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**MEETING OF THE SUPREME COURT ADVISORY COMMITTEE**

SEPTEMBER 10, 2026

(THURSDAY SESSION)

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Taken before *Tammy Pozzi*, Certified  
Shorthand Reporter in and for the State of Texas,  
reported by machine shorthand method, on the 10th day of  
September, 2026, between the hours of 9:04 AM and 2:21  
PM, at the Travis County Civil and Family Courts  
Facility Conference Room, 1st Floor, 1700 Guadalupe  
Street, Austin, Texas 78701.

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

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MS. GREER: So I'm in charge today but they forgot my gavel and my robe -- no, I'm kidding. Excited to be here.

And we have a -- Tammy Pozzi is sitting in as our court reporter today, and she's not familiar with everybody. So if I could ask a favor, if you could identify yourself by name before you speak so that she can identify, it will make her job a lot easier and we would all be very grateful.

And welcome. This is the Travis County Courthouse, and we're very proud of it. Much better than the courthouse that we left, although it is a historic wonderful place where the Business Court now sits. And welcome Melissa Andrews -- Judge Andrews. We're excited to have you here.

HONORABLE MELISSA ANDREWS: Thanks for letting me sit in.

MS. GREER: Of course. Of course.

So with that, I will turn it over to Justice Bland.

HONORABLE JANE BLAND: Hi. Good morning, everyone. And thank you to the Travis County judges for allowing us to use their beautiful facility.

So a couple of you, more -- more than two,

1 really, a few, said they didn't want to get any more  
2 emails from me for a while because we had such a, you  
3 know, tremendous summer of loss, and I don't want the  
4 contributions of those folks to go unmentioned.

5           For the record, we lost professor Elaine  
6 Carlson, who had been on this committee for 40 years,  
7 had started serving in 1986. She was a -- a trial  
8 lawyer in her own right, and I got some emails from  
9 people that had cases with her back in the day. But  
10 then joined the South Texas College of Law faculty full  
11 time in 1982.

12           She was among the first class of tenured  
13 women at the -- at the school, and she was a prolific  
14 writer and publisher, particularly in the area of Texas  
15 Practice and the Rules of Civil Procedure. She had a  
16 special affinity for post-judgment enforcement, and  
17 ble- -- you know, and anyone that has an affinity for  
18 that is a special person because it's pretty arcane  
19 and -- and tough.

20           She was such a great person for the  
21 committee in terms of not only her significant,  
22 thoughtful contributions to the jurisprudence by helping  
23 draft rules, providing thoughtful evidence, but she also  
24 was so collegial and able to make this group kind of  
25 slow down a minute when it was going off to the races or

1 maybe on a frolic and detour that wasn't going to prove  
2 so fruitful and was just going to get everybody's  
3 patience exhausted.

4                   So we will very much miss her. There has  
5 been an announcement that there will be a memorial  
6 service on September 20th, but we don't have the -- the  
7 specific details yet. So when we do, we will let you  
8 know.

9                   And then, of course, our illustrious Vice  
10 Chair Buddy Low. And Buddy was a five-decade member of  
11 this committee and had served as the Vice Chair for  
12 probably the last 20 or so years. He, you know, was,  
13 again, a person of tall stature in the Texas legal  
14 committee and an Ameri- -- American College Lawyer.  
15 There wasn't a case that got tried in East Texas that  
16 Buddy didn't have some involvement in. And -- and, you  
17 know, if -- if he could manage it, he would be in the  
18 courtroom on one side or the other.

19                   He spent his entire career at Orgain Bell  
20 & Tucker, and that is an unusual aspect of his  
21 professional career these days with lawyers, sort of,  
22 moving around more than they used to.

23                   He was very involved at the University of  
24 Texas School of Law and in his Beaumont community, and  
25 there was not a -- there was not a day that you could

1 come to Beaumont that he would not be there to welcome  
2 you and to involve you in whatever was happening that  
3 day, if there was a Bar event that day, if there was a  
4 community event that day.

5                   So we will very much -- very much miss  
6 him. And I know in particular Jack Carroll, his  
7 partner, and who Buddy vouched for to be on this  
8 committee will -- will especially miss him.

9                   I was sad I -- sad to not make the  
10 funeral, if any of you did, the memorial service in  
11 Beaumont, and I -- it was a, you know, summer of lots of  
12 flight delays and I had a five-hour flight delay that  
13 made it impossible to get to Beaumont.

14                  Okay. And then John Kim, who is -- was  
15 the -- the -- the newest of our members that we lost  
16 this summer, has been -- had been on the committee since  
17 2021. And so was sort of appointed in the -- in the --  
18 during the pandemic years and had friends on the  
19 plaintiff side, the defense side, was very involved in  
20 ABOTA and was the head -- president of Texas ABOTA.  
21 And -- and for that reason was very helpful in our  
22 dialogue with all the various groups, the trial lawyers,  
23 ABOTA, defense counsel, in crafting a remote proceedings  
24 rule that would be workable for everyone and not, kind  
25 of, change the -- the idea of what an in-person jury

1 trial looks like but -- but provide the useful tool  
2 that -- that it is, I think, today.

3           And we thought we would get a lot of  
4 feedback on that rule after it went into effect, and we  
5 had almost no cases and no comments. So -- and I'm -- I  
6 hesitate to even mention that, I -- in case somebody --  
7 somebody has been stewing about it for the last six  
8 years. But -- but -- or five years. But any -- it's  
9 a -- it was a testament to his ability to get along with  
10 lots of people. And -- and -- and we were personal  
11 friends from our very beginning lawyer days when we were  
12 brand-new lawyers in Houston, and he was a lot of fun.

13           We are -- we are going to miss him.  
14 There's going to be a memorial service for him in  
15 Houston at some point, and we will let you know at. . .

16           So -- so we lost these three people this  
17 summer. And we lost Alistair Dawson and Professor Bill  
18 Dorsaneo last year. And I think the overwhelming sense  
19 I have in reflecting on it is just how much gratitude  
20 for -- gratitude for them and for all of you.

21           So we'll take a moment of silence to honor  
22 them and -- and think about just how grateful we are to  
23 have had them in our lives.

24           All right. So on to -- to happier topics.  
25 So -- so it's the beginning of the court term. The

1 September meeting of SCAC is always a great one because  
2 we have completed any number of projects, and we -- we  
3 don't know quite yet what projects are going -- the  
4 court is going to refer to us. So -- so there's a tiny  
5 bit of a lull, although we have some ongoing projects  
6 that we need to complete. And -- and it's like the  
7 beginning of any fresh new school year for the court.  
8 It's the new term. We had our Petitions Conference last  
9 week, our new law clerk started Tuesday, and we have  
10 oral argument next week.

11 So, you know, it's a new beginning to a  
12 new term, which is always nice, after everyone hopefully  
13 had a little bit of a rest, but I hope all of you all  
14 had a little bit of a respite this summer.

15 This afternoon, we're going -- we're going  
16 to, like, break early, today because this afternoon, the  
17 Texas Supreme Court Historical Society is sponsoring the  
18 portrait hanging for Justice Craig Enoch. And so  
19 Justice Young and I will be there for that. We also  
20 have other obligations with the judicial conference and  
21 a few other things, so we'll be in and out.

22 On -- in terms of the rules -- so that's  
23 at 3:00 -- 3:00 PM in the Supreme Court courtroom. Of  
24 course, you are all cordially invited, and I look  
25 forward to seeing some of you tonight at the Hemphill

1 Dinner, which is also going to be a wonderful event.

2 All right. As far as rules go, we have  
3 a -- a good agenda today, and things that are still in  
4 the pipeline that we are working on. Rule 76a, this  
5 committee did a lot of work on, and we're -- we're --  
6 we're working on it.

7 We had the AI sanctions rule that this  
8 committee discussed at our last meeting. We put out a  
9 preliminary rule for comment, and the comment period  
10 ended September 1st. And we'll go through the comments  
11 and look at it hopefully to issue an order effective in  
12 October or late fall.

13 And then the expedited action rules were  
14 finished, and that was really more just housekeeping to  
15 increase the amount in controversy at -- per legislative  
16 statute.

17 So I -- you know, we are always interested  
18 in hearing feedback on the rules, even after they go  
19 into effect. In particular, I think, you know, after we  
20 have a year of the summary judgment rule in practice, a  
21 year or two, so we know what it's looking like, it would  
22 be great if we -- if we, you know, heard some -- some  
23 substantive feedback about things that we might need to  
24 do differently or add or -- add or amend in the rule.

25 And that is my report.

1 Justice Young?

2 HONORABLE EVAN YOUNG: I have nothing to  
3 add.

4 HONORABLE JANE BLAND: All right. We'll  
5 turn it over to Marcy.

6 MS. GREER: Okay. Thank you. Thank you  
7 for that status report and your comments as we move  
8 forward.

9 First we're going to take up the jury  
10 rules and jury composition, and I just wanted to commend  
11 these reports. They're very well done, and thank you  
12 for putting them together. I know it takes a lot of  
13 work. And I'm sorry that we don't have the one on the  
14 third-party litigation funding. I was trying to get a  
15 report done for our committee, but we have talked about  
16 it and we have lots of fun things to discuss.

17 But we'll start with jury rules and jury  
18 compensation -- I mean composition, excuse me. Who is  
19 going to be leading that?

20 Kennon, excellent.

21 MS. WOOTEN: Well, I would be remiss if I  
22 didn't start by saying that I thought a lot about  
23 Professor Carlson in preparing to present today, because  
24 she was the head of this subcommittee for so long and  
25 because of some of what we're going to talk about today

1 has her fingerprint on it from 2021 when we started  
2 working on some of the components of the request that  
3 got carried over to this day.

4               So the memo behind Tab 1 in the material  
5 contains an overview of our work as a subcommittee on  
6 updating and modernizing the rules in Part 2 of the  
7 Texas Rules of Civil Procedure, as well as rule  
8 proposals from the subcommittee that are appended to the  
9 memo.

10              And this work product that we're going to  
11 talk about today stems in part from a request from the  
12 Supreme Court of Texas in March of this year for our  
13 committee to review all jury rules for updating and  
14 modernizing.

15              But for the record, in case it's helpful  
16 to the court and others who may read it later, I'll note  
17 that the subcommittee also analyzed the jury rules in  
18 the relatively recent past, specifically in 2021. And  
19 like this time, it did so in response to requests from  
20 the Supreme Court of Texas.

21              The first request came in 2021 in a letter  
22 from Former Chief Justice Hecht requesting review of  
23 Texas Rules of Civil Procedure 216 through 236  
24 because -- that are outdated and don't reflect current  
25 practice in all regards.

1           And that request did yield a subcommittee  
2 memo with proposals. The memo is dated August 24, 2021,  
3 and the Supreme Court Advisory Committee did discuss the  
4 contents of that memo at its meeting on September 3rd of  
5 2021.

6           The Supreme Court didn't make any rule  
7 changes, to my knowledge, in response to those  
8 proposals, but it's our understanding as a subcommittee  
9 that that stemmed from the court's priorities rather  
10 than a rejection of the proposals that were there.

11           So some of what we're going to talk about  
12 today is -- is truly just a carryover from what was  
13 recommended before, back in September of 2021 at a SCAC  
14 meeting.

15           The other relatively recent request came  
16 in another referral letter from Former Chief Justice  
17 Hecht also in 2021 asking this committee to review an  
18 implicit bias instruction for Texas Rules of Civil  
19 Procedure 226a as recommended by the State Bar of Texas  
20 Court Rules Committee and to make recommendations.

21           In another subcommittee memo, also dated  
22 August 24, 2021, the subcommittee recommended that the  
23 full committee recommend adoption to the court of  
24 adoption of the court rules committee's proposal, and  
25 that was included with the memo back in 2021.

1           We were informed as a subcommittee that  
2 the Supreme Court of Texas doesn't need any further  
3 discussion about that implicit bias jury instruction, so  
4 I will not be addressing that further. I just wanted to  
5 make it clear for the record that that was part of the  
6 collective discussion back in 2021.

7           Today I'm going to summarize the  
8 recommendations to update the rules. Again, some of  
9 these recommendations being carried over from 2021. And  
10 I'm also going to talk about the modernizing work that  
11 the court asked us to do for the jury rules.

12           And I'm going to start with that  
13 modernizing work because it's pretty straightforward,  
14 and I think it makes sense to just get it out of the way  
15 at the front end.

16           So back in 2008, shortly after I started  
17 as rules attorney, then Justice Hecht gave me this book  
18 by Bryan Garner, Guidelines for Drafting and Editing  
19 Court Rules, and said I should look at this when making  
20 proposals for the court with respect to how the rules  
21 are structured, how you go about phrasing things,  
22 etcetera.

23           And so I -- I've had this since then, and  
24 I've looked at it several times since then. We were  
25 asked to look at a more current version of this when

1 working on modernizing the rules. I drew the short  
2 straw and -- and did the draft of modernizing the rules,  
3 and I did look at a more recent version of this  
4 publication.

5 I will say that after completing that  
6 work, I realized there is an even more recent version of  
7 the Garner work that now has a co-author, Joseph Kimble.  
8 It's called Essentials for Drafting Clear Legal Rules,  
9 and it is posted on the official USCourts.gov website.  
10 And I -- I looked at it. I'm happy to say that it  
11 doesn't change, really, what has been recommended in  
12 terms of modernizing these rules.

13 Though for this room, the only group of  
14 people I know who might care about this, I will say that  
15 now in the current guidelines, they recommend a space  
16 before and after dashes. I couldn't force myself to do  
17 it because Hecht didn't do it, and so you'll see that  
18 those spaces are not incorporated. But, otherwise, with  
19 respect to the modernizing, what's been put out in the  
20 current version from -- from Garner and Kimball dated  
21 2024 really isn't different for our purposes.

22 So some key principles, really, that drove  
23 the modernizing, it's reflected in the table that's  
24 appended to our subcommittee memo, I'll go over now so  
25 that you have them in mind.

1                   And what we did if you look at that table,  
2 is we have the current rule text on the left and the  
3 proposed rule text on the right, so that you can see at  
4 a glance when we combined rules, when we eliminated  
5 them, and how the proposed text relates back to the  
6 current text.

7                   If you want to follow along with the PDF,  
8 this is on pages 6 through 28 of the PDF that was  
9 circulated by Sherma. If you are looking at page  
10 numbers instead, it's pages 4 through 26 behind Tab 1.

11                  So here's the key principles with respect  
12 to the modernizing work that was done on the rules.  
13 One, we tried to use plain language and remove  
14 unnecessary text.

15                  There's a lot of verbiage in these rules  
16 that really seems like fluff at this point in time.  
17 Maybe it was very important back when these rules were  
18 drafted, but now there is a lot we could cut without  
19 removing substance.

20                  Another key principle that drove this is  
21 we incorporated descriptive subheadings. And that's  
22 something, for those of you who are interested, that --  
23 that really, I think, started when the appellate rules  
24 were removed from the body of the Texas Rules of Civil  
25 Procedure and put into their own set. And that's where

1 you can really see that beginning of those subheadings,  
2 the descriptive subheadings that help the reader follow  
3 along and know what's coming. And so here we've done  
4 that. We've incorporated descriptive subheadings into  
5 the jury rules.

6 We've already incorporated lists into the  
7 jury rules to improve readability. We attempted to  
8 group similar content together, again, to improve  
9 readability and clarity.

10 And only because we were working in a  
11 table format, we didn't follow the guidelines that  
12 Garner puts out with respect to indenting text and all  
13 that formatting because it didn't make sense here. But  
14 please know that we're mindful of it, we encourage the  
15 court to use it, we just didn't do it in this table  
16 format.

17 So I think that one point I'll make about  
18 modernizing for the record is that what we did when text  
19 was removed, whole rules or rules were combined, is  
20 simply renumber the proposed rules. But Bryan Garner  
21 does suggest, and I think wisely so, that if there are  
22 familiar rule numbers, it makes sense to keep them.

23 So the committee -- the subcommittee, more  
24 specifically, has simply renumbered for now. That was  
25 easier to do, but the court may decide that it makes

1 sense to keep some of the existing numbering.

2           When I think about really familiar  
3 numbering, I think about Rule 12(b)(6), things like  
4 that. Everybody refers to it by number. And I don't  
5 think that's necessarily true with the jury rules,  
6 though, I -- I think maybe 226a could be an exception to  
7 that. But that's -- that's just something for the --  
8 for the court to consider, and if the committee wants to  
9 weigh in, of course, they can.

10           Turning now to the updating component of  
11 this project, as indicated before some of the proposals  
12 that we have today are carried over from 2021, including  
13 proposals reflecting pertinent statutory changes that  
14 were back then.

15           I'll go over, just in summary format, what  
16 we've got with respect to updating that's more  
17 substantive in nature than the modernizing.

18           First, Texas Rules of Civil Procedure 216  
19 through 218 and 220 have been revised to eliminate  
20 references to jury fees. If the rule was all about jury  
21 fees, it's just been removed, and that reflects the  
22 repeal of the statute authorizing jury fees which was  
23 Section 51.604 of the Texas Government Code.

24           Second, we recommended deleting Texas Rule  
25 of Civil Procedure 225, which addresses summoning of the

1    talesman, and Texas Rule of Civil Procedure 231, which  
2    addresses adding additional prospective jurors to  
3    panels.

4                   The removal of Rule 225 reflects our  
5    understanding as a subcommittee that the practice of  
6    summoning the talesman isn't really something that  
7    happens in county and district courts these days. Of  
8    course, if we're wrong, we -- we stand to be corrected.

9                   The removal of Texas Rule of Civil  
10   Procedure 231 reflects the fact that we have a statutory  
11   provision, Section 62.015 of the Government Code that  
12   covers the same subject matter. And it seemed to us  
13   that in this particular instance, there wasn't a need to  
14   repeat that statutory text in the rule and that doing so  
15   could create confusion and the need to keep up with the  
16   statutory text, so we just have recommended removal of  
17   it.

18                   That said, I want to point out that the  
19   subcommittee has added in the memo, said it may be  
20   helpful for the Supreme Court of Texas to consider in a  
21   comment explaining why that's gone and maybe referencing  
22   the statutory provision addressing the addition of  
23   prospective jurors.

24                   Third, also relating to comments, the  
25   subcommittee recommends adding a comment to what is now

1 renumbered as Rule 228 to let the litigants know that  
2 Section 62.020 of the Government Code addresses  
3 additional peremptory challenges that are available if a  
4 court decides to seek alternate jurors.

5           So that's something that happens with some  
6 frequency, I know here in Travis County, but perhaps not  
7 enough frequency overall to put it in the rule text.  
8 That's something the committee can discuss further.

9           But moving along to high points here with  
10 updating. The fourth point I want to make is that we  
11 recommended the removal of references to the jury wheel  
12 throughout the jury rules. And I think where that  
13 exists in the current rules is in Rules 221 and 231.

14           This dates back to our 2021  
15 recommendations, and initially it was because we thought  
16 that practice of the jury wheel, putting the cards in  
17 the hopper, etcetera, etcetera, just wasn't around  
18 anymore.

19           It turns out that the statutory text still  
20 describes in a lot of detail that old practice of  
21 manually writing names on cards and putting them in the  
22 hopper and turning it and all that jazz. But our  
23 understanding is that even in the smallest counties in  
24 Texas, this is an electronic process now, and so to  
25 modernize and update the rule, we've just removed

1 references to the jury wheel, understanding it's still  
2 there in the statutory text.

3 Fifth, as explained in the memo and  
4 evidenced in the table that's appended to it, we  
5 recommend combining several rules, again, to improve  
6 readability, putting like text with like text.

7 Last but not least, we have recommended  
8 updating the instructions in Rule 226a regarding  
9 electronic communications, including those made with  
10 social media and AI tools. To enable you-all to focus  
11 your attention on precisely what I'm talking about, that  
12 text is highlighted in yellow in the table appended to  
13 the memo.

14 And that's -- that's it. I'll open the  
15 floor for discussion.

16 MS. GREER: Justice Chu? I mean Judge  
17 Chu, sorry.

18 HONORABLE NICHOLAS CHU: Thank you for the  
19 upgrade.

20 Kennon -- oh, Nick Chu for court reporting  
21 purposes.

22 Kennon, on your -- on the proposed rule  
23 223, oath to jury panel, unless that oath to the panel  
24 is a statutory one, I would probably suggest just on  
25 swear, put in brackets to "or affirm" and then put in

1 brackets "so help you God".

2 That's -- for committee purposes, I think  
3 that's consistent with all the other oaths that we have  
4 now with folks that don't want to swear for religious  
5 reasons or things like that.

6 MS. WOOTEN: That's a great suggestion. I  
7 don't -- I don't think that came up at the subcommittee  
8 level, and it's a great suggestion.

9 MS. GREER: Justice -- Judge Estevez, I'm  
10 sorry.

11 HONORABLE ANA ESTEVEZ: Your old Rule 232,  
12 new Rule 228, peremptory challenges, I wanted to suggest  
13 that we look at (a) and try to figure out another way of  
14 wording it.

15 Here it states that you -- you only get  
16 those challenges if you only have 24 names left. And  
17 I -- I understand that, but commonly in practice, what  
18 we do is if we've gone through all of that jury  
19 selection process and we may have less jurors than we  
20 need, we go ahead and let people complete their strikes  
21 because one side may want to do -- have less strikes in  
22 order to keep going so we didn't lose that day and we  
23 can keep going.

24 And I -- so I guess technically, I haven't  
25 always followed Rule 228, but I think that we should

1 figure out a way to give people that option. I don't  
2 think that if there's not 24 names left, that one side  
3 who doesn't want to keep going can just say, hey, King's  
4 X, there's only 23 jurors. We don't even know if  
5 there's going to be a double-strike at that point, one  
6 side could always exercise five and force it.

7 So I don't know -- I don't have a  
8 solution, but I did want to just state that we should  
9 reword that.

10 MS. WOOTEN: And that -- that would be a  
11 change to existing --

12 HONORABLE ANA ESTEVEZ: I -- and I  
13 understand --

14 MS. WOOTEN: -- standards.

15 HONORABLE ANA ESTEVEZ: -- that. I was  
16 trying to see -- I didn't see anything in the Government  
17 Code, and I don't know if there's anything in the  
18 Constitution that requires to have 24 names before we  
19 keep going. So I don't -- I don't know the answer to  
20 that. I didn't find it, but I did look.

21 MS. GREER: Judge Miskel.

22 HONORABLE EMILY MISKEL: Emily Miskel.

23 I was going to add, since you brought that  
24 up to me, I was looking at the grammar of the rules on  
25 page -- this is 26 of the PDF.

1                   So the only Rule 232 said if 24 names  
2 remain, the parties shall proceed to make their  
3 peremptory challenges, implying that the proceedings  
4 can't proceed unless 24 names remain.

5                   But in the rewritten 228 (a), it just says  
6 parties may assert peremptory challenges if 24 names  
7 remain.

8                   So under the new rule, if -- if less than  
9 24 names remain, people don't get peremptory challenges,  
10 not that it halts the proceeding.

11                   I don't know if that was --

12                   MS. WOOTEN: It was not --

13                   HONORABLE EMILY MISKEL: -- intended or  
14 not.

15                   MS. WOOTEN: -- intentional.

16                   HONORABLE EMILY MISKEL: Okay.

17                   MS. WOOTEN: That's a good catch. I mean,  
18 I should have probably made clear with respect to the  
19 modernizing work, the goal was not to change substance.  
20 So that's a -- how would you recommend rephrasing?

21                   HONORABLE EMILY MISKEL: So the first one  
22 just says shall proceed to make their peremptory  
23 challenges. So the "proceed" in there implies if 24  
24 names remain, you can't proceed. So I don't know if you  
25 might -- parties may proceed to assert peremptory

1 challenges would more parallel the original.

2 MS. WOOTEN: Okay.

3 HONORABLE EMILY MISKEL: I didn't think  
4 about it carefully.

5 MS. WOOTEN: Thank you.

6 MS. GREER: Sharena?

7 MS. GILLILAND: Sharena Gilliland. I'm a  
8 district clerk, and so the terminology "jury wheel" is  
9 old terminology, but we've kind of adopted it to the  
10 electronic process.

11 So no opinion one way or the other on  
12 modernizing that language, but we do refer to as  
13 "recharging our jury wheel" when we get new lists from  
14 the Texas Secretary of State. We have had moments where  
15 our system went down and we had a shuffle, of course,  
16 and we did cut slips of paper and stick them in the bowl  
17 and --

18 MS. WOOTEN: Oh, really?

19 MS. GILLILAND: -- shuffle. So that is a  
20 rare thing, but even the smallest counties do have  
21 access to the SOS website to do everything  
22 electronically.

23 With respect to Rule 216, I don't have an  
24 opinion one way or the other, but the Clerks  
25 Association, working with the Office of Court

1 Administration, trying to give effect to the new civil  
2 rules as well as to Rule 216, this is how it's being  
3 applied in a lot of counties.

4               Local Government Code 135.101 sets out the  
5 allocations for your local consolidated fee -- and now  
6 we have a state consolidated fee and a local  
7 consolidated fee. And the portion that's to the jury  
8 fund has been called an allocation, so there's actually  
9 one fee and then different allocations to different  
10 funds for that one fee.

11              Then instead of the old \$40 fee that was  
12 in the Government Code for jury requests, now we look at  
13 216, and so it's 5 or \$10.

14              And so what, in practice, you're seeing in  
15 a lot of counties, a lot of times there's a jury demand  
16 in a petition or an answer with no fee, and then if they  
17 want to actually be on the jury docket, they pay that  
18 fee.

19              Again, I have no opinion if 216 should  
20 stay in place or be repealed, but just in practice,  
21 that's what you see happening in a lot of counties.

22              MS. WOOTEN: That's good to know. Thank  
23 you.

24              MS. GREER: Quentin? Oh, who's -- oh, I'm  
25 sorry. I thought Quentin had his hand up.

1 MR. SMITH: Oh, that's not me.

2 MS. GREER: Schaffer, sorry.

3 HONORABLE ROBERT SCHAFFER: Bob Schaffer.

4 Is there some rule or statute that  
5 requires us to use the language "24 names" or "12  
6 names"? Is there a reason why we can't just say  
7 peremptory challenges may be -- may be made?

8 Because if we take -- if the 24 names  
9 remain or the 12 names remain is taken out, then that  
10 resolves the problem that Judge Estevez talked about,  
11 and it allows the court to -- to do what she did and  
12 does and I was tempted to do that myself when we got  
13 really close.

14 MR. PERDUE: What?

15 HONORABLE ROBERT SCHAFFER: What? The  
16 rule says parties may assert peremptory challenges --  
17 this is the new rule -- if 24 names remain on the list  
18 or 12 names remain on the list.

19 Why not just take out that last clause,  
20 "if 24 names remain on the list" and just say parties  
21 may -- "peremptory challenges may be made"?

22 MR. PERDUE: But if you -- if you finish  
23 the process of cause challenges and you've got 20 --

24 HONORABLE ROBERT SCHAFFER: Correct.

25 MR. PERDUE: -- the -- the point is, is

1 that at that point, you can't impanel a jury.

2 HONORABLE ROBERT SCHAFFER: But if you do  
3 what Judge Estevez says what she does, and I was tempted  
4 to do it, let the lawyers make their strikes -- some may  
5 only do five or four. I've had -- on many occasions, I  
6 had lawyers -- wasn't very smart, but I had lawyers  
7 exercise only four peremptory challenges or five or  
8 three, whatever.

9 But if you're trying to get a panel, like  
10 she was talking about, you can't technically -- not  
11 technically -- she violated the rule the way she did  
12 that -- thank you very much -- and -- and -- and I would  
13 be tempted to do the same thing. But here it says you  
14 can only go to the peremptory challenges if there are 24  
15 names remaining on the list.

16 MR. PERDUE: I guess my concern would be  
17 that in that instance, if you have a judge who is very  
18 much seeking to get 12 in the box or six in the box --

19 HONORABLE ROBERT SCHAFFER: Could be the  
20 parties too.

21 MR. PERDUE: It could be. It could be.  
22 But when you leave it to that much, there's no --  
23 there's no guidance in the rule, then you -- you have  
24 the potential for manipulation either by the court that  
25 wants to get a jury out of the setup or one party.

1                   And at least you know -- at least you know  
2 under the rule, as it exists now, that, you know, if we  
3 get down to 20 after causes, you're not -- we're --  
4 we're done.

5                   HONORABLE ROBERT SCHAFFER: You're  
6 unlikely to get a panel in that situation, I get it, and  
7 I'm not trying to -- to say that the -- a court would  
8 be trying to get someone to do or not to do something.  
9 If you do it, like Judge Estevez did it and there were  
10 only 10 jurors remaining, you busted the panel. You go  
11 to the next one.

12                  MR. PERDUE: I'm kind of -- I'm playing my  
13 Kent Sullivan here. It's, like, we have to have guiding  
14 principles. It's very awkward.

15                  MS. GREER: Rich and then Judge Salas  
16 Mendoza.

17                  MR. PHILLIPS: So -- Rich -- Rich  
18 Phillips.

19                  MS. GREER: I mean Phillips.

20                  MR. PHILLIPS: You're fine. My wife for a  
21 long time before we started dating thought my name was  
22 Phillip Richard, so I'll take it.

23                         Don't put that in the record. I'll get in  
24 trouble with my wife.

25                         On the question we've just been talking

1 about, Rule 231, the way I read this, seems to address  
2 it although we're getting rid of it; right?

3 Because what it says is, if you're done  
4 with your causes for strikes and you've got less than 24  
5 or 12, before you go to peremptories, you're supposed to  
6 summon some more people and get back over 24 and 12.

7 So where it says proceed to their strikes,  
8 I think 232 has to be read -- all 232 -- in light of all  
9 231, which says you're done with causes, we've got 22  
10 people left, we go summon some more people, then we move  
11 on to peremptories.

12 I think that's the way it's written. And  
13 I don't have a lot of -- I'm -- I'm an appellate lawyer,  
14 so I've not done a lot of this, but that seems to me how  
15 it's supposed to work and -- and then we move on to  
16 that.

17 The -- the other quick two comments. One,  
18 on a modernizing thing, you could read the way it was in  
19 232 and it's kept over in 228 to say 24. So if there's  
20 25, I don't make strikes; right? Does it -- shouldn't  
21 it say at least 24 or at least 12 people or more than 12  
22 and more than 24?

23 MS. WOOTEN: I see, yeah.

24 MR. PHILLIPS: And then I would be in  
25 favor of putting the -- the rule for alternates into the

1 rules. I used to do a presentation on air preservation,  
2 and one of my favorite things I liked to do was -- was  
3 point out the section of the Government Code that nobody  
4 had ever read before.

5 And so I think the comment that just  
6 says -- it -- it -- I don't know. I'd put it in the  
7 rule, would be my -- my vote for all three.

8 MS. GREER: Justice Salas Mendoza and then  
9 Judge Chu.

10 HONORABLE MARIA SALAS MENDOZA: So I just  
11 want to say do it all the time -- we do it all the time,  
12 and -- and I would say that the parties consent to  
13 exercising their strikes when you have less than 24.

14 And that's because it could be 6:00  
15 o'clock and you've spent all day trying to seat a jury  
16 in a sexual assault of a child and they want to seat  
17 maybe.

18 I would say in those tough cases,  
19 frequently, we didn't get a jury, but then it was done  
20 and it was all set out in the strikes and we -- we  
21 didn't get a jury. But in several cases, if you're  
22 close, I -- and then -- it's just -- you -- you get to  
23 choose; right? The parties decide you want to do your  
24 strikes. Let's see how it goes. And -- and we did it  
25 all the time.

1                   So I would say definitely it's at least  
2 the 24 language, but I -- I think in practice or in  
3 combining modernization and ordinary practice, I will  
4 tell you that, you know, El Paso is not the biggest  
5 county but it's not a little one and there's no going  
6 out and getting more jurors.

7                   I mean, I remember like the old days, they  
8 would say go out into the hallway. That's not what we  
9 do. And it would require calling another panel. You  
10 could call down the jury hall, see if anyone had anyone  
11 left, but that's requiring a lot of consent. Talk about  
12 bullying the parties. It's telling them, wait, we're  
13 going to get another panel, we're going to do this  
14 again.

15                  I -- you know, I think the -- the old 231  
16 which saves some of this is not really practical. It's  
17 not what we're doing. But I -- I'm in favor of what  
18 Judge Schaffer is saying, just doing -- getting rid of  
19 the numbers. Just go through the process and see what  
20 happens.

21                  MS. WOOTEN: I -- I will add, just for the  
22 record, I'm looking at Section 62.015 of the Government  
23 Code, and it does not speak to a particular time when  
24 additional prospective jurors could be summoned. It  
25 says at any time. Specifically, it says the court at

1 any time does not have a sufficient number of  
2 prospective jurors present whose names are on the jury  
3 list and who are not excused by the judge from jury  
4 service, the judge shall order the clerk, sheriff, or  
5 constable to summon additional prospective jurors to  
6 provide the requisite number of jurors for the panel.

7           It goes on to provide additional guidance,  
8 but I take your point. And saying this for here in  
9 Travis County, the process of getting the prospective  
10 jurors happens well before you start your jury trial and  
11 voir dire, and those names are set. And I -- I, too,  
12 don't recall a single time here when it was so easy to  
13 just go out and get some additional prospective jurors.

14           MS. GREER: Jim, were you going to respond  
15 as well or did you have a comment?

16           MR. PERDUE: I don't want to jump to the  
17 head of the line.

18           MS. GREER: Okay. Well, I -- I didn't  
19 know --

20           MR. PERDUE: But I -- I --

21           MS. GREER: -- if you were responding --

22           MR. PERDUE: -- I -- well --

23           MS. GREER: -- to that point. And -- and  
24 Judge Chu, I've got you on next.

25           MR. PERDUE: So I have had backfill happen

1 in a rural county, but I haven't had it in the last  
2 decade. And so I don't know, you know, if we have  
3 anybody with that perspective. So the Government Code  
4 may say that --

5 MS. WOOTEN: Yeah.

6 MR. PERDUE: -- but having tried one in  
7 Dewitt, which is a county of 20,000, you -- you're --  
8 you voir dire the entire array. I mean, everybody who  
9 shows up, that's who you get. And there was no chance  
10 to backfill in that situation because that was the civil  
11 call for that week.

12 So I just don't know anywhere where you  
13 still have the opportunity to backfill, even if you were  
14 to go out in the hallway. So --

15 HONORABLE MARIA SALAS MENDOZA: Just real  
16 quick to that, I mean, there is a -- you know,  
17 there's -- there's a lot of counties that have, sort of,  
18 the -- the qualifications done separately, so you have  
19 panels waiting.

20 And in El Paso, part of trying to make  
21 sure that if you're proceeding in a trial, that you  
22 could go, is that juror panels weren't excused until all  
23 the courts had either ceded or decided not to go. So  
24 there are panels, but I think that's where -- I don't  
25 think it's practical.

1 I -- I -- it never happened, and I would  
2 be really surprised if I ever had any lawyers who were  
3 willing, at any point after they already had their names  
4 and done all of their work, and -- and were just going  
5 to take another panel and just go, because they're --  
6 you know, there's not a whole a lot you can do but there  
7 is more you can do when you're given names.

8 So I -- I think the -- the backfill idea,  
9 it exists, but it's just not practical. It's just not  
10 going to happen.

11 And I -- I do -- it's a good point that in  
12 rural counties, it -- it operates differently, but I can  
13 tell you in some of our rural counties, there's no one  
14 else.

15 MR. PERDUE: Right.

16 HONORABLE MARIA SALAS MENDOZA: There's  
17 just no -- you're getting everyone who responded that  
18 day, so -- sorry.

19 MS. GREER: Judge Chu?

20 HONORABLE NICHOLAS CHU: I -- first, I  
21 just want to say I'm sad that we're getting rid of the  
22 talesman. It's my favorite thing in the law.

23 But -- but more on talking to this  
24 discussion, I think it's important to -- to note that a  
25 lot of courts beyond the urban counties do general

1 jurisdiction, so they're doing criminal and civil.

2 And so the criminal jury rules are  
3 statutory under the Code of Criminal Procedure. I  
4 looked at Section 35 of that, and it doesn't mention  
5 anything about this 24 or 12, don't do -- don't proceed  
6 on with the peremptories after. And I think that's what  
7 Justice Salas Mendoza has been talking about, is that in  
8 those sexual assault trials or criminal trials, we're  
9 really trying to get that panel done.

10 And so, you know, I think it would cause a  
11 little bit of confusion -- I think maybe probably we're  
12 not following it because in our -- our general  
13 jurisdiction courts, they're kind of defaulting to what  
14 they do in the criminal cases.

15 So perhaps it's best to kind of be  
16 consistent with what -- kind of like the least  
17 restrictive of this is, which is the Code of Criminal  
18 Procedure rules and kind of get rid of that 12/24  
19 language so that we kind of pick juries all the same in  
20 criminal or civil as best we can.

21 MS. GREER: Thank you.

22 Sharena, I think you're next and then --

23 MS. GILLILAND: Okay.

24 MS. GREER: -- Justice -- Judge Estevez.

25 MS. GILLILAND: First, let me say, when we

1 have civil trials, the civil attorneys are always the  
2 kindest people that we have at the courthouse. So thank  
3 you for that.

4 But what we're seeing in how juries are  
5 summoned and how they're being dealt with at each  
6 courthouse, it very much varies county to county, and  
7 you're probably seeing that. There still are some who  
8 have a large central jury room and kind of the old  
9 cattle call where they summons thousands of people and  
10 send this group to that court, this group to that court,  
11 and you do have people lingering for the day if they're  
12 needed.

13 In your smaller counties that don't have  
14 the space for that, essentially, if that's a jury trial  
15 week on that court's docket, we're summoning jurors to  
16 that court, and, like you said, these -- this is  
17 everyone in the county for the day in your courtroom,  
18 and that's what you get.

19 Then there are others that are kind of  
20 doing some hybrids that maybe there's still a central  
21 jury place where people can show up, but you go online,  
22 you do all of your qualifications, and you're assigned a  
23 particular court to go to on your day to try cut down on  
24 some of that waiting.

25 So in terms of having extra jurors

1 available, that very much varies county to county.  
2 Because if you're already summonsed to that courtroom,  
3 there's not a -- a secret room somewhere of jurors  
4 waiting around to be called in to duty there.

5 MS. GREER: That's helpful, because I'm  
6 starting a trial in Muleshoe, Bailey County next week,  
7 and I --

8 MS. GILLILAND: I would imagine they have  
9 probably summons just to that court.

10 MS. GREER: Judge -- Judge Estevez.

11 HONORABLE ANA ESTEVEZ: Well, I -- I think  
12 we just need to look at --

13 And I'm sorry, Ana Estevez.

14 We need to look at the policy issues here.  
15 And I -- most of my civil weeks -- because I'm general  
16 jurisdiction, I have one county where it's a criminal  
17 week, then I switch to civil every other month, then  
18 another criminal week for a different county.

19 So they -- if they don't get a jury, it  
20 may be a year before they're hit again on a civil jury  
21 trial week. And they've summoned experts, the parties,  
22 just so many people would be unable to go forward. And  
23 I -- I'm assuming they could both agree to waive, but no  
24 one is getting hurt. I -- I'm not taking away their --  
25 their strikes. They both exercise their six if they

1 choose to, and then they didn't make a jury. Or one  
2 side that wants to go more than the other -- I've even  
3 had them agree to both do three when we only had six  
4 left.

5 I mean, usually both sides want to go.  
6 Nobody is trying to say, hey, you've got to let them go,  
7 there's not enough jurors.

8 MS. GREER: Justice Miskel?

9 HONORABLE EMILY MISKEL: I -- Emily  
10 Miskel.

11 I do love the charm of the talesman. A  
12 historical fun fact: There were five talesmen on the  
13 Boston Massacre jury trial. They busted the panel and  
14 picked five spectators to serve. So that's part of our  
15 historical tradition.

16 I also used to love to threaten with it  
17 when I was a judge; that, yeah, you can try to bust the  
18 panel. I'm going to go in the hallway and round up some  
19 talesmen. So I like the charm of it, but I understand  
20 it's not the modern practice.

21 One thing I was going to add is the number  
22 of civil peremptories, I do not believe, is set by any  
23 statute. I believe the only place the number of  
24 peremptories that you get in a civil case exists is in  
25 the civil rules. So it needs to mention a number

1 because that's the only place where the number comes  
2 from.

3           The Code of Criminal Procedure sets out  
4 specific peremptories for different types of criminal  
5 cases. And then the Government Code also sets out  
6 peremptories for alternates, which is what Rich was  
7 talking about, but I didn't see anywhere that said for  
8 normal civil petit juror/regular cases.

9           And then another feedback I was going to  
10 say is if parties can waive it, then it's fine to keep  
11 it in the rule; right? Because the rule can say you --  
12 you need 24 people left so you can have your 12  
13 peremptories and 12 jurors. And if the parties want to  
14 go forward, then they haven't preserved error as to  
15 that. So I think it's fine to leave it in with the  
16 acknowledgment that if the parties want to waive it,  
17 then --

18           HONORABLE ANA ESTEVEZ: But what if one  
19 doesn't?

20           HONORABLE EMILY MISKEL: Yeah, then they  
21 can't. Oh, I see what you mean, because they're -- one  
22 could effectively waive it by just declining --

23           HONORABLE ANA ESTEVEZ: Decline.

24           HONORABLE EMILY MISKEL: -- to exercise  
25 strikes.

1 HONORABLE ANA ESTEVEZ: Yes.

2 HONORABLE EMILY MISKEL: But I guess you  
3 could say that; right? I won't make more than five. We  
4 can go forward.

5 HONORABLE ANA ESTEVEZ: But -- I -- I -- I  
6 don't know, because the other side says no. It says  
7 that you have to have 24, and we don't have 24, I don't  
8 want to go forward.

9 HONORABLE EMILY MISKEL: I hear what  
10 you're saying.

11 HONORABLE ANA ESTEVEZ: I know your expert  
12 can't be here next month, so I would love to wait  
13 another month. That's why she denied my continuance.

14 MS. GREER: Justice Brown?

15 HONORABLE HARVEY BROWN: Well -- two  
16 points. One, I want to agree with Rich's suggestion  
17 that alternates also be in the rule. I think that a lot  
18 of lawyers don't know how that process works.

19 Second, I was going to make the waiver  
20 point that Emily did. If nobody objects, in fact, not  
21 only don't object, they firmly state we're fine with  
22 this, then I don't think it can be appealed.

23 If one party doesn't object -- that's the  
24 whole reason for having the 24 as a hard number right  
25 now. I may want to insist on the 24 or my six strikes

1 even though the judge is leaning on me, even though I've  
2 got to wait a year, and I don't want the judge to be  
3 able to say no, they've agreed to it, so you have to  
4 agree to it.

5 I think that if they both agree, though,  
6 we are only going to exercise five strikes, they can do  
7 that. Not a problem.

8 MS. GREER: Roger?

9 MR. HUGHES: Roger Hughes.

10 On this issue about waiver, I understand  
11 the possibility that one side may decide to be a dog in  
12 the manger and say no, you -- the other side can't  
13 waive, that's insufficient.

14 We do have a harmless error rule, and if  
15 one side wants to say I'm going to cut down my  
16 strikes -- my peremptory strikes so that we don't run  
17 out, and the judge says, okay, harmless error, let's go,  
18 that's, I think, the answer.

19 MS. GREER: Justice Gray?

20 HONORABLE TOM GRAY: With regard to  
21 getting out of the strikes, the -- we had a case, 220  
22 called, I think all of them or almost all of them  
23 showed. We had been given six extras, so we had -- each  
24 side had 12 peremptories. We were getting down to close  
25 to 38. I guess we're six each, and anyway, we were

1 getting down to close to 38, running out of strike room,  
2 and, you know, those strikes for cause got real hard to  
3 get.

4                   So the trial judge was taking the -- he  
5 was starting to count chairs too. So I'm really  
6 surprised that y'all get to that point as trial judges  
7 where there's less than 24.

8                   But general comments, I agree with the  
9 two -- whether it's Phillip Richard or Richard Phillips,  
10 either way, and Roger on when these rules that we are  
11 simplifying, modernizing were initially drafted, we  
12 didn't see alternate jurors. That needs to be added in.

13                  I would also suggest that we need to add  
14 in the Batson procedure. There's probably not a more  
15 difficult, stressful, complicated -- other than the  
16 charge of getting something properly preserved than the  
17 Batson challenge when it comes up. It would be really  
18 nice if that procedure was actually in the rule that was  
19 consistent on both the civil and criminal side.

20                  It -- you know, the case that you and I  
21 tried in Fort Worth, we had a Batson challenge, civil  
22 case, and so it would be nice -- of course, I -- that  
23 was federal court, but it would be nice to see that in  
24 the rules.

25                  MS. GREER: Are -- are you volunteering to

1 write that?

2 MS. WOOTEN: That's what I heard.

3 HONORABLE TOM GRAY: I would be happy to  
4 volunteer anybody in the room to write that. I -- I  
5 will sit on the ad hoc committee, if -- if necessary.  
6 Most people don't want me on those committees, so, yeah,  
7 I -- I've built my reputation.

8 On the numbering, Kennon, I do agree with  
9 you. I understand why you did it in this process, but  
10 people that do research and they're looking by rule  
11 number, you really lose the thread if you start changing  
12 rule numbers.

13 And I would rather see a comment in an  
14 eliminated rule of where the rule went to than  
15 renumbering of the other rules and have a 19, you know,  
16 90 case that has one rule number, the same rule number  
17 then cited in 2027 is a different rule number and you're  
18 still talking about the same thing. It makes research  
19 easier.

20 And not to raise a dead horse, but let's  
21 eliminate the shuffle. Specific --

22 MS. GREER: Does anyone want to try to  
23 channel John Kim on that one?

24 MR. PERDUE: I -- I'd -- I'd be more than  
25 happy to. No. Don't eliminate the shuffle.

1 MS. GREER: Roger?

2 MR. HUGHES: Well, that -- since you --  
3 since the shuffle has just somehow popped up --

4 MR. PERDUE: This is like Gray can't write  
5 the Batson rules.

6 MR. HUGHES: Yeah.

7 And for the court reporter, Roger Hughes.

8 I was curious that the -- that the draft  
9 retained the shuffle, which I suppose followed the rule  
10 that if it's -- that unless we've been instructed to  
11 change it, it doesn't get changed.

12 The shuffle rule is unique to Fed- --  
13 Texas, to practice in Texas. No other state does it.  
14 And I'm curious why if there is a reason -- specific  
15 reason the committee chose to retain it.

16 Now, I can see first, of course, the  
17 shuffle is a hassle for the -- for the clerks, but I can  
18 see the shuffle having a legitimate thing, is when  
19 you've got a jury consultant that says you want a person  
20 of this kind of social background, etcetera, etcetera,  
21 and there's too many in the first 24.

22 On the other hand, having practiced where  
23 I practiced for decades, I know that the shuffle was  
24 often practiced for reasons that would plainly, plainly  
25 violate Batson, and we didn't have Batson. No one ever

1 said Batson applied to shuffles. Only applied to  
2 selecting jurors.

3 So number one, I'm -- I am not sure I want  
4 to get rid of it because it's Texan, which means we know  
5 it and we love it. And on the other hand, if -- I'm  
6 curious why the committee chose not to change this rule.

7 And then taking up Judge Gray's  
8 suggestion, we -- if we're going to keep this thing, so  
9 to speak, to keep it within proper bounds, and we're  
10 going to have a Batson rule for challenging the exercise  
11 of strikes, are we going to extend Batson by rule to  
12 apply the shuffles?

13 MS. WOOTEN: So to respond to the question  
14 of why we didn't do it, the ask from the court was to  
15 update and modernize. We stayed within the scope of the  
16 request with our work product here.

17 MS. GREER: Justice Bland.

18 HONORABLE JANE BLAND: Yeah, just for some  
19 history on this topic. For the last 25 years,  
20 there's -- there have been two very robust discussions  
21 about this shuffle in this committee and a very close  
22 vote about whether to retain the shuffle or eliminate  
23 the shuffle, with lawyers united on one side largely  
24 favoring retaining it -- plaintiffs' lawyers and defense  
25 lawyers -- and judges on the other side largely favoring

1 eliminating it.

2           Unless the court refers that topic to us  
3 again, I don't think we want to spend a lot of time on  
4 it, because we have -- some of the people in this room  
5 participated in those discussions over the years and  
6 probably have their talking points ready to go.

7           But let's not -- let's not continue that  
8 debate unless we get some guidance that we should.

9           MS. GREER: Judge Chu and then Justice  
10 Gray.

11           HONORABLE NICHOLAS CHU: Just for record  
12 purposes, if the court wants to add a Batson procedure  
13 into the rule, it's probably just a straight  
14 copy-and-paste of Code of Criminal Procedure Article  
15 35.261, which is the Batson procedure for criminal  
16 cases, which just copies the Batson procedure for --  
17 pretty much everywhere, but you just have to change a  
18 couple of terminology there if you wanted to.

19           MS. GREER: Perfect. Justice Gray and  
20 then Justice Kelly.

21           HONORABLE TOM GRAY: First of all, Jane, I  
22 apologize for throwing the grenade, but I was just  
23 putting the list of my comments together. And in the  
24 pause, after I threw the grenade, I lost my place and  
25 didn't get to make my specific comments on changes.

1                   Page 6 of 26 actually where the shuffle  
2 appears, but in (a) and (b), I don't understand why (b)  
3 ends with the phrase "randomly select from the names on  
4 a jury list a sufficient number of qualified jurors to  
5 serve on the jury panel," when we could use the same  
6 language that we use in (a) after the word "must," and  
7 that would be "place prospective jurors' names on the  
8 general panel in the order in which they are randomly  
9 selected".

10                   You'd take out the word "general," but  
11 place prospective jurors' names on the panel in the  
12 order -- because you've already selected them randomly.  
13 Just put them on -- in the -- in the list.

14                   The other, kind of, gnat that I've noticed  
15 was that on page 10 of 26, item 6.d., we say "inspect  
16 items mentioned in this case unless they are presented  
17 as evidence in the court". Later in the rules, we use  
18 the word "admitted" rather than "presented".

19                   "Presented" creates a problem for me  
20 because sometimes get offered into evidence that are not  
21 admitted into evidence, and they are not supposed to use  
22 that, although we probably all know that they remember.  
23 Skunk in the jury box kind of thing. So that's my  
24 gnats. I'll let it go.

25                   MS. GREER: Justice Kelly? Did you have

1 your hand up?

2 HONORABLE PETER KELLY: I understand  
3 reluctance to mess with Texas jury shuffles, but the --  
4 we encountered a problem in a -- in a trial in Dallas  
5 County that the shuffle has to occur before voir dire  
6 examination begins. Voir dire examination begins when  
7 the oath is administered.

8 But in the metropolitan counties where all  
9 the jury panel members are assembled in a central  
10 gathering area, an oath is administered the moment they  
11 all get there.

12 And so -- whereas the jury shuffle usually  
13 occurs once they all get up to the individual courtroom,  
14 they're all technically -- voir dire has already begun  
15 under the rules because the -- because the oath is  
16 already administered. So there's no actual meaningful  
17 right to a jury shuffle because voir dire has already  
18 begun when everybody is down there in the -- in the jury  
19 holding room.

20 So to modernize the rules, we might want  
21 to account for the fact that, at least in metropolitan  
22 counties, you have that oath being administered before  
23 they're sent off to the individual courtrooms.

24 MS. GREER: Sharena?

25 MS. GILLILAND: Sharena Gilliland.

1           With so many counties utilizing online  
2 responses for jurors, most counties, when the juror goes  
3 to log into the system and say I got my summons and  
4 they're doing their qualifications and exemptions, it is  
5 not the full oath but it is an acknowledgment that the  
6 answers they are giving are true and correct.

7           And, yes, typically before the actual  
8 questioning by the attorneys for voir dire, there is  
9 some point that probably outside the presence of the  
10 parties they have been given the full civil or criminal  
11 oath.

12           MS. GREER: Have we run out of comments?  
13 Oh, Giana Ortiz?

14           MS. ORTIZ: A slight comment on the -- the  
15 instructions. I like the updates on communication  
16 through various manners. And in two places, we instruct  
17 the jury to not discuss the matter or communicate with  
18 others through various means including AI.

19           I wondered if the committee considered  
20 adding AI as a prohibited means of investigation as  
21 well, which we have Google and other, you know, visiting  
22 the site, looking in dictionaries to define terms, we're  
23 prohibiting the jurors from doing that. But I suggest  
24 in the two places -- I believe it's two places where the  
25 jurors are instructed not to do their own investigation,

1 that AI be added there as well.

2 MS. WOOTEN: The subcommittee did not  
3 discuss that, but I think it's a good suggestion.  
4 That's a very frequent way of investigating, but in  
5 quotes, these days.

6 MR. PERDUE: I'm -- I'm sorry to jump in,  
7 but what is Bing? Because the current rule says search  
8 engines such as Google, Safari or Bing. Maybe we should  
9 put MySpace back in the rule.

10 MS. HOBBS: I hear it's making a comeback.

11 MR. PHILLIPS: On that, I don't think  
12 Safari is a search engine. It's a web browser.

13 MR. PERDUE: It's a browser, yeah.

14 MR. PHILLIPS: Yeah.

15 HONORABLE ROBERT SCHAFFER: I think Bing  
16 is a browser also.

17 MS. WOOTEN: Yes, that's a good -- good  
18 suggestion.

19 MS. GREER: Any other comments?  
20 Questions? Thoughts?

21 HONORABLE MELISSA ANDREWS: I don't know  
22 if --

23 MS. GREER: Justice Andrews?

24 HONORABLE MELISSA ANDREWS: -- I'm allowed  
25 to have a comment on that.

1 MS. GREER: Yeah, sure.

2 HONORABLE MELISSA ANDREWS: I don't know  
3 that this is a problem, but I just wondered a little bit  
4 about 216 (a) and the modernization. We took out the "a  
5 reasonable time" before a trial or not less than 30  
6 days.

7 And I guess my question was, because I am  
8 typically operating under that reasonable amount of  
9 time, the business court, we still charge a separate  
10 jury fee, and -- and it -- it may or may not be 30 days.  
11 But for me at least here in Travis County, it has to be  
12 a minimum of eight weeks because Travis County requires  
13 that for -- to call in a jury. We call in a separate  
14 jury, and I have to pay them.

15 So I guess I'm just -- I'm just wondering  
16 if I'm going to get parties saying to me, well, I paid  
17 it 30 days and the rule says that's good enough and  
18 you've got to give me a jury trial. And I say well,  
19 I -- I had an order that said eight weeks and --  
20 maybe -- maybe -- I can't imagine but maybe waived your  
21 jury trial or at least you have a problem and not me.

22 MS. WOOTEN: Judge, I think that's a -- a  
23 good comment. I was, in the effort to take out things  
24 that were unnecessary, focused on 30 days and the "not  
25 less than" language, but if -- if in practice more time

1 is needed there, I -- I think -- I suggest that the  
2 court reincorporate the "reasonable time" language.

3 HONORABLE MELISSA ANDREWS: And -- and we  
4 may be absolute oddity, but -- we exist --

5 MS. WOOTEN: But if it's --

6 HONORABLE MELISSA ANDREWS: -- we --

7 MS. WOOTEN: -- you exist and you have it,  
8 so, yes, forgive the inadvertent omission that matters  
9 to the business court.

10 MS. GREER: Justice Salas Mendoza.

11 HONORABLE MARIA SALAS MENDOZA: Maria  
12 Salas Mendoza.

13 I just want to add -- I -- I -- I know we  
14 kind of skipped over your comment earlier, Sharena, but  
15 I -- I was a little confused about the jury fee. It  
16 seems like we're -- we're -- we're saying we're not  
17 doing it, and I -- and I think it -- it does seem like  
18 the parties kind of ignore it and the judges go to trial  
19 even if the jury fee hasn't been paid, but it still  
20 exists. Is that what I understood?

21 MS. GILLILAND: Yes.

22 HONORABLE MARIA SALAS MENDOZA: And then  
23 I -- I don't know because I -- I'm not familiar with  
24 what the clerks are doing in our district, but I guess  
25 we need to be more careful about that jury fee, because

1 it apparently is -- does matter, is required and is  
2 being charged, sort of, differently.

3 So I -- I just wanted to make sure that we  
4 didn't just lose that comment about the jury fee.

5 MS. GREER: Judge Estevez?

6 HONORABLE ANA ESTEVEZ: Yeah, there's a  
7 statute that actually eliminated the jury fee, so --

8 MR. PERDUE: Yeah.

9 HONORABLE ANA ESTEVEZ: -- so if they're  
10 charging fees -- except for maybe business courts,  
11 because I don't know what they're doing, there they have  
12 to pay for everything, so that's going to be an  
13 exception.

14 But there was a statute. So if the  
15 counties are still getting that, I don't -- I don't know  
16 why.

17 MS. GILLILAND: Well, we received advice  
18 from the OCA to still charge that under Rule 216,  
19 because the filing fee, the portion that goes to the  
20 jury fund, is not a jury fee but --

21 HONORABLE ANA ESTEVEZ: Oh --

22 MS. GILLILAND: -- the way you think of a  
23 jury fee you're requesting.

24 HONORABLE ANA ESTEVEZ: Yes.

25 MS. GILLILAND: The counting who are like

1 us who are insisting if you want a jury trial to pay  
2 your 5 or \$10, we're using that sort of as a docket  
3 management, because in most of your civil cases, at some  
4 point, usually everyone has requested a jury trial,  
5 whether they really want one or not. And so we're kind  
6 of using it as if you paid your fee, then you really are  
7 on the jury docket.

8 HONORABLE ANA ESTEVEZ: Yeah, so that's a  
9 filing fee. So as long as they pay the filing fee,  
10 which also include -- everybody was paying a special fee  
11 for it, but there -- there used to be one where you  
12 would have to pay and if you didn't pay that additional  
13 money, you couldn't get a jury. Now anybody can get a  
14 jury just by paying the filing fee.

15 MS. GILLILAND: Well, that -- that's what  
16 I'm saying. I think there's different counties  
17 interpreting that differently.

18 But what -- our clerk's association has  
19 received advice from the OCA is that the filing fee, the  
20 portion that goes to the jury fund, is not the -- the --  
21 a jury fee. It's an allocation.

22 And to give effect to both the Local  
23 Government Code Chapter 135 and to 216, that if you  
24 requested a jury trial and you really wanted a jury  
25 trial, you needed to pay the fee under 216, and that was

1 after the \$40 jury request fee was eliminated.

2 MS. GREER: Justice Miskel?

3 HONORABLE EMILY MISKEL: So I think what's  
4 happening is the jury fee in Rule 216 dates to 1990, it  
5 looks like, but in 2021 or 2023, I believe, the  
6 legislature went to consolidated civil filing fee.

7 So I think what we're talking about here  
8 is now there's a consolidated civil filing fee that  
9 4.6948 percent of it goes into the county jury fund.  
10 But I believe what I'm hearing you say is because Rule  
11 216 still allows the clerk to charge 10 or \$5, that  
12 clerks in some counties are taking the position that  
13 they receive their percentage of the consolidated fee,  
14 plus they can charge the fee under the Texas Rules of  
15 Civil Procedure.

16 And so what I'm -- my understanding as a  
17 judge was there's no more jury fee, you can't charge a  
18 person to get a jury. So to the extent that the current  
19 text of the rule is allowing the clerks to charge an  
20 additional 5 or \$10 to know who really wants a jury, I  
21 think we're perfectly within our ability to remove that  
22 from 216.

23 I don't think that -- yeah.

24 MS. WOOTEN: I will say the goal with that  
25 change, if it's not obvious already, was to align the

1 rule with the statutory way that they -- not to align  
2 the rule with practices throughout the state with  
3 respect to the fee.

4 And I -- I wasn't aware of an allocation,  
5 as -- as you might imagine.

6 MS. GILLILAND: It's -- it's fun with  
7 words, but --

8 MS. WOOTEN: Yeah.

9 MS. GILLILAND: -- that -- and -- and I  
10 don't have a strong opinion either way, but just that is  
11 how it's being applied in some counties.

12 MS. GREER: Lisa, did you have your hand  
13 up?

14 MS. HOBBS: No. I -- I think -- just for  
15 the Supreme Court's reference, I do think we have done a  
16 memo internally about our ability to assess fees  
17 separate and apart from a government code or statutory  
18 provision, and so that might be something that y'all  
19 have internally.

20 MS. GREER: Justice Gray?

21 HONORABLE TOM GRAY: I wanted to circle  
22 back to my comment on these alternate jurors. The --  
23 not only is the picking of the alternate juror should  
24 probably be addressed in the way peremptories work in --  
25 on that. The -- what I was really focused on is with --

1 before I left the court at the end of '24, we had had  
2 several cases -- and I know there are other reported  
3 cases -- on where does that alternate juror go in the  
4 post-trial deliberative process.

5           We had -- the first case -- and -- and I'm  
6 not going to get into why we got reversed, but we were  
7 reversed on one where we held that the issue was not  
8 preserved. All of that should have been -- or should be  
9 addressed by -- by a rule of, you know, where -- where  
10 does that alternate juror go while the regular jury is  
11 deliberating; and then how do you restart the jury with  
12 the alternate if one of the regular jurors are dismissed  
13 after deliberations have been done. Because it becomes  
14 a huge problem.

15           I've seen it more in criminal cases. In  
16 fact, entirely in criminal cases, but there's no reason  
17 those same problems wouldn't necessarily occur in civil  
18 cases. And I think it's better to get in front of that  
19 problem if we're going to be tinkering with the rules.

20           MS. GREER: I've usually seen the  
21 alternate jurors dismissed once they start to  
22 deliberate.

23           HONORABLE TOM GRAY: That's the way it  
24 used to be done, but that is not what is occurring in  
25 practice now of what we've seen. They -- they wait.

1                   And, unfortunately, in both the cases that  
2 I was involved in, the alternates were sent to the jury  
3 room with the other 12 jurors. And then what happens?

4                   Again, I won't discuss further of my  
5 belief of -- you know, since I did get reversed on one  
6 of them, so -- or but you can look it up online, Kennon.

7                   MS. GREER: Kennon and then Justice --  
8 Judge Estevez.

9                   MS. WOOTEN: I will note for the record  
10 that Section 62.020 of the Government Code, subpart (d),  
11 as in "dog," says: "In order in which they are called,  
12 alternate jurors shall replace jurors who, prior to the  
13 time the jury retires to consider its verdict, become or  
14 are found to be unable or disqualified to perform their  
15 duties. An alternate juror who does not replace a  
16 regular juror shall be discharged after the jury retires  
17 to consider its verdict."

18                  MS. GREER: Judge Estevez?

19                  HONORABLE ANA ESTEVEZ: I think there was  
20 another statute, though, because there was another  
21 one -- and it may just apply to criminal cases, but I do  
22 think it needs to be addressed. So thank you for  
23 bringing that up, because it is always an issue because  
24 I usually have an alternate juror. So I've had that  
25 issue since the law has changed every single time.

1                   And I would like to suggest that the  
2 Supreme Court put in a -- a rule, and I will just  
3 suggest that what I do as one of many options.

4                   I get both -- the jury goes off to  
5 deliberate. I leave the alternates in the open  
6 courtroom after the jurors have gone -- and this is very  
7 important in criminal cases, so maybe this isn't proper  
8 place and -- and it's more important there because we  
9 get two phases there. So they'll come back, and they'll  
10 have to do punishment. So if we leave -- if we lose a  
11 juror during deliberation, we can't get on to the next  
12 phase.

13                  So what we do at that point is we let the  
14 jurors go to deliberate. The alternates stay. And I  
15 ask the parties, and they have to agree, and the -- the  
16 choices are -- I -- I never let them go, but they can  
17 have them stay here and they -- and -- under the same  
18 instructions they are not to discuss the case with  
19 anyone, not do any independent research, not remain in  
20 the hearing of anyone else discussing it, or they can go  
21 about their days with that -- their day knowing that  
22 they will be called back, if for some reason the jury  
23 cannot continue to deliberate.

24                  And that's really important, like that --  
25 the case we -- they just had that they had seven days of

1 deliberations, I mean, that is an easy time to lose a  
2 juror. And so if they didn't have that alternate juror  
3 that could come in and start the deliberations with them  
4 at some point, then the case would be gone. And they  
5 would have had -- I mean, I know that they had a hung  
6 jury anyway, but if they hadn't, that -- that is  
7 something that we need to come to some sort of consensus  
8 of what needs to happen.

9 MS. GREER: Well, and it does happen in  
10 civil cases. You bifurcate punitive damages.

11 HONORABLE ANA ESTEVEZ: Right.

12 MS. GREER: So it's the same concept.

13 HONORABLE ANA ESTEVEZ: My last juror --  
14 jury deliberated for 11 hours, and so I could have lost  
15 one there for the first phase.

16 MS. GREER: Good points.

17 Do we have any others?

18 Well, would now be a good time to take a  
19 break? And then we can come back and move on to  
20 finality, which I think there will be some opinions  
21 about that.

22 Why don't we take a ten-minute break?  
23 We'll come back at 10:30.

24 (Recess taken 10:17 AM to 10:33 AM.)

25 MS. GREER: All right. We're going back

1 on the record. Everybody, please take their seats.

2 All right. Before we move on to the  
3 finality, which I know everybody is dying to talk about,  
4 Justice Estevez -- Judge Estevez had a comment that we'd  
5 like to put on the record, going back to the jury rules  
6 and composition.

7 HONORABLE ANA ESTEVEZ: Okay. Well,  
8 Justice Miskel helped me set my mind right. And so just  
9 to clarify the record, Texas Code of Criminal Procedure  
10 33.011 states that, "Alternate jurors in the order in  
11 which they are called shall replace jurors who, prior to  
12 the time the jury renders a verdict on the guilt or  
13 innocence of the defendant and, if applicable, the  
14 amount of punishment, become or are found to be unable  
15 or disqualified perform their duties or are found by the  
16 court on agreement of the parties to have good cause for  
17 not performing their duties." And so that was where the  
18 discrepancy occurred.

19 So in criminal cases, as we stated before,  
20 they do have to -- they are not -- alternate jurors are  
21 not discharged when the jury goes to deliberate but are  
22 only discharged after the verdict has come back on -- on  
23 guilt and innocence.

24 And I'm only referencing that in case we  
25 ever wanted to change it or if somebody wanted to change

1 it back for the -- the criminal cases and just not to  
2 have the confusion that we are all discussing. So it  
3 does -- I did not find anything that was recent.  
4 Apparently, this is -- this is it, and this is 20 years  
5 ago but it feels like it was seven years ago.

6 And that's all I needed.

7 MS. GREER: Wonderful. Okay.

8 Onward to finality. Are you going to lead  
9 that discussion?

10 HONORABLE HARVEY BROWN: I'll start.  
11 Judge Miskel is going to probably take most of the lead.

12 So we were assigned a -- well, a task  
13 force was formed at the Supreme Court's request, to  
14 study Rule 301 and to come up with a suggestion for  
15 creating more certainty in judgments.

16 This was not going to be an easy task. If  
17 you look back historically, Lehmann goes through and  
18 shows the issue of finality has been a problem that has  
19 vexed courts since -- since our courts began; okay?

20 Justice -- then Justice Hecht's opinion in  
21 Lehmann talks about different trends in 1981, then they  
22 changed in 1896, changed again in 1913, tweaked in 1966,  
23 changed again in 1941, 1993. Long and short of it is,  
24 this is a problem with courts have really struggled with  
25 for a long time, and the phrase Justice Hecht used was

1 that -- was that the solution is difficult, it's an  
2 elastic problem, and it's a vexing problem, according to  
3 him. And that is true.

4               So we got some good people on our  
5 committee. In addition to a number of people from this  
6 committee, we had Judge Andrews join us, Alex Albright,  
7 since she taught Texas Civil Procedure joined us on our  
8 committee, Reagan Simpson, Justice David Gunn and  
9 Justice David Peeples.

10              We're not the first committee that's been  
11 asked to look at this. If you read Lehmann closely,  
12 you'll see that in 2001, the court repeatedly referenced  
13 that the Supreme Court Advisory Committee was wrestling  
14 with the problem and trying to come up with a solution.  
15 And then in 2010, David Peeples chaired a committee that  
16 looked at this and made some suggestions.

17              Neither of those got any traction,  
18 obviously. So this is the latest iteration of an  
19 attempt to solve what many think is an unsolvable  
20 problem.

21              If you'll bear with me, I'm going to do  
22 something I've never done in one of these meetings  
23 before, which is to read from part of an opinion,  
24 because I just think it summarizes the problem so well  
25 and it's Justice Hecht's opinion in Lehmann.

1                   And he goes through -- there's basically  
2 three different things that can happen with the way you  
3 structure a final judgment.

4                   He says the fundamental problem is: Must  
5 a final judgment dispose of all claims and parties  
6 specifically or may do so by general language or even by  
7 reference?

8                   Then he gives three possibilities. If a  
9 specific disposition of each party and claim is strictly  
10 required -- very strict reading required -- then a  
11 judgment apparently intended by the parties and the  
12 trial court to be final and appealable -- might not be,  
13 because it doesn't meet that strict requirement -- an  
14 appeal from such a judgment must be dismissed or at  
15 least abated, resulting in delay and a waste of court's  
16 and parties' resources. All right. That's the first  
17 problem.

18                  Second, if a judgment intended to be final  
19 did not meet the strict requirements, then the case  
20 would remain open, allowing the possibility of further  
21 proceedings and appeals years later. On the other hand,  
22 if a judgment may dispose of all parties and claims by  
23 general language or inference, a party or trial court  
24 may think that a judgment is interlocutory and,  
25 therefore, they don't appeal. And we've seen cases on

1 both ends.

2                   And the Supreme Court has seen at least  
3 five cases that they have tried to wrestle through this  
4 problem with sometimes language being something that a  
5 common -- a layperson might think that was final but it  
6 didn't meet some strict requirements and other times it  
7 did meet -- it did meet requirements. So the court has  
8 struggled with it. Generally, it's found to be final  
9 but not every time.

10                   So we were asked to try to come up with  
11 that -- with a solution. We don't know if we did.  
12 We've come up with something a little different than  
13 anything that we found out there. We did do a brief  
14 survey of different jurisdictions. We spent a fair  
15 amount of time talking about the federal rule and its  
16 process. There was pretty unanimous opposition to the  
17 federal rule, which Justice Miskel will talk a little  
18 bit about. But that's the problem that's facing us, and  
19 we welcome suggestions today.

20                   It really was a lot of brainstorming and  
21 just talking it through. We changed a number of times  
22 the direction we wanted to go. First draft was  
23 basically just codifying Lehmann and all the subsequent  
24 cases. Then we said, well, that doesn't really fix the  
25 certainty problem. So then we did a complete rewrite,

1 which had some similarities to federal court but some  
2 big differences too.

3                   So with that, I'm going to ask Justice  
4 Miskel, who does such a great job of helping us draft  
5 this thing during our meetings, contemporaneously on  
6 Zoom, to walk us through those things.

7                   But we -- we do think one big-picture  
8 issue might be something we should talk about before we  
9 actually go through the rule, and that is do we want  
10 something kind of like a federal rule or do we not.

11                  And so Justice Miskel will talk about that  
12 as long -- as well as a number of big-picture issues.

13                  MS. GREER: And before we do that, can I  
14 ask one question?

15                  HONORABLE HARVEY BROWN: Yes.

16                  MS. GREER: The -- the rule is framed in  
17 terms of judgments, but if an order contained this  
18 language in it --

19                  HONORABLE HARVEY BROWN: Yes.

20                  MS. GREER: -- would that be a judgment?

21                  HONORABLE HARVEY BROWN: Yes.

22                  MS. GREER: Okay.

23                  HONORABLE HARVEY BROWN: Yeah. If it says  
24 this is -- if it says "final" in it, then it has the  
25 other two requirements that are in current case law,

1 it's appealable and it disposes of all claims and  
2 issues, it's a final judgment no matter what the title  
3 of it is.

4 MS. GREER: Perfect. Thank you, Justice.

5 HONORABLE HARVEY BROWN: And one of the  
6 other things that makes this difficult is, Rule 301 says  
7 nothing about what makes a judgment final. That -- it's  
8 all case law. So one reason to play with the rule is a  
9 lot of lawyers who are trial lawyers are not reading all  
10 the case law, and so they don't know. So one thing  
11 might be just to get some of it into a rule.

12 I had dinner last night with an appellate  
13 lawyer, and he said, well, here's the rule. I said,  
14 that's not the rule. He said, I'm positive. I'm  
15 95 percent certain that's the rule. I said look it up.  
16 He looked it up and said you're right, I -- I -- I just  
17 missed those two cases that came out in the last few  
18 years. So it's -- it's tricky even for appellate  
19 lawyers.

20 Judge Miskel?

21 HONORABLE EMILY MISKEL: Yeah. And that's  
22 -- under current law, which is Lehmann, if a document  
23 says it's final, it -- it disposes of all the parties  
24 and claims and is appealable, then it might be erroneous  
25 but it is not interlocutory. That is currently a final

1 judgment.

2 Which leads to one of the points that we  
3 got spread thin a little early on is -- I believe it's  
4 Rule 299 talks about rendering a judgment, which is  
5 different from signing a judgment. And the issues were  
6 compounding exponentially.

7 What we decided for this project is what  
8 was referred to us was judgment finality. So we took  
9 our assignment as the signing of a final judgment, not  
10 oral rendition, not memorandum rulings. I think the  
11 committee was willing, if referred to us to -- I believe  
12 it was Justice Young concurrence or something to talk  
13 about we need to clean up the differences between  
14 rendering, signing and entering. We did not take on  
15 that project in addition to this project which is also  
16 controversial.

17 So FYI, this is just about signing a final  
18 judgment, which starts your post trial and appellate  
19 deadlines.

20 So the -- it's been funny -- I think we've  
21 been working on this since March, and I think in that  
22 time, we've had at least, like, five different Supreme  
23 Court opinions grappling with whether a judgment is  
24 final or not. So I chuckled when I was assigned to this  
25 task. I don't know that it is capable of being solved,

1 but we followed our direction. We came up with a  
2 coherent proposal that would change -- be a significant  
3 departure to the current law.

4           So under the current law, the first case  
5 was Aldridge -- or not first. Of many cases in this  
6 long stream, Aldridge in 1966 says following a  
7 conventional trial on the merits, a thing that a judge  
8 signs is presumed to be a final judgment, and that's a  
9 presumption which could be rebutted. So that's also  
10 part of our proposal.

11           Apparently, that didn't solve all the  
12 problems. So in 2001, we had Lehmann, which is  
13 currently the foundational case. Under Lehmann, a  
14 second way a judgment can be final, in addition to  
15 following a conventional trial, is if it states that  
16 it's final, disposes of all parties and claims and is  
17 appealable.

18           And in order to determine currently  
19 whether something is or is not a final judgment, we have  
20 to reconstruct, sort of, the entire record, assemble  
21 what various disposition documents exist and whether  
22 they Voltron into a final judgment via disposing of all  
23 claims and all parties. And that can result in  
24 unfairness, because parties may not realize that what  
25 had happened was a final judgment.

1                   So let me get this on the screen. So the  
2 first problem we have -- I'm trying to make this bigger.

3                   All right. So the problems under existing  
4 law -- and I'm sorry, I can't get this all in one page.

5                   We identified, like, six ways that we  
6 could have conflicts about whether a judgment is final  
7 or not. The first one is the main problem that I think  
8 our rule does effectively solve. You could have hidden  
9 or series finality.

10                  Basically, through some kind of  
11 combination of involuntary dismissal, partial summary  
12 judgment, settlement, severance, nonsuit, you have four  
13 or five different pieces of paper that add up a final  
14 judgment. And then people don't realize until something  
15 has been signed later and they try to appeal that, and  
16 the appellate court says actually, last plenary power  
17 three months ago because the severance made this a final  
18 judgment.

19                  So the unfairness there is that Lehmann is  
20 met in which the court has disposed of all parties and  
21 claims, nothing remains, but since no judgment clearly  
22 announces it, parties may not realize and they may miss  
23 their post-judgment deadlines.

24                  Another finality problem that appellate  
25 courts struggle with is what if a judgment contains

1 language suggesting finality but maybe has other  
2 language that suggests it's not final. And, again, we  
3 read the tea leaves to see what the trial court  
4 intended, whether we put ourselves in the mind of the  
5 judge, think that the judge meant for it to be final.

6 A third type of finality problem you could  
7 have is a false positive. It -- it unequivocally states  
8 that it's final even though it did not address a party  
9 or a claim. Under existing law, this is, like I said,  
10 erroneous but not interlocutory. And so under our  
11 proposal, that would also remain true.

12 Conflicting finality -- oh. So we have  
13 ambiguous finality and expressly conflicting finality  
14 statements.

15 Another problem I've seen a lot recently  
16 is multiple expressly final judgments. So there was --  
17 in our court, we had one where there was breaches of  
18 three contracts, and the court signed three final  
19 judgments on the same day, one for each breach and they  
20 said all of the relief not granted is denied. So which,  
21 if any, of those three?

22 That, I believe, is solved under current  
23 law and remains solved under our proposal, which is if a  
24 later judgment is signed, courts can modify their  
25 judgment as long as they have plenary power, so that a

1 later judgment would replace the earlier one. But  
2 again, if you have three judgments signed on the same  
3 day, how do you know? You're just going to have to send  
4 that back to the trial court.

5 A lot of the problems we talked about  
6 can't be solved by rule because the problem is imprecise  
7 trial court action, and you're not going to solve  
8 imprecise action with rules.

9 And then the last one that popped up  
10 during the time we were working on this -- and I believe  
11 had three separate opinions and no majority, but what if  
12 there are ambiguous orders entered after a judgment that  
13 is expressly final?

14 So a later document may create uncertainty  
15 whether the court intended to modify or replace their  
16 final judgment, even though it has express finality  
17 language.

18 So among those problems, the ones that are  
19 just, you know, obvious mistakes are probably not going  
20 to be solved by rule. But what we really thought we  
21 could do is solve the hidden finality problem, the --  
22 the series finality problem, and also the ambiguous  
23 finality problem.

24 So under our proposed rule, if there's a  
25 bunch of documents that may add up to a final judgment

1 but no judgment has finality language, we have a  
2 solution for that. And if you have the document that  
3 has ambiguous finality language and if you're not sure  
4 it's final, then our proposal does solve that.

5               We are not -- I think I'm being --  
6 speaking with everybody on the committee that says we're  
7 not necessarily saying that this proposal, like, needs  
8 to be done and is definitely better than the system we  
9 have. Our task was to come up with a system that would  
10 be more clear about finality. What we have currently is  
11 a system that favors finality even if people are  
12 roadkill in certain situations; right?

13              All of our judgments, the -- the system is  
14 biased toward finality, and what we have decided is we  
15 don't want the harm of people thinking something is  
16 final and discovering later that it wasn't. So instead,  
17 we have the harms of things are final when people don't  
18 realize it. The new system we're proposing flips that.

19              So under the new system, a judgment is not  
20 final unless it follows a conventional trial, it  
21 contains the Lehmann finality language, or the parties  
22 get a Certificate of Finality.

23              So that would solve the problem of series  
24 finality. It would solve the problem of ambiguous  
25 finality. And it would hopefully minimize the amount of

1 times where nobody got a certificate, they thought it  
2 was final, turns out it wasn't, although in the system,  
3 that could sometimes happen.

4 All right. So Harvey, do you want me to  
5 start going through the actual rules, or was there more  
6 background discussion?

7 HONORABLE HARVEY BROWN: I -- I think it  
8 might be helpful, but I look to the court as to what the  
9 court thinks to talk about the big picture of the  
10 federal rule versus what we did, and maybe give some  
11 background as to how our certificate is similar but  
12 different than the federal rule and why we --

13 HONORABLE EMILY MISKEL: Okay.

14 HONORABLE HARVEY BROWN: -- didn't go with  
15 the rule.

16 HONORABLE EMILY MISKEL: I am the worst  
17 person to speak on this because I do not have federal  
18 practice as part of my background. My understanding  
19 from those on the committee that did -- we had some very  
20 passionate voices that we should not import the federal  
21 way of doing things into our Texas state court system.

22 My understanding under the federal  
23 rules -- and I think this -- let me see if I can find  
24 this in the memo.

25 Okay. So there's Federal Rule of Civil

1 Procedure 58, requires a separate document in each case,  
2 basically memorializing a final judgment. And then  
3 because they experience problems with people not getting  
4 them, then they have a backstop rule that says, okay, if  
5 you fail to do the document you're supposed to, then we  
6 presume after 150 days it's been done. And then I think  
7 they also have a separate rule that there can be  
8 judgments that dispose of fewer than all claims or all  
9 parties, and so they have a separate rule for that.

10 And I -- again, I invite anyone to share  
11 the notes about federal stuff. I don't. I just can  
12 represent that when we looked at the problems that  
13 people unquestionably experience in federal courts, plus  
14 the fact that our Texas state court system is much, much  
15 more massive than the federal system -- so just looking  
16 at the numbers, in a federal district court in Texas,  
17 the court may dispose of 600 cases in a year with a  
18 staff of attorneys. A Texas district court may dispose  
19 of 2- or 3,000 cases per year with no attorney staff.  
20 And so we did not want to have a rule that increased the  
21 level of formality required.

22 So that's why we tried to keep the similar  
23 rules of as long as you have final trial, we -- you have  
24 a judgment. As long as you have express finality  
25 language, you have a judgment. We're not creating work

1 for courts or parties to get another task checked off  
2 the list unless there's truly a problem.

3 HONORABLE HARVEY BROWN: If you don't mind  
4 my in. So in the federal court system, the, quote,  
5 separate document is required in every case. In our  
6 state court system, it's not required to -- to have much  
7 of anything if you go to trial. It's pretty simple if  
8 you go to trial. So they don't have the trial judgment  
9 rule that we have. So that's one difference.

10 Second, because judges in federal court  
11 write these opinions and dispose of the case more or  
12 less but don't have necessarily the magic language, they  
13 have this separate document. So even if there's a very  
14 thorough opinion, that opinion does not start the  
15 appellate timelines until the court has this separate  
16 document.

17 And I say "the court," and that's a little  
18 inaccurate because the court doesn't sign the separate  
19 document. The court clerk signs the separate document.  
20 This has created, I'm told -- I've never experienced  
21 this myself, but our committee, in talking about it, I  
22 was told that sometimes there's a question as to whether  
23 an opinion or order is, in fact, meant to be final and a  
24 separate document is signed saying it was final and so  
25 somebody has got to go back and say no, that separate

1 document shouldn't have been signed, it wasn't final to  
2 begin with. So we've just moved the -- the fight to a  
3 different place as to whether finality has occurred.

4           The other thing is lawyers aren't always  
5 attune to a clerk issuing a separate document. They're  
6 very attune to a judge signing something, but something  
7 with the clerk may not get noticed and, therefore,  
8 people miss appellate deadlines.

9           Also, since -- if the clerk does an issue,  
10 it becomes final in 150 days, somebody may not notice  
11 the 150 days has exactly run and may not realize the  
12 150-day rule and, therefore, they lose their right to  
13 appeal.

14           So the people on our committee that have a  
15 heavier federal practice thought it was not a good idea.  
16 Instead, we took the idea of a separate document and  
17 said we're not going to make it mandatory, we're going  
18 to make it optional. We're going to make it something  
19 that is available through a judge signature to create  
20 finality if there's questions, if there's ambiguity or a  
21 party isn't sure about it.

22           So it's -- for our rule, it's a safety  
23 valve. If you're not sure, you go to the Certificate of  
24 Finality. But if you're sure because you have the  
25 Lehmann language, you don't need it at all. And that's

1 going to be most cases.

2 To require the federal rule would take a  
3 small problem and require a solution in thousands of  
4 cases that's unnecessary. So it's, we thought, better  
5 to be a safety rule than a necessary requirement.

6 HONORABLE EMILY MISKEL: Also, I don't  
7 mean to minimize how much of a sea change this is, so  
8 there's also going to be an education process because  
9 this is a real change from practice, and lawyers and  
10 judges seem to be slow to absorb new changes.

11 So my concern is that it's going to --  
12 even if it's an objectively better system, there's going  
13 to be some transition growing pains, which we should  
14 not -- you know.

15 All right. Are we ready to get into the  
16 text of the proposed rules?

17 All right. So let me explain the  
18 overview. Hold on.

19 Okay. So we have -- in your materials, we  
20 have a revised Rule 301 regarding final judgment. We  
21 have a brand-new rule 301A called Certificate of  
22 Finality, we have a form Certificate of Finality, and  
23 then we have some other changes that may or may not be  
24 made to the various rules regarding post-judgment  
25 deadlines. So I'll save that discussion for when we get

1 there.

2 But let's start with the proposed rule  
3 301. We currently have an existing Rule 301. It's in,  
4 sort of, non-modern language. So the first parts of  
5 this rule just modernize without changing the language  
6 of Rule 301.

7 So A, B and C, as you see on the screen,  
8 basically take the current rule and just make it into  
9 modern language. I don't know if there's any comments  
10 on that part of it, but that was not meant to be a  
11 change.

12 Going down to the part that is the change.  
13 All right. The current rule says: "Except as otherwise  
14 provided by law, only one final judgment may be rendered  
15 in a cause."

16 And here is where we have our new rule.  
17 Number 1, we're making the Aldridge rule into a -- an  
18 explicit rule, and we're strengthening it.

19 A judgment signed of a conventional trial  
20 on the merits is final -- not presumed, is final --  
21 unless the judgment affirmatively state that certain  
22 identified claims or parties remain pending.

23 So if you had a conventional trial and you  
24 have a judgment signed, it is not presumed final, it is  
25 final, unless for some reason it itself says it's not

1 final.

2           The second way that a judgment can be  
3 final under the new rules is (2)(A), that's Lehmann. We  
4 went back and forth on whether to require a magic-words  
5 phrase, like your judgment has to have this magic-words  
6 phrase. That's what Lehmann rejected initially, and  
7 there were problems with that prior system. So we've  
8 tried to straddle the problem and say it just needs to  
9 communicate the three concepts from Lehmann: It's  
10 final, it disposes of all parties and claims, and it's  
11 appealable.

12           If the judgment, anywhere in it -- because  
13 we went through should it say at the beginning, should  
14 it say at the end. Basically we decided, look, I don't  
15 care what page it's on, somewhere in that document if it  
16 has these three concepts, then it is a final judgment.

17           The third way that is the new way is the  
18 trial court has signed a Certificate of Finality under  
19 Rule 301A.

20           If your document doesn't satisfy one of  
21 those three rules, you do not have a final judgment. So  
22 you could have a partial summary judgment, a settlement  
23 and severance and a nonsuit, but because none of those  
24 three followed a conventional trial and none of those  
25 three have express finality language, you would not have

1 a final -- your case would not be over, you would not  
2 have a final judgment unless you, then, obtained a  
3 Certificate of Finality. And that's purposeful because  
4 that's to make sure everyone is aware that their case is  
5 becoming final and now they need to do their  
6 post-judgment and appellate remedies.

7 And so that's -- so we say a judgment that  
8 contains other indicia of finality but doesn't have  
9 those specific things is not final.

10 (e) codifies --

11 HONORABLE HARVEY BROWN: May -- may -- may  
12 I interrupt --

13 HONORABLE EMILY MISKEL: Oh, go ahead.  
14 Yes.

15 HONORABLE HARVEY BROWN: -- what you were  
16 saying?

17 Just to be clear, so if you look at 2(A),  
18 let's just say a judgment says this is final and  
19 disposes of all parties and claims. That won't do it.  
20 You got to have all three.

21 If you only have two of the three, you go  
22 to the Certificate of Finality, and say, Judge, we  
23 intended this, everybody knows we intended it, and it --  
24 it gets fixed. But those three are required in every  
25 case.

1                   Now, case law right now says, for example,  
2 Mother Hubbard isn't sufficient, the word "final" is not  
3 sufficient. This would make it clear that all three of  
4 those are required. So --

5                   HONORABLE EMILY MISKEL: Which is --

6                   HONORABLE HARVEY BROWN: -- this -- this  
7 is a little bit like magic words in a sense, but we  
8 purposely take out a quotation on it -- quote marks  
9 around it.

10                  HONORABLE EMILY MISKEL: And -- and we  
11 picked those three from Lehmann. But if your memo says,  
12 like, okay, well, if it says final and includes all  
13 parties and claims but doesn't say the word  
14 "appealable," are we really going to say we don't have a  
15 final judgment?

16                  So that's a judgment call for the  
17 committee. Like, maybe we want to cut the three Lehmann  
18 requirements down to two. Our subcommittee expresses  
19 opinion or judgment on that. Just -- that is just  
20 something to be considered.

21                  (e), it incorporates some recent Supreme  
22 Court case law that a judgment rendered after a  
23 conventional trial has presumptions in favor of it  
24 because the parties were there, they participated in the  
25 trial, they should know that a judgment was coming. But

1 for default judgments, since the parties aren't there,  
2 they didn't participate and they don't know a judgment  
3 is coming, if the final default judgment has conflicting  
4 statements about finality, it is not a final judgment.  
5 So that's currently the law, and so we just incorporated  
6 that into the rule.

7 I think that gets us through the -- the  
8 changes to Rule 301. So it's a sea change but it's not  
9 a lengthy rule.

10 The other thing that we went back and  
11 forth on the committee is, okay, well, we know about,  
12 like, probate and guardianship cases. Everybody  
13 casually says, oh, they have multiple final judgments.  
14 So we're, like, do we need something in the final  
15 judgment rule to account for these cases with, quote,  
16 multiple final judgments?

17 But on exploring it further, they don't  
18 truly have multiple final judgments. They have multiple  
19 orders that can be appealed before a final judgment is  
20 entered. So we decided none of those changes belong in  
21 this rule because this is about final judgments and it  
22 applies the same to everybody. We'll attempt to address  
23 those cases in the next rule that we talk about.

24 Is this any -- let's pause here before we  
25 go on to C, what is a Certificate of Finality and how do

1 you get one?

2 Yes.

3 HONORABLE NICHOLAS CHU: Judge Miskel,  
4 do -- there's one point that deals with probate. Do --  
5 do you want me to bring it up now or towards the end --

6 HONORABLE EMILY MISKEL: Oh, yes.

7 HONORABLE NICHOLAS CHU: -- when we do the  
8 probate stuff?

9 HONORABLE EMILY MISKEL: Yes, yes, yes,  
10 yes. Oh, no, go ahead with what you're saying.

11 HONORABLE NICHOLAS CHU: Well, I was just  
12 going to say when -- when you sent that to me, I had a  
13 question of, oh, does C not apply to probate cases. And  
14 then you educated me that, yes, C does apply; it's just  
15 that -- that your new -- (1)(A) applies also.

16 In -- in order to clear up that confusion,  
17 I'm wondering instead of saying one final judgment on C,  
18 just delete one and say final judgment, so that it's  
19 clear when we're dealing with probate cases, even though  
20 there may be a final judgment or multiple final  
21 judgments in -- in mental health cases, for example --

22 HONORABLE EMILY MISKEL: Sure.

23 HONORABLE NICHOLAS CHU: -- it still can  
24 be applicable.

25 HONORABLE HARVEY BROWN: No, that language

1 in that sentence is, I think, direct in the existing  
2 rule.

3 HONORABLE NICHOLAS CHU: Oh, yeah. No,  
4 no, not the language, just the -- the --

5 HONORABLE HARVEY BROWN: Title?

6 HONORABLE NICHOLAS CHU: Yeah.

7 HONORABLE HARVEY BROWN: Okay.

8 HONORABLE EMILY MISKEL: Yeah, just this  
9 word right there?

10 HONORABLE NICHOLAS CHU: Yeah.

11 HONORABLE EMILY MISKEL: Because it still  
12 will say except as otherwise provided by law, which is  
13 your special cases.

14 HONORABLE NICHOLAS CHU: Yes.

15 HONORABLE EMILY MISKEL: And it does even  
16 say only one final judgment, because just for folks that  
17 may not know, that's not the law in every state.

18 So, for example, in California, in a  
19 divorce case, you get your divorce judgment, and then at  
20 some later time you get your custody judgment and then  
21 at some separate different time you get your division of  
22 the marital estate. And those are done at different  
23 times, and there's no requirement that it all be wrapped  
24 up into one final judgment.

25 So this -- it does need to say only one

1 final judgment because that preserves our Texas system,  
2 but I totally hear what you're saying.

3 HONORABLE NICHOLAS CHU: Yeah.

4 MS. PFEIFFER: I do have one question. So  
5 this still retains the concept of final but erroneous;  
6 is that --

7 HONORABLE EMILY MISKEL: Yes.

8 MS. PFEIFFER: Okay.

9 HONORABLE EMILY MISKEL: Yeah. So if it  
10 has -- just like now, if it has that Lehmann language  
11 and it failed to dispose of a party or claim, that may  
12 be an error that you might have to preserve and bring  
13 up. And we certainly get those cases now, but it won't  
14 be interlocutory or not yet appealable.

15 MS. PFEIFFER: And then the follow-up  
16 question, you know, (2)(A) is basically the Lehmann  
17 magic language that -- why can't we just say that  
18 there's magic language; that if you put this in, it is  
19 final and acknowledge that's what -- exactly what we're  
20 doing?

21 HONORABLE EMILY MISKEL: Yeah, we  
22 definitely had earlier drafts where we proposed, like, a  
23 sentence with quotation marks and said it has to have  
24 this sentence and -- and versions where above the  
25 judge's signature, it has to have this sentence. And

1 then what we got into is what if it leaves out one word,  
2 what if it's not on the same page as the judge's  
3 signature but a different page?

4 Like, then the consequence of non-finality  
5 can be a really bad consequence, and so our system is  
6 kind of designed to overlook technicalities in favor of  
7 finality. And we figure that having a magic word  
8 sentence would create more problems than it solves.  
9 Does that make sense?

10 MS. PFEIFFER: Well, I would think it's  
11 just the opposite because the finality is what triggers  
12 the deadlines. You don't want to accidentally create a  
13 final judgment and have deadlines running without  
14 everybody understanding that that's what's being  
15 triggered. So --

16 HONORABLE EMILY MISKEL: Here -- here's  
17 the problem that we thought about. Say that there is a  
18 judgment that everyone thinks is final but it's  
19 technically not final. And then three years go by, no  
20 one realizes that it wasn't final, the case went onto  
21 DWOP'd, and so now no final judgment exists.

22 That can be a pretty hard consequence for  
23 somebody that might need to, like, register that order  
24 in a property record. It could affect, you know, real  
25 property interests or all kind of bad stuff that we

1 think about.

2                   So that's sort of the policy consideration  
3 underlying all of this, is our current system sort of  
4 overdoes finality in a way that harms some people, but  
5 there are also risks to underdoing finality. But,  
6 again, this is something that we grappled with, and  
7 definitely there were some folks in favor of just have a  
8 magic sentence; right?

9                   MS. PFEIFFER: Right.

10                  HONORABLE EMILY MISKEL: But then that  
11 sort of gets into that -- the federal problem and,  
12 again, the educated -- education of attorneys to start  
13 putting that magic sentence in on February 1st or  
14 whatever it is when they're using forms that are ten  
15 years old.

16                  MS. PFEIFFER: Okay. It's -- it's  
17 problematic whatever you do, so. . .

18                  HONORABLE EMILY MISKEL: It -- right.  
19 Like, if -- if the Supreme Court could have solved this  
20 problem in the last 25 years, I'm confident they would  
21 have done so.

22                  HONORABLE ANA ESTEVEZ: Are the judges  
23 going to be able to just do them sua sponte?

24                  HONORABLE EMILY MISKEL: Yes.

25                  HONORABLE ANA ESTEVEZ: Okay. Because

1 sometimes we look and we think something should have  
2 been dismissed, but the clerk says, no, there's somebody  
3 else left and --

4 HONORABLE EMILY MISKEL: We definitely  
5 wanted to preserves judges' ability to do that --

6 HONORABLE ANA ESTEVEZ: Okay.

7 HONORABLE EMILY MISKEL: -- on their own,  
8 yes.

9 Other discussion -- yes.

10 MR. PHILLIPS: I -- I think you answered  
11 this with your response to Connie, but I want to be  
12 clear.

13 On the serial issue, right, one party gets  
14 dismissed here, six months later, another one. You get  
15 to the last one, and the party that files that --  
16 whatever it is, dismissal order or it's an order on  
17 nonsuit, and they're paying attention so they put into  
18 that last one all this stuff in C(2)(A), then that's it.  
19 It's final. We don't have to do -- so it -- it address  
20 serial orders by just -- you just have to make sure you  
21 put that one in the last order?

22 HONORABLE EMILY MISKEL: Yes, because I  
23 think it's fair enough -- we know people don't read  
24 their E-filing, but if it was sent to you and it has  
25 finality language in it, I don't feel bad that you

1 didn't read it, basically, is where our committee came  
2 down to it; right?

3 We understand the risks that somebody  
4 could slip finality language into something, but you  
5 should be looking at things that the judge signs that  
6 come to you, which is also why we wanted it to be a  
7 judge thing, not clerk thing.

8 Yes?

9 MR. OLDS: Can I ask what happened to the  
10 nonsuits?

11 CERTIFIED STENOGRAPHER: I'm sorry, sir.  
12 What is your name?

13 MR. OLDS: Daniel Olds.

14 CERTIFIED STENOGRAPHER: You don't have a  
15 name tag.

16 MR. OLDS: I'm sorry. Daniel Olds.

17 CERTIFIED STENOGRAPHER: Thank you.

18 MR. OLDS: There's always nonsuits, you  
19 know, last claim in a case. Right now, they're going to  
20 be final.

21 HONORABLE EMILY MISKEL: Right. So this  
22 would to the final because there wouldn't have been a  
23 conventional trial and they're -- I'm assuming there's  
24 not express finality language in one party's nonsuit of  
25 their own claims. So then it -- the case would not be

1 final, and somebody would have to go get a Certificate  
2 of Finality.

3 I think I saw somebody over -- okay. Yes.

4 MR. SCHENKKAN: Pete Schenkkan.

5 Judge Miskel, I'm confused about the  
6 reading together of (e) Finality of Default Judgment  
7 with (c)(2)(A).

8 (e) -- (e) says it's not withstanding  
9 subdivision (c)(2)(A), a default judgment is not final  
10 if. But -- but (c)(2)(A) says -- as -- as worded, only  
11 says if it -- when it's possible for a judgment to be  
12 final. So I'm -- I'm not sure what the contradiction  
13 intended is.

14 Do -- do we mean that (c)(2)(A) should be  
15 worded a -- a judgment not governed by (c)(1) is final  
16 if but only if? Or do we --

17 HONORABLE EMILY MISKEL: Yeah, it says is  
18 final "only if".

19 MR. SCHENKKAN: I -- I know, but at --  
20 but -- but with -- with only the "only if" part in it,  
21 I'm not -- I'm not getting the contradiction. I'm not  
22 understanding.

23 HONORABLE EMILY MISKEL: Okay. So the --  
24 the facts that underlie (e) -- so we just had a case  
25 under (e), the default judgment had the Lehmann express

1 finality language. It had all of those things in it,  
2 and it said the case is set for trial on August 30th and  
3 so it -- it had an express contradiction of the finality  
4 of the default judgment.

5 In a normal case where parties have  
6 appeared, that is final. It activates Lehmann. It  
7 starts your deadlines.

8 Under two 2024 Supreme Court cases in a  
9 default judgment, it is not final. It does not start  
10 your post-judgment deadlines. So we can agree of  
11 whether we want that to still be the law or not, but  
12 that's currently the law.

13 MR. SCHENKKAN: Still -- still not getting  
14 the -- why that's tied to -- in the way it is to -- to  
15 (c) -- (c)(2)(A). It -- it -- it -- by saying it's  
16 final only if, it's setting up a situation which it can  
17 be final, rather than saying it is final if but also  
18 only if.

19 HONORABLE EMILY MISKEL: I guess I don't  
20 understand your question.

21 MS. HOBBS: If I may --

22 MR. SCHENKKAN: Yeah.

23 MS. HOBBS: -- maybe we would rather say  
24 even if an order, judgment, whatever document contains  
25 the language in (c)(2)(A), it's -- a default judgment is

1 not final.

2 MR. SCHENKKAN: That -- that's exactly --  
3 precisely, Lisa.

4 HONORABLE EMILY MISKEL: But it -- it can  
5 be --

6 MR. SCHENKKAN: Thank you.

7 MS. HOBBS: Yeah.

8 HONORABLE EMILY MISKEL: -- final -- it  
9 can be final. So a default judgment would --

10 MS. HOBBS: No, I know, but a default  
11 judgment is not final if its language affirmatively  
12 undermines or contra- -- he just doesn't like the  
13 notwithstanding, because -- I get your -- why you're --  
14 it's illogical for ways that it's hard to articulate.  
15 But I think --

16 HONORABLE EMILY MISKEL: So we could say  
17 something -- instead of "notwithstanding," we could say  
18 even if a judgment -- even if a default judgment  
19 contains the express finality language of subdivision  
20 (c)(2)(A), it is not final if it's language  
21 affirmatively --

22 MR. SCHENKKAN: Yes, that -- that is --

23 MS. HOBBS: Yes.

24 MR. SCHENKKAN: -- what I was --

25 MS. HOBBS: That is -- that would --

1 MR. SCHENKKAN: -- trying to make sure was  
2 the case.

3 MS. HOBBS: Yes.

4 HONORABLE EMILY MISKEL: Okay. Let me  
5 make a note.

6 MS. GREER: Judge Andrews?

7 HONORABLE MELISSA ANDREWS: This is  
8 Melissa Andrews. So I just -- I -- I think that the  
9 comment about notwithstanding may stem from a reading of  
10 the "only if" language, the predicated language of (c)  
11 to be this is permissive and not exclusive. But I'm not  
12 sure that the committee understood it to be permissive  
13 rather than -- I think the -- the committee may have  
14 understood it to be if and only if.

15 HONORABLE EMILY MISKEL: Yeah. We  
16 definitely meant if and only if.

17 MS. WOOTEN: Yeah. Which is the same as  
18 only if.

19 MR. SCHENKKAN: Yes, that --

20 HONORABLE EMILY MISKEL: That's what I  
21 thought.

22 Yeah. So in other words, just like with  
23 the nonsuit example, if you have something that appears  
24 to be a final judgment but it doesn't have the three  
25 finality magic words -- I won't say magic words, three

1 finality concepts or conventional trial, then you do not  
2 have a final judgment and you have to get a Certificate  
3 of Finality. That's the change, the departure from  
4 Lehmann.

5 So let's talk -- we can come back to this,  
6 but let's go ahead and start talking about --

7 HONORABLE HARVEY BROWN: You -- you --

8 HONORABLE EMILY MISKEL: -- what a  
9 certificate --

10 HONORABLE HARVEY BROWN: We have another  
11 question.

12 HONORABLE EMILY MISKEL: -- of finality --  
13 oh, yes.

14 MS. GREER: Sorry to interrupt you.

15 HONORABLE TOM GRAY: As you know, I  
16 appreciate the effort. We talked before we started  
17 today. This is sort of a sea change that makes me  
18 nervous because case law has been out there for decades,  
19 specifically Lehmann. We've tried to implement it, as  
20 you and I have talked about. As an appellate judge,  
21 give me the rule, I'll apply it, just make it clear, but  
22 I think with the sea change, what you do is you create a  
23 whole new opportunity to start writing new law by case  
24 authority that is just -- the pendulum switch -- shifts  
25 and you start over there and you kind of start over.

1                   And I'm wondering -- I -- I understand  
2   that y'all have chosen to do that pendulum swing, but  
3   just -- if we codified Lehmann by rule, it seems like  
4   that's a baby step that is already pretty well  
5   established. And while it's -- always has problems, it  
6   always has problems. So will the pendulum shift that  
7   we're creating here.

8                   This reminds me six or seven years ago, we  
9   started through this process about the problem with what  
10   I call letter orders. The first one that I experienced  
11   personally was after a jury trial. And there was a  
12   letter from the trial court that -- you would use the  
13   term and Evan might -- would use the term "rendered  
14   judgment," but it was after a traditional trial on the  
15   merits and it announced the judge's ruling and it was in  
16   anything and the question became whether or not that  
17   letter was a judgment, which is the first word in a  
18   couple of these and leads me to ask the question: What  
19   is a judgment?

20                   And if we still have that problem with the  
21   letter from the trial court, we still have that problem.

22                   HONORABLE EMILY MISKEL: Yes.

23                   HONORABLE TOM GRAY: And -- and --

24                   HONORABLE EMILY MISKEL: So under this one  
25   if the trial court signs a document after a final trial

1 and the document does not say this is not a final  
2 judgment, it might -- it is a final judgment.

3 HONORABLE TOM GRAY: And -- and that goes  
4 back to where Lisa a while ago, she caught herself, a  
5 judgment or document, and it -- that concerns me greatly  
6 of how we are trying to rewrite this under the  
7 presumption that we're going to have a piece of paper or  
8 electrons that up at the top say "judgment" and that may  
9 not be what we're dealing with at all on any of these.

10 And while I'm still recognized, I'm going  
11 to say in addition to the problem in probate, I was  
12 thinking that in the context of partition proceedings,  
13 each of the two or three phases -- I think it's three  
14 phases -- are called judgments in the law. And that  
15 would be another type of proceeding not where there's  
16 orders but there are judgments that affect discreet  
17 areas of the proceeding that may or may not be  
18 addressed. And that doesn't even get to the question of  
19 interlocutory orders, the use-it-or-lose-it problem, are  
20 they appealable or not or can they be raised as errors  
21 later.

22 So I would probably be in the camp of  
23 thank you very much but -- I'll keep what I have or  
24 maybe try to codify what we have now. And then I'll  
25 talk about certificates of appealability versus finality

1 in a moment because of the question of the orders.

2 HONORABLE EMILY MISKEL: And I would -- so  
3 I'd ask -- so when you said maybe we start with the rule  
4 where we codify Lehmann, that's where the subcommittee  
5 started.

6 When you say "codify Lehmann," do you just  
7 mean if the document says those three express finality  
8 concepts, it's a final judgment, the end? Or in other  
9 words, does your -- when we say the shorthand of "codify  
10 Lehmann," do we attempt in any way to solve that hidden  
11 series finality problem where you have documents that  
12 add up to a final judgment under Lehmann?

13 HONORABLE TOM GRAY: I -- would not --

14 HONORABLE EMILY MISKEL: Or just leave it  
15 alone?

16 HONORABLE TOM GRAY: I -- I would leave it  
17 alone. I mean -- I'll say this. I've never had a pro  
18 se that waited too late to bring their appeal. I could  
19 be -- I mean, I'm sure that's happened, but the pro ses  
20 tend to get there early on every order that they  
21 disagree with. Certainly if it has "judgment" or  
22 "final" or anything like that, they try to get there  
23 and -- and appeal it. It's lawyers that are more likely  
24 to stumble into one of these problems, and the litigants  
25 have their own remedy when that happens against the

1 lawyer.

2 HONORABLE EMILY MISKEL: All right. Any  
3 other -- yes.

4 MS. HOBBS: I -- I just -- the way I --  
5 and I don't disagree with you except for that last  
6 comment, which went a little too far for me, but, you  
7 know, the way I thought about it is I'd rather dance  
8 with the partner I know even if he's not the best dancer  
9 in the room. And I don't think you're alone even on the  
10 subcommittee that we -- that there are many people on  
11 the subcommittee who felt that way too. I'll pick my  
12 dancer right now, which is, I think, kind of what you're  
13 saying too.

14 But on the other hand, I do think we have  
15 a task, and -- and so we wanted to present something  
16 that we think solves the most common problems that we're  
17 seeing where rights are really being affected and not  
18 just go sue your lawyer.

19 HONORABLE EMILY MISKEL: And to be fair,  
20 the problem of hidden or series finality is a -- is a  
21 true problem --

22 MS. HOBBS: It is.

23 HONORABLE EMILY MISKEL: -- a lot of  
24 people get killed by, so it's worth attempting to solve.  
25 I don't know if the medicine is worse than the -- the

1 cure is worse than the sickness.

2 We'll start going through 301A, and if we  
3 have any comments --

4 HONORABLE TOM GRAY: Roger wants to say  
5 something.

6 HONORABLE EMILY MISKEL: Oh, yes. Go  
7 ahead.

8 MS. GREER: Also Justice Brown.

9 MR. HUGHES: Why I'm in favor of changing  
10 the rule is so -- my informal perception is, things as  
11 they are, are creating a great deal of problems for  
12 appellate judges but not trial judges. And what often  
13 happens, of course, is that the appellate courts are  
14 throwing it back in the laps of judges who -- trial  
15 judges who then must, so to speak, have to do a do-over.  
16 And I think changing the rule will accomplish two  
17 things.

18 First, it will have a rule that tells  
19 lawyers and their paralegals, this is what it better be  
20 in the darn order or the judgment if you want it to be a  
21 judgment you can enforce and if it's one you're going to  
22 appeal.

23 The second thing is, it gives judges some  
24 certainty if that language isn't there, they'd better  
25 think twice about what it is they're signing.

1                   And it also gives a -- the creation of a  
2   certificate of appealability, which hopefully will  
3   remove all doubt from the -- from it, so that, once  
4   again, the appellate judges can do what they're hired to  
5   do or elected to do and trial judges will have done what  
6   they were elected to do, and lawyers hopefully will have  
7   read the rules so that they will do for their clients  
8   what they were hired to do.

9                   MS. GREER: Justice Brown?

10                  HONORABLE HARVEY BROWN: Another thing I  
11   just wanted to comment on is, I do think if we don't do  
12   something like this, that at a minimum, codifying  
13   Lehmann and its prodigy into a rule would aid a lot of  
14   lawyers.

15                  I mean, when I go to dinner with a  
16   board-certified appellate lawyer who doesn't understand  
17   a nuance in this, it tells me putting it in a rule would  
18   help practitioners a lot.

19                  MS. GREER: Are you going to reveal that  
20   lawyer's name for the record?

21                  HONORABLE HARVEY BROWN: No.

22                  MS. GREER: I didn't think so.

23                  Justice Salas Mendoza?

24                  HONORABLE MARIA SALAS MENDOZA: So I just  
25   wanted to add in where we're saying -- we're just seeing

1 a lot of increase in cases at the appellate level. We  
2 currently have at least three in the last, I would say,  
3 ten days where the lawyers -- where we've sent back --  
4 the notice shows jurisdiction, right, and they're saying  
5 we're appealing because we don't know if it's final.  
6 And so they're just filing it just in case; right?

7 And so that's -- that's adding to the  
8 increase in caseload. So it would be helpful to have,  
9 for clarity.

10 HONORABLE EMILY MISKEL: I really do like  
11 the concept of a Certificate of Finality because I think  
12 that right now, the person trying to figure out if  
13 there's a final judgment or not is the appellate court,  
14 like, way later. And if we could relocate that job to  
15 the trial court before the deadlines expire, that would  
16 be both better and more fair and helpful to the parties.

17 HONORABLE NICHOLAS CHU: Can you just walk  
18 me through -- if the trial court is in error in issuing  
19 the certificate, how does that work out? Is it just a  
20 lack of jurisdiction on the appellate court, an error of  
21 the trial court on that certificate, or does it create  
22 finality, basically?

23 HONORABLE EMILY MISKEL: Can you pause  
24 your question and --

25 HONORABLE NICHOLAS CHU: Yeah, yeah.

1 HONORABLE EMILY MISKEL: -- and we'll  
2 come --

3 HONORABLE NICHOLAS CHU: Sure.

4 HONORABLE EMILY MISKEL: -- back to it?  
5 Because I think there's, like, two different ways to  
6 take your question, and I think at the right time,  
7 let's --

8 HONORABLE NICHOLAS CHU: Yeah, yeah.

9 HONORABLE EMILY MISKEL: -- get to it.

10 Okay. So big picture, I think -- I -- I  
11 like the concept of a Certificate of Finality. We  
12 wanted a couple things from it.

13 Number one, we wanted to make sure the  
14 judge could just do it. If the judge is, like, this is  
15 final, I don't want any more questions about being  
16 final, here's the judgment and the certificate, go home,  
17 leave me alone; right? Great.

18 We also wanted a -- a process for a party  
19 to request a Certificate of Finality. Say they have,  
20 like, partial summary judgment, a settlement agreement,  
21 etcetera. Then they could ask is this final, right,  
22 rather than just appealing it and hoping the appellate  
23 courts work it out.

24 So we'll start with the motion part of it,  
25 how the trial court determines it, and we'll go from

1 there.

2           So when no judgment satisfying -- we've  
3 had a conventional trial or there's express finality  
4 language has been signed, a party who contends that all  
5 claims and parties have been disposed may file a motion  
6 requesting a Certificate of Finality. The motion must  
7 identify the dispositions that resolve all the claims  
8 and parties, because we don't want this to be  
9 hide-and-seek for the trial court. Like, you need to  
10 put in your motion what you're claiming, and attach a  
11 proposed certificate for the court to sign. And we have  
12 our proposed form next.

13           The movant must serve the motion on every  
14 party who has appeared at any time. And we wanted that  
15 because, say, you're the party that got involuntarily  
16 dismissed on standing at the beginning of the suit. We  
17 wanted to give you a heads-up that this case is becoming  
18 final so you can exercise your appellate rights.

19           Except on leave of court, the non-movant  
20 has to respond within 14 days. The response must  
21 include any objections to the issuance or contents of  
22 the certificate.

23           After the response period, we wanted to  
24 leave this open for the trial court to do it with or  
25 without a hearing. We didn't want to require a hearing.

1 The trial court must determine whether all claims and  
2 parties have been disposed. If so, the court must sign  
3 a Certificate of Finality identifying the dispositions  
4 that resolved all claims and parties. If not, the court  
5 must identify the remaining claims or parties in written  
6 order.

7                   Going down. And then under (e), the court  
8 can do it on its own initiative, and everybody is  
9 supposed to get notice.

10                   The effect of the Certificate of  
11 Finality -- this is, again, a big change. The  
12 Certificate of Finality establishes finality. It denies  
13 all relief not expressly granted, and it starts -- it is  
14 the date that starts the post-judgment deadlines.

15                   So the Certificate of Finality doesn't say  
16 you're right, finality happened back in March, because  
17 that would defeat the whole purpose of doing this. The  
18 date the Certificate of Finality is signed, it denies  
19 all claims -- to your question, Judge Chu. The  
20 Certificate of Finality denies claims, and it starts the  
21 post-judgment deadlines.

22                   So that is new, and people could disagree  
23 with that.

24                   Yes?

25                   MR. SMITH: Quentin Smith. Can we remove

1 the movant must serve the motion on every party who has  
2 appeared at any time? That's just --

3 HONORABLE JANE BLAND: Quentin, can you  
4 repeat --

5 MR. SMITH: -- fraught with too many  
6 issues, I mean, when there's --

7 MS. GREER: Quentin, can you repeat that,  
8 because there was a motorcycle going by and we didn't  
9 hear you?

10 MR. SMITH: Oh, sorry. I'd like to remove  
11 the last sentence of (a), must serve every party who has  
12 appeared at any time. Because what if they've been  
13 dismissed or severed and they're not there at all,  
14 they're not in the case, and trying to serve them -- how  
15 could you serve -- you don't even -- like --

16 HONORABLE EMILY MISKEL: E-serve. You  
17 would E-serve.

18 MR. SMITH: Well, they're -- what if  
19 they're no longer there, rather -- I mean, they're  
20 severed; right? And they got a final judgment in  
21 another matter, they're no longer represented by that  
22 lawyer necessarily. Do I have to go, like, serve them  
23 through the -- through, like, official channels, like --  
24 like a new lawsuit?

25 HONORABLE EMILY MISKEL: No. We -- we

1 meant -- we meant 21a service, not --

2 MR. SMITH: Yeah, but --

3 HONORABLE EMILY MISKEL: -- citation.

4 MR. SMITH: -- but if you're -- I'm just  
5 saying if they're not there anymore.

6 HONORABLE EMILY MISKEL: Yeah. So we  
7 specifically wanted the people who are not there  
8 anymore. So if you were dismissed at an earlier stage,  
9 we want to know. Because, say, you were dismissed for  
10 lack of standing. You can't appeal that until the final  
11 judgment is signed. But that may have been 18 months  
12 ago, and you may not realize that a partial summary  
13 judgment combined with the nonsuit starts your deadline  
14 to appeal.

15 MR. SMITH: Right. So what if you file a  
16 Rule 91a, you win, you sever out and there's a final  
17 judgment entered against the parties. So they're --  
18 they're already done. They're no longer -- like, you  
19 can't serve them.

20 HONORABLE EMILY MISKEL: They'll still be  
21 in the E-serve.

22 MR. SMITH: Maybe, if they don't remove  
23 themselves.

24 HONORABLE EMILY MISKEL: It's like  
25 impossible to remove yourself because I'm on E-serves

1 and --

2 MR. SMITH: So we just removed ourself  
3 from a pro bono case.

4 HONORABLE ROBERT SCHAFFER: Right. You're  
5 still going to get E-served.

6 MR. SMITH: But that -- but that -- would  
7 that service even still be effective, though, if they're  
8 no longer in the case?

9 HONORABLE EMILY MISKEL: So we can clarify  
10 that we mean under 21a.

11 MS. GREER: I think -- Judge Estevez?

12 HONORABLE ANA ESTEVEZ: Yes. I just  
13 wanted to be sure that under (e), there is no notice  
14 required if I'm reviewing my files, working on my  
15 disposal rate, I can just sua sponte do that, it goes  
16 out -- I'm sure they still have 30 days to come back and  
17 say you made a mistake -- and I -- I retain that plenary  
18 power. But other than that, no one has to get notice if  
19 the judge doesn't sua sponte.

20 HONORABLE EMILY MISKEL: That was  
21 important to us. We didn't want the -- the court to  
22 have to go through this 14-day procedure. So the court  
23 can do it sua sponte, and if the parties think the court  
24 got it wrong, they have their motion for new trial,  
25 motion to modify, correct or reform the judgment, all

1 the things that they can do anytime the court signs a  
2 wrong judgment.

3 MS. HOBBS: Okay. Two things have come up  
4 that I don't think we talked about in the subcommittee.  
5 And I agree with your answer that that's what we  
6 intended. But remember -- and we never went back and  
7 looked at it -- there's a Rule of Civil Procedure that  
8 requires the clerk to give notice of a final judgment.

9 HONORABLE EMILY MISKEL: Yes, it's in  
10 here.

11 MS. HOBBS: It -- I'm sorry. Is it --  
12 sorry.

13 HONORABLE EMILY MISKEL: It's 306a(3).

14 MS. HOBBS: The -- oh, good. Good. Okay.  
15 sorry.

16 And then to Quentin's point, I think maybe  
17 what he's asking is what is the ramification if the rule  
18 says you need to serve it on every party that's ever  
19 appeared but you don't, is that going to affect the  
20 finality of the judgment upon certification?

21 HONORABLE EMILY MISKEL: So that was why  
22 we put in the comment that -- and, again, we can say  
23 this maybe is not appropriate for comment, this might  
24 need to be in the text of the rule. But the purpose of  
25 that is to ensure that parties in earlier phase receive

1 notice that a judgment is made final. And what we said  
2 in the comment was if party doesn't receive notice and  
3 the party's claim is affected by the certificate --  
4 because, again, if you're not affected, you know,  
5 harmless error, whatever, but if you're affected the  
6 party may pursue remedies such as restricted appeal or  
7 bill of review as appropriate and the certificate is not  
8 interlocutory.

9 MS. GREER: Rich?

10 MR. PHILLIPS: I think Quentin's point  
11 brings up something I hadn't even thought about going  
12 through this, which is if I've severed somebody out so  
13 that the judgment against them is final already, why do  
14 they need to be told? They're done. They're out;  
15 right?

16 What he said is if I get a 91a against  
17 somebody, they get severed. Then why would they need to  
18 get notice that the case that they've been severed from,  
19 that they're not a part of anymore? Why do they need  
20 notice that there's a final judgment in that case?

21 HONORABLE EMILY MISKEL: Because it's  
22 easier to administer a rule that says give notice to  
23 everybody that's ever appeared than a rule that says  
24 give notice to the people who may be affected by the  
25 certificate.

1 MR. PHILLIPS: But I think if you sever  
2 them, there is a chance they're not there. And 21a  
3 notice isn't -- their service isn't good on somebody  
4 who's not a party to the case. If you've severed them,  
5 they're not a party to the case anymore.

6 HONORABLE EMILY MISKEL: They don't have  
7 to be --

8 MR. PHILLIPS: If they're --

9 HONORABLE EMILY MISKEL: -- a party to the  
10 case to receive a notice, though.

11 MR. PHILLIPS: But now you do have to go  
12 find -- I mean, here's another thing, right, and I've  
13 seen this come up in some of my cases. The case is over  
14 as to that client. They've been severed. They thought  
15 they're done. Their -- their lawyer has been  
16 discharged. If I send it to their lawyer who isn't  
17 their lawyer anymore, now what? Because the case is  
18 over.

19 HONORABLE EMILY MISKEL: So under the  
20 current system, nobody is getting any notice when things  
21 are made final after --

22 MR. PHILLIPS: Right.

23 HONORABLE EMILY MISKEL: -- a variety of  
24 dismissals, severances, etcetera.

25 MR. PHILLIPS: But what I'm trying to make

1 a distinction between is somebody who has an  
2 interlocutory dismissal; right? If -- if you know what  
3 you're doing and you're a lawyer in that case, you tell  
4 your client yes, you're out, but this case is not over  
5 until there's a final judgment.

6 So I'm -- we're not terminating the  
7 relationship or whatever because the case isn't over as  
8 to you yet. It's mostly over, but there's some chance  
9 it comes back because this is interlocutory.

10 But in a situation where you've severed  
11 somebody out to make the judgment against them final,  
12 there is no chance the case comes back against them.

13 HONORABLE EMILY MISKEL: So what would you  
14 propose how to word that?

15 MR. PHILLIPS: I -- I -- I'm not sure.  
16 I'd have to think about it a little bit, but I mean,  
17 it's -- you've got to address the -- the idea of  
18 severance. If somebody has been severed out, they don't  
19 need to be given this notice because they're out.

20 HONORABLE EMILY MISKEL: Okay.

21 MR. PHILLIPS: They're in a different  
22 case.

23 HONORABLE EMILY MISKEL: We're open to  
24 your wording on that. We just wanted to make sure  
25 people that were out at earlier stages are aware of

1 their appellate rights.

2 MR. PHILLIPS: I think we have to  
3 distinguish between out interlocutorily or -- which may  
4 be the first time I've ever said it that way -- or out  
5 be -- and -- and severed. Because that's --

6 HONORABLE EMILY MISKEL: Yes.

7 MR. PHILLIPS: -- that's two different  
8 kinds of out.

9 HONORABLE EMILY MISKEL: We -- we welcome  
10 your proposed language.

11 MR. PHILLIPS: I'll -- I'll think about  
12 it. Sitting here right now, I'm not sure what it is,  
13 but we have to address that problem, because that's, I  
14 think, where this is going.

15 HONORABLE EMILY MISKEL: Well --

16 MR. PHILLIPS: It's not somebody that's  
17 still hanging around because it's interlocutory. It's  
18 the people that have an actual final judgment against  
19 them already.

20 MS. GREER: Chris has the answers.

21 MR. WARREN: Oh, me?

22 MS. GREER: Yes.

23 MR. WARREN: John Warren.

24 Just so that everyone is aware, there was  
25 a change made to Rule, excuse me, 21F-10 that required

1 the clerk to give notice to every party on everything  
2 that transpired in the case, notices and other  
3 documents.

4           And so what -- what was in the past, for  
5 historical purposes, a court coordinator sets a trial,  
6 set a hearing, they will send the notice to the  
7 parties. That notice, because we're not all  
8 electronic, those -- well, in the past because we had a  
9 paper file, a copy of that notice would go in a paper  
10 file. We don't do that anymore. The notices would  
11 bypass our case management system, so there was no  
12 record in our case management system of any docketable  
13 event related to notices and other documents from the  
14 court that goes to the parties.

15           All that changed with 21F-10 that requires  
16 everything to come to the clerk, and the clerk sends the  
17 notice to the parties. But that notice -- but it also  
18 says the clerk sent it electronically. The way that is  
19 done is through Research Texas, and Re -- and Tyler  
20 Technologies pulls all of the parties' information from  
21 the State Bar website, from the State Bar system, and  
22 that's what they use in Research Texas to send notice.

23           I don't know if someone is -- if someone  
24 has been severed from a case, if they -- if -- if  
25 that -- does that mean -- Sharena, help me with this --

1 does that mean that you're no longer a party and that  
2 you no longer receive notices, or that you may just be  
3 severed but if you're still associated with the case,  
4 you're still going to get those notices -- orders,  
5 notices and other documents from the court?

6 MS. GILLILAND: Oh, I -- if you're  
7 severed, you -- in the original case, I think the clerk  
8 should have you electronically shown as inactive and you  
9 would not still be getting those notices. And even if  
10 you had a series of dispositions of settlements or -- or  
11 whatever along the way, if the clerk has marked you as  
12 inactive, you're probably not getting that automatic  
13 Research Texas notification.

14 HONORABLE EMILY MISKEL: Yes?

15 HONORABLE PETER KELLY: There's a  
16 practical problem with this, that if you have somebody  
17 who's dismissed early or just nonsuited early on, you  
18 have a final judgment occurring after two or three  
19 deals, eight, ten years later.

20 Now, if the lawyer for that party that's  
21 been dismissed early on has died or forgotten to pay  
22 their Bar dues or not taken their CLE and their license  
23 has been suspended in any way, that severs the  
24 attorney-client relationship, which means a notice to  
25 that attorney is not effective to the party. Because

1 that can happen.

2 So seven years later, someone is trying to  
3 get a final -- Certificate of Finality, and it may not  
4 even be possible at that moment, in which case you have  
5 yet -- the final judgment is appealed.

6 And I had this case a number of years ago,  
7 it's -- in the case of Holman, and I lost it on the  
8 Supreme Court. This is going to cause a problem because  
9 that puts a burden on the court in making sure this --  
10 the party is still represented by a lawyer who can  
11 accept notice on behalf of that -- of that party.

12 So particularly, if you're trying to get  
13 finality many years later, that could be a real problem,  
14 just lawyers retiring. There is no -- there's nobody to  
15 serve in that instance, so far down the road.

16 HONORABLE EMILY MISKEL: And -- and that  
17 certainly is the current system, that no notice is  
18 provided, judgments become final, and people that were  
19 involuntarily dismissed lose their appellate rights. So  
20 this is our attempt to add text that's not currently in  
21 the law. So it's fair to say that causes too much  
22 complication, and we're not going to try to add that  
23 protection.

24 Yes?

25 HONORABLE TOM GRAY: Oh, my God. A whole

1 new area to create appeals. But the motion, the --  
2 Quentin, I had flagged that same issue, but you  
3 articulated it much better than I ever could have.

4 When you say that this person that wants  
5 this may file a motion, the burden then is on the person  
6 that wants their certificate to serve everybody that is  
7 entitled to service, and that's going to be everybody in  
8 the case that hasn't been severed.

9 The person that has been dismissed early  
10 on, whether they're nonsuited or dismissed by an order,  
11 as Phillip commented, the -- they're still in the case.  
12 They're just being drug along till there's a final  
13 judgment. And so they're still there. They're still  
14 entitled to 21a service until that case is over.

15 There is no need at all for the last  
16 sentence. Strike it. It's out. Everybody still gets  
17 nervous -- notice that's in the case -- and they may be  
18 nervous too, but they get notice.

19 HONORABLE EMILY MISKEL: So currently  
20 people don't provide notice to involuntarily dismissed  
21 parties.

22 HONORABLE TOM GRAY: That's their problem.  
23 That's a whole 'nother problem subject to appeals.

24 If -- I mean, if -- I know that in a case  
25 in which I was one of the defendants, I continued to get

1 notice until the case was over years and years later,  
2 even though I had been dismissed in the first 90 days  
3 of -- of the filing. I just never went to get it  
4 severed. And that's what you do if you don't want to  
5 get notices anymore and you want to close it out and be  
6 done with it.

7                   And so I -- I just think the last sentence  
8 is completely unnecessary because you interject whether  
9 it is 21a service, personal service, who -- I mean, it  
10 just -- I think it's completely unnecessary.

11                   HONORABLE EMILY MISKEL: Rich and then  
12 Harvey.

13                   MR. PHILLIPS: So nonsuit actually raises  
14 a different issue I hadn't even thought about; right?  
15 If I'm a defendant and I got nonsuited, that means the  
16 case against me is over, whether I'm severed or not;  
17 right? The only way you're getting me back is if -- if  
18 it's a nonsuit without prejudice, is by suing me, right,  
19 severed or not. So I -- that -- that raises a whole  
20 different can of worms.

21                   And then the second thing I thought about  
22 is, if I'm a defendant who got dismissed somehow, I  
23 moved for summary judgment and I got it or they  
24 nonsuited me because we came to some arrangement or  
25 whatever, why do I care that the case has now become

1 final? Why are we worried about -- I mean, who is it  
2 that we're worried about here --

3 HONORABLE EMILY MISKEL: People that were  
4 dismissed involuntarily that lose their right to appeal  
5 because they don't realize later on the case becomes  
6 final.

7 MR. PHILLIPS: So a plaintiff that was  
8 dismissed involuntarily. A defendant dismissed  
9 involuntarily --

10 HONORABLE EMILY MISKEL: Right; yes.

11 MR. PHILLIPS: -- doesn't care; right?

12 HONORABLE EMILY MISKEL: Or, like, yeah,  
13 counter-respondent or whatever you might say.

14 MR. PHILLIPS: Those people, if they -- if  
15 they're looking -- I mean, I guess the other thing is,  
16 if they really are looking to appeal at some point,  
17 doesn't that put the onus on their lawyer to be paying  
18 attention to what's going on in the case?

19 I -- I -- I think --

20 HONORABLE EMILY MISKEL: This --

21 MR. PHILLIPS: -- that this thing --

22 HONORABLE EMILY MISKEL: -- happens a  
23 lot --

24 MR. PHILLIPS: -- of every party who's  
25 ever appeared, we're creating an issue that maybe --

1 HONORABLE EMILY MISKEL: Okay.

2 MR. PHILLIPS: -- doesn't need to be  
3 solved or we're making -- making it worse by trying to  
4 do it this way.

5 I -- I still haven't come up with  
6 language, but I think we need to come up with the idea  
7 of you -- you shouldn't have to notify people that are  
8 out and are happy to be out and don't care anymore.

9 HONORABLE EMILY MISKEL: We just figured  
10 it was -- we didn't have any language that made it easy  
11 to determine who -- who falls into that category and who  
12 falls out of it. But it -- like, it's fine to delete  
13 too.

14 Harvey?

15 HONORABLE HARVEY BROWN: I think what we  
16 were thinking is we'd rather be over-inclusive than  
17 under-inclusive for the service. I'd rather too many  
18 people get service than not enough people get service.

19 If you're a person who gets served and  
20 you've been nonsuited, what do you do? You ignore it.  
21 You're a person who's been severed, what do you do when  
22 you get served? You ignore it. If you're a person who  
23 we don't have a rule that you serve everybody and you  
24 don't get it, you may have just lost right of appeal and  
25 you didn't know it.

1                   This doesn't affect finality, because the  
2 comment specifically says "if notice wasn't given". So  
3 the lawyer is dead, okay, or the lawyer is -- hasn't  
4 completed his CLE, it doesn't affect finality. We have  
5 in there that that -- you have other remedies, but it's  
6 still a final judgment if they don't serve it properly.

7                   MR. PHILLIPS: Okay.

8                   HONORABLE HARVEY BROWN: So that's the --  
9 the intent. I mean --

10                  HONORABLE EMILY MISKEL: Well, and --

11                  HONORABLE HARVEY BROWN: -- we could put  
12 something as simple as except for parties who have been  
13 severed or nonsuited. You could do that at the end.

14                  HONORABLE EMILY MISKEL: Okay.

15 Friendly --

16                  HONORABLE HARVEY BROWN: It just seems to  
17 me then -- then you have the lawyer trying to parse  
18 who -- who gets it, who doesn't get, maybe makes a  
19 mistake in who gets it. Just give it to everybody.

20                  HONORABLE EMILY MISKEL: Yeah, friendly  
21 amendment, this is the tail wagging the dog now. Just  
22 delete it. Because we were just trying to, like, help  
23 some people, but if that's going to cause more  
24 complexity than the entire rest of the rule, like, it's  
25 unnecessary.

1 Yes?

2 MR. PHILLIPS: I -- I just --  
3 over-inclusive is fine except for now you're putting a  
4 way bigger burden on the party who's --

5 HONORABLE EMILY MISKEL: Yeah.

6 MR. PHILLIPS: -- trying to get their  
7 judgment --

8 HONORABLE EMILY MISKEL: Okay.

9 MR. PHILLIPS: -- final so they can --

10 HONORABLE EMILY MISKEL: It's deleted.  
11 It's done.

12 MR. PHILLIPS: Yeah, I --

13 HONORABLE EMILY MISKEL: Yes?

14 MS. GILLILAND: I have a -- a question  
15 regarding this finality and the Certificate of Finality  
16 and -- and nonsuit.

17 If you have a basic one plaintiff versus  
18 one defendant and they say plaintiff takes a nonsuit,  
19 does that nonsuit without the judge's signature have to  
20 include finality, or does a party come back and file a  
21 motion for Certificate of Finality when they just took a  
22 nonsuit --

23 HONORABLE EMILY MISKEL: I guess, if a  
24 party have -- so normally we wouldn't think of a nonsuit  
25 in that situation as a final judgment. But if a party

1 wanted to have it be determined to be a final judgment,  
2 I guess they could ask for a Certificate of Finality.

3 Does that -- I -- I don't know if I'm -- I  
4 don't think we would ordinarily -- because you're not  
5 even required to have a nonsuit order. All you have to  
6 do is announce your nonsuit, and a case is over.  
7 There's oftentimes no order at all.

8 MS. GILLILAND: But that -- that was my  
9 question is, so would you just -- your nonsuit with no  
10 order have to have that language of this is --

11 HONORABLE EMILY MISKEL: If you want it to  
12 be considered a final judgment, but most people wouldn't  
13 consider a nonsuit to --

14 MS. GILLILAND: Okay.

15 HONORABLE EMILY MISKEL: -- need a final  
16 judgment.

17 MS. GILLILAND: And how does that affect  
18 here on subsection (a), the motion can be filed, you  
19 know, orders, judgments, nonsuits, settlements, does it  
20 mean a different situation for nonsuits?

21 HONORABLE EMILY MISKEL: Yes. So, for  
22 example, say you have, like, a partial summary judgment,  
23 say you have four defendants, you've partially summary  
24 judgment two of them, you nonsuit one of them, and then  
25 the -- the fourth one gets to a final something and we

1 can't tell if it's a judgment or not.

2                   Then in that case, you would want a final  
3 judgment because you have some non- -- some summary  
4 judgments you want finalized and formalized, you have  
5 some agreements you want finalized and formalized, you  
6 need a final judgment. The nonsuit is part of what  
7 makes it a final judgment.

8                   But just I sue you and then nonsuit,  
9 nobody would say we have a final judgment, under my  
10 understanding, and I could be wrong.

11                  HONORABLE ANA ESTEVEZ: I think her  
12 concern is, is this going to affect how she's doing her  
13 disposals.

14                  HONORABLE EMILY MISKEL: No, because  
15 nonsuits are a separate rule. It's at 165.

16                  HONORABLE ANA ESTEVEZ: Right, but I think  
17 that was what you were --

18                  MS. GILLILAND: Yeah, the --

19                  HONORABLE ANA ESTEVEZ: -- concerned about  
20 because if you get an order of -- even if you had an  
21 order of dismissal and it didn't have finality words,  
22 but -- but I don't think that's what she's saying.

23                  MS. GILLILAND: And I think really it's  
24 more partial nonsuits, not nonsuit of everyone and  
25 everything.

1 HONORABLE ANA ESTEVEZ: Yeah. So you  
2 would still dispose of it in the case without it having  
3 a final judgment.

4 MS. GILLILAND: Okay.

5 HONORABLE EMILY MISKEL: Yeah, because  
6 nonsuits now are not final judgments.

7 MS. GILLILAND: Right. Right. But just  
8 the word -- just "nonsuits" and trying to make that work  
9 with Rule 162, that -- it's not --

10 HONORABLE EMILY MISKEL: Yeah, I suppose  
11 if somebody wanted a Certificate of Finality, they're  
12 not prohibited from asking for one, but --

13 MS. GILLILAND: I mean, that would be  
14 weird --

15 HONORABLE EMILY MISKEL: Yeah.

16 MS. GILLILAND: -- but just having  
17 "nonsuits" in that sentence without any more clarity  
18 there, I think, could lead to some confusion.

19 HONORABLE EMILY MISKEL: Sorry. I'm  
20 notating that we are deleting "the movant must serve".

21 Okay. Was that -- yes.

22 HONORABLE NICHOLAS CHU: Justice Miskel,  
23 on (c) for the determination, two things.

24 One is similar to the summary judgment  
25 ruling -- or the rule. Do we want to put some kind of

1 mechanism to say, hey, you got to make a ruling within a  
2 certain period of time; if not, is that process just a  
3 mandamus to do that?

4 HONORABLE EMILY MISKEL: Yeah. So we did  
5 briefly discuss that, whether we want to set a deadline  
6 or not, and I think this would just fall under the  
7 ordinary, like, failure to rule.

8 HONORABLE NICHOLAS CHU: Yeah. And then  
9 do you think it would be helpful to make it clear in  
10 there that the court doesn't have to set a hearing?

11 HONORABLE EMILY MISKEL: We can because we  
12 want to make sure the court knows they're not required  
13 to have hearings all the time if they can tell.

14 HONORABLE NICHOLAS CHU: Yeah. I think --  
15 I -- I think that would just be helpful just so -- I  
16 mean, it's just a straight-up looking at paperwork kind  
17 of decision.

18 MS. HOBBS: You could say a trial court  
19 must determine with or without a hearing.

20 HONORABLE NICHOLAS CHU: Yeah. I think  
21 that's the language that we used on all the other rules.

22 HONORABLE EMILY MISKEL: Yes. And then I  
23 thought you were going to bring up your other point on  
24 (c), which is what if there actually is a judgment with  
25 express finality language, but someone --

1 HONORABLE NICHOLAS CHU: Oh, yeah.

2 HONORABLE EMILY MISKEL: -- comes back  
3 after three months and says, oh, I would like a  
4 Certificate of Finality, a new deadline.

5 HONORABLE NICHOLAS CHU: Yeah.

6 HONORABLE EMILY MISKEL: So we want to  
7 make clear that you can't use a Certificate of Finality  
8 if you already have a final judgment. You can't, like,  
9 poof your case back into live existence by obtaining a  
10 later Certificate of Finality.

11 So we kicked around some language by email  
12 amongst the subcommittee. It didn't make it into your  
13 draft. I don't know if I can get it on the screen here.

14 Okay. So --

15 HONORABLE ANA ESTEVEZ: Can I ask you  
16 something while you're opening it up?

17 HONORABLE EMILY MISKEL: Yes.

18 HONORABLE ANA ESTEVEZ: Is the purpose of  
19 this only for appellate purposes? I mean, for clerks,  
20 would it be easier for you to put in the title for  
21 appellate purposes?

22 HONORABLE EMILY MISKEL: This is not for  
23 appellate purposes. This is to make your judgment  
24 final, period, whether you appeal it or not, which is  
25 the big change.

1 MS. HOBBS: And to that end, if I can just  
2 kind of wrap my head around this -- and I'm sorry I  
3 missed the last subcommittee meeting, but -- so you have  
4 a -- serial orders that do dispose of all parties and  
5 all claims, but the last order does not have the Lehmann  
6 magic language. Somebody moves to certify it as final.

7 The obligation, then, is on the trial  
8 court, but the trial court does not, after the time for  
9 response, determine whether all parties and all claims  
10 were disposed of and does not certify it. Then you have  
11 a no finality in that case for an indeterminate amount  
12 of time, and that's a problem.

13 HONORABLE EMILY MISKEL: So currently to  
14 now, how you would have, like, a motion to enter a  
15 judgment and the court may or may not act on that by any  
16 particular deadline and then you would mandamus them for  
17 failure to move on that motion to enter; right?

18 MS. HOBBS: Yeah. I -- but, like --  
19 usually that's following a conventional trial on the  
20 merits; okay? So --

21 HONORABLE EMILY MISKEL: Well, but say you  
22 have, like -- yeah, you're right, or something would be  
23 tried.

24 MS. HOBBS: Typically, right? Okay. So  
25 you have, like, an impetus behind -- beside it, but if

1 you're talking about a series of orders and then -- I  
2 guess I just -- I guess I'm just worried about --

3 HONORABLE EMILY MISKEL: No, this is --  
4 this is the actual whole controversy of the proposal --

5 MS. HOBBS: Yeah.

6 HONORABLE EMILY MISKEL: -- you can have  
7 things that actually dispose of all claims and all  
8 parties, and you do not have a final judgment under the  
9 new system.

10 MS. HOBBS: Yes.

11 HONORABLE EMILY MISKEL: That's the  
12 difference.

13 MS. HOBBS: Correct. And so ten years --

14 HONORABLE EMILY MISKEL: Yes, until you  
15 get one of these three things.

16 MS. HOBBS: -- ten years from now --

17 HONORABLE EMILY MISKEL: Correct.

18 MS. HOBBS: -- someone could come back and  
19 be like, wait a minute, I don't like what this trial  
20 court did ten years ago, and under today's rules, you'd  
21 be out of luck because that did create a final judgment.  
22 And under the new rules, let's go up.

23 HONORABLE EMILY MISKEL: Yes.

24 MS. HOBBS: Okay.

25 HONORABLE EMILY MISKEL: That's the policy

1 change and difference.

2 HONORABLE ANA ESTEVEZ: So this is just  
3 for practicality issues for a judge that has to take  
4 care of their numbers.

5 So right now, if someone settles a case  
6 with a plaintiff -- a plaintiff and a defendant, and  
7 they still have their counterclaims and they'll do a  
8 final judgment but they didn't do anything about the  
9 counterclaims. And then later the defendant comes back  
10 and just goes ahead and nonsuits it, then the clerk is  
11 kind enough to go ahead and click the disposed case, so  
12 that I have another number on the disposed case.

13 Now, that is completely disposed. If  
14 there's no Certificate of Finality in the record, does  
15 that mean I don't get a case disposed?

16 HONORABLE EMILY MISKEL: So if there's  
17 no --

18 HONORABLE ANA ESTEVEZ: There's nothing  
19 left.

20 HONORABLE EMILY MISKEL: -- didn't have a  
21 conventional trial, the --

22 HONORABLE ANA ESTEVEZ: Even --

23 HONORABLE EMILY MISKEL: -- parties have  
24 resolved their issues with each other and aren't asking  
25 you for anything --

1 HONORABLE ANA ESTEVEZ: Let's say they had  
2 a conventional trial and all they had left was this, oh,  
3 we're going to do the attorneys' fees later for y'all,  
4 and then now they're nonsuiting attorneys' fees, so it  
5 wasn't final for any reason.

6 But now somebody has nonsuited after  
7 either conventional trial or not, because sometimes  
8 there's some issues we do take up after the conventional  
9 trial.

10 HONORABLE EMILY MISKEL: Okay. So if it's  
11 after a conventional trial is final, if the parties  
12 have resolved their disputes with each other and aren't  
13 asking you for stuff, then I think if you know that the  
14 judgment is final, you can do your own Certificate of  
15 Finality, or it will end up on your DWOP docket if they  
16 haven't closed their case.

17 HONORABLE ANA ESTEVEZ: So -- but now  
18 the clerk actually looks at the file, and when they know  
19 that happens -- because they don't send me this  
20 nonsuit --

21 HONORABLE EMILY MISKEL: So what do the  
22 parties do to let the clerk know that their case is  
23 over?

24 HONORABLE ANA ESTEVEZ: They just filed a  
25 nonsuit --

1 HONORABLE EMILY MISKEL: Okay.

2 HONORABLE ANA ESTEVEZ: -- on the last  
3 issue they had, and I didn't get any notice of that. So  
4 I don't --

5 HONORABLE EMILY MISKEL: Yeah. So your  
6 case is closed. You don't care whether there's a final  
7 judgment or not.

8 HONORABLE ANA ESTEVEZ: Well, that's what  
9 I'm asking you --

10 HONORABLE EMILY MISKEL: Yeah.

11 HONORABLE ANA ESTEVEZ: -- is it still  
12 okay for the clerks to close it --

13 MS. HOBBS: Yes, because finality --

14 HONORABLE ANA ESTEVEZ: -- for us if  
15 that --

16 MS. HOBBS: -- and closure are two --

17 (Indiscernible crosstalk.)

18 CERTIFIED STENOGRAPHER: I -- I'm sorry.

19 HONORABLE EMILY MISKEL: Sorry.

20 CERTIFIED STENOGRAPHER: Y'all are all  
21 speaking over each other, please.

22 HONORABLE EMILY MISKEL: Parties can make  
23 a case go away without a final judgment.

24 HONORABLE ANA ESTEVEZ: Okay. So it's not  
25 affecting the clerks at all?

1 HONORABLE EMILY MISKEL: I'm trying to  
2 think of what the clerks currently report. They report  
3 cases resolved by trial, cases resolved by other, is  
4 that right, or agreement? I can't remember.

5 MS. GILLILAND: There -- there's trial,  
6 non-trial, summary judgment and nonsuit.

7 HONORABLE EMILY MISKEL: Yeah. So they  
8 would continue to do that. I believe they would have  
9 the ministerial duty to do that.

10 HONORABLE ANA ESTEVEZ: Okay.

11 MS. HOBBS: And for the record, it would  
12 not affect the parties' rights to whether it's final or  
13 not. Because I have had a clerk close a case that was  
14 not actually, and I'm, like -- I just call them up and  
15 be like no, there's no final judgment here, just FYI,  
16 you know. But it doesn't -- it's a separate -- one is  
17 an administrative issue and one is, like, actual  
18 substantive rights, and they're two different things.  
19 So yeah.

20 MS. GREER: Is this a good time to take a  
21 break and have lunch?

22 HONORABLE EMILY MISKEL: Yeah.

23 MS. GREER: Okay.

24 (Recess taken 11:52 AM to 12:38 PM.)

25 MS. GREER: Okay. We're going back on the

1 record.

2 Would Justice Miskel please go back to the  
3 podium?

4 HONORABLE ROBERT SCHAFFER: I don't think  
5 she wants to.

6 HONORABLE EMILY MISKEL: I'm having fun.  
7 I won't lie.

8 MS. GREER: All right. We're going to  
9 resume our discussion of finality, and Justice Miskel  
10 and Justice Brown?

11 HONORABLE EMILY MISKEL: Okay. So where  
12 we left off was the discussion of this language just  
13 saying if you've already got final judgment, you can't  
14 open things by later on asking for a Certificate of  
15 Finality. So I agree that this is a good change, and  
16 this was meant to go in the full draft.

17 Let's see. What else is in here? Let's  
18 look at the proposed form certificate --

19 CERTIFIED STENOGRAPHER: The proposed  
20 what, I'm sorry?

21 HONORABLE EMILY MISKEL: The proposed form  
22 Certificate of Finality.

23 CERTIFIED STENOGRAPHER: Thank you.

24 MR. PHILLIPS: Before we do that --

25 MR. SMITH: Just -- it's on the form,

1 just --

2 MR. PHILLIPS: Okay.

3 HONORABLE EMILY MISKEL: Let me find the  
4 zoom here.

5 MR. PHILLIPS: Can I -- just one thing on  
6 that added thing about -- sorry, this is Rich Phillips.

7 HONORABLE EMILY MISKEL: Oh, yes.

8 MR. PHILLIPS: I mean, I -- I think it's  
9 important and it's good, but, like, we're still creating  
10 a situation where the judge -- although the court must  
11 not sign such a certificate, the court could still sign  
12 such a certificate and then somebody is going to have to  
13 ask the Court of Appeals to, like, dismiss the appeal;  
14 right?

15 HONORABLE EMILY MISKEL: Yes. And our  
16 hope was, under the new system, there's three ways to  
17 have finality, conventional trial, express finality  
18 language and a certificate. We figure that the first  
19 two are relatively easy to figure out, has there been a  
20 conventional trial, is there express finality language.

21 So even if the court erroneously signed a  
22 Certificate of Finality after one of those two things  
23 has happened, it's not as hard to figure out as the  
24 hidden series finality problem that we were talking  
25 about before.

1                   So, yeah, that's another problem here, is  
2 courts just signing wrong and incorrect stuff, is always  
3 going to be part of what happens; right? So the  
4 multiple judgments or judgments that conflict about  
5 whether they're final -- like, some of these human  
6 problems are always going to be with us.

7                   Yes?

8                   HONORABLE NICHOLAS CHU: I feel like  
9 the -- the wording of must not sign a certificate has to  
10 be tweaked because if those criterias are met, how do  
11 you close the loop of a motion and a response and --  
12 like, something -- like, would you just enter an order  
13 saying no action? Or -- you know.

14                  HONORABLE EMILY MISKEL: Yeah. So -- so  
15 one of the wording proposals was the court must deny the  
16 motion.

17                  HONORABLE NICHOLAS CHU: Yeah.

18                  HONORABLE EMILY MISKEL: Since this court  
19 can do these sua sponte, there might not be a motion.

20                  HONORABLE NICHOLAS CHU: Right, but if --  
21 I guess, this -- this assumes a world -- this part  
22 assumes a world where we put the language of finality  
23 in -- in the order, and so now there's a Certificate  
24 of -- of Finality request out there; right?

25                  Or if there's a -- I -- I think the "and

1 certificate" that has no effect part assumes a world  
2 where if the trial court erroneously signs a  
3 certificate, we wash that away. But what happens if a  
4 party requests and they're erroneous in their request or  
5 that it's already final?

6 That's -- it -- it just is kind of, like,  
7 closing the loop of there would be an open motion  
8 without some kind of ruling on that motion.

9 HONORABLE EMILY MISKEL: And commonly  
10 trial courts don't rule on all the motions that are  
11 filed in the court also.

12 HONORABLE NICHOLAS CHU: Yeah.

13 HONORABLE EMILY MISKEL: So -- because  
14 that is one difference being on the Court of Appeals, is  
15 they feel some kind of obligation to rule on every  
16 motion that's filed, which I don't understand, but. . .

17 HONORABLE NICHOLAS CHU: Yeah. It --  
18 it -- yeah. And also, like, I -- I don't know. It's  
19 just -- if they're requesting finality, how do you  
20 communicate to them other than an order, hey, it's  
21 already final, like, so I'm not going to do this?

22 HONORABLE EMILY MISKEL: I guess you could  
23 just deny the motion.

24 HONORABLE NICHOLAS CHU: Yeah. That --  
25 that's why I think denying the motion would be better,

1 but "must not sign" and "deny" are --

2 HONORABLE MELISSA ANDREWS: Any motion so  
3 that you cover the sua sponte problem?

4 HONORABLE NICHOLAS CHU: But if you sua  
5 sponte sign it, then it just wouldn't have any effect on  
6 it.

7 HONORABLE MELISSA ANDREWS: I'm just  
8 saying to cover this situation where there is no motion.

9 MS. HOBBS: So what we're -- or what we're  
10 trying to solve is -- I don't know what we're trying to  
11 solve, but one of -- one of the things that is a problem  
12 that we need to think about is if you have a judgment  
13 that is, in fact, final, whether erroneously so or not,  
14 and a subsequent certificate, we want to know which one  
15 controls; right? I mean, that's kind of what we're  
16 trying to do here.

17 So I think a certificate signed after such  
18 judgment shall have no effect solves that problem  
19 without the rest. If a judgment satisfying 301(c)(1) or  
20 (c)(2)(A) exists, a certificate signed -- any  
21 certificate signed after such judgment shall have no  
22 effect. Meaning if it's already final, then the  
23 certificate is just an anomaly.

24 HONORABLE EMILY MISKEL: Okay.

25 HONORABLE TOM GRAY: You could flip the

1 two clauses, last clause first, where it says a  
2 certificate signed after a judgment satisfying 301(c),  
3 yada, yada, such judgment has no effect.

4 MS. HOBBS: Such certificate has no --

5 HONORABLE TOM GRAY: Such -- yeah, such  
6 certificate. Thank you. Yeah.

7 HONORABLE EMILY MISKEL: So this was an  
8 earlier version of that phrase. So it just said the  
9 court must deny the motion instead of the court must not  
10 sign a certificate.

11 MS. HOBBS: I just don't know that you  
12 need anything about an action taken on anything.  
13 It's -- what we want is that the certificate is an  
14 anomaly; right?

15 HONORABLE TOM GRAY: Whether it's after a  
16 motion or --

17 HONORABLE EMILY MISKEL: So you could --

18 HONORABLE TOM GRAY: -- Sua sponte.

19 MS. HOBBS: Exactly. If you sua sponte --  
20 if a judge signs a certificate after he has what is  
21 already a final judgment, erroneous or not, that  
22 certificate has no meaning in the law.

23 HONORABLE NICHOLAS CHU: Well, the --  
24 here -- the problem --

25 MS. DAUMERIE: Everyone, can you remember

1 that Tammy is --

2 HONORABLE NICHOLAS CHU: Oh, sorry.

3 MS. DAUMERIE: -- is trying to take this  
4 down and not talk over each other and say your names?

5 Thank you.

6 HONORABLE NICHOLAS CHU: And, Lisa, to  
7 your -- your idea, the -- the -- the problem is, is in  
8 probate, guardianship and mental health civil commitment  
9 cases, we have multiple judgments and orders. And under  
10 this version of the rules, it requires us to issue a  
11 Certificate of Finality in all appeals.

12 The issue becomes we want to make sure  
13 that, along with the final trial of the merits but also  
14 on -- on these orders, if we just put the -- I'll say  
15 the Lehmann language on there, we want the clock to  
16 start.

17 Because if, for example, I do an order to  
18 sell real property, and I put the Lehmann language but I  
19 don't do the certificate, how -- without something like  
20 this, essentially somebody could come back two years  
21 later and request a certificate, start the clock, appeal  
22 an order that the property has now been sold. That's  
23 one example.

24 Another is the mental health cases. Like,  
25 there's some people that are committed for multiple

1 years but there are multiple orders, but their appeal  
2 period kind of has already ended but at some point they  
3 may decide, hey, I want to appeal and we kind of open up  
4 a can of non-final final orders.

5                   So there has to -- I -- I feel strongly  
6 that there has to be some kind of certificate not having  
7 an effect if a -- if -- a certificate not having with an  
8 effect if there -- other scenarios exist.

9                   And I don't know, Judge -- Justice Miskel,  
10 I think on judgment, that may need to change to  
11 "judgment or orders" to encompass those probate,  
12 guardianship and -- and mental health cases.

13                   HONORABLE EMILY MISKEL: Let me go back  
14 to. . .

15                   Would it -- let me ask you a question. So  
16 in a probate or guardianship or mental health case,  
17 where there may be multiple appealable orders, are those  
18 orders typically called judgments, or they're just  
19 called "order" and we just know they're appealable?

20                   HONORABLE NICHOLAS CHU: A lot of them are  
21 called orders, like order to approve inventory --

22                   HONORABLE EMILY MISKEL: The more I think  
23 about this --

24                   HONORABLE NICHOLAS CHU: -- or appraisal.

25                   HONORABLE EMILY MISKEL: -- we were trying

1 to put this -- to solve a separate probate problem -- so  
2 the task was figure out how to make more clarity about  
3 judgments. And one of the problems that causes us a  
4 lack of clarity is in these multiple-order proceedings,  
5 is this one that can be appealed or not.

6 So one of the ways we tried to add clarity  
7 was to say you always need a certificate in all of  
8 these, so that we don't have to conduct this research  
9 project.

10 But the more I think about it, the more I  
11 think this probate wrinkle, we're trying to shoehorn it  
12 into the wrong place, because we're using the word  
13 "judgment" instead of "order". We're saying Certificate  
14 of Finality when that's not really what we mean. We  
15 mean certificate of appealability.

16 And it makes me wonder, should we just  
17 pull this whole concept out and have it be its own rule  
18 maybe even in TRAP or something like that to -- to  
19 specifically deal with these multiple-order --  
20 multiple-appealable order process without transplanting  
21 this judgment finality framework onto the same tool.  
22 Does that make sense?

23 HONORABLE NICHOLAS CHU: Yeah. Because I  
24 think when Harvey initially contacted me about this,  
25 there was a discussion I kind of shopped around with

1 some folks in the Probate Bar and probate judiciary.  
2 And we had initially thought maybe a separate rule that  
3 may be a little bit cleaner on -- on some of this  
4 because we're kind of shoehorning some very specific  
5 things.

6 If that's the case, I think, then, on the  
7 first number of the rule, you say --

8 HONORABLE EMILY MISKEL: 301 --

9 HONORABLE NICHOLAS CHU: -- except for  
10 probate guardianship or other cases where there are  
11 multiple judgment proceedings or something.

12 HONORABLE EMILY MISKEL: Yeah, we could  
13 import --

14 HONORABLE NICHOLAS CHU: -- here's the --

15 HONORABLE EMILY MISKEL: -- import that  
16 language the rule and then have a separate rule for  
17 specifically --

18 HONORABLE NICHOLAS CHU: Yeah, like 301 --  
19 301(b) or something like that.

20 HONORABLE EMILY MISKEL: I -- I agree, or  
21 the -- yeah, 301(b) or the TRAP or something.

22 Because I think we ran -- so just  
23 background on our subcommittee discussion, we also ran  
24 into the same problem with the probate, guardianship,  
25 mental health tail wagging the dog too much, because as

1 we tried to build it in, there became separate  
2 references and every rule and multiple references. We  
3 finally got it down to this.

4 But I think we're still trying to, you  
5 know, put the triangle peg into the square hole. And  
6 the more I think about it, the more I think we -- we  
7 still should solve this problem because this is causing  
8 us a lot of lack of clarity on appeal about whether this  
9 can be appealed or reconstructing the record at the  
10 wrong time, maybe after plenary power has run or the  
11 judge -- deadlines have run.

12 So I still think it's a worthwhile project  
13 to tackle, clarity about these orders. I just don't  
14 know that I agree now that it belongs in this rule.

15 HONORABLE NICHOLAS CHU: Yeah. And my  
16 last comment on that would be the Supreme Court in  
17 February, in the estate of Wheatfield -- or Wheatfall  
18 kind of -- kind of changed some of that or kind of  
19 created some questions on that, so that it -- there is  
20 enough of a question amongst the Probate Bar that, like,  
21 we should probably have some kind of direct rule related  
22 to that.

23 But it's clear even from the opinion that  
24 probate, guardianship and mental health is just, like,  
25 this unique thing that probably needs a separate rule.

1 And I would suggest, if the court is taking suggestions,  
2 creating a subcommittee or a task force to just deal  
3 with that as a 301(b) kind of rule.

4 MS. GREER: Rich?

5 MR. PHILLIPS: Just since we're talking  
6 about this now, I've had a couple of these where we  
7 tried to appeal and it sure looked to us like it was a  
8 completion of a phase.

9 In fact, the -- the law is a mess on this.  
10 But I had one where what was left was heirship, an -- an  
11 heirship declaration, which, by statute, is its own  
12 phase, so we appealed the other thing, the preliminary  
13 appeals. And the Court of Appeals bounced us and said,  
14 no, it's still -- that's not the end of the phase yet  
15 because heirship has to be determined.

16 So one of my concerns about this  
17 structure, and just something to keep in mind if we do  
18 it as a 301(b), is unlike a final judgment and the final  
19 judgment rules, we still have the courts are out there  
20 sort of saying it's still only appealable if it actually  
21 is the end of a phase of the litigation, whatever that  
22 means.

23 And so you could, I think, still find  
24 yourself in a situation where you get the certificate  
25 from the trial court that says this is the end of the

1 phase of litigation, you can appeal it. And you go up  
2 to the Court of Appeals, and the Court of Appeals sua  
3 sponte says no, that wasn't the end of the phase of  
4 litigation, you shouldn't have appealed, go back and do  
5 it again.

6 I agree this needs to be addressed,  
7 because right now, everybody that practices in that  
8 area -- and I've done, like, this much of it -- you  
9 basically have to appeal because if it isn't appealable,  
10 the Court of Appeals will tell you that, but they may  
11 not tell you till you've briefed it and spent all the  
12 money. But if you don't appeal, they'll tell you in two  
13 years when you try to appeal it, it should have been  
14 appealed two years ago.

15 This is a -- it to be addressed because  
16 it's -- it's a -- it's an impossible -- impossible --

17 HONORABLE EMILY MISKEL: And right now,  
18 everyone is infuriated by the current system; right?  
19 Because parties don't want to do, have no clarity.  
20 Appellate courts are not necessarily probate and mental  
21 health and guardianship experts, so they're sifting  
22 through your records that are partially provided.

23 So our effort throughout this project was  
24 also if there's a question about finality, it makes more  
25 sense for the trial court to determine it before plenary

1 power runs than for the appellate court to determine it  
2 after deadlines have been blown. And so that's another  
3 feature to this system that we tried to make happen.

4 Yes, Quentin?

5 MR. SMITH: I just have a comment before I  
6 leave on the certificate itself, which is we have a  
7 place to make sure it has the parties subject to this  
8 Certificate of Finality, just because I'm worried about  
9 if somebody got nonsuited, then they wouldn't  
10 necessarily be party to the final judgment.

11 HONORABLE EMILY MISKEL: So what we were  
12 trying to do here -- it's possible we did not phrase it  
13 correctly -- was the -- the -- all of the dispositions  
14 that ended up adding up to everybody has been disposed  
15 will be listed here. So it would say maternal  
16 grandparents dismissed, aunt nonsuited; you know, mom  
17 and dad went to mediation, got an MSA.

18 Like -- and then so all of that, the  
19 nonsuit, the partial summary judgment dated  
20 September 4th, the settlement severance dated whatever,  
21 whatever, those -- each disposition would be listed  
22 there.

23 Would that answer your question? That --  
24 that would also tell you which parties were dismissed.

25 MR. SMITH: Not particularly, because I

1 guess if you're nonsuited, you're not necessarily a  
2 party to the final judgment. Like, you're nonsuited. I  
3 can still sue you later if it's a different transaction  
4 or occurrence or something.

5 HONORABLE EMILY MISKEL: Yes, but it  
6 resolved to you as a claim and party in this litigation.  
7 This doesn't change the current law; right?

8 MR. SMITH: I don't know if that's right.  
9 I don't --

10 HONORABLE EMILY MISKEL: This doesn't  
11 say that -- you know, this doesn't create a judgment  
12 against a nonsuited party. It just says the following  
13 orders, judgments, nonsuits or settlements or other  
14 dispositions --

15 MR. SMITH: Yeah, I was just hoping we  
16 could define who the parties would be that are subject  
17 to the final judgment.

18 HONORABLE EMILY MISKEL: I think that  
19 would be a lot. It sounds like -- it sounds like in  
20 this room we can't agree on who's a party to the  
21 judgment.

22 Yes?

23 MR. HUGHES: Going back a bit, part of --  
24 part of the -- and I -- I was the source of saying why  
25 in the final section we should give -- talk about

1 denying the motion altogether. If you go back to  
2 subsection (c), can we pull that up?

3 If a motion is filed, the judge has only  
4 two options. Either sign a certificate or sign an order  
5 saying what's left to be tried.

6 But what if the party filed -- and I --  
7 for want of a better term, a frivolous motion in order  
8 to stall execution, or to get an extension of time to --  
9 because they've blown their appellate deadlines? The  
10 judge should be able to say I'm going to deny the  
11 motion. I don't have to sign a certificate, and I don't  
12 have to tell you what's left. We already have a final  
13 judgment because it has the magic language that you're  
14 supposed to have. So I -- that's why I said that.

15 I think we also need something like  
16 subsection (g) to deal with the section where the judge  
17 for whatever reason signs a Certificate of Finality  
18 that -- and under the circumstance he shouldn't -- that  
19 he or she should not have signed, because we already  
20 have a judgment that meets the finality criteria that  
21 contains the magic language. I realize that could  
22 create a hardship for some people.

23 But also note that there's no deadline to  
24 file a motion for certificate. You could file it six --  
25 60 days after the -- the last order, you could file it

1 six months, you could file it a year, and that creates  
2 problems.

3 So I -- I -- I think we need -- we need to  
4 have something to deal with the issue that the judge --  
5 that there should be no certificate issued, and the  
6 judge shouldn't -- should be able to just outright deny  
7 it. And if a certificate that's, for want of a better  
8 term, flat wrong, has no effect to extend the deadlines.

9 HONORABLE EMILY MISKEL: And I will also  
10 say, in the beginning, you can only file a motion when  
11 there's no judgment satisfying (c)(1) or (c)(2).

12 So if you're good faith or bad faith wrong  
13 about it, right, then I don't think we're in a situation  
14 where we required the judge to do one of two things,  
15 which is either sign a Certificate of Finality or sign  
16 what's left.

17 MS. GREER: Justice Gray?

18 HONORABLE TOM GRAY: If the court is  
19 presented with a motion that it doesn't want to sign one  
20 of these, grant or deny, the court can just send a  
21 letter that says I'm not going to rule and mandamus is  
22 the remedy. But that wasn't what I raised my hand for.

23 What I raised my hand for was I would make  
24 this a lot easier on the trial judge and this  
25 certificate -- and we'll talk about the title in a

1 minute -- we have two sentences in it. The court  
2 determines that all claims and parties have been finally  
3 disposed, your first sentence as it exists.

4 Then chop down the last paragraph where it  
5 says pursuant to Rule 301A, this certificate establishes  
6 finality under Rule 301(c) as of the date it is signed.

7 And that could be a sua sponte order. It  
8 could -- or certificate or it could be as the result of  
9 a motion, and it eliminates the judge's requirement to  
10 go through and document every party that was added and  
11 how they were disposed. It just makes it easier.

12 HONORABLE EMILY MISKEL: We wanted the  
13 trial court to have to do that job, not the Court of  
14 Appeals. So this is a purposeful delegation to the  
15 trial court, you figure it out which things create the  
16 final judgment.

17 HONORABLE TOM GRAY: Well, I -- I --

18 HONORABLE EMILY MISKEL: So we can  
19 disagree whether we want that, but that was our express  
20 purpose, is --

21 HONORABLE TOM GRAY: Okay.

22 HONORABLE EMILY MISKEL: -- we want the  
23 trial court to be the one to figure out --

24 HONORABLE TOM GRAY: I --

25 HONORABLE EMILY MISKEL: -- which

1 dispositions --

2 HONORABLE TOM GRAY: I'll leave that up to  
3 the people sitting down at the big table.

4 And then we have the question about  
5 appealability versus finality. You -- in the break, you  
6 said that finality was purposeful title because that is  
7 what it is establishing. It doesn't say anything about  
8 appealability.

9 But yet back on the Rule, 301(c)(2)(A),  
10 one of the three requirements to get to that finality is  
11 that the judgment is determined to be appealable, and  
12 that's a statement that it required.

13 One, I don't know that that is necessary  
14 as a third element. I think there's only -- two would  
15 be required, it is final and it disposes of all parties  
16 and all claims.

17 Of course, a judgment can be final by some  
18 other means because all claims might not have to be  
19 reached for it to be a final judgment in one sense,  
20 particularly counterclaims or crossclaims that are  
21 obviated by others.

22 Anyway, the -- the point is, I would use  
23 finality -- excuse me, I would use appealability if  
24 that's what we are trying to do, is end it for purposes  
25 of appeal. You say it's not. Well, maybe we need to

1 change that language back up in 301.

2 HONORABLE EMILY MISKEL: Yeah. So I want  
3 to make sure I emphasize how different what we're doing  
4 is.

5 This is not just so we know when you can  
6 appeal. This is when your lawsuit is over and you are  
7 done with court. So we -- we legitimately mean your  
8 case is not final with a final judgment unless one of  
9 these three things happens.

10 So it's not a certificate of appeal.  
11 So -- so let's say you have the multiple-disposition  
12 thing. You've got your partial summary judgment, you've  
13 got your settlement agreement, yet your case will not be  
14 final until you get a Certificate of Finality, and the  
15 date the Certificate of Finality signed is the date that  
16 the judgment is signed in your case.

17 So it's not -- and so that also has the  
18 side effect of starting your appellate deadline, but  
19 it's not primarily for the purpose of appeal. Does that  
20 make sense?

21 I'm just saying that's the big change that  
22 we're proposing because that's weird compared to the  
23 current --

24 HONORABLE TOM GRAY: Well, I was just  
25 trying to make it, in effect, easier because this is

1 going to be a problem for trial courts.

2 And, of course, in my world, we would  
3 never have the need for one of these because I would  
4 write it the other way, Lehmann. But --

5 HONORABLE EMILY MISKEL: To your other  
6 question, the three magic words that it takes to be  
7 expressly final, we took those from Lehmann. Those  
8 aren't the only words that we could pick. We could pick  
9 some or all of them or totally different words.

10 So what I also heard you say was a  
11 proposal that instead of requiring the words final,  
12 disposes of all parties and claims and appealable, why  
13 are we requiring them to say the word "appealable,"  
14 could we do without and have two magic words instead of  
15 three? I think that would be a fine way to go, or we  
16 could have a magic sentence or we could have anything we  
17 want there.

18 So I agree with you. I am concerned about  
19 if there's a judgment that says this judgment is final  
20 and disposes of all parties and claims for which let  
21 execution issue and doesn't have the word "appealable"  
22 in it, then we say there's no final judgment.

23 HONORABLE TOM GRAY: I would actually  
24 change (A) to where it's -- the requirement only that it  
25 disposes of all parties and all claims, because that is

1 a final judgment and it is appealable if, in fact, it  
2 disposes of all parties and all claims. If you're  
3 trying to make this simple for anybody.

4 HONORABLE HARVEY BROWN: Comment?

5 HONORABLE EMILY MISKEL: Yes, go ahead.

6 HONORABLE HARVEY BROWN: Harvey Brown.

7 One of the advantages to requiring all  
8 three is it's going to jump out to the lawyer maybe  
9 easier or more readily than if you just have two.

10 I -- I understand your point, and it's a  
11 good point that it is more complicated and might miss  
12 one. Good point. But if you read one that says it is  
13 final, it disposes of all parties and all claims and is  
14 appealable, there should be, like, zero doubt.

15 Whereas we have at least one case that  
16 says if it just says it's a final, that's not enough.  
17 We've had cases that says if it says all relief denied  
18 herein is -- all relief requested herein is denied,  
19 that's not enough.

20 We've had the court say these three is  
21 enough. I don't think we've had the court say two of  
22 the three is or is not enough. I don't -- I just don't  
23 think the court has dealt with that yet. So we were  
24 trying to make it safe harbor for what the court has  
25 written so far.

1                   But you're right. It could be simpler,  
2 and -- and you're right about that. It's just a --

3                   HONORABLE TOM GRAY: Well, we had --

4                   HONORABLE HARVEY BROWN: -- question about  
5 more.

6                   HONORABLE TOM GRAY: Okay. Excuse me.  
7 We --

8                   HONORABLE HARVEY BROWN: And could I --  
9 could I comment one other thing about you -- what you  
10 said?

11                   Can you go back to the certificate for  
12 just a second, Justice Miskel?

13                   Your point about, you know, the -- it's  
14 going to be burdensome for the trial judge to have to  
15 fill it out and pull that stuff in, that was my first  
16 reaction too. But the motion itself requires two  
17 things: One, they have to list all those things in the  
18 motion itself; and second, they're supposed to provide  
19 the order itself.

20                   So all those things should be listed in  
21 the certificate. So it's just the judges signing it at  
22 the end of the day.

23                   Now --

24                   HONORABLE TOM GRAY: And what --

25                   HONORABLE HARVEY BROWN: -- will the

1 lawyers always do it? Probably not.

2 HONORABLE TOM GRAY: What is the effect of  
3 leaving a party out of the listing?

4 HONORABLE HARVEY BROWN: Well, if the  
5 party gets left out and they weren't disposed of, then  
6 it's not a -- well, it -- it is a Certificate of  
7 Finality, so it's final.

8 HONORABLE EMILY MISKEL: So things can be  
9 final but erroneous.

10 HONORABLE HARVEY BROWN: Yeah.

11 HONORABLE EMILY MISKEL: So much like the  
12 final law, which is that the final judgment purports to  
13 dispose of all parties and claims but a party or claim  
14 was, in fact, not disposed of, it's not interlocutory.  
15 It's just erroneous. So similarly, a Certificate of  
16 Finality that is wrong is final but erroneous.

17 HONORABLE TOM GRAY: Okay.

18 HONORABLE HARVEY BROWN: I do think it  
19 might be helpful in the rule itself where we say the  
20 movant has to provide an order to have language saying  
21 that the order must identify all the motions, nonsuits,  
22 etcetera.

23 HONORABLE EMILY MISKEL: I think that's --  
24 the motion must identify the disposition that  
25 resolved --

1 HONORABLE HARVEY BROWN: Yeah, I -- I  
2 misspoke.

3 HONORABLE EMILY MISKEL: -- all claims and  
4 parties.

5 HONORABLE HARVEY BROWN: I meant the order  
6 should list them. I don't want to make the judge have  
7 to handwrite them all over again or spend the time on  
8 it. If -- if they're in the motion, they can put it in  
9 the order. So I would say that the order should say  
10 that too.

11 The proposed certificate, in other words,  
12 should list, and I'd put the exact same stuff.

13 HONORABLE EMILY MISKEL: I'll make a note.

14 HONORABLE HARVEY BROWN: Also makes it  
15 easier for judges to sign sua sponte if the -- if the  
16 stuff -- no, you're wrong -- I'm wrong about that. That  
17 made no sense.

18 HONORABLE EMILY MISKEL: Okay. I made a  
19 note.

20 HONORABLE HARVEY BROWN: Thank you.

21 HONORABLE EMILY MISKEL: Where -- did  
22 anyone want to -- did we have more hands?

23 MR. PHILLIPS: Just --

24 HONORABLE EMILY MISKEL: Yes?

25 MR. PHILLIPS: And maybe you talked about

1 this. Why do we need the certificate to go into that  
2 level of detail?

3 Like, if you file a motion that explains  
4 all of that, what's the point of making the certificate  
5 include all of those things that have happened in the  
6 case all along?

7 HONORABLE EMILY MISKEL: So that would  
8 help the Court of Appeals and also the choices -- sign a  
9 certificate identifying the dispositions that resolved  
10 all claims and parties or identify the remaining claims  
11 or parties.

12 So that you have one place to look to know  
13 what were the dispositive pieces of paper or what's  
14 remaining.

15 We wanted the trial court to figure this  
16 out rather than reconstructing it on appeal. So we  
17 actually did want the trial court to list the -- the  
18 things that make up the hidden or series finality.

19 And that way, the parties can speak about  
20 it in the trial court before the deadlines start running  
21 rather than on the Court of Appeals after it's too late.  
22 Does that make sense?

23 MR. PHILLIPS: Well, once the court signs  
24 that order, if the parties want to beef about it, they  
25 will be doing it while the deadlines are running; right?

1 HONORABLE EMILY MISKEL: But --

2 MR. PHILLIPS: I mean --

3 HONORABLE EMILY MISKEL: -- so say --  
4 like, say I file motion --

5 MR. PHILLIPS: Right.

6 HONORABLE EMILY MISKEL: -- and I'm, like,  
7 here's two things that add up to a final judgment. And  
8 you say actually there's three or actually one of those  
9 isn't even correct. Then you're supposed to file a  
10 response saying actually there's four, not two or  
11 actually one of your two is made up, or whatever. And  
12 then the court can hash that out before signing the  
13 certificate.

14 MR. PHILLIPS: Right. So that's why we  
15 put it in the motion, but why does the order -- if it's  
16 in the motion --

17 HONORABLE EMILY MISKEL: So say you say it  
18 was two and I say it was four and the court --

19 MR. PHILLIPS: Then the court --

20 HONORABLE EMILY MISKEL: -- says yeah,  
21 it's final.

22 MR. PHILLIPS: Okay.

23 HONORABLE EMILY MISKEL: Does that make  
24 sense?

25 Yes?

1 HONORABLE PETER KELLY: Does the  
2 non-moving party waive the opportunity to object if it  
3 doesn't specify in the trial court?

4 You know, the moving party says these two  
5 issues are final. Non-moving party doesn't snap to it.  
6 Certificate gets issued. Does the non-moving party --  
7 can they raise that on appeal that, hey, actually, it's  
8 not a final judgment?

9 HONORABLE EMILY MISKEL: I don't know the  
10 answer. I'm trying to think of how it would compare to  
11 current practice regarding a motion to enter or a motion  
12 to modify a judgment or say if currently a party files a  
13 motion to modify a judgment and asks for an incorrect  
14 modification --

15 HONORABLE PETER KELLY: Right.

16 HONORABLE EMILY MISKEL: -- and the other  
17 side doesn't respond. Have they waived it? I don't  
18 know what the law currently is on that.

19 HONORABLE PETER KELLY: I don't know  
20 either. So --

21 HONORABLE EMILY MISKEL: Okay. Yeah,  
22 yeah, yeah.

23 HONORABLE PETER KELLY: -- it just -- just  
24 popped up and --

25 HONORABLE EMILY MISKEL: But I would

1     imagine it would be --

2                   HONORABLE PETER KELLY:  -- waiver is an  
3     issue, I guess.

4                   HONORABLE EMILY MISKEL:  -- the same -- I  
5     would imagine it would be the same solution as whatever  
6     the law currently says about that situation.  Because I  
7     don't think we would try to make new -- our goal would  
8     not be to have a new whole realm of appeals and  
9     appellate fighting as a result of the rule.

10                   Was there -- did I see any --

11                   HONORABLE TOM GRAY:  I -- I was going to  
12     say that it would make it an erroneous certificate.  And  
13     I would have thought that it was subject to the same  
14     non-waiver as a judgment, but maybe it's not.  Maybe the  
15     certificate is like a ruling on a motion or something  
16     that --

17                   HONORABLE PETER KELLY:  Or if the --

18                   HONORABLE TOM GRAY:  -- the judgment is  
19     what is appealable, not the certificate.

20                   HONORABLE PETER KELLY:  -- because it's  
21     the certificate --

22                   HONORABLE TOM GRAY:  That's wrong.

23                   HONORABLE PETER KELLY:  -- it's not a  
24     judgment --

25                   HONORABLE TOM GRAY:  Right.

1 HONORABLE PETER KELLY: -- and slightly  
2 different rules apply to judgments that -- I -- I don't  
3 know.

4 HONORABLE TOM GRAY: Oh, my God.  
5 Something else to appeal.

6 HONORABLE EMILY MISKEL: I was trying to  
7 see if it -- we never say the Certificate of Finality is  
8 the -- so -- okay.

9 So another thing we discussed was, why do  
10 we even need the Certificate of Finality? Why don't we  
11 require people to put all of their relief in one final  
12 judgment instead of allowing them to have it distributed  
13 between four different dispositions; right?

14 So another direction on this could be  
15 you're no longer allowed to resolve your case through  
16 partial summary judgment, a nonsuit, a severance,  
17 etcetera. You have to put it all in one document. We  
18 thought that would be worse and less easy to comply with  
19 and cause more problems for practitioners. So we  
20 thought certificate was better than a system where we  
21 say one final judgment means exactly one final judgment  
22 and no other pieces of paper.

23 Yes?

24 HONORABLE NICHOLAS CHU: I'll play devil's  
25 advocate on that.

1 HONORABLE EMILY MISKEL: Go ahead.

2 HONORABLE NICHOLAS CHU: I kind of like  
3 that idea of just one document saying here's the final  
4 resolution of the case, let me spell out everything, for  
5 people in the public to, like, see what happened in this  
6 case and then say, wait, what happened to this one  
7 party, like, he got partially summary judgment out.

8 Also in the days now of judicial  
9 accountability when we have to report to OCA our  
10 clearances and what constitutes a final judgment, I've  
11 been hearing from our clerks issues of, well, is this a  
12 final judgment that we report, or is this just a partial  
13 that we do not report to OCA?

14 It would be kind of helpful in those  
15 instances. That's probably more of a burden for -- for  
16 some folks, but it may clean up how we close out these  
17 cases.

18 HONORABLE EMILY MISKEL: I -- I think one  
19 of the issues with that is kind of a problem that's been  
20 brought up several times today, is that there were  
21 people knocked out at an earlier stage that are no  
22 longer with us at the end, so who's going to point that  
23 out at the stage -- do you know what I mean?

24 Because it's -- the two people who are  
25 left are not going to care what happened to other people

1 who aren't them. Do you know what I mean?

2 HONORABLE NICHOLAS CHU: Yeah. And I -- I  
3 feel like maybe the final judgment needs to recite the  
4 procedural history of the parties on that, like, these  
5 parties were knocked out on this date by summary  
6 judgment, this party was nonsuited, therefore --

7 HONORABLE EMILY MISKEL: So I think that's  
8 what this was meant to do.

9 HONORABLE NICHOLAS CHU: Yeah.

10 HONORABLE EMILY MISKEL: Right?

11 HONORABLE NICHOLAS CHU: But then that way  
12 that's all in your judgment that -- I don't know. I --  
13 I feel like the judgment then -- there's one document  
14 everybody can look towards to find action to send to  
15 collections or to do whatever, but I'm seeing a lot of  
16 faces that are shaking. It's easier for --

17 HONORABLE EMILY MISKEL: I think that --

18 HONORABLE NICHOLAS CHU: -- a judge to say  
19 this --

20 HONORABLE EMILY MISKEL: -- is a totally  
21 valid theory. In practice, the problem we're dealing  
22 with is that nobody is doing judgments right, and so a  
23 standard that requires even more of a high standard for  
24 judgments is going to frustrate people.

25 HONORABLE NICHOLAS CHU: Yeah.

1 HONORABLE EMILY MISKEL: But --

2 MR. HUGHES: I -- I understand the idea  
3 about what -- what you -- you -- you kind of want a --  
4 sort of like a detailed pedigree of what led to being a  
5 final judgment, but this is the difference between  
6 federal courts and state courts.

7 Federal courts, you have clerks to keep  
8 track of all of this docket who are trained differently  
9 than maybe in state court. You have law clerks, and you  
10 have judges who may have been there for a long time.

11 But in state court, the judge who may have  
12 been on the bench when this case got filed and for the  
13 first couple of years has left office and another judge  
14 has taken over. You have a change in clerks. In many  
15 counties, they have no law clerks.

16 I think a simple certificate is all that's  
17 needed. If we're going to require the judgment set out  
18 a pedigree, I think that's a burden that ought to be on  
19 the -- on -- on the -- on the lawyers to spell all that  
20 out.

21 And I think if the rule just -- we have a  
22 rule that says sign it after a -- after conventional  
23 trial, we're just going to -- it is final. Or if you  
24 have those three ones that are in 30 -- Rule 300, hey,  
25 then it's final.

1                   And I don't think a Certificate of  
2                   Finality -- it might be nice for the Court of Appeals to  
3                   set it all out, but to require that it said it all, I  
4                   think that's a burden on -- the burden best carried by  
5                   the lawyers who want the certificate and -- or who --  
6                   who draft the judgment in the first place.

7                   HONORABLE EMILY MISKEL: I think we -- do  
8                   we have -- yes?

9                   MR. OLDS: I -- I was going to add  
10                  something. What if someone got dismissed ten years  
11                  prior and then, you know, maybe there was a new judge on  
12                  the case and no one remembers how this one party who has  
13                  been fooling around out there got dismissed, so they  
14                  have to, like, go search and figure out, like, what if  
15                  they're --

16                 CERTIFIED STENOGRAPHER: I'm sorry. I  
17                 didn't hear what -- the end of your sentence .

18                 MR. OLDS: What -- what if they didn't  
19                 find that -- those records.

20                 CERTIFIED STENOGRAPHER: Thank you.

21                 HONORABLE EMILY MISKEL: So if that party  
22                 were appealing it, then they would bring the record, and  
23                 if that party is not harmed, then --

24                 MR. OLDS: But -- so what if the trial  
25                 judge says I'm not going to sign this until you've

1 assured me that this person was disposed somehow ten  
2 years ago, the lawyer can't figure it out, and the trial  
3 judge says I'm not going to sign this?

4 HONORABLE EMILY MISKEL: So I think then  
5 the court would identify the remaining claims or parties  
6 in a written order, which is you haven't shown me that  
7 this party was disposed of, I have no document showing  
8 that they have, so that remains open and then that could  
9 either be nonsuited, dismissed for want of prosecution,  
10 set for trial.

11 MR. OLDS: So if they were -- I mean, you  
12 might have a contested motion. Maybe a nonsuit --

13 HONORABLE EMILY MISKEL: So if there was a  
14 an order --

15 MR. OLDS: Yeah. What if they can't find  
16 the order? Like, this happened a long -- like, it's so  
17 long ago, you just can't find the order?

18 HONORABLE EMILY MISKEL: I mean, ten years  
19 ago is 2016.

20 MR. OLDS: I have a case that's 30 years  
21 old. I mean, all those records, I don't know where they  
22 are.

23 HONORABLE EMILY MISKEL: Did you have any  
24 other --

25 HONORABLE PETER KELLY: It was a comment I

1 made to Judge Salas during the break is when -- when --  
2 yes, occasionally it's a problem with finality of  
3 judgments. I don't know how often you encounter it in  
4 your court. It comes up periodically, but what I  
5 finally learned to do was, instead of spending a week of  
6 staff time, two days of my time trying to figure it out,  
7 I would do a limited remand to the trial court and say  
8 what's going on, figure it out, this is final, answer  
9 these questions.

10 And it seems like we're putting an awful  
11 lot of work to be done in every single case when it  
12 really doesn't come up that often.

13 HONORABLE EMILY MISKEL: Only in cases  
14 where people want a Certificate of Finality. Most cases  
15 are going to be resolved by a judgment with finality  
16 language or at trial.

17 HONORABLE PETER KELLY: If there's  
18 billable hours to be had, it will be sought, I think,  
19 and it seems like it's a lot of process of something  
20 that might not actually be necessary, and it's another  
21 billing opportunity for, oh, we've got to get that  
22 certificate even if you really don't need it.

23 And is there some way to restrict -- I  
24 mean, only in problematic cases would you need the  
25 certificate, or is there any -- some -- some restriction

1 on when it has to be done?

2 HONORABLE EMILY MISKEL: It only has to be  
3 done if you didn't put finality language in your  
4 judgment or you didn't have a trial.

5 HONORABLE PETER KELLY: That was just a  
6 little comment not -- not specifically on the rules  
7 but --

8 HONORABLE EMILY MISKEL: Yeah, but I mean,  
9 that's exactly the policy decision we're facing right  
10 now. There's no -- there's really no requirement on the  
11 test of the final judgments, and if it's wrong, we ask  
12 the appellate court to figure it out and figure out  
13 later whether somewhere someone has lost the right to  
14 appeal.

15 HONORABLE PETER KELLY: I -- I agree  
16 with --

17 HONORABLE EMILY MISKEL: So -- so the  
18 thing about the remand is by the time the appellate  
19 court would act to remand it, often what we're saying  
20 is, mmm, you did sign a final judgment but since the  
21 partial summary judgment resolved everything, that was  
22 after your plenary power expired and it was void; right?

23 So this would solve that problem because  
24 the judgment wouldn't be void yet because the  
25 Certificate of Finality would start the deadlines. Does

1 that make sense?

2 Because --

3 HONORABLE PETER KELLY: Yes.

4 HONORABLE EMILY MISKEL: -- even if you  
5 send it back and the judge is like, yeah, I signed that  
6 order on September 1st, that's my order. Well, what  
7 about this partial summary judgment on April 1st? I  
8 thought I had power, and that's why I signed it.

9 You know, you're still -- that's still an  
10 appellate problem to figure out if that was true or not.

11 HONORABLE PETER KELLY: Well, I agree  
12 generally. I mean, the general proposition, the burden  
13 should be on the trial court and, therefore, more  
14 immediately on the parties. The trial court isn't going  
15 to be drafting these things. Realistically, it will be  
16 the parties drafting for the trial court to sign.

17 I think the burden should go downhill to  
18 get that done before it goes up to the Court of Appeals  
19 to try to figure it out on an incomplete record or  
20 nobody in the trial court had to snap to actually get it  
21 done properly at the time.

22 HONORABLE EMILY MISKEL: Rich?

23 MR. PHILLIPS: So this, I guess, gets to  
24 the other concern I had, which is everything is done,  
25 the last claim gets dismissed by nonsuit. There's no

1 order. And four years from now, the plaintiff gets a  
2 new lawyer who says, hey, guess what? We could appeal.  
3 And now a case that everybody thought was final four  
4 years ago, under this rule, isn't final, wasn't final  
5 and now we're appealing a case that everybody thought  
6 was dead four years ago?

7 HONORABLE EMILY MISKEL: Yes, that's  
8 exactly the problem outlined in the memo, which is  
9 absent these three -- so the task was to provide more  
10 clarity about when a judgment is final.

11 The problem is, if you provide more  
12 clarity, then what we're trading is more things are  
13 final but people don't realize with, okay, we're more  
14 clear about what's final which means more things are  
15 left unfinal. So that's exactly right.

16 Or what could happen is, you know, people  
17 thought they were done and then it gets DWOP'd or  
18 whatever it might be, and then the DWOP is the, you  
19 know, finalization of the case.

20 MR. PHILLIPS: Yeah. Well, that requires  
21 a judge be actively policing their docket to DWOP  
22 things and --

23 HONORABLE EMILY MISKEL: Which under --

24 MR. PHILLIPS: -- that's -- that's not  
25 happening.

1 HONORABLE EMILY MISKEL: -- under SB 293,  
2 they definitely are now.

3 MR. PHILLIPS: Well, one would hope. But  
4 I -- I mean, I guess -- and -- and I understand what the  
5 request for the subcommittee's work was, but I think I'd  
6 just point out, I'm not sure that the scenario of a case  
7 coming back to life four years after everybody thought  
8 it was dead is a good trade-off for avoiding the  
9 situation where people who should have known that the  
10 case was final just didn't realize it.

11 HONORABLE EMILY MISKEL: Yes. That's the  
12 exact policy question before the committee today.

13 MR. PHILLIPS: Then I'm on the record to  
14 say I prefer where we are now than resurrecting cases  
15 four years from now that everybody thought were dead.

16 HONORABLE EMILY MISKEL: Judge Chu, yes.

17 HONORABLE NICHOLAS CHU: I'm going to pull  
18 a Tom here and throw a grenade and then. . .

19 Did -- did the committee think about an  
20 alternative to where keeping the current case law but  
21 creating, more or less, a certificate of appealability  
22 that -- I don't know how this would function -- I'm just  
23 kind of spit-balling here, but it would function like we  
24 would keep our current existing civil procedure  
25 structure of appealing, but then as an additional step,

1 once you get to the appellate court, you have to have  
2 some kind of document from the trial court saying yes,  
3 this was the final appealable judgment --

4 HONORABLE EMILY MISKEL: So --

5 HONORABLE NICHOLAS CHU: -- as kind of  
6 like a screening.

7 HONORABLE EMILY MISKEL: -- we did try.  
8 So our initial efforts were to try to recreate Lehmann  
9 to try to have a rule that's both more clear but also  
10 preserves this concept of if an order actually disposes  
11 of all parties and claims, then that may be the final  
12 order. The problem is, is it forward-looking or is it  
13 backward-looking?

14 So the difference with the Certificate of  
15 Finality is, say we realize, oh, my gosh, all of that  
16 added up to a final judgment as of April 1st, but now  
17 it's August and nobody realized it. With a Certificate  
18 of Finality, we have a clear explicit statement of  
19 finality, either conventional trial, finality language  
20 or a certificate. So the record reveals a clear  
21 statement of when the deadline starts.

22 If we did sort of a backwards-looking  
23 certificate of appealability, it would take some  
24 homework off the Court of Appeals, but it wouldn't solve  
25 the problem of nobody realized the case became final.

1 Because you would be, like, ah, yes, your case became  
2 final four months ago, everyone is out of luck, goodbye;  
3 right?

4 It wasn't really -- yeah. So I think both  
5 things are problems, the homework and going through the  
6 record and whose best place to do it, but also, is the  
7 deadline of the certificate the effective date or does  
8 the deadline -- or does the certificate recognize some  
9 prior event having happened?

10 And when we were trying to still keep  
11 things can become final implicitly, we couldn't get  
12 around it, if that makes sense.

13 HONORABLE NICHOLAS CHU: Yeah.

14 HONORABLE EMILY MISKEL: And, again, like,  
15 we were only, what, eight people. So I'm not saying  
16 there's no way to do it. We just didn't think of one.

17 HONORABLE NICHOLAS CHU: Yeah. And -- and  
18 I'm sorry, Rich kind of kicked into this thought of --  
19 of -- that it would be a seismic shift to -- on plenary  
20 power of -- if we didn't have a certificate but we did  
21 have the language as -- like, does the court have this  
22 plenary power for four years, five years.

23 HONORABLE EMILY MISKEL: Yes. If there's  
24 no expressly final document, right, the court's plenary  
25 power is live, no post-judgment deadlines have start to

1 run, no appellate deadlines have started to run. So,  
2 yes, that's the policy choice which you could either  
3 disagree or agree with.

4 HONORABLE NICHOLAS CHU: Yeah.

5 HONORABLE EMILY MISKEL: Yes?

6 MS. GILLILAND: So kind of go to Rich's  
7 point and question about, you know, we thought it was  
8 done and then four years later, somebody asked for the  
9 Certificate of Finality and it's resurrected, was there  
10 any discussion about a deadline for requesting this  
11 Certificate of Finality?

12 HONORABLE EMILY MISKEL: Yes, and the  
13 tricky part is what does that deadline run from?  
14 Because the whole point is we haven't realized that  
15 something is final yet. Like --

16 MS. GILLILAND: So even if we thought it  
17 was --

18 HONORABLE EMILY MISKEL: And people are  
19 chuckling because this is, like, impossible; right?  
20 It's a fair point and one that was raised in committee;  
21 right? If the federal rules have this 150-day backstop,  
22 let's have that. Okay. Where do we start the 150 days?  
23 Yeah.

24 Yes.

25 MR. SCHENKKAN: I -- I just -- this is

1 Pete Schenckan.

2 I -- I just wonder if we're over-thinking  
3 this for today. I mean, it -- it's clearly identified  
4 that there are tradeoffs, that there are going to be  
5 some problems that are either created or at least remain  
6 and perhaps maybe put in a different light that would be  
7 unfamiliar for a while in either direction. And yet,  
8 this looks like -- because we've made real effort to say  
9 what does count as final for appealability purposes and  
10 for other purposes and got a backstop of some type for  
11 at least people who think they may have a problem to get  
12 a solution for it, that the best thing to do is to go  
13 ahead with that, if the court -- if, of course, the  
14 court agrees that this is worth writing and see what  
15 happens.

16 Because then we get to see how often does  
17 it happen that all we've done -- or maybe not -- no, not  
18 all we've done but that one of the things we've done is  
19 have somewhat more situations of a case that everybody  
20 thought was gone, that rises -- you know, that's a  
21 zombie, it -- it reappears four years later, and it's  
22 just -- we're just going to have to see.

23 But I mean, this looks like it would make  
24 material progress on which you identified as the two  
25 priorities out of the four or five or whatever it was

1 possibilities that you could work on that were the top  
2 priorities. The -- this looks like it would improve on  
3 those. Then let's see -- see what happens.

4 HONORABLE EMILY MISKEL: I -- so I  
5 think -- if I could restate what you're saying. I think  
6 our purpose here today, we were asked to try to have a  
7 system that had -- provided more clarity about the  
8 finality of judgments.

9 Our options today are we could do nothing;  
10 leave it alone. We could have a version of this 301  
11 that we had up here before and just stop at codifying  
12 Lehmann; just codify Lehmann and do no more. Or we  
13 could have this whole system where we move to a system  
14 where things aren't final just because they've disposed  
15 of all parties and claims; there actually has to be  
16 something clear in the record that starts and  
17 establishes finality. And, like, that's a policy  
18 decision.

19 So maybe what I'm hearing you say is we  
20 need the court to reflect. Like we've provided, I  
21 hope --

22 MR. SCHENKKAN: Yes.

23 HONORABLE EMILY MISKEL: -- the bones of a  
24 functioning system to illustrate and test-drive what  
25 number three might look like, but tell us, like, do you

1 want to go forward down the number-three path, or are we  
2 just, like, codifying Lehmann, or are we not kicking the  
3 hornet's nest at all.

4 Is that --

5 MR. SCHENKKAN: Yes. That -- that's  
6 even better, because that's exactly right. You're --  
7 you're -- "we," if we vote to do this, are recommending  
8 to the court that they take a clear-headed look at those  
9 tradeoffs and decide, but the -- the reason you went  
10 down this road and got to the point where we voted yes  
11 for it is we think this is likely to net, have fewer  
12 really bad outcomes of people not understanding -- and  
13 maybe fewer total messes altogether, but at least net  
14 reduction in the highly prejudicial bad outcomes from  
15 not being able to know whether it's final or not.

16 HONORABLE EMILY MISKEL: Another point  
17 that Lisa made over lunch was it may be frustrating the  
18 Supreme Court that they're apparently constantly getting  
19 cases that -- and I know they are constantly getting  
20 them because we've seen, like, five opinions in the last  
21 six months that we've been working on this project.

22 So to them, it seems like there's  
23 constantly this high number of cases where we can't tell  
24 where a judgment is final. But they're not seeing  
25 petitions for review in the 1.9 million cases that

1 nobody had a question about it; right?

2                   So it's a selection bias problem in that  
3 the problem seems worse than it is because out of their  
4 docket of 50, seven involved that, which seems like a  
5 high percentage, but of all of the judgments entered  
6 from municipal courts of record on up in the state of  
7 Texas, like, a tiny, tiny fraction were confusing.

8                   So that's also something to consider when  
9 we think about a radical change to a system.

10                   HONORABLE MARIA SALAS MENDOZA: I think we  
11 should vote on the options. We've got --

12                   MS. GREER: Why don't we let John and  
13 Justice Brown make their comments, and then we'll take a  
14 vote?

15                   MR. WARREN: Okay. John Warren.

16                   MS. GREER: That's a great idea.

17                   MR. WARREN: Just -- just a reminder as  
18 we're going through it, we have to have finality,  
19 because when it comes to House Bill 1182 and 2384 as  
20 relates to dispositions, you don't want anything  
21 muddying the water on that end because that's just going  
22 to create more problems.

23                   HONORABLE HARVEY BROWN: Harvey Brown.

24                   I was thinking about the deadline, and I  
25 know we didn't come up with anything. And this may be a

1 stupid idea because I'm just throwing it off the top of  
2 my head, but I wonder if we could say something like  
3 within 150 days after the disposition of the last  
4 remaining defendant or -- or something that ties into if  
5 there's a nonsuit, if there's a partial summary  
6 judgment, something that's broad enough to take all  
7 those categories of this is the last thing, and with  
8 that last thing, now you've got 150 days. So you don't  
9 have the four-year problem that Rich identified because  
10 I do think that's a real problem to think about, the  
11 four years somebody files a certificate and nobody  
12 knew --

13 HONORABLE EMILY MISKEL: Sort of like --

14 HONORABLE HARVEY BROWN: -- some titles  
15 changed.

16 HONORABLE EMILY MISKEL: -- a rule of  
17 repose?

18 HONORABLE HARVEY BROWN: Yes. Yeah.  
19 Could -- could we do it in a -- a language that would  
20 pick up every type of last disposition?

21 HONORABLE EMILY MISKEL: Well, that's  
22 currently what we have, right, now is the 30 days after  
23 the judgment, the court has plenary power or you have,  
24 you know, plus 57 for a motion for new trial.

25 HONORABLE HARVEY BROWN: Mm-hmm.

1 HONORABLE EMILY MISKEL: You could just  
2 extend that to 150; right? Because essentially --  
3 because that already encompasses the last thing. Right  
4 now, it's 30 days after the last thing. You're saying  
5 150 days after the last thing.

6 HONORABLE HARVEY BROWN: Well, I'm saying  
7 150 days after the certificate. I'm adding a special  
8 certificate rule because of the problem Rich has  
9 identified.

10 Do you have an idea, Peter?

11 HONORABLE PETER KELLY: I'd say the  
12 problem is it gets -- starts getting circular; right?  
13 Say disposition of the last defendant. Well, the point  
14 is, there might be some defendant that wasn't disposed  
15 that everyone has forgotten about, which prevents it  
16 from being final.

17 HONORABLE HARVEY BROWN: Yeah.

18 HONORABLE PETER KELLY: So that's the  
19 whole --

20 HONORABLE HARVEY BROWN: You're right.

21 HONORABLE PETER KELLY: And it's precisely  
22 what Emily said, was, like, where do you start it  
23 from --

24 HONORABLE HARVEY BROWN: Yeah.

25 HONORABLE PETER KELLY: -- the last thing

1 everybody thinks is final or. . .

2 HONORABLE MARIA SALAS MENDOZA: Or the  
3 order or the judgment?

4 MS. GREER: Okay. Let's --

5 HONORABLE HARVEY BROWN: So do you think  
6 it would be helpful for the court to have maybe a vote  
7 on just two, kind of, broad categories, something  
8 like -- and let's set aside probate and assume we're  
9 going to --

10 HONORABLE NICHOLAS CHU: All right. Yeah.

11 HONORABLE HARVEY BROWN: -- do that as a  
12 separate pool --

13 HONORABLE NICHOLAS CHU: That's good --

14 MS. GREER: Yeah.

15 HONORABLE HARVEY BROWN: -- a 301B, that  
16 there will be either a Lehmann-like codification,  
17 something similar to 301 or a 301 and 301A with the  
18 modifications we've talked about.

19 HONORABLE EMILY MISKEL: So I have a --

20 HONORABLE HARVEY BROWN: Might that be --

21 HONORABLE EMILY MISKEL: -- friendly  
22 amendment.

23 HONORABLE HARVEY BROWN: -- helpful?

24 Yeah.

25 HONORABLE EMILY MISKEL: Okay. So I would

1 say the choice might be to modernize the -- I -- I'm not  
2 going to "do nothing" as a vote.

3 HONORABLE MARIA SALAS MENDOZA: I think  
4 there's a lot of people that --

5 HONORABLE EMILY MISKEL: We could -- we  
6 might stick with do nothing, but the other two, I would  
7 say, like, modernize the rule to codify Lehmann only;  
8 and then vote for the other option, option three would  
9 be shift to a system that requires express finality in  
10 the record. Or -- you know, we have one proposal here  
11 of how to do that, but things aren't final unless  
12 there's express finality reflected in the record.

13 HONORABLE HARVEY BROWN: So, in other  
14 words, you want to -- instead of saying something like  
15 301A, you want to say "express finality" is -- is --

16 HONORABLE EMILY MISKEL: Right. The  
17 content right now, things can become final  
18 automatically. And the system we proposed to increase  
19 clarity was things can't become final accidentally; they  
20 can only become final with an explicit step.

21 HONORABLE HARVEY BROWN: Pete?

22 MR. SCHENKKAN: Justice Miskel, make sure  
23 I understand what the friendly amendment here is --  
24 is -- is intended to do. It sounds like it's taking the  
25 work done on the proposed Rules 301 and 301A off the

1 table and trying to make it into a concept question?

2 HONORABLE EMILY MISKEL: Yeah. It was  
3 more like is -- is this even worth exploring at all,  
4 because it's such a sea change in the fundamental  
5 existence system of our system.

6 MR. SCHENKKAN: Okay. Well, then, I  
7 needed that -- the answer to that question as the  
8 predicate for my real question, which -- or -- or my no,  
9 not my question, my comment, which is, I think,  
10 precisely because of what we've seen happens when you  
11 try to talk about it at the big-concept level, you can't  
12 do that without seeing how far you can go at each  
13 concept.

14 And so I really think we to ought vote on  
15 the ones you've proposed, and -- and then you -- of  
16 course, the court can say, if the vote is, you know,  
17 anything more than a bare majority of people in the  
18 present room at the table, okay, well, we -- we'll take  
19 that into account in thinking whether we ought to do it  
20 at all but we'll still talk about the details, we can --  
21 can have a later conversation about that.

22 But I think unless we vote on it -- on --  
23 on the change concept with some specifics that have been  
24 pretty thoroughly vetted and -- and -- and crafted, it's  
25 too hard to understand. We're not helping them. If we

1 vote on what we've got proposed, propose it, and then  
2 let them take it from there and say "well, what about".

3 MS. GREER: Okay. Well, I think I'm going  
4 to do this in two stages. And overruling your  
5 objection, I am going to ask: What's the vote on we  
6 leave the rule as is? All in favor?

7 Okay. One --

8 MS. HOBBS: You mean the law as is?

9 MS. GREER: The -- the rule and the law.

10 MS. HOBBS: Do you mean --

11 HONORABLE EMILY MISKEL: Yeah, literally  
12 no changes to --

13 MS. GREER: No changes.

14 MS. HOBBS: No changes to anything.

15 MS. GREER: Right.

16 MS. HOBBS: Okay.

17 MS. GREER: Okay. All right. One in  
18 favor.

19 Opposed? Okay. I don't -- I won't count  
20 but everybody else.

21 HONORABLE TOM GRAY: Well, not everybody  
22 else. Some of us didn't vote.

23 MS. GREER: Oh, I'm sorry. We have an  
24 abstention.

25 HONORABLE TOM GRAY: Abstention.

1 MS. GREER: So --

2 HONORABLE TOM GRAY: A couple.

3 MS. GREER: Hands up. Hands up. I have  
4 to count.

5 13. 13 in favor.

6 And I guess -- do I get to vote if I'm --

7 MR. SCHENKKAN: You do if you say you do.

8 MS. WOOTEN: As the chair only if you're  
9 needed to break a tie.

10 MS. GREER: Okay.

11 MS. WOOTEN: Yeah.

12 MS. GREER: So I'm not the chair.

13 MS. WOOTEN: We'll, you're chairing right  
14 now.

15 MS. GREER: Well, that was why I asked the  
16 question.

17 HONORABLE HARVEY BROWN: Yeah, I think you  
18 have to identify that you voted and what your vote was,  
19 for the chair. I -- I do. I think, you know --

20 MS. GREER: Okay.

21 HONORABLE HARVEY BROWN: -- the chair  
22 99 percent of the time abstains.

23 HONORABLE NICHOLAS CHU: Actually --

24 MS. GREER: Okay.

25 HONORABLE NICHOLAS CHU: I think actually,

1 Roberts Rules of Order says -- I'm sorry. I'm, like, a  
2 real nerd on this.

3 MS. GREER: That's okay.

4 HONORABLE NICHOLAS CHU: Roberts Rules of  
5 Order says it's actually a myth that the chair doesn't  
6 have -- or abstains. It's only in the Senate -- US  
7 Senate that's explicit in the US Constitution. So  
8 we're -- that's where the myth comes from, so -- or --

9 MS. GREER: Okay.

10 HONORABLE NICHOLAS CHU: Sorry.

11 MS. GREER: Then I'm going to abstain.

12 The second -- the second part of the vote  
13 would be if we're in favor of a change, are we in favor  
14 of clarifying the rule to provide an absolute mechanism  
15 for identifying the final judgment so that the rule does  
16 all the work?

17 All in favor?

18 MS. ORTIZ: What's the alternative?

19 MR. PHILLIPS: Yeah.

20 MS. GREER: Oh, the alternative would be  
21 do something less than that.

22 MR. PHILLIPS: Like codifying language.

23 MS. GREER: Like codifying, yeah.

24 Codifying --

25 HONORABLE EMILY MISKEL: Just modernize

1 and codify Lehmann.

2 MS. GREER: Huh?

3 HONORABLE EMILY MISKEL: Just modernize  
4 and codify Lehmann, would be one option --

5 HONORABLE MELISSA ANDREWS: And Aldridge.

6 HONORABLE EMILY MISKEL: -- or this --

7 MS. GREER: And Aldridge, yeah.

8 HONORABLE EMILY MISKEL: -- would be the  
9 other option.

10 HONORABLE HARVEY BROWN: I have a  
11 question. Do we have to pick? Because I like -- I  
12 would vote for both. I would vote for the second.  
13 If -- if it doesn't pass, then I want something like --

14 MS. GREER: Okay.

15 HONORABLE HARVEY BROWN: -- the Lehmann  
16 language.

17 MS. GREER: Let's do this in baby steps  
18 then.

19 HONORABLE HARVEY BROWN: Okay.

20 MS. GREER: Okay. How many are in favor  
21 of codifying Lehmann and -- and Aldridge?

22 HONORABLE MELISSA ANDREWS: Aldridge. And  
23 the default judgment rule.

24 MS. GREER: And -- and the default  
25 judgment. But the probate is off the table. We're not

1 talking about the probate; okay?

2 HONORABLE HARVEY BROWN: Okay.

3 MS. GREER: Okay? Oh, I'm abstaining. I  
4 forgot.

5 13 in favor.

6 Opposed to that proposition?

7 Okay. So the next one is how many are in  
8 favor of going down this road, maybe not this particular  
9 proposition all the way, but the idea of making the rule  
10 do the work of identifying finality in the trial court?

11 Eight.

12 All opposed?

13 Four -- five opposed.

14 Okay. Did I give you the count for in  
15 favor?

16 MS. DAUMERIE: Yes.

17 MS. GREER: Okay.

18 HONORABLE HARVEY BROWN: And -- and I had  
19 proxy for in favor there.

20 MS. GREER: Oh, in favor, so --

21 HONORABLE HARVEY BROWN: Yes, Connie had  
22 to leave and I --

23 HONORABLE TOM GRAY: Could you add one to  
24 in favor of that last proposition, please?

25 Okay. We had a pre-approved proxy vote.

1 MS. DAUMERIE: In favor.

2 MS. GREER: So I think that -- I think  
3 that has given, hopefully, a lot of information to this  
4 discussion and we can probably move on from there, if  
5 that's okay. Because I do want to reach the third-party  
6 litigation funding before we leave. And I'd like to let  
7 everybody go at 2:15 so that if you want to attend  
8 Justice Enoch's portrait ceremony, you can be there.

9 So we will move on to that. And this is  
10 my report, another unusual thing that the presiding  
11 person is going to actually give a report. Let me pull  
12 this up.

13 We didn't get a chance to get a written  
14 report, and that's on me, but we did -- we did have a  
15 lot of really good discussion. And I want to be very  
16 clear that we are not -- what is not on the table is  
17 discussion over whether we're going to have a  
18 disclosure. What -- we voted against that. The Supreme  
19 Court has said they want us to prepare a rule, so that's  
20 what we're doing.

21 So the focus is not on whether -- whether  
22 this is a good idea but that we are going to think about  
23 what a required disclosure -- or not a required, a  
24 disclosure rule might look like for third-party  
25 litigation funding.

1                   So with that in mind, basically, you know,  
2 we -- we had that report that Robert Levy put together  
3 that was really very thorough. And I'm going to be  
4 updating that for the next meeting because there have  
5 been some updates. More -- more states are going to a  
6 statutory codification system of a disclosure-type  
7 approval rule.

8                   And there are a number of different  
9 approaches to this. And the -- we came up with -- we --  
10 we came up -- with -- with Jackie's help with five  
11 different ideas of what types of things we want to  
12 consider. So we thought it might be most productive for  
13 this group if we talked about those five considerations  
14 and got more feedback on how we might put together this  
15 rule.

16                  So I'm going to read them forward, and I'm  
17 not going to take any questions until I'm done and then  
18 they'll take them up in order; okay?

19                  So one, the -- the first one would be  
20 whether or not the rule is permissive. Like, in other  
21 words, is it going to be -- one of the proposals that we  
22 had in the 2024 -- '25 -- '24 memo, Robert's earlier  
23 memo, was to put it in the required mandatory disclosure  
24 rules. But different courts and jurisdictions have  
25 taken different approaches, and one thing we need to

1 consider is whether we should have a discretionary,  
2 not-in-every-case situation for third-party litigation  
3 funding.

4           Because to keep in mind, third-party  
5 litigation funding takes on different forms. It's not  
6 like it's a one-set product off the shelf. There are  
7 different ways that it works. And so in some cases,  
8 it -- it may not be -- it may not impact the parties or  
9 the parties don't even care.

10           So the question is, do we want to consider  
11 having a -- upon a showing of good cause or necessity or  
12 some other standard to require -- to -- to ask -- ask a  
13 judge to require a disclosure, or do we want to make it  
14 kind of mandatory? That's number one.

15           Number two, are we going to do the  
16 existence of -- of third-party litigation funding to  
17 everybody, all parties, possibly insurers, or is it  
18 going to apply to just one set of parties?

19           We need to -- if we're going to go down  
20 the road of the road -- excuse me, the road of the court  
21 making the decision on this, we have to kind of come up  
22 with an in-camera review process, because obviously, you  
23 know, I don't want to let the cat out bag until a  
24 decision has been made.

25           And in certain cases -- the fourth issue

1 is in certain cases only where it -- it -- are there  
2 certain categories of cases that we want to consider  
3 making either a mandatory or discretionary, of course,  
4 decision disclosure.

5                   And then the -- the fifth one would be we  
6 need to define what third-party litigation funding is.  
7 And that's -- that's going to be quite a challenge,  
8 because we don't want it to include funding that's not  
9 really at issue here, like a parent funding a child's  
10 litigation. You know, that -- that -- I mean, I --  
11 unless somebody completely disagrees -- and I'll hear  
12 about that soon -- that would be off the table in my  
13 mind.

14                   Or -- but, you know, that is one end of  
15 the spectrum. And the other end of the spectrum is the  
16 thing that a lot of the proponents of such a rule are  
17 worried about in third-party litigation, the funder is  
18 actually controlling the litigation and making decisions  
19 for the lawyers. So -- which is the -- the not-okay  
20 situation, and the query is would the disclosure of that  
21 information change the situation or not?

22                   But anyway, those are the five topics that  
23 we want to bring up. And before I do that, let's see if  
24 anybody -- Constance is not here. Jim, you're here and  
25 Harvey is here. Do you want to comment on any of these

1 before we put it out of the group?

2 MR. PERDUE: On -- on the global  
3 proposition?

4 MS. GREER: Not --

5 MR. PERDUE: I mean, not --

6 MS. GREER: Not on the global proposition.

7 MR. PERDUE: Yeah, I --

8 MS. GREER: We're not doing that.

9 MR. PERDUE: -- I'm fighting the ocean,  
10 so. . .

11 MS. GREER: I mean, I -- I -- I don't  
12 think it's productive.

13 MR. PERDUE: No, it's --

14 MS. GREER: It's kind of like with the  
15 business court --

16 MR. PERDUE: Yeah.

17 MS. GREER: -- when we -- when everybody  
18 was saying, no, we shouldn't have a business court.  
19 Well, that wasn't our job.

20 MR. PERDUE: Right.

21 MS. GREER: Our job was to get rules for  
22 it.

23 MR. PERDUE: Right.

24 MS. GREER: And now it's here. So  
25 welcome.

1 HONORABLE MELISSA ANDREWS: Well, then on  
2 this topic of --

3 MS. GREER: She knows this. She's a part  
4 of our subcommittee. She -- this is not new.

5 HONORABLE MELISSA ANDREWS: We'll just say  
6 on the topic, we do this already. We have -- we copy  
7 the Fifth Circuit's disclosure of interested parties  
8 form, and so we already -- we get disclosure of any --  
9 anybody who has an interest in the case, which is  
10 covering third final -- third-party financing. So we  
11 already have this information for all of our cases.

12 MS. GREER: Okay.

13 HONORABLE HARVEY BROWN: But you don't  
14 require disclosure of what the interest is; right? I  
15 mean, you require identification part. You don't want  
16 to see --

17 HONORABLE MELISSA ANDREWS: Just that they  
18 have an interest, yeah.

19 HONORABLE HARVEY BROWN: Just -- some  
20 courts are saying I only want to know if they control  
21 or I only want to know X. You just want to know who  
22 you're --

23 HONORABLE MELISSA ANDREWS: Well, we --  
24 that's what's automatically required.

25 HONORABLE HARVEY BROWN: Right. Okay.

1 MS. GREER: That's a really good point.  
2 And then, you know, another part is how far does it go?  
3 I mean, do you have to turn over the documents, the  
4 insurance policy so to speak?

5 Justice Miskel?

6 HONORABLE EMILY MISKEL: I was going to  
7 try to express that I think there are probably two -- at  
8 least two concerns. One is control over the outcome,  
9 and one is, sort of, a profit interest.

10 Because you said, oh, I obviously don't  
11 care if a family member is paying your bills, but they  
12 control the outcome. If mom is paying your bills in  
13 your divorce, mom is the one that needs to settle your  
14 divorce. Like, those are the worst cases to be on. But  
15 mom doesn't have a profit interest in your divorce.  
16 Nevertheless, she controls the outcome when she's  
17 draining her 401(k) to pay for it.

18 So I agree with you. I'm -- I'm not as  
19 interested if somebody is related by consanguinity or  
20 affinity in requiring disclosure of that. But let's not  
21 pretend that those aren't controlling the outcome of the  
22 litigation.

23 I think what we're more interested in is a  
24 profit interest in the litigation; would that be fair?

25 MS. GREER: I mean, I think that makes

1 sense. That's -- to me, I mean, but it -- these  
2 questions are for all of us to discuss. So I think you  
3 raise a very good point.

4 Let's go with Kennon and then Justice  
5 Kelly.

6 MS. WOOTEN: I think that there might be  
7 cases in which even the existence of a profit interest  
8 wouldn't justify disclosure of the identities of people  
9 funding the litigation.

10 And I say that because a profit interest  
11 may be if you end up with a recovery, I get my -- my  
12 fees compensated. Well, that's not like they're trying  
13 to drive the outcome. It's just I get reimbursed for  
14 what I gave you, and that's different from interest,  
15 other things that may exist in that relationship with a  
16 third-party litigation funder.

17 I -- I will say that this is something  
18 that we've battled recently in litigation, and the  
19 funders were having no control over the impact and it  
20 became this huge source of interest, even though there  
21 was no interest in those funders in doing anything other  
22 than contributing to a process, period.

23 And so it can lead to people not having  
24 access to justice, even if you identify the names as a  
25 mandatory nature. I think at the end of the day, judges

1 ought to be able to look at the circumstances to assess  
2 whether under the circumstances of the case, there is  
3 truly a need to know who's funding the litigation.

4 That's my view.

5 MS. GREER: Well, so let -- let's dive  
6 into the first one, which is whether or not we want  
7 this to -- we suggest that it should be mandatory or it  
8 should be permissive with the judge.

9 MR. SCHENKKAN: And can I ask a question  
10 about that?

11 MS. GREER: Sure.

12 MR. SCHENKKAN: I'm -- I'm -- my brain  
13 keeps catching on the word "permissive". By  
14 "permissive," do we mean for cause shown?

15 MS. GREER: Yes.

16 MR. SCHENKKAN: So it's conditioning.

17 MS. GREER: Well --

18 MR. SCHENKKAN: It's not permissive.  
19 It's -- the judge decides if we're going to have it as  
20 opposed to a flat rule that we'd always have it.

21 MS. GREER: Exactly. The --

22 MR. SCHENKKAN: Okay. Just --

23 MS. GREER: The -- the -- and we would  
24 have to decide what the showing would be.

25 MR. SCHENKKAN: Yeah.

1 MS. GREER: Because is it necessity, like,  
2 you know, to overcome work product or is it more like  
3 cause or what -- what -- what is it.

4 And Justice Kelly, I think you're next,  
5 and then Roger.

6 HONORABLE PETER KELLY: And touching on  
7 what Kennon said and I think is the topic here, that  
8 the -- if disclosure is a remedy to solve a problem,  
9 should -- what is the problem.

10 And my recollection from the last time we  
11 talked about it was, there are certain instances where  
12 the litigation funders exert such control over the  
13 litigation that it becomes unseizable, which would  
14 suggest that it's only necessary to have this disclosure  
15 if there is good cause shown, if there is reason to  
16 believe, if the defendants can demonstrate to the court  
17 that it's been rendered unseizable by the conduct of  
18 the litigation funders, or there is a likelihood that  
19 that is the case.

20 So if there is going to be this  
21 disclosure, it should be limited to those very rare  
22 circumstances where the case has been rendered  
23 unseizable by their participation.

24 I think it's not necessary. I think it's  
25 violative of the Constitution anyway. But if it's going

1 to be done, it has to be tailored to remedy that very  
2 limited ill, which is the only ill that I heard  
3 discussed at the last meeting.

4 MS. GREER: Okay. Roger?

5 MR. HUGHES: I usually run into -- or I  
6 used to usually run into this in personal injury  
7 litigation having to deal with medical bills. And when  
8 you have a case where you have a medical lienholder,  
9 they have to file their stuff someplace. So it's not  
10 like we can't find out what hospital has a lien on this  
11 case and what's the amount of their lien because they  
12 had to file that in the official records.

13 And the same thing goes if they -- if the  
14 plaintiff signs a note for his fees to the doctor, that  
15 will be in the medical records, and we can get it and we  
16 can find out that Dr. Schmidlap has -- has a -- you  
17 might say a lien or a subrogation interest or something.  
18 And usually if there's an insurance company involved, we  
19 find out that too because they hunt us down to let us  
20 know so we pay -- we'll pay them at the end. We don't  
21 have a problem with that.

22 The problem -- and it's winding its way  
23 through the courts now -- is factoring. And that -- and  
24 for those of you who haven't been exposed to the issue,  
25 what's -- what can go on in a factoring situation is you

1 have a company that basically -- it's a three-part  
2 agreement. The patient signs a note to the doctor or  
3 the hospital that they will be paid X -- signs a note  
4 for X -- you know, say, \$30,000 for this procedure.  
5 That may be -- the problem is that the -- the third leg  
6 of this stool is that the doctor and the hospital have  
7 signed an agreement with the factoring company that they  
8 will accept \$10,000, and the rest of the money will go  
9 to the factoring company.

10 So the question that's winding its way  
11 through, can -- this will be discovered on the issue of  
12 what's a reasonable fee when the -- when -- when the  
13 question in personal injury cases is what has the  
14 provider agree -- actually agreed to accept.

15 And, you know, the argument on one side  
16 is, well, we know what that is. That's the note for  
17 \$30,000. And the defendant goes, no, what they have  
18 actually agreed to accept and what the jury ought to  
19 know is they're only getting paid \$10,000. And the  
20 answer -- the -- the flip -- they're opposed to that is,  
21 no, they have -- they -- they have simply sold their  
22 account to somebody else.

23 And we'll see where the -- where the  
24 Supreme Court eventually ends up. I simply lay out the  
25 problem. That's already -- and the courts may solve

1 that issue about factoring bills for us.

2 I think the real thing is the third-party  
3 financing of -- you know, in other words, other  
4 litigation expenses, legal fees, experts, etcetera, and  
5 on that, you're right. I think you've laid out the  
6 issues already.

7 MS. GREER: Jack?

8 MR. CARROLL: I -- I may have -- not have  
9 been listening closely enough, but we voted on this last  
10 August, as I understand it, to not recommend. Is the  
11 court coming back to us and saying we -- we want you to  
12 propose some type of rule?

13 MS. GREER: Correct.

14 MR. CARROLL: Okay.

15 MS. GREER: Justice Brown?

16 HONORABLE HARVEY BROWN: Harvey Brown.

17 I do think it's important to identify what  
18 the problem is that we're trying to solve. Justice  
19 Kelly said it's the third party having not just control  
20 but so much control that it's messing up the settlement;  
21 right? It's -- it's preventing a case that otherwise  
22 would settle from settling.

23 I have -- in my reading about this, and  
24 I -- I read a lot of articles -- it was two years ago  
25 probably I read them all. It was not the destroying the

1 ability to settle. It was controlling the decisions  
2 that are made in the litigation itself. Do we hire this  
3 expert? Do we go this route? Do we make this argument?

4 So I think whether it's control or messing  
5 up a settlement are two different issues.

6 If it's control, it seems like to me that  
7 the disclosure should be about control. What does your  
8 agreement say, how much control they have, some --  
9 basically like an interrogatory in nature.

10 If it's messing up a settlement, I think  
11 that may be a rule that it sounds good on paper but  
12 doesn't do much because I don't think parties are -- are  
13 going to know that a third party is making the  
14 settlement impossible to reach, once there's a rule like  
15 this.

16 Now, right now, I suppose some plaintiff's  
17 lawyer might say in a mediation, well, I can't settle  
18 this case because, you know, I got this third party over  
19 here, they're saying X. They might have it now. But if  
20 they knew that they said those things, that's going in a  
21 motion, and it's going to open the door to this  
22 discovery. They're never going to say why they're not  
23 accepting the settlement. They're going to be silent as  
24 to the reasons why or they'll give other reasons why.

25 So I think we need to identify the -- the

1 interest that's at part -- or in play, and then if it's  
2 the unsuccessful settlement, I'm really not sure what  
3 the -- the court is hoping to accomplish by the rule.

4 MS. GREER: Well, I think -- I think it --  
5 I've heard the argument made that when you have tranches  
6 of funding and they're tied to certain deadlines, that  
7 information can be important to the other side because  
8 they want to know -- because they want to know where the  
9 pressure points are and where is the point at which the  
10 plaintiffs' lawyers are now -- or the plaintiffs are now  
11 underwater. You know, they -- they've run out of  
12 funding, and there's going to have to be negotiation  
13 with the funder to get more, meaning there's going to be  
14 a pressure point to try to get things settled.

15 On the flip side, that's information that  
16 they claim is -- could impact the decision-making  
17 process, because the pressure to get more money gives an  
18 indirect ability to control what happens at this phase.  
19 So that's part of the analysis. I mean, just in  
20 paper -- papers that I've read.

21 So -- but the -- but I'm not sure how the  
22 rule would really address that. But I -- to both of  
23 your point, we do need to identify what is the evil that  
24 needs to be cured here and -- so that we can create a  
25 rule that addresses it.

1 HONORABLE HARVEY BROWN: And may I?

2 Some would argue, and have argued in the  
3 past, that if it's just to find out when money is coming  
4 along so that you can say, okay, I'll settle you -- for  
5 you this date before you get this additional money and  
6 this additional interest, that that's not a public  
7 policy disclosure problem, that is the Defense Bar wants  
8 information they can use to force settlements at a lower  
9 number.

10 And so I think that's -- for a lot of the  
11 plaintiffs -- and -- and we don't do this, so this isn't  
12 our firm -- a lot of the plaintiffs think that's just a  
13 way to force lower settlements by getting information  
14 that has nothing to do with the lawsuit or who's making  
15 decisions about the lawsuit.

16 MS. GREER: Right. So the -- I'm just  
17 laying out the different issues.

18 Yes?

19 MS. GILLILAND: Sharena Gilliland.

20 There was mention of not being as  
21 interested in familial funding, like in family cases,  
22 but if that is a consideration at any point, Rule 145,  
23 the statements of inability to pay, we see -- we see  
24 those a lot in family cases. And I think the type of  
25 cases we're talking about with third-party funding

1 probably don't have statements of inability to pay being  
2 filed.

3 But if you were to get into wanting  
4 information about mom paying for the lawyer for this  
5 divorce, that could be a relevant place for those two  
6 concepts to cross.

7 MS. GREER: Yeah, that's a great -- that's  
8 a great point. And I -- I think we're just trying to --  
9 I've been trying in my mind to figure out where are  
10 the -- you know, the end points of the spectrum, because  
11 we're going to be talking about everything in between,  
12 and that gets very complicated.

13 Well, the second thing we talked about is  
14 do we want to know -- do we want to make it fair to  
15 everybody, if anybody has got third-party litigation  
16 funding. I mean, sometimes defense firms will use it to  
17 bridge payments and, you know, when receivables aren't  
18 coming in and things like that. Are we going to make it  
19 equal opportunity and possibly -- possibly insurers?  
20 Although, I -- I don't know that insurers necessarily  
21 have that, but basically anybody who's got an interest  
22 that would go on your form, do we need to have that  
23 disclosed?

24 Justice Miskel?

25 HONORABLE EMILY MISKEL: I was going to

1 say, I would like to hear more about how it's  
2 functioning currently.

3 HONORABLE MELISSA ANDREWS: We -- it -- we  
4 do it primarily for conflict purposes. We think if  
5 someone has an interest in the case, we need to know  
6 that for conflict purposes.

7 I -- I think -- we talked about this at  
8 one of our recent meetings. I don't think anyone of us  
9 has had any third-party financing cases, so it just  
10 hasn't really been much of an issue. But we would know  
11 if it was happening.

12 I mean, theoretically, you could have an  
13 investment with some investment fund that goes out and  
14 finances these, so you could technically have a  
15 conflict. So we -- we looked -- we adopted from it that  
16 perspective, and not from the perspective of worrying  
17 about who's controlling.

18 We haven't -- it hasn't had a chance to be  
19 implemented in a case with third-party financing.

20 MS. GREER: Well, and to your point,  
21 didn't you say Goldman Sachs was doing this?

22 MR. PERDUE: Well, my understanding is  
23 that there is a capital arm of Goldman Sachs and also  
24 perhaps with Blackrock, depending on what you read, that  
25 is providing capital to both parties, by the way.

1 And -- and it's interesting the business court has it  
2 for purposes of conflict because you -- and they haven't  
3 seen it because you would expect it to be in -- you  
4 know, in that setting.

5 But that's -- that's my, at least,  
6 understanding, is that you've got -- you have well  
7 capitalized people who see this as an opportunity to  
8 create more than 10 percent return on investment, and  
9 that's the capital that's -- that's in -- that's in  
10 issue.

11 MS. GREER: Okay. Roger, and then Justice  
12 Miskel?

13 MR. HUGHES: Would this -- would this  
14 extend to what I -- I politely call "grant of money"?  
15 Because I was involved in one case where the client  
16 obtained a grant for legal fees from a nonprofit with no  
17 strings attached. All they wanted to know was what was  
18 the nature of the cause and what particular claims we  
19 were advancing and whether it fit with the broad social  
20 goals, but they didn't ask for any money back and they  
21 didn't ask to have any control. So are we talking about  
22 that kind of stuff as well?

23 I -- I mean, I bring that up as -- as --  
24 because there are some nonprofits that will give grants  
25 with no strings attached as long as they think you're

1 advocating the kind of things we want advocated, but  
2 we're not going to tell you what to do, you don't have  
3 to pay us back.

4 MS. GREER: I mean, that's -- that's a  
5 fair question. All -- all of this is on the table --

6 MR. HUGHES: Okay.

7 MS. GREER: -- so. . .

8 Any more discussion -- oh, yeah, Justice  
9 Miskel, I'm sorry.

10 HONORABLE EMILY MISKEL: I was -- maybe I  
11 missed it. How do you define "interest in litigation,"  
12 or how -- how do you clarify who needs to disclose?

13 HONORABLE MELISSA ANDREWS: So I -- we  
14 stole the Fifth Circuit -- you know, the -- for those of  
15 you who do a lot of federal practice, there's the  
16 corporate disclosures and most circuits do. Fifth  
17 Circuit has a heightened standard. They -- they call it  
18 the certificate of interested parties, and so that's  
19 what we use. I don't think that there is a definition  
20 of interest in the -- in the action in there.

21 I think we are understanding to mean an  
22 interest in the outcome not just financial but any  
23 interest in the outcome because that's what we would  
24 need to know for conflict purposes. But I think  
25 probably parties are usually thinking financial.

1 HONORABLE NICHOLAS CHU: Just to kind of  
2 follow up Roger's line of thought, I -- I think some  
3 direction on, like, what do we mean by third party. I'm  
4 thinking now, like civil rights organizations that kind  
5 of cover fees for the attorney -- or take care of the  
6 fees for the attorneys and everything for folks that  
7 have these civil rights cases or legal aid or, you know,  
8 mom, like, where do we draw the line, or, you know,  
9 Goldman Sachs kind of person or entity.

10 So if -- it would be helpful to get  
11 direction, just for transcript purposes, on what kind of  
12 entity we're talking about and then tailor that rule, if  
13 we do a rule, on -- on those entities rather than create  
14 one thing that maybe then all of a sudden Volunteer  
15 Legal Services has certain disclosures and maybe that's  
16 not what we wanted to do.

17 MS. GREER: So -- and if -- it's -- it's  
18 hard to imagine a Volunteer Legal Services case in your  
19 court, but if there were, you -- you would expect  
20 Volunteer Legal Services to disclose that they have an  
21 interest in litigation --

22 HONORABLE MELISSA ANDREWS: Sure, because  
23 what if I'm married to someone who's a lawyer at  
24 Volunteer Legal Services? So I -- I think I would --  
25 but that's -- I mean, again, our purpose there is -- is

1 conflicts and not -- I think this is about something  
2 else that -- and if I could just say one thing about the  
3 grant point, we said no strings attached, but if you  
4 qualify for the grant by having your case be the kind of  
5 case they want to support, that might be something  
6 that's relevant. I mean, that might be influencing the  
7 case.

8 MS. GREER: Justice Miskel?

9 HONORABLE EMILY MISKEL: I think it would  
10 make total sense to have a -- one rule for nonprofit and  
11 a separate rule for everything else. Because first of  
12 all, if you have an advocacy group involved, they're  
13 probably not hiding it. It's probably, like, on the  
14 letterhead; right?

15 So -- but yeah, that would address grants,  
16 that would address advocacy groups, all of that. We  
17 could have whatever rule we wanted for nonprofits and  
18 then a rule for other, which would include anyone that's  
19 not a nonprofit who presumably has a pecuniary interest  
20 in something.

21 But that would help the waters from being  
22 muddied, to talk about the other rule with, oh, well,  
23 what about this good purpose and this nonprofit and it  
24 might be an easy way to distinguish between the two.

25 MS. GREER: Justice Brown?

1                   HONORABLE HARVEY BROWN: I like that idea,  
2 only I would tweak it to say -- I would have a rule for  
3 the for-profit and then the other category. And for the  
4 other category, I wouldn't just include nonprofits. I  
5 might include the mother, etcetera.

6                   So for-profit, some disclosure. Nonprofit  
7 or -- I didn't want to use that term, but the other  
8 category, I'm persuaded that just knowing the identity  
9 of that might be helpful for conference purposes, the  
10 spouse that works there. I hadn't thought about that.  
11 I think just knowing the name for those would be enough.

12                  MS. GREER: Okay. Let -- let's move on to  
13 the next because I want to make sure we get out of here.

14                  What about the idea of an in-camera review  
15 of -- assuming that the -- I think you have to assume  
16 that it would be the -- the judge-made decision on a  
17 case-by-case basis.

18                  Would -- would we do the court as -- would  
19 submit the agreement to the court for in-camera review?  
20 Would that be part of the process?

21                  I mean, I'm always worried that even if  
22 you submit it to -- for in-camera review, you might run  
23 into Rule 76a problems, and hopefully the Supreme Court  
24 is going to solve those very soon. But if not and we're  
25 still operating under the old system, you know, what do

1 we think about that?

2 Justice Gray? No grenades.

3 HONORABLE TOM GRAY: Tom Gray, since I  
4 failed to do that on any of my other comments.

5 The difficulty is talking about this  
6 somewhat in the abstract for me. Because in the  
7 extensive previous, there was discussion about a  
8 disclosure -- a mandatory disclosure of a summary  
9 existent of third-party funding. And there was a draft  
10 and I have it in front of me, and so it's making it hard  
11 for me to add to this.

12 But the concept for the in-camera, to me,  
13 comes in at the point where, yes, there is a third-party  
14 agreement, some type of required disclosure in every  
15 case that captures the concept of third-party funding,  
16 contingent upon a recovery or whatever. And then the  
17 other party gets to decide whether or not they want to  
18 try to compel production of the agreement, the document,  
19 the -- what is controlling this relationship considered  
20 third-party funding.

21 That gets -- would get submitted, in my  
22 mind, to the trial court to decide if there's any aspect  
23 of this agreement that the other side needs to be made  
24 aware of, and then could control how much or whatever of  
25 it, much like some insurance policies, subrogation

1 policies or whatever. You get into those areas of, you  
2 know, this isn't relevant to, you know, anything and  
3 it's not going to impact you.

4 And I -- the -- the thing that I'm  
5 thinking about -- of course, this is a criminal case as  
6 opposed to civil, but there are a lot of places -- and  
7 this is why I think funding may not be the right concept  
8 to think about but the GoFundMe accounts that are very  
9 prevalent now in all kinds of cases.

10 MS. GREER: Yeah.

11 HONORABLE TOM GRAY: A lot of those, you  
12 don't know who's providing the funding but -- it -- it's  
13 some other method. But if we're not looking at a draft  
14 to see if that even covers -- I don't know where to go  
15 with that kind of idea.

16 But in specific response to your question,  
17 we can -- the in-camera review of the actual agreement  
18 should be made like in-camera reviews of discovery now  
19 of -- by the trial court judge when compelled to do so.

20 MS. GREER: Rich?

21 MR. PHILLIPS: And just a small point.  
22 In-camera, we don't run into any -- sorry, Rich  
23 Phillips.

24 We don't run into any 76a problems.  
25 That's the whole point. Something submitted

1 in-camera is not a court record.

2 MS. GREER: And I --

3 HONORABLE MELISSA ANDREWS: Well, I don't  
4 think that's true. I think the rule specifically  
5 define -- specifically excludes for court orders  
6 documents submitted in-camera for review to determine  
7 whether or not it is confidential for -- for  
8 discovery --

9 MR. PHILLIPS: Really?

10 HONORABLE MELISSA ANDREWS: -- review,  
11 whether or not it's privileged.

12 MR. PHILLIPS: So maybe we need to tweak  
13 76a to allow that, but I mean, generally that's the  
14 point of in-camera, is that you're giving it to the  
15 judge, not to the clerk.

16 MS. GREER: Right. I understand that, but  
17 it -- it gets a little scary once it goes out of your  
18 hands.

19 MR. PHILLIPS: Right.

20 MS. GREER: Some things can happen.

21 MR. PHILLIPS: Just like with privileged  
22 documents too.

23 MS. GREER: Exactly.

24 Kennon?

25 MS. WOOTEN: I think in-camera review is a

1 very good idea if we're going to have this type of  
2 disclosure. There can be impacts on family  
3 relationships, friend relationships, etcetera, through  
4 disclosure of third-party funders.

5           And I don't think we can sit here and  
6 imagine all the potential impacts, but why risk them if  
7 a judge can look at the agreement and decide for him or  
8 herself this has zero to do with anything in the  
9 litigation, this is some other side issue that one party  
10 is trying to get at to exert control or impact  
11 settlement strategy, etcetera, etcetera.

12           So if there is going to be disclosure, I  
13 do very much think there should be an in-camera review  
14 stage so that the -- the judge can decide whether and to  
15 what extent that other side or other parties should know  
16 what's in the document.

17           MS. GREER: So is it fair to say that  
18 you're in -- in favor of a permissive situation --

19           MS. WOOTEN: Yes.

20           MS. GREER: -- where there would need to  
21 be some sort of showing before you even get to this  
22 point of disclosing --

23           MS. WOOTEN: Yes.

24           MS. GREER: -- identity or content?

25           MS. WOOTEN: Yes.

1 MS. GREER: Of the -- okay. And then I  
2 think Justice Miskel had her hand up and then Justice  
3 Brown.

4 HONORABLE EMILY MISKEL: So I looked up  
5 the Fifth Circuit Rule 28.2.1, which is the Certificate  
6 of Interested Persons. And to respond on the GoFundMe  
7 issue, part of their rule says if a large group of  
8 persons or firms can be specified by a generic  
9 description, individual listing is not necessary.

10 And that might also be something we  
11 consider that you could just disclose the general  
12 category of the funder, family member, charity, you  
13 know --

14 MS. WOOTEN: Friend.

15 HONORABLE EMILY MISKEL: -- GoFundMe.  
16 Exact -- yeah. And then we wouldn't necessarily have to  
17 list every specific name if the category itself is one  
18 that people don't care about.

19 And if private equity is listed, you might  
20 be more concerned. I'm just being facetious.

21 MS. GREER: Okay. Go ahead -- I was going  
22 to just move on to the next one, if that's okay.

23 Do we want to limit this rule to certain  
24 types of cases or just make it case-by-case? Certain  
25 categories of cases, you know, personal injury, wrongful

1 death, property damage versus commercial?

2 Justice Gray.

3 HONORABLE TOM GRAY: Tom Gray.

4 Everything. I mean, if you're going to  
5 open the door and it's going to be part of the  
6 disclosure, that -- as I said previously, it sounds like  
7 from -- anecdotally, there are not that many cases that  
8 are going to be impacted by litigation funding. And if  
9 there's just some type of required disclosure that is a  
10 high-level summary of this type of conduct or nature or  
11 whatever you want to call it, most of the time, that  
12 required disclosure is going to be -- is the third-party  
13 funding, no, or describe the summary of third-party  
14 funding, none. And --

15 MS. GREER: So you're in favor of a  
16 mandatory disclosure?

17 HONORABLE TOM GRAY: I think that's what  
18 we're required to --

19 MS. GREER: No.

20 HONORABLE TOM GRAY: -- address. I -- I  
21 haven't seen the referral, so I don't know.

22 MS. GREER: Oh, okay.

23 HONORABLE TOM GRAY: But --

24 MS. GREER: No, no, we're -- we're --  
25 everything is on the table. It's -- you know, we're --

1 we're looking at all the different options. So --

2 HONORABLE TOM GRAY: If -- okay. If -- if  
3 you don't have some type of mandatory disclosure of it,  
4 then you don't have disclosure at all. Because if I --  
5 as a defendant, or even as plaintiff, if I've got to  
6 find out that the other side has got it, I already know  
7 it by the time I need to know it. It -- it's -- it's  
8 circular.

9 If -- if you're going to have some  
10 disclosure of this, it's going to have to be mandatory.  
11 I mean --

12 MS. GREER: Justice --

13 HONORABLE TOM GRAY: -- why would you do  
14 voluntary? I mean, I --

15 MS. GREER: It's not --

16 HONORABLE TOM GRAY: -- walk in --

17 MS. GREER: It's not --

18 HONORABLE TOM GRAY: -- and say, oh, by  
19 the way, you know, somebody is funding this and they're  
20 your brother-in-law.

21 MS. GREER: It's not mandatory versus  
22 voluntary. It's mandatory versus permissive, but with a  
23 judge -- versus a judge may call as to whether there's  
24 going to be disclosure.

25 HONORABLE TOM GRAY: Okay. So in other

1 words, I would have to file a motion to find out?

2 MS. GREER: Right.

3 HONORABLE TOM GRAY: So you're going to  
4 drive up the price of litigation to get a mandatory --  
5 or what you could mandate and it would be available in a  
6 few cases. So, yeah, I guess I'm in favor of  
7 mandatory -- if -- if we're going to go down this path  
8 of proposing rules, I -- it would be mandatory.

9 MS. GREER: Justice Brown, you're --  
10 you're next, and then Justice Miskel.

11 Did somebody else raise their hand? Oh,  
12 Pete.

13 HONORABLE HARVEY BROWN: The -- the  
14 problems that I've read about are in big cases, so I  
15 think there should be level three but all types. I  
16 wouldn't do it for the small cases.

17 MS. GREER: That's a good point. I hadn't  
18 thought about that. That's a good point.

19 Justice Miskel --

20 HONORABLE EMILY MISKEL: I'm --

21 MS. GREER: -- and then Pete and then  
22 Roger.

23 HONORABLE EMILY MISKEL: I'm legitimately  
24 requesting information on this. What case types are the  
25 litigation funders taking on? Is it only tort cases?

1 Is it only contingent fee cases? Is it -- is there  
2 anything that we could say, oh, this is usually in this  
3 industry?

4 MS. GREER: I've seen it in a lot of  
5 different contexts.

6 HONORABLE EMILY MISKEL: Okay.

7 MS. GREER: It's just -- commercial cases,  
8 tort cases, etcetera.

9 Roger? Oh, no, it's Pete. I'm sorry.  
10 Pete.

11 MR. SCHENKKAN: Yeah.

12 MS. GREER: I apologize.

13 MR. SCHENKKAN: I know we're -- at this  
14 point you're just trying to get the lay of the land out,  
15 and -- and so this is in that spirit.

16 It seems to me that if one felt this was  
17 necessary -- in fact, there's a Fifth Circuit rule and  
18 procedure for it suggests that's a plausible notion, we  
19 should have a mandatory disclosure of economic interest  
20 in the outcome of the case for conflicts purposes for  
21 the court, and perhaps in some cases for arguments about  
22 the -- the lawyers are conflicted out or some other  
23 reason. But at -- at that level, it seems to me -- and  
24 perhaps limit it to level three cases -- you can have a  
25 mandatory disclosure of an economic interest.

1 I would pause to the question whether --  
2 you talked about the -- being married to the -- to the  
3 lawyer who's working for the legal aid, I just don't see  
4 that. I don't understand how that can rise to the level  
5 of conflict for the judge to where the judge can't sit  
6 in the case where somebody else in the legal aid office  
7 is representing some private person.

8 That -- that -- that seems a stretch to  
9 me. I -- but as you say, we're just brainstorming at  
10 the moment. Maybe there's a role to stretch it further,  
11 but I think if you can keep the mandatory thing to an  
12 economic interest, that's a fair proposition and it  
13 is -- intrinsically --

14 MS. GREER: Well, you know, that brings --

15 MR. SCHENKKAN: -- covers all sides to the  
16 litigation. Doesn't matter whether you're a plaintiff  
17 or a defendant or an intervenor or whatever. It's all  
18 for the purpose of making sure the judge knows I can --  
19 can be presumed to be impartial in doing my job as a  
20 judge.

21 The next layer in -- in terms of should  
22 there be something that you keep calling permissive --  
23 and I don't really like that. It's conditional.

24 MS. GREER: Conditional.

25 MR. SCHENKKAN: It's for cause --

1 MS. GREER: That's better.

2 MR. SCHENKKAN: -- for cause shown, and it  
3 is going to require somebody making a motion saying I  
4 say we need to know more. And I think that ought to be  
5 for control and -- and only for control.

6 And then you have the question of what if  
7 the person who is called upon to say that says no  
8 control? And then you have a dispute about what -- is  
9 it really no control, and then I think you are talking  
10 about let me see the documents and that's going to be in  
11 check.

12 MS. GREER: You know, you raise an  
13 interesting point, because I have never in a Fifth  
14 Circuit disclosure disclosed the insurance company who's  
15 paying the bills or might have to pay the judgment. But  
16 under -- are people disclosing insurance companies in  
17 their --

18 HONORABLE MELISSA ANDREWS: I think so,  
19 and I -- I would think they would qualify. I mean --

20 CERTIFIED STENOGRAPHER: I'm sorry. Can  
21 you speak --

22 HONORABLE MELISSA ANDREWS: I'm so sorry.

23 CERTIFIED STENOGRAPHER: -- speak up a  
24 little bit? No worries.

25 HONORABLE MELISSA ANDREWS: Melissa

1 Andrews.

2 CERTIFIED STENOGRAPHER: Yes, mm-hmm.

3 HONORABLE MELISSA ANDREWS: I think so,  
4 and I would think they would be someone with an interest  
5 in the case who would -- who would be disclosed.

6 I mean, again, what if -- what if my  
7 husband is head of legal department of -- I mean, I  
8 don't often have conflicts, and I think most conflicts  
9 rules are for things that aren't necessarily going to  
10 happen a lot but it just does seem like it could happen.

11 But, again, I don't think the purpose of  
12 all this is about conflicts.

13 MS. GREER: Right.

14 HONORABLE MELISSA ANDREWS: I think you  
15 guys are after something different, so you know, my  
16 business --

17 MS. GREER: All right. And I think Roger  
18 was going to go, then Jack, then Judge -- oh, yeah. I  
19 think we're going to have to -- I'll tell you what.

20 Why don't we continue the conversation --  
21 you know, email me, and I'll make sure that the  
22 committee gets your -- your comments and thoughts. But  
23 otherwise, we're going to miss the portrait ceremony,  
24 and as fascinating as this is, I hate to do that to  
25 Judge -- Justice Enoch.

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So we are adjourned.

(Proceedings adjourned at 2:21 PM.)

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**REPORTER'S CERTIFICATION**

MEETING OF THE

SUPREME COURT ADVISORY COMMITTEE

\* \* \* \* \*

I, TAMMY POZZI, Certified Shorthand  
Reporter, in and for the State of Texas, hereby certify  
that I reported the above meeting of the Supreme Court  
Advisory Committee on the 10th day of September, 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 \$1,977.50, which was paid or  
will be paid the The State Bar of Texas.

Given under my hand and seal of office on  
this the 18th day of October, 2026.

/s/Tammy Pozzi

**Tammy Pozzi, Texas CSR 5629**  
Certificate Expires 10/31/27  
Bulverde, Texas  
(210) 279-5810