way and that's not widely available -- available to all
23 counties. If it was going to be that a reconsideration
24 doesn't count for reporting, could it just say a
25 reconsideration doesn't count for reporting, don't report

1 it?

2 CHAIR TRACY CHRISTOPHER: Yes.

3 MR. ORSINGER: What if we treated the motion
4 to reconsider as a filing of a new motion? Is it within
5 our scope and is it within the Supreme Court's scope in a
6 rule to say that a motion to reconsider is treated like a
7 newly filed summary judgment motion?

8 CHAIR TRACY CHRISTOPHER: But Harvey's not
9 filing a summary judgment. He's -- which is why he's in
10 the position he's in, because the summary judgment was
11 granted. If the summary judgment had been denied, sure,
12 you can file a new summary judgment motion. He can't file
13 a summary judgment motion that's the opposite.

14 MR. ORSINGER: But what I'm looking for is a
15 way to trigger the new timetable on his filing of his
16 motion to reconsider by just pretending like it's a motion
17 for summary judgment for scheduling purposes or for
18 timetable purposes. You see what I'm saying? Then you
19 would have the whole --

20 HONORABLE HARVEY BROWN: I don't think the
21 Legislature was trying to get to a redo of the summary
22 judgment, frankly, but my big point is I heard this
23 debate, and I walked out of there saying, well, I don't
24 know the answer, so I'm going to rechange the title of
25 this. But I know that. The Bar should know something

1 about this, is my big point.

2 CHAIR TRACY CHRISTOPHER: Okay.

3 HONORABLE EMILY MISKEL: So, I guess, to go
4 back to the redline, we put it in here for discussion, but
5 I don't actually believe in the comment that the
6 subcommittee endorses the statement that Rule 166a does
7 not apply to motions to reconsider summary judgment
8 motions that have been previously granted. I think that
9 was put in here to spark discussion, but was not actually
10 a recommendation of the subcommittee.

11 MR. ORSINGER: Absolutely right. We put it
12 here specifically so it would be discussed, not because we
13 agreed it should be the rule or the comment.

14 CHAIR TRACY CHRISTOPHER: All right. And we
15 would -- we on the informal subcommittee would just like
16 to say, despite the fact that we have made a bunch of
17 suggestions, we think the Court's rule was really good.

18 HONORABLE EMILY MISKEL: Yes.

19 HONORABLE ANA ESTEVEZ: Yes.

20 CHAIR TRACY CHRISTOPHER: And we all liked
21 it when we first read it, and so we respectfully give this
22 extra discussion to you.

23 All right. Let's take a 10-minute break and
24 finish up our last two.

25 (Recess from 2:29 p.m. to 2:42 p.m.)

1 CHAIR TRACY CHRISTOPHER: Judge Bland has
2 left us, but we are going to continue on without her, and
3 Jackie is going to keep good notes, and we have a
4 transcript, so both things available to the Court on this.

5 So our first matter is jury rules, and I
6 think, Tom, you're going to -- or next matter, not first.
7 Next matter is jury rules, and, Tom, you're going to take
8 that one?

9 MR. RINEY: Yes. And as evidenced by the
10 attendance, this is clearly what everyone has been waiting
11 to hear today. Our materials are at Tab Number 6, and the
12 genesis of our assignment is the same as Judge Estevez
13 mentioned, and that is the changing of the jurisdiction of
14 the county courts at law in House Bill 16 from 250,000 to
15 325,000. There are, obviously, instants in which certain
16 county courts at law have jurisdiction in excess of
17 \$325,000. So this simply amends the statute, which was
18 adopted, I believe, in 1919 or 1920, that says if a
19 statutory county court has jurisdiction in an amount that
20 is now 325,000, used to be 250,000, you get twelve jurors
21 instead of six. They've adjusted that for inflation.

22 As you will see in our report, we have
23 amended all of the rules which talk about twelve jurors if
24 you're in district court or six if you're in county court
25 to simply talk about cases that require a twelve-person

1 jury or a six-person jury. So if they amend it the next
2 session to make it 350,000, we don't have to go back and
3 change this rule.

4 Now, the actual referral did not mention
5 Rule 231; however, it also talked about six and twelve, so
6 it made sense to go ahead and include it. And one final
7 note is the proposed comment that we have added to
8 Rule 233, which governs the number of peremptory
9 challenges. The number of peremptory challenges has
10 always been governed by Rule 233, but yet the number of
11 peremptory challenges if you have any alternate jurors is
12 not governed by the rules, but rather by a statute.
13 That's always seemed to me to be a trap for the
14 practitioner or for the court. So we have suggested a
15 comment that refers to the Texas Government Code regarding
16 additional peremptory challenges if the court seats
17 alternate jurors. There is, however, a
18 typographical error in my proposal, and it's actually
19 Texas Government Code 62.020.

20 HONORABLE ANA ESTEVEZ: Does that count
21 towards criminal cases, too, that peremptory -- extra
22 peremptory strike?

23 CHAIR TRACY CHRISTOPHER: Yes.

24 MR. RINEY: I believe so.

25 CHAIR TRACY CHRISTOPHER: Yeah, I recently

1 pulled up that statute, and --

2 HONORABLE EMILY MISKEL: I was just saying I
3 never knew it was a statute.

4 CHAIR TRACY CHRISTOPHER: Yeah. I recently
5 pulled it up and was shocked to find that if you're going
6 to seat two alternates, you only get one extra cause
7 strike.

8 MR. RINEY: But if you go more than that,
9 you get an additional. So...

10 CHAIR TRACY CHRISTOPHER: Or not cause
11 strike. Peremptory strike.

12 MR. RINEY: That's correct. Okay. So we
13 recommend that comment. One final comment, and that is,
14 in 2021, our subcommittee was given a much broader
15 assignment, including plain language and updating the jury
16 rules; and we presented that, as well as this very
17 language that we're presenting here today, in a memo of
18 August 24th of 2021; and I presented that at our meeting
19 on September 3rd of 2021.

20 We thought our work product really wasn't
21 too bad, but in some e-mail exchanges of our subcommittee
22 in connection with this assignment, it turns out that some
23 of the comments I made four and a half years ago about
24 jury wheels may have been incorrect. So if anybody wants
25 to go back and read that transcript, ignore what I said

1 about jury wheels without checking with John Warren, and
2 he can straighten that out.

3 CHAIR TRACY CHRISTOPHER: All right. But is
4 the -- are the changes that you-all recommended back in
5 2021 still current, despite that correction?

6 MR. RINEY: I believe that's probably
7 correct, but once I figured out where we were and what --
8 our assignment was limited this time, and so we chose
9 primarily just to focus on what we're assigned and not try
10 to get off into other areas.

11 CHAIR TRACY CHRISTOPHER: But if the Court
12 wanted to go back and look at your 2021 work --

13 MR. RINEY: Yes.

14 CHAIR TRACY CHRISTOPHER: -- would there be
15 anything that you think needed to be changed?

16 MR. RINEY: Not other than perhaps the jury
17 wheel issue. And I think that was, perhaps, my
18 misunderstanding at the time.

19 CHAIR TRACY CHRISTOPHER: Any comments on
20 any of the proposed changes with respect to the jury
21 rules?

22 Yes, Sharena.

23 MS. GILLILAND: If there is a consideration
24 to revise this in whole to kind of modernize them, I would
25 recommend some consultation with district court -- or

1 district clerks instead of county clerks, because it's
2 usually the district clerk who is doing all of the jury
3 summonsing, et cetera.

4 CHAIR TRACY CHRISTOPHER: Okay. Judge
5 Miskel.

6 HONORABLE EMILY MISKEL: Do you recall
7 whether in 2021 your subcommittee took a position on
8 whether to discard or retain the talesman rules?

9 MR. RINEY: Well, we discussed that
10 thoroughly in 2021, because I didn't know what a talesman
11 was, and that -- I promise you, that's in the transcript,
12 and it was thoroughly discussed, and I think -- I looked
13 back and reviewed it. My recollection was that some
14 people thought it should be retained because there are
15 instances where there simply aren't enough people to form
16 a jury, and some courts apparently simply go out in the
17 hallway and grab some additional people and were able to
18 seat a jury. At least that was the comment at the time.

19 HONORABLE NICHOLAS CHU: (Inaudible)

20 THE REPORTER: I'm sorry, what was that?

21 HONORABLE NICHOLAS CHU: I was just saying
22 it's also the funnest thing to teach about jury law.

23 MR. RINEY: It should be on the civil trial
24 exam. "What is a talesman?"

25 HONORABLE EMILY MISKEL: Well, that's what I

1 used to threaten people with when they were trying to bust
2 a panel, and I'd say, "I will round up some talesmen, so
3 good luck."

4 CHAIR TRACY CHRISTOPHER: People have done
5 it in my lifetime, just rounded up people in front of the
6 courthouse and pulled them in, so...

7 Any other comments to this?

8 All right. Thank you for that report, and,
9 Jackie, you can tell us if you want us to look back at
10 that old report in connection with changing.

11 All right. Our next tab is hallucinated
12 citations, and, Judge Miskel, are you presenting?

13 HONORABLE EMILY MISKEL: Yes.

14 CHAIR TRACY CHRISTOPHER: Yes.

15 HONORABLE EMILY MISKEL: Okay. So I will
16 give credit. Robert Levy did the bulk of the work on
17 this, and he prepared an excellent report. He is so
18 diligent, prepared the proposed language, and it's only
19 because he can't be here today that I get to bask in his
20 reflected glory. I know that this committee has talked
21 about the issue of AI in the past, and we are not beating
22 a dead horse today. We have a focused newer issue. The
23 most recent time we discussed it was back in -- and it's
24 in the memo materials, but the August 16, 2024, SCAC
25 meeting, there was a discussion of a variety of aspects of

1 AI from Texas Rules of Civil Procedure to Texas Rules of
2 Evidence to ethical stuff. We're not really talking about
3 that today.

4 So, at that time, we had a discussion of
5 implications of AI, but the sense of SCAC was it's not
6 ripe for regulating at this time, and we just need to let
7 everybody get more acquainted with it before we start
8 regulating it, and we don't need to do things like require
9 certifications or anything else. I still largely and
10 almost entirely agree with the conclusions of that past
11 work, so we are not reopening that, except to a limited
12 extent.

13 Our referral, which I just had up on my
14 screen, was "The use of hallucinated AI citations in court
15 filings continues to be problematic. The committee should
16 study and draft amendments to the TRCP, specifically,
17 TRCP 13, a comparable appellate rule, and trial and
18 appellate rules to expressly allow sanctions for
19 misstating legal authority."

20 I'll give you three examples of ways this
21 has come up in the past couple of months. We had a case
22 where the appellant cited hallucinated cases to support a
23 proposition of law that is not recognized in Texas law,
24 and the appellee responded in their briefing, "We can't
25 find those cases, and that's not the law in Texas." In

1 appellant's reply, they neither addressed the hallucinated
2 cases or the fact that they were claiming a proposition of
3 Texas law that does not exist. Our appellate panel held a
4 show cause hearing to assess whether sanctions were
5 appropriate, and in preparation for that show cause
6 hearing, we reviewed the Texas Rules of Appellate
7 Procedure and noticed, for example, that Rule 9.1 requires
8 you to sign a brief, but nowhere in the appellate rules
9 does it say your signature on a brief means anything. So
10 you're required to sign it, but your signature doesn't do
11 or accomplish or represent or certify to anything.

12 And then there are, in some places in the
13 TRAP, explicit authority, for example, for the Supreme
14 Court to sanction misrepresented facts, but then there is
15 silence about what the intermediate court can do, and
16 there's silence about misrepresentation about the law or
17 about the record or things like that. So for this -- oh,
18 that was circumstance one.

19 Circumstance two, pro se litigant, obviously
20 using AI to draft their pleadings, which are, you know,
21 good and bad, depending on how the AI did. And then the
22 third situation that was interesting that I haven't seen
23 reported -- most of the reporting I see is on hallucinated
24 citations to the law, but the third circumstance that
25 happened was we had an original proceeding. So it was a

1 petition for a writ of mandamus, and clearly, what the
2 movant had done was take the reporter's record, feed it
3 into an AI, and say "generate our petition for writ of
4 mandamus."

5 In that case, I had happened to read the
6 reporter's record first and then when I went to read the
7 petition, they're talking about this happened on this day,
8 and the mom testified this, and the child had a fever, and
9 I'm like I didn't see anything about that. Went back to
10 the record, control F, no mention of fever. I go to look
11 at the page and line cited in the petition, it's a
12 completely different topic, so obviously that was AI's
13 hallucinated citation to the reporter's record.

14 So our committee met, and Robert prepared a
15 draft rule, which appears in your materials. We're
16 proposing two draft rules. The first is on page 119 of
17 the PDF, which is page four of Tab 7. This is the
18 proposed change to TRCP 13. So this affects trial court
19 level hallucinated citations, and all we did in the trial
20 court, at least there's already a rule that signatures
21 mean something, and so, to it, we added the statement that
22 your signatures also constitute a certificate by you that
23 the legal citations and references to the record are
24 correct and substantiate the asserted contentions. And
25 then underneath the definition of "groundless," we also

1 added "including the failure to verify the accuracy of
2 citations generated by artificial intelligence tools."
3 And then there's a comment that explains that both counsel
4 and unrepresented parties have an obligation to verify all
5 of their cited authorities, regardless of whether they
6 used AI or not.

7 I will briefly go over the appellate rule
8 and then I'll go back to a problem that was sort of
9 explicated on the eve of this meeting. All right. So in
10 the appellate rule, we figured if Rule 13 ain't broke, why
11 fix it, and we could largely import Rule 13 and format it
12 to be an appellate rule. So we decided the correct place
13 for that to live would be under Rule 9.1, which already
14 talks about signing, and just add the thing that's not
15 there currently, which is 9.1(d), which would essentially
16 be a paraphrased version of TRCP 13. So that's what you
17 see on page 120 of the PDF. The signatures constitute
18 that you've read it and that citations to the law and the
19 record are correct and substantiate the asserted
20 contentions, so, basically, very similar to Rule 13.

21 Then part (2) gives the appellate court, on
22 motion or on its own initiative, after notice and hearing,
23 to impose appropriate sanction. Now, we all felt, of
24 course, we have an inherent authority to sanction, but
25 because the TRAP mentioned certain sanction powers and are

1 silent on others, we thought it might be helpful to
2 expressly give this power to sanction, along with a
3 comment. So I'm not going to read all of that aloud. You
4 can read it.

5 I'm just going to close with the problem
6 that was identified on the eve of this meeting, which is,
7 well, currently Rule 13 and this proposed copy of it for
8 the TRAP, they don't punish sort of negligent violations
9 of the -- or they don't impose sanctions for negligence.
10 Your pleading has to be groundless and brought in bad
11 faith or groundless and brought for the purpose of
12 harassment, and I think it was Connie pointed out that it
13 will rarely be the case that someone just using AI and
14 ending up with hallucinated citations is doing anything
15 overt at all. It would be hard to show that they were
16 doing that in bad faith or for the purpose of harassment.

17 So then we discussed by e-mail, okay, do we
18 want to say if it's AI the court can just sanction you for
19 doing it in the first place, without having the additional
20 showing that it was in bad faith or for harassment, and
21 then several on the committee were very concerned that
22 lightening the standard for a particular subset of
23 sanctions would lead to just weaponizing the use of
24 requests for sanctions on those topics. And so since that
25 all came up fairly last minute for this meeting today, we

1 don't have any other different wording for you other than
2 the current wording, which in order -- which folds in a
3 representation by your signature that you've checked your
4 citations, but has the same basis for sanctions that you
5 still have to show not only was it groundless, but it was
6 in bad faith or for the purpose of harassment.

7 So I will pause there, and we can either
8 start with the discussion on TRCP 13 or TRAP 9.1. It's
9 sort of the same substance, just in two different places.

10 I think, Jim, did you have a concern about
11 the lightening of the sanctions standard? And I don't
12 know if you want to speak on it or not.

13 MR. PERDUE: We'll see how the conversation
14 goes.

15 HONORABLE EMILY MISKEL: Okay. And then,
16 Marcy, I think you also had some feedback by e-mail. Did
17 you want to add it? I hate to just cold call everybody,
18 but...

19 MS. GREER: I'm trying to think what my
20 feedback was.

21 HONORABLE EMILY MISKEL: I think the issue
22 was how could we reword this to not make AI hallucination
23 sanctions rely on bad faith or harassment, but we didn't
24 come up with a creative way to do that without causing the
25 unintended consequence of making that a new ground for a

1 paper war.

2 MS. GREER: I don't think I came up with any
3 ideas.

4 HONORABLE EMILY MISKEL: No, I don't think
5 we had anything productive, so the rule we have just
6 applies the same standard to AI as already are there for
7 groundless pleadings.

8 CHAIR TRACY CHRISTOPHER: Harvey.

9 HONORABLE HARVEY BROWN: I don't want us to
10 have the problem of AI causes us to overreact to innocent
11 mistakes. I'll never forget when I had one of the best
12 appellate practitioners in the state before us in a case,
13 and I read the brief, and I read the record, and I said
14 that -- a couple of statements in the brief didn't match
15 up with what I had thought from the record, and I went
16 back and double-checked it. I said, sure enough, this
17 great appellate advocate was just flat out wrong on two
18 citations. You know, I wouldn't want somebody to be
19 sanctioned for, you know, innocent mistakes or anything
20 like that. It seems like, to me, AI is a different
21 category, but I just want to caution about that, that even
22 very good lawyers make mistakes, particularly under the
23 gun of trying to get a brief done.

24 CHAIR TRACY CHRISTOPHER: Giana, then Roger,
25 then Jim.

1 MS. ORTIZ: I would echo that sentiment, and
2 the concern I would have with the first change in Rule 13
3 is that a lot of our time in our response brief is trying
4 to distinguish cases and saying it doesn't really stand
5 for what they're trying to tell you it stands for. So I
6 would hate for that strategy, that common strategy, to
7 lead unscrupulous litigants to then say, "and so now you
8 need to sanction them." You know, and I wonder if that is
9 broad enough that that would happen and if the language as
10 it is, which is the groundless, brought in bad faith, does
11 the trick to accommodate mistakes and/or simple
12 distinguishing of case cites without adding another layer
13 of -- or level of, you know, accuracy than what we already
14 require.

15 CHAIR TRACY CHRISTOPHER: Okay. I think
16 Roger.

17 MR. HUGHES: I -- yeah, I'm a little
18 troubled about lightening the standard and specifically
19 saying that they're certifying that the legal citations
20 and record reference records are correct and substantiate
21 the intentions and that if you're wrong to any degree on
22 that, you can end up being sanctioned. I mean, you could
23 get into arguments on like, well, he said you could find
24 it on page 110 of the reporter's record, and it's not
25 there. It's really on page 100. And disagreements over

1 how do you analyze what was in a particular case versus
2 that case doesn't even address that issue whatsoever.

3 I think the problem we're facing -- and I
4 echo the sentiment about not overreacting -- is outright
5 hallucinations, using AI to invent things that don't
6 exist. So I would -- I would not include the statement
7 that you're certifying that the legal citations to the
8 references in the record are correct and substantiate the
9 assertions.

10 What I have seen courts do to address this
11 is basically the person ends up in a show cause hearing
12 and gets told to rewrite the brief, and if you're going to
13 sanction a person, I think, for using -- for basically
14 misciting, using AI to miscite the record or invent
15 citations, and they're doing it basically because they got
16 in a rush or I didn't know better, I think the answer is
17 expanding the idea of groundless, just for the court of
18 appeals, that a willful -- a willful refusal to follow
19 court rules. I mean, we have rules that say you're
20 supposed to cite the record and provide legal arguments,
21 and if it's been pointed out to you that you're not doing
22 that and you don't correct your ways in that brief and
23 you're told to rewrite the brief, et cetera, then maybe
24 you ought to be sanctioned, but simply bad advocacy I
25 don't think is grounds for sanction.

1 You may be told -- the punishment ought to
2 be rewrite the brief in accordance with our formatting.
3 Rewrite the brief and cite cases that actually exist.
4 That's my thought.

5 CHAIR TRACY CHRISTOPHER: All right. Jim,
6 did you have your hand up?

7 MR. PERDUE: No.

8 CHAIR TRACY CHRISTOPHER: Oh, sorry. Kent.

9 HONORABLE KENT SULLIVAN: Well, just to
10 follow up on that, it seems to me that we just need to try
11 and make it clear that this is not intended to apply to
12 isolated instances, that it's intended to apply to a
13 pattern of a practice, and if we make that clear, then I
14 think we're probably on solid and comfortable ground.

15 CHAIR TRACY CHRISTOPHER: Richard.

16 MR. ORSINGER: Well, I've done a lot of
17 writing and speaking and litigating on the sanctions, and
18 one of the difficulties in a sanction proceeding is
19 proving that the opposing party either didn't do an
20 adequate investigation of the facts or investigate the law
21 before the lawsuit was filed or the claim was made, and
22 it's going to be much more difficult to establish what was
23 done in good faith at the appellate level, because there's
24 not going to be any interaction directly between the
25 appellate lawyers. There will be no depositions. There

1 will be no production of files, and so importing into the
2 appellate rules things that involve intent or knowledge,
3 like bad faith, I think will be a very difficult
4 translation.

5 Now, the appellate rules already have a
6 sanction rule for original proceedings in TRAP 52.11, and
7 it has the following criteria. It says, "not acting in
8 good faith," which is already -- as I said, already a
9 little bit of a problem on appeal, but "Not acting on good
10 faith is indicated by any of the following," (a), (b), (c)
11 and (d). (a) is filing a petition that is clearly
12 groundless. (b) is bringing the petition solely for delay
13 of the underlying proceeding. (c) is grossly misstating or
14 omitting an obviously important and material fact in the
15 petition or response, and (d) is filing an appendix or
16 record that is clearly misleading because of the omission
17 of obviously important and material evidence or documents.

18 So I wonder if 52.11 might be an avenue for
19 us to file an appellate rule that's broader than just
20 original pleadings, original proceedings, but would apply
21 to all filings, including ordinary appeals and briefs,
22 but, you know, I've seen some instances where these --
23 these hallucinatory citations occur, and while I don't
24 know, because I don't know what's in the thinking or in
25 the minds of the other side, I get the impression that it

1 was a lawyer that was not the lead lawyer that was
2 delegated the job to draft the document or do the research
3 and write the brief, and they just relied on their
4 artificial intelligence and said, "Write me a brief that
5 says so-and-so," and because artificial intelligence is
6 trying to please you, they're going to write you a brief,
7 even if they make stuff up.

8 So, to me, it's like a combination of
9 laziness and a lack of carefulness, but the lawyer who
10 signed the brief is probably not the lawyer who did the
11 work, and so that means if the lawyer who signs is subject
12 to being sanctioned for somebody using AI and not
13 double-checking it, doesn't that mean that the lawyer who
14 signs is going to have to double-check the work of the
15 associate who relied on the AI?

16 And so I think it's a problem, but I don't
17 know that it's worth thousands of dollars, frankly. I
18 know how frustrating it is when somebody -- when you have
19 to read -- to the appellate courts, especially, if they
20 have to figure out that the record references are
21 imaginary or hallucinatory, but I'm just not going to make
22 a recommendation specifically about this rule, other than
23 I think there's some reasons that Rule 13 might work
24 better in the trial court and that we should look at 52.11
25 and see what the Supreme Court has already accomplished in

1 sanctions in the original proceedings.

2 CHAIR TRACY CHRISTOPHER: Judge Chu, then
3 Judge Miskel, then Kent.

4 HONORABLE NICHOLAS CHU: I think I take this
5 from a different perspective. I don't see this as kind of
6 like a, hey, this is okay as long as it's not pervasive
7 practice or that this is probably a mistake. I think if
8 we don't hit hard at this moment in terms of the standard
9 of practice, in terms of how you can use artificial
10 intelligence, and the consequences if you do it wrong,
11 then we are going to have a huge problem later on with AI
12 slop. Because what will happen is people will say, oh, I
13 just did this, maybe I didn't get caught, but the problem
14 is, if the one person who gets caught one day, right, then
15 as the trial court judge, if I figure that out, then I
16 have to figure out, oh, I always have to check this
17 lawyer's work. Then the opposing counsel, same thing.
18 That reputation gets along, but there's also real
19 consequence to that.

20 The story that I think Justice Miskel was
21 talking about, the opposing side had to bill an hour, or
22 whatever amount of time that they billed, in order to
23 figure out, like, where did this citation come from, let
24 me go double-check that, and that ups the cost of
25 litigation at some point, and so I think the rule

1 shouldn't say, you know -- I think to opposite Richard's
2 point, yes, the partner should be checking the work of the
3 associate if the associate's using the AI and they're on
4 the hook for it, and that's something that probably they
5 need to reinforce with their associates, that they need to
6 do this right and they need to check on it.

7 And so I think the rule, maybe it gets done
8 better on a comment that we put down that AI hallucinated
9 citations, or whatever the wording is, constitutes
10 de facto groundless, baseless, and whatever the criteria
11 is, without needing to change the criteria.

12 CHAIR TRACY CHRISTOPHER: Judge Miskel.

13 HONORABLE EMILY MISKEL: I would say the
14 quantity I'm seeing this on the court I'm on is at least
15 once a month, and so it is hard to -- or it's burdensome
16 to have an individual show cause hearing on every
17 tailor-made case. It would be easier to have a rule.

18 I heard Kent say something about, well, once
19 you show it's a pattern of practice then you can show that
20 it's a problem, but I -- and I would disagree with Richard
21 saying it's somebody signing off on someone else's work.
22 What I am seeing is the times that when it's happening,
23 it's somebody who doesn't do appeals. They are not repeat
24 players. There is no pattern. They don't have a practice
25 before our court. That's why they're using AI to generate

1 their whole thing. And so it's pro ses. It's trial
2 attorneys who have never done an appeal before or once
3 every decade do an appeal.

4 So the problem is -- and I think we need a
5 rule, because it's not a scenario where now I see this
6 lawyer and I know I can't trust their work. It's like I
7 will never see this lawyer again. We only see them once.
8 That's why this whole thing is a problem. That's why
9 they're using AI, but there's enough of them that our
10 court is still seeing it very frequently and increasingly.

11 I note that we did look at 52.11, which
12 talks about original proceedings in the Supreme Court and
13 the Court of Criminal Appeals, and it talks about obvious
14 -- or grossly misstating or omitting a fact or filing an
15 appendix or record that is misleading because of the
16 omission of evidence and documents, and so nothing there
17 was helpful to AI, because we're not talking about
18 omitting a fact or omitting evidence or documents. We're
19 talking about hallucinated citations to the record and to
20 authorities, and there's -- by saying expressly that facts
21 can be punished, it just caused some heartburn.

22 I'll also flag one other issue that came up
23 in our discussions, which was I felt -- one of the issues
24 in the show cause hearing was, by granting a particular
25 sanction in this particular case, are we setting a

1 precedent for something that has to be followed by other
2 panels in other situations, and I said "no." It came up
3 again when we immediately then got a pro se, and I felt
4 like it should be handled differently than how we handled
5 the lawyer, and in our discussion of that, we have an
6 independent duty to police our own profession. We have
7 disciplinary rules. We have ethical conduct for lawyers
8 that don't apply to pro ses, right?

9 So it's still not great if a pro se is doing
10 hallucinated citations and stuff, but whether they use AI
11 or whether they use a sovereign citizen website, like,
12 pro ses come up with a variety of sources for their
13 pleadings, and some of them are certainly very competent.
14 I'm not saying that just because you're pro se you can't
15 handle an appeal, but that's also a concept. The rules
16 that we've presented don't necessarily differentiate
17 between attorneys that we have a higher level of duty to
18 police their conduct and pro ses who don't have the same
19 ethical obligations as an attorney.

20 CHAIR TRACY CHRISTOPHER: Kent, and then
21 Pete.

22 HONORABLE KENT SULLIVAN: So let me clarify.
23 When I used the phrase "pattern or practice," Judge Miskel
24 I think interprets it to mean multiple proceedings or
25 appeals or the like, and candidly, I don't mean it in that

1 context. I think that you can see a pattern or a practice
2 within one document, and my point that I was attempting to
3 make earlier was, number one, you shouldn't attempt to
4 punish someone for something that's isolated and something
5 that might be like Justice Brown pointed out, an
6 inaccurate citation to a real case.

7 It seems to me that when you -- that the
8 core problem that we were trying to address are things
9 like hallucinated citations, right, i.e., fictitious
10 cases. That, on its own, is a practice that would strike
11 me as sanctionable. In other words, if you're making an
12 argument to the court and citing to a case that does not
13 exist, it seems to me that's -- that's problematic. It
14 would be particularly interesting if you were then
15 explaining the impact of the case that did not exist to
16 the court, which I presume -- you know, I would defer to,
17 you know, some of the current jurists as to whether people
18 are going that far, but all of those things seem to me to
19 be sanctionable on their face, that if you're pointing to
20 cases that do not exist.

21 I think what we were concerned about is
22 simply the notion that the rule would suffer from
23 overbreadth so that somebody who simply gets a citation
24 wrong, or something like that, could potentially fall
25 within the rule, and that would be a mistake.

1 CHAIR TRACY CHRISTOPHER: Pete, then Rich,
2 then Richard.

3 MR. SCHENKKAN: I want to urge two things.
4 First, that we separate out the existing Rule 13's goal,
5 which is to make sure people understand that they
6 shouldn't file suits that are groundless and either in bad
7 faith or for harassment or for delay, from a situation
8 where people are making an argument in their motion or
9 pleading that is not supported by the citations to the law
10 or the record that they're using. You can make such an
11 argument, whether due to AI or for some other reason, in a
12 case that is not groundless and the case itself is not in
13 bad faith and is not for harassment, is not for delay. We
14 can test that proposition most easily by thinking about
15 your pro se litigant.

16 So I think we really have two separate
17 sanction issues, the existing one that is -- has to do
18 with bad faith motions and lawsuits and the other that has
19 to do with the practice of making sure your citations to
20 the law and references to the record are correct, or
21 reasonably likely to be correct, and might somehow in the
22 process have gotten the Bates number instead of a document
23 number or the other way around in your citation.

24 So I think we really need to separate these
25 into two, and then as to the AI problem, it seems to me

1 the basic thing we want can be done by taking -- if you
2 look at the very first sentence of Rule 13 at page five of
3 39 of the hallucinated citations set of document
4 materials, if you just take the -- the language and that
5 "to the best of their knowledge, information and belief,
6 formed after reasonable inquiry, the instrument is not
7 groundless," et cetera, and you moved it, and you used it
8 again in a separate -- separate rule or subset of the
9 rule, and that their signature also constitutes, to the
10 best of their knowledge, "information and belief formed
11 after reasonable inquiry, the legal citations and the
12 record references are correct."

13 And then you punish the lawyer, or whoever,
14 the party pro se, for only doing an AI check and not
15 seeing if the cases were real, or -- I really think this
16 record reference thing is going to be a whole lot more
17 severe than the case part, because it's a lot harder to
18 check up on. You have to go through and read the entire
19 deposition transcript to try to see that they really made
20 up a fact, and at the moment, I gather some of these
21 deposition services tools are bad at that, are really bad
22 at that. So I think if we put these in two separate piles
23 and then use the same basic approach of saying, look, part
24 of whoever is signing this thing, lawyer or party's job,
25 is to certify I have tried to make sure this didn't

1 happen.

2 CHAIR TRACY CHRISTOPHER: Okay. Rich, and
3 then Richard, and then Judge Miskel.

4 MR. PHILLIPS: So on the question of the --
5 sort of the standard bad faith or ground -- or for
6 purposes of delay, and one way to address sort of the
7 concern of, you know, somebody claiming that I'm citing a
8 case that actually exists, but it doesn't say what I say
9 it says, which is different than the concern that I'm just
10 making up a case. To me, take the AI out of it, right.
11 That's how we're getting to these things, but if a lawyer,
12 or a pro se, sat down and wrote a brief and just out --
13 off the top of their head made up a case, said something
14 and said "See *Smith V. Jones*," made up a citation,
15 da-da-da, and did it, I would have no problem saying that
16 was bad faith. Right? They're making it up.

17 And given the lawyer's duty of competence
18 technologically to know what the problems of AI are, I
19 would have no problem with a lawyer who cites even one
20 hallucinated AI case that just doesn't exist in a brief
21 and saying that's bad faith. It might be that you didn't
22 intend to mislead the court, you intended to do something,
23 but you used a bad resource to do this, and it's in the
24 legal press enough now to know it's a problem that if
25 you're saying to the court this case exists and it

1 doesn't, that's bad faith. I mean, I think you could get
2 it there without then having to put in this language about
3 that they substantiate the asserted contentions.

4 I mean, that's what opens the problem to
5 write -- and I do share that concern, because there are
6 lawyers in this state who will read that and then I file a
7 brief and they -- or a pro se who will file a sanctions
8 motion in the court of appeals because they disagree with
9 my understanding of, you know, *Walker Vs. Packer*, or
10 whichever real case you want to take up; but when it's a
11 purely made up case or a purely made up citation to the
12 record, it just flat doesn't exist, I'm less concerned
13 about whether they got there by making it up or by AI.
14 It's bad faith.

15 CHAIR TRACY CHRISTOPHER: Richard, then
16 Justice Miskel, and then Roger.

17 MR. ORSINGER: Okay. So focusing on the
18 proposed Rule 13, the grounds for sanctions are groundless
19 and brought in bad faith or groundless and brought for
20 purpose of harassment, and so if we translate that to
21 somebody incautiously relying on hallucinated citations,
22 we're going to either have to say that hallucinated
23 citation is groundless, and then you still have to show
24 that it was brought for purposes of harassment, or
25 groundless and it was brought in bad faith. And it seems

1 the only lever we can grab on to to define bad faith is to
2 include the use of hallucinated citations.

3 Now, when you take that same concept to the
4 appellate rule, it's a little more problematic, because it
5 says "groundless and brought in bad faith" and "groundless
6 and brought for the purposes of harassment," but at the
7 end of the rule it says, "The failure to verify the
8 accuracy of citations generated by artificial intelligence
9 tools." How is anyone going to know if the hallucinated
10 citations were generated by artificial intelligence tools?
11 Who is going to have what evidence to prove that, or is it
12 like *res ipsa loquitur*, if you have a hallucinated cite
13 you must have got it from artificial intelligence and not
14 from a typo in a CLE article or something?

15 So I'm wondering if what we should do -- and
16 I don't mean to lessen this work. It's great work, but it
17 might be more useful to use the model of 52.11 on original
18 proceedings, but strip out the overreliance on facts and
19 just say, "Attorney is not acting in good faith, as
20 indicated by any of the following," and you've got (a),
21 (b), (c), and (d), and add on there "citing legal
22 authorities that do not exist." That's one of the ways to
23 measure failure to act in good faith.

24 CHAIR TRACY CHRISTOPHER: Roger. Oh, sorry.
25 You're next.

1 HONORABLE EMILY MISKEL: You teed me up
2 great for what I was going to say, which is right now the
3 proposed rule defines "groundless" by referencing, you know,
4 hallucinated citations, but, actually, as we're discussing
5 it, what we really want to do is define outright
6 inventions, willfully fictitious, you know, wholly
7 outright fictitious citations to authorities or to the
8 record as bad faith, because they're already groundless.
9 They don't exist. But to say that something is wholly
10 fictitious, I think, aligns more with bad faith, like what
11 you said, and so maybe some tweaking to say -- because
12 then that would get rid of the problem of you cited to
13 page 110 and it's on 100, or this case says "reasonably,"
14 and you didn't say the word "reasonably," right, so that
15 might be a suggestion as well.

16 What I would like to ask is we're talking
17 about this certification that you've -- that you're
18 representing that your citations substantiate your
19 contentions. The concept of nothing in the TRAP says your
20 signature certifies anything, are we opposed to having
21 your signature on a brief certify that you've read it and
22 it substantiates your asserted contentions, and it's just
23 a matter of the wording? I'm seeing head-shaking, so I
24 also wanted to get a sense of that as we continue our
25 debate.

1 CHAIR TRACY CHRISTOPHER: Let's see. Roger,
2 then Rich, then Giana.

3 MR. HUGHES: I was just going to say, the
4 standard for groundlessness in (d)(2) I think is
5 sufficient to be neither overinclusive or underinclusive.
6 It hits the nail on the head, and therefore, I don't think
7 we need to have the -- include the part in (d)(1) about
8 that the legal citation referenced in the record are
9 correct and substantiated; and (d)(2), what it says, is
10 "Groundless, for the purpose of the rule, means no basis
11 in law or fact." Now, that's going to deal right there
12 with the person who either is very stupid and has not read
13 the records, so they're making it up, or using the AI and
14 not realizing that it's totally made up because they
15 haven't read it. It's going to deal with the person who
16 just dreams up a case or heard somebody say that, you
17 know, *Smith Vs. Gomez* stands for this proposition, when it
18 doesn't, and they've never read it.

19 It's going to deal with those situations,
20 whether they're the result of willful -- willful
21 ignorance, if you want to call it that, meanness, or, you
22 know, I'm relying on AI. Because the way that the
23 sentence ends up is that it includes the failure to verify
24 the accuracy of citations generated by AI, but doesn't
25 limit it to that. So you deal with the person who's just

1 doing it all out of their head instead of a machine and
2 you're not -- you're not penalizing the person for what I
3 call mediocre or even poor advocacy, but not sanctionable
4 advocacy.

5 I think that the standard for groundless is
6 about all we need if you establish, one, that the
7 citation of -- you can't find this anywhere in the record
8 at all. It just doesn't exist in the record, or there is
9 no such case, or the case you're citing doesn't even
10 remotely discuss that proposition of law, you're very
11 close to bad faith, and the only question is how important
12 was the legal argument you -- for which you cited that
13 case or the importance of that fact that you were talking
14 about to the case at all, and I think -- and I think the
15 question, I think the rule leaves the court sufficient
16 latitude to determine.

17 CHAIR TRACY CHRISTOPHER: Rich, and then
18 Giana.

19 MR. PHILLIPS: So one thing I want to be
20 careful about, Richard, I heard you say a couple of times
21 incautiously using AI. I mean, if you don't check it,
22 you're -- I don't want to minimize the idea that you can
23 use AI without checking that the cases it's giving you are
24 real. So I think we ought to be careful about talking
25 about whether somebody is cautiously using AI or

1 incautiously using AI. If they use AI and end up with a
2 fake case and they don't know it, I don't see that as
3 being any different than just pulling a case name out of
4 the air and adding some numbers behind it and saying it
5 supports your proposition. The just standard general
6 competence in practicing law means you have to know, if
7 you use those tools, you've got to check them.

8 The second thing, on the question of
9 signing, I'll be honest with you, I didn't realize that
10 there wasn't something in the TRAPs that was similar to
11 Rule 13. Every time I've signed a brief I've assumed I'm
12 saying I've read this thing and I'm comfortable that it
13 means what it says; and, frankly, if we are concerned, as
14 appellate lawyers, that we don't want to have that
15 obligation when we sign a brief, I think there's a
16 different problem.

17 And also, the idea of delegating to somebody
18 else, they write the brief, you sign it. If you're going
19 to sign it, you better darn well have read it, and you
20 need to know what's in it. The case from New York, I
21 think, was the one where they used a lawyer in the firm
22 who was admitted in the federal court, and he signed it,
23 and he didn't know that it was full of hallucinated cases,
24 and the judge in New York was like "I don't care. Your
25 name's on it. You're the one who came to the court and

1 represented that this is accurate, and you're getting
2 sanctioned." So putting your name on something means
3 something under Rule 13, and I always assumed it kind of
4 did under Rule 9, and we ought to make clear that it does.

5 CHAIR TRACY CHRISTOPHER: Giana, and then
6 Marcy.

7 MS. ORTIZ: Just briefly, yes. I think an
8 easy way to address it is defining "bad faith," and maybe
9 that's something that can be done in a comment so that
10 it's like super easy to be flexible when AI turns into
11 some other term that we use in the future, hallucinated
12 cites changes terms in the future, first; and second, the
13 fact that you're asking if there's any opposition means
14 that it -- I was not clear the first time. I think it's
15 great that you identified the gap in what Rich has just
16 described, that there's not a correlate to Rule 13 in the
17 TRAP, and I'm very supportive of adding that. I'm just
18 concerned about the language in Rule 13.

19 CHAIR TRACY CHRISTOPHER: Marcy.

20 MS. GREER: Giana just said what I was going
21 to say.

22 CHAIR TRACY CHRISTOPHER: And, Jim, I'll get
23 to you. I wanted to -- Chair prerogative here. I think
24 the irony of the whole situation that we're discussing is
25 that we are looking at the new Westlaw CoCounsel program,

1 where we can upload a brief, and it will tell us whether
2 your citations are accurate. It will prepare this huge
3 printout that will say, you know, whether you have
4 accurately cited something.

5 MS. STOKES: I signed up for that this week.

6 CHAIR TRACY CHRISTOPHER: Pardon me?

7 MS. STOKES: I signed up for that this week.

8 CHAIR TRACY CHRISTOPHER: So, yes, and I
9 mean, it -- and, of course, we, in the court, are -- we
10 could, if we wanted to, upload a draft opinion into
11 CoCounsel and ask them to double-check it for us before it
12 goes out. So, you know, we're using artificial
13 intelligence to double-check other people's artificial
14 intelligence and double-checking our own artificial
15 intelligence, you know, so there's a lot to be thinking of
16 there just in terms of issues.

17 Jim, and Richard.

18 MR. PERDUE: You want to go first, Richard?

19 MR. ORSINGER: No, go ahead.

20 MR. PERDUE: I'm trying to make Riney go
21 first. He said he was waiting for me to go first.

22 MR. RINEY: That's right. I have something
23 to shoot at.

24 MR. PERDUE: I was waiting here quietly. So
25 it seems like the Court asked for something, and my

1 observation to the committee was be careful about
2 weaponizing sanctions, but what was maybe not verbalized,
3 I didn't disagree with the goal of the rule. I think one
4 thing Tom and I certainly would agree on, there's a
5 fundamental aspect of professionalism that if you put your
6 name on something as a lawyer, you have an obligation to
7 make sure the legal citations are correct and substantiate
8 the asserted contentions, and you should be verifying the
9 accuracy of citations in something.

10 And I know that the speeches that we give on
11 professionalism are cautionary about the -- since Justice
12 Christopher just talked about courts using AI, there is an
13 implicit laziness in reliance on AI that is increasing
14 because of the shortcut it provides, and so there's a
15 tension for me as a practitioner on the idea of putting
16 into a sanction rule something that could be interpreted
17 as broad in potential sanctions, which I think sanctions
18 track a professionalism obligation as well, that they need
19 to be targeted and tailored, right, for the appropriate
20 conduct.

21 But I would say, from a practitioner
22 standpoint, I think the rule -- the proposed amended
23 Rule 13 and 9 don't give me heartburn that the concern I
24 had about increasing the use of sanctions for things would
25 occur, and I think it is worthwhile to inform the Bar

1 that, if you are using AI, you should do so with caution.

2 CHAIR TRACY CHRISTOPHER: Richard.

3 MR. ORSINGER: Okay. So I'm troubled by the
4 idea that the sanction is triggered by the use of
5 artificial intelligence aids or tools, because I don't
6 think that the appellate court will be able to determine
7 whether it was generated by artificial intelligence. So
8 what we ought to just do is say if they're fictitious
9 citations, you're -- you're in hot water. It doesn't
10 matter whether someone can show it came from artificial
11 intelligence or not. The only thing we're going to know
12 is that it's just fiction.

13 Secondly, on the signature issue, Emily, we
14 have an equivalent to that in the appellate rules, 52.3(k)
15 about original proceedings and the certification, and let
16 me read that, because it's really different from Rule 13
17 and even Rule 9. "The person filing the petition," not
18 signing, but filing, "must certify that he or she has
19 reviewed the petition and concluded that every factual
20 statement in the petition is supported by competent
21 evidence included in the appendix or record."

22 Now, that could be a model for what we would
23 say, only it would be legal that every case citation in
24 the brief is supported by -- or is accurately represented.
25 I don't want to make the words up right now, but the idea

1 is --

2 HONORABLE EMILY MISKEL: "Substantiates the
3 asserted contention."

4 MR. ORSINGER: Okay. Well, now, you're
5 getting into whether people are having clear logic or --
6 so if the citation is imaginary, boy, that's easy, right?
7 What's hard is to say is this lawyer completely
8 misrepresenting to the court what this case held? That's
9 what we want to stop, isn't it? But if it's, like, on the
10 edge there, maybe that's what the court implies or maybe
11 -- you know, maybe that's not the holding, but maybe
12 that's obiter dicta, but, be that as it may, it does seem
13 to me that this is a good model for an appellate
14 proceeding, is to say when you sign or file, because the
15 rule says "file," not "sign," when you sign or file that
16 you have reviewed it and that every legal citation -- or
17 make it as broad as you want -- is accurately reported or
18 something. But I don't think we'll ever be able to prove
19 that somebody was using AI, and you're not going to take a
20 deposition and a show cause hearing. They probably would
21 plead the Fifth. I don't know. But anyway, that's my
22 thought. It's a worthy goal. We can clean this up, but
23 it requires fine-tuning.

24 CHAIR TRACY CHRISTOPHER: Well, we had a
25 lawyer who cited a case that was a correct case, but they

1 were citing the dissent, without telling us they were
2 citing the dissent. You know, what do you do with that?

3 MR. ORSINGER: You know, and that could be
4 such -- that could be a wording problem. I mean, was the
5 citation with parentheses, justice dissenting?

6 CHAIR TRACY CHRISTOPHER: No.

7 MR. ORSINGER: Golly. Boy, that's going to
8 get a tangle.

9 CHAIR TRACY CHRISTOPHER: No. I mean, and I
10 think that was just bad Westlaw search or Lexis search.

11 MS. STOKES: Not reading it.

12 CHAIR TRACY CHRISTOPHER: Not reading the
13 whole case, no. Here's this great statement from this
14 whole case and not noticing it was the dissent. Tom.

15 MR. RINEY: I think sanctions should be very
16 rare. It's easy to talk about sanctions, but it can ruin
17 a lawyer's reputation. It can impact their ability to get
18 insurance, all kinds of things, but there are situations
19 where sanctions are merited. In the case you described
20 where they're talking about they're referencing a record,
21 a fever, and it's not even there, that kind of stuff, I
22 mean, that's sanctionable conduct.

23 I have a lot of empathy now for your
24 statement that you had difficulty figuring out language,
25 because after reading the report and listening to all of

1 this, I don't have any real suggestions. I think
2 Richard's comment about, you know, maybe modifying some of
3 it is pretty good, but, Justice Miskel, you also mentioned
4 that most of these are lawyers that only handle one appeal
5 every once in a while and so forth. That's probably true,
6 but those are the ones that cause a lot of damage. I
7 mean, people that don't know what they're doing. They do
8 it in the trial court. They do it in the appellate court,
9 and it's really harmful.

10 I remember Jim Sales, who was president of
11 the State Bar, had a quote ahead of his presidency that
12 said, "May you be cursed by having a bad lawyer on the
13 other side." I mean, there's nothing worse. It's just
14 awful, and so I haven't gone back and looked, but did the
15 disciplinary rules, do you think, have some application to
16 this, or are they just as vague and ill-suited to AI as
17 anything else?

18 And, clearly, we don't want to sanction
19 lawyers that made a mistake, even if it's a kind of a
20 serious mistake, but I think I was not aware that the
21 abuses were as much as are stated in the committee report,
22 and it's not going to get any better. It's going to get
23 worse.

24 MR. HUGHES: Yes.

25 MR. PERDUE: Yeah.

1 MR. RINEY: And let me add one other thing
2 about signing. If I have a case and I get Jim Perdue to
3 sign the petition or David Keltner to sign the petition,
4 there's a reason, and the reason that I want their name on
5 there is that it lends credibility to my position, and I'm
6 probably going to have to pay Perdue a bunch of money to
7 get his name on there, and so whoever signs onto something
8 needs to have some responsibility.

9 CHAIR TRACY CHRISTOPHER: So, just
10 anecdotally, I'm sure Judge Miskel could tell you the same
11 thing. We get a lot of pro se briefs that clearly have
12 false citations in them, and we've thought about striking
13 the brief, right, and saying, you know, redo it, but it's
14 usually on original proceedings that we get the most
15 pro se filings, but if they don't have a good mandamus, or
16 whatever, to begin with, are we going to waste our time
17 going through that whole process, right? I mean, there's
18 always that consideration.

19 You know, I like striking the offending
20 whatever, but especially at the appellate -- in the
21 appellate world, you know, just if we do a brief check and
22 you've cited a bunch of, you know, nonexistent cases, we
23 just strike your brief and order you to rebrief, and it's
24 faster and easier than a show cause and a sanctions
25 hearing.

1 Yes, Judge Miskel.

2 HONORABLE EMILY MISKEL: We felt like the
3 opportunity to rebrief rewarded the party who did the
4 wrong thing in the first place --

5 CHAIR TRACY CHRISTOPHER: Yeah.

6 HONORABLE EMILY MISKEL: -- because now they
7 have a chance to have a do-over, and we thought that that
8 was not the equitable and fair result to the other side
9 who didn't cheat their way to the end of the process.

10 MR. PERDUE: Yeah, but, Justice Christopher,
11 you're talking -- the reason why I had skepticism about
12 changing the sanctions rules, because I felt like the
13 courts have inherent authority under practice today, under
14 case law today, to deal with this, right? As opposed to
15 having another -- the opposing party bring what would be a
16 sanctions motion, but if there's any question about the
17 court having inherent authority or they need to broaden
18 the language of 13 or 9 to deal with this, I would say, as
19 a practitioner that wants to hold the Bar to the highest
20 standard, then so be it. But I feel like if you're
21 striking -- if you're striking a brief, that's not based
22 on Rule 9. That's based on the court's inherent authority
23 to say that's not passing muster.

24 CHAIR TRACY CHRISTOPHER: But, you know,
25 gosh, there's, you know, this level of sanctions, that

1 level of sanction, inherent authority sanctions, and so
2 sometimes it's better to put it in the rule, and I think
3 that's why Judge Miskel thought it was better, you know,
4 to have it in the rule with respect to the case that she
5 was involved with. And, I mean, I can't imagine a lawyer
6 getting an appellee's brief that says you made up all of
7 this stuff who wouldn't fall on their knees begging for
8 forgiveness, but this lawyer apparently didn't. You know,
9 I mean, that's just the incredible part of it.

10 Marcy.

11 MS. GREER: I really think that sanctions
12 are kind of a slidable scale, and generally, you don't get
13 sanctions until there are repeated incidents of stuff
14 going on, and if somebody -- I mean, I am sensitive to the
15 fact that, you know, having worked for a big law firm and
16 you're relying on the work of other people, you can't
17 necessarily read every case that's in an appeal brief, and
18 you are relying on other people, and we even have
19 paralegals who double-check every cite, but I got one back
20 from a very experienced paralegal who tried to change a
21 cite to a Supreme Court case, and it was to the syllabus.
22 I was like the syllabus is not part of the U.S. Supreme
23 Court decision. Makes me crazy.

24 So, I mean, you know, things happen like
25 that. There are human errors that happen, and I think

1 that if I have a brief struck by anybody, especially Chief
2 Justice Christopher, I'm going to be so humiliated, and
3 I'm going to go fix it. I think it's the rare person who
4 is not going to be humiliated by that, and I don't
5 consider it a do-over as much as a, oh, my God, what
6 happened here, and, you know, I think there has to be a
7 record of bad faith. And, generally, I remember Roy
8 Minton saying, you know, generally, if someone has done
9 something really bad, there's a whole line of history that
10 comes before that, and so I think there ought to be more
11 in the record than just a brief that had hallucinations.
12 I heard the term "hallucinations," which I actually
13 thought was kind of funny, but that hasn't picked up
14 apparently.

15 So I do worry that we're going to be overly
16 correcting when we've got lesser means. Now, if Chief
17 Justice Christopher strikes the brief and they come back
18 and they have more, that's proof of bad faith, you know,
19 right there, but to me, things can happen, and they can
20 happen even without AI and much more so with AI, as we're
21 trying to learn how to use it, and mistakes get made, and
22 I guess I would like to be more forgiving and not assume
23 people are doing stupid things.

24 CHAIR TRACY CHRISTOPHER: Pete, and then
25 Judge Miskel.

1 MR. SCHENKKAN: I want to push back on one
2 of the two earlier points, because I think maybe I didn't
3 make it clearly enough. We start out in the Rule 13
4 suggested amendment that the legal citations and
5 references to the record are correct and substantiated,
6 and then after that we refer to the accuracy of citations.
7 We need to do both each time, and one of the reasons we
8 need to do that is we can draw a bright line that may not
9 be an adequate bright line, but we can draw a bright line
10 that says if you file a brief or a motion that has a
11 hallucinated citation to a case in it, a case that does
12 not exist, you will be sanctioned. We could. I'm not
13 saying we should, necessarily, but we could do that. We
14 could have a bright line rule that says if your brief
15 winds up having a hallucinated citation, in the sense of a
16 case that does not exist, somebody is going to get
17 sanctioned something, and then we leave the sliding scale
18 problem of probable proportionality to the sanction
19 decision.

20 I don't think we can do a bright line one
21 for what I think is going to turn into the big problem,
22 which is the effort to use AI to digest all of the
23 depositions and make an assertion about what the witnesses
24 said. It's too hard to be sure where it is on the scale
25 between completely made that up and you just -- boy, did

1 you put a lot of lean on something somebody said and took
2 inadequate account of the rest.

3 So two points. If we're going to do both,
4 let's do both every time, legal citations, record
5 references, and if we're going to talk about what we're
6 going to do about sanctions and we really want to make the
7 demonstrative educational point as the system, as a legal
8 system, we really don't want this to happen anymore, let's
9 do it on the one that's clear. If you file a brief or a
10 pleading that's got -- that cites a case that doesn't
11 exist, you will be sanctioned. Something. I'm not saying
12 how much.

13 MS. STOKES: Or how.

14 MR. SCHENKKAN: Or how. Or what the process
15 is.

16 MS. STOKES: Right.

17 MR. SCHENKKAN: Because that could vary
18 depending on whether the trial is over or where it is in
19 the process and whether it's an original proceeding or
20 whatever.

21 CHAIR TRACY CHRISTOPHER: So I think -- I
22 think, was it what Richard said, that proving that it was
23 generated by artificial intelligence rules is tricky.

24 HONORABLE EMILY MISKEL: None of the current
25 rule requires that. It just lists like "such as by AI."

1 It doesn't require that you prove that it's by AI.

2 CHAIR TRACY CHRISTOPHER: Well, no, this
3 second sentence appears to require that.

4 HONORABLE EMILY MISKEL: Oh, which one?

5 CHAIR TRACY CHRISTOPHER: Of the proposed
6 amended rule, the second sentence, "including the failure
7 to verify the accuracy of citations generated by AI
8 tools."

9 HONORABLE EMILY MISKEL: Right. That's not
10 limiting the definition of "groundless." That's just
11 giving an example.

12 MR. ORSINGER: But does it add anything, or
13 can we take it out, because how are you ever going to
14 prove how it was generated?

15 HONORABLE EMILY MISKEL: Right. I don't
16 think you need to. So here was the direction I was going
17 to take back. Number one, the concept of 9.1(d) that, by
18 signing an appellate paper, your signature means something
19 seems to be uncontroversial. Now, whether we pattern that
20 after Rule 13 or if we pattern that after 52.3(k), I think
21 we can work on some language. So, step one, an appellate
22 signing certification is a good idea. TBD what it says.

23 Step two, by signing, you are certifying
24 that your citations to the record and to authorities are
25 substantiated, and then, step three, not having a separate

1 standard for hallucinated citations that is lighter or
2 heavier than the otherwise standard for the other bad
3 stuff. And then, number four, instead of working this
4 under the groundless part of groundless and in bad faith,
5 we instead, either in the rule or in a comment, include a
6 definition of "bad faith" that refers to outright
7 fictitious inventions. So those are my four notes for
8 taking this back for further work.

9 CHAIR TRACY CHRISTOPHER: Roger.

10 MR. HUGHES: I propose leaving in the
11 included language, and here's the reason. I think it's
12 been pointed out endlessly this is becoming a problem that
13 needs to be addressed now, at least that's the feeling. I
14 don't think we would be here otherwise.

15 Second, we can't know until the lawyer steps
16 up to the plate to explain why this fictitious record
17 reference, this fictitious case, snuck into their brief.
18 What this sentence does, or rather this phrase does, it
19 eliminates as a defense, "Oh, that came from Snap" -- Snap
20 whatever. It means a lawyer who wants to say, "I relied
21 on AI" had better say a lot more than "I relied on AI,"
22 because if all they've got is "AI told me so and I
23 believed my computer," that is not going to work, and
24 that's what that sentence tells them.

25 CHAIR TRACY CHRISTOPHER: Richard.

1 MR. ORSINGER: One last thing, Emily. I
2 might have misheard what you said, but I heard you mention
3 appellant, and I wondered if you also mean appellee.

4 HONORABLE EMILY MISKEL: Yes. Yes.

5 MR. ORSINGER: So it doesn't matter which
6 position it is. You do a bad thing, you're subject to
7 sanction. Okay.

8 CHAIR TRACY CHRISTOPHER: So, yeah, the new
9 Westlaw CoCounsel that they're trying to get the courts of
10 appeals to all buy into and then they'll try to get all of
11 the law firms to buy into because they'll say all of the
12 courts of appeals have it, you know, promises to do all of
13 these incredible things for you; and then, of course, we
14 as a court, if our lawyers start to use some of those
15 tools, you know, what parameters do we put on them to
16 verify whatever they have done using those tools?

17 But I did want to tell you that I went to a
18 nonlitigation CLE. I don't know why I was asked to speak,
19 but I was, and there was this whole panel on AI, and
20 unlike the trial court CLEs and the appellate court CLEs
21 that wring their hands and say the world is coming to an
22 end because of AI, they were encouraging its use. They
23 have clients that encourage its use. It is going to be --
24 because it saves them money, it does this, it does that,
25 it is ubiquitous in the business world. So, you know, we

1 cannot just sort of close our eyes to it.

2 MS. STOKES: And if I may add, the reason I
3 know about CoCounsel is because I got an offer on a case
4 from a lawyer that's not a good lawyer, and I thought is
5 this good? What's the deal? I called her up. I said,
6 oh, my God, this is great, blah, blah, blah. I really
7 kind of thought she had stolen it from like a Dallas
8 lawyer. No, she said she got it off of CoCounsel. That's
9 how I found out about it. I was like, hey, I need to
10 check it out. It was impressive. My demo was really
11 cool.

12 MR. ORSINGER: Going forward, you don't have
13 to worry about signing opinions that might have imaginary
14 cites in it because you have judicial immunity.

15 CHAIR TRACY CHRISTOPHER: Well, I do have
16 immunity. It is the embarrassment factor that you --

17 MR. ORSINGER: You can go home and not worry
18 about what your briefing attorney has done.

19 CHAIR TRACY CHRISTOPHER: True. True. But
20 you don't -- you know, but I might get sanctioned for it.

21 MR. ORSINGER: Oh, I don't think so.

22 HONORABLE EMILY MISKEL: And I was going to
23 say we've been talking about lawyers and self-represented
24 litigants, but to be fair, your materials include several
25 stories of judges sending out opinions and orders with

1 hallucinated materials in it, so it's a human problem --

2 CHAIR TRACY CHRISTOPHER: Right.

3 HONORABLE EMILY MISKEL: -- not a lawyer
4 problem.

5 CHAIR TRACY CHRISTOPHER: And will only
6 continue to be more of one, I think, in the future. Well,
7 and just so you know, this CoCounsel thing that they're
8 trying to sell us on will give you oral argument
9 questions. You can upload the briefs and say, "What
10 questions should I ask the lawyers in oral argument,"
11 right, and I said, okay, so if I have CoCounsel and I do
12 that and the lawyer has CoCounsel, are they going to get
13 the same questions?

14 Yes, they will. So I'm like, well, gosh I
15 can't ask those questions then because then they'll know
16 I've used AI to get the questions.

17 MR. ORSINGER: CoCounsel may give them the
18 answer to the questions you're asking.

19 CHAIR TRACY CHRISTOPHER: It could.

20 MR. ORSINGER: Which then you could read
21 that without oral argument.

22 MR. SCHENKKAN: No more oral arguments.

23 MR. ORSINGER: What questions should I ask
24 and what answers should they give?

25 CHAIR TRACY CHRISTOPHER: It's pretty crazy.

1 There's even a "who should win."

2 MR. ORSINGER: Oh, no. Oh, no.

3 CHAIR TRACY CHRISTOPHER: "Who should win"
4 button.

5 MS. GREER: We had a presentation at the
6 American Academy of Appellate Lawyers, and U.S. Supreme
7 Court practitioners were showing how they use AI. What
8 would Chief Justice Roberts say about this or ask about
9 this. I mean, it was incredible. They had really
10 generated the prompts so that they could hone it down. It
11 was incredible. I'm like not ever doing an oral argument
12 without doing that again.

13 MR. ORSINGER: Well, you know, if it gets
14 better, why do they need a lawyer?

15 MS. GREER: Because it could be wrong.

16 MR. ORSINGER: That's right. We're going to
17 be fact-checking whatever --

18 CHAIR TRACY CHRISTOPHER: It's a brave new
19 world. So do we think the subcommittee has enough
20 discussion to go back and come back again?

21 HONORABLE EMILY MISKEL: Yes.

22 CHAIR TRACY CHRISTOPHER: Okay. Then do we
23 have any other business for the day?

24 All right. We are adjourned. Thank you.

25 (Adjourned)

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REPORTER'S CERTIFICATION
MEETING OF THE
SUPREME COURT ADVISORY COMMITTEE

* * * * *

I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above meeting of the Supreme Court Advisory Committee on the 30th day of January, 2026, and the same was thereafter reduced to computer transcription by me.

I further certify that the costs for my services in the matter are \$ 2,077.00, which was paid or will be paid by The State Bar of Texas.

Given under my hand and seal of office on this the 2nd day of March, 2026.

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