

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

* * * * *

MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

August 11, 2017

(FRIDAY SESSION)

* * * * *

Taken before *D'Lois L. Jones*, Certified
Shorthand Reporter in and for the State of Texas, reported
by machine shorthand method, on the 11th day of August,
2017, between the hours of 8:58 a.m. and 4:19 p.m., at the
State Bar of Texas, 1414 Colorado Street, Room 101,
Austin, Texas 78711.

INDEX OF VOTES

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

<u>Vote on</u>	<u>Page</u>
Judges' use of social media	28,604
Judges' use of social media	28,606
Proposed Amendments to Code of Judicial Conduct & Policies on Assistance of Court Patrons	28,677
Proposed Amendments to Code of Judicial Conduct & Policies on Assistance of Court Patrons	28,677
Rule 145	28,709
Rule 145	28,739
Rule 145	28,740
Rule 145	28,741

Documents referenced in this session

- 17-13 Judges' Use of Social Media (Proposal), 8-8-17
- 17-14 Code of Judicial Conduct-Pre-2002 and Current Canon 5;
Canon 3B(10)
- 17-15 Rules of Engagement - Texas Bar Journal article
- 17-16 ABA Formal Opinion
- 17-17 TAJC Report Amendment and Policies, 6-6-17
- 17-18 TAJC Proposed Amendment to Code of Judicial Conduct with
Combined Exhibits, 5-2-16
- 17-19 Memo on Suggested Changes to TRCP 145, 4-23-17
- 17-20 Subcommittee Report on Amendment to TRAP 24, 7-20-17
- 17-21 Subcommittee Report on TRAP 11, 7-20-17

--*-*

1
2 CHAIRMAN BABCOCK: Welcome, everybody. Glad
3 that you could get here today. Changing our venue from
4 the TAB to the State Bar, a nice change of pace. So
5 without further adieu, we will get into comments from
6 Chief Justice Hecht. If he's ready.

7 CHIEF JUSTICE HECHT: I'm ready. Well,
8 since we met June 9th the Court again cleared its docket
9 of active argued cases.

10 CHAIRMAN BABCOCK: Kind of proud of that,
11 aren't you?

12 CHIEF JUSTICE HECHT: We are. It's a team
13 effort, and it's three years in a row, and I think we're
14 getting the hang of it. In June the Court made some
15 nonsubstantive clean-up changes in MCLE rules, nothing of
16 much significance there, primarily addressing procedures
17 for requesting inactive status or exemption and just
18 conforming the rules to existing practices. We also
19 joined the Court of Criminal Appeals in making some
20 changes in Rule 4.6 of the appellate rules concerning the
21 situation when a criminal defendant has not received
22 notice of the trial court order on a motion for forensic
23 DNA testing. That rule was supposed to take effect
24 September 1st, but the Court of Criminal Appeals has
25 delayed the rule in order to consider public comments.

1 We also made some nonsubstantive clean-up
2 changes along with the Court of Criminal Appeals in TRAP
3 Rule 33.1. In July, the Court created a task force
4 required by House Bill 7 to review the rules on the time
5 for motions for new trial, appeals, and the preparation of
6 the record in parental rights termination cases. This has
7 just been an intractable problem over the years, not to go
8 into it in much depth, but some years ago the Legislature
9 to speed things along in these cases imposed very strict
10 deadlines on post-trial procedures, and the problem then
11 was that appointed counsel in those cases did not want to
12 continue to serve after the trial of the case. They
13 didn't want to serve on appeal, and so frequently counsel
14 was not appointed right away, and the ball got dropped,
15 and the appeal didn't get filed on time, and there were
16 very serious consequences. Basically you lost if you
17 didn't file the appeal on time, which then raised
18 ineffective assistance issues and constitutional issues,
19 which got to us eventually, and so the procedures got
20 modified.

21 Then the Legislature took most of them out.
22 Now they were going to put most of them back in again this
23 time, but they -- we suggested to them that a task force
24 of lawyers and judges who do these cases all the time
25 would be better suited to look at the procedures. So

1 that's what we did, and also people -- Judge Rucker, Dean
2 Rucker out in Midland, is the chair of the task force, and
3 he's very familiar with this litigation and then other
4 appellate experts like Lisa Hobbs and Richard Orsinger are
5 on the task force, and their recommendations are due in
6 December.

7 And another thing we've noticed at our Court
8 is back in the Nineties I don't know that we got six
9 parental rights termination cases a year, and now we get
10 six a week, and there's just a lot of them, and hardly any
11 of them have any merit, but, of course, all of them the
12 issues are critical. So they take a lot of time, but more
13 importantly, they delay the process of trying to get the
14 children in a settled position, and a lot of these
15 children are young, so, of course, that is very bad when
16 you can't move them to some kind of finality. So we hope
17 the task force will come up with some good suggestions in
18 those cases.

19 Then you'll recall in March the committee
20 discussed a State Bar rule, Article IV, section 5(A)(3),
21 which has to do with the qualifications of -- for officers
22 and directors of the State Bar and provides that a lawyer
23 who has ever been suspended or disbarred cannot be an
24 officer or director of the State Bar. So this committee
25 considered that. Nina Cortell gave the committee report.

1 We debated it for more than an hour and asked the bar
2 again for their view on the subject. The president of the
3 bar and the immediate past president both reviewed the
4 transcript of this meeting. They told me to congratulate
5 you on your thoroughness and your detail in considering
6 all of the various possibilities, and they asked me please
7 never to put them on the committee, so we'll try to honor
8 that. But they have decided after discussions among
9 themselves and looking at the transcript to change the
10 rule to preclude lawyers who have been disbarred from ever
11 being officers or directors, but only -- for suspension
12 only if the suspension has been within 10 years of the
13 lawyer putting himself forward for candidacy as an officer
14 or director. So that's what they're going to recommend to
15 their board, which meets in mid-September, and then that
16 recommendation will be coming to the Court. So I just
17 wanted to report that the ball has moved down the field
18 since our discussion in March, and I think from the bar's
19 point of view at least they'll come to -- they think that
20 some of the changes that we discussed are appropriate.

21 On legislation, the Legislature passed House
22 Bill 351 and Senate Bill 1913, and the Governor signed
23 them, which changed the way fines and fees are collected
24 in basically traffic cases, traffic-like misdemeanor
25 cases. We have 1,294 municipal judges in Texas. We have

1 806 JPs. That's an even 2,100 judges who handle about
2 seven million of these cases a year. They collect a
3 little over a billion dollars in fines and fees, so this
4 is a monster operation, and here as well as across the
5 country there have been problems with trying to impose
6 fines and fees on indigents who just can't pay them and
7 jailing them when they can't. So these two bills --
8 they're very much the same -- change those procedures.

9 The Judicial Council last year changed the
10 collection improvement program rules to make headway on
11 these same issues, and so I -- the -- there was some
12 antipathy toward these changes among the judges at first,
13 but now at least the leadership and I think pretty well
14 through the ranks the judges have embraced these changes,
15 and I think they'll be very good.

16 Justice of the Peace Gravell in Georgetown
17 was on the task forces from time to time that worked on
18 these issues, and he has had the new procedures in place
19 even ahead of the legislation taking effect for the last
20 several months, and he reports that a waiver of fines and
21 fees for indigents is up 23 percent. They're waiving it
22 in 23 percent more cases. Jail credit is down 68 percent,
23 so fewer people are going to jail. Community service is
24 up 188 percent. Payment plans are up 317 percent, and
25 revenue is up 4 percent.

1 CHAIRMAN BABCOCK: Sounds like a win-win.

2 CHIEF JUSTICE HECHT: Sounds like a win-win.

3 The great concern in all of this had been that revenue
4 would go down, and of course, that would be a concern to
5 the local governments who keep about two-thirds of the
6 money. The other third goes to the state, but at least
7 preliminarily the rules seem to be operating very well.

8 The Senate Bill 1338 passed the Senate.
9 It's bail reform. It fell short in the House. This is a
10 bill that, like the fines and fees bills, has been
11 championed by both the political left and the political
12 right, not to summarize it too much, but the -- I think
13 from the political left the issues are more humanitarian
14 kinds of -- think about the good, injury to the person and
15 the indigent who is being fined or has to pay fees, has to
16 pay for bail; and on the right it's more about the burden
17 on taxpayers for having to put these people in jail, and
18 so this is an effort that is ongoing across the country.
19 Many states are engaged now in bail reform, and they run
20 the lot, and they're trying it all different ways, so it's
21 really an ongoing process.

22 After the legislation failed in Texas, the
23 county judge in Dallas County called and said that they're
24 going to voluntarily use these risk assessment tools to
25 get away from bail in that county, but the judges are for

1 it, DA is for it, law enforcement is for it, sheriff is
2 for it, and could we help him. And the county judge up
3 there is Clay Jenkins, and Clay was a law clerk to Oscar
4 Mauzy the year that I got to the Court, so --

5 CHAIRMAN BABCOCK: So it makes you old.

6 CHIEF JUSTICE HECHT: Yeah. Things take
7 strange turns in life. But a stranger turn still is that
8 Tarrant County is going to do the same thing basically the
9 same way. So you have a predominantly Democrat county and
10 predominantly Republican county taking the same steps in
11 this area, and Nueces County is doing it as well. So
12 maybe even though the legislation failed, the result will
13 be the same, and if the judges do it voluntarily so much
14 the better.

15 Meanwhile, as you probably know, there's a
16 lawsuit in Harris County in federal court down there
17 involving the bail system in Harris County, and it's on
18 appeal to the -- Judge Rosenthal ruled against the county,
19 and it's on appeal to the Fifth Circuit.

20 The Legislature passed more extensive
21 monitoring of guardianship cases, and in a very tight year
22 appropriated \$2.4 million to the Office of Court
23 Administration to continue its guardianship monitoring
24 efforts, but the Governor vetoed it. I personally think
25 he got bad advice, but anyway, that's what happened. The

1 Office of Court Administration is going to continue to --
2 its monitoring program and try to find funding elsewhere.
3 This is, again, a problem all across the country; and what
4 OCA has been doing is been going into counties, when
5 invited, working in cooperation with the judges there to
6 see what the status of guardianship cases is. And as you
7 probably know, guardians are supposed to report in
8 periodically and file statements of assets and all sorts
9 of things, and frequently they don't, and so cases just
10 lapse. And sometimes it's worse. Sometimes guardians
11 take advantage of the wards, and so this is an effort to
12 help with processing of guardianship cases.

13 I just returned from a meeting of the
14 Conference of Chief Justices of the United States, and we
15 met in Philadelphia, and we had a nice meeting. Just two
16 things to report from that. One is that the Congress
17 has -- both houses have voted on budgets and -- at least
18 partial budgets and regards to the Legal Services
19 Corporation, which is funded by the Congress, the House
20 voted to cut the budget from \$385 million annually to 300
21 million, which sounds terrible, and it is, a 22 percent
22 cut; but it's better than zero, which they have voted for
23 in the past. Meanwhile, the Senate voted to keep the
24 number at \$385 million; and the White House, as you may
25 recall in January, recommended eliminating LSC. So this

1 has been kind of a challenging year for them.

2 But their leadership and I and some others
3 have met with The Heritage Foundation, which is a
4 conservative think tank group that makes recommendations
5 on the federal budget, and we met recently with the
6 vice-president's legal staff. We were supposed to meet
7 with the vice-president himself, but he went to Houston to
8 see the new astronauts, class of astronauts, so we didn't
9 get to do that. But the staff was very supportive of
10 legal services in general and funding for LSC in
11 particular, and so things look much better for LSC now
12 than they did, and again, this has become a pretty
13 bipartisan effort.

14 Our champion in the Senate is Senator
15 Richard Shelby of Alabama, and I think it's fair -- I
16 think Senator Shelby wouldn't mind if I said he is a very
17 conservative member of the United States Senate, and
18 nevertheless, he has been adamant that this funding
19 continue. And it just so happened, as providence would
20 have it, that I ran into Senator Cochran a few days before
21 the vote, and he's chair of the appropriations committee.
22 I ran into him at dinner one night and told him what a
23 great job he was doing on legal services, and he's been
24 very supportive as well. So that looks a little better.

25 Another issue that the chiefs are concerned

1 about is the operations of ICE agents in state
2 courthouses, and you may have seen in the press that the
3 Chief Justice of California wrote the attorney general and
4 then Secretary Kelly complaining that ICE agents were
5 showing up in state courthouses and scaring people away.
6 The Chief Justice of Washington wrote shortly thereafter
7 and then the attorney general responded and said we're
8 just basically -- "We're doing our job." It was a nice
9 letter, but said, you know, "We're doing our job, and
10 we're going to keep doing it." The chiefs of New Jersey,
11 Connecticut and Oregon have also written, so we formed a
12 task force to try to assess the extent of this problem and
13 to begin a dialog with the Department of Homeland Security
14 on these issues, and we've made a lot of progress on that.

15 The local administrative judges in Travis,
16 Dallas, and Harris Counties have reported to me after
17 polling the judiciary in those counties that they're just
18 not a problem in Texas. There's been one incident I think
19 in Austin about six months ago when it was a mistake. The
20 ICE agent showed up in family court, and he was supposed
21 to be going to the criminal court, and he just went in the
22 wrong place. But I've not heard much concern about that
23 in Texas. New York, you may have read a city councilwoman
24 in New York City was complaining of this problem there,
25 but the chief judge of New York says that she's looked

1 into this and they don't think it's as bad or bad at all
2 maybe, but right across the river in New Jersey they think
3 it's worse. So, anyway, the chiefs are going to continue
4 discussions with the Department of Homeland Security, and
5 they are very receptive to this. They want to do their
6 jobs in ways that don't interfere with state courts doing
7 their jobs. So I think we made some progress at the
8 meeting.

9 And then finally, Martha Newton, who you may
10 know is a jogger, went for a run in Alberta, Canada, last
11 week. It was called the Canadian Death Race, and it's in
12 Canada because the United States outlaws torture. It was
13 only 125 kilometers, which is a little over 77 miles, and
14 she finished the 24-hour race in 23 hours and 40 minutes.

15 (Applause)

16 CHIEF JUSTICE HECHT: And I'm sure the
17 question on everyone's mind is why, and you'll have to
18 talk to Martha about that.

19 CHAIRMAN BABCOCK: Yeah, shocking, actually,
20 Martha, but congratulations. That item ties into our next
21 item. We have achieved today a breakthrough in our
22 sartorial record book. You know, our shoe choices have
23 been very diverse and varied in this committee, you know,
24 boots, laced-up shoes, loafers with tassels, with buckles,
25 plain loafers, high heels, low heels, mid heels, pumps,

1 open toe, closed toe. Today for the first time ever that
2 I can remember -- and I've been here for a long time.
3 Chief, you may contradict me, but today we have four-toned
4 designer sneakers on one of our members, and Rusty will
5 model those for you. He has red, white, black, and gray
6 tones on his shoes.

7 MR. HARDIN: Some people have too much time
8 on their hands.

9 CHAIRMAN BABCOCK: And he's sitting next to
10 Justice Gray, so coincidence, I don't think so. So we'll
11 get right to our agenda. The first item is guidelines for
12 social media use by judges. The chair is Elaine Carlson,
13 who can't be with us today, and Judge Peeples is doing
14 yeoman duty today by taking over not only this but the
15 next item as well, but with that, Judge Peeples, take it
16 away.

17 HONORABLE DAVID PEEPLES: Thank you. There
18 are four handouts that you ought to have before you, and I
19 hope you've had time to read them. The one we'll have
20 before us for discussion is called "Proposal for
21 discussion." It's a one-pager, and I hope you had a
22 chance to read the ABA opinion from 2013 on this topic,
23 which is "Social media use by judges." There's a *Texas*
24 *Bar Journal* article by John Browning and Justice Don
25 Willett. You know who Justice Willett is. John Browning

1 is just towering above everybody else in this area, and
2 that's good reading, and the last thing is a couple of
3 provisions from the Code of Judicial Conduct, and so I ask
4 you to have the proposal, which is one page, and the Code
5 of Judicial Conduct provisions before you because I think
6 they'll be pertinent.

7 In addition to Elaine Carlson not being able
8 to be here, committee members Tom Riney and Alistair
9 Dawson could not be here, but Bobby Meadows is here and
10 Kent Sullivan. I haven't seen Kennon Wooton. Is Kennon
11 here? She's now on the committee, and I haven't seen Carl
12 Hamilton. Anyway, you have the proposal. Let me say on
13 the other handout, which is from the Code of Judicial
14 Conduct, the code has some general provisions about things
15 like impartiality and integrity and independence and
16 confidence in the judiciary, but it has some very specific
17 provisions about comments by judges concerning pending
18 cases and also comments about other things, classes of
19 cases and so forth. The rule for a good many years is at
20 the top of this handout, and we had that up until 2002,
21 but the U.S. Supreme Court decided in that same year
22 *Republican Party of Minnesota vs. White*, which gave judges
23 some free speech rights, and so Canon 5 was rewritten in
24 light of that decision, and that's at the bottom of the
25 page. And I think it's fair to say that the subcommittee

1 thinks that comment by judges about pending cases is a
2 big, serious part of this discussion.

3 That's maybe the main thing, and so we have
4 some existing law about that, and we didn't take it upon
5 ourselves to discuss whether there ought to be changes in
6 what the Court did in 2002. On the second page or on the
7 back is Canon 3B(10), which deals with that same topic,
8 comment by judges, and it's referred to in Canon 5. So
9 that's some existing law that we need to have in mind.

10 And finally, let me say that the
11 subcommittee fully expects that after a good, good
12 discussion today we'll probably have to take this back and
13 study it some more and talk about it some more. We'll
14 just have to see, but this is not presented as hopefully
15 to be adopted today. If it is, fine, but we're looking
16 forward, frankly, to a robust discussion and a lot of good
17 input because this is a hard issue.

18 So having said that, Chip, I guess I'll
19 turn -- let me see if Kent Sullivan and Bobby Meadows, the
20 only other two members of the subcommittee here, want to
21 chime in and say something.

22 CHAIRMAN BABCOCK: Kent, I think you should
23 lead off since Bobby has escaped the room.

24 HONORABLE KENT SULLIVAN: Yeah, I want to
25 object to this proceeding. I mean, everyone else has

1 disappeared. No, look, I would echo what Judge Peeples
2 said. I think there is a huge concern about a likelihood
3 -- the prospect of a judge commenting on a case pending
4 before him or her, and I think that there was a fairly
5 substantial discussion both in the group and separately
6 about how one can best deal with that and the level of
7 specificity that is needed and admonition to all judges
8 given the size and diversity of something like the Texas
9 judiciary, and it seems to me that's the -- probably the
10 real focal point, or at least I saw it that way. I am one
11 that thinks that the more specific we can be, the more
12 likelihood we will have compliance in 2017. I favor
13 trying to be as bright-lined as possible, at least with
14 respect to perhaps some of the commentary on the rule, and
15 I will be candid and say I think comments on pending cases
16 are just a bad idea. Almost whatever form they take.

17 CHAIRMAN BABCOCK: All right.

18 HONORABLE DAVID PEEPLES: Discussion?

19 CHAIRMAN BABCOCK: We'll get Bobby's
20 comments when he returns. Harvey. Justice Brown.

21 HONORABLE HARVEY BROWN: So what does this
22 add right now? In other words, aren't judges already
23 subject to following the canons in the social media with
24 or without this; and so, if so, what are we adding by
25 putting this here?

1 HONORABLE DAVID PEEPLES: Yeah, and that's a
2 very good point, Harvey. It simply makes it explicit and
3 clear that the existing rules that apply to campaign
4 literature, speeches, you know, mail outs, just news
5 conferences or whatever, if you can do it there, right now
6 you can do it on social media, but the comment -- and
7 especially the big paragraph in the middle, the comment is
8 designed to sensitize judges and everyone else to the
9 dangers of social media, because social media platforms
10 take this to a new level. It's -- you know, something a
11 judge says about a case or about anything might get into
12 the newspaper and might get onto television and everything
13 else, but social media, the bounce, the multiplier effect,
14 the fact that it can be taken out of context so easily,
15 and we try to, you know, highlight those for people. But
16 in terms of black letter law, this doesn't change
17 anything, so you're right. It refers to it and tries to
18 sensitize people, and maybe we need to be more explicit,
19 which is what Kent Sullivan said.

20 HONORABLE HARVEY BROWN: Yeah. I mean, it
21 seems like to me the thing that I've read about, at least
22 in the media, is judges commenting about cases, and I
23 could see how it might be helpful to have a specific rule
24 about that, but then when we have a commentary generally
25 about the use of social media, the comments about liking

1 and following without any guidance, I mean, somebody might
2 read these comments and say, "Look, all of these
3 admonitions about being careful, it even mentions
4 following and liking and you're doing that, so you're
5 violating the comment." And some judges might read that
6 exact same thing and think the exact opposite, "It doesn't
7 forbid me." So it just seems like to me that we're trying
8 to address one problem, which is judges talking about
9 cases, with language in the comments that looks at the
10 bigger issue and that is not specific at all, and so
11 you're going to have different people interpreting it
12 different ways. There's no predictability or guidance for
13 a judge to -- whether they can like or follow or use
14 social media in a number of other ways that are not
15 related to a case.

16 CHAIRMAN BABCOCK: Robert, and then Frank.

17 MR. LEVY: When I read the proposed comment
18 I did notice the question about liking. A concern is that
19 people using social media might not be aware of some of
20 the pitfalls and should have some level of understanding
21 about how it works. I don't know exactly how you would
22 articulate it, but a like could imply an endorsement.
23 Maybe it doesn't. If you like a comment on Twitter, do
24 you agree with it, or are you just noting it for your
25 followers? So there are some real traps there, and I

1 think people that go into it should be aware.

2 And another issue is privacy settings. If
3 you have a Facebook personal page and you have comments
4 and you don't set it properly, you could be granting
5 access to people that aren't your friends. Because if
6 your friends are tagged in it then their friends might
7 have access to the comments, and that, too, I think can
8 create some potential traps, which I understand that's
9 really part of what you're trying to address.

10 CHAIRMAN BABCOCK: Frank.

11 MR. GILSTRAP: Both versions, we're talking
12 about use of the electronic social media, but both
13 versions eliminate the use of electronic social media
14 platforms. "Platforms" looks like a limiting -- a
15 limitation. Is that intentional, and what's the
16 significance of that?

17 HONORABLE DAVID PEEPLES: I have to confess
18 that, you know, Kennon Wooton who is on this committee and
19 participated very helpfully, being younger and more --

20 CHAIRMAN BABCOCK: Hip?

21 HONORABLE DAVID PEEPLES: -- knew a lot
22 about it. She ran this by what she called some techies in
23 her firm, and they --

24 CHAIRMAN BABCOCK: Speak of the devil.
25 There she is.

1 HONORABLE DAVID PEEPLES: Are you down
2 there? You might want to speak for yourself, but people
3 who really are conversant with the lingo here thought that
4 was the proper way to say this. It's not intended to be
5 limiting, I don't think.

6 MR. GILSTRAP: Well, I understand that they
7 have their reasons, but it would nice to know what those
8 reasons are. It seems to me that, you know, "use of the
9 electronic social media" is broader than "use of
10 platforms"; and if it's not, maybe the word "platform" is
11 not needed.

12 CHAIRMAN BABCOCK: Kennon, are you ready to
13 talk?

14 MS. WOOTEN: I am ready to talk. The
15 question being why that was --

16 HONORABLE DAVID PEEPLES: Why "platforms"?

17 CHAIRMAN BABCOCK: They're talking to you
18 about "platform."

19 MS. WOOTEN: Well, I didn't choose the
20 language, so I can come back with a more detailed
21 explanation, but it was really just to try to be
22 encompassing of all the different social media outlets
23 that are available.

24 MR. GILSTRAP: It was intended to broaden
25 "electronic social media." Okay.

1 HONORABLE DAVID PEEPLES: So you think that
2 having the word "platforms" is a broadening rather than a
3 limiting concept?

4 MS. WOOTEN: That was my understanding, that
5 they were trying to choose verbiage that would capture the
6 different types of social media that are available.

7 HONORABLE DAVID PEEPLES: Okay.

8 CHAIRMAN BABCOCK: Bobby -- it's back.
9 Bobby, do you want to say anything about this? You had
10 the floor a minute ago, but --

11 MR. MEADOWS: But I was absent. No, I want
12 to hear how the discussion develops. I mean, those of us
13 that spent a little time on this coming into this meeting
14 I think are fairly like-minded that -- well, maybe I
15 shouldn't say that. It's my view that we need to be as
16 clear as we can about what type of conduct, behavior, is
17 permitted or prohibited. So as we focus on this, I think
18 the -- my aim would be that we make this -- you know, the
19 outcome pretty clear in terms of how you can behave as the
20 judge, commenting from the bench or about pending
21 litigation -- might be probably not at all -- and what's
22 tolerated. So to the extent that it's been introduced
23 that we're searching for or maybe we're looking for a
24 bright line, that -- that's my inclination.

25 CHAIRMAN BABCOCK: Does the -- is it the

1 sense of the subcommittee that -- that the method of
2 distribution, that is, social media platforms, as opposed
3 to an op-ed piece in the newspaper or appearance on a
4 television show, does that affect what type of speech or
5 how much speech a judge can engage in? In other words, is
6 the distribution system affecting what the judge can or
7 cannot say? In other words, it's okay if you say it in an
8 op-ed piece but not if you put it on Facebook?

9 HONORABLE DAVID PEEPLES: I don't think
10 that's the view of anybody on the committee, and they can
11 speak for themselves. We did not really go there or think
12 that, and I personally don't. It's just the difference
13 between saying something maybe in this room and going
14 outside and saying it with a loud speaker or a megaphone
15 or publishing something. You get more people, and that's
16 one of the things about social media, is it's one reason
17 judges want to have their Facebook page and all of the
18 rest of it is it's so much more potent. It gets out
19 there, and it gets more bounce and that's -- they're in
20 politics.

21 CHAIRMAN BABCOCK: But because of that are
22 you -- are you thinking that judges should be more careful
23 or restrictive in their speech if they do it in this room
24 as opposed to doing it on social media, which reaches
25 potentially, you know, tens of thousands of people?

1 HONORABLE DAVID PEEPLES: Myself, the
2 difference between saying something in this room and
3 saying it on Facebook is -- is simply the difference
4 between shooting a high caliber gun and a bow and arrow
5 maybe. They can both kill you. One is more potent and
6 powerful than the other.

7 MR. LEVY: Well, which are we, the arrow or
8 the gun?

9 CHAIRMAN BABCOCK: Poison-tipped arrow.

10 HONORABLE DAVID PEEPLES: And, you know, we
11 may need to talk about this. Look at 3B(10). That's been
12 the law for a good long time, and that first sentence
13 talks about public comment about a pending or impending
14 case; and it says you can do it but not if you're going to
15 suggest your probable decision. I have a hard time
16 thinking about any good reason for saying anything about a
17 pending case that I'm trying or going to try. Why do I
18 need to do that? And I was talking to a couple of people
19 earlier. Does anybody remember Jack Pope or Robert
20 Calvert holding a news conference or writing an article to
21 talk about a pending case before the Supreme Court that
22 they were trying? Out of the question. But the law
23 allows it right now. The code.

24 MR. GILSTRAP: Well, doesn't that have to do
25 with the free speech issue? I mean, is that where it came

1 from?

2 HONORABLE DAVID PEEPLES: 3B(10) was there
3 before 2002, but Canon 5 as amended happened because of --

4 CHAIRMAN BABCOCK: Right.

5 HONORABLE DAVID PEEPLES: -- that case.

6 CHAIRMAN BABCOCK: Yeah. Our provision was
7 identical to the Minnesota provision that was struck down,
8 and so we eliminated our canon that was identical with a
9 general nudge from Judge Nowlin in the Western District.

10 MR. MEADOWS: So I'm -- I mean, maybe we can
11 just kind of take it a step at a time. I am completely
12 with Judge Peeples on this in terms of why would we
13 tolerate a judge talking in any way about a pending
14 matter?

15 HONORABLE DAVID PEEPLES: You know, if I
16 went out into the hall of a courthouse and started talking
17 about a case I was trying, oh, how interesting it is, how
18 important it is, why do I need to do that? I mean, forget
19 about whether it's harmful, but is there a need to do it?
20 I just don't see that there is. But 3B(10) allows it, and
21 I don't think -- you know, I would have to look again at
22 the Supreme Court's decision in *Minnesota vs. White*, but I
23 see close to zero need to do that, even if I'm
24 not insinuating how I might decide it. But we didn't get
25 down to the nitty-gritty of do these substantive

1 provisions, I'm going to call them, need to be modified.

2 We didn't talk about that, but we may need to go there.

3 CHAIRMAN BABCOCK: Okay. Yeah, Justice
4 Brown.

5 HONORABLE HARVEY BROWN: Well, I would
6 rather err on the side of being too cautious on comments
7 than judges making comments about cases, but I will say I
8 think that judges sometimes let lawyers in town know when
9 they have an interesting case. I mean, "Hey, this is Joe
10 Jamail's last jury trial. You might want to let some of
11 your associates know, and they might want to come watch
12 him." Those type of comments I do not find offensive.
13 Anything much beyond that, I am in total agreement with,
14 and if it takes a rule that blocks all comments in order
15 to make sure we don't have improper comments, I can
16 understand that. Sometimes --

17 CHAIRMAN BABCOCK: It's okay -- sorry.

18 HONORABLE HARVEY BROWN: I think it's
19 sometimes reasonable. Sometimes.

20 CHAIRMAN BABCOCK: Sorry. It's okay if
21 Judge Peeples in court says, "Hey, I'm thinking about
22 ruling for the plaintiff in this case. I'm going to sleep
23 on it, but I'm likely to grant their summary judgment."
24 That's okay. And it's okay if, as is the practice in some
25 state courts, to have tentative rulings that are

1 published. "I'm tentatively -- and here's all the reasons
2 why I'm -- now, you tell me why I'm wrong." That's okay.

3 HONORABLE DAVID PEEPLES: Chip, I think it's
4 the fourth sentence, the penultimate sentence in 3B(10),
5 "This section does not prohibit judges from making public
6 statements in the course of their official duty." I'm not
7 sure exactly what that means, but I think that would cover
8 a statement from the bench in court. "I've heard the
9 arguments, very good arguments. I'm going to study it
10 overnight. I'm leaning toward A, B, and C, but I'll get
11 back with you tomorrow." I've commented on it. It's a
12 pending case, but I think that sentence covers it I think,
13 and it should, or something should, which I think is what
14 you were talking about.

15 CHAIRMAN BABCOCK: I am, but what if that
16 same statement is made at a cocktail party that night by
17 the judge?

18 HONORABLE DAVID PEEPLES: Why should a judge
19 be able to say that? About a pending case.

20 CHAIRMAN BABCOCK: Yeah.

21 HONORABLE DAVID PEEPLES: Pending cases are
22 different from --

23 CHAIRMAN BABCOCK: He's not saying anything
24 different from what he said in court.

25 MR. HARDIN: Yeah, but doesn't that last --

1 I'm sorry.

2 CHAIRMAN BABCOCK: No, go ahead. Raise your
3 hand.

4 MR. HARDIN: Doesn't that last saving
5 sentence make a distinction between the courtroom
6 statement and a cocktail statement, in effect? I mean,
7 couldn't you read the top and the bottom as to say he
8 can't do what Judge Peeples is talking about, but he can
9 do it on the bench?

10 CHAIRMAN BABCOCK: Well, it says, "This
11 section does not prohibit judges from making public
12 statements in the course of their official duties."

13 MR. HARDIN: Yeah, right, and I'd argue that
14 that means when he's talking from the bench as to how he
15 may rule and he's going to think about it, but he's
16 inclined to do X, that's in the performance of --

17 CHAIRMAN BABCOCK: But from a speech
18 perspective what's the difference? It's the same speech.
19 Justice Bland.

20 MR. MEADOWS: Does your example occur where
21 both parties are present? Or are you just -- just
22 cocktail party talking to one of the lawyers or --

23 CHAIRMAN BABCOCK: No, I don't think it's a
24 case-specific cocktail party in my hypothetical. Justice
25 Bland.

1 MR. MEADOWS: So that's a violation of any
2 number of --

3 CHAIRMAN BABCOCK: Justice Bland.

4 HONORABLE JANE BLAND: The difference is
5 that when you say it at a cocktail party and the parties
6 are not there to interpose objection in a formal
7 proceeding on a record, inviting an ex parte
8 communication, versus saying it in open court on the
9 record where any party that wants to can pose an
10 objection. But as far as banning all talk of a pending
11 case, I could see that that might be a little bit
12 difficult when you're talking about the educational
13 purposes of judicial speaking, in particular at the high
14 courts, the Court of Criminal Appeals and the Texas
15 Supreme Court.

16 So, for example, you know, the Texas Supreme
17 Court was holding 50 or 60 cases about whether
18 municipalities -- whether the sue or be sued language
19 could be -- it could constitute a waiver of sovereign
20 immunity, and they held those cases for a while, and they
21 were collecting them around the state, and I think it was
22 probably routine at a lot of CLE speeches to say, "The
23 issue presented in a number of cases is whether or not
24 this language, statutory languages, waives sovereign
25 immunity, and that issue is pending before the Court." I

1 don't think it revealed any of the deliberative process of
2 the Court, but it was letting the practitioner know "Hey,
3 if you have cases out there like this I'm flagging the
4 issue for you."

5 So there is an educational purpose for
6 speech about cases outside of the courtroom, and, you
7 know, it seems to me like it's always been a distinction
8 that judges have to draw between talking about issues
9 presented in cases for an educational purpose and not
10 talking about cases in a sense of giving away any of the
11 deliberative process that's taking place either by the
12 judge individually, "I'm leaning," or by the court
13 collectively deliberatively.

14 CHAIRMAN BABCOCK: What about if in a CLE a
15 sitting member of the Texas Supreme Court says, "Hey, you
16 know, every summer I look at what we've done the past
17 term, and I noticed that we had seven cases on mineral
18 rights issues, and we had six cases on the Citizens
19 Participation Act, and you know, I think that trend is
20 going to continue."

21 HONORABLE JANE BLAND: That's the kind of
22 thing I'm talking about.

23 CHAIRMAN BABCOCK: Is that okay?

24 HONORABLE JANE BLAND: Focusing on, you
25 know, non-fact-specific, non, you know, particular

1 case-oriented discussions for the educational purpose of
2 letting people know, you know, what -- what's out there
3 these days. Educating both --

4 CHAIRMAN BABCOCK: What if he says it at a
5 campaign rally?

6 HONORABLE JANE BLAND: Educating the public
7 and the practitioner.

8 CHAIRMAN BABCOCK: What if he says this at a
9 campaign rally?

10 HONORABLE JANE BLAND: I'm not arguing. I
11 would never want to get into a free speech debate with
12 you, Chip, and I agree with you. I think there are
13 purposes outside the courtroom for discussing cases, and
14 the line between those has to do with, you know, what's
15 revealed and what's not revealed in any given situation.

16 CHAIRMAN BABCOCK: Yeah, this is a hard area
17 to write rules in because, you know, you can't -- you
18 can't, I don't think, properly under the First Amendment
19 approach it from a regulator standpoint. You have to
20 like, you know, why would you ever want to do this? Well,
21 that's not the right end of the telescope. There's got to
22 be -- there's got to be strict scrutiny applied to this,
23 so you have to have a compelling reason, and it has to be
24 narrowly drawn, and as long as you do that you're probably
25 going to be okay. Frank.

1 MR. GILSTRAP: What's interesting about the
2 last 10 minutes or so is it has nothing to do with social
3 media. This whole area about judges' comments is
4 something that, you know, we don't talk much about. It
5 obviously needs to be revisited; but the issue today is
6 does the use of social media add or detract anything from
7 the current situation; and I'm not -- you know, what we've
8 got before us are a couple of fairly bland and, you know,
9 noncontroversial provisions that say that, you know, it
10 all applies to social media, too, and then kind of an
11 educational comment, educating judges about how they can
12 get in trouble if they put too much on their Facebook
13 page. I'm not sure that there's much more that we can do
14 at this juncture unless we want to go back and revisit
15 these underlying restrictions anyway.

16 CHAIRMAN BABCOCK: Judge Newell.

17 HONORABLE DAVID NEWELL: Not to -- a lot of
18 the focus here is really on the idea of commenting on
19 cases, and I don't want to get -- I worry that what I'm
20 about to say might get us off track, but I wanted to
21 dovetail back to something someone said earlier about sort
22 of the idea is should we be treating social media
23 differently or not, and I think that so far I think for
24 ease of conversation we're just talking about it as a
25 distribution system, but even the comment in one of the

1 comments here, those comments, there's some
2 acknowledgement that social media creates unique
3 relationships. So liking something is incredibly
4 ambiguous as opposed to a direct comment or something
5 saying that you're liking something or following somebody
6 or something like that, and there's also a potential for
7 you to be seen as sort of being -- having a comment thrust
8 upon you by being tagged.

9 So from that standpoint, social media might
10 -- I tend to agree with Justice Brown that there's not a
11 lot of guidance with regard to these, and that's really
12 one of the big motivating things for this, too, is that I
13 think a lot of judges recognize I don't want to comment
14 about a pending case, but I really don't want to get
15 tagged with a violation for having someone tagging me, you
16 know, and I think that's one of the things that -- why we
17 need to have the discussion about social media.

18 CHAIRMAN BABCOCK: Yeah. Judge, I think
19 that's a really good point, because in that -- in some
20 instances it's not the judge's speech.

21 HONORABLE DAVID NEWELL: Right.

22 CHAIRMAN BABCOCK: It's not your speech.
23 It's somebody else's speech.

24 HONORABLE DAVID NEWELL: Right.

25 CHAIRMAN BABCOCK: And somebody else says

1 something and then because of the mechanics of the social
2 media site, it could be perceived by the public that
3 you're endorsing that --

4 HONORABLE DAVID NEWELL: Correct. That's
5 correct.

6 CHAIRMAN BABCOCK: -- speech, and you maybe
7 don't intend to at all or maybe you don't even keep up
8 with it and don't even know about it, but the public
9 doesn't know that.

10 HONORABLE DAVID NEWELL: Right.

11 CHAIRMAN BABCOCK: So in that instance I
12 think you are absolutely right that social media changes
13 things from the traditional model where you're talking
14 about the judge's speech, but I don't think that the
15 method of distribution changes what the judge says.

16 HONORABLE DAVID NEWELL: That's true.

17 CHAIRMAN BABCOCK: It's going to be the same
18 in newspapers or TV or social media, but there may be
19 other aspects where other people's speech get attributed
20 to the judge, and that's something to be concerned about.

21 MR. GILSTRAP: Could you give us an example?
22 I didn't follow that about this "likes" and everything.
23 Maybe I don't do enough Facebook. Entirely possible.

24 CHAIRMAN BABCOCK: Yeah, you need to get
25 your face on Facebook more.

1 MR. GILSTRAP: I'm sorry.

2 CHAIRMAN BABCOCK: It might break the
3 system.

4 MR. GILSTRAP: Could you give me an example
5 of what you mean?

6 CHAIRMAN BABCOCK: Sure. And this came up
7 in a case that I tried a couple of years ago for Judge
8 Slaughter from Galveston. She had a Facebook page, and
9 she said, "We're having a big case start Monday, a
10 criminal case," and I think it was about that case that
11 somebody wrote in and said, "Hang 'em high, Judge. Just
12 saying." Okay. So maybe that is -- you know, maybe she
13 endorses, you know, that she's going to hang this guy
14 high.

15 MR. GILSTRAP: Maybe she should say "not
16 like" or "dislike" or something.

17 CHAIRMAN BABCOCK: She deleted it from her
18 Facebook.

19 HONORABLE DAVID NEWELL: There is no
20 "dislike" button.

21 CHAIRMAN BABCOCK: Judge. I'm sorry.

22 HONORABLE DAVID NEWELL: There's no
23 "dislike" button. It's "like." It's like using a car
24 horn. Basically, you use this one sound, and it can mean
25 any number of different things.

1 CHAIRMAN BABCOCK: Yeah.

2 MS. WOOTEN: Actually, it's more refined
3 now. You have a "love" button.

4 HONORABLE DAVID NEWELL: Sad face, a "wow."

5 MS. WOOTEN: A "ha-ha" button.

6 PROFESSOR ALBRIGHT: But it's easy to hit
7 the wrong one.

8 HONORABLE DAVID NEWELL: There's no "This is
9 ethically prohibited. I cannot comment on this." That's
10 the button that needs to be made.

11 CHAIRMAN BABCOCK: Justice Boyce.

12 HONORABLE BILL BOYCE: I have a question for
13 the committee about whether there was an intent in the
14 comment to take a position about the standing alone
15 relationship of a friend or a follower or whatever flavor
16 it is on whatever platform you're talking about, because
17 the current comment talks about "Social media platforms
18 also create unique relationships such as friends and
19 followers," another sentence, and then the sentence after
20 that says, "All of this can undermine public perceptions
21 of judicial dignity, integrity, and impartiality." So
22 looking at that, that I think potentially talks more of a
23 bright line rule in terms of merely being friend -- to
24 take a specific example, being friends with lawyers on
25 Facebook, and I don't know if the committee wanted to take

1 a position on that, but that -- that's edging up to taking
2 a position on that, the way I read it.

3 HONORABLE DAVID PEEPLES: That sentence,
4 "All of this can undermine," that's intended to refer to
5 everything else in that paragraph, not just the couple of
6 sentences that preceded it, if you wanted that, Bill. We
7 didn't -- we didn't discuss or intend to come up with any
8 concrete rule about friending and the consequences of it,
9 either for recusal or lack of dignity and impartiality.

10 CHAIRMAN BABCOCK: Justice Busby.

11 HONORABLE DAVID PEEPLES: Didn't intend to.

12 HONORABLE BRETT BUSBY: For the same reasons
13 raised by Justice Boyce and by Justice Brown, I think the
14 best approach here would be to be either very broad or
15 very specific and that the comment now is sort of
16 somewhere in between and therefore leaves us a little bit
17 at sea on questions like the ones that have just been
18 raised and also exposes us to potential complaints in
19 those areas. I'm having a little bit of a hard time
20 seeing how instantaneously liking a friend's photo of
21 their family undermines judicial dignity or impartiality.

22 HONORABLE TOM GRAY: It kind of depends on
23 the photo, doesn't it?

24 CHAIRMAN BABCOCK: Yeah, if it's the Manson
25 family.

1 HONORABLE BRETT BUSBY: But it says "all of
2 this," which I think suggests that we don't care what the
3 photo shows, and that's why I think this middle ground of
4 sort of laying out the issues more like a CLE seminar
5 would do to sensitize judges to it that maybe the comment
6 is not the place to do that, so I would say let's either
7 be very specific or very general.

8 I also think some of the statements in here
9 are not necessarily correct. The one about "disseminating
10 to thousands without actual consent or knowledge of the
11 person posting it" I think is incorrect given the way you
12 can set your privacy settings to be shared or not. So,
13 you know, depending on the platform. I actually think
14 mass e-mail is much more of a threat in this area and much
15 more subject to being forwarded in an instant without
16 knowledge or consent than it is on social media where you
17 can say, you know, only friends can see this and you can't
18 share it and that sort of thing where you do have those
19 limits, but yet it seems that this doesn't apply to mass
20 e-mail, given the use of "platforms."

21 So, you know, there are some choices being
22 made here that I think we need to think through a little
23 bit more carefully, and I do think it's true that postings
24 can invite response and discussion over which the original
25 poster has no control, and Chip gave a good example of

1 where that could be a problem, and that things can lie
2 dormant and then be recirculated, but I think the liking
3 and the friends and followers comments and the comments
4 about consent or knowledge of the person who posted it
5 perhaps should be removed. I do also think it's worth
6 looking at some language choices. I prefer alternative A,
7 but if we look at alternative B, I think the and's in that
8 sentence should probably be or's, "independence or
9 integrity or impartiality." I don't know why you would
10 need something to violate all three in order to be of
11 concern if you did go with alternative B, and in the
12 second -- in the last sentence of the first paragraph of
13 the comment, I'm not sure we mean to say that those
14 features threaten ethical standards. Maybe there's a
15 different way to say that. I'm not sure it's the
16 standards that are being threatened. Just some thoughts
17 for further consideration, since y'all are taking a
18 further look at this.

19 HONORABLE DAVID PEEPLES: Good.

20 CHAIRMAN BABCOCK: Okay. Pam, then Kent,
21 then Richard, then Justice Boyce.

22 MS. BARON: I think it would help me if we
23 could have some specifics of things that we all agree you
24 really can't do; and so going back to your hypothetical,
25 or actually it wasn't a hypothetical, where judge says,

1 "I'm going to have this hearing on Monday" on social
2 media. Somebody writes in "Hang 'em high, Judge." Now,
3 what if the judge "likes" that comment? Okay. Do we all
4 agree that you can't do that? I just want -- you know, it
5 would help me to have some very clear things that we agree
6 is a comment on a case, that's not ambiguous, through
7 social media that should not be permitted.

8 CHAIRMAN BABCOCK: Kent.

9 MS. BARON: So do we agree with that?

10 HONORABLE KENT SULLIVAN: I was just going
11 to agree with the point that was raised by Justice Boyce,
12 and I would say to my part I probably didn't read it as
13 carefully as I should, and the problem of course was
14 "unintentionally created." This is the language in the
15 comment that talks about "all this," so it sort of
16 indiscriminately potentially refers to everything that
17 came before, and I'm wondering if it could be fixed simply
18 by striking those two words and including something like
19 "misuse of social media," which is general, but that is at
20 least -- that might provide a quick fix for that problem,
21 and I agree that it is a problem.

22 CHAIRMAN BABCOCK: Richard.

23 MR. ORSINGER: Okay. So I like these
24 proposals because they are general. One concern I have is
25 if we're overly specific the technology will change so

1 quickly that it will be outvoted right away and that we
2 make a mistake because we won't be addressing the new
3 technology because we were too specific about the current
4 technology. But in my mind our concerns are different
5 depending on what the subject matter of the speech is, and
6 that may be an unconstitutional way to approach it, but
7 I'd like to articulate this at least as a policy. We have
8 past rulings that a judge may have made that may be
9 criticized in the press or in social media, and a judge
10 may wish to defend the ruling. I have the least concern
11 about that, because the decision has been made. It's
12 public. We're now engaged in a policy debate about the
13 policy that was used or the law that was used or whether
14 the jury was right or wrong in finding a person innocent.
15 To me that's really important for us to be able to have a
16 robust discussion about that, and judges should be free to
17 defend their rulings and defend the legal process.

18 CHAIRMAN BABCOCK: What if it's
19 interlocutory?

20 MR. ORSINGER: That gets into my next
21 category, which is the category where I have the greatest
22 concern, which is comments about a pending case, because
23 that is where litigants might feel that they're not being
24 treated fairly. Although we know in reality judges may
25 make up their mind before the evidence closes, we expect

1 judges not to reveal that if that's true. We expect them
2 to at least listen until the evidence is closed and then
3 make the decision. So any post, any communication,
4 whether it's on the internet or otherwise, that telegraphs
5 to a party that the judge has made a decision or has --
6 has formulated even a working hypothesis before they've
7 heard all of the evidence to me creates sense of a lack of
8 due process or unfairness, and that concerns me the most.

9 Now, I was sitting over here thinking of an
10 example I heard about. I think it came out of Collin
11 County where a judge sent either -- I think it was an
12 e-mail in that case that the prosecution was doing a
13 terrible job in this particular prosecution. And the
14 prosecutors got really upset about that, and maybe some
15 people in the press got upset about it. Well, you know, I
16 mean, that doesn't really signify the judge's ruling.
17 That just means that the prosecutor is doing a terrible
18 job. Should you say that while the case is still going
19 on, or should you wait to say that afterwards? You know,
20 I don't know. I'm not as concerned as I am about
21 commenting on the process as I am in revealing the judge's
22 thinking about the results.

23 So that's the past case where I feel like
24 there should be no restrictions really; the current case,
25 which really concerns me a lot; and then the future cases.

1 And I think back to the controversy around the parental
2 bypass for the underage women, girls, if you want to call
3 them that, wanted to terminate a pregnancy without their
4 parental consent; and during that period of time when it
5 was very politically sensitive there were a lot of
6 candidates for the judge who took a position publicly on
7 whether they would or wouldn't grant those kinds of
8 rulings. That's a difficulty, but there's already a
9 remedy for that, and that's a motion to recuse. Now, in
10 that particular instance --

11 CHAIRMAN BABCOCK: Wait a minute, that
12 violates the current canon.

13 MR. ORSINGER: It does?

14 CHAIRMAN BABCOCK: Yeah. Canon 5 as to
15 promises. "I promise I'm not going to grant them."

16 MR. ORSINGER: All right. Then another
17 reason.

18 CHAIRMAN BABCOCK: That may be
19 unconstitutional but --

20 MR. ORSINGER: Another reason why we don't
21 need to articulate a specific prohibition that's already
22 covered by another prohibition; and by the way, the remedy
23 for a violation of the Code of Judicial Conduct is some
24 kind of administrative sanction against the judge, either
25 a public reprimand or a removal from the bench or

1 whatever. We have a remedy for a judge who has
2 telegraphed their bias in future cases, which is recusal.
3 We may or may not want to take him off the bench, but the
4 litigant can take him off the case. So there's already a
5 remedy for that.

6 And then to me the last category apart from
7 past cases, pending cases, and future cases is respect for
8 the judge and respect for the rule of law generally; and I
9 think it's unseemly, even if the judge is defending his or
10 her ruling on a past case to get him in a war of words
11 with people who are, you know, flaming them, if that's not
12 an archaic concept, publicly; and it kind of demeans the
13 judge to get in the back and forth; and it kind of demeans
14 the judiciary altogether.

15 So I have different concerns about different
16 ones of those, but let's remember we already have some
17 remedies for some of those. We have recusal. We have
18 judicial sanction, and of course, in Texas we have
19 judicial elections; and so I don't really see why we
20 should be very specific here. In fact, I don't think
21 really think we should change anything. To me the big
22 concern about social media is not that millions of people
23 can see it. It's that people treat it too informally. If
24 a judge is going to go and be interviewed by a newspaper
25 reporter or by a television reporter, they're going to be

1 really careful about what they say, but if they get on
2 social media people are very casual. They don't treat it
3 as a serious communication. They say things they would
4 never say if they were in front of a microphone. So to me
5 it's not the number of people that can read it. It's the
6 informality we associate with sharing our views, and I
7 like this idea that we need to caution the judges, "Look,
8 there are standards out there. They work, but be
9 especially careful when you're on social media to remember
10 that those standards apply to what you put in your e-mails
11 and your posts." So I kind of like this generality.

12 CHAIRMAN BABCOCK: Justice Boyce.

13 HONORABLE BILL BOYCE: It sounds like the
14 discussion is going back and forth about the appropriate
15 level of specificity versus generality, but I think
16 regardless of where that balance is struck in whatever
17 final proposal comes out, an acknowledgement that context
18 matters would be helpful, similar to what the ABA proposed
19 opinion, formal opinion, does at the bottom of page two
20 and top of page three to provide a little flex, because we
21 could probably spin out endless scenarios where people
22 would say this feels okay, this different situation feels
23 not okay. Context may be a little bit of a -- provide
24 some flex there, a specific reference in the ultimate
25 comment; however, it gets revised to the importance of the

1 specific context.

2 CHAIRMAN BABCOCK: Buddy.

3 MR. LOW: I just think if a judge goes and
4 tries to defend, not in a courtroom, but on a public
5 media, social media, his decision in a case, he's getting
6 down -- I just don't believe that's very dignified. And
7 further, even though there would be a remedy, what if it's
8 on appeal? You said it's temporary and then it's remanded
9 back to him. Well, you can disqualify, but we're not --
10 we're trying to make judges look better. We're trying to
11 do justice, and I question that.

12 As far as social media, it looks like we're
13 focusing only on a specific case or a group of cases. I
14 mean, they're different. It can be running for office.
15 He could be posting saying, "I'm going to seminars and I'm
16 learning this. I'm doing this publicly." There are a
17 number of things, but it looks like, as I can tell, we're
18 addressing specific cases or a specific case; is that
19 correct?

20 HONORABLE DAVID PEEPLES: I think it's
21 broader than that.

22 MR. LOW: Well, the material we have talks
23 about a judge should be dignified and all of that.

24 CHAIRMAN BABCOCK: That's in the comment.

25 MR. LOW: And there are different rules for

1 different methods, and when you come down to commenting on
2 a specific case, I think you should be very careful in
3 allowing a judge to comment about a specific case.

4 CHAIRMAN BABCOCK: Yeah, Justice Busby.

5 HONORABLE BRETT BUSBY: I was just going to
6 mention briefly in response to some of the comments
7 earlier about can a judge, you know, in a CLE seminar say,
8 you know, "Here's the section of the paper that says
9 pending cases so that you'll be aware of what the subject
10 matter is." I think that's already allowed under 3B(10),
11 which says what you can't do is comment in a way that
12 suggests to a reasonable person the probable decision on
13 any particular case. So it's fine to let people know and
14 flag it and say it's out there. What you can't do is say,
15 "By golly, you know, I intend to rule for, you know, one
16 side or the other in any of those cases," but I do think
17 it serves a valuable function to let people know about
18 that, and I think we should retain that qualifier that
19 what we don't want is commenting on the probable decision.
20 And that would also include, you know, coming to watch Joe
21 Jamail or, you know, "We're having court next Tuesday if
22 you want to come and see the judiciary at work." You
23 know, that's not commenting on the probable decision.
24 That's just letting the public know, come watch your
25 judges do what they do if you're interested.

1 CHAIRMAN BABCOCK: Justice Boyd.

2 HONORABLE JEFF BOYD: I have a question for
3 the subcommittee or the whole. It seems obvious to me
4 that the rule is not going to allow judges to do more on
5 social media than they're allowed to do otherwise, at a
6 CLE or in this committee meeting or whatever; and so
7 whatever it is the rules allow us to do otherwise, one way
8 to say that is you can only do on social media what you're
9 allowed to do otherwise; but to me the tougher decision is
10 should the rules prohibit judges from doing things on
11 social media that we might otherwise be allowed to do at a
12 CLE or in a meeting like this, because social media is so
13 ambiguous when you hit "like" or is so open to -- so, for
14 example, wasn't there a court decision just this week
15 somewhere in the country that said either a government
16 official or an elected official, I don't remember which,
17 is not allowed to block any follower on a social media
18 platform? So if somebody wants to follow me on Twitter
19 but they always make derogatory comments, well, then I
20 just have to tolerate that. I'm not allowed to block
21 them.

22 So there are things about social media that
23 put us in a more awkward position than maybe showing up to
24 give a Supreme Court update at a CLE does, and it just
25 seems to me what -- there's two issues. If the conclusion

1 is we should be subject to all of the same limitations on
2 social media as we are otherwise then the issue is how
3 much detail do we provide specific as to social media to
4 explain what that means? But then there's this other
5 issue of, well, should the rules impose greater limits on
6 what we can do on social media than what we can otherwise
7 do? And I don't know if the subcommittee considered that
8 or whether this committee thinks we ought to, but to me
9 that's kind of the fundamental issue.

10 HONORABLE DAVID PEEPLES: I think it's fair
11 to say we didn't really talk about changing -- having
12 stricter standards for social media statements than
13 others. What we basically do here is caution judges, as a
14 few people have noted, that you're playing with dynamite
15 here, sort of, and therefore, be careful. And, you know,
16 it may -- it may be that we need to do that. There's a
17 sentence at the very end of this Browning and Willett
18 article that I think is pretty good. The ethical -- it's
19 about the last paragraph. "The ethical restrictions
20 applicable to every other means of communication are just
21 as applicable to social media." I think that's the
22 situation right now.

23 HONORABLE JEFF BOYD: Sure.

24 HONORABLE DAVID PEEPLES: And I think what
25 you're raising is should we make it a little bit more

1 restricting.

2 HONORABLE JEFF BOYD: To follow up with an
3 example, just to help the conversation, I do Supreme Court
4 update speeches all the time, and, you know, I have 30
5 minutes to highlight five decisions that this particular
6 audience might think are really relevant to their
7 practice, and it's decisions that we've just made.
8 Sometimes -- Lisa will tell you, sometimes they're still
9 pending on rehearing, so I have to be very careful to
10 merely quote what we held instead of trying to go very far
11 to explain why we held it. So but I will talk about our
12 cases, including -- and, for example, I'll often say, "And
13 here are three cases where we've granted review, and
14 they're going to be argued this fall, so you ought to be
15 watching these cases," and in those I'm very careful on my
16 Power Point to only quote what Osler has said about those
17 cases and say, "This is Osler's description, not mine,"
18 but I'm talking about a case that's pending, but I will
19 never do that on social media. I will never even talk
20 about a case that we've decided. I will never say, "Hey,
21 y'all should go read this opinion because the Court just
22 held this," because it just opens -- so I am personally
23 more strict on what I'll do in social media than I would
24 do in other settings, but the issue it seems to me as a
25 matter of policy is should the rules require that.

1 CHAIRMAN BABCOCK: Yeah, does the Twitter
2 laureate of Texas adhere to that same?

3 HONORABLE JEFF BOYD: I think so. I think
4 I've heard him say -- well, what's he say in this article,
5 that he won't talk about cases or political topics in his
6 social media posts?

7 CHAIRMAN BABCOCK: Okay. Buddy.

8 MR. LOW: I don't think we --

9 CHAIRMAN BABCOCK: No, I mean, Munzinger had
10 his hand up first and then you, Buddy. Sorry.

11 MR. MUNZINGER: I just don't see the reason
12 to have a rule at all. If a judge -- the judge now knows
13 that the judge may not communicate publicly his or her
14 position on a pending case or an impending case, that that
15 is improper, this rule adds nothing to that rule. In
16 fact, the use of social media, whether I operate my own
17 place on a platform -- and, by the way, I think the word
18 "platform" is restrictive, not expansive, but if I
19 operate -- if I had my own place on Facebook, I am
20 communicating; and if I write an e-mail to somebody at
21 their Facebook place or I send an e-mail, I am
22 communicating. And judges certainly should be astute
23 enough to know that e-mails are not private, nor were
24 letters before we had e-mail. If I wrote the Chief
25 Justice a letter, my letter became a matter of public

1 record if he chose to reveal it, and the same was true if
2 he wrote me. Once that letter was gone, it was mine to do
3 what I want with, unless there was some restriction
4 imposed by the author which was legally enforceable.
5 That's no different than an e-mail.

6 Why do we have this rule to warn judges what
7 they already know about? They're certainly as astute
8 politically as I am. I don't run for office. I just
9 vote, but they know what the rules are, or they should,
10 and if they don't, maybe they don't need to be judges, but
11 this rule is -- it isn't even a warning. It's just adding
12 another layer of saying something that is already
13 enforced, and so I don't think you need a rule at all. If
14 you are going to have a rule, I sure would delete the word
15 "platform," because the word "platform" it seems to me is
16 restrictive. I don't have a Facebook page, and I hope to
17 live a long time, and I don't intend to ever have a
18 Facebook page.

19 MR. LEVY: I'll set it up for you right now.

20 MR. MUNZINGER: You and my children. I
21 don't want a Facebook page. I don't want to live with it.
22 But if I were a judge I dang sure wouldn't want to live
23 with it. There are too many people out there to take
24 advantage of innocent mistakes. There are too many people
25 out there who are tickled pink to pervert, change, do

1 whatever with what I say, what I think is in private, and
2 it turns out not to be in private because it's an e-mail.
3 But the word "platform" suggests that I sponsor my
4 Facebook page, and this rule only applies to that
5 situation, when, in fact, the rule, B(10) says "any public
6 comment"; and if I whisper to Frank, it's private. If
7 Frank says, "Richard just whispered to me," it's no longer
8 private, and it's no longer private in this room because
9 she's making a record of it, and it will be on the
10 internet and available to the entire public to read
11 tomorrow morning or next week whenever she gets the
12 transcript done and it's finally posted. So long and
13 short of it is -- and I'll be quiet -- I think we're
14 spending a lot of time on a rule that is unnecessary.

15 CHAIRMAN BABCOCK: Buddy.

16 MR. LOW: Yeah, as I understand it, there is
17 a rule now, and the charge of the committee was because of
18 the popularity of social media do we change the rule, not
19 treat social media differently, but because of that social
20 media should we change the rule. Am I wrong on that,
21 Judge? Judge Peeples?

22 HONORABLE DAVID PEEPLES: I'd have to reread
23 the letter from the Chief.

24 MR. LOW: Well, I'm just giving my own
25 interpretation, which was not --

1 HONORABLE DAVID PEEPLES: We were certainly
2 asked to look at it. Yes.

3 CHAIRMAN BABCOCK: Judge Estevez, and then
4 Judge Wallace.

5 HONORABLE ANA ESTEVEZ: First of all, I'm
6 indifferent on whether we adopt one of the provisions
7 there, but if we do I think we need to drop "platform."
8 But the reason I'm indifferent, because I think that the
9 judges that are going to abide by the canons are also
10 going to do it in the social media, because they're aware
11 of them. It's just like he said. I mean, either the
12 judge has read the canons and knows what they can do. I
13 mean, the people that are violating them outside in their
14 e-mails and the internet and the social media are the same
15 ones that are at the cocktail parties telling you how
16 they're going to rule when no one else is around. We go
17 through this in judge -- you know, every time we have a
18 judicial type of conference. They tell you this at new
19 judge school. It -- you know, you're either going to
20 abide by them or you're not, so I don't know that it's
21 needed, but if the committee believes it's needed I think
22 it should be treated the same.

23 I think if -- you know, Justice Boyd, if he
24 can do it in public, he can do it on social media. If he
25 can't do it on social media, I don't think there should be

1 a distinction. It should just be a line. It's either
2 something that's good and allowed, or it's something that
3 shouldn't be allowed in any type of capacity. I think
4 that makes it confusing. I think it will be hard to
5 enforce, and it really isn't going to have a reason --
6 there's not really a reason. I mean, you should be able
7 to do whatever you can do in public, you should be able to
8 do in public media.

9 CHAIRMAN BABCOCK: Thanks, Judge. Judge
10 Wallace.

11 HONORABLE R. H. WALLACE: We've been talking
12 mainly about judges and what they do. Of course, this
13 rule also applies to judicial candidates as well as
14 judges, and the use of social media is pervasive in people
15 running for office, and I think there's so many things
16 that you can do it would be hard to have a bright line
17 rule as to what judicial candidates can or -- or what
18 they're doing would be violating these rules. For
19 instance, people go to meetings, and they take pictures of
20 speakers, and they post it on Facebook, and they say,
21 "Having a wonderful time listening to so-and-so talk about
22 the sanctuary cities bill." Well, have they made a
23 comment or something about how they might rule on a
24 pending matter or -- that's the type of thing you see all
25 the time.

1 Or someone -- somebody posts something and
2 they "like" it or comment on it, and so -- and, of course,
3 a lot of those -- some of those people probably aren't
4 really that familiar with these rules, but the rules do
5 apply to them, but to me, I don't have a problem with what
6 I would post or say as a judge. It would be basically
7 nothing, but when you're in that kind of environment, some
8 people feel like that's absolutely essential, that you be
9 able to have those type of -- that type of communication
10 with people out there who are following your Facebook
11 page.

12 CHAIRMAN BABCOCK: Judge, you had an
13 opponent who attacked one of your rulings.

14 HONORABLE R. H. WALLACE: Yes.

15 CHAIRMAN BABCOCK: How did you handle that?

16 HONORABLE R. H. WALLACE: Well, I didn't
17 respond on Facebook or on the internet at all.

18 CHAIRMAN BABCOCK: But did you respond at
19 all?

20 HONORABLE R. H. WALLACE: I went to meetings
21 where, yeah, people would ask, and I would -- I had a
22 response, kind of -- it wasn't entirely extemporaneous,
23 but, yeah, I would respond there, but not an e-mail or
24 Facebook or anything like that.

25 CHAIRMAN BABCOCK: But from a regulatory

1 standpoint that shouldn't matter, should it?

2 HONORABLE R. H. WALLACE: Shouldn't what?

3 CHAIRMAN BABCOCK: It shouldn't matter from
4 a regulatory standpoint, if we're going to regulate
5 judges' speeches, it shouldn't matter if you made it at a
6 meeting of --

7 HONORABLE R. H. WALLACE: Well, yeah.

8 CHAIRMAN BABCOCK: -- the League of Women
9 Voters.

10 HONORABLE R. H. WALLACE: I agree. But
11 there's also the issue -- and, I mean, I've seen this come
12 up, and that is a candidate being asked outright, "Would
13 you ever grant a judicial bypass?" You know --

14 CHAIRMAN BABCOCK: Have you ever heard a
15 candidate respond?

16 HONORABLE ANA ESTEVEZ: I have.

17 HONORABLE R. H. WALLACE: For some people
18 it's easy to say, "Well, I can't comment on that," but
19 some people think, well, you can't afford to say that.

20 CHAIRMAN BABCOCK: What have you heard,
21 Judge?

22 HONORABLE ANA ESTEVEZ: Oh, when I was
23 running for office, we would be at a full candidate forum,
24 and all of them, every one you went to, they wanted to ask
25 you that question.

1 CHAIRMAN BABCOCK: All right. So they asked
2 it, and what was the response?

3 HONORABLE ANA ESTEVEZ: Some people would
4 say "yes" or "no" and other people -- I mean, I said, "I
5 cannot comment," so I looked really bad. And everybody
6 else looks -- you know, they got to hear whatever they
7 wanted them to hear.

8 CHAIRMAN BABCOCK: So the other candidates
9 would say, "I promise you" --

10 HONORABLE ANA ESTEVEZ: We were all
11 candidates. I wasn't a judge either, but I knew that I
12 wasn't supposed to comment, and I'd also state just that
13 I've seen other Supreme Court justices' platforms when
14 they were running for office and received them that seemed
15 to say things that I thought I wasn't allowed to say as
16 well.

17 CHAIRMAN BABCOCK: But you heard people say,
18 "I promise you that I'm never going to grant a judicial
19 bypass"?

20 HONORABLE ANA ESTEVEZ: They said, "I am
21 pro-life, and I would never grant an abortion." Is that
22 the same thing? I think that's the same thing.

23 CHAIRMAN BABCOCK: Sounds like a promise to
24 me.

25 HONORABLE ANA ESTEVEZ: Okay. Now,

1 obviously, I won.

2 CHAIRMAN BABCOCK: Yeah, because you didn't
3 tell the voters what you were going to do.

4 HONORABLE ANA ESTEVEZ: No, I mean, I don't
5 think that had anything to do with it, but I'm just
6 saying, you know, if it's inappropriate -- it's not really
7 fair when some people are running without the judicial
8 canons and other ones are, because it's very frustrating
9 when you know the rules and you're abiding by them and you
10 don't want to, you know, just call up the Ethics
11 Commission every 10 minutes. You're not going to call up
12 anyone. You just know what you're allowed to do and the
13 parameters, but I think it is very important to the
14 voters. Those issues are the most important issues in the
15 state of Texas to the voters, are whether or not you're
16 pro-life or pro-choice or willing to make it -- give an
17 abortion or not. That's the most important number one
18 question for every -- for the majority of voters in the
19 state of Texas.

20 CHAIRMAN BABCOCK: Yeah. Robert, I'll get
21 to you in a second, but just as an aside historical
22 footnote, when the White decision was -- came down, the
23 Texas Supreme Court appointed a task force to look at our
24 canons, and we recommended and the Court adopted a change,
25 so we dropped the identical provision that was attacked in

1 White. But we also talked about the promises clause, and
2 there were a number of people on the committee that
3 thought the promises clause was also unconstitutional, and
4 that is still a wide open question about whether it is or
5 is not, but the promises clause is implicated by your
6 example, where those other candidates clearly violated it,
7 and the question is, is that -- were they exercising their
8 constitutional rights when they did so. Robert, sorry to
9 take so long.

10 MR. LEVY: Oh, that's all right. Well, one
11 of the other issues that we need to think about is what
12 does social media mean, other than the platform question.
13 So you can send a message to me -- when Richard, if he had
14 Facebook, in the Facebook messenger app. That might be
15 considered a private message. You can also post something
16 that is only to your family and not intended for friends
17 or the public. There are a number of other kind of ways
18 that we communicate that might be considered social media.
19 Snapchat, where the messages disappear unless you take a
20 screen shot, and even the question of whether an e-mail is
21 a form of social media or an e-mail distribution or a
22 blast.

23 So I think that there are a couple of
24 issues. One is if we want to sensitize judges and
25 candidates that anything they do in the social media space

1 is subject to this, even if they do it in a way that they
2 think is a private discussion and not a public discussion,
3 then we need this rule because that's not clear now. But
4 if that's not what we want to do then we need to make very
5 clear what type of social media constitutes a public
6 comment that triggers this code provision.

7 CHAIRMAN BABCOCK: Richard.

8 MR. MUNZINGER: His comment, if you look at
9 alternative A, just made -- if it were to have been
10 adopted and his logic adopted, just made all presumed by
11 the sender private communications public. "The provisions
12 of this code apply to a judge's use of electronic social
13 media." So if I just sent an e-mail to Chip's Facebook
14 page, if you can do that, and I said "Chip," whatever I
15 said to him, that has become public because it's the use
16 of social media, unless the word "platform" is used; and
17 even with the word "platform" I'm using his platform; and
18 this illustrates my point again. We may be stepping into
19 a swamp here unnecessarily. Whatever I say if I'm an
20 elected judge, whatever I say I need to be careful about
21 what I say, so that people don't believe and I don't tip
22 my hand as to how I will rule or make a promise that would
23 cause someone to vote for me because they think they know
24 how I will rule in a particular case.

25 That's the law. These rules don't change

1 that law. All they do is waive a flag to the judge, "Hey,
2 Judge, don't be stupid in using social media." That's all
3 that's going on here. I think that's the intent. I don't
4 think the intent is to regulate here or to change that
5 thing and to change the rule about what I may or may not
6 say and how and where I may say it.

7 CHAIRMAN BABCOCK: So you would say we
8 should have an alternative C, "Judge, don't be stupid
9 using social media"?

10 MR. MUNZINGER: Yeah.

11 CHAIRMAN BABCOCK: Elegant.

12 MR. MUNZINGER: If that's what you're going
13 to say. I just don't think that there's a need for it,
14 frankly; and you look at B(10), "A judge shall abstain
15 from public comment about a pending," et cetera. Don't
16 comment. How can I comment? I can comment through the
17 microphone. I can comment through my e-mail. I can
18 comment at a campaign rally. I can comment at the league
19 of lady voters or whatever it's called.

20 MR. ORSINGER: Women, women, women.

21 MR. MUNZINGER: Women voters. They're not
22 all ladies I guess.

23 MR. ORSINGER: Better-informed voters.

24 CHAIRMAN BABCOCK: Kennon.

25 MS. WOOTEN: I just want to say I agree with

1 the comments about the need for some guidance about
2 whether the standards are meant to apply equally to social
3 media communications, in part because of what Justice Boyd
4 said. It is a different form of communication. I think
5 everybody acknowledges the way you communicate there can
6 reach so many more people so much faster than in other
7 mechanisms, and you have less control over what sort of
8 information, understanding that we do have some control
9 because we can set different things in the background such
10 that only certain people can see comments, et cetera. You
11 do have less control than you would in some other
12 settings. And I think if we pick up the rules now, you
13 don't know whether there was an intent for them to apply
14 equally to this type of communication that is different
15 that wasn't contemplated when these standards were
16 written. So I see a need for a rule.

17 CHAIRMAN BABCOCK: Justice Hecht, Chief
18 Justice Hecht.

19 CHIEF JUSTICE HECHT: Just a reminder that
20 one thing the Court needs counsel on is the regulatory
21 side of this. So this issue comes up all the time in the
22 conduct commission, and when we meet from time to time
23 with the commission just in -- as an agency related to the
24 Court, one of the concerns commissioners raise is how
25 should we -- what standards do we have for these kinds of

1 cases, when are we going to discipline somebody more
2 severely or not. And I'm reminded Chief Justice Greenhill
3 used to tell me, he asked a court employee one time, not a
4 lawyer, what he thought of free speech, and the guy said,
5 "It depends on what's being said." And so there's --
6 there is a very -- I think there was a very wide, a very
7 disparate view about what judges should say and what they
8 shouldn't, and for myself I thought I had a clearer view
9 of that 25 years ago. Then White comes along and says I
10 can talk about a whole lot of things, but maybe I'm
11 recused; and if that's the only consequence, you know,
12 that is different for the judge than if the judge is going
13 to get disciplined, if he's going to get reprimanded or
14 something. And, you know, how much of speech on social
15 media is just ill-advised, to use Richard's word, stupid,
16 and how much is bad and how much is wrong, and there's a
17 consequence to the appearance of justice and fairness in
18 the judiciary, you know, that's a -- I know the conduct
19 commission has been struggling with that, and we would if
20 we were going to try to tell them -- give some explanation
21 about that.

22 CHAIRMAN BABCOCK: Yeah, and in the whole
23 underpinning of White, the whole reason White came out the
24 way it did was because Minnesota, like Texas, had an
25 elected judiciary, and so lots of things get said by

1 judges because they feel like they have to. Because Judge
2 Wallace gets an opponent who is a single issue, single
3 case opponent, he's got to address that. You're at
4 forums, Judge Estevez, where issues get brought up and you
5 feel like you have to address it in some fashion, based on
6 your interpretation of the code. So there's all of this
7 speech out there. Some could say it's good, some could
8 say it's bad, but it's driven by our system of having
9 elections, and that was almost the whole point of White.

10 CHIEF JUSTICE HECHT: Yeah.

11 CHAIRMAN BABCOCK: O'Connor especially, the
12 way she put it.

13 CHIEF JUSTICE HECHT: And it's one thing,
14 for example, if a judge says, "Well, I would never rule
15 this way in a case"; "I would never hold public school
16 finance unconstitutional," or whatever. I'm -- you know,
17 "I would never apply the death penalty"; "I would always
18 affirm the death penalty." And so then you're recused in
19 that case from now on or those cases. That's different
20 from saying maybe something more systemic, like, you know,
21 "I would never rule in favor of a party represented by a
22 lawyer from Houston." And then maybe if you made a
23 comment like that you've really damaged the independence
24 of the judiciary or something more than just recusing in a
25 case, and it's that -- it's how to differentiate between

1 those that's hard, and the social media can be so easily
2 misunderstood. I think it was your case, but it was one
3 case where the judge put on her Facebook she was starting
4 a trial, sexual abuse, child abuse case, and these
5 cases --

6 CHAIRMAN BABCOCK: The boy in the box case.

7 CHIEF JUSTICE HECHT: "These cases are
8 always hard for the jury." Well, she --

9 CHAIRMAN BABCOCK: Oh, no, that's a
10 different case.

11 CHIEF JUSTICE HECHT: She meant that, you
12 know, it's hard to listen to, it's hard to -- it's hard to
13 sit there as a juror taken off the street and hear about
14 something that you may never see much of, but the defense
15 lawyer says, "There's nothing hard about this case, my guy
16 is innocent, and you're suggesting that it's hard because
17 the case really should go half one way and maybe it
18 won't," and I am inclined to believe her. I doubt that's
19 what she thought, but you can see that -- I mean, it's not
20 completely unreasonable for a lawyer to read it that way.

21 CHAIRMAN BABCOCK: Yeah. Yep. Bobby, you
22 had your hand up a long time ago. You still want to talk?

23 MR. MEADOWS: Yes. I want to say one thing.
24 Obviously, from just listening to Justice Hecht, and this
25 can be about as dense as anything we talk about in this

1 room and what to do about it, but in terms of our
2 assignment, I agree with Kennon that we need a rule and
3 that seems to me for us, this discussion, to be the
4 threshold question, do we need a rule. We've heard that
5 we don't. And if we need a rule, this is about as benign
6 as it gets, because all we're saying is what we already
7 have applies.

8 CHAIRMAN BABCOCK: Okay. There are a bunch
9 of people with hands up. I know Richard had his up, so
10 you're next.

11 MR. ORSINGER: Well, in light of Justice
12 Hecht's comments, administratively I would be very
13 concerned if we adopted a rule that would affect judicial
14 sanction by adding to or modifying the Code of Judicial
15 Conduct, because the Code of Judicial Conduct is a uniform
16 promulgated standard that's been adopted by many states.
17 Maybe all, I don't know. It's been litigated in the
18 United States Supreme Court to some extent. It's been
19 interpreted by hundreds of articles, and I feel like
20 there's safety in numbers there. When we're talking about
21 restraining speech in an area of politicians who are
22 elected to office -- judges, I should say, who are elected
23 to office in the political process, it's a very dangerous
24 area for us to be laying down rules about who can say
25 things. I would rather stay in the pack, in the

1 mainstream. I just can't even dream that we should adopt
2 something here or recommend today that we amend the Code
3 of Judicial Conduct to allow judges to be sanctioned based
4 on what we understand social media to be and what we think
5 is appropriate social media behavior.

6 CHAIRMAN BABCOCK: At the risk of repeating
7 myself, I agree with what you say and what Munzinger said.
8 I don't -- I think we're just stating the obvious. I
9 mean, clearly the speech of judges on a social media, the
10 canons apply to it just as if it was in a newspaper or on
11 television or on radio or on a campaign -- I don't think
12 we're saying anything here. There are problems peculiar
13 to social media that probably need to be addressed. The
14 most critical one that I see is the speech of others and
15 when that becomes the judge's speech, because of -- call
16 it social media platform, but that to me is a problem for
17 judges, and they need to know how to handle that. And I
18 don't think there is any clear rule now on how they -- how
19 they do or don't handle that. It's not their words. It's
20 somebody else's words, but because it appears on their
21 Facebook page or because there's some thing that says
22 "like" that it looks like maybe it's their words. Judge
23 Gray. Justice Gray.

24 HONORABLE TOM GRAY: I was trying to save
25 all of my time for the next discussion, but I feel like

1 I've got to jump in on this one because one thing that --
2 I was very much in the Richard camp of we don't need to
3 change anything here until a statement that Robert made,
4 and it drew my attention to the phrase in (10), "A judge
5 shall abstain from public comment." Do we need to say
6 that everything done on these social media sites is or is
7 not public comment? In other words, to me we don't need
8 the rule, but we may need to clarify what does a public
9 comment mean in the existing rule, because it's the
10 media -- it's the nature of the -- this type media that
11 makes it more public, if we're talking about availability
12 out in a greater environment, and so that sort of caused
13 me to pause and say, well, maybe we don't need the rule
14 that's been proposed, but maybe we need to look at what do
15 we mean when we say "abstain from public comment."

16 Of course, I go with the Munzinger and Buddy
17 Low view of the less said the better, and I don't -- you
18 know, I don't have any social media presence, and so this
19 is -- whatever y'all do is not going to affect me so much.

20 CHAIRMAN BABCOCK: So no personal stake in
21 this thing, huh? All right. Yeah, Justice Brown.

22 HONORABLE HARVEY BROWN: Well, I'm still in
23 favor of not having a rule because I think it's so general
24 it doesn't really add much, but I will say I've heard some
25 judges express the view that they would like a rule not so

1 much to say what they can't do, but to make it clear what
2 they can do. In other words, create safe harbors. For
3 example, you go to judicial conferences, and you'll have
4 four people up front speaking on a panel, and one will
5 say, "You better not like a lawyer," and another will say,
6 "Oh, it's perfectly fine to like a lawyer," and they get
7 in this little debate, and the judges are sitting there,
8 and they all don't know what to do. So somebody files a
9 complaint, and you end up in front of the Judicial Conduct
10 Commission. They all read it, and I'm concerned about how
11 they might read this comment. Some of those are not
12 lawyers, and they all bring their own predilections and
13 experiences to it, and the judges feel like they don't
14 have any predictability. So I just point out that there
15 is the flip side to a rule that you could also address
16 what they could do, not just what they can't do.

17 CHAIRMAN BABCOCK: Well, and that's not an
18 insubstantial point either, because a lot of judicial
19 candidates like to -- like to say, "I'd love to tell you
20 my position on this, but I can't because I'm prohibited,"
21 and it's cover for that on the campaign trail. Now,
22 whether or not that's something we ought to be trying to
23 do or not, provide cover, is a different issue. Judge
24 Peeples.

25 HONORABLE DAVID PEEPLES: Let me make two or

1 three comments. The issue brought up by Chief Justice
2 Hecht, I'm not sure whether we're talking about getting
3 into the -- you can get recused for this but not
4 sanctioned or that kind of thing, but the principle of
5 fair notice is big time important, and so the judges and
6 everyone else are entitled to -- the people who apply this
7 rule, the conduct commission, are entitled to have rules
8 that are easy enough to read and follow and you can know
9 what you can and can't do, and that's a very fair thing to
10 expect. Now, here is just an observation: When people
11 are running for office and they're running for an
12 important job, they are going to want to use social media,
13 and to expect them not to is expecting a lot, and Barack
14 Obama and Bernie Sanders and others have shown how just
15 powerful it is to raise money and get your message out,
16 and not to get into, you know, the President and tweeting
17 and 140 characters and all of that, but it's just so easy
18 to shoot from the hip. It just is, and when you see
19 chains, like, you know, "like," and a three or four word
20 comment and then somebody else, and they're referring back
21 to the person two comments before, that can get
22 undignified in a hurry. And one concern I have and we
23 haven't really talked about it that much is the judge
24 didn't intend to be caught up in a mud wrestling almost
25 undignified thing, but it happens, and you can be sort of

1 tainted by the slop.

2 CHAIRMAN BABCOCK: That's what I'm talking
3 about.

4 HONORABLE DAVID PEEPLES: And that is a
5 concern that, you know, we're not going to be able to come
6 up with something perfect that's very easy to apply, I
7 don't think, but we should do the best we can to keep the
8 size of the undignified discussion smaller rather than
9 larger, it seems to me. And that's why it's hard.

10 CHAIRMAN BABCOCK: But do you want to make
11 the judge the policeman for the dignity of others? I
12 mean, the judge says something that's perfectly
13 acceptable, totally acceptable; but he does it on social
14 media, and then, you know, all of the pig farmers are out
15 there, start slopping around and interpreting it in ways
16 he never intended; and they say a whole bunch of stuff
17 that's not dignified. Is it the judge's responsibility to
18 police that because he started it? I don't know the
19 answer. I'm just saying that's posed by the question.

20 HONORABLE DAVID PEEPLES: Are you asking for
21 an answer?

22 CHAIRMAN BABCOCK: No, no. I'm just putting
23 it out there.

24 HONORABLE DAVID PEEPLES: Good.

25 CHAIRMAN BABCOCK: Yeah. No, it's --

1 MS. TAYLOR: Holly.

2 CHAIRMAN BABCOCK: It's you, Holly. Sorry.

3 MS. TAYLOR: Sorry. Just briefly, the
4 problem that Judge Newell and you, Chip, were talking
5 about earlier about the issue on social media of the
6 comments being made actually by someone else impacting a
7 judge can be true even if the judge is not on social
8 media. I just want to point out that you can get dragged
9 into these things by somebody photographing you,
10 videotaping something you said completely out of context
11 or just quoting you, and this discussion is going on, and
12 if you're not on social media maybe you don't even know
13 about it, but you've still been dragged into it. So it's
14 something that we just can't avoid.

15 CHAIRMAN BABCOCK: Yeah. Okay. Judge
16 Estevez.

17 HONORABLE ANA ESTEVEZ: Well, just in light
18 of what we've talked about, I was just going to suggest we
19 don't adopt a new sentence, but we really spend time on
20 the comment so that we don't add to the electronic social
21 media, so it stays broad enough that it will include any
22 new technologies and that we do focus on the comment. So
23 we can decide maybe we say, "If you 'like' something, you
24 are adopting it," period. I don't know if that would be
25 helpful for those that don't understand that.

1 CHAIRMAN BABCOCK: Yeah. Okay. Before our
2 morning break I'll ask the vice-chair of this subcommittee
3 if he wants any votes. Want any votes taken?

4 HONORABLE DAVID PEEPLES: Well, let's just
5 be sure we understand what marching orders we need.
6 Should we have a rule or not? Should we say something or
7 not? I guess that's one question. And then if we want a
8 rule, and I think the Court probably wants something to
9 look at. I mean, they can always say, "No, we're going to
10 keep things the way they are. " Are we thinking -- should
11 we consider and talk about whether to change 3B(10), you
12 know, to change Canon 5, which is a really high-powered
13 task force drafted, that -- that's a big project it seems
14 to me.

15 CHAIRMAN BABCOCK: Yeah.

16 HONORABLE DAVID PEEPLES: But if we're
17 supposed to do that, we need to know it, and then there's
18 the question of how specific do you want to be? And then
19 I think the points are very good and valid that -- I
20 argued it myself. Fair notice is -- you're entitled to
21 that, and we need to do the best we can to tell people,
22 and I think as Pam Baron said, a list of you can do this,
23 you can't do that, even if it's not exhaustive might
24 advance the ball some. So I don't know how much latitude
25 the subcommittee thinks we have. Do we need guidance?

1 What do you all think?

2 MS. WOOTEN: Personally I think it would be
3 helpful to know whether we should try to craft a rule.

4 HONORABLE DAVID PEEPLES: I didn't hear a
5 whole lot of traction on that, but there may be some.

6 MR. MUNZINGER: May I ask a question?

7 CHAIRMAN BABCOCK: You may. Yes, you may.

8 MR. MUNZINGER: Perhaps you know it. I'm
9 looking at this B(10). Is there a comment that
10 accompanies B(10)?

11 CHAIRMAN BABCOCK: I don't think so.

12 MR. MUNZINGER: It's not in what we've been
13 handed. I don't know if the rules themselves include a
14 comment, because one issue here would be if we are
15 attempting to alert the bench to the pitfalls of using
16 social media, perhaps rather than drafting a new rule a
17 couple of cautionary sentences in a comment might do the
18 job.

19 CHAIRMAN BABCOCK: Okay. Well, I think it
20 would be good to have a vote on whether we have a rule or
21 not. So do you want to frame the question, Justice
22 Peeples?

23 HONORABLE DAVID PEEPLES: Well, I'd ask the
24 committee how many people think there shouldn't be any
25 change, and we leave the code just the way it is?

1 CHAIRMAN BABCOCK: All right. Everybody
2 that thinks we should --

3 HONORABLE DAVID PEEPLES: Is that a fair
4 statement?

5 CHAIRMAN BABCOCK: -- not have either
6 alternative A, B, or Munzinger's C, don't be stupid,
7 everybody that thinks we should not have any of those
8 alternatives, raise your hand.

9 All right. Everybody that thinks we should
10 have something?

11 17 to 6 think we should have something.
12 Okay. Do we have any other votes to take before we take a
13 break?

14 MR. ORSINGER: I would propose that it would
15 be useful to know if it should be a change in the rule or
16 just a comment, because I think some people --

17 MR. LOW: I agree.

18 MR. ORSINGER: -- feel more comfortable with
19 the comment than they do a rule.

20 CHAIRMAN BABCOCK: Is that okay with you?

21 HONORABLE DAVID PEEPLES: Sure. Sure. You
22 know, there are not a lot of comments, and I got this out
23 of the back of the West Thompson, whatever it is,
24 Publishing. You know, there's not a lot of commentary.

25 CHAIRMAN BABCOCK: I don't see a comment to

1 3B(10).

2 HONORABLE DAVID PEEPLES: So I don't know
3 what the Court is thinking. I think should we try to come
4 up with some do's and don't's or some kind of list? I
5 think that's something we might want to get the guidance
6 of the committee on.

7 CHAIRMAN BABCOCK: The vote will be how many
8 people think we should do a comment versus how many people
9 think we should tackle 3B(10). Judge, before we vote --
10 judges before we vote, do you have any opinion on that?
11 You could break the tie before we vote.

12 CHIEF JUSTICE HECHT: Not that I want to
13 express.

14 HONORABLE TOM GRAY: Chip, it might be worth
15 pointing out that my quick glance at the Code of Judicial
16 Conduct is there are no current comments in it at all.

17 MS. HOBBS: That's not true.

18 MS. WOOTEN: It depends on where you look,
19 because there are in some publications, like that West
20 publication there are some comments I believe, and in
21 other publications you see no comments.

22 MS. HOBBS: On the Court's website, if you
23 look at the Code of Judicial Conduct on their actual
24 website, it does include the comments, including the
25 comment that was written after White, which is -- warns

1 judges, "You may get to talk about things, but if you talk
2 about them you may face recusal." That's a comment to
3 Canon 5.

4 HONORABLE TOM GRAY: So are they official
5 comments?

6 CHAIRMAN BABCOCK: I think I wrote that
7 actually.

8 MS. HOBBS: As one who was involved it, I
9 considered it an official comment.

10 HONORABLE TOM GRAY: Okay.

11 CHAIRMAN BABCOCK: Okay. So everybody that
12 thinks we should work on a comment as opposed to tackle
13 3B(10)? Everybody who is a comment person.

14 All right, everybody that thinks we ought to
15 try to redo 3B(10).

16 All right. 18 to 1, comment over tackle
17 3B(10). So with that, we'll take our morning recess and
18 be back at 11:05.

19 (Recess from 10:48 a.m. to 11:06 a.m.)

20 CHAIRMAN BABCOCK: We are back on the
21 record. Kent, Eduardo. They can't even hear me.

22 HONORABLE JEFF BOYD: You need a whistle.

23 CHAIRMAN BABCOCK: I've got a pretty good
24 whistle. All right. Judge Peeples, for the -- for
25 direction, the -- I think it's the Court's view that the

1 comment should address substantive issues like can a judge
2 "like" somebody, can a judge "like" some comment, what
3 responsibility does a judge have to police his Facebook or
4 social media site. What was the other one? Another --

5 HONORABLE JEFF BOYD: Postings about cases
6 pending, is that permissible. What was the other one?

7 CHAIRMAN BABCOCK: There's one more.

8 HONORABLE JEFF BOYD: And your point being
9 the comment as a draft for consideration would be helpful
10 to do a substantive comment that talks about specific
11 practices in social media, not just a general, "Hey, you
12 need to follow the rules whenever you're on social media."
13 And that way it will provide for better discussion.

14 HONORABLE DAVID PEEPLES: For example, one
15 thing that occurs to me is if you want to have some
16 different rules for social media as compared to everything
17 else is, you know, keep 3B(10) for traditional things and
18 say on social media you can't even do what 3B(10) allows.
19 You could say that, just stay away.

20 HONORABLE JEFF BOYD: And that's the
21 question I was raising earlier.

22 HONORABLE DAVID PEEPLES: Just stay away
23 from cases, period. That would cover the continuing
24 education speech, things like that, which are not on
25 social media. That would be one way of doing it.

1 CHAIRMAN BABCOCK: Yeah. That's an issue to
2 discuss. And there's one more. We'll get it to you. If
3 the Chief was here he would remember, but all right,
4 moving on to the proposed amendments to the Code of
5 Judicial Conduct and policies of assistance to court
6 patrons by court and library staff. The chair of the
7 subcommittee is Nina Cortell, and she's unable to be here,
8 and so who draws the assignment? It's David Peeples
9 again. Thank you, Judge, for working so hard on all of
10 this.

11 HONORABLE DAVID PEEPLES: Okay. You will
12 need before you three things, I think. One is the -- and
13 let me just say, it falls into three categories, a
14 proposal to let judges -- allow judges to help people more
15 than they think they can right now, the self-represented,
16 and then a proposal for clerks, district and county clerks
17 and their staff, and then an identical proposal of do's
18 and don't's and so forth for court staff, librarians, et
19 cetera. So we've got those three things, but the second
20 and third are substantively the same. I didn't find a
21 single thing different. And did you mention that Trish
22 McAllister is here?

23 CHAIRMAN BABCOCK: Oh, I did not. I'm
24 sorry. Trish McAllister is here, and, Judge, I believe
25 you had a motion with respect to allowing her speaking

1 rights on the committee.

2 HONORABLE DAVID PEEPLES: Yes.

3 CHAIRMAN BABCOCK: So granted.

4 HONORABLE DAVID PEEPLES: Thank you.

5 CHAIRMAN BABCOCK: With no opposition that I
6 heard, by the way.

7 HONORABLE DAVID PEEPLES: So, you know, Pam
8 Baron suggested on the last discussion that it would be
9 helpful to have a list of things, couldn't be exclusive,
10 you can do A, B, C, D, and E, and you cannot do X, Y, and
11 Z, and so we've got this here for clerks and staff and so
12 forth about you are permitted to do many, many things.
13 There are some things you shouldn't do, and the things
14 that are permitted you're not going to get in trouble for
15 doing them. I think that's a fair statement, and I think
16 I need to point out that none of this is mandatory.
17 Unless I missed something, it's they may do it, but nobody
18 is compelled or mandated to do any of this, but they're
19 given permission.

20 And let me say Lisa Hobbs and Justice Busby,
21 who are -- have been active in the work-up of this with
22 the Access to Justice Commission, and I'm not sure,
23 because I can't tell you exactly their job descriptions up
24 there, but they're up to speed on it. And do you-all
25 think we ought to focus on any issues first, second, and

1 third? How do you think this ought to be structured?

2 MS. HOBBS: Well, if I could just give a
3 little background --

4 HONORABLE DAVID PEEPLES: I think that would
5 be great.

6 MS. HOBBS: -- to the committee about why
7 this proposal came from the Access to Justice Commission.
8 We are seeing, as I'm sure you all are aware of, a crazy
9 increase in the number of pro se litigants in our court
10 system. A lot of it is family law, but it's not
11 exclusively family law, but the numbers are very high, and
12 we're not alone. This is not something that's happening
13 only in Texas. It's happening all across the nation, and
14 a lot of times what they're coming to the court system
15 with are the most important cases, parental termination
16 cases, losing their home cases, you know, losing a child,
17 losing -- these are big cases that they're trying to
18 handle on their own, and courts are struggling with it,
19 too. If you talk to judges across the state about how
20 difficult it is when someone comes in and they are
21 representing themselves, as they have a right to do, but
22 it is -- it's -- it is definitely creating a burden on the
23 court system handling this increased number of
24 self-represented litigants.

25 So the question is -- the question that

1 always comes up with judges and court staff is uncertainty
2 about how we can accommodate self-represented litigants
3 when they come into the courthouse. What can we do, what
4 can we say, what can we not say? What's the difference
5 between giving legal information on how to go through the
6 court process versus giving legal advice that we don't
7 want our court staff or judges to be doing, and so on a
8 national level the ABA model code was changed to assure
9 judges -- from the judge's standpoint, the issue is am I
10 being -- am I violating my duty of impartiality when I do
11 give accommodation to somebody in my courthouse. Does
12 that make me -- am I giving one side an advantage if I
13 tell them, you know, here's what's going to happen as we
14 go through this process.

15 And so the ABA amended their model code 10
16 years ago to add a comment that says it doesn't violate
17 the canons for you to make reasonable accommodations to
18 self-represented litigants. About five years ago the
19 Conference of Chief Judges passed a resolution urging the
20 states to amend their Code of Judicial Conduct to make
21 clear to judges that it's not a violation of their duty of
22 impartiality to make reasonable accommodations to
23 self-represented litigants, but Texas is not one of those.
24 Right now there are 35 states who have either in response
25 to the ABA model code change or at the call of the Chief

1 Justices have amended their code, and Texas is not one of
2 those 35. Instead what we've tried to do is educate
3 judges and court clerks and court personnel in a concerted
4 effort that involved Access to Justice Commission as well
5 as the OCA, Office of Court Administration, and there was
6 one other body.

7 MS. McALLISTER: Well, it really was just us
8 two. There was another body involving modification of
9 the --

10 MS. HOBBS: Okay. So we -- these groups
11 worked together to create a 25-page manual on how you can
12 accommodate self-represented litigants in the court
13 system, and they went around to all of the conferences,
14 the judicial conferences and the court clerk conferences,
15 and they for two years tried to educate people in the
16 courthouse on what is okay to do and what is not okay to
17 do, and the problem is as the Access to Justice Commission
18 sees it is there's still a lot of uncertainty, and you can
19 be treated completely different in county A than you would
20 in county B just based on what comfort level judges and
21 court staff have in helping you navigate through the court
22 system.

23 And so the rules and legislative committee
24 of the Access to Justice Commission decided to study this
25 about two years ago. It seems like it was 2015 when we

1 first started studying this, and so we just looked around,
2 what were other states doing, and you'll see in this
3 report that I think was included in the materials today
4 dated July the 6th all of the research that we have on how
5 other states are handling this issue and changing their
6 code, and so our collective feeling at the Access to
7 Justice Commission was we need judges to know that it
8 doesn't violate their duty if they make reasonable
9 accommodation. We need to give them guidance, and we need
10 to give court clerks and court personnel who aren't
11 lawyers guidance as well and that it should come from the
12 Texas Supreme Court because we've tried to do it
13 informally without the stamp of approval from high up, and
14 it's just not helping -- the problem is still persistent.
15 So this is our recommendation, and our recommendation is
16 that the code be changed and the policies be adopted by
17 the Supreme Court.

18 CHAIRMAN BABCOCK: Okay. Judge Estevez.

19 HONORABLE ANA ESTEVEZ: Thank you. That's
20 it. We need something like this, because I struggle with
21 this in trying to help people. I have other lawyers
22 watching that criticize what they think I've crossed the
23 line, you know, so I think this is wonderful.

24 MS. McALLISTER: Can I just add a little bit
25 more context?

1 CHAIRMAN BABCOCK: Yeah, sure, Trish.

2 MS. McALLISTER: Which is, you know, I
3 was -- I was at the commission when we were going around
4 and doing all of this stuff, and one of the things that's
5 still present today is that we still get reports of
6 self-represented litigants going to courthouses and being
7 told that they can't file things, they have to go away and
8 get a lawyer. When I first started at the commission in
9 2011 there was a website -- some county, and I can't
10 remember what it was now, basically had on their website
11 you cannot come to the courthouse unless you have a
12 lawyer. So we are talking about just even -- you know,
13 just even allowing people to file things pro se, much less
14 giving people just information about procedural things
15 like, you know, "You need to go over to that room over
16 there to file your pleading," which they would tell a
17 brand new lawyer to do, or "You need to get service in
18 this particular way."

19 So those are -- those are just -- those are
20 very simple things that, you know, court personnel are not
21 clear on; and then judges, like you said, I mean, since
22 I've been in the access to justice world for 20 years
23 we've been having conversations with the Travis County
24 judges. Those are the ones that I have litigated with,
25 and from courtroom to courtroom judges were unclear about

1 what they could do, whether they could ask questions,
2 whether they could not ask questions. Some judges said
3 they felt comfortable that they could. Other judges felt
4 like there was no way that they could, so it's been a
5 long-standing issue that, you know, we've just not been
6 successful with in terms of education. So that's it.

7 HONORABLE JEFF BOYD: Can I ask a question
8 real quick?

9 CHAIRMAN BABCOCK: Sure.

10 HONORABLE JEFF BOYD: So it's an issue in
11 the minds of the people that are being asked for help,
12 what can I do?

13 MS. McALLISTER: Yeah.

14 HONORABLE JEFF BOYD: Is it an issue in
15 terms of enforcement against those people for violating
16 the current rules? Is that happening? Are people getting
17 in trouble for doing --

18 MS. McALLISTER: So we did some research on
19 that.

20 HONORABLE JEFF BOYD: It's kind of hard to
21 write rules that allow nonlawyers to practice law or to
22 say, okay, we're going to define legal advice so broadly
23 that basically you can give legal advice even though you
24 can't. In other words, it's going to be hard to write
25 rules to allow some of the help that in the real world is

1 happening right now, and so if we do write specific rules
2 we're going to end up saying, "You can't do some of the
3 things you're doing," which I'm not sure that in the end
4 is going to be helpful to the mission you're trying to
5 accomplish. You know what I'm saying?

6 MS. HOBBS: Well, I mean, I think from a
7 policy standpoint you don't want people -- what you're
8 saying is there's unauthorized practice of law going on in
9 our courthouses today, and are we going to stop it when we
10 tell them, "Oh, by the way, that's giving legal advice and
11 you shouldn't be doing it"?

12 HONORABLE JEFF BOYD: So I happen to know
13 someone -- that's as much as I'll say.

14 HONORABLE DAVID NEWELL: On Facebook.

15 MR. ORSINGER: Do you like them?

16 HONORABLE JEFF BOYD: Who was -- that's as
17 much as I'll say. Who was served with a temporary
18 protective order and notice of hearing this coming Monday
19 in a small county in Texas where he had to, you know, show
20 up and be prepared for the actual hearing for a real
21 protective order. It was just an emergency temporary one,
22 by an estranged relationship, and so someone told him,
23 "You need to drive up to that court and file a response,"
24 and so he drove up to the court. Of course, he didn't
25 have a lawyer. He doesn't have a college degree, doesn't

1 know what he's doing, and drives up and someone at the
2 court said, you know, "If I were you, I probably wouldn't
3 file a response on your own. I would definitely go talk
4 to a lawyer, and I can help you -- help put you in touch
5 with Legal Aid to see if they can help, but I don't think"
6 -- having driven all the way up there, "if I were you I
7 don't think I would file anything right now."

8 Well, is that legal advice, or is that that
9 procedural stuff you're talking about? You start trying
10 to write rules on whether they can say that much or not,
11 and you might be preventing what was pretty good help and
12 probably not a blatant violation, but I don't know how to
13 write rules where that doesn't become legal advice, right?

14 MS. HOBBS: Well, I think there's gray area
15 certainly between the two, and that's what everyone is
16 struggling with, and you can read our policies and decide
17 that some of it shouldn't be in there, and maybe we need
18 to add more. I think the subcommittee's philosophy on it
19 was try to get as many examples of what's proper and
20 what's not proper so that maybe we're lessening that gray
21 area that we're all struggling in now. Are we going to
22 get it perfect? No. Do we want education in conjunction
23 with an adopted policy by the Supreme Court? Yes.
24 Because when we have these conversations it's -- it helps
25 clarify different examples, but, yeah, you're right,

1 there's problems with having a policy.

2 CHAIRMAN BABCOCK: Judge Yelenosky.

3 HONORABLE STEPHEN YELENOSKY: There are
4 judges who are uncertain, and probably that needs to be
5 addressed, and there are pro se who are uncertain, but as
6 we know from 145, there are judges who may be hostile to
7 pro se litigants, and there are pro se litigants who can
8 be hostile to the court.

9 CHAIRMAN BABCOCK: No?

10 HONORABLE STEPHEN YELENOSKY: And so when
11 we're writing this I think we need to look at it from all
12 of those directions, and also I am concerned that what I
13 think is -- would be appropriate for the judge to do and I
14 have done, and the other side understands, and I tell
15 them, you know, "I can do this, but I can't do that," will
16 be clipped perhaps by this; and I'm not sure that -- maybe
17 examples are okay; but if you have a hostile pro se
18 litigant, an example for something like this which says,
19 "Explain your ruling," I always like to explain my
20 rulings; but you have a pro se litigant who hangs on and
21 continues to ask and continues to ask and then you finally
22 say, "I'm sorry, that's the ruling, you're going to have
23 to leave the court," they could point to this comment and
24 say, "Well, it says you're supposed to give me an
25 explanation."

1 Now, that may seem farfetched, but, you
2 know, there are pro se litigants who ask me to show them
3 my oath, you know, and things like that. So I think we
4 understand it to be "Here's what you can do," but some pro
5 se litigants will understand it to be "Here's what you
6 must do, Judge." And then the other side of it is it
7 may -- it may say too much, or it may not say not enough.
8 I'm not sure what it means, for instance, when it says
9 "foundation, evidentiary foundational issues." Does that
10 mean if they screw up in trying to present something I can
11 tell them how to do it the next time, or is it
12 something -- and so, therefore, I sort of prevent the
13 other side from excluding evidence on the basis of some
14 evidentiary objection? I'm not sure what that means, and
15 I don't think there's anything we can say that in a rule
16 or maybe even in a comment that can sort of navigate
17 through all of that, but whatever we do, I think we need
18 to consider all of those different perspectives.

19 MS. HOBBS: I think I didn't answer Justice
20 Boyd's question about -- and Judge Yelenosky's comment
21 made me kind of think because when you were talking I was
22 wondering whether you were concerned about being
23 disciplined, that they may file a complaint against you?

24 HONORABLE STEPHEN YELENOSKY: I'm not
25 worried about that.

1 MS. HOBBS: Or that it might affect the
2 appeal and in some way that they may raise it in a review
3 of your refusal to give an explanation?

4 HONORABLE STEPHEN YELENOSKY: Well, I'd like
5 to think that I'm concerned about making sure that the
6 hearing or trial is fair and figuring out what that is may
7 be in a case-by-case basis. For instance, you may have a
8 litigant who suffers objections that are -- you would
9 otherwise consider sort of a hypertechnical, ridiculous,
10 and any attorney would cast aside; and maybe if they do
11 that repeatedly I might somehow make it clear that, you
12 know, that's not an okay objection perhaps.

13 MS. HOBBS: Right.

14 HONORABLE STEPHEN YELENOSKY: And I wouldn't
15 do that with an attorney probably. On the other hand, I
16 might if an attorney is incompetent enough to allow that
17 to continue, but you have to judge it on a case-by-case
18 basis, and it's not a concern -- I'd like to think it's
19 not a concern about anything that could happen to me or on
20 appeal, but how do you make the trial fair.

21 MS. HOBBS: Right. Well, we did survey
22 nationally whether -- in the states that have adopted the
23 model code language or some language in response to the
24 call of the Chief Justices, whether there had been any
25 complaints filed with the judicial conduct commissions

1 based on the failure to accommodate, accommodating too
2 much, anything regarding accommodation of self-represented
3 litigants, and we got no reports that any complaints have
4 been filed in the 35 states who have changed the rule as
5 we're proposing or similar to how we're proposing, and
6 that's been over the last 10 years.

7 HONORABLE STEPHEN YELENOSKY: Do you have
8 any information on whether judges when given examples and
9 you can do this, some judges just say, "I'm not going to
10 do that"?

11 MS. HOBBS: So I -- after we published this
12 rule -- proposed rule, I went around to various judicial
13 education forums and worked with Linda Chew --

14 HONORABLE STEPHEN YELENOSKY: Oh, I know
15 her.

16 MS. HOBBS: -- and we did a presentation,
17 and yes, I mean, you can sit in a room with a hundred
18 judges from across the state, and they all have very
19 different ideas about whether they can accommodate in any
20 way, are they doing enough to ensure that people have
21 access to the courthouse. There are some that are very
22 concerned that they are not doing enough. There are some
23 who think they can't do anything, and that is really why
24 we would like to have a rule.

25 HONORABLE STEPHEN YELENOSKY: Well, I mean

1 judges who know they can do it, but just won't because
2 they're philosophically opposed to pro se litigants or as
3 a practical matter they're opposed to pro se litigants, so
4 for those judges you would want something mandatory. On
5 the other hand, that creates a problem on the other end
6 because it gives a cudgel to pro se litigants who want to
7 use a cudgel inappropriately. So on the one hand clearing
8 things up is helpful, but it's not going to be helpful for
9 judges who philosophically are just opposed to pro se
10 litigants.

11 MS. HOBBS: Well, if they're opposed to pro
12 se, right, but if they are legitimately concerned that
13 accommodation is a breach of their duty of impartiality,
14 this will help them. So there could be two reasons why
15 you're philosophically not going to accommodate. One is
16 probably legitimate, that you're worried that you will
17 come across as not fair. Well, we want to take that off
18 the books, and we'll never change everybody's minds about
19 how they can be helpful to probably the people who elect
20 them, so but we want to take away one of those
21 philosophical problems off the table.

22 CHAIRMAN BABCOCK: Richard. Yeah, you.
23 Orsinger. Richard the younger.

24 MR. ORSINGER: Is your only concern about in
25 the trial process, or is it all aspects of the judicial

1 process?

2 MS. HOBBS: Most of the problems we see are
3 in the trial court level and not the appellate court.

4 MR. ORSINGER: Well, I was in an associate
5 justice court in Dallas County two weeks ago, and there
6 were two pro ses that presented interesting questions, and
7 it was very interesting to me the way the AJ handled it,
8 and I will throw that out there for consideration. The
9 first one was a mother of an eight-year-old child who the
10 state had taken temporary possession away because she had
11 a drug problem, and the child had been placed in the
12 custody of a parent -- of her parent, who had now filed a
13 lawsuit to have the mother be given court-ordered
14 visitation, and the associate justice -- associate judge
15 found out that the father had not been named in the
16 petition and had not been served with process and said, "I
17 can't go forward with any decision about parental rights
18 unless you first notify the father. Who is the father?
19 Where is he? When did you last see him?" And after a
20 period of discussion, which took a long time, it seems,
21 the whereabouts of the father was unknown.

22 So then the judge said, "You're going to" --
23 "I'm going to have to appoint an attorney ad litem to find
24 the father and then you're going to have to public
25 citation." And then she asked anyone in the courtroom if

1 they knew how much citation costs, and one lawyer stood up
2 and says, "It's \$200 if it's just one time, but sometimes
3 they'll waive the fee." So off they went to go kind of
4 get it right and come back again.

5 The next case a father had been denied
6 visitation. He was pro se, and he had filed apparently an
7 original petition to modify the visitation so that he got
8 more concrete visitation; but the associate judge was
9 bothered because it was an original petition and not a
10 petition to modify; and she said, "I can't grant the
11 relief you want. You haven't filed the right pleading";
12 and he said, "Well, what is the right pleading?" And she
13 said, "Well, it's not this pleading." So she wasn't
14 willing to tell him to go file a petition to modify. So I
15 thought in my mind isn't that interesting that she was
16 willing to kind of help out the first litigants to be sure
17 that the non-named party who was an essential party was
18 named, but in the second she wouldn't tell the guy the
19 pleading. There's a rule you're not following, but I
20 won't tell you what the rule is. Reminds me of some of
21 the stories of the Roman emperors. So it seems to me --

22 HONORABLE STEPHEN YELENOSKY: Those are
23 different. She's protecting somebody who is not there.

24 MR. ORSINGER: There we go.

25 HONORABLE STEPHEN YELENOSKY: That's

1 different.

2 MR. ORSINGER: Okay. See, now, that seems
3 really different to you, but from the standpoint of are we
4 giving justice to people that need it, to me I see a lot
5 of similarity. There's a poor guy there that was smart
6 enough to find an original petition, but he didn't
7 understand the law enough to know that you don't file the
8 original petition in order to modify.

9 HONORABLE STEPHEN YELENOSKY: I'm not saying
10 she should have -- I'm not disagreeing with you on the
11 second example. I'm just saying there's a rational
12 reason --

13 MR. ORSINGER: Yeah.

14 HONORABLE STEPHEN YELENOSKY: -- for drawing
15 a distinction, which is there's somebody not in the
16 courtroom and the court needs to make sure that person
17 gets due process. That's different.

18 MR. ORSINGER: Well, from just a neutral
19 observer sitting in the back of the courtroom it seemed to
20 me that our judges should be able to free -- be free to be
21 able to tell a litigant if they can't get into the
22 courthouse correctly what they need to do to get into the
23 courthouse, because that's when the law starts, and so
24 that's a little bit different than monitoring a trial I
25 understand, but I think we may have just as much trouble

1 getting people into the courthouse as we do getting them
2 through a trial.

3 CHAIRMAN BABCOCK: Kent, then Trish, then
4 Judge Estevez.

5 HONORABLE KENT SULLIVAN: Just a quick
6 comment at 50,000 feet, and this may only occur to me, but
7 it just seems to me that there's an elephant, you know,
8 standing in the corner that we ought to acknowledge, and
9 it's that there are very significant portions of the legal
10 system for which you need a lawyer, and there's simply no
11 way to circumvent that. That's the way I view it, and we
12 ought to be more straightforward, I think, and honest
13 about addressing that. I mean, the medical analogy that
14 occurs to me is if somebody walked into an emergency room
15 and they had a horrible medical problem and they were
16 asked, you know, "Do you have enough money to hire a
17 doctor?" And the answer is "no."

18 "Well, I'll give you some hints on how you
19 might want to operate on yourself." You know, I don't
20 think we would think that was satisfactory for a second,
21 but I think the discussion is such that we largely think
22 that it's okay with respect to our legal system. My quick
23 thought is that there are two things that you have to do
24 in terms of dealing with this problem long term, and it's
25 a problem -- and the reason I'm reacting this way is I

1 think it was Lisa's comment that it's obviously getting
2 worse. The numbers are getting larger. It's growing and
3 growing, and we are still 10 years behind looking through
4 the rearview mirror.

5 First, I think you've got to decide a system
6 that triages pro ses to determine whether or not they
7 really have a legal issue that requires a lawyer, and then
8 second, and this is the tough one, you've got to get them
9 a lawyer. And it seems to me that we haven't been as
10 aggressive as we could be in terms of using law students,
11 in matching them with appropriate legal issues and
12 problems and sort of opening the courts up maybe under
13 some supervision for them to be much more actively
14 involved, could be a win-win. We haven't been as
15 aggressive as we should be in identifying perhaps retired
16 lawyers or people that are not as active in the practice
17 and trying to get them involved, and then finally I think
18 this has been the issue that's been most contentious in
19 really insisting that all of us as practitioners bear some
20 responsibility for this, and there's got to be a way for
21 sharing that responsibility at the end of the day, but I
22 think the first order of business is acknowledging that
23 this is the issue, that we're going to have to in certain
24 circumstances, that we could identify or acknowledge,
25 we're going to have to get people lawyers when they need

1 them.

2 CHAIRMAN BABCOCK: Trish.

3 MS. McALLISTER: I just wanted to address
4 the question that you brought up, which is that is
5 actually a very, very common thing that we hear, which is
6 people believe that telling somebody what pleading they
7 should file is legal advice, but they don't feel that
8 stating, you know, you need to -- do citation by
9 publication or you need to do this and this and this,
10 that's procedural. So it doesn't actually surprise me
11 that she came down that way, that a judge came down that
12 way, because we hear court staff being told these things
13 as well. So that is a classic example of, you know, from
14 the outside you and me would say why did she go that far
15 with this one case, but she wasn't willing to go very far
16 with this other case, but in her own mind, she felt like
17 one was actually giving legal advice and one was not. So
18 that's a really common one that we hear about all the time
19 with the pleadings.

20 CHAIRMAN BABCOCK: Judge.

21 HONORABLE ANA ESTEVEZ: My question was also
22 -- kind of like Trish's was, but mine was I wanted to just
23 ask you if you would have been opposing counsel, a
24 separate party, would the actions of the judge have
25 offended you in either way, in either case?

1 MR. ORSINGER: No. No.

2 HONORABLE ANA ESTEVEZ: What would you --
3 let's just say that you are a party, and they're before
4 you, the other side is another attorney, and I just want
5 to know when do you think that's inappropriate, if the
6 same situation had occurred and the other party had a
7 lawyer.

8 MR. ORSINGER: It's easier for me to say in
9 this instance than it is to announce a general feeling, a
10 general policy; but if all you're doing is helping
11 somebody to get into court, that doesn't offend me. But
12 if you're helping them in court to win, that does offend
13 me.

14 HONORABLE ANA ESTEVEZ: Well, if they had
15 filed the wrong pleading, you would have objected that it
16 was the wrong pleading --

17 MR. ORSINGER: Right.

18 HONORABLE ANA ESTEVEZ: -- but you wouldn't
19 want me to be the one to tell them what they had to file.

20 MR. ORSINGER: Right.

21 HONORABLE ANA ESTEVEZ: Right? I mean,
22 wouldn't it have offended you? "Judge, why are you
23 practicing law for them?"

24 MR. ORSINGER: You know, it seems to me on a
25 preliminary procedural point like that we have to make a

1 decision about whether we want people to get into court
2 and be able to say what they want or not. If we're going
3 to say if they don't hire a lawyer they can't get into
4 court and they can't put on their evidence or state their
5 case, then we need to stop that behavior.

6 CHAIRMAN BABCOCK: Yeah, but your client
7 doesn't want them to get into court.

8 MR. ORSINGER: Okay.

9 HONORABLE ANA ESTEVEZ: I want to assume
10 they had a lawyer, so they're technically equal.

11 MR. ORSINGER: You know, as lawyers we have
12 to balance representing the interests of a client in a
13 particular case with adopting policies or espousing
14 policies that are good for the society as a whole, and in
15 a particular case it may be your obligation to oppose a
16 party getting an opportunity to put their case on, but
17 sitting around in this room we have to concern ourselves
18 with the overall society. And so it seems to me like the
19 discussion we should have is not whether an individual
20 lawyer can object or dislike what's happening, but whether
21 as a society we're going to condone people who don't have
22 lawyers not ever getting their day in court because it's
23 too complicated to get into court.

24 HONORABLE ANA ESTEVEZ: I'm not disagreeing
25 with you. I'm trying to let you perceive it in a way that

1 the judge perceives it because we have to look at them as
2 if they are a lawyer, at least that's how we feel without
3 this, and therefore, we're treating them as if there was
4 two equal lawyers and one came and what would their right
5 have been if they would have been here.

6 MR. ORSINGER: I get that. I know.

7 HONORABLE ANA ESTEVEZ: And so it's very
8 difficult for us to not look like we are helping this
9 person, because we don't really know what the merits of
10 the case is. We are giving legal advice if we're telling
11 someone, "You have the wrong pleading. Give that to me.
12 Let me cross this out. Let me call it this. Let me
13 change this pleading. Go pay your filing fee." I mean,
14 isn't that what they would have paid you for? That is
15 what legal advice is.

16 MR. ORSINGER: And, by the way, if that
17 person had hired a lawyer that had filed a wrong pleading
18 no judge would have any compunction denying the hearing.

19 HONORABLE ANA ESTEVEZ: Right.

20 MR. ORSINGER: But if it's a pro se should
21 you give them an advantage they wouldn't get from the
22 court if they had a lawyer?

23 HONORABLE ANA ESTEVEZ: No, I probably would
24 have crossed out everything and handed it to him and -- I
25 don't know what I would have done. I'm not going to say

1 that because I wasn't in that situation, but I usually
2 will say, "This is not the correct thing. I cannot help
3 you," and if I see someone I'll just kind of go "Hey, you
4 want to talk to him for two minutes," if I see someone
5 that happens to know the law just to see if somebody would
6 do a little help. So I'm not violating my rules, but we
7 need a little -- I mean, because of the interests we're
8 balancing we need a little more, I don't know,
9 flexibility.

10 CHAIRMAN BABCOCK: Stuff.

11 HONORABLE ANA ESTEVEZ: Flexibility. And
12 I'd like to see in it that we're allowed to ask questions
13 when it is contested. I mean, just flat out say that we
14 can ask questions, even if we can or can't. I mean, I
15 always ask permission when it's two lawyers. I say, "Can
16 I ask a question" because no one has addressed something
17 that's bothering me. If they say "no" -- it's amazing
18 they never do, but I always ask. But I don't know if I
19 can like technically do that on a pro se case, but I do.

20 CHAIRMAN BABCOCK: Judge Newell has had his
21 hand up for quite sometime. Judge, and then Judge
22 Yelenosky.

23 HONORABLE DAVID NEWELL: I'll try to make
24 this as quick as I can. First of all, I would want to say
25 and I do want to say this is a very, very difficult issue

1 for a lot of different facets. I think that Justice Busby
2 and Lisa Hobbs have done a tremendous job in gathering all
3 of this and being very thorough about all of this, so I
4 think that they're doing their best with a very tough
5 situation. One of the things that I'm hearing and I would
6 just sort of make an observation to, we're talking about
7 judges wrestling between the difference between legal
8 advice and legal information, but this is also going to
9 apply to clerks, right? We're also talking about applying
10 to clerks and things, and I fear that this is the best
11 possible distinction you can make, but I'm not sure that
12 it's -- I think that it's going to be unresolvable.

13 I think that there is going to be a lot of
14 potential with these two different things for someone to
15 give what they think is legal information only to be told
16 later that they actually gave legal advice, and so I don't
17 know how to resolve that. I just -- these kinds of
18 distinctions where you have -- on two different sides of
19 this very table here going, "Well, that's legal
20 information."

21 "No, that's legal advice." I think you're
22 just going to see that coming up again and again and
23 again, and I don't know how to resolve that, and I wonder
24 whether you can.

25 CHAIRMAN BABCOCK: Judge Yelenosky.

1 HONORABLE STEPHEN YELENOSKY: I think,
2 Richard, your examples point out to some extent why it's
3 so case-by-case. If you say, well, it's okay for judges
4 to help people get in the courtroom. Somebody comes in,
5 and I know by looking at something if they don't file it
6 tomorrow the statute of limitations is going to knock them
7 out of court. Am I supposed to help them by telling them,
8 "You need to file it tomorrow or you're going to be out of
9 court"?

10 In the example of family law, for instance,
11 there are some things I might do because a child is
12 involved. I'm not doing it because of the other parent.
13 I'm doing it because the child's interest may be affected
14 by what the other parent can tell me. So those are just
15 examples that -- how complicated this is, and I do think,
16 you know, giving some direction to judges is okay for
17 those judges who are hesitant to do it now, but I don't
18 know how far we could go.

19 CHAIRMAN BABCOCK: Justice Busby, and then
20 somebody else had their hand up over there, but anyway,
21 Justice Busby.

22 HONORABLE BRETT BUSBY: That's what we're
23 trying to do is give some examples of this is something
24 you can do, and it is written permissively, and it's not
25 mandatory that you do this. So we're being careful to

1 give guidance rather than requirements, but that's what
2 we're trying to do is not solve every situation that is
3 going to come up because it needs to be case-specific, but
4 that's why the rule suggestion is to say that it's -- you
5 know, that a judge may do this, and that it has to be
6 reasonable to allow for that flexibility, but, you know,
7 the example that came up about the -- an original petition
8 versus a modification, that's the very reason we have in
9 here "construing proceedings to facilitate consideration
10 of the issues raised," which is the approach the Supreme
11 Court consistently takes, the substance over form approach
12 to reaching the merits, you know, when you've raised the
13 issue before the Court, even if you didn't call it the
14 right thing.

15 That's why we have that example in there,
16 and the one that Justice Boyd raised about the clerk
17 saying, "You may want to go get a lawyer," there's a
18 provision in the policy for court clerks saying it's fine
19 to encourage self-represented litigants to obtain legal
20 advice from a lawyer. So I think, you know, while we
21 can -- there's sort of two levels of discussion here. Is
22 it worthwhile to have some -- this is very similar to the
23 discussion we were having earlier. Do you want to have
24 concrete rules? This is a safe harbor. Yes, you can do
25 this. You don't have to, but yes, you can. Or, no, you

1 really shouldn't do this, or should we just kind of leave
2 it to very general rules, and what we're finding is when
3 you leave it to really general rules then very similar
4 litigants get treated very differently in different parts
5 of the state, and so we want to provide some clarity so
6 that judges are able to understand, you know, what they
7 can do to facilitate getting the cases heard and getting
8 them out of court.

9 But I do think, you know, we need to have
10 both of those discussions, is this a good thing or not to
11 have safe harbors and then to have areas definitely you
12 can't do this; and then assuming it is, which I certainly
13 think it is, you know, we can talk about the language, do
14 we need more or fewer and, you know, do we need to tailor
15 these in some ways. But I think, you know, the examples
16 that are coming up here are the very reason that we put
17 some of these provisions in and are suggesting them to
18 this committee.

19 CHAIRMAN BABCOCK: Eduardo, and then
20 Munzinger.

21 MR. RODRIGUEZ: I have a question and then I
22 have a comment. What are judges taught when they first
23 become judges about this issue, if anything? And
24 secondly, I mean, I think that we have to find a -- we
25 have to do something so that it's applicable statewide,

1 because it's unfair for litigants in Travis County and San
2 Antonio, which are liberal cities that allow all of these
3 things, versus in some other areas for a litigant to be
4 treated differently. So I'm in favor of us coming up with
5 something, but I'd like to know if judges are told
6 anything about what to do when they go to judges school.

7 HONORABLE DAVID PEEPLES: The answer is
8 little or nothing.

9 CHAIRMAN BABCOCK: Munzinger, and then Judge
10 Peeples.

11 MR. MUNZINGER: In my time of practicing law
12 I've had several civil cases with pro se litigants. Two
13 come to mind where the litigant was not poverty stricken.
14 He was just a wild man. One had a PhD in physics. The
15 lawsuit lasted several years. He voluntarily consciously
16 chose to be pro se. He had the money in his pocket to
17 hire a lawyer, but he wouldn't. I think the rules need to
18 distinguish between someone who is pro se because they
19 want to be pro se and someone who is pro se because they
20 can't afford a lawyer, and I would also caution the group
21 to remember that there are a lot of lawyers in the state
22 who will work for \$250 or \$300 or \$400 or \$500. All over
23 the state, in every city in the state and to the -- those
24 fellows might take such a case. You need to be careful,
25 in my opinion, in your mindset that you don't identify pro

1 se with poor. That's not necessarily the case. And what
2 is poor, by the way?

3 I also think Richard's point in the family
4 law cases, to deprive a person of their child or to visit
5 their child is an incredibly serious thing and needs to be
6 approached with the greatest of care obviously, but again,
7 the same thing comes up. "Why are you pro se, sergeant?
8 I mean, my God, man, you're an E-8, you're making" -- "I'm
9 not going to pay a dadgum lawyer to see my son." There
10 are a lot of people who believe that way. That's their
11 belief. Let them suffer the consequences of their belief
12 unless they are forced not to. That's my personal view of
13 it.

14 CHAIRMAN BABCOCK: Judge Peeples. I'm
15 sorry.

16 MR. MUNZINGER: And the other thing is
17 remember that whenever you give something to the pro se
18 litigant you may be taking away something from the other
19 litigant, and everybody is entitled to equal justice
20 before the law. My client, because my client had the
21 foresight to hire me or him or anybody who is practicing
22 law in this room ought not to be punished to have the
23 substantive law changed. I looked here, and by the way,
24 that raises another point. Is it a jury trial or nonjury
25 trial? Big difference. Huge difference. Because the

1 judge isn't making the findings of fact. The jury is.

2 I just came from a case that I lost. The
3 jury was out two and a half hours. I lost it. They
4 kicked my tail to the moon. It wasn't pro se, but the
5 juries are the juries. They're going to do what they do.
6 They're going to think what they think, and judges and
7 lawyers try and prepare them for the trial. Sometimes we
8 succeed, sometimes we don't, but if it's a jury trial, be
9 careful that you adopt a rule that lets a judge treat a
10 pro se litigant differently than in a bench trial. Look
11 at this rule, this suggestion here, "By way of
12 illustration a judge may either directly or through court
13 personnel subject to the judge's discretion and control,"
14 number one, "Construe pleadings to facilitate
15 consideration of the issues raised." Well, we have a rule
16 that says you cannot submit a special issue that is not
17 supported by the pleadings. That's a rule. My client
18 says, "But they don't have the pleading."

19 "Yes, I understand that, and I know you paid
20 me a lot of money, and you're paying me a lot of money to
21 fight and what have you, but we have a rule that says in a
22 jury case a judge may construe the pleading that it raises
23 the issue even though it doesn't raise the issue." Is
24 that what you're going to do? That's a substantive law
25 change. And I think you need -- the committee needs to be

1 very careful. Part of the problem here is the mindset is
2 to equate pro se with poor. The mindset is to equate the
3 pro se problem as a problem in front of a judge as
4 distinct from a judge with a jury, and again, the problem
5 is is to lean for the pro se litigant.

6 People need to be held responsible for their
7 decisions and that I may be a person who can only make a
8 certain amount of money a month and I face the loss of my
9 child or the right to visit my child is a far different
10 situation from being a PhD in physics who wants to sue a
11 newspaper for liable because of my physics calculations in
12 an article on page nine, and we spent a zillion dollars
13 defending this case. He was pro se, and the judges
14 treated him the way they should have, but that's a
15 different story than what we're thinking about when we're
16 doing what we're doing, and I'm sorry to take so much
17 time.

18 CHAIRMAN BABCOCK: No apologies necessary.
19 Eloquent as always. Judge Peebles.

20 HONORABLE DAVID PEEPLES: I'm going to make
21 an observation and ask a question. The observation is
22 we're talking almost entirely about judges and what judges
23 do, and Richard Orsinger raised a good point a few minutes
24 ago. He would be more lenient, I think he said, on
25 getting into the courthouse and a little bit more strict

1 at trial. But what we've got is two bifurcated proposals
2 here. One deals with what judges may do, and that's
3 almost always in trial. Not always, but almost all of it
4 is in trial, and then we've got what clerks and staff and
5 so forth can do, and that's everything is pretrial.
6 That's getting into the courthouse. Maybe not getting
7 into the premises and getting it filed, but it's nursing
8 your case from filing to disposition, and if I had to
9 assign percentages on the importance of these two I would
10 give about 80 percent or 90 percent importance to what the
11 policies for clerks, et cetera, and 10 or 20 percent
12 importance for judges. I really would.

13 To me the vast need here which cries out is
14 to help people navigate their way through the courthouse.
15 Once it gets to a court, it's -- it's important, but not
16 nearly as important, and so I just make that observation
17 that we ought to focus on -- I mean, really and Justice
18 Boyd brought it up about when is something unauthorized
19 practice or not. A good way to figure that out is to look
20 at the lists of things you can and cannot do and identify
21 some of them that maybe ought to be on a different list.
22 You shouldn't be able to do it rather than you can because
23 it might be too close to the line. That's a good focus
24 for us to do, but that's that.

25 My question is we're talking as though these

1 policies and so forth would apply to all kinds of cases.
2 When Judge Newell spoke up I wondered are we talking about
3 rules where everybody gets help if they're pro se in a
4 criminal case? That's very rare. The appointed lawyers
5 are for poor people in any significant cases, is the rule.
6 And I just question whether we ought to have the same set
7 of rules for criminal cases and for family law and for
8 everything else, civil, and I think the needs -- and then
9 I'm through talking for a while. The needs in JP court
10 and in probate court and in family court are different.
11 They're just different situations and different needs, and
12 I think there needs to be some discussion with that.

13 CHAIRMAN BABCOCK: Kennon, and then Frank.
14 And then David. Kennon, David, and then Frank.

15 MS. WOOTEN: On the proposed amendment to
16 Canon 3B(8) it strikes me that the language that's in the
17 rule actually doesn't give something more favorable to the
18 self-represented litigant than any other because it's
19 phrased as making "reasonable accommodations afforded
20 litigants, including self-represented litigants, that
21 right," which is actually different from the ABA standard,
22 which speaks only to the pro se litigants. So I think
23 what's proposed is actually not giving the
24 self-represented litigants something different than the
25 other litigants, but one thing that strikes me as

1 something we have to be mindful of is whether in the quest
2 of creating more consistency we're giving so much leniency
3 to the judge that we're actually reducing consistency.

4 Because I look at what is in the comment,
5 and I think if I were instructing my client about what to
6 expect at trial I might have to think again about what I
7 thought I knew about the Rules of Evidence, about pleading
8 requirements, and other things of that sort. So this
9 scares me just a little bit because I feel like it could
10 actually lend itself to less consistency in courtrooms for
11 all litigants, because there's so much discretion in
12 deciding when you can modify the rules a little bit.

13 And in terms of the clerks and the other
14 judicial staff, one question I had -- and I'm sorry if I
15 missed it in the call that I wasn't on last time -- is
16 whether and to what extent there was an effort to line up
17 this text in the policy with how the practice of law has
18 been statutorily defined and then construed by courts.

19 CHAIRMAN BABCOCK: David.

20 MR. JACKSON: Yeah, I want to kind of tag on
21 something Richard said. Not all pro se litigants are
22 poor. There's a third class of pro se litigant, the
23 litigant who weighs the amount of money involved against
24 the cost of hiring a lawyer. We file hundreds of cases
25 from our office pro se on collection issues where the

1 party on the other side was a lawyer, and we're
2 undefeated, so there are people that can do it right.

3 CHAIRMAN BABCOCK: Frank.

4 MR. GILSTRAP: I agree with Judge Peeples
5 that, you know, we might be more productive if we talked
6 about the guidelines or policy or whatever it is for
7 dealing with a guidance of court staff and lawyers as
8 opposed to trying to change the judges. I do have some
9 specific comments on the proposed policy, and I guess the
10 first comment does go to the question of whether or not
11 this is a policy, or is it simply a list of some do's and
12 don't's with some safe harbor provisions. For example,
13 over on the second page, (d), it has "prohibited
14 services," and two of the prohibited services are, (5),
15 "Disclose information in violation of the law," and (9),
16 "Otherwise engage in the unauthorized practice of law."
17 Well, if these are guidelines, those are worthless. I
18 mean, they shouldn't be here, and I'm not sure even if
19 they're a policy how -- if they advance the ball. I don't
20 think they do.

21 Also, this devises some categories, a court
22 patron, self-litigant, and talks about how you should
23 treat those people, but I'm not sure that those words
24 wouldn't do just as well by saying "a member of the
25 public." For example, over on (d)(6), you shouldn't "Deny

1 a self-represented litigant access to the court, the court
2 docket, or any services provided to other court patrons."
3 Well, does that mean that you can deny other people access
4 to the court docket? Of course not. It should just say
5 you shouldn't deny anybody. I'm not -- and, again, I
6 don't think those two categories really help matters.

7 Over on (d)(8) it says you shouldn't "refer
8 a court patron to a specific lawyer or law firm, except as
9 provided in (c)(2)." Well, I think about our discussion
10 on judicial bypass where there's this kind of netherworld
11 where, you know, the young woman, girl, whatever, comes to
12 the court and wants a judicial bypass, and the clerks say
13 "You need to talk to somebody," and they know who it is,
14 and they help them, and obviously you want that, and so
15 you look over at -- over at (c)(2), and it says, "Here's
16 what you can do. You can inform court patrons about pro
17 bono legal services, low cost legal services, limited
18 scope." That all makes sense, but it's prefaced by this:
19 "Informing court patrons of legal resources and referrals,
20 if available, including but not limited to." Well, I
21 mean, (c)(2) it seems to me to allow, you know, if you can
22 send all of the hot personal injury cases to lawyer X.
23 It's either got to be a guideline or a policy, but it's
24 got to be clarified. Thanks.

25 CHAIRMAN BABCOCK: Okay. Judge Estevez.

1 HONORABLE ANA ESTEVEZ: I liked what Judge
2 Peeples stated a little while ago, and I think the more I
3 think about it, I think this -- it should be more lenient
4 but just in family law cases. One way we're talking about
5 the best interest of the child because we have a different
6 interest. It's not the interest of petitioner or
7 respondent. It's always the child, and I think that would
8 be less offensive to litigants if we're doing it and we
9 can say "because we're looking at the best interest of the
10 child." I don't think we need it in criminal matters.
11 I've had a whole jury trial with a guy going pro se, you
12 appoint -- you know, they have a constitutional right even
13 if they don't want one, they have a lawyer there the whole
14 entire time because you appoint standby counsel whether
15 they want it or not. So there is a lawyer sitting there.
16 They get what they asked for, and unfortunately it's been
17 really bad.

18 I've had pro se all the way jury trials with
19 a family law case that really -- I don't know, probably
20 one of our best attorneys in Amarillo and won his jury
21 trial pro se, but at one point I also appointed an
22 attorney for the children so they wouldn't be so messy, so
23 I mean, there's some things we can do when it's a jury
24 trial that we wouldn't necessarily do in other
25 circumstances. And in a civil case it's money, so if they

1 don't care enough to get money, if they've got a good case
2 they did get somebody on contingent, you know, so for a
3 civil case it's not so important. So I just really liked
4 what you said. I mean, why not just do this for family
5 law cases? It won't be offensive. I think everybody --
6 society would think that there is a higher reason other
7 than just two people playing an offensive game, that we're
8 talking about the best interest of children, and I think
9 that would make the judges feel more comfortable giving a
10 little more leniency. We want to do that. We want to do
11 the right thing.

12 CHAIRMAN BABCOCK: Yeah.

13 HONORABLE ANA ESTEVEZ: So it will help us
14 feel like we're really administering justice because we
15 would have something that would tell us that we can do
16 what we want to do.

17 CHAIRMAN BABCOCK: Okay. Justice Busby.

18 HONORABLE BRETT BUSBY: I certainly
19 understand the impulse to say that this is going to come
20 up most often in family law cases, but there are similar
21 situations in other types of cases, guardianships, probate
22 and trust matters, where the court has special obligations
23 outside of the family law context that I think would also
24 need to be taken into account.

25 HONORABLE ANA ESTEVEZ: I don't do those.

1 HONORABLE BRETT BUSBY: And I understand you
2 don't, but also, you know, and, you know, this comes up a
3 lot in landlord -- you know, we have a huge number of
4 self-represented litigants in landlord-tenant cases, a
5 huge number in JP courts. And so I think, you know,
6 perhaps a comment along the lines of, you know, in
7 exercising discretion on how best to accommodate
8 litigants, and this is something that Lisa had suggested
9 we might consider. A judge could consider representation
10 or nonrepresentation of parties, the nature of the case,
11 civil or criminal, tried to the jury or bench, family law,
12 something like that, and lay out some of those factors
13 that may influence a judge in deciding how much to apply
14 this in a given kind of case, but I think having a hard
15 and fast rule only family law cases would really leave out
16 some folks who need the help of this rule.

17 And I do disagree somewhat with Judge
18 Peeples about the judge part of this being less important
19 because I do think that some of the things that are in
20 here that we're saying a judge may do are things that can
21 arise pretrial and would be very helpful pretrial such as
22 providing information about the proceeding, attempting to
23 make legal concepts understandable, construing pleadings
24 to facilitate consideration of issues raised. I think --
25 and at that point you won't know necessarily whether it's

1 going to be a jury trial or a nonjury trial. So I think
2 having a hard and fast rule only in jury trials and family
3 law cases or only in family law cases or cases where there
4 are nonjury trials it's going to create some sort of
5 artificial barriers to this helping people where they most
6 need it.

7 CHAIRMAN BABCOCK: Justice Bland.

8 HONORABLE JANE BLAND: I didn't have my hand
9 up.

10 CHAIRMAN BABCOCK: I know that, but we want
11 to hear from you.

12 HONORABLE JANE BLAND: Okay. I favor the
13 proposed change. I think it will alleviate at least one
14 area of concern for judges who are really trying to
15 provide access to the courts for people that are
16 unfamiliar with the process, and one of our obligations is
17 to educate the public and lawyers about how to have their
18 legal problem brought before a judge who will ultimately
19 decide it hopefully on the merits. So although I
20 understand that there are some challenges, given the
21 adversarial nature of our system, it seems to me like we
22 ought to at least remove the idea that you could be
23 judicially -- that you could be sanctioned for conduct
24 that was intended to assist by providing information and
25 that remedies for assistance that somehow crosses the line

1 into advocacy or other sorts of remedies, like recusal.
2 So I favor a rule, and I thank the commission and Justice
3 Busby and Lisa Hobbs for their work in presenting it to
4 us, and it seems like -- did you say 38 other states?

5 MS. HOBBS: 35.

6 HONORABLE JANE BLAND: 35 other states have
7 taken a look at this, so we're not -- you know, we're not
8 going where no man has gone before. Let's just give it a
9 try, and if it turns out to be terrible, well, we'll be
10 visiting it again.

11 CHAIRMAN BABCOCK: Judge Wallace.

12 HONORABLE R. H. WALLACE: As someone who
13 presides over just a civil court, I don't see very many
14 pro se litigants, and I see even fewer who need help.
15 Most of them are there abusing. If they're on the
16 plaintiff's side, they're abusing the legal system and
17 don't need help, but I like -- I like the rule, as long as
18 it's clear that it is permissive and you don't have to do,
19 and somebody won't be coming up and saying, "Judge, you've
20 got to do this or you've got to do that." But, I mean, in
21 practice I already do it if I think they're deserving, but
22 I think having the rule is fine, and that's my view on it.

23 I would have a problem -- and I don't know
24 how it is. It depends upon the county. In Tarrant County
25 each district court is assigned an administrative clerk by

1 the district clerk. I'd be kind of nervous about letting
2 that person be giving this kind of information to
3 litigants without knowing exactly what they're telling
4 them and things of that nature, because then you're going
5 to hear, "Well, Judge, your clerk told me such-and-such"
6 or "Your clerk told me this, that, or the other," but I'm
7 okay with the rule. If it were me I just may tell my
8 clerk, "You send them up to me if they have a question,"
9 because it's one that I may want to answer.

10 CHAIRMAN BABCOCK: Richard Munzinger.

11 MR. MUNZINGER: We talk about adopting the
12 rule, and I'm looking at the comment on page two and the
13 12 separate items that are suggested to be adopted in the
14 comment I assume that we are going to say to state trial
15 judges that they may do, and again, that's part of the
16 reason why I say be careful about jury and nonjury trials.
17 But just look, for example, at number (6), "permit
18 narrative testimony." In a jury trial? Permit narrative
19 testimony? What warning does the other side have to make
20 an objection to something? And we all know that the trial
21 judge may say to a jury "Disregard that and don't give it
22 any weight," but we also all know that that's for the
23 appellate court and not for fact. It's not the real
24 world. They've heard it. That's a real problem.

25 Number (7), "Allow litigants to adopt their

1 pleadings as their sworn testimony." So I've got a pro se
2 guy who's got a pleading, and now I allow him to adopt
3 that as his sworn testimony? Do I get to cross-examine
4 that? Is it a legal conclusion? Has he met all of the
5 requirements of law because he pled it, but he can't prove
6 it? I don't know what states adopted that, number (7).
7 Wisconsin. Dear God, save us from Wisconsin. Refrain --
8 There was another one. But I don't have an objection with
9 a judge asking neutral questions to elicit or clarify
10 information. I've had that happen in cases where
11 everybody is represented by a lawyer and the judge doesn't
12 think the jury has understood or that the lawyers have
13 been sharp enough to ask the right question, and I think
14 the state law allows a judge to ask such a question so
15 long as he doesn't become an advocate for one side or the
16 other. I don't think you get reversible error because the
17 trial judge asked a question to clarify. I've never read
18 it.

19 "Modify the traditional manner of taking
20 evidence." Wow. Does that allow the trial court to
21 overrule the dead man's rule? Well, it says here I get to
22 modify the traditional manner of taking evidence. Again,
23 even in a nonjury case, in a probate case, modifying the
24 way of taking evidence erases the dead man's rule? I
25 think you've got to be awfully careful. I don't know who

1 these people are and what they've done, but I don't think
2 we ought to be lemmings that are running off cliffs
3 because we have -- the judge says she wants to do justice.
4 Praise God, that's what you were elected to do, but
5 justice has two scales. Justice has two scales. And my
6 client, represented by me, has got the identical right
7 under the state and federal Constitutions to a fair trial,
8 conducted in accordance with the laws of evidence and
9 conducted in accordance with the laws of civil procedure,
10 and when you start telling the judges to change that, you
11 best be careful, and you best not be doing it because you
12 think everybody is poor and every case is a divorce case,
13 because they aren't.

14 CHAIRMAN BABCOCK: What if we said "except
15 for the dead man's rule"?

16 MR. MUNZINGER: I mean, it's a valid
17 example, I believe. It's a valid example.

18 MR. HARDIN: I know, but some of us are
19 astounded at your ability to think of them. It's a great
20 example, but I would never have ever gotten there.

21 MR. MUNZINGER: Well, I just came out of a
22 case, and we fought over the dead man's rule. For God
23 sakes, I mean, we all went nuts trying to figure out how
24 to get around that.

25 CHAIRMAN BABCOCK: I think we've established

1 that Munzinger has got a broader practice than you do,
2 Rusty.

3 MR. HARDIN: God help Wisconsin.

4 CHAIRMAN BABCOCK: Justice Gray.

5 HONORABLE TOM GRAY: I can't speak with the
6 extemporaneous oratory skills that Richard Munzinger does,
7 so --

8 CHAIRMAN BABCOCK: I don't think anybody
9 can.

10 MR. RODRIGUEZ: Obviously they're not that
11 good because he just lost.

12 HONORABLE TOM GRAY: But it was the dead
13 man's rule that did it, so any of us could have lost that
14 one. So I apologize for that. I have to write and
15 organize and then edit, and so forgive that I have written
16 down some of my thoughts. I was on the subcommittee. I
17 know that Trish and Lisa and Brett, they chose that side
18 of the room because I had already decided to sit over
19 here. They kind of have an idea of what's coming. I
20 actually think that's probably why Mike Hatchell and Nina
21 Cortell are not here, that they didn't want to have to
22 live through this again, but I also want -- have an
23 admission. I recognize that this is going to happen, and
24 there's nothing I can say to stop it, and I considered
25 very seriously simply suggesting that it -- making a

1 motion that it be done so we could go on to other rules
2 that maybe we could change, but this is something that I
3 feel strongly about, and I'm against it for some
4 fundamental philosophical reasons based upon my view of
5 what the law is and how it should be applied and the role
6 of the judge in that process.

7 There were four idioms -- and I had to
8 research what idiom meant as opposed to idiot. There were
9 four idioms that I had to research for this response:
10 Crossing the Rubicon, crossing the River Styx, whistling
11 past the graveyard, and tilting at windmills. Twice I
12 argued in our subcommittee that I didn't know if we were
13 crossing the River Styx or the Rubicon, but that I was
14 pretty sure it was the River Styx because I thought we
15 were all headed straight to Hades if we made this change.
16 But I decided there's an advantage -- after doing the
17 research on the idioms that there's an advantage to
18 crossing the River Styx instead of the Rubicon, because at
19 least with crossing the River Styx there's a possibility
20 of return. The very essence of crossing the Rubicon is
21 that it is the point of no return, and if anybody doesn't
22 know those idioms, I'll fill you in straight off of the
23 Wikipedia, but I'm not going to spend this time doing
24 that.

25 We are members of a profession. That

1 profession is about the ability to identify relevant legal
2 issues based on the facts presented and advise a client on
3 how to conduct himself in their best interest. To make
4 that system work there have to be rules. Hence, we have
5 the rule of law. It is the rule of law that distinguishes
6 us from Kim Jong-un. It is the rule of law that gives
7 meat to the bones of the constitutional provisions of due
8 process and equal protections. It is the rule of law that
9 gives lawyers the ability to predict a result upon which
10 advice and counsel is given to a client. To make the rule
11 functional in practice we have an adversarial trial system
12 to resolve facts and apply the law to those facts. The
13 adversarial system is under the management of judges,
14 independent participants in the process. They are not
15 spectators, but they are not participants in the sense
16 that they are not aligned with any party, point of view,
17 or policy-driven outcome other than the neutral
18 application of the rule of law.

19 I think where we are headed with this takes
20 us away from that and particularly the judge. I read the
21 entire July 6th, 2017, report that Lisa summarized and
22 each of the exhibits with great interest. I have some
23 disagreements with some of the statements that are made in
24 there, but I think it -- there's a glaring failure of the
25 proffered approach to the perceived problem of increasing

1 numbers of self-represented litigants. I do not believe
2 that is the problem, that there are increasing numbers of
3 self-represented litigants, but nevertheless, let us go
4 with the premise that that is the problem. All of these
5 other states -- Judge Bland just mentioned 35 states have
6 done this so far, and here we go to do something. But
7 where is the empirical study that says after doing this
8 all across the country that the number of self-represented
9 litigants is declining or even a more fundamental concept
10 that the satisfaction with the justice meted out by this
11 kinder and gentler system is better, more fair, or more
12 just?

13 The report told me that four or five years
14 ago we tried a brief stint of training for three or four
15 years. We did -- we didn't measure the effectiveness of
16 it, but I think we just gave up because it wore us out,
17 and we weren't really changing anything. Training on a
18 fundamental change like what is proposed will require much
19 longer than three or four years. In fact, it will be a
20 never ending process because the judicial turns over, the
21 court staff turns over. We have a lot of training to do
22 to get up to speed and to achieve some of the solutions
23 that need to be reached.

24 Next I look at where the proposed change is
25 being made, the canons of ethics for judges, in a part of

1 the rule that addresses ex parte communications. I find
2 that very interesting. And how is this change going to
3 fix the problem with clerk staff, communications, and
4 accommodations? It's all about education. I think we
5 gave up too quick. I don't think three or four years is
6 enough. I think a 25-page manual is probably something
7 that we should all know about, be educated on, and the
8 Supreme Court has the authority or the bar to do something
9 about that with mandatory education for judges, and I
10 think it could be imposed through the Legislature like
11 there is mandatory education for employees on the Open
12 Records Act request. So it can be compelled if necessary
13 if we can't get it done through I guess you would say
14 voluntarily means.

15 And the amendments and especially the
16 comments are clearly directed at self-represented
17 litigants, but more -- if you really drill down, they are
18 directed at indigent self-represented litigants, but from
19 my vantage point in the legal system for the last 18
20 years, I've seen more persons who are represented by
21 counsel that need this type of accommodation than
22 self-represented litigants, and I say that -- I'm serious
23 when I say that. The -- I don't want to say, you know,
24 malpractice, but the level of incompetency to follow a
25 simple rule on how to change out attorneys in a case, just

1 boggles my mind. I do not understand why it's so
2 problematic for the lawyers, but, you know, search Lexis,
3 Westlaw for "waiver," "waive," "fail to object" or "fail
4 to preserve," and you will see what I'm talking about.

5 And what if the legal information given to a
6 patron, as was mentioned earlier, by a clerk or deputy
7 clerk or person that answers the phone at the clerk's
8 office is wrong? For example, "When can or should I file
9 this? How long do I have to respond? What do I need to
10 do to file an answer?" And completely ignore serious
11 questions like venue, special appearance, sworn denials,
12 and affirmative defenses. Some have suggested that this
13 would be appropriate or more appropriate in nonjury
14 trials. So let me see if I've got this right. If you're
15 self-represented and you waive your right to a jury trial,
16 I can help you, but if you insist on having your right to
17 a jury trial, you're on your own. Is that two different
18 levels of justice?

19 And look at what we do in the criminal
20 cases. We give them a lawyer, but every once in a while
21 they exercise their right to represent themselves. Now
22 they're self-represented entirely because they want to be.
23 Do we accommodate that defendant in either jury or nonjury
24 situations?

25 We're a nation of laws. We are not equal.

1 We are equal in the law because the same rule applies to
2 us all, so let's say that Judge Peeples accommodates
3 Ms. Hobbs on not strictly applying the Rules of Evidence,
4 but Buddy is sharp. He knows the Rules of Evidence and
5 makes a proper objection. Nevertheless, the trial court
6 admits it. Now, Buddy has suffered his first ever trial
7 loss.

8 MR. LOW: Oh, that was a hundred years ago.

9 HONORABLE TOM GRAY: Now he has to bring his
10 first --

11 CHAIRMAN BABCOCK: It's only hypothetical.

12 HONORABLE TOM GRAY: Now he has to bring his
13 first appeal. What law do I apply on appeal? This
14 made-on-the-fly law of Judge Peeples trying to accommodate
15 a litigant? Or the law that Buddy relied upon when he
16 advised his client about how to fund and progress in a
17 case? Which brings me to the question if this is
18 something that is not an ethical violation if I do it, is
19 it an ethical violation if I do not do it? And that
20 troubles me a lot. I note that under the decision *Wheeler*
21 *vs. Green* if I do not accommodate, and this is as a trial
22 judge, and actually as Joe found out on appeal from the
23 Dallas Court, if you don't accommodate, it is error, even
24 if not a violation of the code of conduct. And while
25 today I may accommodate unless we draw the line and don't

1 do this, tomorrow "may" will be stricken from the rule,
2 and it will become mandatory, and I think it will be
3 mandatory when somebody says, "The judge made an
4 accommodation for that litigant, but not for me."

5 Which brings me to my final idiom. I think
6 we are all tilting at windmills when we're talking about
7 changing this rule. Those who think this rule will make a
8 change and make any discernible difference in the way that
9 things happen in the field. I am tilting at windmills
10 because I hope that logic will prevail rather than being
11 politically correct and that we will move on and address
12 the problem and not a symptom of the problem. I'll forego
13 at this time commenting on the individual items and the
14 comments. I think there are some real problems in there,
15 but if we get to discussing those individually we can get
16 there, but I think some clearly cross the line, and I
17 guess I am going to mention one specifically. The neutral
18 question, I just don't think there is anything -- such
19 thing as a neutral question.

20 Justice Douglas in *Lemon vs. Kurtzman* in his
21 concurring opinion made the observation -- *Lemon vs.*
22 *Kurtzman* was about spending money in parochial schools.
23 It said, "Even arithmetic can be used as an instrument of
24 pious thoughts as in the case of the teacher who gave the
25 problem to her class if it takes 40,000 priests and

1 140,000 sisters to care for 40 million Catholics in the
2 United States, how many more priests and sisters will be
3 needed to convert and care for the hundred million
4 non-Catholics in the United States?'"

5 Any time there's a burden of proof and a
6 standard of review, a question that is designed to elicit
7 information is -- about the facts is going to sway that or
8 affect that burden, has it been met, has it not been met,
9 and with those comments I will say that with -- Lisa was
10 right on. It's a gray area.

11 CHAIRMAN BABCOCK: No play on words there.
12 So you've made your point, and now Jane will have the
13 counterpoint.

14 HONORABLE TOM GRAY: Excellent.

15 CHAIRMAN BABCOCK: Don't call her any name.

16 HONORABLE JANE BLAND: No, I want to call
17 the question.

18 CHAIRMAN BABCOCK: You don't want to rebut
19 that?

20 HONORABLE JANE BLAND: No.

21 CHAIRMAN BABCOCK: Oh.

22 HONORABLE DAVID PEEPLES: Call what
23 question?

24 HONORABLE JANE BLAND: I think it's had a
25 full airing of the issues.

1 HONORABLE DAVID PEEPLES: Well --

2 MR. ORSINGER: I'm not sure what the
3 question is.

4 HONORABLE DAVID PEEPLES: Yeah. We need to
5 know what the question is. You know, I --

6 HONORABLE JANE BLAND: Whether we should
7 adopt the proposed amendment to the Code of Judicial
8 Conduct.

9 HONORABLE DAVID PEEPLES: I neglected to say
10 -- I neglected to say when we started that this proposal
11 does not come to the full committee with the
12 recommendation of the subcommittee. We were so divided on
13 this whole thing that we couldn't come up with a
14 recommendation, so we just decided instead of trying to
15 draft something in our fragmented state we would just let
16 the commission's proposals be on the floor, and so, I
17 mean, the subcommittee has -- we spent so much time
18 talking about should we even go here that we didn't get
19 into the details of is this, you know, number so-and-so
20 changing the law of unauthorized practice of law. So I
21 think that the subcommittee needs to look at it again, no
22 matter what, and if for no other reason, the Court wants
23 us to, but frankly, this has not really been vetted in
24 subcommittee very much because we were so divided.

25 CHAIRMAN BABCOCK: Yeah. Buddy, you've had

1 your hand up for a while.

2 MR. LOW: Chip, let me add one addendum.

3 Justice Gray didn't mention it is surely embarrassing to
4 lose a case to a pro se litigant. He didn't tell you
5 that.

6 CHAIRMAN BABCOCK: Yeah, Judge Estevez.

7 HONORABLE ANA ESTEVEZ: I'll do a two-minute
8 rebut.

9 CHAIRMAN BABCOCK: There we go. Point,
10 counterpoint.

11 HONORABLE ANA ESTEVEZ: Outside of the
12 comment because the comment I think is a little broad and
13 goes too far for what I would feel comfortable adopting,
14 but I know in my experience if there has been a valid
15 objection, I would sustain it even if it's a pro se
16 litigant if it's valid, but let's say that that example
17 was hearsay. He gets up, and he says it's hearsay, and
18 you know there's an exception to the hearsay that anybody
19 else and the court of appeals would recognize, and so you
20 go ahead and overrule the objection, even though he didn't
21 tell you why it was overruled. Now, if it's a valid
22 objection, I don't think there's anything -- if there is
23 something in here I don't think that their intent is we're
24 going to change the rules, and it's going to be
25 adversarial.

1 It is a way to get the information that if
2 they would have had a really bad attorney, they would have
3 had it out, I mean, like just somebody just sitting there
4 presenting the cases and just -- you know, they just don't
5 know what they have to show, you know. Did you live in
6 Randall County? You know, have you been here for six
7 months and a resident for 90 days? You know, those little
8 basic questions that aren't neutral. They're extremely
9 important, because you don't even have jurisdiction if you
10 don't get there, but is it really unfair for someone to
11 help you with it? Is it really the -- does everyone get
12 offended if someone comes forward and doesn't know how to
13 do that and a judge helps them with some things that
14 anyone else that just passed the bar would have known to
15 do because they would have had this little form. And
16 maybe they even give them the form, but you don't want to
17 waste 25 minutes of them going through the form when you
18 can go through the questions in five minutes and get to
19 your next hearing.

20 So I understand some of the concerns that
21 you articulated. I believe that that's like a huge
22 slippery slope, and it doesn't deal with the problem we
23 really have, and I'm going to respond to you how I respond
24 to every court of appeals justice that makes me mad. I
25 need a little ticket that makes you go and sit in my shoes

1 for one day.

2 HONORABLE TOM GRAY: All you've got to do is
3 invite me. I can come to your county.

4 HONORABLE ANA ESTEVEZ: I'm going to invite
5 you, and I'm going to set it up with my pro se divorces
6 with all of the kids, and then you're going to come and
7 you're going to have your own version because you're going
8 to realize that there is a way to do this. I don't know
9 that this is it. I mean, I think some of it is really,
10 really good, so I really appreciate all of the work, but
11 I'm reading this, and I'm like "God bless Wisconsin, too."
12 I really am. I don't know what some of this means; and if
13 it means what it looks like it means, it goes way too far,
14 and it's not fair, and it's not fair to our system. And
15 our system is adversarial, and we need to be able to
16 preserve that but still be able to help those that are
17 poor that come before us, and this is the only way they're
18 going to come before us. They're not going to get here.

19 I don't have a law school, okay, so whoever
20 has a law school option, that's great. I don't have a law
21 school. I'm in Amarillo. If that law student wants to
22 come help somebody, he's got to drive two hours. I mean,
23 I'm just not going to get it unless it's summer and I'm
24 the one that hired them. So there's not -- you know, they
25 may be the ones that want to work for \$400, but I don't

1 have a county that's going to pay it, and I don't have a
2 tax base for it. So just forget every other option. I
3 don't have it. Unless the State Bar says you have to do
4 pro bono work I'm not getting a lawyer. But I sure have a
5 whole bunch of poor people. High, high percentage that
6 need to get divorced because it's really bad for the kids
7 to see them abusing each other, because I have a huge
8 amount of domestic violence cases. Huge. There's a huge
9 amount of CPS cases, and we have to deal with this, and we
10 can't -- I can't -- I don't know what I can do, and I want
11 to do what's right, and I want to do it -- and I don't
12 mind doing it. If they tell me I can't do it then I'm not
13 going to do it. Period. I'm not going to be the one that
14 just says, "Oh, I know I can't do this, but here I go." I
15 want to do it right. So let me do it. Find a way to let
16 me do it right so we can get the right result or at least
17 as close as we can, still preserving the best system in
18 the world.

19 How did I do, Richard? Not as good as you
20 do. You need to pick up on that, because you're a lot
21 better. Best system in the world.

22 MR. MUNZINGER: You know, we're writing
23 rules. I don't know how you do it. I mean, I don't know
24 how you do it, and my concern is to write a rule that is
25 universally applicable is not in the interest of the

1 society. It's not in the interest of justice. It's not
2 in the interest of clients. I mean, people who are
3 litigants who have clients. As he says, I advise a client
4 prior to trial, "They can't prove this because it's
5 hearsay." Or "They can't prove this because of
6 so-and-so," but then I have a comment here that says to
7 the trial judge that you can modify the way evidence is
8 admitted.

9 CHAIRMAN BABCOCK: You're back to this dead
10 man thing, aren't you?

11 HONORABLE ANA ESTEVEZ: Yeah, but we don't
12 have to adopt that part. Let's assume that's not there.

13 MR. MUNZINGER: I don't know the answer to
14 the question of how.

15 HONORABLE ANA ESTEVEZ: That's not what's
16 going on in my court. I'm not sitting there saying, "Oh,
17 we're throwing out this rule" or "We're not going to do
18 that." That's not what's going on in any of these courts.
19 I don't believe there's a whole bunch of judges just
20 saying, "Come on up." And the narrative part, the
21 narrative just means they got up there and they testified,
22 just like anybody does with their attorney fee. "I'm
23 going to testify as to my attorney's fees." They get up
24 there, they do their narrative, and then they get crossed.

25 CHAIRMAN BABCOCK: Judge Yelenosky wants to

1 jump into this. But before you do --

2 HONORABLE STEPHEN YELENOSKY: Yeah. I will
3 bet -- and you can tell me, Judge. I would bet that the
4 vast majority of cases in which you have a pro se litigant
5 they're pro se on both sides. Is that fair?

6 HONORABLE ANA ESTEVEZ: A lot of them.

7 HONORABLE STEPHEN YELENOSKY: Yeah. And so
8 we're talking about the situation, which is anomalous
9 really, it happens and it's of concern, but when you have
10 a pro se on one side and attorney on the other. When you
11 have a pro se on both sides, if you're fortunate to have a
12 law school to help them, great. If it's uncontested,
13 obviously there's no real problem. In Travis County we
14 have resource attorneys who help the -- in the uncontested
15 cases, but I don't know that it's a bigger problem or it
16 is a problem when you have pro ses on both sides. I can
17 go into that, but I do have a suggestion in looking at
18 what's listed here.

19 A number of these things are things that we
20 can already do, number one, and we could already do for
21 represented counsel, and -- or represented parties, and is
22 an approach to say essentially -- I don't know what the
23 words would be -- to remind judges that it is not a
24 violation of ethical duties, for instance, to explain a
25 ruling. How could that possibly be an ethical violation?

1 It's not an ethical violation to refrain from using legal
2 jargon. We can do that even if there are attorneys on
3 both sides. Right? It's not -- I've never felt in a
4 bench trial that I was prohibited from asking any question
5 I wanted to ask, and I've never heard a lawyer object to
6 it to try to preserve error on that. So if I have a
7 question in a bench trial, nobody has told me I can't ask
8 a question. Jury trials are different, and I have tried
9 jury trials with a lawyer on one side and pro se on
10 another, but that's another anomaly.

11 There's nothing that prevents me now from
12 construing pleadings as the Supreme Court has directed,
13 and that language would be fine for anybody, which is not
14 to go by the label, but the substance. That may not be
15 equivalent to saying I'm going to treat a modification as
16 if -- or an original petition as if it's a modification,
17 but it might, because one might see that as really not a
18 substantive difference. So there are about seven or
19 eight.

20 Now, the one about evidentiary proceeding
21 and evidentiary foundational requirements, as I said
22 before, I have a question about that and "modify the
23 traditional manner in taking evidence." If that doesn't
24 mean the Rules of Evidence, I can't modify the Rules of
25 Evidence, but the manner of taking evidence, that might be

1 okay. I might do things in a different order. I don't
2 see a problem with that, and I might do that now. "To
3 allow to adopt the pleadings as sworn testimony," I think
4 that would be new. So there are like three here that are
5 controversial. The rest of them seem to me to say,
6 "Judges are reminded that to ensure a fair trial it's not
7 an unethical violation to do" -- ba-ba-ba-ba-ba-ba -- and
8 that might be okay even to Mr. Munzinger.

9 MR. MUNZINGER: Yeah. I agree. A number of
10 the things on here are -- should be permissible and are
11 done routinely. I agree with that. But I am -- I am very
12 concerned about changing the Rules of Evidence or allowing
13 them to be changed. When you're going to craft a rule you
14 have to be verbally specific. That protects the rights of
15 everybody.

16 HONORABLE STEPHEN YELENOSKY: Even when I
17 have lawyers on both sides, there are plenty of lawyers
18 who don't understand you have an evidentiary rule of
19 hearsay, and I might have to explain it to both of them
20 after getting a bunch of stupid objections, and I do that.

21 MR. MUNZINGER: And I think most good trial
22 judges do, and I think, again, you've asked questions in
23 nonjury cases. I suspect you may have asked a question in
24 a jury case. I've had a jury case --

25 HONORABLE STEPHEN YELENOSKY: On a jury case

1 it's very -- it's only for clarification. I'm very
2 careful about that.

3 MR. MUNZINGER: I understand.

4 HONORABLE STEPHEN YELENOSKY: But a bench
5 trial, no, I don't restrict that.

6 MR. MUNZINGER: I agree with you a hundred
7 percent.

8 CHAIRMAN BABCOCK: Justice Brown.

9 HONORABLE HARVEY BROWN: We heard Judge
10 Peeples say that they really didn't work exhaustively on
11 the comments section, so I would suggest that we vote on
12 the rule itself first, and, you know, they can go back and
13 tinker with the language if they want to a little bit, but
14 the concept of the rule and save for the next time the
15 going through each item in the comment section.

16 CHAIRMAN BABCOCK: Yeah, that's where I was
17 headed. Richard Orsinger.

18 MR. ORSINGER: The discussion has caused me
19 to think back to my very first family law jury trial,
20 which was the first trial that this particular judge had
21 ever did while he was on the bench, and after I would
22 finish cross-examining a witness the judge, who was
23 hostile to my client, would go in and ask questions on
24 redirect after the lawyers were finished and unwind all of
25 the damage that I did on cross-examination. So I stood up

1 finally and said, "I object to the Court asking
2 questions," and the judge said, "Counsel, you're not
3 allowed to object to the Court asking questions." And
4 then I said, "Then I object to the Court asking leading
5 questions"; and he said, "Counsel, you're not allowed to
6 object to the Court asking any questions." And then I
7 said, "Your Honor, I object to the Court not allowing me
8 to object." And then he recessed the case and took me
9 into chambers and chewed my butt, but I think he affected
10 the outcome of that trial, and so --

11 CHAIRMAN BABCOCK: So you lost.

12 MR. ORSINGER: I did. I lost. I think
13 he --

14 MR. HARDIN: Maybe it was a pro se opponent.

15 HONORABLE STEPHEN YELENOSKY: I didn't say
16 you couldn't object.

17 MR. ORSINGER: I think --

18 HONORABLE STEPHEN YELENOSKY: But I get to
19 rule on it, right?

20 MR. ORSINGER: -- we need to be careful
21 because a smart judge knows how to ask questions and to
22 make insinuations or tones of voice or whatever that can
23 influence a jury, and so I'm really -- as I said early on,
24 I'm really nervous about judges inserting themselves in a
25 trial, less nervous about helping them get into the

1 courtroom.

2 CHAIRMAN BABCOCK: Did you object to the
3 judge commenting on the weight of the evidence?

4 MR. ORSINGER: No, that's the jury charge,
5 and we used the pattern jury charge -- well, no, we didn't
6 have a pattern jury charge.

7 HONORABLE STEPHEN YELENOSKY: Again, you're
8 just talking about a jury trial.

9 CHAIRMAN BABCOCK: Judge Peeples.

10 HONORABLE DAVID PEEPLES: Richard Orsinger,
11 do you have a problem in a jury case, or nonjury case,
12 too?

13 MR. ORSINGER: That case that I just
14 described was in a jury trial.

15 HONORABLE DAVID PEEPLES: Okay. But do you
16 have less stringent objections to these rules in nonjury
17 cases as opposed to jury?

18 MR. ORSINGER: Perhaps so, but, you know, a
19 judge can skew a nonjury trial by influencing the witness.
20 If the lawyer on redirect is not good enough to clear up
21 some problems on cross, a judge can go clear them up and
22 then the record is clear. So I still have a problem with
23 judges who are doing things that are actually altering the
24 balance of the trial.

25 CHAIRMAN BABCOCK: Buddy.

1 MR. LOW: Well, like a judge explaining his
2 rulings. A pro se offers something. He said, "I can't
3 accept it, but if you'll offer it for the limited purpose
4 of showing notice, then it will come in." I mean, that's
5 explaining his ruling. How far can you go?

6 CHAIRMAN BABCOCK: Yeah. Okay. Well,
7 Justice Bland has made a motion, seconded by Justice
8 Brown, that we have a vote on whether we're going to have
9 these rules or not, and if the vote is affirmative then
10 the subcommittee will go back -- and frankly, whether it's
11 affirmative or not, the subcommittee will go back and
12 present us their version of the rules as best they can
13 with the carnage on the floor among the subcommittee
14 members.

15 HONORABLE DAVID PEEPLES: So a "yes" vote is
16 a vote to send it back to the subcommittee?

17 CHAIRMAN BABCOCK: A "yes" vote is that we
18 have the rule, in which case it will go back to the
19 subcommittee, but even a "no" vote means it will go back
20 to the subcommittee.

21 MR. ORSINGER: So you lose any way you look
22 at it, David.

23 CHAIRMAN BABCOCK: So, yeah, you've got the
24 big L on your forehead. So everybody who is in favor of
25 having --

1 MR. GILSTRAP: Chip, you're talking about --

2 CHAIRMAN BABCOCK: -- a rule, although maybe
3 not these two specific rules, raise your hand.

4 MR. GILSTRAP: Wait, wait. Exactly what
5 rule are we talking about?

6 CHAIRMAN BABCOCK: What's that?

7 MR. GILSTRAP: Exactly what rule are we
8 talking about?

9 HONORABLE DAVID PEEPLES: Are you talking
10 about the whole package?

11 CHAIRMAN BABCOCK: I'm talking about the
12 whole package.

13 MR. GILSTRAP: Okay. Which one?

14 CHAIRMAN BABCOCK: We've got two rules.
15 We've got one for judges, one for clerks.

16 HONORABLE DAVID PEEPLES: Clerks, et cetera.

17 CHAIRMAN BABCOCK: Do you want to split it
18 up?

19 HONORABLE DAVID PEEPLES: I just want to be
20 -- we know what we're voting on. That's what I want.

21 HONORABLE TOM GRAY: But that's not a rule
22 change. That's a proposed policy. The rule, the only
23 proposed rule change is to add the language "and may make
24 reasonable accommodations to afford litigants" --

25 CHAIRMAN BABCOCK: Good point.

1 HONORABLE TOM GRAY: -- "including
2 self-represented litigants, that right" into 3.B(8) of the
3 canon.

4 MR. MUNZINGER: Well, but you've added a
5 comment.

6 CHAIRMAN BABCOCK: Our first vote will be
7 whether or not we change the canon and add a comment. So
8 that will be our first vote. Are you in favor of that or
9 not?

10 MR. GILSTRAP: Are we voting on the comment,
11 too?

12 CHAIRMAN BABCOCK: We're just voting on the
13 concept.

14 MR. GILSTRAP: Concept.

15 HONORABLE BRETT BUSBY: To have a comment.

16 MR. LOW: To have that comment.

17 CHAIRMAN BABCOCK: Yeah. Everybody in favor
18 of that, raise your hand.

19 And everybody against? That passes 17 to 5.
20 Now, everybody in favor --

21 HONORABLE STEPHEN YELENOSKY: Can we vote
22 for a comment without a rule change?

23 CHAIRMAN BABCOCK: Everybody in favor of
24 having this policy statement for the clerks and their
25 staff, everybody in favor of that, raise your hand.

1 MR. GILSTRAP: This policy statement, this
2 particular?

3 CHAIRMAN BABCOCK: No, no, no. In concept.

4 MR. GILSTRAP: In concept, okay. All right.

5 CHAIRMAN BABCOCK: Everybody in favor of
6 that, raise your hand.

7 All right. Everybody against?

8 MR. LOW: Richard and I.

9 CHAIRMAN BABCOCK: All right. 19 to 3 in
10 favor.

11 MR. HARDIN: What happened to the gang of
12 five?

13 CHAIRMAN BABCOCK: I don't know. The gang
14 of five lost a couple. Two people switched their vote.
15 So the Gray opinion will be in dissent and not the
16 majority, and this will go back to the subcommittee to
17 bring us at the next meeting something that the
18 subcommittee can sort of recommend. And with that we'll
19 be on our lunch break for one hour and be back at 1:45.

20 (Recess from 12:43 p.m. to 1:47 p.m.)

21 CHAIRMAN BABCOCK: Okay. We're going to
22 talk about Rule 145, and Richard Orsinger is here and
23 primed and ready to go.

24 MR. ORSINGER: All right.

25 CHAIRMAN BABCOCK: And thinks we're going to

1 take the rest of the day on this, right?

2 MR. ORSINGER: No, I don't think so.

3 CHAIRMAN BABCOCK: You're hoping, but you
4 don't think so.

5 MR. ORSINGER: Let me get organized here. I
6 may just have to wing it here. The subcommittee report is
7 in written form that was e-mailed to everybody. It was
8 prepared last April, and it has one inaccuracy in it,
9 which we'll discuss later, but, Chip, my suggestion is
10 going to be that the first thing we do is we look at the
11 three questions that Justice Hecht raised with the
12 committee and identify what they are. Then go to Rule 145
13 as it now exists and comment -- if you'll let me just
14 briefly comment about the different sections so the
15 discussion is in context, and that's on page seven, is
16 where the current rule is, and then go back to page one
17 and take up each of the numbered questions one at a time.

18 CHAIRMAN BABCOCK: Yep.

19 MR. ORSINGER: Are you okay with that?

20 CHAIRMAN BABCOCK: Yes, absolutely.

21 MR. ORSINGER: Okay. So the initiating
22 inquiry from Justice Hecht was three questions. Should
23 Rule 145 prohibit a litigant who is represented by counsel
24 under a contingent fee arrangement from filing a statement
25 of inability to afford payment of court costs, meaning if

1 somebody has a PI lawyer or PI claim on contingent fee
2 should they be able to get by without paying court costs
3 or not. That's question one.

4 Number two, should the rule be amended to
5 more clearly address the trial court's authority to hold a
6 hearing and to issue an order on the declarant's ability
7 to afford court costs after the judgment has been signed?
8 We're talking now about someone that didn't file the
9 affidavit of inability or the statement of inability while
10 the case was in the trial court. Now there's a judgment.
11 Now they want to appeal, and all of the sudden for the
12 first time they're claiming that they can't afford it, and
13 the question is who decides that, the trial judge or the
14 appellate judge.

15 The third question is should the rule
16 mandate that an order requiring the declarant to pay costs
17 state the deadline for seeking review of that decision in
18 the court of appeals? Meaning you've got a judgment,
19 you've got 10 days to file a motion in the court of
20 appeals as the rule is now written. Should we tell people
21 that? Should it be in the judgment so they know?

22 Now, having those three presenting
23 questions, let me tell you that some other issues came up
24 in subsequent discussion or e-mails, and I think it would
25 be helpful for all of us to go through Rule 145 at a high

1 level so we can remember the -- the rules we have now and
2 the discussion we had a couple of years ago. So on page
3 seven is the current Rule 145. In the general rule book
4 145(a) is -- we don't call it a pauper's oath anymore or
5 an affidavit of inability. It's now a statement of
6 inability, and it either has to be sworn to before a
7 notary or made under the penalty of perjury. If it's
8 sworn to by a notary, we're all familiar with that. They
9 just take the oath and they sign it. If it's made under
10 the penalty of perjury then that's an unsworn statement
11 that's under oath, and the Civil Practice and Remedies
12 Code requires that the residence address of the declarant
13 be revealed, and that creates a problem later on that
14 we're going to talk about because there are some
15 situations where the declarant might be an intended victim
16 of family violence or something and doesn't want her
17 residence address revealed. So we'll discuss that later.

18 So (b), the form that -- the clerk has to
19 have -- the Supreme Court promulgates a form. The clerk
20 has to pass the form out. (c), costs are defined as "fees
21 charged by the court or an officer of the court that will
22 be tied to the bills of costs," and they include filing
23 fees, and they include subpoena fees. They include
24 service of process fees, and they also include the
25 preparation of a clerk's record for appeal and the

1 reporter's record for appeal.

2 Subdivision (d) says you're not supposed to
3 throw these statements out for defects of form unless it's
4 actually a failure to properly swear to or to have your
5 own sworn declaration subject to perjury, and if there are
6 other defects then they're correctable. It says right
7 here, "If a defect or omission is material the court or on
8 its own motion, the motion of a clerk, or party may direct
9 the declarant to correct or clarify this statement."

10 Okay. So then let's move on to (e).
11 "Evidence of inability to afford costs required." This
12 evidence that they're talking about is evidence in the
13 statement itself, either in the form of the sworn
14 statement or in the form of supporting documentation. So
15 subdivision (e) says what do you have to attach to your
16 statement for it to be valid. You either have to have an
17 oath or evidence or both that you're receiving benefits
18 from a government entitled program, eligibility of which
19 is based on means. So we're talking about means-tested
20 poverty program there. You have to either swear that
21 you're receiving benefits or give proof of it.

22 Number (2), that you're being represented by
23 an attorney whose legal services are provided free of
24 charge, without contingency, so it can't be a PI
25 contingent fee arrangement, through (A), (B), or (C), a

1 Texas Access to Justice provider, someone with the Legal
2 Services Corporation, or a nonprofit that provides
3 services to people that are below 200 percent of the
4 poverty level.

5 The last category, pardon me, the third
6 category is that you have applied for free legal services
7 and qualified, but you were declined, and the last one is
8 that you just simply don't have funds to afford payment of
9 costs. Maybe you're not represented by Legal Aid, maybe
10 you never applied, but you just can't afford that, and so
11 if you swear to that or you can prove that then your
12 statement is acceptable. And as a practical matter, if
13 you comply with this requirement as a statement, it
14 basically creates a presumption that you're unable to pay,
15 unless somebody else is to get -- is able to get into
16 court and file an oppositional statement and then there's
17 a hearing, you are home free. You can get through without
18 paying for the costs.

19 Now, this list in (2)(A), (A), (B), (C), and
20 category (3) and (4), well, these are called automatic
21 qualifiers. In the old days we called them automatic
22 qualifiers because prior to 2016 if you were represented
23 by Legal Services Corporation, it was an automatically --
24 automatic qualifier for avoiding the payment of costs, but
25 when the rule was amended in 2016 it ceased being an

1 automatic qualifier, and now it just became one of the
2 criteria that had to be mentioned in your statement,
3 unless you were relying on that you had evidence you don't
4 have funds to pay. So one of the things that we're going
5 to discuss today is whether these that used to be
6 automatic qualifiers now are just certain criteria for
7 your statement. Should they go back to where they're
8 automatic qualifiers, or should they stay where they are
9 now where some judges are saying, "Well, I don't care if
10 you're represented by Legal Aid, I have evidence -- I see
11 evidence that you can afford to pay, and I'm going to make
12 you pay anyway."

13 So let's move on to (f). The court can
14 order someone to pay costs even if they filed a complaint
15 and statement on the motion of a clerk or a party, but
16 that motion by the clerk or the party has to be based on
17 sworn evidence, not information and belief, that either
18 the statement is materially false or that due to changed
19 circumstances is no longer true. That could occur when
20 you're -- when initially a statement was filed and they
21 were allowed to proceed in forma pauperis, and later on
22 they ran into some money, and now we're going to make them
23 pay for the rest of the case or for the appeal. So in
24 order to contest it, if you're the clerk or a party, you
25 have to file a motion that's based on sworn evidence and

1 allege materially false or changed circumstances.

2 An attorney ad litem under subdivision
3 (f)(2) can file a motion to require a hearing on a
4 statement of inability to pay. That section 107.013 of
5 the Family Code is a state-filed termination of the
6 parent-child relationship or a state-filed lawsuit to take
7 managing conservatorship away and to put it to a delegate
8 designee of the state of Texas. So if you're an ad litem
9 for a parent you can in a sense contest it or file a
10 motion, but you have to comply with (f)(1), which requires
11 that you have sworn evidence that the statement of
12 inability was materially false or that there have been
13 changed circumstances.

14 Now, what if you're the court reporter?
15 That's subdivision (f)(3). "When the declarant requests a
16 preparation of a reporter's record but cannot make
17 arrangements to pay for it, the court reporter may move to
18 require the declarant to prove the inability to afford
19 costs." Notice, the court reporter is not required to
20 comply with (f)(1). So the court reporter doesn't have to
21 have sworn testimony that the statement was materially
22 false or that there have been changed circumstances. So
23 the clerk has a higher burden to create a fact question
24 that requires a hearing than the court reporter, and I
25 would say that the clerk has the same duty to present

1 evidence of falsity or change that a party would.

2 So let's go on to (f)(4). The court on its
3 own motion. "Whenever evidence comes before the court
4 that the litigant can afford to pay costs, the court may
5 require," that's not obligated to, but may require proof.

6 So we get to (f)(5), notice and hearing.
7 You've got to give the declarant -- meaning the person
8 applying to be exempted from costs of a hearing. It has
9 to be an oral evidentiary hearing, got to have 10 days
10 notice, and at the hearing the burden is on the declarant
11 to prove the inability to afford costs. So now we're
12 talking about the burden of persuasion. Before we were
13 talking about the burden to plead a statement that gave
14 rise to a presumption of inability to pay, and if that was
15 properly pled and it created the presumption that it
16 carried the day unless one of these qualified people filed
17 an opposition under (f)(1) or (f)(3), in which event now
18 the presumption of inability is gone, and now we're in a
19 hearing where the party claiming the exemption has to come
20 forward with proof. There is no statement here or
21 definition in this rule of what constitutes the inability
22 to pay, which is perhaps an issue that we want to discuss.
23 At the hearing the judge has got to make a
24 ruling, and if the judge denies the leave to proceed
25 without costs the court has to issue detailed findings,

1 and the court can also order partial payment or the court
2 can order payment of costs in installments, but cannot
3 delay the provision of services while the installment plan
4 is underway. On appeal, you may recall this discussion,
5 but only the declarant who is attempting to be exempted
6 from costs can appeal. The court reporter or the clerk,
7 the state, they can't appeal an adverse finding, but the
8 party who is denied the ability to go forward without
9 costs can appeal, and you do that by filing a motion in
10 the court of appeals under subdivision (g)(2). You see
11 that it has to be filed within 10 days and can be extended
12 by the court of appeals an additional 15 days.

13 The party who's appealing the denial of the
14 leave to proceed without costs is entitled to a free
15 record of that hearing on costs, not a free record on the
16 case on the merits, but just a free record on the evidence
17 that was presented of the inability to pay, and that has
18 to be provided by the clerk and by the court reporter free
19 of charge, and then the court of appeals has to rule
20 promptly at the earliest practicable time. Also, if it
21 turns out that the plaintiff -- or should I say the
22 litigant who's given leave to proceed without costs --
23 obtains a monetary recovery, in the judgment the judge can
24 say, "I want the part of the monetary recovery applied to
25 the court costs that we allowed you to get by with." So

1 here at the end when the judge is signing the judgment, if
2 there's money for the party that was proceeding without
3 costs, you can recoup it, the state can recoup it or
4 whoever it is can recoup it out of the costs.

5 That's kind of the overview, so let's go
6 back to question number one on page one. Well, like every
7 other question raised, the committee had no majority and
8 really probably no plurality, and so we're basically
9 bringing you the problem with no recommendation on a
10 solution, but we did discuss possible solutions. So this
11 issue number one about should PI lawyers be able to get by
12 on their contingent fee cases by paying costs was
13 submitted by Dinah Gaines, a staff attorney from Bexar
14 County, who said this is becoming an increasingly popular
15 practice in Bexar County. One member of the subcommittee
16 said, yeah, you should force the plaintiff's lawyer to
17 come up with the money. One tentatively said "yes,"
18 tentatively; another one said "probably"; one said maybe
19 they should be recouped; and several had no opinion at
20 all, so I think we're teeing it up here. We should
21 recognize that if we do not require an indigent plaintiff
22 who is represented by a contingent fee lawyer to pay
23 costs, we're basically picking up some of the cost of the
24 claim, but the contingent fee lawyer is picking up the
25 rest, the expert witness fees and all of the other costs

1 associated that are not court costs. So is that what we
2 want to do? Do we want the court reporter to do that? Do
3 we want the county to do that or the district to subsidize
4 that and then perhaps get it recouped if the district
5 judge so decides at the end of the case if there's a
6 recovery? Don't have a recommendation, Chip, but I have
7 my own opinion, but I don't want to --

8 CHAIRMAN BABCOCK: Well, we would like to
9 hear that, but your subcommittee on this is Professor
10 Albright, Professor Carlson, Nina Cortell, Professor
11 Dorsaneo, Carl Hamilton, Pete Schenkkan, and Judge
12 Estevez.

13 MR. ORSINGER: Yes, and Judge Estevez has
14 already gone, so Alex is the only other one here.

15 CHAIRMAN BABCOCK: Professor Albright, do
16 you have any thoughts about this, this first question?

17 PROFESSOR ALBRIGHT: As I recall, I think I
18 was out of town during this discussion. But I'm sure if I
19 think hard enough I'll have something to say.

20 CHAIRMAN BABCOCK: So what was the big
21 disagreement?

22 MR. ORSINGER: You know, it's hard to say.
23 I mean, it seems to me like if the plaintiff's lawyer is
24 funding a med mal case or a products liability case this
25 is like chicken feed, and to me, I mean, okay, I guess the

1 county is a big thing. You know, the state is a big
2 thing. You know, we can afford to pay a few fees, but the
3 court reporter is not a big thing. The court reporter is
4 an individual who has to do this work for free, and I
5 think is without compensation, David, is it?

6 MR. JACKSON: Well, a lot of times it's even
7 with additional costs because while you're getting these
8 records out you're paying someone to sit in your court. A
9 lot of times.

10 MR. ORSINGER: And do you get reimbursed by
11 the county or the state if you have to do a free record?

12 MR. JACKSON: No. Well, I'm not sure on
13 that. There was some -- there has been some discussion
14 with the commissioners about paying some of those indigent
15 fees, but it doesn't always happen. It's not in every
16 county for sure.

17 MS. HOBBS: My understanding is they should
18 be reimbursed by the county.

19 MR. ORSINGER: Okay. So then it is --
20 eventually it is at the cost of the state, not -- there is
21 no particular individual that is preparing this for --

22 CHAIRMAN BABCOCK: Justice Bland, then
23 Justice Gray.

24 HONORABLE JANE BLAND: I just want to
25 clarify that the court -- in some counties the court

1 reporter when the court reporter is out the court reporter
2 pays for the other court reporter?

3 MR. JACKSON: That happens, yes, especially
4 if they're getting out a big record. That's part of the
5 issue with court reporters, what they call double-dipping.
6 You know, they work it out by paying someone to sit in
7 their court while they get the record out.

8 MR. ORSINGER: Well, that works fine if
9 you're getting paid to work on it, but if you're not
10 getting paid to work on it then it's coming out of your
11 salary.

12 CHAIRMAN BABCOCK: Justice Gray, then
13 Richard or -- Richard Munzinger.

14 HONORABLE TOM GRAY: Is it inappropriate to
15 ask our official court reporter to give her comment?
16 Because I could tell she had one. But because we're
17 soliciting information here, I thought maybe that would be
18 okay.

19 MR. JACKSON: I'll come write for you, Dee.

20 (Off the record)

21 MR. ORSINGER: Well, without objection she
22 has permission to extend her comments in the record after
23 the hearing.

24 CHAIRMAN BABCOCK: Well, we could do it that
25 way, too.

1 MR. ORSINGER: That's the way they do it in
2 the Senate.

3 CHAIRMAN BABCOCK: That's the way they do it
4 in the Senate. Jim, you've got some contingent cases.
5 You got any thoughts on this?

6 MR. PERDUE: I'm sorry, I'm just catching up
7 on this, because this is a little bit in my universe, and
8 I -- again, I've got to be real careful because I'm trying
9 to figure out -- this came to you from Bexar County, and
10 it says that they're -- I mean, I'll just weigh in. I
11 mean, I think that part of the reason that you justify a
12 contingency fee is that you're paying the costs to
13 prosecute the claim. And, you know, my -- my contracts
14 will write to a contingency fee, uncapped at this time at
15 least, is, you know, predicated on my -- on my contractual
16 commitment to the client to take on the expense of the
17 litigation. And if we lose, then I'm out all of that.
18 I've always seen that that's the risk, you know, inherent
19 in my world; and so I can honestly say it's never occurred
20 to me to suggest that, you know, look, I don't represent
21 anybody who can pay my bill. It's all contingency fee.

22 CHAIRMAN BABCOCK: Right.

23 MR. PERDUE: And what merits the contingency
24 fee is advancing the costs. Now, you know, I know there's
25 moves afoot to change that right of contract, and I would

1 probably be worried about a rule that, if that world
2 changes, now says that the client, you know, can't be
3 indigent because I could potentially be indigent as well
4 if we have 10 percent caps on contingency fees, but, you
5 know, I -- honestly, I kind of understand where the court
6 reporters would be coming from on this, is, you know, I do
7 ethically believe that the part of the deal for a
8 contingency fee lawyer is taking on the costs of the
9 litigation. That's what merits having a fee interest in
10 winning, and if you lose, you've lost it.

11 CHAIRMAN BABCOCK: Isn't it pretty customary
12 for cases that are being handled on a contingency fee
13 where you'll just pay the filing fee, right? You won't
14 mess around with a statement of indigency?

15 MR. PERDUE: I've honestly never heard of
16 such a thing.

17 CHAIRMAN BABCOCK: I've never seen it,
18 but --

19 MR. MUNZINGER: I was taught in law school
20 by Albert Jones to always -- if I took a contingent fee --
21 this is 51 years ago or longer, 55 years ago, if you take
22 a case on a contingency fee, get an assignment of the
23 cause of action. If you don't get an assignment of the
24 cause of action to the extent of your fee, your client
25 settled out from underneath you, and you're in trouble.

1 If you've got the assignment, your client's settlement
2 doesn't extend to your assignment. So if the plaintiff's
3 lawyer takes an assignment of the fee, the indigent has
4 now given 30, 40, whatever percent it is, to the attorney,
5 which to me makes the attorney have to prove the attorney
6 can't afford it because he's receiving 40 percent of the
7 recovery if there's an assignment.

8 I've always had an assignment in my
9 contingency fee agreements. I don't know if others do.
10 He shakes his head "yes." It's a common practice. I bet
11 you the TTLA tells you first thing you do when you pay
12 your membership fee is be damn sure you get assignment.

13 MR. PERDUE: I don't know if that's the
14 first thing, but --

15 HONORABLE STEPHEN YELENOSKY: It's a thing.

16 MR. PERDUE: It's a thing.

17 CHAIRMAN BABCOCK: Well, what's the case
18 against -- I mean, obviously somebody in the subcommittee
19 felt strongly that this should not be -- Buddy, yeah.

20 MR. LOW: What if the contingency fee
21 contract had that provision, that they'll pay everything
22 but the -- I mean, I've never heard of it, and I'm like
23 Jim. When I take one, I say, "Well, I'm getting ready to
24 take a loss if I lose." It's like the old Champion case
25 way back in the Sixties. When they didn't answer and the

1 guy said, "Well, wait a minute you can't dismiss" -- they
2 didn't answer the interrogatories or something. Say, "You
3 can't dismiss because I've got a fourth interest in it.
4 You can't dismiss my part." It all goes with one, so the
5 attorney usually is bound by all costs, the experts, all
6 of it. I've never heard of it otherwise.

7 CHAIRMAN BABCOCK: So what's the argument
8 against it?

9 MR. ORSINGER: No one raised an argument,
10 Chip, but --

11 CHAIRMAN BABCOCK: Well, you said you were
12 not in agreement.

13 MR. ORSINGER: Right, because I couldn't
14 get -- I couldn't even get a plurality.

15 CHAIRMAN BABCOCK: Doesn't sound like you
16 got anybody on the phone.

17 MR. ORSINGER: Well, it wasn't for a bunch
18 of no's. It was because I got a bunch of different yeses
19 or different kinds of yeses.

20 MR. HARDIN: Different types of agreements?

21 MR. ORSINGER: No, there was "yes,"
22 "tentatively yes," "yes under certain circumstances," that
23 kind of thing, but I can say that this whole Rule 145 is
24 supposed to let people who can't get access to the
25 courthouse, because they have no money, is to let them

1 litigate their case. Somebody who is in court with a
2 personal injury lawyer suing somebody doesn't have a
3 problem getting into the courthouse to have their case
4 heard. So do they really belong under Rule 145, which is
5 for those people that can't get into court without getting
6 a pass on paying their share of the litigation fees. I'm
7 not sure I see any good logic to say that that kind of
8 person belongs under Rule 145, apart from the point that
9 Jim made, which is that it's really the personal injury
10 lawyer that you're subsidizing, not the indigent litigant.

11 CHAIRMAN BABCOCK: Okay. Yeah, David.

12 MR. JACKSON: Wouldn't just about everyone
13 who lost a case try to come under this new rule if we
14 changed it? I mean, if you lose, I mean, most of us could
15 come up with a dozen reasons why we can't pay for
16 something.

17 MR. ORSINGER: Well, that raises an
18 interesting point, too. If you lose in the trial court,
19 you want to appeal, and then you file your affidavit or
20 your statement of inability on a going forward basis,
21 you'll have no contingent fee. The plaintiff's lawyer
22 would have no contingent fee, and the litigant would have
23 no recovery.

24 MR. LOW: Could win on appeal.

25 CHAIRMAN BABCOCK: Yeah. Yeah. Justice

1 Busby.

2 HONORABLE BRETT BUSBY: Call the question.

3 MR. HARDIN: Are you in collusion with her
4 down there?

5 CHAIRMAN BABCOCK: I know.

6 HONORABLE BRETT BUSBY: I'm trying.

7 CHAIRMAN BABCOCK: These Houston appellate
8 judges.

9 HONORABLE JANE BLAND: But we have a red
10 light in Houston.

11 MR. ORSINGER: Yeah, 20 minutes per side.

12 HONORABLE STEPHEN YELENOSKY: Why don't you
13 bring it here?

14 CHAIRMAN BABCOCK: Scott.

15 MR. ORSINGER: Don't give her the red light.

16 CHAIRMAN BABCOCK: She doesn't get that
17 button.

18 MR. STOLLEY: I don't know if this is
19 another complication, but what if the plaintiff is being
20 funded by one of these litigation funding companies, and
21 the plaintiff himself is indigent, but they've got a
22 litigation funding company behind them? It falls in the
23 same category that Richard is talking about, somebody who
24 does have access to the courts.

25 CHAIRMAN BABCOCK: What do you think about

1 that, Rusty?

2 MR. HARDIN: I just think when we take on a
3 plaintiff's case -- it's already been said. We take on a
4 plaintiff's case, we take it for the whole ride like
5 Buddy's talking about. That's part of our gamble. I
6 think we're responsible, and it shouldn't be --

7 MR. LOW: If you don't want it --

8 MR. HARDIN: I didn't know that was
9 happening in San Antonio. Is that the only place it's
10 happening?

11 MR. LOW: I never heard of it.

12 MR. HARDIN: I haven't. I've never seen it
13 happen in Houston.

14 CHAIRMAN BABCOCK: Justice Bland.

15 HONORABLE JANE BLAND: And I want to
16 clarify, in Harris County, a court reporter, it doesn't
17 come out of the court reporter's salary for a substitute
18 to come in, so that isn't the issue in Harris County. I
19 just checked with the administrative judge to make sure
20 that times had not changed, but the court reporter is --
21 and I just want to clarify that because I know the
22 practice may be different throughout the state, and I
23 don't know that it affects this conversation, but it might
24 affect others in connection with paying for the record.

25 CHAIRMAN BABCOCK: Justice Gray.

1 HONORABLE TOM GRAY: I'm trying to frame
2 this question in my mind, and it's not coming well, but
3 the -- my concern is that the clerk when one of these
4 affidavits is filed is going to have to interrogate the
5 filer about their representation and whether or not
6 they're represented -- and presumably they may would know
7 at that point whether or not they're represented by an
8 attorney because it may be an attorney filing it, but not
9 necessarily. But even if they are represented by an
10 attorney, what kind of lawsuit it is, what kind of
11 arrangement do you have with your lawyer. It seems to me
12 that the fundamental question remains the same, is -- is
13 the person who is the party primarily reliable -- liable
14 for the cost able to pay, and if the answer to that
15 question is "no" then they ought to be able to proceed
16 without the payment of costs, and I would think that would
17 justify a "no" answer to the question as asked.

18 There may be a -- something about it in like
19 Jim Perdue's world where he signs up and he agrees to pay,
20 but maybe it's not a case in which there's going to be a
21 recovery. They are represented by an attorney. It just
22 seems to me there's some circumstances that we're probably
23 not fully evaluating that would become very complicated if
24 you're allowing a clerk to interrogate a represented party
25 to determine if they are truly indigent and if they are

1 represented in a contingent fee contract or not, and I
2 think a clerk doesn't -- shouldn't be delving into the
3 type of representation that they have. Lawyer may just be
4 doing it pro bono.

5 CHAIRMAN BABCOCK: Yeah.

6 HONORABLE TOM GRAY: Just it's a friend or
7 somebody that -- you know, somebody they work -- you know,
8 there's just too many contingencies, and I would rather
9 not see the clerk have to interrogate anybody about
10 whether or not they have a contingent fee arrangement and
11 expect a monetary recovery. Because they can recover at
12 the end if they are in a contingent fee case and there is
13 a recovery made. I mean, there is a provision for that.

14 CHAIRMAN BABCOCK: Yeah. Judge Wallace.

15 HONORABLE R. H. WALLACE: The way the filing
16 works at least in Tarrant County, of course, everything
17 now is e-filed, so the clerk doesn't even talk to anybody.
18 Something gets e-filed, and then either costs -- either
19 the filing fee is paid or it's not paid, and if it's not
20 paid the clerk will contact whoever filed and say, "You
21 need to pay the fee," and they don't make a determination
22 really, I don't think, as to whether -- it's either they
23 pay it or they don't pay it, and I have not seen this
24 problem in Tarrant County. I mean, I would imagine 99
25 percent of car wrecks are represented on contingent fees

1 and their attorneys pay the filing fees, and I think that
2 should be the case.

3 CHAIRMAN BABCOCK: Buddy.

4 MR. LOW: Chip, wouldn't the person have to
5 swear, "Are you or any person who has interest in
6 potential recovery," or "all of you"?

7 CHAIRMAN BABCOCK: Indigent.

8 MR. LOW: Indigent. You don't have to put
9 whether he's a contingent fee, but you've assigned. You
10 know that, so you know you have to swear that the people
11 who have an interest in recovery are indigent.

12 CHAIRMAN BABCOCK: What's wrong with that?
13 Justice Busby.

14 MR. ORSINGER: If we're -- I'm sorry. Go
15 ahead.

16 CHAIRMAN BABCOCK: No, he wants to call that
17 question.

18 MR. ORSINGER: If we're going to go that
19 route we need to look on page seven about the evidence of
20 inability to afford costs required, because right now to
21 file the sufficient statement you have to either allege or
22 prove that you're receiving benefits from a government --
23 a means-based government entitlement program or you're
24 represented on a noncontingent basis by one of these legal
25 funding agencies. So we would need to add on there some

1 kind of clarification or statement. I mean, right now,
2 you could not meet the criteria of being on a government
3 program, you could fail to meet the criteria of not having
4 a Legal Aid-provided lawyer. You could fail to meet the
5 criteria of having applied for a Legal Aid but not getting
6 it, but you could still meet the criteria that you don't
7 have funds to afford payment of costs. But the question
8 is "you." "You" meaning the plaintiff or "you" meaning
9 the plaintiff and your contingent fee lawyer. We have to
10 clarify that if we are meaning to include unable -- cannot
11 afford to pay the costs. We have to clarify that if we're
12 going to include the plaintiff's contingent fee lawyer
13 there.

14 MS. BARON: Richard, what about if you meet
15 the criteria of one, but you still have a contingent fee
16 lawyer?

17 MR. ORSINGER: Yeah, if you meet the
18 criteria of one, that gets us back into the discussion
19 that we'll have later on with Trish's help, but there used
20 to be automatic qualifiers, and if you met one, it was an
21 automatic qualifier. It didn't matter whether you had a
22 million bucks in the bank, if you somehow were getting on
23 a government entitlement program, it's an automatic
24 qualifier. The 2016 rule allows the judge upon a proper
25 contest to look at all of the evidence and that there's

1 evidence that you have the ability to pay even though
2 you're on an entitlement -- a means-tested entitlement
3 program, the court now has the authority to reject that.
4 So we'll discuss that a little bit more later on, but you
5 could meet (e)(1), and if somebody is able to file a
6 contest, then at the hearing they've got to come forward
7 with the evidence, and the contingent -- the evidence may
8 be "I have a contingent fee lawyer that is able to pay
9 these fees" and therefore, the judge says, "Then no go. I
10 don't care if you're on welfare, you're going to have to
11 pay."

12 MR. LOW: The contingent fee lawyer can't
13 have it both ways, you know.

14 CHAIRMAN BABCOCK: Yeah, Trish.

15 MS. McALLISTER: One thing just to note is
16 that before the rule was revised the original rule did
17 exclude contingency fee cases, so there's language in the
18 former rule that could potentially be used to modify the
19 current rule.

20 MR. ORSINGER: Okay.

21 CHAIRMAN BABCOCK: Lisa.

22 MS. HOBBS: I was just going to say that for
23 Trish in case she didn't say it.

24 CHAIRMAN BABCOCK: Okay. All right. Any
25 other comments about this?

1 MR. ORSINGER: Chip, I would just say that
2 there's already in the rule the ability to recapture if
3 the suit is successful. If the practice is allowed, the
4 contingent fee lawyers can get by without paying the
5 costs. There is already a provision in the rule that in
6 the judgment the judge can make you repay the county.
7 Now, that's not a good reason to say that they shouldn't
8 have to pay, but it's there as a safety net if they go
9 that route.

10 CHAIRMAN BABCOCK: Well, doesn't it look
11 like from the anecdotal evidence that Bexar County is an
12 outlier on this?

13 MR. ORSINGER: Yeah, I mean, I don't
14 understand, but once everybody figures out you can get
15 away with this, probably it will spread.

16 CHAIRMAN BABCOCK: Well, and that's the
17 thing I'm worried about.

18 MR. ORSINGER: Well, then I should have
19 never raised it, never mentioned it today, because this is
20 going to be on the internet. Anybody can get it, and now
21 it's going to spread like wildfire.

22 CHAIRMAN BABCOCK: No, you had to mention
23 it.

24 MR. ORSINGER: Oh, okay.

25 CHAIRMAN BABCOCK: But the charge from the

1 Court, as you've outlined in here, was to make explicit
2 that the -- that the contingency fee lawyer pays the -- or
3 at least it's between him or her and their client as to
4 who pays the filing fee, but it's not the county.

5 MR. ORSINGER: Right. And I think that it
6 might be helpful to the Court for us to take a vote,
7 because I haven't heard any arguments in favor of allowing
8 the plaintiff's lawyers to get by without costs.

9 HONORABLE TOM GRAY: I guess I didn't do a
10 very good job of articulating that.

11 MR. ORSINGER: Oh, okay.

12 CHAIRMAN BABCOCK: Yeah. Justice Gray was
13 perhaps in the majority, perhaps in the vicinity.

14 MR. ORSINGER: Well, maybe a vote would be
15 revealing.

16 CHAIRMAN BABCOCK: Yeah. Richard.

17 MR. MUNZINGER: The current rule as written
18 would not require a contingency fee lawyer to -- or would
19 not require that lawyer to pay the costs.

20 CHAIRMAN BABCOCK: That's right.

21 MR. MUNZINGER: It uses the words "such as
22 evidence" as distinct from "including evidence," and my
23 personal belief is if you've got a contingency fee lawyer,
24 contrary to what Justice Gray says, I'm paying for it.
25 Why should I pay for that? Why should my taxes pay for

1 this? I was in it.

2 CHAIRMAN BABCOCK: Don't get excited now.

3 MR. MUNZINGER: I'm excited. I'm boiling
4 over. But, I mean, why should I? And why should people
5 who aren't lawyers do this? Why should the homeowner -- I
6 mean, who was it was just down here from El Paso trying to
7 tell the state Legislature, for God's sakes, leave us
8 alone? 70 percent of our tax base in El Paso comes from
9 homes. It's a poor town. You tell me why my poor
10 homeowner should pay a plaintiff's lawyer to file a
11 lawsuit. That makes a lot of sense.

12 HONORABLE TOM GRAY: Because it's not --

13 CHAIRMAN BABCOCK: You're going to have to
14 fight Rusty on this.

15 HONORABLE TOM GRAY: Because the claim does
16 not belong initially to the lawyer. It belongs to the
17 litigant, and to get the litigant's case resolved may
18 require the ability to get into court without paying the
19 cost.

20 MR. MUNZINGER: Well, your insertion of the
21 word "initially" is significant. Because if he's assigned
22 it, he's assigned 40 percent of his claim. He can't
23 recover unless 40 percent of the claim is proven. That
24 was my point in raising the issue of the assignment to the
25 plaintiff's lawyer. You've got Joe Jamail who is saying,

1 "I can't pay the costs." Are you kidding me?

2 CHAIRMAN BABCOCK: Well, that's a bad
3 example.

4 MR. MUNZINGER: It is a bad example. It's
5 an extreme example, but it's accurate.

6 CHAIRMAN BABCOCK: Well, not really today,
7 but --

8 MR. MUNZINGER: True.

9 CHAIRMAN BABCOCK: Justice Bland.

10 HONORABLE JANE BLAND: I would just be
11 curious. Trish, do you know what the language was from
12 the earlier version that was amended out and what the
13 thinking was when it was taken out?

14 MS. McALLISTER: I don't know what the
15 thinking was when it was taken out, but -- and I can run
16 upstairs and get the former language, but I don't have it
17 with all of the stuff that I brought with me today. I
18 just know that it was accepted, you know, and that the
19 rule that was in existence from 2005 until 2015 or up to
20 '16.

21 CHAIRMAN BABCOCK: Buddy, then Richard.

22 MR. LOW: If the contingent fee lawyer is
23 not willing to gamble the court costs, he's going to take
24 a closer look at that case, I'll tell you that.

25 CHAIRMAN BABCOCK: Richard.

1 MR. ORSINGER: I don't think that anything
2 was intended by that, Jane. I think that what happened
3 was we originally had a definition of poverty or what
4 would qualify, and the rule got shifted around and
5 rewritten to create -- it's tacit, but it tacitly creates
6 a rebuttable presumption that can only be rebutted in
7 extremely limited circumstances by people with actual
8 knowledge that are willing to swear to something, and if
9 they do rebut it then we have a fact hearing. So the rule
10 was restructured and stated in more of a flow of burden,
11 burden to plead, burden to prove, and in that part of
12 the -- part of what we lost was the definition of poverty
13 or inability to pay, and part of it we lost was this
14 contingent fee. Because notice the concept of
15 noncontingent is still in here.

16 It says under (e)(2) "is being represented
17 in the case by an attorney who is providing free legal
18 services to the declarant without contingency." So they
19 meant to mean that you couldn't get by by saying, "I've
20 got free legal services, but it's from a contingent fee
21 lawyer." But the way this is written that just creates a
22 rebuttable presumption. We no longer have an absolute
23 definition of "inability to pay," and really, that's one
24 of the things I hope we discuss a little later is whether
25 we want to introduce a definition and specifically decide

1 if we want to be more explicit about how to handle
2 contingent fee because --

3 CHAIRMAN BABCOCK: Okay.

4 MR. ORSINGER: Go ahead.

5 CHAIRMAN BABCOCK: Okay. But right now on
6 this question Pam is bored, and she wants to move on.

7 MS. BARON: Yes.

8 CHAIRMAN BABCOCK: So we're going to take a
9 vote on how many people think the rule should be amended
10 to prohibit a litigant who is represented by counsel under
11 a contingency fee agreement from filing a statement of
12 inability to afford payment of court costs? If you're in
13 favor of that, raise your hand.

14 How many are against?

15 All right. 19 to 2. So Justice Gray will
16 write the dissent in his spare time on this. And we'll
17 move to question number two.

18 MR. ORSINGER: Question number two, Chip, is
19 submitted by the clerk of the Eighth Court of Appeals in
20 El Paso, and she had a case in which a pro se defendant
21 was proceeding to represent themselves in court. They had
22 no ruling at all about being exempt from the ability to
23 pay of costs. They lost the judgment. On the day the
24 judgment was signed they filed their statement of
25 inability to pay fees, and a question arose as to whether

1 that should have gone to the Eighth Court of Appeals to
2 decide whether to allow them to proceed without costs or
3 whether it should have gone to the trial court. I don't
4 know how they resolved it. Her e-mail didn't say how they
5 resolved it in that case, but she made a request, is would
6 you-all consider telling us who has jurisdiction when the
7 statement of inability to pay is filed at the time or
8 after judgment? Does the trial judge have the first shot
9 at the hearing, or is the court of appeals supposed to do
10 it based on affidavits? And if they're doing them on
11 affidavits, how do they resolve, you know, factual
12 disputes. Because they can't call witnesses and stuff
13 like that, so it seems to me like it's got to go to the
14 trial court first, but anyway the question is --

15 MR. HARDIN: Justice Gray votes for that.

16 HONORABLE TOM GRAY: No. I think the rule
17 does provide for it. It depends on what fees you're
18 trying to waive.

19 MR. ORSINGER: Okay.

20 HONORABLE TOM GRAY: If it's the appellate
21 filing fee, it's filed with us.

22 MR. ORSINGER: Okay.

23 HONORABLE TOM GRAY: And we decide it.

24 MR. ORSINGER: Okay.

25 HONORABLE TOM GRAY: But if they're trying

1 to waive the fees in connection with the trial court
2 costs, which includes the appellate record, then somehow
3 or another we've got to get jurisdiction back to the trial
4 court to decide that if they think about filing an
5 affidavit down there.

6 MR. ORSINGER: Okay. So I think --

7 HONORABLE TOM GRAY: So I'm wondering if we
8 should attempt to accommodate this litigant who has filed
9 an affidavit with us but hasn't filed one in the trial
10 court and what would we do.

11 MR. ORSINGER: To me it's like if somebody
12 filed a notice of appeal in your court and not in the
13 trial court. I think you send a courtesy copy back to the
14 district clerk, don't you? So at any rate it does seem to
15 me like we need to say something here, because this rule
16 is written as if the ruling was done before judgment, and
17 we have to accommodate for a fact where somebody files a
18 statement of inability to pay afterward. They may only
19 file it in the trial court after judgment in which event
20 you don't know about it when it comes to your court costs,
21 but if they file it in your court and don't tell the trial
22 judge about it then the court reporter and the court clerk
23 don't even know that the affidavit has been filed. Right?

24 CHAIRMAN BABCOCK: Well, do you disagree
25 with what Justice Gray just said, that if the fees are

1 trial court fees the trial court ought to decide it?

2 MR. ORSINGER: I think that's -- I think the
3 court of appeals should decide whether to waive their
4 fees, but here's the problem. You can't have fact
5 witnesses.

6 MR. HARDIN: Is your answer "yes" or "no"?
7 I got confused.

8 MR. ORSINGER: Well, it makes good sense for
9 the court of appeals to decide whether to waive their
10 fees, but it doesn't make good sense for the court of
11 appeals to have a hearing because the court of appeals can
12 only read affidavits and read records. They can't have
13 witnesses, and so what do we do when we have a contest,
14 someone says, "I have the inability to pay," and then
15 you've got a sworn statement from someone saying that
16 that's materially false. What does the court of appeals
17 do with that? They remand it to the trial court for a
18 hearing. Wouldn't you?

19 HONORABLE TOM GRAY: I really have said more
20 than I should on this one already.

21 MR. ORSINGER: Okay. So it does seem to me
22 like we should provide for the trial court to take the
23 first shot at one of these and then the court of appeals
24 can review it on their own costs or the trial court's
25 costs.

1 CHAIRMAN BABCOCK: Judge Wallace.

2 HONORABLE R. H. WALLACE: I was trying to
3 look it up and can't get there. Isn't there an appellate
4 rule that addresses filing?

5 HONORABLE TOM GRAY: 20.

6 HONORABLE JANE BLAND: 20.1.

7 HONORABLE R. H. WALLACE: Is it 20?

8 HONORABLE JANE BLAND: 20.1.

9 HONORABLE R. H. WALLACE: Yeah. I mean, I
10 think I've heard those before where something was filed in
11 the appellate court, and I think it may be addressed to
12 me.

13 MR. ORSINGER: So if you like the idea of
14 saying that one that's filed with the judgment or after
15 the judgment should be heard by the trial court, we could
16 just simply adopt a section here that says if it's filed
17 at the time of or later than judgment, then the trial
18 court shall conduct a hearing in accordance with the
19 procedures set out herein.

20 CHAIRMAN BABCOCK: You've lost Justice Gray.

21 MR. ORSINGER: I did?

22 HONORABLE TOM GRAY: No. You've got to --
23 it depends on what costs they're trying to waive.

24 MR. ORSINGER: Well, they're probably trying
25 to waive all of them. So what are we going to do?

1 HONORABLE TOM GRAY: Then if you want one
2 affidavit to apply to all then the only place to do that
3 is in the trial court, but the Rule 20 specifically
4 provides that they can file an affidavit with us. And if
5 they file an affidavit with us, all we're addressing when
6 we rule on it is the appellate fees, the appellate filing
7 fees.

8 MR. ORSINGER: And how do you rule on it?
9 Based on what?

10 HONORABLE TOM GRAY: Because all we have is
11 the affidavit, and nobody gets to file a motion apparently
12 to challenge it. We decide based on the affidavit that's
13 filed.

14 MR. ORSINGER: But what -- are there any
15 requirements of what you put in the affidavit like there
16 are in Rule 145?

17 HONORABLE TOM GRAY: I think it -- I'm
18 trying to remember if we -- if the rule specifies that or
19 not. Off the top of my head I don't remember. But --

20 MS. BARON: It does.

21 HONORABLE TOM GRAY: Okay. So it's got the
22 same requirements in 20?

23 MS. BARON: They're a little bit different,
24 like you have to say you meet IOLTA requirements, I think.

25 HONORABLE R. H. WALLACE: But it is heard by

1 the trial court?

2 CHAIRMAN BABCOCK: Justice Bland.

3 HONORABLE JANE BLAND: In the appellate
4 rules it says that if the appellant proceeded in a trial
5 court without advance payment of costs under IOLTA then
6 that can continue, but if they cannot pay costs in the
7 appellate court, they file an affidavit of indigence in
8 the trial court with or before the notice of appeal, but
9 they have to do that even if they had already filed an
10 affidavit of indigence in the trial court, because it's a
11 different -- advanced payment of appellate costs is
12 separate than advanced payment of trial court costs. So
13 it looks to me like it always get filed in the trial
14 court.

15 HONORABLE TOM GRAY: 20.1(c) entitled "When
16 no statement was filed in the trial court," and it says,
17 "An appellate court may permit a party who did not file a
18 statement of inability to afford" -- and goes on from
19 there, and "The court may require the party to file a
20 statement in the appellate court."

21 MR. ORSINGER: It doesn't state what the
22 criteria are. Are we borrowing the trial court criteria
23 for what the showing has to be?

24 HONORABLE TOM GRAY: I don't know what
25 you're doing, but that's what we're doing.

1 MR. ORSINGER: It is?

2 CHAIRMAN BABCOCK: Lisa.

3 MS. HOBBS: I think I finally understand
4 this question because I never really understood what the
5 hypothetical was, because I never understood why the fact
6 that they filed a notice of appeal somehow changed the
7 trial court's jurisdiction, because you can file a notice
8 of appeal and the trial court can still have
9 jurisdiction --

10 CHAIRMAN BABCOCK: Right.

11 MS. HOBBS: -- over the case. But I think
12 now that Justice Bland has read that language, I think
13 someone must think because Rule 20 says it has to be filed
14 at or before the notice of appeal that someone is reading
15 that to say that if you don't do that, that's somehow
16 jurisdictional and the trial court can't hear it after
17 that. So it sounds to me like what needs to change to
18 address this hypothetical is Rule 20 and not Rule 145.

19 HONORABLE TOM GRAY: Well, the problem that
20 we have is the scenarios are kind of multifaceted, but you
21 can have a defendant that suddenly becomes liable for
22 costs that is appealing. They never filed an affidavit
23 before. How do we get the trial court to decide, because
24 Richard is correct. We've got a fact question about their
25 ability to pay. How do we get the trial court to decide

1 that?

2 MS. HOBBS: I know what -- what we're
3 talking about is kind of different than what the clerk of
4 the Eighth Court of Appeals posited to us. And it was her
5 question that I just didn't understand until Justice Bland
6 just read that. But I agree with you. I think it needs
7 to happen at the trial court, and most of the time it does
8 because it's when you're trying to get the record up.

9 HONORABLE TOM GRAY: Well, two things are
10 happening simultaneously. We're trying to get them into
11 the court of appeals and get our record set up as to
12 whether or not they're going to proceed with payment or
13 not and then get the record up, and there's a whole --
14 there's a lot larger proceeding going on for that trial
15 court determination, because there's a lot more at risk.

16 MS. HOBBS: Right.

17 HONORABLE TOM GRAY: If David Evans was here
18 he would be talking about his court reporter's interest is
19 not piqued until she gets a notice that the appellate
20 record is sought for an appeal. Doesn't care up until
21 that point. And because there is a fact determination to
22 be made, how does the appellate court that gets that -- it
23 comes to their attention. How do we empower or notify the
24 trial court "You need to hear it" is -- I'll just tell you
25 -- a question that we are struggling with.

1 MS. HOBBS: I handle the Third Court of
2 Appeals pro bono committee. I chair the committee that
3 screens cases for the Third Court's pro bono committee, so
4 the appellant filed -- or appellee, really, but either can
5 do it. They check a box on the docketing statement that
6 says they want to be considered for inclusion into the
7 program and then I have a committee that I chair that we
8 screen them, and it's almost never happened. I wonder
9 how --

10 HONORABLE TOM GRAY: What's almost never
11 happened?

12 MS. HOBBS: It's almost never happened that
13 the issue hasn't arisen at the time that the indigent is
14 seeking the record in the trial court, and not that
15 they're -- because like the rule says, if you get it -- if
16 you get declared -- I guess that's not the right
17 terminology, but if you are indigent in the trial court,
18 that will carry up to your appeal as well, and so we're
19 seeing them all the time there. I can't think of one case
20 where one of these applicants didn't file something in the
21 trial court but now wants to waive the 175-dollar fee on
22 the appeal.

23 HONORABLE TOM GRAY: We've got three pending
24 now.

25 MS. HOBBS: Wow. I've been on the committee

1 since probably 2000 --

2 HONORABLE TOM GRAY: Yeah, but you're not in
3 Waco. We're only 90 miles up the road. You want to come
4 down and visit? But that's -- I mean, we've got one
5 situation where we've got a defendant, they're now up on
6 appeal, and there was nothing filed in the trial court
7 regarding indigency. We've got another one where there
8 was -- the defendant filed there and with us, and then
9 we've got one where it's the plaintiff, but the sequence
10 fell so quickly the motion -- or the indigence
11 determination had not been made at the time that the case
12 had been dismissed, and so now the plaintiff without a
13 determination yet is in our court.

14 MS. HOBBS: After the plenary power expired?
15 Is that what you mean?

16 HONORABLE TOM GRAY: Well, we hadn't
17 gotten that far into it yet.

18 MS. HOBBS: Okay. Sorry. I don't mean to
19 talk about a pending case in public.

20 HONORABLE TOM GRAY: And I'm trying to
21 avoid.

22 CHAIRMAN BABCOCK: Justice Busby.

23 HONORABLE BRETT BUSBY: I was just going to
24 say we've had this come up as well, and we discussed it at
25 a recent judges meeting and adopted some language for our

1 -- that our clerk's office uses. When someone files in
2 our court we send an order out that says that they're
3 deemed indigent for purposes of the appellate filing fee,
4 but if they want the clerk's record and reporter's record
5 without payment of costs then they need to go file in the
6 trial court, because that's something that has to be
7 handled there. So and sometimes we can't tell from the
8 information we have whether there is one on file in the
9 trial court or not.

10 HONORABLE TOM GRAY: Because we don't have
11 the clerk's record yet.

12 HONORABLE BRETT BUSBY: Exactly.

13 HONORABLE TOM GRAY: Now, but how long does
14 the trial court have to hear that?

15 HONORABLE BRETT BUSBY: We'll see.

16 HONORABLE TOM GRAY: Without an abatement
17 order.

18 HONORABLE BRETT BUSBY: Right.

19 CHAIRMAN BABCOCK: Any other comments about
20 this? Richard.

21 MR. ORSINGER: Yes. The TRAP 20 more or
22 less meshed with old version of this rule before it was
23 amended in 2016 so that you couldn't rebut a statement of
24 inability to pay that was accompanied by a certificate
25 that you've qualified for free legal services; but if you

1 don't have the certificate then you have to file an
2 affidavit with 12 categories of listing your employment,
3 income, spouse's income, real and personal property, all
4 of your assets; and so we're using a different approach at
5 the appellate level than we are at the trial court level;
6 and it's not clear what costs are here; but the appellate
7 rule said "costs in the appellate court"; and so that's I
8 guess as distinguished from the clerk's record and the
9 reporter's record; and so that means we have two different
10 tiers. We have an appellate rule for just the filing fee,
11 which is like 50 bucks.

12 HONORABLE TOM GRAY: 250.

13 MR. ORSINGER: 250 now, okay. And then we
14 have another rule in the trial court where it's thousands
15 of dollars, and they're not -- the one that's in the court
16 of appeals is the one that's fact intensive, and the one
17 that's in the trial court is the one that's all by
18 certificate. I wonder if we should coordinate the two and
19 whether we ought to make it clear that Rule 20 is just the
20 filing fee in the appellate court, and then we've got to
21 go back here and be sure that we allow the indigent person
22 to file that request to be treated indigent in the trial
23 court after the judgment. I don't think we allow that
24 right now.

25 HONORABLE TOM GRAY: 20.1(a) makes it clear

1 that the costs are only the appellate filing fees.

2 HONORABLE BRETT BUSBY: Right.

3 MR. ORSINGER: Yeah. I agree.

4 HONORABLE TOM GRAY: And there's a similar
5 rule in 145 that defines costs to include the appellate
6 record.

7 MR. ORSINGER: Right.

8 CHAIRMAN BABCOCK: Are you going to tamper
9 with the plenary power of the trial court?

10 MR. ORSINGER: You know, this doesn't affect
11 the judgment, and the court of appeals can do things after
12 plenary power like, for example, if the trial court fails
13 to give findings of fact that are necessary to the appeal,
14 the appellate court can abate the appeal and remand the
15 case long enough to get a finding. I don't know. What do
16 you appellate judges say about that?

17 CHAIRMAN BABCOCK: Justice Bland.

18 HONORABLE JANE BLAND: I agree that we need
19 to have a sit down with Rule 145 and 20.1 side-by-side and
20 make sure that they work together, because they don't, and
21 courts of appeals are all over the map about how to handle
22 it. It's not a question of jurisdiction, because I agree
23 we can always send it back to get organized, but it's a
24 question of how do we most efficiently determine this
25 issue of indigency so we don't delay the prosecution of

1 the appeal. Because what happens right now, and used to
2 be worse, was that these things would get hung up on the
3 indigency issue, and we would be working on that for
4 months before it would even, you know, start on the
5 appeal, and I think we have improved that somewhat, but
6 now the rules are really not talking to each other, and it
7 would be good if your committee, Richard, and Pam's
8 committee could get together and come up with a proposal
9 that would handle indigency from soup to nuts that
10 wouldn't require extra steps for somebody that's once been
11 determined indigent and really everybody believes they
12 continue to be indigent, because that wastes everybody's
13 time. It's only when there's some change in status at the
14 time of filing the appeal that we want to revisit that.

15 MR. ORSINGER: And this problem, Jane, came
16 up in the context of somebody that hadn't been previously
17 ruled indigent --

18 HONORABLE JANE BLAND: Right.

19 MR. ORSINGER: -- and all of the sudden at
20 the time of the judgment for the first --

21 HONORABLE JANE BLAND: Right.

22 MR. ORSINGER: -- time they decide they want
23 to be free.

24 HONORABLE JANE BLAND: Yeah. So what we
25 need to do is consider harmonizing the two rules to

1 address that problem without -- you know, but at the same
2 time, if there has been no change in status, allowing that
3 status to seamlessly continue through the appellate
4 process would save a lot of time in terms of legal staff
5 and clerk's office staff and judge time on these issues.
6 And I think we've made a lot of progress in that area. It
7 used to be much worse, but we're still not there yet, and
8 partly it's because the rules are not getting looked at in
9 tandem with each other.

10 MR. ORSINGER: We will be happy to do that.
11 Alex and I will, if the Court wants us to. We do? Okay.
12 That's our job. So somebody will tell us -- hopefully
13 it's not October. We have a lot of things we're doing
14 between now and October.

15 CHAIRMAN BABCOCK: There's a lot of stuff to
16 be done in October. So you want to defer this until our
17 December meeting?

18 MR. ORSINGER: Well, I would prefer that we
19 finish our discussion today, Chip.

20 CHAIRMAN BABCOCK: Well, yeah, of course.

21 MR. ORSINGER: Yeah. No earlier than
22 December, please, because we --

23 CHAIRMAN BABCOCK: The additional work will
24 be December.

25 MR. ORSINGER: Okay.

1 CHAIRMAN BABCOCK: That's when our next
2 meeting after October is, right? No, let's keep going.
3 I'm sorry.

4 MR. ORSINGER: Okay. So assuming you don't
5 want to make a vote then the next question is on page two,
6 question three, which is should the judgment or order
7 that's being appealed state the deadline for seeking
8 review? Again, my subcommittee, some people said "yes."
9 One said "no." One said that we're not giving you enough
10 time, and another one said "what's the hurry, why not
11 allow 30 days." So we don't have a unified
12 recommendation. The point is you have a pro se litigant.
13 They've just suffered a loss. The judge is entering the
14 judgment. It's been a long time since I did a criminal
15 plea or a criminal conviction, but don't they tell you at
16 the time that the judgment is entered you have a right to
17 appeal or something like that? Does anybody do criminal?
18 So these are indigent people. No lawyer.
19 If the judge doesn't tell them orally in the hearing that
20 they have a right to do this within 10 days, they probably
21 won't do it within 10 days, and the best way to make that
22 happen is to put it right in the judgment itself that if
23 you want to appeal this case then you have to file
24 something, let's decide what and where, within 10 days.
25 So that was the question. By the way, Lisa volunteered

1 usable language, which we're grateful for.

2 MS. HOBBS: She must be a former rules
3 attorney.

4 MR. ORSINGER: And a very nice person to
5 boot. And so we have two options to look at. One is, in
6 my view, a little more formalistic and the other one is a
7 little more chatty.

8 CHAIRMAN BABCOCK: Chatty?

9 MR. ORSINGER: Well, it's more designed for
10 a nonlawyer to understand. I didn't mean anything
11 negative by that. I just meant, you know, like "If you
12 decide to challenge this order you must file within 10
13 days." This is all, you know, to the defendant in plain
14 language, whereas the first one that says "is an order
15 must be supported by" -- blah, blah, blah. It's kind of
16 abstract and something that someone may not understand and
17 may not even finish reading the paragraph.

18 CHAIRMAN BABCOCK: No, I think chatty is a
19 great description.

20 MR. ORSINGER: Yeah, I would use a different
21 word. I'm just saying more conversational or more --

22 CHAIRMAN BABCOCK: Plain language.

23 MS. McALLISTER: Plain language, yeah.

24 CHAIRMAN BABCOCK: Plain language. Lisa.

25 MS. HOBBS: So the reason why I suggested

1 this rule change is again serving on that subcommittee I
2 see a lot of indigents miss this 10 days. It's short.
3 They don't know about it. By the time I'm screening the
4 case the 10 days has passed because I don't get the -- I
5 mean, Jeff Kyle is pretty quick about forwarding me those
6 docketing statements and notice of appeal, but he rarely
7 does it within 10 days. It may sit in my inbox for a day
8 or two, because I don't sit around and screen cases every
9 single day at my job, but by the time we've noticed it
10 it's passed, and so it just seemed like an easy fix would
11 be to just put it in the rule that the judge should let
12 them know in the order that this is a quick turnaround.
13 And I think the 10 days is because of what Justice Bland
14 is saying. I think that's because we wanted to expedite
15 the --

16 CHAIRMAN BABCOCK: Right.

17 MS. HOBBS: So I'm not necessarily in favor
18 of changing the 10 days. I'm just in favor of making sure
19 that we're very clear with these indigents that--

20 CHAIRMAN BABCOCK: Yeah. Makes a little bit
21 of sense. But Justice Gray.

22 HONORABLE TOM GRAY: Again, you get back
23 into the problem that 30 days is not a problem if it's the
24 plaintiff filing it from the get-go, but if it's the
25 defendant and they've already got a judgment --

1 MS. HOBBS: That's right.

2 HONORABLE TOM GRAY: -- and you come up,
3 well, your -- every day you extend this makes the whole
4 appellate process longer because you can't get to the
5 record --

6 CHAIRMAN BABCOCK: Right.

7 HONORABLE TOM GRAY: -- until this is
8 decided.

9 MS. HOBBS: Although, to be clear I get a
10 lot of cases where no one moved to be declared indigent
11 until they realized how costly that record is going to be.
12 So the little fees along the way didn't bother them, but
13 "Oh, my God, I have to pay \$10,000 for a record? Well, I
14 can't afford that." So win or lose, plaintiff or
15 defendant, sometimes -- a lot of the time I'm seeing it
16 happen at the end of the case, just because that's when
17 the big fee expense comes in.

18 HONORABLE TOM GRAY: And so my point is that
19 I'm not opposed to giving them more time, and you know, as
20 long as it's clear, but the next question that we will be
21 asked to decide is what happens when that phrase is not in
22 the order that determines their indigent status.

23 CHAIRMAN BABCOCK: Yeah, I'm worried about
24 that.

25 HONORABLE TOM GRAY: You know, I mean, do

1 they get -- what is it -- 329b where they didn't get
2 notice of an appealable order and they get six months to
3 do it, you know? And when we get to it I want to talk
4 about the motion, too. It's not one of these three
5 questions, but what is that motion.

6 CHAIRMAN BABCOCK: We will not adjourn until
7 we address that.

8 HONORABLE TOM GRAY: Well, I don't know
9 about that.

10 MR. ORSINGER: Well, I might say on the
11 10-day issue a lot of times the trial lawyer doesn't know
12 anything at all about an appeal, and we had this
13 discussion on the termination appeals where we tried to
14 accelerate that. They get around to getting an appellate
15 lawyer on board by before the 30th day so that the motion
16 for new trial could be timely filed, and they typically
17 miss the request for findings of fact in the bench trial
18 and anything that's quicker than 30 days, because the
19 trial lawyers know about the motion for new trial
20 deadline. They don't know about the others. There is
21 some logic in having this be a 30-day period, and I don't
22 think it will delay anything anyway, because nobody is
23 going to probably request a record from the court reporter
24 until well after the motion for new trial is filed and you
25 have an extended deadline. So I personally think that I

1 don't see any harm in waiting 30 days, and the people who
2 are likely victims are indigent people that may not
3 realize how quickly they need to act.

4 We'll cure that if you said, well, you've
5 got 10 days and it's in the judgment that they got 10
6 days, but I hope they can get out and hire a lawyer, an
7 appellate lawyer, within that 10-day period. I'm not sure
8 they can. So I would be in favor of extending it to 30
9 days.

10 CHAIRMAN BABCOCK: Justice Boyd.

11 HONORABLE JEFF BOYD: What if instead of an
12 order requiring the declarant to pay costs, it's an order
13 that recognizes indigency and says you don't have to pay
14 costs? Doesn't the rule already have a 10-day deadline
15 for challenging that?

16 MS. HOBBS: I don't think you -- I think if
17 you're declared indigent, I don't think there's an
18 appellate right to that. So it's only if someone says, "I
19 think can you pay for it," you get a right to appeal it,
20 but if they say she can't pay for it, the court reporter
21 doesn't have an appellate right.

22 HONORABLE JEFF BOYD: There is a 10-day
23 deadline in there. Is it 10 days from the date of the
24 application you have to file an objection? Because we had
25 a per curiam decision this past term where a court

1 reporter did not get the notice that the rule says the
2 clerk is supposed to provide until after the 10 days had
3 expired, and we ruled that the court reporter was out of
4 luck, she just couldn't challenge.

5 MS. HOBBS: You're so cruel.

6 HONORABLE JEFF BOYD: So there is another
7 10-day deadline in there somewhere that we need to make
8 sure is consistent.

9 MS. HOBBS: So she has 10 days from the
10 application.

11 HONORABLE JEFF BOYD: Is that what it is?

12 MS. HOBBS: Yeah. She has 10 days to
13 challenge it.

14 HONORABLE JEFF BOYD: Okay.

15 MS. HOBBS: And then there's a time set for
16 when the hearing is going to happen and then once the
17 judge signs the order the --

18 HONORABLE JEFF BOYD: You cannot appeal
19 from --

20 MS. HOBBS: Court reporter cannot appeal.

21 HONORABLE JEFF BOYD: -- granting indigency,
22 but if instead the order doesn't grant indigency, it
23 requires payment, then you can appeal in 10 days.

24 HONORABLE TOM GRAY: Where is the 10-day to
25 challenge? I thought that was taken out of the rule.

1 MS. NEWTON: It was.

2 HONORABLE TOM GRAY: Yeah.

3 MS. HOBBS: Oh, sorry.

4 MR. ORSINGER: The 10 days is tied -- you
5 have to --

6 HONORABLE TOM GRAY: See, the way it's
7 structured now --

8 MR. ORSINGER: If you're going to appeal
9 from the denial of your indigency you've got 10 days to
10 appeal.

11 HONORABLE TOM GRAY: To file the motion.

12 MR. ORSINGER: By filing a motion, and if
13 you don't then you've got 15 days to request an extension,
14 and I think the other 10-day rule was removed.

15 HONORABLE TOM GRAY: It was removed because
16 the affidavit is on file, or the declaration of indigency
17 or whatever it's called, and the -- but when the court
18 reporter gets the notice to prepare the record, that's
19 when she can file, he or she can file the motion to
20 determine their ability to pay, and so that's when it
21 comes back up on the court reporter's radar.

22 MR. ORSINGER: You know, one of the concerns
23 I have is the motion by the clerk, the party, the ad
24 litem, or the court reporter has to be based on sworn
25 evidence, not information and belief. So unless there was

1 testimony in the trial that came out that somebody had
2 assets, how is the clerk or the court reporter ever going
3 to be able to sign an affidavit. And even if they do,
4 isn't that based on hearsay testimony maybe? Or, I mean,
5 I'm wondering how functional this is that the motion that
6 would require a hearing to prove indigency has to be based
7 on sworn evidence that the representations in the
8 application are materially false.

9 HONORABLE TOM GRAY: No, the court reporter
10 doesn't have to have any evidence attached to their
11 motion.

12 MR. ORSINGER: Oh, yeah, you're right. It's
13 just the clerk that does that one.

14 HONORABLE TOM GRAY: Yeah, just the clerk.

15 MR. ORSINGER: And we are doing that because
16 we hate clerks and like court reporters, or why are we
17 treating them differently?

18 HONORABLE TOM GRAY: I don't know. I didn't
19 write the rule. They're sitting over there, but I --

20 CHAIRMAN BABCOCK: Why are you looking over
21 at us?

22 HONORABLE TOM GRAY: I thought it had to do
23 with the timing. The clerk is going to get involved early
24 on in the process of nonpayment when the case is filed,
25 whereas the court reporter is not going to get involved in

1 nonpayment until the record is requested at the end.

2 MR. ORSINGER: Okay. So the clerk has 10
3 days -- no, the clerk has to do it based -- only
4 information they have is a petition has been
5 electronically filed by somebody they've never seen, and
6 it's got a statement of inability to pay from somebody
7 they've never seen, and now they have to sign an
8 affidavit, the clerk does, that they have personal
9 knowledge that this person has assets. Now, is that
10 workable? Or is this really just a disguised way to make
11 it impossible for clerks to contest it. That's what it
12 is. Okay. Well, then all right, if that's what you want
13 to do then let's do it.

14 CHAIRMAN BABCOCK: Justice Bland.

15 HONORABLE JANE BLAND: Well, and this is one
16 of the places where Rule 20 -- TRAP 20.1 and Rule 145 look
17 different. TRAP 20.1 says that you have to challenge the
18 order within 10 days of the order being signed or 10 days
19 after the notice of appeal is filed, whichever is later.
20 And so if we're talking about the indigency proceeding in
21 the appellate court and the appellate record being part of
22 that analysis, then -- then you get more time than if
23 you're looking at it under Rule 145. So that just brings
24 us back to getting these two rules on the same page and
25 trying to harmonize them, because there really shouldn't

1 be any difference at what point in the process you're
2 wanting to get this reviewed of indigency accomplished.

3 CHAIRMAN BABCOCK: That's right. Don't you
4 think, Richard?

5 MR. ORSINGER: Yes, and in that context can
6 I raise one other ancillary topic?

7 CHAIRMAN BABCOCK: Certainly.

8 MR. ORSINGER: We -- Rule -- appellate Rule
9 20 says that it's basically irrebuttable if you have a
10 certificate of representation from Legal Aid, but I think
11 we had discussions last time if the trial judge has ruled
12 that they're indigent there should be a presumption of
13 continuing indigency so that do we really have to reapply
14 for indigent status on appeal, or can we just say if they
15 were declared indigent the first time they remain indigent
16 unless someone files a contest?

17 CHAIRMAN BABCOCK: Justice Bland.

18 HONORABLE JANE BLAND: So we have that
19 presumption in parental termination cases.

20 MR. ORSINGER: Yes. Okay.

21 HONORABLE JANE BLAND: And the question is
22 can't we continue that presumption in other cases where
23 the litigant has already been declared indigent and
24 there's no apparent change in the circumstances, and it
25 would seem like for the same reasons that it was important

1 to continue the presumption in parental termination cases
2 -- that is, expediency and ensuring that we get these
3 cases addressed in a timely manner -- that would apply to
4 other cases and that, you know, absent any evidence of any
5 change in circumstances there ought to be that
6 presumption.

7 HONORABLE TOM GRAY: I thought it was -- did
8 continue under 20.1(b)(2).

9 MR. ORSINGER: (b)(2)?

10 MS. NEWTON: (b)(1).

11 HONORABLE TOM GRAY: (b)(1). Well, (b)(2)
12 is the method for establishing it, which is to simply make
13 the -- communicate to the appellate court clerk that the
14 party is presumed indigent.

15 CHAIRMAN BABCOCK: Holly.

16 MS. TAYLOR: For what it's worth, we do have
17 such a presumption in criminal cases. Just FYI, there is
18 a presumption of a continuing indigency. Once an
19 indigency determination is made in the trial court
20 throughout those proceedings, unless there is some
21 challenge made. The attorney representing the state may
22 move for reconsideration of the determination if there
23 were material changes.

24 CHAIRMAN BABCOCK: Okay. Justice Bland.

25 HONORABLE JANE BLAND: The presumption only

1 applies in parental termination cases unless this has been
2 amended since this rule I'm looking at.

3 HONORABLE TOM GRAY: I think it's been
4 amended since the rule you're looking at.

5 HONORABLE JANE BLAND: I'm looking at the
6 Supreme Court's rule on their website.

7 MR. ORSINGER: Yeah, my copy of (b)(1)
8 doesn't say that there's a continuing presumption.

9 MS. NEWTON: Really?

10 HONORABLE JANE BLAND: It says, you know,
11 you can do it by affidavit where you show that you filed
12 your affidavit, that it's not contestable. It's not
13 contested or not sustained by a written order and you file
14 a notice of appeal. So you have to file an affidavit.
15 And then the presumption of indigence, which is in (3)
16 says "in a suit filed by a governmental entity in which
17 termination of the parent-child relationship is requested,
18 a parent determined by the trial court to be indigent is
19 presumed to remain indigent for the duration of the suit
20 and any subsequent appeal."

21 CHAIRMAN BABCOCK: Okay.

22 HONORABLE TOM GRAY: I guess I'm reading out
23 of a different rule book.

24 MS. NEWTON: Yeah. I'm looking for that,
25 because that's wrong. So it might be --

1 MR. ORSINGER: That's the old rule?

2 MS. NEWTON: Yeah.

3 HONORABLE TOM GRAY: Because 20.1(b)(1) --

4 MR. ORSINGER: So the texascourts.gov
5 version of the Rules of Appellate Procedure is not
6 accurate? That's pretty scary.

7 MS. NEWTON: Well, we're looking at the --
8 we just pulled this from our website, and it has the
9 current version of the rule on our website.

10 HONORABLE JANE BLAND: I'm looking at your
11 website, too.

12 MR. ORSINGER: I'm looking at
13 texascourts.gov. I think that's your website.

14 HONORABLE TOM GRAY: I just have one of
15 these old paper books.

16 CHAIRMAN BABCOCK: Well, you need to get on
17 a different platform.

18 MS. NEWTON: One issue is if you Googled it,
19 it may have pulled up a cached version or something.

20 HONORABLE JANE BLAND: That might be right.

21 MR. ORSINGER: Could be.

22 CHAIRMAN BABCOCK: There's a difference
23 between a social media?

24 MR. ORSINGER: No, a cached version. I
25 don't know. That means that I pulled it up before 2016

1 and then I keep pulling up the before 2016 version, which
2 is pretty frightening to think that my research is a year
3 and a half out of date.

4 CHAIRMAN BABCOCK: That's an Orsinger
5 problem, right?

6 MR. ORSINGER: Well, apparently it's a
7 Justice Bland problem, too.

8 CHIEF JUSTICE HECHT: But it's malpractice
9 for you.

10 MR. ORSINGER: It's reversible error for her
11 and malpractice for me.

12 CHAIRMAN BABCOCK: Man, out of the bleachers
13 comes a fast ball.

14 HONORABLE TOM GRAY: From center field.

15 HONORABLE JANE BLAND: Amen.

16 MR. ORSINGER: Okay. So, you know, I think
17 somewhere in this we've just kind of lost the vote on
18 whether we ought to have 10 days or 30 days written in the
19 judgment.

20 HONORABLE JANE BLAND: Has that changed?

21 CHAIRMAN BABCOCK: All right. How many
22 people want 10 days? Raise your hand.

23 HONORABLE JANE BLAND: So --

24 CHAIRMAN BABCOCK: Two hands.

25 HONORABLE JANE BLAND: I would just say, I

1 would like -- and if I'm not looking at the wrong version
2 again, but if it's 20.1(j) it says 10 days after the order
3 is signed or the notice of appeal, whichever is later. Is
4 that all gone?

5 MS. NEWTON: Yes. There's no (j).

6 HONORABLE JANE BLAND: Okay.

7 MR. ORSINGER: Let me say this, that my
8 subcommittee was asked to make a recommendation on whether
9 or not we should require the judgment in the trial court
10 to tell the indigent litigant that if they wanted to
11 proceed in forma pauperis, right, that they have to -- no,
12 no. No, I'm wrong. It's the order that denies their
13 status to move forward in forma pauperis that they've got
14 10 days to appeal that on account of interlocutory appeal.
15 That's what we were asked to vote on or recommend. I
16 would like to see a vote on that. I think everybody is
17 going to be in favor of it.

18 CHAIRMAN BABCOCK: Okay. Why don't you
19 frame the question?

20 MR. ORSINGER: Should the order denying
21 leave to move forward without paying costs specify the
22 deadline for appealing that order?

23 CHAIRMAN BABCOCK: All right. Everybody in
24 favor of that, raise your hand.

25 MR. HARDIN: Let the record --

1 CHAIRMAN BABCOCK: Everybody opposed?

2 Unanimous.

3 MR. HARDIN: Let the record reflect Justice
4 Gray did not dissent.

5 MR. ORSINGER: Are you willing to do 10
6 versus 30 just to see?

7 CHAIRMAN BABCOCK: Yeah, just to see.

8 MR. ORSINGER: Get a sense, okay.

9 CHAIRMAN BABCOCK: Frame it. Go ahead.

10 MR. ORSINGER: Should order or should the
11 notice of the order say they have a right to appeal within
12 10 days or within 30 days?

13 CHAIRMAN BABCOCK: So what are we voting on
14 first, 10?

15 MR. ORSINGER: Ten, ten.

16 CHAIRMAN BABCOCK: All right. Everybody in
17 favor of 10, raise your hand. I was hoping you would.
18 Everybody in favor of 30.

19 HONORABLE TOM GRAY: 28? 28?

20 CHAIRMAN BABCOCK: No.

21 MR. ORSINGER: That's a lunar month, not a
22 solar month.

23 HONORABLE TOM GRAY: It's a week.

24 CHAIRMAN BABCOCK: 15 to 1, 30 over 10.

25 MR. ORSINGER: With one complaint.

1 CHAIRMAN BABCOCK: And a number of people
2 not voting, including the Chair. Okay.

3 HONORABLE TOM GRAY: Could we make sure that
4 the record reflects that that was not Justice Gray that
5 was the one vote?

6 CHAIRMAN BABCOCK: Yes. It was clear that
7 it was a justice, but more bland than gray.

8 MR. HARDIN: Not bad. Not bad for 3:00
9 o'clock.

10 HONORABLE TOM GRAY: Getting late in the
11 day.

12 MR. ORSINGER: You ready to go on to number
13 four?

14 CHAIRMAN BABCOCK: Lisa needs a question.

15 MS. HOBBS: No, I have a comment just for
16 the record. If the appellate deadline for appealing the
17 determination of indigency is 30 days, I feel less
18 strongly about having an order say it. So as the person
19 who proposed this idea it was because of the short time
20 frame that made me want to give them special notice of
21 their appellate rights, but if it's a traditional
22 appellate timetable, which it's not quite, but still, if
23 it's 30 days I just feel less --

24 CHAIRMAN BABCOCK: Are you asking for a
25 revote?

1 MS. HOBBS: No, I'm not. I just wanted the
2 record -- to the extent the judges care anything about my
3 opinion, I thought I would just say it for the record.

4 CHAIRMAN BABCOCK: Okay.

5 MR. ORSINGER: So No. 4 was an initiative
6 that came of the Access for Justice Foundation, not from
7 Justice Hecht, and Trish McAllister helped us on this, and
8 she gave us a memo. The memo I attached back in April had
9 an inaccuracy in it, and I wanted Trish to correct that if
10 you can on the fly.

11 MS. McALLISTER: Yeah.

12 MR. ORSINGER: And then also would you mind
13 -- or do you want me to introduce your proposal or you
14 want to introduce it?

15 MS. McALLISTER: Either way is fine,
16 whichever way you want to do it.

17 MR. ORSINGER: Go ahead and make the
18 correction and then present your proposal.

19 MS. McALLISTER: Okay. One of the issues --
20 and this is the issue that Richard brought up earlier,
21 which is in cases involving domestic violence or a
22 situation where somebody wants to keep their address
23 confidential. The current statement of inability to
24 afford costs form is just a declaration, and that requires
25 you to list your address. So what we are proposing is

1 that the statement also be made sort of a dual purpose,
2 that it become a statement/affidavit, and the person can
3 choose whether or not they want to just make a declaration
4 or whether or not they want to have a notarized affidavit.

5 It's actually something that is done in the
6 protective order kit that -- the form kit that the Supreme
7 Court already has. They have the option of making a
8 declaration, or they already have an option of doing an
9 affidavit where those situations where the address needs
10 to be confidential.

11 CHAIRMAN BABCOCK: Lisa.

12 MS. HOBBS: I hate that statute. It's so
13 bad that you have to put your home address in order to
14 make a declaration. I mean, I know we can't override a
15 statute, but I will say that I sometimes put my work
16 address. When I'm doing a declaration in support of my
17 attorney's fees, I just put my work address in there. I
18 don't know why it needs to be a residential address.

19 CHAIRMAN BABCOCK: So you're violating the
20 statute every time you do it?

21 MS. HOBBS: Yes. And I'm admitting it on
22 the --

23 MS. McALLISTER: On the record.

24 CHAIRMAN BABCOCK: Okay. In case anybody
25 tries to catch you.

1 HONORABLE JEFF BOYD: This is not number
2 four in the memo, right?

3 MR. ORSINGER: No. Yes, it is. The
4 question -- yes, on page three, number four. But there
5 was two things, Judge. There was a correction of the copy
6 of the Access to Justice Foundation memo in April was
7 incorrect, and I wanted Trish to correct it.

8 MS. McALLISTER: No, it's the report.

9 MR. ORSINGER: And then next is the proposal
10 they're making, which is significant.

11 MS. McALLISTER: It's the report that's
12 incorrect.

13 MR. ORSINGER: It's the report, my report?

14 MS. McALLISTER: Yeah.

15 MR. ORSINGER: No, the memo was just fine.
16 My recounting of the important part of the memo was
17 flawed. That's been corrected. Now let's move on to the
18 major proposal. Okay.

19 MS. McALLISTER: Okay. So the other
20 proposal is that we have received several complaints or
21 just several -- I've gotten several e-mails from Legal Aid
22 attorneys in the field that are really wishing that the --
23 there was still a definition that if somebody who is a
24 recipient of public benefits is defined as poor, which in
25 the former rule they were defined as poor. And then the

1 second thing is that they are also wanting that anybody
2 who is currently being represented by a Legal Aid program
3 be automatically defined as poor, too, and the reason is,
4 is because there is still -- the whole reason why there
5 was that IOLTA certificate in the last rule was because
6 Legal Aid attorneys were spending a lot of time going in
7 and defending their affidavits, which they are now getting
8 -- the judges are now asking them to -- or clerks are
9 contesting them. So they're now having to go back into
10 court and start proving up that their people are poor,
11 which, you know, is in my personal opinion a waste of
12 their time because not only do people have to -- when you
13 qualify for Legal Aid, you have to not only do an income
14 test, but you also have to do an asset test, and in terms
15 of the public benefits, that's the same situation.

16 The public benefits people actually are
17 slightly -- some of them, like food stamps, the current
18 SNAP program, they actually can make more money than
19 somebody at Legal Aid, a recipient of somebody who is
20 getting represented by a Legal Aid attorney, but those --
21 what we're hearing is that judges are seeing somebody who
22 is receiving public benefits, but then they see that they
23 have a cell phone, and they say, "You know what, you can
24 afford that cell phone, so I think you can afford payment
25 of costs," without -- and, you know, I just make a clear

1 statement that there's a lot of just subjective, I think,
2 sort of subjective and sort of personal --

3 HONORABLE TOM GRAY: Prejudices?

4 MS. McALLISTER: Bias or, you know, it's --
5 I don't know what the right word is to say. I don't want
6 to be offensive, but, you know, some assumptions that are
7 made based on what, you know, their personal beliefs are.
8 And the fact of the matter is like, you know, there's a
9 lot of studies that show somebody who has a cell phone
10 it's actually a very -- a poor person who has a cell phone
11 is a wise financial choice for them for a variety of
12 reasons. Because they have access to the internet through
13 a phone, you know, blah, blah, blah. Most of their
14 phones, by the way, usually expire within 30 days because
15 they only have plans that last, you know, 15 days because
16 they eat up their data. But also, cars, I mean, we've
17 heard, you know, judges who are upset because they have a
18 car, got a new car, which, you know, there's lots of
19 evidence that shows getting a car that's reliable helps
20 people stay out of poverty because they can get to work on
21 time, blah, blah, blah, all of those kinds of things.

22 So, you know, we would just state that and
23 in the -- well, I don't know that it got into your memo,
24 Richard, but in the memo that we sent to the subcommittee,
25 just sort of a reiteration of the information that was in

1 the report when we originally filed on Rule 145 a couple
2 of years ago and has all of the information about the
3 kinds of tests that somebody has to go through to be able
4 to receive public benefits and specifically the kinds of
5 assets they're allowed to have. They can't have, you
6 know, a car worth more than \$5,000. They can't have this,
7 they can't have that, and all of their accounts are
8 monitored, too, by the government to ensure that they
9 don't have more than \$2,000 in savings or a thousand
10 dollars in savings, depending on what benefit they're
11 receiving. So a long-winded way of saying we would just
12 ask that those be -- instead of being what they are now,
13 which is just evidence of indigency that they actually be
14 proof of indigency.

15 HONORABLE JEFF BOYD: Conclusive proof?

16 MS. McALLISTER: Rebuttable.

17 CHAIRMAN BABCOCK: Rebuttable.

18 MS. McALLISTER: They can be challenged.
19 You know, everything can be challenged.

20 HONORABLE JEFF BOYD: Why wouldn't it be --
21 what's the difference between evidence of and proof of?

22 MS. McALLISTER: Well, I think that -- not
23 that it could be challenged like right away. I mean, if
24 you file a statement and you are attaching proof that you
25 are a current recipient of public benefits, it shouldn't

1 be able to be challenged by the clerk; but if you go along
2 in the case and someone says, you know, "We just saw that
3 you won the lottery, we want to be able to challenge that,
4 because you were a former recipient of public benefits," I
5 think that should be able to be challenged.

6 CHAIRMAN BABCOCK: Judge Yelenosky, then
7 Frank.

8 HONORABLE STEPHEN YELENOSKY: So the rule
9 was changed fairly recently.

10 MS. McALLISTER: Right.

11 HONORABLE STEPHEN YELENOSKY: It used to be
12 conclusive and irrebuttable, right?

13 MR. ORSINGER: No, it was a certificate of
14 representation by Legal Aid or a similar organization that
15 was irrebuttable. Isn't that right, Trish?

16 MS. McALLISTER: Yes. The --

17 HONORABLE STEPHEN YELENOSKY: And that's no
18 longer true?

19 MS. McALLISTER: Yeah. If you were -- it
20 was an IOLTA certificate, but of course, IOLTA has
21 decreased so much we wouldn't want it to be an IOLTA
22 certificate, but, yes, it used to be where if there was an
23 affidavit filed by a Legal Aid entity it was not able to
24 be challenged.

25 HONORABLE STEPHEN YELENOSKY: And that was

1 changed.

2 MS. McALLISTER: And that was changed with
3 the new rule, but under the old rule, "A party who is
4 unable to afford costs is defined as a person who is
5 presently receiving government entitlement based on
6 indigency or any other person unable to afford costs." So
7 the definition of poverty was somebody receiving --

8 HONORABLE STEPHEN YELENOSKY: Yeah. Well,
9 whatever language is used, the poverty determination --
10 everybody can disagree about what poverty line is, but so
11 what are we going to use? We're going to use something
12 that's standard, and the standard is federal poverty line.
13 If you don't like the poverty line as a judge, then go
14 lobby for a different poverty line from your Legislature.
15 If you think that somebody is cheating the system I guess
16 you can report them for fraud or something, but it isn't
17 the judge's role to decide that somebody has more money
18 than they're supposed to have. That's the entity that's
19 providing the benefit. And so I don't see on what basis
20 somebody would -- what we would gain by having this
21 refuted, and I guess I don't know why we moved away from
22 that from where we were.

23 MR. ORSINGER: Chip, if I can respond.

24 CHAIRMAN BABCOCK: Yeah.

25 MR. ORSINGER: I think that the debate that

1 we had was that should we take complete discretion away
2 from the judge to make a fact-based decision. So let's
3 say that somebody --

4 HONORABLE STEPHEN YELENOSKY: The question
5 is the fact.

6 MR. ORSINGER: Let's say that somebody is
7 qualified by their degree of poverty to receive benefits,
8 but we can prove that they have money. They have a car or
9 whatever. Is the judge forced to ignore the evidence and
10 required to perpetuate the determination for -- that was
11 done for different purposes for a federal benefit?

12 HONORABLE STEPHEN YELENOSKY: Yes. Yes.
13 And I'll tell you why. Because you just said, "Well, they
14 have a car or whatever." Yeah, lots of people can qualify
15 under the poverty level if they have the car. You have to
16 have the whole picture, and you don't get the whole
17 picture as a judge. You maybe get something that makes
18 you think, oh, they've got money, and maybe if it does
19 indicate that then it's a case of fraud, but you're not
20 getting the whole picture. I think the fact question
21 ought to be are they, in fact, receiving benefits for
22 which they had to qualify on a poverty basis. That's the
23 fact question for the judge, not whether the judge thinks
24 they have enough money.

25 MR. ORSINGER: Well, for everyone else it's

1 a question of whether they have enough money.

2 HONORABLE STEPHEN YELENOSKY: I know.

3 MR. ORSINGER: And for purposes of the
4 appellate rules, the standard -- I know I was using an old
5 copy. There's no affidavit anymore on Rule 20 is there,
6 or is there?

7 HONORABLE STEPHEN YELENOSKY: I mean, the
8 poverty level is low enough that middle income people
9 should probably qualify for indigency even if they're
10 above the poverty level, and so the real problem is the
11 expense that the government is spending through challenges
12 to determine whether or not somebody who has qualified,
13 assuming it was done properly, which I think we have to
14 assume, as being poor, and I thought the determination
15 always was that that game was not worth the candle, and we
16 were spending money determining that people below the
17 poverty line are, in fact, poor.

18 MR. GILSTRAP: Chip?

19 CHAIRMAN BABCOCK: Frank, sorry.

20 MR. GILSTRAP: I think Steve's, you know,
21 kind of practicality cost-benefit approach might be the
22 answer, but I do want to revisit the problem that came up
23 earlier, and that is what is a government entitlement
24 program? I mean, if you're under the Affordable Care Act,
25 is that a government entitlement program?

1 HONORABLE STEPHEN YELENOSKY: No.

2 MR. GILSTRAP: If you're on one of these
3 things where they supplement your electric bill, that
4 really covers a wide range of --

5 HONORABLE STEPHEN YELENOSKY: Well, I
6 thought it was defined not to include those.

7 MR. GILSTRAP: Is it defined?

8 HONORABLE STEPHEN YELENOSKY: Isn't that
9 right, Trish?

10 MS. McALLISTER: Well, the proposal we
11 brought had a list of them, but the current rule obviously
12 doesn't have a list of them, but, you know, I think that
13 you could be specific on anything that requires both an
14 income and an asset test, which not all of the programs
15 that subsidize people's, you know, utilities or something
16 like that, don't necessarily require it. And just for
17 your all's information, I mean, there is not one standard
18 of poor, so every public benefit has a different scale of
19 what poor is. SNAP is 137 percent, TANF is -- you know,
20 the Temporary Assistance for Needy Families is a little
21 higher, like 150 percent of the federal poverty
22 guidelines.

23 So but the reality is, is that they're all
24 very low income, and they all have certain exemptions,
25 like people can own a home, they can own a car, they can

1 own a burial plot. I mean, it's very odd the kinds of
2 things that are exempted, but all of that has already been
3 screened, which is what your point is, and it's a very
4 complex -- I mean, even I do not know how to conduct a
5 screen, eligibility screen, for Legal Aid, and I was a
6 Legal Aid lawyer. I mean, it's got many, many steps, and
7 you have to look at bunches of different stuff to
8 determine whether or not somebody qualifies.

9 HONORABLE STEPHEN YELENOSKY: I mean, if we
10 started out for the first time saying we're going to have
11 affidavits of indigence, right, and we said, well, how are
12 we going to determine that? We're going to have people
13 come in and testify what they have and somebody says,
14 "Hey, the federal government is already doing that, let's
15 just use their decision." Wouldn't that be smart?

16 CHAIRMAN BABCOCK: Justice Bland.

17 HONORABLE JANE BLAND: Trish, explain to me
18 why you think this proposed amendment is different than --
19 I mean, how this is going to change the analysis. Because
20 I think you said it set up a rebuttable presumption and
21 if --

22 MS. McALLISTER: Well, no, the definition,
23 no -- well --

24 HONORABLE JANE BLAND: I'm just trying to
25 figure out --

1 MS. McALLISTER: Right.

2 HONORABLE JANE BLAND: -- why is the 2016
3 rule not working?

4 MS. McALLISTER: Because it's just evidence,
5 so the problem is is that somebody will say -- will come
6 in and say, "I'm a recipient of public benefits," and the
7 judge will say, "You know what, I see here that you are --
8 you know, I see that you've got a cell phone." I mean, we
9 have had people say, "I see that you've got a cell phone.
10 I think that you're just using your money
11 inappropriately."

12 HONORABLE JANE BLAND: But doesn't the rule
13 say that the only reason that you can require them to come
14 forward with more is if their statement is materially
15 false or --

16 MS. McALLISTER: I'm just telling you what's
17 happening in the field. I mean, it may be that people
18 are --

19 HONORABLE JANE BLAND: What I'm trying to
20 say is there a problem with the current drafting of the
21 rule?

22 MS. McALLISTER: Well, it didn't used to be
23 when the -- under the old rule when --

24 HONORABLE JANE BLAND: Right.

25 MS. McALLISTER: -- when it basically said,

1 you know, somebody receiving public benefits is defined to
2 be poor. We never had anybody -- we never had a judge
3 saying, you know, that's --

4 HONORABLE JANE BLAND: We did.

5 MS. McALLISTER: Well, we might have, but
6 not to the extent -- I don't know. I'm just saying, you
7 know, these are the -- this is the problems that we are
8 seeing in the field. We would prefer it not to be
9 evidence because I get -- it does give more discretion,
10 when, you know, you can at least point to the rule and
11 say, "Well, that's actually what's defined," rather than
12 pointing to a rule that says, you know, it's now only a
13 piece of evidence. Again, you know, in the old rule it
14 used to be a not -- uncontestable if you were represented
15 by Legal Aid. Now, you can contest it, and they do. So,
16 I mean, I do think there's a difference. I'm not -- I
17 mean, obviously you're looking confused, so I'm not sure
18 what I'm saying --

19 HONORABLE JANE BLAND: I've been confused
20 all afternoon.

21 CHAIRMAN BABCOCK: Hang on. Hang on.
22 Richard's got answers.

23 MR. ORSINGER: Okay. So part of what
24 happened was we used to have a definition of what
25 qualified for poverty, and in 2016 we shifted to a

1 pleading and counter-pleading requirement with no
2 definition of the ultimate finding. So we have certain
3 criteria that you must swear to under oath in order to get
4 the benefit of avoiding costs, and then we have certain
5 counter-swearing that has to be presented in order to
6 create a contest. If there's a proper swearing and a
7 proper counter-swearing, there is a hearing in which the
8 indigent person has the burden to prove poverty, but
9 there's no definition of poverty, because the definitions
10 now are what's a required pleading and what's a required
11 counter-pleading, not what's a required showing in the
12 hearing.

13 So part of what Trish's problem is, I
14 suspect, is that we don't have a definition of poverty
15 anymore; and if we have properly sworn and properly
16 counter-sworn, then the judge can do anything they want,
17 including, I believe, ignore the fact that they're
18 represented by Legal Aid. So maybe one thing that we
19 could do is to introduce a definition of poverty for the
20 hearing on the merits and decide whether proof is just
21 some proof of poverty or whether it's conclusive proof of
22 poverty. I think that would help to clear a lot of this
23 conclusion, and then the debate becomes, well, does
24 qualifying for a federal benefit program constitute
25 conclusive proof of poverty? If it does then we have what

1 Steve Yelenosky wants, which is we use the federal test
2 and the hearing is over. If not, then some judges may use
3 the federal test and some other judges may use the West
4 Texas or East Texas test, so it's kind of like where you
5 want to go, but I really think part of the issue is we
6 don't have a definition of poverty for the hearing on the
7 merits

8 CHAIRMAN BABCOCK: David Jackson, then Judge
9 Yelenosky.

10 MR. JACKSON: I pulled up under
11 texascourts.gov Rule 502.3(b), inability to afford fees,
12 and it says, "A statement that is accompanied by a
13 certificate of a Legal Aid provider may not be contested
14 under (d)," which sets out all of the things we're talking
15 about about the possibilities of contesting it, but I've
16 heard several times people say that's gone, but it's here.

17 MR. ORSINGER: It's in 502?

18 MR. JACKSON: 502.3.

19 MR. ORSINGER: Yeah, we were talking about
20 145 and 20.

21 MR. JACKSON: It's in here, though.

22 MS. McALLISTER: I think 502 got updated,
23 though, right, Martha?

24 MS. WOOTEN: Yeah. I think there's an order
25 16-91122 that updated.

1 MS. McALLISTER: When 145 and TRAP 20 and
2 Rule 402 got all updated all at the same time.

3 MS. WOOTEN: That's right. August 31, 2016.

4 MS. NEWTON: Yes, it did; however, my
5 recollection is that we did not make all of the
6 substantive changes to 502 that we did to 145 because we
7 wanted to keep that rule as simple as possible and because
8 we had not heard of any problems in the JP court.

9 MS. McALLISTER: It must have been just the
10 -- I know it also had just --

11 CHIEF JUSTICE HECHT: 502 was relatively
12 new, and --

13 MS. McALLISTER: Yeah. It had just been
14 redone.

15 CHIEF JUSTICE HECHT: The 806 JPs, and they
16 were getting used to it, and we just decided not change
17 it.

18 HONORABLE STEPHEN YELENOSKY: I'm sorry, I
19 couldn't hear.

20 CHIEF JUSTICE HECHT: I'm sorry?

21 HONORABLE STEPHEN YELENOSKY: I'm sorry, I
22 could not hear.

23 CHIEF JUSTICE HECHT: Yeah, 502 was
24 relatively new, and it had taken some time to rewrite
25 those rules, and the JPs -- there's 804 of them -- had had

1 a lot of training on the new rules, and we thought it best
2 just to leave those alone.

3 CHAIRMAN BABCOCK: Go ahead, Judge.

4 HONORABLE STEPHEN YELENOSKY: Well, I either
5 don't have a memory of this or I was zoned out because I
6 don't remember this going through the Supreme Court
7 Advisory Committee. It's also possible I was out for an
8 extended period of time when my wife was hospitalized, so
9 maybe I missed it then, but I was not aware that there was
10 a retrenchment on this. So that's part of my surprise
11 here, and I think people look at this as either a due
12 process issue where people are getting something that they
13 shouldn't get or -- and/or that it is a moral issue,
14 because it sure isn't a revenue issue.

15 I don't think anybody can show that the
16 state is taking in more money as a result of the change in
17 the rule, so people are -- want to contest this because of
18 the belief that some people are wrongly receiving
19 benefits, and I don't -- that may be happening, but this
20 is a revenue issue, should people pay for coming into
21 court; and there has to be some provision for indigence,
22 which is going to be imperfect, but the challenges other
23 than those made by the court reporters, if judges are just
24 reluctant to do it, I can't see what it would be other
25 than improperly thinking it's unfair to the other side

1 because this person shouldn't be in court at all without
2 paying the fee. I mean, that's like when we got
3 objections -- we would be representing somebody at Legal
4 Aid, and the other side would contest our client's right
5 to have a Legal Aid attorney, and the judges I was before
6 rightly said that's an issue between the Legal Aid office
7 and its funding source, the federal government. So I
8 don't really understand why we should respect a judge's
9 desire to get into this as a moral issue.

10 CHAIRMAN BABCOCK: Anybody else?

11 HONORABLE DAVID PEEPLES: Richard, how much
12 of the controversy here is from court reporters who have
13 to prepare sometimes lengthy records after a jury case?

14 MR. ORSINGER: I haven't heard anything from
15 them recently, just in the past, and I'm now very confused
16 because I thought that the court reporters had to do the
17 work for free. I heard today that it may be statewide or
18 at least in some places they're reimbursed, and I really
19 feel like we probably ought to know because the court
20 reporters, the burden of preparing a long record is
21 substantial, and I have been operating under the belief
22 that it was something that they had to bear alone.

23 HONORABLE TOM GRAY: I think your belief was
24 correct.

25 MS. McALLISTER: That is correct.

1 MR. JACKSON: In some jurisdictions the
2 commissioners do pay, but the rule says "may," the
3 commissioners "may pay."

4 MR. ORSINGER: Okay. Well, to me --

5 MR. JACKSON: So there are jurisdictions
6 where they won't.

7 MR. ORSINGER: We can sit over here and talk
8 all we want about the great State of Texas and this
9 multi-billion-dollar budget, but when one court reporter
10 has to do a free transcript that's going to take three
11 weeks of time and then if they can't do their daily work
12 for the district judge, is that judge -- does that county
13 make them pay for their substitute out of their salary?
14 To me that's way more important than saying that -- I
15 mean, that weighs more heavily in the comparison than
16 comparing the revenue issues for a state that has a
17 billion-dollar budget.

18 HONORABLE STEPHEN YELENOSKY: The problem is
19 that the Legislature doesn't require it to be paid, and so
20 now we're taking on the burden of making it fair to court
21 reporters. The problem is there should be a statewide
22 rule that takes care of court reporters so that they don't
23 have to do it for free. The solution is not to make it a
24 more cumbersome process for determining if somebody is
25 sufficiently indigent when the vast majority of the time

1 they're going to be found to be indigent.

2 MR. ORSINGER: That may be, but it's not
3 just an issue of cumbersome, what we're talking about,
4 regardless of how cumbersome it is, we don't want people
5 that should pay to get away without paying. That's what
6 we don't want.

7 HONORABLE STEPHEN YELENOSKY: Why is that
8 important to us?

9 MR. ORSINGER: It's important to us as a
10 state because every dollar adds up to a million dollars
11 and every million dollars adds up to a billion dollars,
12 but it's --

13 HONORABLE STEPHEN YELENOSKY: You're
14 assuming --

15 MR. ORSINGER: -- really important to the
16 court reporters that are having to subsidize the state's
17 cost because we have a public policy we're not willing to
18 pay for.

19 HONORABLE STEPHEN YELENOSKY: Well, yeah.
20 But there's two things. One, you said we don't want -- we
21 want them to pay because there's costs. There's money
22 we're losing. What's the evidence of that? There isn't
23 any evidence that I know of that by making it more
24 cumbersome we're bringing in all of these dollars,
25 especially if you monetize the time that judges and others

1 are spending on it. As for the court reporters, you're
2 basically trying to fix a problem that the Legislature
3 should fix.

4 CHAIRMAN BABCOCK: Richard Munzinger.

5 MR. GILSTRAP: But they won't fix it. They
6 won't fix it, so --

7 HONORABLE STEPHEN YELENOSKY: Well, they
8 won't -- and it doesn't -- if you go through a cumbersome
9 process and the vast majority of the time they're going to
10 be found indigent anyway, we're not solving the problem.

11 MR. GILSTRAP: Is that the answer? In other
12 words, that in most cases when the court reporter files a
13 contest, the court reporter loses? If that's the case
14 then I agree. But what's the real empirical facts here?

15 MR. JACKSON: In fairness, if the court
16 reporter knows ahead of time, like it used to be, where
17 you had to get your indigency designation in the beginning
18 of the case, the court reporter then knows that he's
19 dealing with probably -- he or she is dealing with
20 probably a free transcript. They can share the work among
21 court reporters around in their area and split the case up
22 so that they're not all spending a month getting a
23 transcript out. And in cases where the commissioners do
24 pay, you could come up with rates that are like the
25 criminal courts in a criminal case. It's a very low rate,

1 but at least the court reporter is not out of pocket
2 money. A lot of court reporters are using up their
3 vacation time, their sick time, because they're trying to
4 get out records that they're not -- you know, may not get
5 paid for and while a substitute is in their court.

6 HONORABLE STEPHEN YELENOSKY: Do you know
7 how often that --

8 MR. GILSTRAP: How does allowing the court
9 reporter to challenge it help the situation?

10 MR. JACKSON: It probably doesn't really.
11 Because really they're probably going to lose.

12 MR. ORSINGER: That would be unless the
13 trial presents evidence of wealth. I mean, some of these
14 situations the evidence comes out during the trial that
15 they've got money, and then at that point I think that's
16 why we put in here if the judge has any evidence that they
17 can pay the judge can order them to pay.

18 HONORABLE STEPHEN YELENOSKY: That's just
19 anecdotal, and you just heard a court reporter, who is ex
20 officio, I think, say it doesn't solve the problem.

21 CHAIRMAN BABCOCK: Judge Munzinger.

22 MR. MUNZINGER: My only point about the
23 counties picking up expense is not everybody lives in
24 Dallas and Houston and Austin and Fort Worth where the
25 counties have a lot of money. I've got to tell y'all,

1 y'all need to come read the paper and listen to what goes
2 on in El Paso, Texas, and the border cities. We're
3 strapped for money in our communities. Terribly so,
4 because we don't have the industrial base and the monetary
5 base to support an ad valorem tax system like you people
6 do here and in Houston and Dallas, et cetera, and when
7 you're tossing around here "Well, let the county do that,"
8 you're saying to the homeowner and to the taxpayer, "You
9 do that." And part of the morality of the whole thing is
10 if you can afford it, you ought to pay for it.

11 HONORABLE STEPHEN YELENOSKY: But --

12 MR. MUNZINGER: And if you can't afford it,
13 that's fine, so let's find out who truly cannot afford to
14 pay for it.

15 HONORABLE STEPHEN YELENOSKY: But you're
16 suggesting that there would be a different standard in a
17 poor county because a poor county doesn't have the money,
18 therefore, either there are a lot of people who are not
19 poor are getting by with it or you're suggesting that
20 people who would get an affidavit of indigence or who
21 would get a free ride on it won't in a poor county. It's
22 not the indigent person who has to deal with the problem
23 that the county doesn't have money if they're truly
24 indigent.

25 MR. MUNZINGER: Well, the county -- you

1 know, El Paso County doesn't have money.

2 HONORABLE STEPHEN YELENOSKY: Well, they --

3 MR. MUNZINGER: They may not have the volume
4 of the problem either. My only point is there's no such
5 thing as a free lunch anywhere. Somebody is paying for
6 it. Who is going to pay for it? The court reporter? The
7 court reporter works at a discounted rate. Why? Because
8 we're in a hurry about determining who can and can't pay.
9 We want to have it simple instead of having the judge make
10 a true examination of whether or not a person is or isn't
11 indigent.

12 HONORABLE STEPHEN YELENOSKY: But everything
13 we've heard is you're not going to get a lot of revenue by
14 doing this, right?

15 MR. MUNZINGER: I think that's true.

16 HONORABLE STEPHEN YELENOSKY: That's true,
17 right?

18 MR. MUNZINGER: Yeah.

19 HONORABLE STEPHEN YELENOSKY: So what you're
20 saying is there's a cost that somebody has to bear, and
21 therefore, you know, we should go through this process,
22 through this fruitless process that is going to end up
23 still costing us the same. When you say El Paso doesn't
24 have the money, what do they do right now?

25 MR. MUNZINGER: Well, Richard's comment was

1 a dollar becomes a million dollars, and a million dollars
2 becomes 5 million dollars, or whatever, and that's --

3 CHAIRMAN BABCOCK: No, he said a billion.

4 MR. MUNZINGER: Whoever it was that made the
5 comment made the comment correctly.

6 MR. ORSINGER: At the federal level it's a
7 trillion.

8 MR. MUNZINGER: That's part of the problem.
9 You're dealing with taxpayer money. "Well, we've got a
10 hell of a lot of money. Let's spend it."

11 HONORABLE STEPHEN YELENOSKY: Yeah, but \$10
12 here and \$50 there doesn't add up to a million, and
13 they're saying it doesn't add up.

14 MR. ORSINGER: What about \$25,000 for a
15 reporter's record added to it, another 35,000 for another
16 reporter's record, and 50,000 --

17 MR. MUNZINGER: I just was asked to produce
18 a check for several thousand dollars as a down payment on
19 a trial court record. Okay. My client can afford it.
20 That's fine, but there may be some indigent trials where
21 it goes two, three, four days or a week or what have you.
22 Somebody is doing this, and they're doing it at their
23 cost. Why? Why?

24 HONORABLE STEPHEN YELENOSKY: Well, I mean,
25 then we have to decide that if you're going to appeal and

1 it's \$25,000, you don't really have a right of appeal if
2 you're below a certain level. A lot of us, or at least
3 me, couldn't come up with \$25,000 for an appeal like that
4 as a judge. So we're just going to say -- and that's
5 fine, but let's make a decision that way rather than
6 saying we're going to go through this process and try to
7 find some people who might be able to pay \$25,000.

8 CHAIRMAN BABCOCK: Judge Peeples.

9 HONORABLE DAVID PEEPLES: Richard, where do
10 we stand on an Anders procedure for civil cases? Anders,
11 in criminal cases there's a procedure by which a lawyer
12 can look at the result and certify there's no issue here,
13 and I ask that. Chief Justice Hecht this morning
14 mentioned a big increase -- I think it was termination
15 cases -- of appeals to their court, a lot of those. I'd
16 say the vast majority of those are indigent appeals, and
17 serious consequences, but how much of it is that kind of
18 record, how much of it is private stuff, and is there an
19 Anders proposal here?

20 MR. ORSINGER: I don't think there is in
21 Texas a civil -- I filed -- on the criminal side I used to
22 file them myself where you were appointed or hired to
23 handle a criminal appeal, and they had no bona fide
24 argument for reversible error but they had a due process
25 right to have their arguments presented anyway, so you

1 filed an Anders brief, and you briefed it as good as you
2 could, but you still had to have your reporter's record to
3 take that up, because they have nothing to review if
4 you're reviewing the evidence you give them in the record.
5 But I don't think there's an Anders concept in a
6 termination appeal, is there?

7 HONORABLE TOM GRAY: Oh, yeah.

8 MS. BARON: Yes, there is.

9 HONORABLE DAVID PEEPLES: And you would
10 still have the record.

11 MR. ORSINGER: Do they take the record up
12 for that?

13 HONORABLE TOM GRAY: Oh, yeah.

14 MR. ORSINGER: So that doesn't help us
15 answer the question.

16 CHAIRMAN BABCOCK: You mind restating the
17 question?

18 MR. HARDIN: Yeah. I was going to ask the
19 same thing.

20 MR. ORSINGER: The question -- and from my
21 perspective, the question is whether we ought to revise
22 the rule to define poverty on the merits; and if we
23 should, should that say that it's the inability to pay,
24 but if you have an IOLTA certificate or if you're
25 receiving benefits under a federal poverty program, that

1 itself is irrebuttable evidence of the ability to pay. Or
2 maybe it's rebuttable evidence of the ability to pay, but
3 it is approved that you can't pay.

4 MR. JACKSON: Which is 502.3 now.

5 MR. ORSINGER: It is. Yeah. Now, I'm
6 suggesting that we -- that we not stick with just the
7 pleading requirement and the counter-pleading requirement
8 with no definition of what poverty is, because that leaves
9 the trial court no standard to follow in the hearing on
10 the merits if you get to one. I think it's okay to have
11 pleading requirements so we don't have wasted hearings,
12 but once we have a proper pleading and proper
13 counter-pleading, then should we define poverty and should
14 that definition of poverty have what they call automatic
15 qualifiers that nobody can question. You just put that
16 certificate in evidence, and everybody leaves.

17 MR. GILSTRAP: Do we adopt 502.3? I mean,
18 that's the issue, isn't it? For everybody, not just
19 justice courts.

20 MS. McALLISTER: 502.3, though, mirrors the
21 old rule significantly.

22 CHAIRMAN BABCOCK: Yeah. Richard, let's
23 move on to the second TAJC issue because we're running out
24 of time a little bit.

25 MR. ORSINGER: And that is?

1 CHAIRMAN BABCOCK: I think it's on page five
2 of your memo. Require 145(a) must be sworn before a
3 notary.

4 MR. ORSINGER: Well, you know, Trish had --
5 yeah, that's fine, Chip. Trish addressed that by saying
6 we spent a lot of time talking to a lot of different
7 people and finally figured out that we can't avoid the
8 requirement that an unsworn declaration supporting
9 emergency relief on a protective order has to reveal an
10 address. We can't do that because it's in the statute.
11 We have to do the repealer. We don't ever use the
12 repealer right, so we concluded after some thought --
13 Trish, do you not agree -- that the best thing for us to
14 do was to change the protective order kit --

15 MS. McALLISTER: No.

16 MR. ORSINGER: -- to add an affidavit? No,
17 okay. Would you explain the solution there?

18 MS. McALLISTER: No. The solution, the
19 protective order kit already has --

20 MR. ORSINGER: Had the fix?

21 MS. McALLISTER: -- an affidavit and a
22 declaration in it, so that is not the solution. What
23 we're asking is that people who -- what happens a lot of
24 times is they go to the district -- or, you know, they go
25 to the county attorney and get a protective order. Then

1 they go over to the district court and file for a divorce,
2 and they are filing this statement; but the statement
3 requires them to list their address, their home address,
4 where they have gotten underneath their protective order a
5 confidentiality, you know, because they don't want this
6 person to know where they are. So what we're saying is
7 just the form statement, if we could make the form
8 statement have two sections, the first one being the
9 declaration, and then they could choose option A or option
10 B. Option B is an affidavit and then it's just a
11 notarized thing. They don't have to put their address.
12 Very simple solution.

13 MR. GILSTRAP: Like the protective order
14 kit.

15 MS. McALLISTER: Like the protective order
16 kit.

17 MR. GILSTRAP: Same way. Yeah, that's the
18 solution.

19 MS. McALLISTER: The protective order kit
20 has two different forms, but it doesn't need to be that
21 way. It just could be one section and then another
22 section.

23 CHAIRMAN BABCOCK: Any comments on that
24 proposal? Richard.

25 MR. ORSINGER: I mean, that seems fine.

1 We -- I think we noodled this around a little bit and came
2 up with this is the best solution, didn't we?

3 MS. McALLISTER: Yeah.

4 MR. ORSINGER: Yeah. I think everybody is
5 agreed that this is the best solution.

6 CHAIRMAN BABCOCK: Any other comments on
7 that? Okay. The last item I saw we may have already
8 talked about.

9 MR. ORSINGER: Yeah. We did, and I think we
10 took a vote, and I think all of us but one, with one
11 complainer, agreed that it ought to be a 30-day rule.

12 CHAIRMAN BABCOCK: Right. Okay.

13 MR. HARDIN: One independent thinker.

14 CHAIRMAN BABCOCK: One independent thinker.
15 So we are going to take our afternoon recess and come back
16 at 4:00 o'clock.

17 (Recess from 3:43 p.m. to 3:57 p.m.)

18 CHAIRMAN BABCOCK: Pam Baron. This should
19 be easy because there's nobody here.

20 MS. BARON: I think our subcommittee
21 outnumbered the people in this room. All right. We had
22 two assignments for this meeting. Professor Dorsaneo, you
23 know, is the Chair, and he was unable to participate. We
24 did have Justices Boyce and Busby, Scott Stolley, Evan
25 Young, and myself and Elaine Carlson, and that last person

1 will be important because we are discussing a supersedeas
2 rule, and Elaine, of course, is the expert in the state on
3 that subject.

4 The Texas Legislature this past session
5 passed House Bill 2776. It provides that certain
6 government defendants who lose a case in the trial court
7 and are entitled to supersede without posting a monetary
8 bond will not be subject to counter-supersedeas, which
9 means that the trial court does not have discretion to
10 disallow particular government entities from superseding
11 an adverse judgment on appeal, and it directs the Texas
12 Supreme Court to adopt a rule that so provides no later
13 than May 1st, 2018.

14 So there is a fair amount of time between
15 now and then for the Court to consider this, but our
16 committee jumped right on it, and the three categories of
17 state defendants that this rule apply to are the state, a
18 department of the state, and the head of a department of
19 the state; and the statute provides for an exception,
20 which is a lawsuit concerning a matter that was a basis of
21 a contested case and an administrative enforcement action.

22 So it's pretty straightforward.
23 Counter-supersedeas is discretionary in the trial court
24 under Texas Rule of Appellate Procedure 24.2(a)(3). The
25 Texas Supreme Court recognized that *In Re: State Board for*

1 *Educator Certification*, and there they said that trial
2 courts do have that discretion under 24, and presumably to
3 override this case the Legislature passed the legislation
4 when it did. We proposed adding a single sentence to
5 24.2(a)(3), which is underlined on page two of our memo,
6 and that sentence would provide, "When the judgment debtor
7 is the state, a department of the state, or the head of a
8 department of the state, the trial court must permit a
9 judgment to be superseded, except in a matter arising from
10 a contested case in an administrative enforcement action."

11 So the suggested language simply parallels,
12 almost quotes in some respects, the statute. And there
13 really wasn't a lot of controversy on our committee,
14 subcommittee, about this. We played around with the
15 wording, and that's what we came up with.

16 CHAIRMAN BABCOCK: All right. It seems very
17 straightforward, but that must be deceptive, Justice Gray.

18 HONORABLE TOM GRAY: No. I'll just be
19 quiet.

20 CHAIRMAN BABCOCK: No, no, no. Justice
21 Busby, any comments about it?

22 HONORABLE BRETT BUSBY: (Shakes head.)

23 CHAIRMAN BABCOCK: Justice Bland?

24 HONORABLE JANE BLAND: I got nothing.

25 CHAIRMAN BABCOCK: Yeah, I figured you

1 would.

2 MS. BARON: It's good to be at the end of
3 the day when people are tired.

4 HONORABLE JANE BLAND: Please correct -- I'm
5 laughing with grammar, for the record, not --

6 CHAIRMAN BABCOCK: Did you say you have
7 nothing or something?

8 HONORABLE JANE BLAND: I got nothing.

9 CHAIRMAN BABCOCK: You got nothing. All
10 right. Laughter followed. Justice Boyce, anything from
11 you?

12 HONORABLE BILL BOYCE: I think it's perfect.

13 CHAIRMAN BABCOCK: Anybody think it's not
14 perfect?

15 MS. BARON: All right. Next.

16 CHAIRMAN BABCOCK: As befits work by Pam
17 Baron. Perfect.

18 MS. BARON: No, it was Elaine and all the
19 members of the subcommittee drafting and agreeing.

20 CHAIRMAN BABCOCK: So do we go to TRAP Rule
21 11?

22 MS. BARON: Yes. TRAP Rule 11, the State
23 Bar Court Rules Committee proposed an amendment to Rule
24 11. Rule 11, if you're not familiar with it, governs the
25 submission of amicus briefs to the Texas appellate courts,

1 and the State Bar proposed a change in the rule for I
2 think two different reasons. One is that many amicus
3 participants did not comprehend or the rule did not
4 specify that their submission could be made in a letter,
5 and there's also a problem in that the rule says you have
6 to follow the briefing rules of the parties. So a lot of
7 amicus were including sections that really just weren't
8 that useful, like restating the facts, because the parties
9 are supposed to have a statement of facts.

10 So the State Bar proposed that a change to
11 section (a) of Rule 11 to add that a brief -- that an
12 amicus submission must either be in the form of a letter
13 or comply with briefing rules for the responding parties.
14 For responding parties because responding parties don't
15 have to put things in like statement of jurisdiction,
16 statement of issue, statement of facts. So it eliminates
17 some repetitive sections.

18 The question was -- to our subcommittee is
19 do we recommend this change to this committee and the
20 Court, and we voted five to one, with the vice-chair
21 disagreeing, to recommend a change with a slight
22 modification. And the concern was raised that once you --
23 the way the State Bar wording of the amendment suggested
24 that if you file a letter you didn't have to comply with
25 briefing rules for the parties, so you wouldn't have to do

1 a response, and you wouldn't have a limit on your words.
2 Parties have to limit various documents to certain numbers
3 of words, and so an amicus could file a 500,000 word
4 letter in 10.5.

5 So the suggested change to that was to adopt
6 what the State Bar had suggested but add a new section (e)
7 requiring the amicus to certify compliance with the limits
8 of 9.4(i) are applicable to a responding party at that
9 stage of the proceeding. And Evan Young would --
10 concurred but wanted to write separately that he would
11 place a specific word limit on letter submissions, which
12 is not currently provided for in 9.4 or any other rule.
13 So that's where we are.

14 CHAIRMAN BABCOCK: Okay. And the vote in
15 the subcommittee was five to one in favor of these
16 changes; is that right?

17 MS. BARON: Yes.

18 CHAIRMAN BABCOCK: Okay. With you
19 dissenting?

20 MS. BARON: Yes.

21 CHAIRMAN BABCOCK: And why did you dissent?

22 MS. BARON: I think we're fixing a problem
23 that doesn't exist based on a survey of the court of
24 appeals clerks. They rarely get amicus briefs at all,
25 much less in letter form. They are also of the opinion

1 that because briefs are considered submitted but not --
2 received but not filed that they just take anything,
3 because how do you reject a filing if it's not filed? And
4 the Supreme Court clerk's office seems to handle these
5 everyday on a regular basis without issue. So we're
6 just -- there are other problems with amicus that I think
7 are more significant that we probably can't fix in a rule,
8 but here we're just doing something to do something. I
9 don't think we're really fixing much.

10 CHAIRMAN BABCOCK: Okay. Justice Busby.

11 HONORABLE BRETT BUSBY: One of my thoughts
12 in voting for the proposal was that, as Pam said, the
13 court clerks are already accepting letter amicus
14 submissions anyway, even though they don't comply with the
15 rules, and so that basically this revision would update
16 the rules to comply with what the clerks are doing anyway,
17 and that that served a valuable notice function for people
18 who might like to submit a letter but would actually read
19 the rule and try to follow it and think that they couldn't
20 submit a letter.

21 CHAIRMAN BABCOCK: Assuming we do or the
22 Court does want to change, is there any dispute about the
23 language? The language looks fairly straightforward to
24 me. Richard, and -- well, but, of course. Orsinger
25 first. I was looking that way.

1 MR. ORSINGER: I just wonder, Pam, whether
2 we ought to also make them require with the font size
3 requirement, not just the length? Because they probably
4 -- if they're not a lawyer, they won't have any idea that
5 a 10 point or 11 point font isn't even going to be
6 readable on an iPad.

7 MS. BARON: Right.

8 MR. ORSINGER: You would just change that by
9 adding the subdivision that has the font requirement.

10 MS. BARON: We could do that.

11 MR. ORSINGER: That's my only suggestion.
12 Otherwise I like the suggestion.

13 CHAIRMAN BABCOCK: Justice Gray.

14 HONORABLE TOM GRAY: Well, I had a few
15 changes that I thought -- I had trouble with the use of
16 the word "brief" three times in the introductory clause
17 and then say, "A brief can be in the form of a letter."
18 It just linguistically it didn't work for me, and then
19 when subsection (a) has an either-or preceded with the
20 word "must" that created a problem for me, and I
21 endeavored to move -- to talk about it in the context of
22 an amicus curiae support, authority, discussion, a
23 comment, a document, something. I think somebody -- Brett
24 just referred to it as something else that I thought
25 would --

1 MS. BARON: Submission.

2 HONORABLE TOM GRAY: An amicus curiae
3 submission. I like that and then move the "letter or a
4 document that complies with the briefing requirements" up
5 into the introductory paragraph and then renumber (b),
6 (c), (d), and now (e) to just be (a), (b), (c), and (d).

7 CHAIRMAN BABCOCK: Okay.

8 HONORABLE TOM GRAY: It just made it flow
9 better to me.

10 CHAIRMAN BABCOCK: Great. Richard
11 Munzinger.

12 MR. MUNZINGER: Is there a page limit on a
13 letter?

14 MS. BARON: No.

15 MR. ORSINGER: There's a word limit.

16 HONORABLE BRETT BUSBY: Not now.

17 MR. ORSINGER: Under the proposal, at least
18 the second version of the proposal, it's the same length
19 limits, and those limits now are words, total words, not
20 pages.

21 HONORABLE BRETT BUSBY: Or it can be pages
22 if it's shorter than -- I forget. It's pages if it's
23 pretty short or words if it's longer. I can't remember
24 exactly.

25 MR. ORSINGER: I see. So you're saying

1 there might be a page limit applicable to a letter.

2 HONORABLE BRETT BUSBY: Yes. That's why it
3 says "length limits" deliberately, because it can be page
4 or word depending on how long it is.

5 MR. ORSINGER: I did not realize that.

6 CHAIRMAN BABCOCK: Frank.

7 MR. GILSTRAP: What's the purpose of the
8 second sentence of the rule, "But the court for good cause
9 may refuse to consider the brief and order that it be
10 returned"?

11 MR. ORSINGER: Well, it may be disrespectful
12 of the court or --

13 HONORABLE BRETT BUSBY: That's in the
14 current rule, so we didn't --

15 MR. GILSTRAP: I understand. I understand.

16 HONORABLE BRETT BUSBY: -- look at that.

17 MR. GILSTRAP: I just wondered why it's in
18 the current rule since they take everything.

19 MR. ORSINGER: I think it's there -- you
20 know, sometimes things are stricken because they're
21 contemptuous or would be considered in contempt of court.

22 MS. BARON: You know, they're almost never
23 struck, and I've had situations where amicus briefs are
24 paid for by the opposing party. I've had amicus briefs
25 that far exceed the word limits for opposing parties.

1 I've had amicus briefs filed by the expert for the
2 opposing party, none of those have been struck, despite
3 being pointed out to the court.

4 CHAIRMAN BABCOCK: Okay. Any other comments
5 about this? We'll go Holly first, and then Justice Gray.

6 MS. TAYLOR: Well, I mean, this rule also
7 would apply to criminal cases I assume, because Rule 11
8 applies to both.

9 CHAIRMAN BABCOCK: Right.

10 MS. TAYLOR: We do receive amicus briefs. I
11 just -- I apologize. I only about a week ago started
12 looking at this, and we tried to address it in our rules
13 advisory committee meeting last week, but we didn't have a
14 chance to get to it because we had a lot on our plate, so
15 I wasn't able to take kind of a census of what people
16 thought of it. I did talk to our staff member who is head
17 of our petitions for discretionary review intake and also
18 our staff member that handles intake on capital case
19 direct appeals, in which we would receive some amicus
20 briefs, and they've never seen one in letter form. I
21 think both of them said they've always been briefs, and
22 they've always been filed by attorneys. So I guess --

23 CHAIRMAN BABCOCK: You would be in Pam's
24 camp, this is a solution in search of a problem.

25 MS. TAYLOR: Well, right. And the other

1 thing is one of the people I consulted with said, "Wow, I
2 wonder if the language is changed if we might see more
3 people filing them" --

4 MS. BARON: Right.

5 MS. TAYLOR: -- "as letters," and I don't
6 know. I'm not saying that's good or bad. I don't
7 personally have an opinion, but it might have that effect.
8 Currently we primarily get them filed -- the entities that
9 file them may not be attorneys but attorneys have written
10 the briefs for them.

11 MS. BARON: Right.

12 MS. TAYLOR: So and they get filed, and they
13 conform to Rule 38, and Rule 38.2 does allow for the
14 appellee to leave out the statement of facts I think.

15 MS. BARON: Right.

16 MS. TAYLOR: So they have that option, and
17 often, in my experience they do, because they're mainly
18 wanting to argue about the law.

19 MS. BARON: Right.

20 MS. TAYLOR: So --

21 CHAIRMAN BABCOCK: Holly, if your advisory
22 committee has any substantive thoughts beyond what we've
23 talked about today, could you communicate that with
24 Martha?

25 MS. TAYLOR: Yes. But we're not meeting

1 again until November 3. We just met and unfortunately,
2 like I said, we weren't able to get --

3 CHAIRMAN BABCOCK: I'm guessing this is not
4 going to get done by November. Just a hunch. Alex.

5 PROFESSOR ALBRIGHT: I have written some
6 letter amicus briefs, and I would hate to think that I
7 couldn't write a letter because sometimes I -- Justice
8 Boyd and I were just talking about one that I wrote a
9 couple of years ago, and it was just to point out one
10 little thing that I noticed in an opinion, and I would
11 hate to have to -- now I'm in an appellate firm, and I
12 have the ability to do all of that stuff that you have to
13 do with a brief to make it look right, but as a faculty
14 member you don't -- that's very difficult to do, is to
15 follow the form for briefs, so if you could just write it
16 in a letter pointing something out it's very helpful, and
17 I think it can be helpful to the courts as well.

18 CHAIRMAN BABCOCK: Justice Gray, and then
19 Richard, and then Pam, and then Peter, and then we're
20 going to take up a motion. Go ahead.

21 HONORABLE TOM GRAY: I was going to echo the
22 vice-chair's comments about this is not a problem for our
23 court of appeals. I'll take any form of help that I can
24 get in a case that's filed, and if -- you know, if we're
25 going to do it, I do think there's merit to Evan's word

1 count.

2 CHAIRMAN BABCOCK: Yeah.

3 HONORABLE TOM GRAY: Because that can blow
4 up on you, but I think we've all probably gotten letter
5 briefs from Ben Taylor, you know, so --

6 CHAIRMAN BABCOCK: Richard.

7 MR. ORSINGER: I was going to say that I do
8 think that this probably is not a problem that needs to be
9 solved, but I do like the fact that they're putting in the
10 rules that letters can be filed. In my arena in family
11 law, family trial lawyers that get upset about a ruling
12 are going to file a letter because they don't know how to
13 do a brief for the most part, but in my other experience
14 when I was reading the Supreme Court's record in the same
15 sex marriage cases that our Supreme Court decided within
16 the last couple of years, there were many, many, many
17 amicus letters that were filed, some in the form of
18 e-mails and some in the form of conventional letters. I
19 don't know that anybody ever read them except me. Maybe
20 everybody read them, but it was -- I looked at that, and I
21 saw what they were doing, and I saw that they were
22 probably organized groups that were sending the same
23 message, but at the same time, they were petitioning the
24 government for a redress of grievances. They were sharing
25 their view about how public policy should be decided on a

1 core issue, and I said this is a free society. This is
2 good. They instead of being in the streets setting cars
3 on fire and breaking windows, they're sending letters to
4 the Texas Supreme Court. I think we should encourage
5 that. I think it makes them feel like they have a say in
6 our system. So I like to make it explicit that anybody
7 can file a letter brief.

8 CHAIRMAN BABCOCK: Justice Busby, did you
9 have anything?

10 HONORABLE BRETT BUSBY: I was just going to
11 say I took Pam -- maybe I need a clarification from Pam,
12 but I took Pam's point about a solution in search of a
13 problem not to be so much that people weren't filing these
14 letters in the Supreme Court and in other courts, and we
15 don't get a lot of amicus submissions, but when we do I've
16 seen them in the form of letters, and so I think -- I
17 would just -- I think if we're doing it -- if we're
18 accepting these anyway that the rule ought to reflect what
19 the actual practice is.

20 CHAIRMAN BABCOCK: Pam.

21 MS. BARON: I was just going to basically
22 talk about what Richard did, and it's my understanding
23 that the clerk of the Texas Supreme Court now when the
24 Court receives e-mails from people commenting on pending
25 cases, they are logged as amicus submissions and noted in

1 the docket and the parties get notice. None of those
2 are -- or very few of those probably comply with any of
3 Rule 11.

4 CHAIRMAN BABCOCK: Peter.

5 MR. KELLY: Richard's point is well-taken in
6 that we are a participatory democracy, but on the other
7 hand, if you explicitly allow for letter submissions
8 you're going to end up with an amicus practice like
9 California state court has, which is in every single case
10 it's a bunch of "me, too" letters saying -- you know,
11 Farmers Insurance will just file a letter saying, "We
12 support State Farm's position." That's -- and so we have
13 38 to 45 amicus letters in any routine insurance case that
14 don't add anything to it. They're not substantive briefs.
15 They're not citing any case law or making any new
16 arguments. They're just saying "We want you to do what
17 State Farm wants you to do" or whatever the interest group
18 is.

19 So there might be a way to do that. I mean
20 if it were to have the rules reflect the practice, perhaps
21 we should find a way to not encourage these "me, too"
22 letter briefs, and Justice Hecht enlightened me on this
23 whole idea of appointed amicus briefs. If there's a pro
24 se party, the court will appoint an amicus attorney to
25 brief that party's position. They're not representing the

1 party, and then if we're going to conform to the practice
2 then maybe we have to conform to that particular practice
3 as well.

4 On the other hand, if we have a short,
5 succinct rule that seems to cover pretty much every
6 situation, there might not be a need to change it.

7 CHAIRMAN BABCOCK: There has been made a
8 motion made by -- to adjourn early so the Chair can catch
9 his flight, which the Chair grants.

10 MR. ORSINGER: After the Chair debated with
11 itself.

12 CHAIRMAN BABCOCK: It was debated hotly, and
13 the motion was a close one, but it was granted.

14 HONORABLE TOM GRAY: One-zip.

15 CHAIRMAN BABCOCK: So thank you, everybody,
16 and we will see you in October.

17 (Adjourned)

18

19

20

21

22

23

24

25

1 * * * * *

2 **REPORTER'S CERTIFICATION**
3 MEETING OF THE
4 SUPREME COURT ADVISORY COMMITTEE

5 * * * * *

6
7
8 I, D'LOIS L. JONES, Certified Shorthand
9 Reporter, State of Texas, hereby certify that I reported
10 the above meeting of the Supreme Court Advisory Committee
11 on the 11th day of August, 2017, and the same was
12 thereafter reduced to computer transcription by me.

13 I further certify that the costs for my
14 services in the matter are \$ 1,794.00.

15 Charged to: The State Bar of Texas.

16 Given under my hand and seal of office on
17 this the 2nd day of September, 2017.

18
19 /s/D'Lois L. Jones
20 **D'Lois L. Jones, Texas CSR #4546**
21 Certificate Expires 12/31/18
22 3215 F.M. 1339
23 Kingsbury, Texas 78638
24 (512) 751-2618

25 #DJ-443