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**MEETING OF THE SUPREME COURT ADVISORY COMMITTEE**

May 3, 2019

(FRIDAY SESSION)

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Taken before *D'Lois L. Jones*, Certified  
Shorthand Reporter in and for the State of Texas, reported  
by machine shorthand method, on the 3rd day of May, 2019,  
between the hours of 8:59 a.m. and 4:49 p.m., at the Texas  
Association of Broadcasters, 502 East 11th Street, Suite  
200, Austin, Texas 78701.

## INDEX OF VOTES

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

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Rule 215.7	30251
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Ex Parte Communications	30344
Ex Parte Communications	30347
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## Documents referenced in this session

- 19-05 Discovery Subcommittee Proposed Amendments (2.6.2019)
- 19-06 Discovery Subcommittee Rule 215 Sanctions Albright Working Document (2.6.2019)
- 19-07 Discovery Subcommittee Revised Spoliation Rule (2.6.2019)
- 19-08 Spoliation Draft Rule (Texas)-Levy Submission
- 19-09 Subcommittee Report Feb. 11, 2019, on TRCP 244
- 19-10 Memo to TSCAC, Re: Ex Parte Communications

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2 CHAIRMAN BABCOCK: Welcome this morning and  
3 today and tomorrow. We're going to have a couple of  
4 scheduling notes here. We put Texas Rule of Civil  
5 Procedure 244 first out of deference to some people on  
6 that subcommittee who need to be here first thing in the  
7 morning and then have other commitments, and then we'll  
8 get right back to discovery rules because I know maybe  
9 Alex and maybe others have issues this afternoon. And  
10 then Pete informs me that the name change forms, through  
11 no fault of anybody's, are probably not ready to go on  
12 this go around, so let's see how far we can get on the  
13 agenda. I had thought with everything on it we would  
14 surely need tomorrow, and if we do, we will stay, but if  
15 we don't, we won't. So with that I'll kick it to Chief  
16 Justice Hecht.

17 CHIEF JUSTICE HECHT: We're happy to see  
18 that the committee has lost a member, because he has come  
19 over to the Court. So Justice Busby has joined us and is  
20 working very hard and decided that he -- I told him he  
21 could do what he wanted to do, and he was kind of torn,  
22 but he's got lots to do, and he thought he would open up a  
23 seat for someone else. So we are very pleased to have  
24 Brett on board.

25 On rules, just a couple of things. We

1 repealed the case information sheet for the district and  
2 county courts required under Rule 78a, and the JPs told us  
3 through their training center that it wasn't -- the cover  
4 sheet was not really useful for them either, so we  
5 repealed Rule 502.2(b), which is their cover sheet rule,  
6 and so the cover sheet is no more. We are still hopeful  
7 in the legislative session that OCA will be given the  
8 directive and the means to gather more case-specific  
9 information across the state from every -- from every  
10 court, and the Governor is supportive of that, and a lot  
11 of other people are as well, so we're hopeful that we're  
12 moving past things as simple as cover sheets into  
13 something a little more useful. The -- we amended the  
14 Disciplinary Rule 1.01 to require that lawyers be  
15 competent in -- that lawyers have technological  
16 competence. So I don't know if that affects you or not,  
17 but now we are in line with the ABA model rule, and  
18 lawyers are increasingly called upon to have skills in  
19 that area.

20                   We have adopted the UBE, as you know, going  
21 forward, and it will be -- the first exam is supposed to  
22 be given in February of '21, and we're still looking at  
23 exactly how to structure it and hope the -- whether there  
24 will be a Texas component and what it will look like, so  
25 we'll have decisions on those things in the next little

1 while and be looking toward implementing the UBE.

2           The Legislature has been active as usual.

3 So just a word of history, you know that after the  
4 Nineties and early aughts, the Court made a very strong  
5 pitch to the Legislature to not try to enact rules,  
6 procedural rules itself, but to direct the Court to do it,  
7 that they could set policy as much as they wanted to, but  
8 they should leave the details to the bar, the  
9 practitioners, the judges who are going to have to  
10 implement them; and so they experimented with that in 2003  
11 very extensively. I think we had 11 assignments in 2003,  
12 and eight or nine of them were due by September the 1st, a  
13 couple of them by January the 1st; and this committee  
14 turned to and got all of that done; and it was favorably  
15 received by the Legislature at the time; and they have  
16 continued to pursue that same strategy since then, which I  
17 think is very good for the integrity of the judicial  
18 process in the state, but it means a lot of work for the  
19 committee and the Court; and I'll just mention a couple of  
20 things that they're looking at that may come our way.

21           This may not require rules, but they're  
22 probably going to raise the maximum amount in controversy  
23 for JP courts from 10,000 to 20,000. They're probably  
24 going to raise the maximum for amount in controversy in  
25 our expedited rules, 169.244, from 100,000 to 250,000.

1 They're probably going to require the county courts to  
2 have 12 person juries in cases involving more than  
3 \$250,000. They are looking at citation by publication,  
4 which remains to be seen what they'll do. They -- you  
5 probably read in the newspaper that House Bill 3300 would  
6 require the Court to amend Rule 91a so that an award of  
7 attorney fees against the loser would not be mandatory,  
8 but it would be discretionary with the Court, and there  
9 was a big story in the *Texas Lawyer* the last couple of  
10 days saying that that will probably greatly expand the use  
11 of Rule 91a. So, remember, at the time we had a lot of  
12 debate about the attorney fees, and the statute was pretty  
13 careful about directing us how we should adopt 91a, but  
14 that -- that change I think has passed the House and is  
15 likely to pass the Senate.

16           The rape shield law has been a target of  
17 both houses this session, so they're probably going to  
18 either amend or repeal Texas Rule of Evidence 412 and  
19 probably add 413 and 14 to mirror those federal rules of  
20 the same number, and that's unusual that they would  
21 involve themselves that carefully with Rules of Evidence,  
22 but it's a -- kind of has implications, obviously beyond  
23 the functioning of the rule itself.

24           And the -- there are a couple of bills that  
25 have to do with mental health issues. There's a bill that

1 would amend the Code of Judicial Conduct to allow judges  
2 to campaign together. I think the thinking behind the  
3 change is that the prohibition is unconstitutional. I  
4 really haven't talked to the authors much, but it's not --  
5 I don't think the idea is that it's good for judges to  
6 campaign together. I think the idea is that free speech  
7 may require that, but that's probably going to happen. I  
8 think it passed the House.

9           And then there are some other bills. There  
10 are lots of other bills. Some of them have to do with  
11 forms that may require changes in our protective order  
12 forms and in other forms, so we'll get a report to you as  
13 we get closer to the end of the session. The bail reform  
14 that Presiding Judge Keller and I had pushed very hard  
15 this session, and now we've been joined by the Governor,  
16 is kind of lurching along for reasons that I find hard to  
17 understand; but there's a -- the Governor's bill should be  
18 voted out of calendars in the House; but the deadline for  
19 referral in the Senate is next Thursday, so it's coming  
20 close, right down to the wire. And, of course, the two  
21 principal ideas or three principal ideas in the bail  
22 reform are judges would have and be required to use more  
23 information, background information, about the defendant's  
24 record and risk of flight and violence, will be required  
25 to use that information that bail could -- would have to

1 take into account the defendant's inability to pay, which  
2 would result in the release on personal recognizance of a  
3 lot more defendants than are being released now and a  
4 preventive detention measure that would allow judges to  
5 hold defendants who are judged to be a threat to the  
6 safety, public safety, without -- without bail -- without  
7 giving them bail; and as I say, those are pending in the  
8 House calendars committee. I think if they get out  
9 they'll pass the House. Senator Whitmire has the bill in  
10 the Senate, which is very different, but I think the  
11 Senate could be persuaded to pass the House bill if it  
12 gets over there. They did -- they passed a bail reform  
13 bill last time, and so I think it is likely, but it's just  
14 really touch-and-go, as I say, for reasons I don't  
15 understand.

16           And then finally, a bill that's near and  
17 dear to the judges would raise judicial compensation, and  
18 we -- we've gotten two raises in the last 20 years, so  
19 we're working on the third decade here and trying to get  
20 off to a good start, and I am modestly hopeful after  
21 developments last night that it's got a pretty good chance  
22 of passing, but a lot of the judges -- Judge Evans and a  
23 lot of others have been working very hard to get that bill  
24 passed.

25           So that's what's going on over at the



1 Legislature. Every session has a kind of a personality to  
2 it, and this one everybody is smiling and shaking hands  
3 and hugging each other and make -- compromising. Last  
4 session they were, you know, almost got in a fist fight on  
5 the floor of the House and they were saying very awful  
6 things about each other in each other's chamber, so  
7 whether that will result in better legislation, we'll see,  
8 but anyway, they've got 24 days left, I think, and so  
9 we're drawing to a close.

10 CHAIRMAN BABCOCK: Thank you. Thank you,  
11 Chief. I know you've got to step out for a minute.  
12 Justice Boyd, I think you do not have anything to report?

13 HONORABLE JEFF BOYD: No.

14 CHAIRMAN BABCOCK: So we'll get right into  
15 it, and, Elaine, on the Rule 244 of the Texas Rules of  
16 Civil Procedure.

17 PROFESSOR CARLSON: Okay. We have a memo  
18 for the full committee, and the first page states the  
19 ultimate issue, and that is what is the appropriate role  
20 of an attorney ad litem that's appointed when a defendant  
21 is served by publication, but by way of background, I'd  
22 like to just remind you of a couple of the other rule  
23 provisions and why service by publication is a little bit  
24 different and the constitutional guarantees that we  
25 probably need to be aware of. We all know that you can

1 obtain service of process on a defendant in person or via  
2 the mail following Rule 106 without any court approval.  
3 Same with a nonresident defendant under Rule 108, but if  
4 you're unable to do that, then of course, we have the  
5 ability to obtain substituted service under I guess Rule  
6 108(b) or 106(b). I can't remember which one, but that  
7 has to be on motion supported by affidavit by persons with  
8 personal knowledge of the location where the defendant can  
9 probably be found, and the court then enters an order if  
10 they believe that is true, and the defendant can be served  
11 substituted through someone else, like the apartment  
12 manager where they reside or the receptionist where they  
13 work at Exxon refinery or whatever it may be.

14           When we get to service by publication under  
15 Rule 109, the rules right now are a little bit different.  
16 It allows for a clerk, not the court, to issue service by  
17 publication on affidavit by a party or their attorney or  
18 agent that they are unable to locate the whereabouts of  
19 the defendant and they've used due diligence in attempting  
20 to procure that. Texas has no true default judgment for a  
21 defendant served by publication with an in personam  
22 judgment. Under Rule 244, the trial court is obliged when  
23 a defendant is served by publication and fails to appear  
24 or answer to appoint an attorney ad litem to represent the  
25 absent defendant, so it's not a default judgment

1 situation. There is counsel present, and the case law  
2 tells us that the role of counsel is not only to use  
3 diligence and make -- to see if they can locate the  
4 whereabouts of the defendant, but also to defend fully the  
5 absent defendant; and we have Texas Supreme Court cases  
6 that say that can be throughout the appellate process; and  
7 the court is required to compensate the ad litem  
8 reasonable fees.

9           And so the State Bar of Texas committee on  
10 rules, court rules, received several -- well, received  
11 complaints, I won't say several, about the process from  
12 plaintiffs that were suing defendants in fraud I believe;  
13 and almost all of the winnings, if there were winnings,  
14 went to pay the attorney ad litem, even though the  
15 plaintiff was successful; and Rules 131 and Rules 141 of  
16 the Texas Rules of Civil Procedure do provide that the  
17 court should ordinarily tax the costs against the  
18 unsuccessful party, but for good cause they can tax the  
19 costs against the successful party, including these  
20 attorney ad litem fees.

21           So the State Bar proposal is to limit the  
22 role of an attorney ad litem to no longer really represent  
23 the absent defendant, but instead to look at the diligence  
24 that the plaintiff used in attempting to locate the  
25 defendant and to perhaps supplement that with their own

1 diligence, report back to the court, and if the court is  
2 satisfied there's sufficient diligence, then the role of  
3 the attorney ad litem is finished; and like the limitation  
4 that we put on guardian ad litem, they would like the  
5 rule to provide that the attorney ad litem cannot receive  
6 compensation for work beyond that in the case. And so the  
7 question becomes do we wish to maintain the attorney ad  
8 litem practice and what role should the attorney ad litem  
9 play. I think it's positive that and I think our  
10 committee felt it was positive that the court should be  
11 issuing the citation by publication as opposed to the  
12 clerk on an affidavit, and should we limit the  
13 compensation of that attorney ad litem. We all studied  
14 about *Mullane vs. Central Hanover* in law school where the  
15 U.S. Supreme Court looked at when is it necessary to use  
16 the best form of service, you know, the blue star in-hand  
17 service or via the mail; and the court -- that was a case  
18 that involved some New York trust statute that allowed an  
19 official in New York every year to basically sign off on  
20 the earnings of the trust; and notice was given to many of  
21 the beneficiaries by publication, who were beneficiaries  
22 of that trust and then they were bound by that accounting  
23 determination.

24                   One of the beneficiaries sued Mullane, who  
25 apparently was the one handling the trust, and the U.S.

1 Supreme Court said, look, you know where -- you know the  
2 identities of many of these people who are beneficiaries  
3 of the trust; and, therefore, constitutionally due process  
4 requires that you give them notice in a better way than  
5 service by publication; and I put in a memo the quote from  
6 the U.S. Supreme Court on the bottom of -- let's see,  
7 bottom of page three, where the Supreme Court of the  
8 United States said, "It's idle to pretend publication is a  
9 reliable means of acquainting interested parties of their  
10 rights," but that sometimes that's all -- the best we can  
11 do; and the Court has been very consistent I think in its  
12 decisions in saying if the whereabouts of a defendant is  
13 known or with reasonable diligence, you really want to  
14 find the defendant, could be found then service by  
15 publication is constitutionally infirm.

16           There are other cases similar to Mullane  
17 that I quote on page four from the U.S. Supreme Court, the  
18 Mennonite Board of Missions case, where there was a  
19 probate proceeding, and there was notice of a public  
20 auction, I'm sorry, of real property for unpaid taxes; and  
21 the creditors were known, but yet they got service by  
22 publication; and one of them didn't file a claim by the  
23 statutory deadline and was ostensibly barred from  
24 recovery; but they contested the validity of the judgment,  
25 saying it was void because due process was violated by

1 using that form of service, service by publication, when  
2 the identity of interested parties are known.

3           So we've got two lines of cases: One, we  
4 can't find the defendant; and the other is there are  
5 interested persons who are going to be affected by this  
6 judgment, like creditors of this decedent; and if either  
7 of those situations exist, you can't -- do not know the  
8 identities and with due diligence you can't find the  
9 whereabouts of the defendant, then and only then would  
10 publication by citation be appropriate. The case law does  
11 not suggest that -- the U.S. Supreme Court case law, that  
12 the Court must appoint attorney ad litem; and as Carlos,  
13 with the court rules, points out on page two, Texas is one  
14 of four states, now three. Our company is Texas,  
15 Louisiana, Kentucky, and Arkansas, and Louisiana bailed on  
16 it. Those are the three states that do require an  
17 attorney ad litem when the defendant is served by  
18 publication.

19           So Texas has given enhanced procedural due  
20 process protection to nonresident defendants by having the  
21 attorney ad litem present and with the obligation to  
22 represent the absent client, so we've kind of gone above  
23 and beyond probably what the U.S. Constitution requires,  
24 but it also serves I think to dissuade a plaintiff from  
25 using citation by publication, because there's going to be

1 these fees for the ad litem. Plus the rules for a motion  
2 for new trial say that a defendant who is served by  
3 publication instead of having 30 days to file a motion for  
4 new trial has two years from the date of the default  
5 judgment, so we really do give quite a bit of protection  
6 to the nonresident defendant.

7           Our subcommittee started out kind of  
8 thinking, well, we probably have a -- yeah, the rules are  
9 good the way they are, and then the discussion became how  
10 realistic is it that an attorney ad litem can fully  
11 represent a client they've never met and they can't find,  
12 and is it fair to the plaintiff to have to ultimately pay  
13 these enhanced guardian ad litem fees for representing  
14 them all the way supposedly potentially through the  
15 appeal, and I -- where we came out -- where most people  
16 came out is we agreed substantially with the State Bar  
17 recommendation. But our recommendation is a little bit --  
18 I think a little bit more extensive.

19           It starts over on page seven, and we would  
20 combine Rule 109 and Rule 244, as you see on pages seven  
21 and eight of the memo. We included on page nine the  
22 family law particular provisions for the appointment of ad  
23 litem in certain cases under the family law, just by way  
24 of example; and we included on page 10 and 11 Rule 173 for  
25 guardian ad litem just to show for example how fees might

1 be limited in scope to the ad litem, instead of  
2 representing the party, in effect reporting back to the  
3 court and the court having to be satisfied that there was  
4 sufficient diligence and, if not, to order more stuff to  
5 be taken or not allow the citation by publication. So  
6 that's the gist of the proposal, and I -- we can either go  
7 through it paragraph by paragraph, or we can take general  
8 votes on how the winds are blowing.

9 CHAIRMAN BABCOCK: Okay. You said that  
10 Mullane was studied by most of us in law school. That's a  
11 1950 case, right?

12 PROFESSOR CARLSON: Well, yes.

13 CHAIRMAN BABCOCK: So I would point out that  
14 Buddy Low had already graduated.

15 PROFESSOR CARLSON: I would like the record  
16 to reflect that Buddy probably didn't study that in law  
17 school, but I'm sure he's read it since.

18 CHAIRMAN BABCOCK: Which way -- how do you  
19 want to start the discussion?

20 PROFESSOR CARLSON: Well, I would like to  
21 just get the general sense of the group if we continue to  
22 feel that an attorney ad litem is appropriate to be  
23 appointed, and we'll talk about the scope maybe in a  
24 different vote, for a defendant who is served by  
25 publication and has not appeared. But before I do that,



1 I'd like to -- I know, Judge Peeples, you may want to add  
2 to this.

3 HONORABLE DAVID PEEPLES: Well --

4 PROFESSOR CARLSON: And anyone else on the  
5 subcommittee. I'm sorry, I should have done that.

6 HONORABLE DAVID PEEPLES: The three issues,  
7 it seems to me, are if there's going to be an ad litem, do  
8 we want the ad litem to defend the suit or to inquire into  
9 diligence and report that to the court? That's one, and  
10 second, if there is an ad litem, how is he or she going to  
11 be paid? It does seem unfair for the plaintiff to have to  
12 pay the person fighting to -- you know, defending the  
13 case. So payment is an issue, and the third one, it blows  
14 my mind that under our rules right now it's easier to get  
15 citation by publication. You go to the clerk and the  
16 clerk shall issue it on a mere affidavit, easier to do  
17 that than it is to get alternative service on a person  
18 over 16 or by ordinary mail. You've got to go to the  
19 court to do that, to get the more realistic type of  
20 service, and I think that just ought to be changed, and if  
21 we change that and say you've got to go to the court to  
22 get it authorized in the first place, we might not need an  
23 ad litem anywhere else in the process. So those are the  
24 issues, it seems to me.

25 CHAIRMAN BABCOCK: How would -- how would it

1 have worked in the Mullane situation where at least some  
2 of the defendants who were served by publication were  
3 known? So that presumably the ad litem finds them and  
4 says, "Hey, you know, your rights are being affected. You  
5 need to probably either abandon your rights or get in  
6 there and start swinging." How would that work under our  
7 current rule in that fact situation?

8 HONORABLE DAVID PEEPLES: I think that the  
9 people who were cited by publication and the ad litem  
10 would -- under our rule would defend the case, but there  
11 are already probably people who did -- who got cited in  
12 person, were served in person, they're probably fighting  
13 the case, too. I don't know if you would need different  
14 ad litem for all of those people. Mullane was a strange  
15 case because there were so many people involved --

16 CHAIRMAN BABCOCK: Yeah.

17 HONORABLE DAVID PEEPLES: -- that needed to  
18 be cited.

19 CHAIRMAN BABCOCK: But if you had a  
20 situation where there weren't that many people but just  
21 the ad litem found -- and the person, they said, "Yeah, I  
22 want to be -- I want to be in this fight, thanks so much  
23 for finding me, I'm going to have my own lawyer," or "I'd  
24 like to hire you," then in that case you would take care  
25 of the problem, right?

1                   PROFESSOR CARLSON: It would seem to me that  
2 the ad litem should no longer be compensated because the  
3 defendant now knows about the lawsuit and has an  
4 opportunity to appear, and it would be -- I don't think  
5 due process requires that you continue an ad litem under  
6 that scenario. It would probably be inappropriate.

7                   CHAIRMAN BABCOCK: It seems clear to me.

8                   PROFESSOR CARLSON: The rules don't say what  
9 happens when you find the defendant.

10                  CHAIRMAN BABCOCK: Right. Okay. Other  
11 comments? Yeah, Justice Gray.

12                  HONORABLE TOM GRAY: The first thing that  
13 struck me when we were dealing with the rule on service --  
14 and I think Judge Peeples' point sort of addresses this.  
15 I don't understand why we need an ad litem in the -- at  
16 the point that we're trying to effect service. That  
17 person, I will speak personally about a lawyer as an ad  
18 litem. I would be ill-equipped to go find a prospective  
19 or punitive defendant. A personal private investigator,  
20 on the other hand, would be well-equipped, and the trial  
21 court and the plaintiff have a vested interest in finding  
22 the person, not yet getting them represented, but finding  
23 the person that has been sued.

24                  So I would break this entire conversation  
25 differently and talk about service as one issue and then

1 failure of service, then let's talk about an ad litem, and  
2 it just seems to me that the two need not and probably  
3 should not be combined in our efforts here, because the --  
4 there really is functionally to me very different, and the  
5 thing that confused me and I'm just not -- I don't see  
6 much of this at our court and didn't see it in practice,  
7 but why is the plaintiff going after someone that they  
8 can't find? There obviously seems to be a res somewhere,  
9 meaning r-e-s, somewhere that they can glom onto, or maybe  
10 there -- it's the principle not the dollars; but that's  
11 getting to the merits of the litigation and whether the  
12 plaintiff has any real belief that there's going to be a  
13 recovery; and if they want to fund an ad litem in a suit  
14 like that, let them fund it; but that doesn't -- I mean,  
15 we need to somehow make -- if we're going to leave them  
16 together, make finding the defendant commensurate with the  
17 amount of funds or issue at risk. We talk about  
18 proportionality when we get over to the discovery and the  
19 other rules, so there just seems to me to be a fundamental  
20 disconnect here in the service issue and then the ad  
21 litem; and obviously if you find them, there is no need  
22 for an ad litem. If they get notice of the suit through a  
23 private investigator then that ought to be it. That ought  
24 to be -- that's like service of process, hand-delivery and  
25 then they don't do anything. Then you go get your default

1 judgment, and you go on. So I think it would help the  
2 conversation to separate the two and not try to put them  
3 together.

4 CHAIRMAN BABCOCK: Okay. Professor Hoffman.

5 PROFESSOR HOFFMAN: So I echo a lot of that,  
6 Tom. I might phrase it a little differently, but I think  
7 you and I are on the same page.

8 HONORABLE TOM GRAY: That's rare.

9 PROFESSOR HOFFMAN: Yeah, right. I wanted  
10 to highlight that. So -- so I think it's probably a  
11 mistake and potentially a bad mistake to change this rule  
12 now for a few reasons. So -- so, one thing, remember the  
13 Chief's comment that there's a bill -- I don't know what  
14 the success likelihood is or that we're going to change  
15 the rules as to service by publication, but whether or not  
16 that passes or not, and I think that is an issue for us to  
17 think about, our existing rules are not in particularly  
18 good shape. We're dealing with the worst form of service  
19 there is. Everyone acknowledges that service by  
20 publication is the terrible form of service, and so then  
21 the question is just like before we change the rules but  
22 leave them badly broken, maybe we ought to start back; and  
23 so, for instance, this notion of why do we have an AAL in  
24 the first place here. It's a strange thing because the  
25 plaintiff has the obligation to show that they were

1 diligent in looking for where the defendant is, they  
2 looked under all of the rocks. Obviously, they had lots  
3 of financial incentives to do, but, Tom, whether or not  
4 you're right that there are sometimes incentives to go  
5 chase them even when you can't find any money, the  
6 plaintiff still has that obligation, right, to show  
7 reasonable diligence.

8           And so it's a very strange thing that we --  
9 and it's telling that it's a very -- just a small handful  
10 of states have this odd procedure where we pass the  
11 reasonable diligence buck to this AAL creation rather than  
12 leaving it where it appropriately belongs, on the  
13 plaintiff, and, of course, the court under Rule 109 to  
14 ultimately confirm the diligence before judgment was  
15 entered. So I guess my basic point is I'm uncomfortable  
16 with the idea that we would sort of keep in place a system  
17 that is surely not working very well right now.

18           Now, having said that, there may be  
19 occasions when an AAL is actually -- if the judge doesn't  
20 trust that the plaintiff has really done all that they  
21 could do, one could imagine a circumstance when maybe an  
22 attorney ad litem has a role to play; and so maybe the  
23 rule ought to contemplate that as an option; but it does  
24 seem to me the default ought to be let's make sure the  
25 plaintiff is being reasonably diligent with a judge

1 overseeing it. Judge Peeples' point about the clerk  
2 automatically being able to issue it is a problematic part  
3 of 109, even though the next sentence or the sentence  
4 after that does talk about the judge must confirm  
5 diligence before entering judgment. So anyway, I'll stop,  
6 but I have a number of concerns about making sort of not  
7 ideal changes here.

8 CHAIRMAN BABCOCK: Richard Orsinger.

9 MR. ORSINGER: Okay. So I would say I want  
10 to echo what Justice Gray was --

11 PROFESSOR HOFFMAN: Before you continue,  
12 I've got a quote. I'm sorry.

13 CHAIRMAN BABCOCK: No, no.

14 PROFESSOR HOFFMAN: I saved this quote for  
15 about a month. Richard and I did a CLE together. It was  
16 the child protection law section in Dallas, the second  
17 annual of the section. It was wonderful, and Richard,  
18 before he gets up, the director introduces him with this  
19 wonderful glowing remarks, and the line I had to save for  
20 everyone is "I don't know why, but every time Richard  
21 Orsinger speaks I feel both educated and inadequate."

22 MR. ORSINGER: Thank you. That cost me a  
23 lot to get that endorsement.

24 MR. SCHENKKAN: Worth every penny.

25 CHAIRMAN BABCOCK: All right. The great

1 Richard Orsinger may speak.

2 MR. ORSINGER: Thank you. Well, in my field  
3 I'm recognized as -- but perhaps not outside of it.

4 CHAIRMAN BABCOCK: But none of us are going  
5 to feel inadequate, I might add.

6 MR. ORSINGER: Well, not on this committee.  
7 So I agree with Justice Gray's comments, and I would  
8 suggest that we envision the search process for an absent  
9 defendant to be more like the process of service or  
10 alternate service where we maybe even glom onto the  
11 procedures and the administration that exists for private  
12 process servers. Let people who are skilled in skip  
13 tracing and finding missing individuals do that in a  
14 nonlegal context, which is -- which is what it is. It's  
15 not a legal thing to try to find the missing person, and  
16 if we could -- I imagine that the people who are in  
17 private process serving now would willingly step up if we  
18 provided a rule that allowed them to do the skip tracing  
19 and then file affidavits or come into court and testify.  
20 So I completely think we should do away with the attorney  
21 ad litem having the duty to find a missing person and  
22 instead go toward another support personnel, which we  
23 already have an existing bureaucracy to handle the private  
24 process servers, why not use them.

25 Secondly, we have another subcommittee of



1 this larger committee investigating the whole issue of  
2 whether citation by publication in the newspaper four  
3 weeks in a row is, in fact, even -- even justifiable as a  
4 way of giving someone notice and whether we ought to go to  
5 the internet or figure out how to get on Google or on  
6 Facebook or whatever. We're not making much progress on  
7 that. There seem to be a lot of differences of opinions,  
8 but there is some process going on about what to do about  
9 citation by publication anyway; and then I wanted to say  
10 that one of the largest areas for citation by publication  
11 is not in search of a res, r-e-s, like Justice Gray was  
12 talking about, but it's status adjudications like divorce  
13 or the parent-child relationship; and there are very  
14 difficult issues, particularly on the parent-child  
15 relationship side, about termination of the parent  
16 relationship and the phantom client; and the existing duty  
17 under the Family Code it appears to appeal all the way to  
18 the Texas Supreme Court on behalf of an absent parent who  
19 may not even be a resident of the United States or may not  
20 even be alive.

21           And so there's a lot of need for us to  
22 re-evaluate the way we handle citation by publication, and  
23 I would rather than -- unlike Lonny, who I owe more than I  
24 can probably ever for the endorsement that he shared, I  
25 think that we ought to start with the rule change that we

1 think makes sense, which may then start a motion to get  
2 the Legislature to change the Family Code in a way that  
3 makes sense, and we've got to get started somewhere.  
4 We're not making much progress. We've had two task forces  
5 now on citation by publication in family law arenas. The  
6 Legislature to my knowledge has not done anything with it,  
7 and so if we can fashion a good solution for civil  
8 litigation here that makes sense and gets out there and we  
9 try it and it's starting to work, it may increase the  
10 chance that we can get the Legislature to amend the Family  
11 Code to a more sensible citation by publication approach  
12 for these status adjudications.

13 CHAIRMAN BABCOCK: Okay. Justice -- Judge  
14 Evans, and then Judge Yelenosky.

15 HONORABLE DAVID EVANS: I would just like to  
16 share that we see in a civil-only docket in a metropolitan  
17 area, what I see on publication and ad litem comes in  
18 three areas. Tax dockets, collection of property taxes by  
19 the taxing authorities. Second is in foreclosure of  
20 properties where the home is vacant. The heirs are  
21 generally described as unknown, and then you see it in a  
22 few personal injury lawsuits where the defendants cannot  
23 be served or located, and they each have their own  
24 particular problem.

25 In the tax docket you're likely to find an

1 empty piece of property with less than 10 percent of the  
2 equity of the house owed to the taxing authority, which  
3 means there's going to be a sale of excess proceeds  
4 conducted and money deposited in the registry of the  
5 court, and the court then under the Property Tax Code  
6 becomes charged with the district clerk in providing  
7 certain notices and dividing that property, and so when  
8 you appoint an ad -- and those cases come with some  
9 publication. Often Junior and Sissy and everybody is  
10 gone, and they have to be located, and quite frankly, we  
11 all wrestled as trial judges on whether to keep them on  
12 once they've noticed them or not. The taxing authorities  
13 that I have observed do not want you to release the ad  
14 litem. The ad litem is the only communication to these  
15 unrepresented, unsophisticated persons in making sure that  
16 they get their excess proceeds after the sale; and if they  
17 don't, they go to the taxing authorities after a two-year  
18 period.

19               So this termination immediately would  
20 greatly hamper those cases. I'll just point that out.  
21 The other one is -- and I assume it happened at some  
22 mortgage bankers seminar. It was declared that whenever  
23 you foreclose you name all of the unknown heirs and then  
24 you get an ad litem appointed and then you go through it.  
25 Once again, all of those proceeds come out of the

1 foreclosure sale. Okay. So they are useful for locating  
2 unknown heirs and make sure the unknown heirs are not  
3 going to assert a title claim, and you can clear that  
4 piece of generally residential property, obviously where  
5 we are.

6           Now, on 244.2 it says that the defendant  
7 cannot -- last sentence, "He makes a report that the  
8 defendant cannot be located or personal service cannot be  
9 obtained," which would indicate to me that once we locate  
10 the defendant he's not -- we have to re-serve them with  
11 personal service; and if that's the implication, I can say  
12 that I have never served a defendant again or required  
13 service again of a defendant once they've been notified  
14 that they had been served by publication. I get pretty  
15 particular about what kind of report I get on how they  
16 were noticed with the -- how they learned of the lawsuit  
17 and what they were provided, but there is no format for  
18 what the ad litem is supposed to deliver and how to  
19 deliver to this unrepresented person, and an answer date  
20 is never there. So it's a pretty tricky situation.

21           Once I think I ordered the United States  
22 government to serve somebody, but they just deserve  
23 different treatment when they come over, the IRS does. I  
24 held them to a little higher standard. They've got better  
25 resources for locating people from what I've observed, and

1 but those are the practical problems of that docket. Now,  
2 in personal injury docket, usually it's some defendant  
3 that doesn't want to be served, doesn't want to -- often  
4 in a language situation, we find a lot of Hispanics will  
5 not accept service, will not appear; and the personal  
6 injury lawyer is in a real bind, because if they take a  
7 default, the policy goes away, but for whatever reason,  
8 and we've seen -- I've seen four of them in the last three  
9 months on a DWOP docket where we had to cite by  
10 publication and we had locate them and they still won't  
11 contact the carrier; and so those are -- that one is  
12 pretty easy to work through, but it's the taxing dockets  
13 and the real estate foreclosure dockets where I think we  
14 see most of them.

15           And I'm not too -- I like the idea of a  
16 report. I like the idea of a content on the report, and  
17 we require reports now, most of us do in our courthouse,  
18 to be filed; and we've got some specific -- pretty  
19 specific orders for each kind of litigation on what you've  
20 got to do when you go out there; but, yes, we hold them on  
21 after we've got notice so they can help us allocate  
22 proceeds on taxes. It just seems to be an expedient way  
23 to handle it. Thank you.

24           CHAIRMAN BABCOCK: Stephen Yelenosky, then  
25 Justice Christopher.

1 HONORABLE STEPHEN YELENOSKY: Just picking  
2 up on some reference to citation by publication, it seems  
3 to me it's nothing more than touching a base, make us feel  
4 good about it, when in reality can anybody point -- maybe  
5 you can. I don't know of anybody who's ever been cited by  
6 publication in 12 years, at least in my experience,  
7 publication in a newspaper, who ever showed up. If  
8 anybody knows of that, great.

9 HONORABLE DAVID EVANS: Not me.

10 HONORABLE STEPHEN YELENOSKY: But then we're  
11 just making ourselves feel good by saying citation by  
12 publication; whereas what we really should just say is we  
13 can't find the person and, therefore, whatever the rule  
14 is, if you're cited by publication, isn't there a longer  
15 period of time?

16 HONORABLE DAVID EVANS: There's longer  
17 periods of time.

18 HONORABLE STEPHEN YELENOSKY: Yeah, longer  
19 period of time. Just take citation of publication out and  
20 give them a longer period of time, because it's a joke  
21 that anybody now or in the last 10 years, let's say, is  
22 going to find themselves cited in a newspaper given what  
23 we know about how people get their information. The other  
24 thing that's a joke, of course, is posting it in the  
25 courthouse. Do we have that anymore? I mean, most people

1 don't even know where the courthouse is, so that's really  
2 just a feel good thing. So I think strongly we should  
3 stop playing like we're actually citing somebody when  
4 we're not.

5 CHAIRMAN BABCOCK: Justice Christopher.

6 HONORABLE TRACY CHRISTOPHER: I think we  
7 have to remember where the complaint came here. The  
8 complaint came in a fraud case. All right. And sort of  
9 what is the point of getting a judgment against unknown  
10 people in a fraud case? Or, you know, somebody that you  
11 can't find. I mean, whenever someone came in after  
12 service by publication in a regular, you know, personal  
13 injury or commercial dispute, I'm like you have to pay the  
14 costs of the ad litem. What are you going to get with  
15 this judgment? If you don't know where the person is, how  
16 are you ever going to be able to execute your judgment?  
17 So that tended to make a lot of people go away when I  
18 asked them, you know, "What's the point?"

19 I do think in the tax situation, in the  
20 unknown heirs in probate court, in the foreclosure of real  
21 property where you have a res, you still need the attorney  
22 ad litem, and I think it's useful to have them. You know,  
23 I mean, there's -- there are a number of instances and the  
24 ad litem will say, "I am better to explain to somebody,"  
25 like the friend of the friend of the friend that if we

1 find this person and they answer this lawsuit, they might  
2 end up getting some money from the, you know, tax sale of  
3 the property for the house or whatever versus the  
4 plaintiff doesn't have that same incentive to go out and  
5 explain things, especially in a tax case where the money  
6 ultimately, you know, goes back to the taxing authorities.  
7 They don't have that same incentive to try and find the  
8 heirs.

9                   So ad litem say it's better that they have  
10 a lawyer, who's, you know, allegedly on the side of the  
11 defendant, making that explanation to them. I mean, it  
12 could work in the reverse, too, obviously if you have a  
13 lawyer who's -- and it's a personal injury lawsuit or a  
14 commercial lawsuit or something like that, there's no  
15 upside for the defendant to be found in those cases. So,  
16 but unknown heirs in a probate situation and the tax and  
17 the foreclosures, you know, there's a potential upside,  
18 and I just would -- if we change the rule, I wouldn't  
19 change it for those types of cases.

20                   CHAIRMAN BABCOCK: Richard Munzinger.

21                   MR. MUNZINGER: My only thought is that  
22 the -- I have two thoughts. One, by publication is  
23 largely meaningless. In El Paso, just by way of example  
24 the --

25                   HONORABLE STEPHEN YELENOSKY: Could you



1 speak up?

2 CHAIRMAN BABCOCK: Richard, they want you to  
3 speak up.

4 MR. MUNZINGER: In El Paso, if you publish  
5 in the newspaper, you have a city of three quarters of a  
6 million people, and the daily newspaper circulation has  
7 dropped from 100,000 to 20,000. There are lots of reasons  
8 for it, but to believe that anybody is going to be given  
9 notice through the daily newspaper is silly. We have a  
10 weekly that probably has more circulation than the daily,  
11 so from the standpoint of citation by publication, my  
12 personal belief is that I join those who think that that's  
13 silly. It's different than it was when these ideas were  
14 first formulated.

15 The other thing that is different is the  
16 change in the availability of information regarding the  
17 location of various people and the ease with which it can  
18 be obtained, not inexpensively but easily, more easily  
19 than it was many, many years ago. Today you can hire  
20 somebody and spend several hundred dollars and look at  
21 every damn database in every 50 states on everything.  
22 Does Richard Munzinger own a boat in Minnesota? You can  
23 answer that question in three minutes, and if you can't  
24 find Richard Munzinger but there is a Richard Munzinger  
25 that owns a boat in Minnesota, is that the Richard

1 Munzinger you're pursuing?

2                   The question of diligence to me is more at  
3 the heart of this if you're truly interested in getting  
4 due process. The point of due process in the fraud case,  
5 I agree with you, who cares, I mean, you know, but if  
6 there is a res, if there is property, that's a completely  
7 different story. I joked years ago that I wish my dad  
8 would have been a ditch digger because there was a Texas  
9 statute that gave him a section of land on each  
10 alternating mile of ditch that he dug in certain areas  
11 west of the Pecos. My dad was not a ditch digger  
12 unfortunately, and I don't have that section of land, but  
13 let's pretend he was and I have a long lost brother or  
14 something, and he owns his interest in that section of  
15 land, which is now pumping oil and gas like it did 50  
16 years ago.

17                   Now you're talking about something of value,  
18 and so the question of diligence here and taking advantage  
19 of the modern technologies that are available is  
20 important, and so that -- to me that is -- raises an  
21 importance of a guardian ad litem or someone to ensure  
22 that some realistic, real step has been taken to locate a  
23 person who has an interest in property which is the  
24 subject matter of the judgment. These are real rights  
25 that are being determined and because I have a nephew or a

1 cousin or somebody who listened to his own drummer and  
2 moved to Seattle and smokes funny things and lets his hair  
3 grow, but by God, he's a millionaire, and his right to the  
4 property came from the same person that my right to the  
5 property came from, but we don't know where he is.  
6 Chances are you can find him if you spend the money and  
7 look for him today, and to me that's the problem that  
8 needs to be addressed, and that's why there may be a need  
9 for an attorney ad litem.

10 I am not a fan of letting judges do these  
11 things with attorneys. The judges are busy. They have a  
12 lot on their plate. They come in and lawyer says, "I want  
13 to do this."

14 "Well, what have you done?"

15 "Well, I looked for him, and I couldn't find  
16 him." I know the lawyer. I've practiced with him for 25  
17 or 30 years. I trust him. I sign it. Rights are being  
18 resolved, or adjudicated arguably, or certainly affected  
19 by that transaction, and I don't believe that that is  
20 satisfactory or sufficient. I do agree that AAL should  
21 not represent the defendant and fight for the defendant,  
22 but to determine whether there has or has not been due  
23 diligence, I think it is important if there is a res  
24 involved, and I think that the ability to locate people  
25 today is far, far different than it was when these

1 statutes and these concepts were formulated.

2 CHAIRMAN BABCOCK: Jim, then Pete, and then  
3 Judge Wallace.

4 MR. PERDUE: I was just curious from Judge  
5 Evans' comment from the judges. This complaint came from  
6 somebody out of a fraud case?

7 PROFESSOR CARLSON: I believe that's  
8 correct.

9 MR. PERDUE: In the PI cases that are,  
10 quote, publication by service, what happens with that?

11 HONORABLE DAVID EVANS: It was going up  
12 against a DWOP situation. They've been trying to locate  
13 the defendant or get the defendant to accept service, and  
14 they're -- they're either going to be -- then they  
15 disappear with a -- you might have had one or two orders  
16 to substitute service in the file. They still hadn't been  
17 able to effectuate a service that they're comfortable  
18 with, and they certainly hadn't gotten an answer in that  
19 would invoke the coverage. I mean, that's the whole issue  
20 that occurs in the management of the docket, and we'll  
21 give the lawyer enough time to -- but eventually you say  
22 it's on DWOP, got to put it on publication. Let's have an  
23 attorney ad litem and see if we can help locate this  
24 person.

25 Some of them are traveling back and forth

1 between other countries, and you end up with this  
2 publication judgment, and you generally give a lot -- I  
3 give a lot of leeway to make sure that the defendant gets  
4 the notice and the case can be prosecuted, but that's the  
5 only area that I see it in. And I have not seen it in a  
6 fraud case at this point. I don't think I would grant a  
7 judgment. I think if I -- I'm sure, like Judge  
8 Christopher, if I saw an application for publication on a  
9 fraud case and they said they couldn't locate them, I  
10 would want to see the material on due diligence that they  
11 took to try and locate the person.

12 MR. PERDUE: I can say with confidence that  
13 I have yet to been paid on a contingency fee on a  
14 defendant who was served by publication who never showed  
15 on a default judgment.

16 CHAIRMAN BABCOCK: But you're hopeful.

17 MR. PERDUE: Those are not profitable  
18 retentions, so I'm curious about if they were hourly on  
19 the fraud case and now they have a complaint that the  
20 expenses are higher than they wanted to be, but it sounds  
21 like -- I mean, I'm just going -- I've got no familiarity  
22 with the concept of this in PI at all. It makes sense in  
23 a res situation in some form, but there may be a  
24 distinction because when Judge Gray started the  
25 conversation I agreed with him totally. The concept of

1 service needs to be distinguished here. I mean, it's hard  
2 to get off the grid, and every defendant that I haven't  
3 been able to find, every plaintiff I haven't been able to  
4 find, either side of the V is either because they're dead  
5 or in jail. It's hard to get off the grid.

6 CHAIRMAN BABCOCK: Pete, and then Judge  
7 Wallace.

8 MR. SCHENKKAN: It sounds to me listening to  
9 this discussion as though we have a series of different  
10 discrete problems where we are wrestling with who should  
11 do what to try to find someone; and perhaps the answers  
12 are not the same in each of these different contexts; and  
13 in some of the contexts, the changes in our technology,  
14 the social media and the ability to relatively rapidly,  
15 and question mark about how expensively, find anyone  
16 anywhere if they are still alive, would suggest a  
17 different approach altogether than making this the  
18 responsibility of a trial court judge and the lawyer  
19 representing the plaintiff; and I'm thinking in particular  
20 of the -- of the tax situation.

21 I have seen and, in fact, recovered money  
22 myself from notice by publication by the comptroller in  
23 the newspaper. What is it, every year or so, there is the  
24 list of money that's going to be forfeited to the state  
25 because it hasn't been claimed from some bank account, and

1 every once in a while by sheer random chance I look at  
2 that or someone I know says "your name" -- or at least  
3 because of my unique very unusual last name somebody  
4 related to you is in there, but at least for the tax ones  
5 wouldn't a more sensible approach be to require the taxing  
6 authority to spend the money on the social media search  
7 and demonstrate that in the due diligence to the -- to the  
8 district court?

9                   HONORABLE DAVID EVANS: Well, they can do  
10 that, but remember, it's just going to come out of the  
11 equity of the house. It doesn't come out -- there's  
12 nothing -- there is nothing that comes out of tax  
13 litigation that doesn't come out of the taxpayers' wallet.  
14 Court costs, everything comes out.

15                   MR. SCHENKKAN: And that would then be --  
16 the question is whether the requirement of the expense to  
17 demonstrate a certain kind of social media search  
18 diligence at whatever cost that has if it's performed by a  
19 taxing authority that has lots of such cases they  
20 presumably get the bulk rate or indeed perhaps the state  
21 of Texas should have a centralized process for that on  
22 behalf of all the taxing authorities. I'm just wondering  
23 if there isn't an approach to this which is really not a  
24 Texas Supreme Court as the ideal institution to try to  
25 solve by making rules. Yeah, and maybe the answer is no.

1 I mean, I -- you started -- I think the Chief started this  
2 or you did by telling us that we now have amended the  
3 rules to require each lawyer to have competence in social  
4 media, and I was thinking I probably need to expedite the  
5 process of handing in my law licenses. I'm never going to  
6 get there. But this is a solvable problem with what I  
7 think is -- I gather is a much more modest amount of  
8 money, especially if it was done in bulk.

9 CHAIRMAN BABCOCK: Judge Wallace, and then  
10 Justice Christopher.

11 HONORABLE R. H. WALLACE: First of all, I  
12 agree with just do away with service by publication. I  
13 think that's a waste of time. I remember sitting in  
14 property classes of Angus McSwain at Baylor, in medieval  
15 times when they would pick up a handful of dirt and a twig  
16 and say, "I bequeath you black acre." That's about what  
17 citation by publication has come to. Just go to the step  
18 of we can't find them, what do we do next.

19 It's an interesting idea, I thought, about  
20 appointing someone like a process server as opposed to a  
21 lawyer, but there are some lawyers who have a niche  
22 practice and are very good at finding people through  
23 social media and all kinds of stuff. We know who they  
24 are, and sometimes we can appoint them. If we can get  
25 around the Legislature's mandate that we appoint attorney



1 ad litem from a wheel, because then you may or may not  
2 have somebody. But there are -- there are lawyers who do  
3 this, and we know who they are, who are very good at it,  
4 and you can bet they're going to do a good job of trying  
5 to locate somebody.

6 CHAIRMAN BABCOCK: Okay.

7 HONORABLE R. H. WALLACE: And they're  
8 usually very -- I've not encountered any that I felt like  
9 were just abusing the system for, you know, generating a  
10 fee.

11 CHAIRMAN BABCOCK: Okay. Justice  
12 Christopher, but before you comment, what's become of the  
13 case that challenged the constitutionality of the ad litem  
14 wheel? Isn't it in your court?

15 HONORABLE TRACY CHRISTOPHER: It was, and it  
16 got dismissed on some technicality, if I remember  
17 correctly.

18 CHAIRMAN BABCOCK: The trial judge found --

19 HONORABLE TRACY CHRISTOPHER: So it is not  
20 decided.

21 CHAIRMAN BABCOCK: The trial judge found it  
22 was unconstitutional.

23 HONORABLE TRACY CHRISTOPHER: Right.

24 CHAIRMAN BABCOCK: Okay. Anyway, I'm just  
25 curious since Judge Wallace brought it up. Yes, sir.

1                   HONORABLE R. H. WALLACE: I'd just add that,  
2 you know, also in that same deal the Legislature required  
3 appointing mediators from a wheel, and the practicing bar  
4 has learned to deal with that. They just agree on the  
5 mediator, agree on who the mediator is. But I don't know  
6 that you can do that.

7                   CHAIRMAN BABCOCK: Justice Christopher.

8                   HONORABLE TRACY CHRISTOPHER: Well, just to  
9 tell you what we do in Harris County, and I sent this  
10 information to the sub-subcommittee that was working on  
11 this. We have a separate wheel for our tax cases. The  
12 tax ad litem who want to be on that wheel have to go to a  
13 certain number of hours of training before they can get on  
14 that wheel; and there is a list of steps they have to take  
15 in connection with trying to find an unknown heir on the  
16 property and then they do a report to the judge about, you  
17 know, what steps they've taken; and in Harris County, if  
18 they actually find somebody, they -- you know, we get a  
19 second service to that person with the, you know, papers  
20 of the lawsuit. So our county I think provides probably  
21 more process for the unknown heirs in a tax case than is  
22 required by the rules. I'm not in favor of less, which is  
23 the way I see this rule.

24                   CHAIRMAN BABCOCK: Okay. Richard.

25                   MR. ORSINGER: I wanted to make two points.

1 One is that if we dispense with citation by publication,  
2 we need to fold another form of alternative service that  
3 requires an investigation into the background or the  
4 location of the absent defendant, and maybe that's a  
5 better place or better way to handle it than citation by  
6 publication, is create another subchapter of alternate  
7 service and the criteria for it.

8           The other point I wanted to make which  
9 hadn't been discussed is that I noticed that in the rule  
10 change the requirement of a statement of the evidence of  
11 proof as signed by the judge was eliminated, and I don't  
12 know if that was a conscious thing or whether it was just  
13 a matter of drafting, but in the existing rule when you  
14 take a default by citation by publication, you have to  
15 type up a written statement of the evidence and then the  
16 judge has to sign it, and it goes into the district  
17 clerk's file where you can see it easily if you're looking  
18 for the judgment, and I think that that's beneficial. I  
19 know that -- I haven't done this in decades; but when I  
20 used to do them, they were somewhat perfunctory; but  
21 they're better than nothing, because there may or may not  
22 be a record made at the prove-up of the default; and we  
23 just have no basis if you ever come in after the fact to  
24 figure out anything. You have no basis to decide what  
25 evidence was presented, especially if it was an

1 unliquidated damage claim, which requires specific proof  
2 of the injury suffered; and so I think that that's  
3 beneficial in a case where there's a default and no notice  
4 to the other side, is to continue that idea of a  
5 requirement of the statement of the evidence signed by the  
6 judge so that the judge isn't going to do -- endorse  
7 something ridiculous and then we have at least a semblance  
8 of a basis to figure out whether there's a merit to the  
9 case if it's being reviewed two years later on a motion  
10 for new trial or four years later on a bill of review.

11 PROFESSOR CARLSON: Agreed.

12 CHAIRMAN BABCOCK: Is there sentiment -- is  
13 the majority sentiment here to do away with the ad litem  
14 concept and join the majority of states in leaving  
15 Arkansas behind?

16 MR. ORSINGER: Well, Chip, let me say that  
17 there's two roles for the ad litem. One is defend the  
18 merits. The other one is to find the absent defendant.

19 CHAIRMAN BABCOCK: Right.

20 MR. ORSINGER: So we probably ought to vote  
21 on that separately, because the point you just made is  
22 does the ad litem defend the merits, which still left the  
23 question of whether the ad litem searches for the absent  
24 defendant.

25 CHAIRMAN BABCOCK: Okay.

1 HONORABLE JEFF BOYD: Chip, can I just add?

2 CHAIRMAN BABCOCK: Yeah.

3 HONORABLE JEFF BOYD: I think there's a  
4 third, which I was curious to ask whether the subcommittee  
5 explored, which is not to independently search for the  
6 absent defendant, but to be the opposing advocate who  
7 ensures that the plaintiff establishes the record to show  
8 that they diligently searched for the absent defendant.

9 MR. ORSINGER: Yes.

10 HONORABLE JEFF BOYD: I got appointed -- I  
11 was probably a second year lawyer, got appointed to be ad  
12 litem for an alleged punitive father whose whereabouts  
13 were unknown in a termination case, and my role was to  
14 show up and to cross-examine --

15 MR. ORSINGER: Right.

16 HONORABLE JEFF BOYD: -- the plaintiff and  
17 to get the lawyer to explain to the court everything they  
18 had done to find the guy, but I didn't think it was my  
19 role to show that there was no merit-based -- no  
20 substantive basis to terminate his rights, nor to go find  
21 him myself. So I don't know if the committee explored  
22 that as an alternative to putting -- I was a little  
23 surprised to hear the committee's thinking about making  
24 that ad litem be the one to go find the person as opposed  
25 to just make sure the record establishes that the

1 plaintiff went and did everything they should have done to  
2 find them.

3 PROFESSOR CARLSON: That is an alternative.  
4 I was one of the people that liked the rule the way it is,  
5 but I think most of the committee did agree that it's not  
6 realistic that an attorney can defend an -- an ad litem  
7 can effectively defend an absent client.

8 HONORABLE JEFF BOYD: Right.

9 PROFESSOR CARLSON: But there is case law in  
10 Texas that says that is the obligation of the attorney ad  
11 litem. It's not just diligence. It's the merits as well.

12 CHAIRMAN BABCOCK: Okay.

13 PROFESSOR CARLSON: As best you can.

14 CHAIRMAN BABCOCK: Judge Peeples. Yeah.

15 HONORABLE DAVID PEEPLES: Several points. I  
16 want to -- don't look at it, but there's one sentence in  
17 the subcommittee's proposal that seems to me ought to be  
18 thought about. An oral hearing before you get to  
19 publication, an oral hearing on the motion must be  
20 conducted by the court and a record made, and that's  
21 before there's authorization to serve by publication. Let  
22 me just make two or three points about that fact. For tax  
23 cases we've got Rule 117a, which goes on for three and a  
24 half pages about service in tax cases, three and a half  
25 pages in this book.

1           Point two, it is easier for a plaintiff to  
2 win a case when there's no real opposition. We know that;  
3 and so therefore, the incentive on the plaintiff to really  
4 track someone down, it may not be there, because it's just  
5 easier to get what amounts to a default judgment; and so  
6 the incentives are not there to really do your homework on  
7 something.

8           And the third point I want to make is -- and  
9 I've read a lot of these U.S. Supreme Court cases  
10 post-Mullane, and almost all of them really focus on what  
11 information did you know or could you have easily found,  
12 reasonably found, before you went to citation by  
13 publication; and so on that, I would make a couple of  
14 points. In a family law case, unless a child was  
15 conceived in a one night encounter where sometimes the  
16 woman doesn't even know the guy's name, lay those aside,  
17 usually there have been relationships with any -- any  
18 length at all, the woman who is trying to cite a guy by  
19 publication knows some of his relatives probably. Maybe  
20 where he worked, who his friends are, and so if the judge  
21 were to -- before authorizing citation by publication were  
22 to say, "Get the woman under oath and ask some questions  
23 about what do you know about this guy," you would find out  
24 something and then there would be, I think, an alternative  
25 service on somebody over 16, where he used to work and so

1 forth. That might not notify the guy, but it's certainly  
2 better than publication. Certainly better than  
3 publication in a newspaper.

4           Now, the other kind of case is the tax case  
5 or the foreclosure where they're trying to quiet title;  
6 and those cases the taxing authority or the oil and gas  
7 operator, whoever it might be, doesn't have any  
8 relationship with the person, unlike a family law case,  
9 but they may have some scraps of paper that have, you  
10 know, names and addresses, last location and so forth; and  
11 if that's the situation, rather than publication, sending  
12 notice to the last known address with, you know, "please  
13 forward," that might not get there, because people are  
14 very mobile, but it's better than publication.

15           So, I mean, I just can't think of any  
16 situation where publication is really helpful, and the  
17 Family Code did something very good a good long time ago.  
18 It set up a -- and Richard I think would know this better  
19 than I, a child -- a parentage registry. Here's how it  
20 works. Mr. Smith thinks he might have gotten a girl  
21 pregnant. If he wants to be the father of that girl, of  
22 that child, if and when there's birth he's got to put his  
23 name in the registry and make it easy to find him; and if  
24 he didn't do that it's just a lot easier to cite that  
25 person. Now, Richard, I'm sure it's more complicated than



1 that, but that's what they did for out of wedlock births  
2 when the mother wants to cite a guy; and, you know, if he  
3 didn't put his name in the registry, he's pretty much out  
4 of luck.

5               So, I mean, publication, even if everybody  
6 read the newspaper these days, which is not the case, it's  
7 not very helpful; and in the family situation they usually  
8 know some relatives or work history; and in the tax, et  
9 cetera, situation, there's usually some paperwork; and in  
10 either of those situations you can do better than  
11 publication; and we ought to be looking at that with some  
12 judicial scrutiny before instead of after the fact.

13               CHAIRMAN BABCOCK: Okay. Judge Estevez.

14               HONORABLE ANA ESTEVEZ: And I apologize for  
15 being late, so hopefully I'm not saying something that has  
16 already been said, but regarding the service by  
17 publication, I agree with most of the people or maybe all  
18 of the people that it is not effective. I was actually --  
19 I went to look at the publication board at the courthouse  
20 for the very first time, and it was so -- I don't know who  
21 would even go to look. So obviously it's just a total  
22 waste of time, and it's a total waste of money.

23               Now, if we kept it, I do believe there is a  
24 huge value in the attorney ad litem. I was appointed  
25 attorney ad litem years ago, and whether I knew what my

1 role was or I didn't, I found the defendant. So I don't  
2 know if that's what I was supposed to do, but I felt  
3 really good about doing that, and then we finished out  
4 whatever the lawsuit. It probably ended up with an agreed  
5 judgment is what I recall from 18, 19 years ago, but --  
6 but I do -- the tax cases are a huge concern for me. I  
7 don't -- I don't know with the other jurisdictions, but I  
8 have -- they come -- the county comes, they want to  
9 foreclose, get a sale, we get a sale, but then I've got a  
10 couple of cases I have 40 to \$80,000 that is excess  
11 proceeds; and if -- the county is allowed to keep that  
12 money. I don't know that people realize that, but if they  
13 have -- if they've never found them and an attorney ad  
14 litem, even if they represented them, they can keep it.  
15 They don't have to send it to the state. The actual  
16 county does, so there we're just seeing that there's too  
17 much of an incentive to kind of not try so hard. Not that  
18 they do that, but I -- I'm going to agree with Richard in  
19 everything he said.

20 I think that we have to protect everyone as  
21 much as we can because this is a huge due process, and  
22 then I just think that it's antiquated. What we needed --  
23 we do need to do a service by publication, but our service  
24 by publication needs to be a service by Facebook, and all  
25 law things need to be on a Facebook page or something like

1 that that everyone can go in the public, because if I was  
2 miss curious woman -- I don't want to state somebody's  
3 name, but if they just wanted to know what was going on in  
4 Amarillo, Texas, so every day she just got on the post on  
5 Facebook where everything had to be posted she probably  
6 within five boards of "guess who's on there," it would get  
7 back to whoever was. I think it's not that it's not --  
8 it's that we don't use newspapers. That's our problem and  
9 that nobody reads the paper, but people do read the  
10 internet, and there is a better way of doing this that  
11 would be effective the same as it was way back when they  
12 started, and so I think that the change needs to be there.  
13 It's not necessarily just -- I mean, I've had them do a  
14 substitute service by Facebook because "I don't know where  
15 they are, but they're on Facebook" and I go "Well, I'll  
16 tell you what. You're going to put it on his messenger  
17 and then you're going to send it to me that shows the  
18 little thing that shows it was opened." And that was good  
19 enough for me for alternative service, so I think there's  
20 answers there. If we do keep it, I just think you need  
21 the attorney ad litem or you're not really taking care of  
22 people's due process.

23 CHAIRMAN BABCOCK: Frank.

24 MR. GILSTRAP: I think I just want to say  
25 that I think Judge Estevez has hit the nail on the head.

1 We're saying don't serve by publication because nobody  
2 reads the newspaper, but in another area we're talking  
3 about expanding service by publication on the internet.  
4 Shouldn't we look at that before we diss service by  
5 publication today?

6 CHAIRMAN BABCOCK: Elaine.

7 PROFESSOR CARLSON: Yeah, we weren't asked  
8 to come up with alternatives to service by publication,  
9 because that's another subcommittee, and constructive  
10 service does not have to be by publication. That's just  
11 what Texas happened to have adopted. Constructive service  
12 is giving the defendant notice in some method that they're  
13 charged with reading it, even though it's not sent  
14 directly to them or served on someone on their behalf, so  
15 it could be service by internet. I sent Richard, who  
16 chairs that subcommittee, on alternative to service by  
17 publication. There is several states -- I think there  
18 were three or four in that law review article that have  
19 adopted some ability to serve through social media with  
20 restrictions. So this committee was really charged with  
21 however we're going to serve a defendant constructively --  
22 we happen to do by publication under our current rules --  
23 should there be an attorney ad litem appointed and at what  
24 point and what should be the scope. So whether we're  
25 putting the cart before the horse --

1 CHAIRMAN BABCOCK: Who knows.

2 PROFESSOR CARLSON: Who knows.

3 CHAIRMAN BABCOCK: But Richard has a good  
4 point. We ought to talk about the role of the attorney ad  
5 litem. Number one, do people here believe that the  
6 attorney ad litem should defend the merits of the suit?

7 PROFESSOR CARLSON: Right.

8 CHAIRMAN BABCOCK: Is that something we --

9 MR. ORSINGER: That's really important to  
10 decide. Yeah.

11 CHAIRMAN BABCOCK: Okay. So everybody that  
12 thinks the attorney ad litem should defend the merits of  
13 the suit, raise your hand.

14 HONORABLE TRACY CHRISTOPHER: Can I ask a  
15 question before we -- before we do that.

16 CHAIRMAN BABCOCK: Sure.

17 HONORABLE TRACY CHRISTOPHER: Before we take  
18 a vote. I mean, defend the merits of the suit as in call  
19 witnesses or defend the merits of the suit as in you look  
20 at the plaintiff's pleading and see if there are any  
21 defenses based on the pleading?

22 CHAIRMAN BABCOCK: Well --

23 HONORABLE TRACY CHRISTOPHER: Like statute  
24 of limitations. You know, that's the biggest one that an  
25 ad litem can raise on behalf of a missing defendant.

1                   CHAIRMAN BABCOCK: Yeah. Somebody said I  
2 think there are cases, aren't there, that impose that duty  
3 on the attorney ad litem and --

4                   HONORABLE TRACY CHRISTOPHER: Well, unless  
5 the court lets them out earlier.

6                   CHAIRMAN BABCOCK: Yeah.

7                   HONORABLE TRACY CHRISTOPHER: Which most of  
8 the times they do.

9                   CHAIRMAN BABCOCK: But what's the rule --  
10 what duties does the rule today impose?

11                  HONORABLE TRACY CHRISTOPHER: I mean, to me  
12 it is to defend based on the pleading.

13                  CHAIRMAN BABCOCK: Okay.

14                  HONORABLE TRACY CHRISTOPHER: And, you know,  
15 so, for example, there's this big dispute going on in  
16 Harris County about some undiscover -- or in Fort Bend  
17 County about some undiscovered -- or a graveyard that was  
18 discovered on Fort Bend ISD's property while they were  
19 starting to do some new construction. Well, there's all  
20 sorts of stuff that has to be done with old graves.

21                  CHAIRMAN BABCOCK: Yeah.

22                  HONORABLE TRACY CHRISTOPHER: And, I mean,  
23 you know, that's sort of the classic unknown heirs; and to  
24 me it would be good for a lawyer to look at the law,  
25 understand the law, and make the argument to the judge

1 that, you know, this is what has to be done with respect  
2 to these graves versus making the judge do it on his or  
3 her own. I mean, because somebody has to do it in that  
4 kind of a situation, and to me I'd rather see the ad litem  
5 do it and have that representation.

6 CHAIRMAN BABCOCK: Okay.

7 HONORABLE TRACY CHRISTOPHER: I don't know  
8 what happened in this fraud case. I mean, that just  
9 strikes me as really weird.

10 PROFESSOR CARLSON: Apparently -- and I  
11 think it was an electronic fraud case, and so the person  
12 had a real hard time finding the defendant because of the  
13 electronic fraud. I wish Kennon was here because she kind  
14 of conveyed the underlying facts to us.

15 CHAIRMAN BABCOCK: Wasn't Kennon supposed to  
16 be here?

17 HONORABLE JANE BLAND: The State Bar rules  
18 committee is meeting today as well, and I think she's  
19 involved in that committee.

20 CHAIRMAN BABCOCK: Richard.

21 MR. ORSINGER: A way to accommodate Justice  
22 Christopher's suggestion is to leave the court with the  
23 power or the discretion to appoint an ad litem in the  
24 appropriate case, not every case. Right now it's required  
25 in all cases, but we could give the court the power to

1 appoint in -- on good cause shown or something like that,  
2 and then those difficult cases that really deserve it get  
3 it and the rest of them don't.

4 CHAIRMAN BABCOCK: Okay. I was following  
5 your suggestion --

6 MR. ORSINGER: Yeah.

7 CHAIRMAN BABCOCK: -- which I thought was a  
8 good one, to get a sense of the committee as how many  
9 people thought that the -- the ad litem should be retained  
10 as part of this rule. You know, regardless of what the  
11 scope is, whether it's -- whether it's depend on the  
12 merits in total or just review the pleadings or whatever  
13 the law is today, should we retain that or should we  
14 abandon it, and so everybody who is in favor of retaining  
15 it, raise your hand.

16 MR. GILSTRAP: For all purposes?

17 PROFESSOR HOFFMAN: For at least some  
18 purpose.

19 MS. CORTELL: Mandatory in all purposes?

20 HONORABLE ANA ESTEVEZ: No, just any  
21 purpose.

22 CHAIRMAN BABCOCK: Whatever purpose.

23 PROFESSOR CARLSON: Are we going to vote --

24 CHAIRMAN BABCOCK: Whatever the status quo  
25 is.



1                   PROFESSOR CARLSON: So we're not going to  
2 vote separately on scope?

3                   MR. MUNZINGER: I don't believe everybody  
4 understood what they were just voting on. I certainly did  
5 not. Could you restate it and ask for a second vote,  
6 please?

7                   CHAIRMAN BABCOCK: In a minute I'm going to  
8 get Orsinger, who is much more learned, as you know, than  
9 any of us to restate it better.

10                  PROFESSOR CARLSON: You mean educated and  
11 inadequate?

12                  CHAIRMAN BABCOCK: My thought was we had the  
13 status quo, and there's a difference of opinion about what  
14 that is, but there is certainly the status quo is that the  
15 ad litem defends on the merits to some degree. Do we  
16 agree on that or not? Is that right, Elaine?

17                  PROFESSOR CARLSON: That's how I read the  
18 cases, and that's how the State Bar committee read the  
19 cases.

20                  CHAIRMAN BABCOCK: Okay. So we're  
21 proceeding with the assumption that there is some duty of  
22 the ad litem to defend on the merits, and Justice  
23 Christopher says it may be limited. Some people may think  
24 it's not so limited, but that concept of defending on the  
25 merits, do we think is that a good idea or a bad idea?

1 HONORABLE STEPHEN YELENOSKY: In some  
2 circumstances.

3 CHAIRMAN BABCOCK: Judge Wallace.

4 HONORABLE R. H. WALLACE: Well, I know what  
5 the rule says, but as a practical matter in my experience  
6 the vast majority of the cases they do not defend on the  
7 merits. Like the tax cases, they come in and say what  
8 they've done to try to find them, and they've either found  
9 them or they haven't, but they don't defend on the merits.

10 CHAIRMAN BABCOCK: Yeah, Judge Evans.

11 HONORABLE DAVID EVANS: They review the  
12 pleadings to see if there's defects in the notices that  
13 were sent out. It depends on where you are in the tax  
14 process. If you're on distribution of excess proceeds,  
15 you've got different duties of the clerk to make a  
16 reasonable search for the people to give notice to excess  
17 proceeds, and so it's all up and down the line at least in  
18 that, but here's what they do do in the sense of a  
19 defense. They become specialists in it. They know which  
20 cities overcharge mowing maintenance fees. Do you know  
21 how expensive it is to get your yard mowed in Fort Worth  
22 if you're a defaulting taxpayer? It's the damndest thing  
23 you've ever seen in your life, and, you know, the judge is  
24 sitting there. He knows the lien is no good, that it's  
25 unreasonable probably to try to -- you have this every 90

1 days this docket comes through. Well, there's these ad  
2 litem that come through, and they just go over to the  
3 taxing authority and say, "You're not going to stick these  
4 people, unknown people, with this lien. That money is  
5 going to go through." This is taxpayer money for people  
6 who many times are just served at the residence that got  
7 foreclosed.

8 CHAIRMAN BABCOCK: Judge Peeples.

9 HONORABLE DAVID EVANS: I mean, it's bad,  
10 and so they do defend in that sense.

11 HONORABLE R. H. WALLACE: That's --

12 HONORABLE DAVID EVANS: The only thing I  
13 want to say about Richard is -- one thing I want to say,  
14 you've suggested that somebody else could go locate these  
15 people, a specialist. I would much prefer and do hire --  
16 appoint an ad litem and then give them authority to hire a  
17 skip tracer, and I'd rather have them do that than I have  
18 to employ the skip tracer and check out a skip tracer.

19 CHAIRMAN BABCOCK: Good point. Judge  
20 Peeples.

21 HONORABLE DAVID PEEPLES: Here's a way to  
22 phrase the question for the body: Are you for or against  
23 the current provision of Rule 244, which requires the ad  
24 litem to defend the lawsuit, a rule which has stood  
25 unchanged since 1941, nine years before Mullane was

1 decided, which was the minority view of a few southern  
2 states?

3 PROFESSOR CARLSON: Tell me how you really  
4 feel.

5 CHAIRMAN BABCOCK: Well, how can we improve  
6 on that?

7 MR. ORSINGER: Why do you even need to vote  
8 on that?

9 CHAIRMAN BABCOCK: We don't need to vote on  
10 it.

11 MR. ORSINGER: Yeah. He wins by default.

12 HONORABLE DAVID PEEPLES: Trying to be  
13 factual.

14 CHAIRMAN BABCOCK: Stephen Yelenosky.

15 HONORABLE STEPHEN YELENOSKY: Well, I would  
16 formulate it -- although I'm sure Richard could do it  
17 better and I feel terribly inadequate even before I say  
18 it, but --

19 MR. ORSINGER: Please.

20 HONORABLE STEPHEN YELENOSKY: -- how about a  
21 vote on whether or not who would vote for disallowing  
22 representation on defense in any circumstance because if  
23 that prevails then we don't need to go to anything else,  
24 but if it doesn't prevail then we go to limitations.

25 CHAIRMAN BABCOCK: Okay. Professor Hoffman.

1                   PROFESSOR HOFFMAN: At the risk of further  
2 suggesting how the vote might be framed, I see two  
3 questions. One, should the -- if there's going to be an  
4 AAL, should the AAL have the duty to have find missing  
5 persons, which is clearly part of some sense of that. My  
6 own view is, as I said before, the answer to that is no.

7                   CHAIRMAN BABCOCK: Right.

8                   PROFESSOR HOFFMAN: The second question is  
9 should the AAL have the duty on the merits and then one  
10 could limit it from there, such as, you know, as Justice  
11 Boyd was talking about, a duty to confirm the plaintiff  
12 acted diligently. That seems to me a duty that an AAL  
13 could represent someone in doing. It could be limited to  
14 looking at, you know, pleading sufficiency; and so my  
15 suggestion would be to formulate it around -- because I  
16 think that might give more information.

17                   I will say we've probably had a more robust  
18 discussion here about the role of AALs since any time  
19 since 1940 would be my guess, and so both the Court and  
20 the public may benefit from kind of refining our  
21 conversation down to what our views are around those  
22 duties

23                   CHAIRMAN BABCOCK: This committee was formed  
24 I think in 1939. I'm pretty sure it didn't discuss this  
25 at all.

1                   MR. ORSINGER: Chip, I think we need to vote  
2 on how to frame the vote.

3                   CHAIRMAN BABCOCK: Yeah, let's not do that.  
4 We've got a little bit of a scheduling problem here.

5                   PROFESSOR CARLSON: Yeah, I know.

6                   CHAIRMAN BABCOCK: There were some people  
7 that wanted this item to be first on the docket because  
8 they needed to be here in the morning, but now they're not  
9 here and then we have other people who are here for the  
10 debate on the discovery rules, the ESI rules, particularly  
11 electronic stored information, electronically stored  
12 information, and then we've got somebody on the next  
13 agenda item that needs to be at 1:00, so how are we going  
14 to solve this problem?

15                  MR. ORSINGER: Let's take a quick vote.

16                  CHAIRMAN BABCOCK: Huh?

17                  MR. ORSINGER: Let's take a quick vote on  
18 the grounds that you -- I hate to just drop the discussion  
19 and come back tomorrow or two months.

20                  CHAIRMAN BABCOCK: Well, we can come back  
21 later today or tomorrow morning, but --

22                  MR. ORSINGER: Can we take a quick vote?

23                  CHAIRMAN BABCOCK: Okay. You could either  
24 adopt Judge Peeples' formulation of the vote, which seemed  
25 to be somewhat loaded, or you can formulate it yourself,

1 but then let's take that vote. I don't think we're done  
2 discussing this rule even if we vote right now.

3 PROFESSOR CARLSON: I don't think we are  
4 either.

5 CHAIRMAN BABCOCK: Okay.

6 MR. ORSINGER: Is there a question you would  
7 like us to answer, Elaine?

8 PROFESSOR CARLSON: Yes.

9 CHAIRMAN BABCOCK: Elaine is going to  
10 formulate a vote.

11 PROFESSOR CARLSON: Should an ad litem be  
12 appointed for a defendant served by publication, without  
13 regard to the scope because I think that's a separate vote  
14 on whether it's just --

15 MR. SCHENKKAN: By the scope you mean for at  
16 least -- in at least some scope?

17 PROFESSOR CARLSON: Well, what I mean is  
18 would the ad litem be the attorney in the case, would the  
19 ad litem -- for the absent person. Would the attorney,  
20 such as Justice Boyd suggests, obligation be to verify the  
21 due diligence that's been used?

22 MR. SCHENKKAN: But you're saying we will  
23 vote later on --

24 PROFESSOR CARLSON: Yes.

25 MR. SCHENKKAN: -- what the scope is, but

1 there will be at least something for the ad litem to do.

2 PROFESSOR CARLSON: Correct.

3 MR. SCHENKKAN: What that is to be  
4 determined in a future vote.

5 PROFESSOR CARLSON: Correct.

6 MR. SCHENKKAN: Got it.

7 CHAIRMAN BABCOCK: Lamont.

8 MR. JEFFERSON: Just real quick, I mean, my  
9 confusion here is everybody seems to agree that service by  
10 publication isn't going to get notice to anybody; and so  
11 with that as a presumption, trying to figure out the next  
12 step is difficult. I mean, what -- so we're going to have  
13 someone represent an unknown, unidentifiable person that  
14 can't be -- that presumably -- but everybody knows here  
15 can be found, but we're now assuming that they can't be  
16 found. I mean, so if we believe that technology today  
17 pretty much allows us to find everybody, shouldn't the  
18 first question be should there ever be service by  
19 publication?

20 CHAIRMAN BABCOCK: Yeah, and Elaine pointed  
21 out that that wasn't the charge to her subcommittee. The  
22 charge to her subcommittee from the Court was let's figure  
23 out this ad litem thing.

24 MR. JEFFERSON: So we're assuming that -- so  
25 we're being asked to believe in the fiction that



1 publication will get notice to somebody and then what's  
2 the next step?

3 PROFESSOR CARLSON: No.

4 HONORABLE ANA ESTEVEZ: No, no, no. That's  
5 why you need the ad litem.

6 PROFESSOR CARLSON: We use the word  
7 "publication" because that's in our current rules, but  
8 constructive service does not have to be by publication.  
9 Richard's committee is going to come up with a brilliant  
10 answer to that, how alternatives to service by  
11 publication.

12 MR. ORSINGER: We haven't been able to so  
13 far.

14 MR. JEFFERSON: Okay.

15 CHAIRMAN BABCOCK: We're talking today about  
16 ad litem. Right?

17 PROFESSOR CARLSON: Yes.

18 MR. JEFFERSON: But --

19 CHAIRMAN BABCOCK: And that's the vote that  
20 you constructed.

21 MR. JEFFERSON: The ad litem, the task of  
22 the ad litem is to defend the interest of the party that's  
23 not been served? Is that the -- that's the -- in one way  
24 or another, either by attacking the process or by  
25 attacking the merits.

1                   CHAIRMAN BABCOCK: The vote is whether we  
2 should retain ad litem with some duty, some scope of a  
3 duty. It could be what you just said, or it could be  
4 something less, or it could be something more.

5                   MR. JEFFERSON: Okay.

6                   PROFESSOR CARLSON: When a defendant is  
7 served constructively. How about that?

8                   MR. GILSTRAP: What does that mean? I mean,  
9 we're taking service by publication off the table and  
10 saying do we need an ad litem? What are the circumstances  
11 we're talking about if it's not by publication? What's  
12 the least restrictive?

13                  PROFESSOR HOFFMAN: Aren't there three  
14 questions? One, should we have an attorney ad litem at  
15 all. If so, should it be mandatory as it is in the  
16 current rule or should it be discretionary; and then  
17 finally, three, if we do decide we want an attorney ad  
18 litem, the hardest and most detailed conversation would be  
19 what do you want the scope to be.

20                  MR. GILSTRAP: But that all depends on  
21 service by publication. If you have service by  
22 publication, it's one thing. If you have some other kind  
23 of service, it's a completely different debate.

24                  CHAIRMAN BABCOCK: Stephen.

25                  HONORABLE STEPHEN YELENOSKY: Well, I don't

1 think you need to worry about that because a lot of people  
2 have said, and I've said and a lot of others, citation by  
3 publication could be taken out completely. At some point  
4 they're not going to be able to find somebody, right, and  
5 so if the court said, "We can't find this person. What do  
6 we do next?" Even if it's -- you don't do anything else  
7 to publish or serve, what do we do? You don't need a  
8 constructive service. You don't need anything else. You  
9 need a record that we can't find the person, so you're  
10 allowed to proceed. What's the consequence of that?

11 CHAIRMAN BABCOCK: Elaine.

12 PROFESSOR CARLSON: And let me just say  
13 this. We're reporting out because we finished our task,  
14 but if you want this to be tabled until we figure out the  
15 service by publication or constructive service method,  
16 that's fine, too.

17 CHAIRMAN BABCOCK: Well, I tell you what,  
18 let's -- let's take a break and we'll figure that out, but  
19 when we come back we're going to go on to discovery.

20 (Recess from 10:30 a.m. to 10:43 a.m.)

21 CHAIRMAN BABCOCK: All right. Orsinger says  
22 that what we've just done is like Brexit. We don't know  
23 how to get out of --

24 MR. ORSINGER: We all agree it's bad, but we  
25 can't figure out how to solve it.

1                   CHAIRMAN BABCOCK: So we're going to move  
2 away from Brexit to discovery, and I think Bobby's idea is  
3 correct that we take up Rule 215 and the issue of  
4 spoliation, and if anybody has got any comments about how  
5 the subcommittee has incorporated our prior discussions,  
6 as evidenced by their fine work that they've sent us, we  
7 can talk about that at the end of this discussion, but for  
8 now we're going to talk about 215 and the issue of  
9 spoliation. And, Bobby, maybe -- maybe we could talk  
10 spoliation first in deference to some people on our group  
11 who have to leave after lunch.

12                  MR. MEADOWS: Well, spoliation is really all  
13 we have left. The discovery subcommittee has been working  
14 on the review and rewrite of the discovery rules since  
15 September of -- well, discussing it with this subcommittee  
16 since September of 2016, and everything is finished in  
17 terms of full discussion, review, changes from those full  
18 committee discussions, except spoliation.

19                  CHAIRMAN BABCOCK: Okay. And are you -- are  
20 you breaking out ESI from spoliation?

21                  MR. MEADOWS: No.

22                  CHAIRMAN BABCOCK: Okay.

23                  MR. MEADOWS: So here's what's left. So we  
24 obviously talked about this at some length in February.

25                  CHAIRMAN BABCOCK: Right.

1                   MR. MEADOWS: But didn't take votes,  
2 didn't -- I've read the transcript a couple of times, and  
3 I mean, there's no consensus that you can find in it. I  
4 mean, there was a lot of good thoughts around what to do.  
5 The remaining issues, as I see it, spring from this. One,  
6 we do not have a spoliation rule in Texas, right. We have  
7 a good deal of spoliation jurisprudence, maybe works. We  
8 are confronted with the question of whether or not we  
9 should have a spoliation rule, should it look like the  
10 federal rule, which deals exclusively or singularly with  
11 ESI; or should it, as some in this committee and around  
12 the state question, deal with all forms of evidence, not  
13 just electronically stored information? So that's a  
14 question. Another question is --

15                   CHAIRMAN BABCOCK: You want to vote on it?

16                   MR. MEADOWS: Yeah. I would love to vote on  
17 all of these questions that I'm in the process of  
18 enumerating. The -- so you do not have spoliation unless  
19 you have a duty and a breach. So there's a big question  
20 around what should the duty -- what's the duty. There's a  
21 duty obviously that we find in Brookshire. It's built  
22 around the traditional notion of anticipation of  
23 litigation, but there is interest, which was discussed in  
24 February and we see it in some of the material that we  
25 have fashioned around proposals coming from Robert Levy

1 and others who fortunately are here and can talk about it  
2 themselves about the idea that we have a bright line that  
3 establishes a duty.

4           And then there is the question of whether or  
5 not there should be some form of presuit judicial  
6 procedure that allows the parties to appear in court to  
7 resolve disputes around presuit demands for discovery.  
8 Those are the big questions, wouldn't you say, Jane and  
9 Tracy? That's -- I think if we had that resolved in terms  
10 of understanding the direction of this committee, we can  
11 completely and finally conclude our work on the discovery  
12 rules.

13           CHAIRMAN BABCOCK: Okay. Anybody disagree  
14 with that? All right. So what -- what do you want to  
15 start with?

16           MR. MEADOWS: Well, Robert, do you want to  
17 take up duty first or do you want to take up -- I think  
18 those are the two really big questions, and Kent is here,  
19 too. He can weigh in on this and should to make sure that  
20 I have really kind of captured the three questions.  
21 That's presuit procedure, scope and extent of duty, and  
22 scope and extent of a spoliation rule. So, I mean, I  
23 guess the first question maybe should be whether or not we  
24 want a rule that looks more like the federal rule that  
25 deals singularly with ESI or whether or not we think Texas

1 should have a spoliation rule that deals with all forms of  
2 evidence.

3 MR. LEVY: Let's start with that maybe.

4 CHAIRMAN BABCOCK: Okay. Go ahead, Robert.

5 MR. LEVY: The argument that I suggest is  
6 that we should not create an ESI only rule, that we want  
7 to have a rule that is in effect transsubstantive that  
8 applies to all issues related to spoliation, whether it's  
9 physical evidence, the car, the reindeer, or the  
10 electronic information that relates to the matter. The  
11 reason is that it will create artificial lines that will  
12 cause disputes and questions for the courts in deciding,  
13 for example, what is a VHS tape. Is that electronic  
14 evidence, or is that physical? It physically can be  
15 touched, but it contains information that's read  
16 electronically. The papers that we have are physical, but  
17 they are also contained in electronic form.

18 The reason that the federal rules made that  
19 demarcation is that they wanted to preserve the line of  
20 cases dealing with *In Re: Silvestri*, which was a case  
21 involving the failure to preserve a vehicle that was  
22 needed for testing.

23 PROFESSOR HOFFMAN: By the plaintiff.

24 MR. LEVY: By the plaintiff. And the -- I  
25 think that the case law, the standard that was developed

1 in the rule would apply and give guidance, appropriate  
2 guidance, for that scenario for physical evidence as well  
3 as electronic evidence; and if we don't cover the full  
4 panoply of issues then we're going to create a gap that of  
5 course would have to be filled by case law, but it will  
6 create confusion. So I think that we make the rule apply  
7 to any issues related to spoliation.

8 CHAIRMAN BABCOCK: Okay. Are there not  
9 special issues, though, that relate to electronically  
10 stored information that wouldn't apply to a car or --

11 MR. LEVY: There are certainly factors, but  
12 I think that the issues or the guidance that we're  
13 providing or suggesting to provide will help inform a  
14 court in deciding did they have a reasonable approach to  
15 manage that information, was there intent involved in the  
16 deletion of that information, but you could also have a  
17 similar case where you've got a vehicle in the back lot  
18 and somebody else doesn't realize that it's being  
19 preserved and pulls a part out from it for another  
20 vehicle, and is that spoliation or not, and you need  
21 guidance for that, and the rule would give that guidance.

22 CHAIRMAN BABCOCK: Okay.

23 MR. MEADOWS: And if I just may --

24 CHAIRMAN BABCOCK: Yeah.

25 MR. MEADOWS: Jane made a very good point.



1 In considering these -- these points of view and the  
2 issues, I think we should all be focused on something, and  
3 I'm suggesting it's the proposed rule by our subcommittee.  
4 Because there is a separate alternative rule that Robert  
5 wrote up that's in the materials we submitted, and I'm  
6 certainly not suggesting that we just ignore it, but I  
7 just think in terms of questioning a rule we ought to be  
8 all on literally the same page.

9 HONORABLE TOM GRAY: And is that page 59?  
10 No.

11 HONORABLE JANE BLAND: It looks like this.

12 CHAIRMAN BABCOCK: Well, that's helpful.

13 HONORABLE TRACY CHRISTOPHER: It is page 59  
14 and 60 of the February 2019 document, but it's also typed  
15 up in a separate page, too.

16 MR. PERDUE: Tab E. Tab E is also 59 and  
17 60.

18 HONORABLE JANE BLAND: The one that's the  
19 separate page is -- it was drafted after the -- Robert's  
20 proposal, the November 17th draft, and it incorporates  
21 some of the elements of that draft. It was our attempt to  
22 consider those views and include them in the proposed  
23 rule, so if we can just -- if we work from the latest and  
24 greatest, it's this one.

25 PROFESSOR CARLSON: Is it dated?

1 MS. CORTELL: Is it Tab E?

2 HONORABLE JANE BLAND: Yeah. Yeah. I mean,  
3 there is a blacklined copy on page 59, 60, but it's easier  
4 to read on this, so if you're trying to follow along.

5 MS. CORTELL: Is it Tab E?

6 HONORABLE TOM GRAY: No.

7 MR. PERDUE: Yeah, I think it's Tab E.

8 CHAIRMAN BABCOCK: Yeah, Tab E. Right?

9 Okay. Yeah, Professor Hoffman.

10 HONORABLE TRACY CHRISTOPHER: It has the  
11 number at the top.

12 PROFESSOR HOFFMAN: So I'm in agreement with  
13 Robert, which again, I'd like to flag that doesn't happen  
14 all the time; and, in fact, my question is it would help  
15 me to understand, what are the arguments for limiting the  
16 rule duty to preserve only to ESI? My understanding is we  
17 don't have a rule on duty to preserve non-ESI anywhere in  
18 our rules. It's all common law from cases like the  
19 Silvestri case that he mentioned. So but if there is  
20 arguments for that I guess I would like to hear them,  
21 because I'm convinced with Robert's point that the duty to  
22 preserve rule ought to not be limited to ESI, even if we  
23 have some specific rules as to ESI within that rule.

24 CHAIRMAN BABCOCK: Right.

25 PROFESSOR HOFFMAN: Are there any arguments

1 in favor of limiting it just to ESI?

2 CHAIRMAN BABCOCK: Justice Christopher.

3 HONORABLE TRACY CHRISTOPHER: Well, the only  
4 thing that I could say is that it could get a little  
5 trickier when it's non-ESI that, you know, is in  
6 somebody's control. I mean, you will get kind of weird  
7 requests as a trial judge with respect to physical  
8 evidence, just in terms of, you know, like the people  
9 in -- they usually run down and try to get an injunction  
10 that says, "Stop cleaning this up until I can get in there  
11 and test it," right. So the physical evidence is a little  
12 trickier I think, so -- and the federal rule is ESI, so  
13 that's why we drafted it this way, but --

14 CHAIRMAN BABCOCK: Okay. Any other --

15 MR. MEADOWS: I think one thing about it, if  
16 I could, just thinking about Lonny's question.

17 CHAIRMAN BABCOCK: Yeah, Bobby.

18 MR. MEADOWS: You know, with electronically  
19 stored information, people who have it generally have  
20 procedures and rules and protocols for dealing with that,  
21 and when you -- when it comes to something like physical  
22 evidence, an accident site, an automobile, or whatever it  
23 is that's part of the occurrence, I mean, you know, I  
24 can't imagine that you would be dealing with circumstances  
25 where there are, you know, normal preservation procedures

1 and policies, and so you're dealing with what I think is  
2 probably more in terms of the Brookshire situation where  
3 you're dealing with a case-specific set of circumstances.

4 MR. PERDUE: But, Bobby, if that -- that's  
5 true in ESI as well, and my understanding is that the idea  
6 of a rule for ESI is because the common law is not able  
7 for practitioners to understand.

8 MR. MEADOWS: Well, I think the reason we're  
9 considering a rule for ESI is because it's, you know --  
10 that occurred with the federal rules in 2015, and there is  
11 a great deal of concern among large companies over the  
12 expense of maintaining large volumes of costly information  
13 on this -- under this notion of anticipation of  
14 litigation, and so I think that there is -- there is an  
15 interest in relief from -- from that and how it's handled,  
16 and how it's handled is judged.

17 MR. PERDUE: Of which then this rule splits  
18 from the federal rule.

19 MR. MEADOWS: This rule is different from  
20 the federal rule. Sure. I mean, for example, it  
21 prescribes a duty. The federal rule does not.

22 MR. MUNZINGER: Would you say that again?

23 MR. MEADOWS: The rule that is under  
24 discussion, which I said last time is largely a thought  
25 piece as opposed to, you know, a -- I'm not sure you could

1 find that our entire subcommittee agrees with this rule,  
2 but it captures the issues that have been brought before  
3 our subcommittee and that are seriously being considered.  
4 The federal rule does not have a -- does not spell out a  
5 duty. This rule does. It says that the duty occurs,  
6 arises, when there's service of citation, a notice, or  
7 when you -- when there's a claim of privilege that would  
8 put you, you know --

9 MR. MUNZINGER: Thank you.

10 CHAIRMAN BABCOCK: Robert, am I right that  
11 the only thing -- the only language, drafted language, we  
12 have in front of us relates solely to ESI?

13 MR. LEVY: The version that -- this version  
14 that we're talking about, I guess Exhibit E, does talk  
15 about ESI. It is focused on ESI.

16 CHAIRMAN BABCOCK: Well, in the redlined or  
17 blacklined version at page 59, Rule 215.7, that's ESI.

18 MR. LEVY: Right.

19 CHAIRMAN BABCOCK: And then our Tab E, the  
20 standalone, that's ESI, and then the November 17, 2017,  
21 draft which is behind Tab F, that's also ESI.

22 MR. LEVY: Correct.

23 CHAIRMAN BABCOCK: So do we have a  
24 broader --

25 HONORABLE TRACY CHRISTOPHER: No.

1                   CHAIRMAN BABCOCK:  -- so we don't have  
2 language on a broader rule.  You're just suggesting that  
3 it ought to be broader?

4                   HONORABLE TRACY CHRISTOPHER:  We need a vote  
5 to see whether it should be broader.

6                   CHAIRMAN BABCOCK:  Okay.  And if we vote and  
7 say, yeah, it should be, then you-all will have to --

8                   MR. MEADOWS:  We'll write it.

9                   CHAIRMAN BABCOCK:  -- figure out how to do  
10 that.  Yeah.  Commissioner Sullivan, and then Richard.

11                   HONORABLE KENT SULLIVAN:  I think it's  
12 something that deserves some thoughtful consideration.  I  
13 will confess, not having been a part of this discussion,  
14 that it seems to me the discussion has largely been framed  
15 around what the federal rules committee did, and they did  
16 deal exclusively with ESI and probably for reasons that  
17 are unique, and having a vulcanized rule would create some  
18 issues.  So looking at the issue of whether or not there  
19 could be one uniform rule that would cover everything that  
20 might be in controversy relative to spoliation, it seems  
21 would have some real advantages.

22                   I mean, there are a lot of ironies that you  
23 could think of, one of which is you have something stored  
24 on your computer and you hit the print button and you  
25 print out a piece of paper, and arguably there are two

1 different rules that might apply to the identical pieces  
2 of information, one electronically stored on your  
3 computer, the other on a piece of paper that's now on your  
4 desk because you hit the print button; and, again, very  
5 hypothetical, maybe even cliché, but still it's I think an  
6 indication of why you might want to give thoughtful  
7 consideration to something that's uniform. I personally  
8 am just a fan of whatever we could instruct that would  
9 create more certainty, greater clarity, and greater ease  
10 of use. User-friendliness is I think underestimated as a  
11 virtue, and I really think that this is an area that could  
12 use it, and I think we ought to keep our eyes focused on  
13 some of those concepts.

14 CHAIRMAN BABCOCK: Okay. Anybody else on  
15 this topic? I hear three people advocating Robert's  
16 position. Anybody opposed? Justice Bland.

17 HONORABLE JANE BLAND: Well, you know, the  
18 federal rule, I think they took a look at making it  
19 broader and ultimately concluded that they would focus on  
20 electronically stored information because it presents  
21 questions of breadth that physical evidence doesn't  
22 present because of the way it's transmitted and copied  
23 along multiple devices throughout multiple users; whereas,  
24 you know, if you're talking about you hit the print button  
25 and you have a piece of paper, one person is the custodian

1 of that piece of paper and not, you know -- it's not --  
2 it's not on 50 personal computers and telephones and  
3 everything else.

4           So one of the things is that there's just  
5 extreme breadth that of -- and it's also expensive to  
6 produce. So and then when you think about putting forward  
7 a rule on spoliation that we've never had before, maybe it  
8 would be a good idea to try a rule on one sort of  
9 discoverable type of document, electronically stored  
10 information, and see how it works before we expand the  
11 universe to all relevant tangible things, objects, and  
12 other information, which we have a lot of experience with  
13 producing and preserving and which courts are familiar  
14 with; and we have, you know, some good case law on it. So  
15 those would be reasons for keeping it limited to  
16 electronically stored information for now.

17           CHAIRMAN BABCOCK: Robert, then -- no, I'm  
18 sorry. Richard had his hand up earlier. Richard.

19           MR. MUNZINGER: I just think it makes more  
20 sense to address electronically stored information sui  
21 generis because it does have its own problems and its own  
22 rules, and if you attempt to write an overarching rule  
23 that applies to everything and then carve out ESI you're  
24 repeating yourself, et cetera. I think if we can come to  
25 grips with what ESI rules should be then we can work



1 backwards to other rules.

2           Sitting here thinking about a case that we  
3 had many years ago, we have a refinery explosion. The  
4 thing at issue is a valve, and it's a complex device, a  
5 very complex device. In part of the putting out the fire  
6 and reopening the refinery and what have you, this valve  
7 has to be removed, has to be moved, et cetera. How are  
8 you going to write a rule that says preserve that valve in  
9 the midst of a fire? Somebody here is talking about an  
10 oil spill cleanup. We've got to clean the oil up. We've  
11 got to do something here. We've got a health problem and  
12 yet we have this rule -- we may have a rule that says  
13 don't do this, don't do that if a court tells you  
14 so-and-so. You have work product issues that arise. I  
15 think we would be more efficient and better if we devoted  
16 our attention to ESI first with the understanding that we  
17 probably need a more encompassing rule as well.

18           CHAIRMAN BABCOCK: Okay. Robert.

19           MR. LEVY: I think we can do that, but I'm  
20 not sure that we need to, and Justice Bland is correct in  
21 terms of where the federal committee was. In talking to  
22 them when they made that decision, they just were  
23 uncomfortable about upsetting the line of cases from the  
24 Silvestri decision; but having seen the rule being applied  
25 and in the case I mentioned involving a videotape, the

1 court decided that the videotape was physical evidence  
2 and, therefore, the common law standard would apply; but I  
3 think that we're going to see these problems come up  
4 repeatedly, even in the Brookshire Brothers case, was that  
5 recording while it physically existed, so would the common  
6 law standard, the Brookshire case, apply or will this new  
7 rule apply; and I think we are buying trouble if we try to  
8 create an artificial line in deciding ESI versus other  
9 forms of evidence; and under the case, you know, this rule  
10 talks about failing to take reasonable steps to preserve  
11 the information; and the case with the valve, that would  
12 be the question, did the party take reasonable steps, did  
13 they act wantonly or intentionally to destroy it. Those  
14 same standards would be applicable under this rule.

15 CHAIRMAN BABCOCK: Okay. Jim.

16 MR. PERDUE: Hasn't it been the proposition  
17 that the entire policy concern regarding the scope of this  
18 discovery and the expense of this discovery rest in ESI?  
19 I mean, isn't that where all of this conversation comes  
20 from?

21 MR. LEVY: It certainly has been focused  
22 there, but it's not uniquely there. The spoliation issues  
23 apply to other types of evidence as well. The Wal-Mart  
24 case, it was the leading example, the reindeer case.

25 MR. PERDUE: But this committee struggled

1 with the spoliation rule in the past, and the common law  
2 has developed around that area.

3 MR. LEVY: You could argue that the common  
4 law that we have now in Texas with Brookshire Brothers  
5 gives us guidance on ESI. It talks about ESI, and so we  
6 have a standard, but the challenge is that for the average  
7 practitioner and in-house lawyer like me trying to advise  
8 his client, it's a lot more helpful to have a rule laying  
9 out that standard versus a case decision that you need to  
10 go to and apply. So I think we benefit everyone by taking  
11 that standard and putting it into a rule.

12 CHAIRMAN BABCOCK: Yeah. I think to Jim's  
13 point, though, it's true that the howls of protest about  
14 storing ESI have largely come from general counsel  
15 companies with a lot of data.

16 MR. LEVY: Yes. Yes.

17 CHAIRMAN BABCOCK: Justice Christopher.

18 HONORABLE TRACY CHRISTOPHER: Well, I do  
19 think writing a combined rule will be difficult. I do  
20 understand that, you know, it's hard to define what's ESI  
21 versus what's physical evidence; but if you know we're  
22 talking about, the situation where people go and they get  
23 a temporary restraining order to prevent somebody from  
24 destroying something, if we put that into this rule then  
25 people are going to try to get temporary restraining

1 orders to prevent the destruction of ESI, and so that's  
2 going to be trickier.

3 CHAIRMAN BABCOCK: Justice Bland, and then  
4 Lamont, and then somebody over here. Oh, Richard, yeah.

5 HONORABLE JANE BLAND: We have sort of an  
6 ordinary course jurisprudence developed around the  
7 Wal-Mart reindeer case, but if we -- if we replace it with  
8 a rule, you know, you could envision every car wreck case  
9 somebody saying, "Well, don't get your car fixed if you're  
10 going to claim property damage, because, you know,  
11 otherwise, I won't have an opportunity to inspect it."  
12 Well, do we really want delay fixing a dented car, you  
13 know, so that the claim can get resolved and be -- you  
14 know, eventually through litigation? I mean, that doesn't  
15 make any sense at all. And so it would be tough to try  
16 to -- to try to write a rule when I think practitioners  
17 out there are very practical about this stuff when it  
18 comes to physical evidence, and disputes don't very often  
19 arise with physical evidence.

20 CHAIRMAN BABCOCK: Lamont.

21 MR. JEFFERSON: I'd endorse the single rule  
22 idea, and I think if you can read just about any version  
23 of these rules and just substitute "evidence" for  
24 "electronically stored information," and they make sense,  
25 and it's because we're trying to achieve the same thing

1 whether we're talking about physical evidence or  
2 electronic evidence; that is, what's a party's duty, what  
3 is a reasonable response to a request, and what  
4 presumptions should the trier of fact make based on what a  
5 party does. So, I mean, I think -- and whether we  
6 actually separate out the rule or not to address  
7 electronically stored evidence versus other, I think it  
8 will be helpful to keep in mind that this rule -- if it's  
9 just electronically stored evidence that the same  
10 principles apply, so just substitute the word "evidence"  
11 and see what difference it makes in the argument, and to  
12 me it doesn't make -- it doesn't seem to make a difference  
13 as you just read through the rules.

14 CHAIRMAN BABCOCK: Okay. Richard, then  
15 Justice Christopher.

16 MR. ORSINGER: I think there are  
17 considerations for and against the idea. First of all, I  
18 believe that there is a desire to have consistency with  
19 the federal rule, because many defendants are not going to  
20 know whether they're going to be sued in state court or  
21 federal court, and so the only prudent thing to do is to  
22 take the most restrictive protection and implement it  
23 because you don't know whether you're going to be in a  
24 more liberal system or a less liberal system, and that  
25 depends on happenstance, so I think there's a real

1 argument that we ought to conform our rule to the federal  
2 rule or as close as we can.

3           Secondly, if we are going to define duty,  
4 which one of these proposed or maybe both of these  
5 proposed rules do, I don't think you can define a duty for  
6 ESI that doesn't emanate out and affect the destruction of  
7 physical evidence, and so I would say if we're going to do  
8 an ESI rule we ought to stay away from duty and just kind  
9 of talk about the preservation. If we're going to define  
10 duty on preserving evidence, then I think we need to have  
11 a duty rule that's generally stated so that it applies to  
12 all forms of evidence and then we can have a subpart about  
13 how you implement that duty relative to the electronic  
14 stored information versus the physical information.

15           I would also say that it doesn't cost a lot  
16 to -- for a department store to maintain a reindeer  
17 display without destroying it, or if a car has been  
18 involved in a collision where there's a death, we know we  
19 don't send that to the recycle to have it crushed up, but  
20 on ESI, you know, if you get one of these letters, then it  
21 affects every employee in the whole company and you have  
22 to have classes and you have to have software backups, and  
23 so there's hugely different cost considerations, and  
24 therefore, there ought -- to me there ought to be some  
25 cost-shifting possibilities in the ESI protection that the

1 plaintiff who is demanding these enormous steps to  
2 preserve peripheral information, maybe he ought to pay the  
3 cost, and that shouldn't be true on physical preservation.

4           And then lastly, a perspective that's maybe  
5 not largely important here, but in the family law arena  
6 lawyers have glommed onto this preservation thing, and  
7 they send it out at the beginning of a divorce case. So I  
8 have to sit down with my clients and tell them they can't  
9 delete any text messages or any e-mails, they can't remove  
10 any pictures or postings from Facebook, and it's my  
11 opinion that that's just an abuse of the legal system to  
12 try to use this procedure that preserves evidence that's  
13 important in some situations, and it means that people for  
14 six months or a year or a year and a half can't delete any  
15 texts, can't delete any e-mails. So I think we have to  
16 recognize that whatever rules we promulgate for big  
17 corporations suing big corporations, that also small  
18 people are going to be suing small people and using those  
19 same rules.

20           CHAIRMAN BABCOCK: Okay. Justice  
21 Christopher.

22           HONORABLE TRACY CHRISTOPHER: Well, if we do  
23 cover non-ESI, there might be a different duty. I mean,  
24 we might go back to the common law duty of, you know,  
25 reasonable anticipation of litigation, and then it, you

1 know, makes a little -- and we were trying to limit the  
2 duty in the ESI to a certain extent in the ESI field.  
3 And, I mean, like if you look down at our proposed safe  
4 harbor, (e), destroy, you know, it's not an intent if it  
5 happens in the normal course of business. Well, that  
6 would be the reindeer gets swept up and tossed in the  
7 dumpster -- you know, in the dumpster, even if someone is  
8 seriously injured. That's the normal course of business  
9 to do that, and the grocery store might not be thinking  
10 about work product at that point in terms of, you know,  
11 well, I didn't think about it, so, you know, we throw  
12 things away. So, I mean, I think it will be extremely  
13 harder, trickier, worse. Don't make us do it.

14 CHAIRMAN BABCOCK: I note a sense of  
15 pleading in your voice. Jim, and then Jane.

16 MR. PERDUE: Well, to that point I know  
17 y'all want to be done with it, and we've got a draft, and  
18 reasonable anticipation of litigation for material things,  
19 which is, you know, Brookshire Brothers forward, which is  
20 the standard, is different than what's in here.

21 HONORABLE TRACY CHRISTOPHER: Right. It is.

22 MR. PERDUE: I mean, that -- we could  
23 re-engineer the whole thing, but, you know, a preservation  
24 standard in a trucking wreck or an industrial accident is,  
25 you know, anticipation of litigation, which is not



1 contemplated by this rule.

2 HONORABLE TRACY CHRISTOPHER: Right.

3 CHAIRMAN BABCOCK: Jane.

4 HONORABLE JANE BLAND: Look, also I'll point  
5 out that we do have a separate rule for production of  
6 electronically stored information, separate from our rules  
7 regarding production of documents and tangible things, and  
8 it's 196.4. It's on page 26 of your handout, and so we  
9 already -- we categorize it separately in the -- on the  
10 production side of things, and that's something we could  
11 take into consideration as well.

12 CHAIRMAN BABCOCK: Okay. Who is that?

13 Yeah, Nina.

14 MS. CORTELL: I'm sympathetic to the desire  
15 for a single rule. When first we were asked to look at  
16 this, I was surprised to be looking at a spoliation rule  
17 for only a category of documents. On the other hand, I'm  
18 also sympathetic to Justice Bland's observation about  
19 whether we will be throwing a big monkey wrench into  
20 normal cases like a car wreck case, you know, that someone  
21 can't get it repaired. I haven't really heard an answer  
22 to that concern.

23 CHAIRMAN BABCOCK: And I was -- I should  
24 have pointed out that Nina was the recipient of the  
25 prestigious Justinian Award just recently by the Dallas

1 Bar Association.

2 MS. CORTELL: Thank you.

3 CHAIRMAN BABCOCK: And that's for what?

4 MS. CORTELL: I don't know. Having made it  
5 to age 67, I think.

6 CHAIRMAN BABCOCK: But very prestigious.  
7 Okay. Any other comments about this? Are we ready to  
8 take a vote, and if so, can we formulate how it --

9 PROFESSOR CARLSON: Don't look at me.

10 CHAIRMAN BABCOCK: I'm looking at you,  
11 Elaine.

12 PROFESSOR CARLSON: No, don't look at me.

13 MS. BARON: I was going to say something  
14 about ad litem, right?

15 CHAIRMAN BABCOCK: Harvey.

16 HONORABLE HARVEY BROWN: I have a question.  
17 When I read it through I kind of thought the same thing as  
18 Lamont, if I changed the word to "evidence" throughout it  
19 seemed to work to me, and I was somewhat persuaded by this  
20 argument about anticipation of litigation, but then I was  
21 thinking about this section -- section (a)(3), from the  
22 time a claim of privilege under 192.5(a) arises, which of  
23 course, is a privilege about anticipation of litigation,  
24 but it says "a claim of privilege."

25 MR. MEADOWS: Work product.

1 HONORABLE HARVEY BROWN: Work product,  
2 right, and so I wonder if we could tweak that language and  
3 that would fix that issue, because I think what you're  
4 trying to say is from the time they should have  
5 anticipated litigation, and if so, does that fix it or  
6 not?

7 HONORABLE TRACY CHRISTOPHER: No. At the  
8 time they do anticipate litigation and believe work  
9 product privilege applies. Not "should." It is -- it is  
10 meant to be more restrictive.

11 HONORABLE HARVEY BROWN: Okay. That's the  
12 question.

13 HONORABLE JANE BLAND: The idea is if you  
14 are -- if you are in a lawsuit claiming by January 1 you  
15 have some documents that you are claiming a work product  
16 privilege for then you are, you know, conceding --

17 HONORABLE HARVEY BROWN: Right.

18 HONORABLE JANE BLAND: -- that you've  
19 been -- and so you should have taken reasonable steps to  
20 preserve by that point.

21 MR. MEADOWS: You received the notice later.

22 HONORABLE JANE BLAND: The notice.

23 HONORABLE HARVEY BROWN: Right, I  
24 understand. But could you tweak that language, I guess is  
25 what I was asking to say when they should have anticipated

1 litigation, not when they did, so they claim a privilege.  
2 You're saying to claim. I'm saying could you make it more  
3 objective, the person should have anticipated litigation?

4 HONORABLE JANE BLAND: The idea was not to  
5 have a fight about anticipation of litigation every time.

6 HONORABLE HARVEY BROWN: Okay.

7 HONORABLE JANE BLAND: But basically have --  
8 but have that be a point at which you could no longer --  
9 once you're saying these documents are protected because  
10 we anticipate litigation, then at that point you're kind  
11 of -- you're on notice that you need to take reasonable  
12 steps --

13 HONORABLE HARVEY BROWN: Okay.

14 HONORABLE JANE BLAND: -- to preserve.  
15 That's the idea.

16 CHAIRMAN BABCOCK: Okay. We are going to  
17 have a vote. And we're going to vote on whether or not  
18 the rule should apply to all evidence and not just to ESI.  
19 So everybody in favor of --

20 MR. PERDUE: Doesn't it depend on the rule?

21 CHAIRMAN BABCOCK: Huh?

22 MR. PERDUE: Doesn't it depend on the rule?

23 CHAIRMAN BABCOCK: It's the rule we're  
24 talking about. Everybody who is in favor of having a rule  
25 that encompasses all evidence, not just ESI, raise your

1 hand.

2 All opposed? Okay.

3 HONORABLE TOM GRAY: What about the third  
4 option, Chip? No rule at all.

5 CHAIRMAN BABCOCK: That's the third option.

6 HONORABLE TOM GRAY: No rule on spoliation,  
7 just leave it with the common law.

8 CHAIRMAN BABCOCK: Justice Bland, are you  
9 voting for that?

10 HONORABLE JANE BLAND: No. I'm just -- we  
11 were expressly directed to draft a rule.

12 HONORABLE TOM GRAY: I know, as is the  
13 custom in the committee that we don't care if you don't  
14 want a rule, if you were going to draft a rule what would  
15 it look like, but I think there's still the place --  
16 because when I walked in here today I expressed to Bobby  
17 that I was very concerned about not having tangible  
18 evidence covered by the rule; and I have to put a  
19 disclaimer here. I can't fully talk about this because we  
20 are at the court heavily involved in a spoliation case  
21 right now, and so I expressed that disclaimer to Bobby,  
22 and I said, you know, it just bothers me that if we're  
23 going to have a rule that it doesn't cover it all. What I  
24 didn't explain to Bobby is I'm pretty comfortable with the  
25 common law because I've been digging into it, and so I do

1 think there's room to say --

2 CHAIRMAN BABCOCK: Okay. I'm vote happy  
3 today, but not much success until now, and the results  
4 were 7 members in favor of Robert's one rule covering all  
5 evidence, 14 were opposed, the Chair not voting, and a lot  
6 of other people not voting either. So if Justice Gray  
7 moves to have a vote on whether or not we should rely on  
8 the common law rather than have a rule at all on anything,  
9 then I'm way okay with doing that.

10 HONORABLE TOM GRAY: So do you want a motion  
11 then?

12 CHAIRMAN BABCOCK: No, I mean --

13 HONORABLE TOM GRAY: That's what I would  
14 suggest is that there is a -- I think the existing -- and  
15 now the name escapes me. Brookshire Brothers case, really  
16 is a good parameter of what -- how this approaches. I  
17 understand the internal attorney's problem in a mega  
18 corporation, but I think it can be dealt with, and I don't  
19 think we need a rule specific on spoliation.

20 CHAIRMAN BABCOCK: Okay. And we are going  
21 to continue to talk about it, an ESI rule because that's  
22 been our charge.

23 HONORABLE TOM GRAY: Sure.

24 CHAIRMAN BABCOCK: But I don't mind having a  
25 vote on whether or not your thought has any acceptance in

1 the committee as a whole. Pam.

2 MS. BARON: That's just on ESI, though,  
3 right?

4 CHAIRMAN BABCOCK: Right.

5 MS. BARON: Okay. Just wanted to make sure.

6 MR. MEADOWS: On this point, I think it's a  
7 very good thought, too, but I don't think we should just  
8 immediately go to a vote. This is a big topic. I mean,  
9 there's a lot of law, whether it's *In Re: State Farm* or  
10 Brookshire around this topic, and the Supreme Court has  
11 written on everything we're talking about.

12 CHAIRMAN BABCOCK: Right.

13 MR. MEADOWS: So it's a very -- it's a good  
14 thing to consider and talk about, but having a vote  
15 without discussing I think might be jumping the gun, but  
16 you're the Chair.

17 CHAIRMAN BABCOCK: It's sort of on the topic  
18 of what we've been discussing, what's going to be the  
19 scope of the rule, so --

20 MR. MEADOWS: But this is whether we have no  
21 rule.

22 CHAIRMAN BABCOCK: Excuse me?

23 MR. MEADOWS: This is whether or not we have  
24 a rule at all, as opposed to scope.

25 CHAIRMAN BABCOCK: Anybody got any thoughts

1 on that, besides Pam? Robert.

2 MR. LEVY: Kent and I have been discussing  
3 this issue. Commissioner Sullivan and I have discussed  
4 this issue.

5 CHAIRMAN BABCOCK: His highness.

6 MR. LEVY: And the challenge is twofold.  
7 One is that having a rule that's laid out provides that  
8 clarity for practitioners to understand what the standards  
9 and the expectations are. It helps for companies or  
10 parties that are going to be sued here, but it also,  
11 frankly, helps for those in other states, and it gives  
12 that certainty in application. Obviously courts have to  
13 apply the rule, and there are going to be some  
14 determinations to be made, but it -- having basically from  
15 my perspective taking the standard announced in the  
16 Brookshire Brothers case and articulating that or  
17 something similar like the federal rule in a rule is  
18 beneficial, because it avoids you having to go figure out  
19 the standard from a case decision or commentaries about  
20 that, and it also establishes a little bit more  
21 concreteness that is also beneficial as we plan the  
22 systems that last 20, 30 years into the future.

23 CHAIRMAN BABCOCK: Yeah. To your point,  
24 Justice Gray says that the reason he's -- this is  
25 attractive to him is because he's been digging into it and



1 finds a lot of case law. Does some in-house counsel in  
2 New York have to dig into our law in order to figure out  
3 what the deal is?

4                   Yeah, Commissioner Sullivan.

5                   HONORABLE KENT SULLIVAN: I think a rule is  
6 just a much better tool in the sense that it is more  
7 dynamic than the common law. In other words, when there  
8 are changes that have occurred that warrant revisiting  
9 whatever the rule is, it's going to be easier, faster, a  
10 much more dynamic process, more proactive process, in my  
11 opinion, to be able to do it by rule. With respect to the  
12 common law, you have employed the right vehicle as a  
13 general matter, the right case in controversy to come  
14 through the pipeline to percolate up to the right level,  
15 to revisit and announce a new rule of law. That is a much  
16 more, in my view, static approach, and technology is  
17 moving.

18                   We live in a dramatically different  
19 environment than only 10 years ago, and I suspect that the  
20 pace of that will only increase. It will not surprise me  
21 to need to revisit whatever we do here in the near term  
22 much more quickly than we might think, because we've been  
23 outpaced by events. You can do that more easily by rule.

24                   CHAIRMAN BABCOCK: Professor Hoffman. Then  
25 we vote.

1                   PROFESSOR HOFFMAN: Well, so here's where  
2 Robert and I part company, of course, as well with Kent  
3 Sullivan there.

4                   MR. LEVY: Didn't last very long, did it?

5                   PROFESSOR HOFFMAN: No. So the problem,  
6 right, with -- with adopting a rule just for ESI, we've  
7 already decided the group is there, but the problem is  
8 that it's not -- we're going to end up with two different  
9 standards. I mean, indeed the notion -- Robert, your  
10 notion that, you know, it's easier to consult a rule would  
11 be fine if the rule successfully embodied what the common  
12 law is, but of course, it doesn't. It actually  
13 consciously limits the common law. That's by design.  
14 Again, we can debate whether that's a good or bad idea,  
15 but they aren't the same, and so you have that issue. So  
16 I'll stop on that. I'll stop there, but as to Kent's  
17 point, maybe it's the case that the rule process is more  
18 dynamic than common law, although that is news to many of  
19 us on this committee who have watched a very slow process  
20 through many things.

21                   But more than that, I mean, you're sort of  
22 indicting our -- this is our system that we have, right?  
23 We have a system that we largely do rely on the courts to  
24 do it, and I think if anything, you know, practitioners  
25 and judges are pretty familiar with that, and there is a

1 lot of dynamism obviously built into that as we follow the  
2 case law as it goes along. So anyway --

3 CHAIRMAN BABCOCK: All right. Everybody  
4 that's in favor of relying on the common law and having no  
5 rule on this issue, raise your hand.

6 All those opposed?

7 MR. LEVY: Richard didn't vote.

8 MR. ORSINGER: You shouldn't have noticed.

9 CHAIRMAN BABCOCK: It should not matter.

10 MR. ORSINGER: I was trying to fly under the  
11 radar.

12 CHAIRMAN BABCOCK: Four in favor, 18  
13 against, the Chair and Richard not voting. Richard  
14 Orsinger, I might add, not the other Richard.

15 MR. ORSINGER: Don't want to blame the  
16 innocent.

17 CHAIRMAN BABCOCK: Okay. Let's go to I  
18 think the next topic, Bobby and Robert, was the scope of  
19 the duty?

20 MR. MEADOWS: Right.

21 CHAIRMAN BABCOCK: Okay. Let's talk about  
22 the scope of the duty.

23 MR. LEVY: The current draft has the concept  
24 that a duty to preserve takes place when certain events  
25 happen that are objective. It talks about when party gets

1 service, citation or a notice or when they internally  
2 understand that a duty to -- or a work product privilege  
3 in anticipation of litigation privilege arises. The value  
4 of that is it becomes a more objective, bright line  
5 determination that is predictable and is less subject to  
6 courts trying to define either when reasonable  
7 anticipation begins or what was in the mind of the party  
8 that had a duty or failed to preserve when the other side  
9 says they should have been preserving, and it's designed  
10 to give that clarity to avoid another area of dispute, and  
11 it -- so the goal will be to -- to provide clear guidance  
12 rather than kind of a mushier, more ill-defined standard  
13 that will require courts to engage in determination and  
14 potentially open up satellite discovery on issues that are  
15 unrelated to the matters in dispute in the case.

16 CHAIRMAN BABCOCK: Okay. And the language  
17 that we're talking about is behind Tab E, and it's  
18 215.7(a), duty, right?

19 MR. LEVY: Correct.

20 CHAIRMAN BABCOCK: Okay. Comments? Richard  
21 Orsinger, then Professor Hoffman.

22 MR. ORSINGER: Okay. I don't litigate over  
23 physical objects that harm people, but these rules seem to  
24 me to be awfully late in the game, and does this -- if we  
25 adopt this rule, does that mean that if I have a trucking

1 company and there is a car wreck that was caused by a  
2 blown out tire, that I can go burn that tire as long as I  
3 haven't been served with citation, served with notice, or  
4 want to assert a work product claim?

5 MR. LEVY: No. I think the answer is no  
6 because we decided that this rule only applied to ESI.

7 MR. ORSINGER: Oh, I see. We did decide  
8 that?

9 CHAIRMAN BABCOCK: We did.

10 MR. ORSINGER: Okay.

11 CHAIRMAN BABCOCK: It was a vote of 14 to 7.

12 MR. ORSINGER: Then I'm going to reserve  
13 that for my debate with Justice Gray.

14 HONORABLE TOM GRAY: What about the e-mail  
15 from the president to the manager that says "Go destroy  
16 that tire"?

17 MR. ORSINGER: I adopt that amendment, and  
18 that's my point, is that it seems to me this is too late  
19 in the game. Someone could be very sophisticated in the  
20 world of litigation, know that there's some piece of  
21 information that was contemporary, almost like an excited  
22 utterance, and that they can destroy it up until they want  
23 to assert a work product privilege. That's too late in  
24 the game. It seems to me like there is some evidence that  
25 so obviously is going to be the part of a criminal

1 investigation or a civil investigation that your duty to  
2 preserve should arise. I understand the difficulty is how  
3 do you distinguish those critical pieces of evidence from  
4 trivial stuff that you automatically destroy in the  
5 process of throwing out old things, and I don't want  
6 innocent people harmed, but this is -- in my opinion this  
7 is a blank check to destroy evidence up to a very late  
8 stage in the expected litigation process.

9 CHAIRMAN BABCOCK: How is that e-mail, which  
10 has not been destroyed, the tire has, but the e-mail  
11 hasn't, how is that going to escape discovery?

12 MR. ORSINGER: Can't you delete it up until  
13 the time -- first of all, the latest you're going to get  
14 is the citation. Before that you probably get a notice  
15 and before that you may have a right to claim work product  
16 privilege.

17 CHAIRMAN BABCOCK: Right.

18 MR. ORSINGER: But before you have the right  
19 to claim work product privilege there's a long period of  
20 time between the event and the time that it gets up to the  
21 general counsel or to the manager of the department who  
22 says, "Holy crap, we have a lawsuit on our hands here."  
23 Somebody was killed or whatever. That's too long a period  
24 of time to freely destroy evidence. I would rather have a  
25 standard that's more attuned to the fact that we don't

1 want to create a safe harbor for the destruction of  
2 evidence.

3 CHAIRMAN BABCOCK: So the e-mail says  
4 destroy the tire, the guy destroys the tire, and then he  
5 tells his IT guy, "By the way, delete this e-mail," and  
6 it's all before the three events that are listed here.

7 MR. ORSINGER: Yes. That's right, or the  
8 e-mail might have nothing to do with instructions to  
9 destroy the tire. It could be, you know, "I interviewed  
10 the driver and he said he crossed the line, the dividing  
11 line in the highway and had a head-on collision," and then  
12 boy, we want to get rid of that evidence, don't we, so we  
13 just delete it because we're not asserting work product;  
14 and, I mean, we can imagine a lot of scenarios; and like I  
15 said, I don't sue people for damages for a living; but I  
16 do know that this goes on; and I see this as giving too --  
17 a safe harbor to destroy evidence with the intent of  
18 depriving a potential litigant in the court of that  
19 information.

20 CHAIRMAN BABCOCK: Okay.

21 MR. ORSINGER: I don't want to rope in  
22 innocent people that are throwing things away routinely  
23 because the Christmas season is over, but to me this is  
24 like a complete pass on destroying everything up to a  
25 fairly late point, and I don't like it, so --

1                   CHAIRMAN BABCOCK: Too late in the game in  
2 your opinion.

3                   MR. ORSINGER: That's right.

4                   CHAIRMAN BABCOCK: Professor Hoffman.

5                   PROFESSOR HOFFMAN: Two smaller points and  
6 one bigger one. The smaller point first. It seems like  
7 the rule creates a perverse incentive for companies not to  
8 get lawyers involved, so the duty to preserve doesn't kick  
9 in at least under the third option until the time a claim  
10 of privilege arises. Well, and so obviously you don't  
11 have lawyers, you can't have work product at all, and so  
12 the duty wouldn't kick in. I wouldn't think that Robert  
13 or others who represent companies would want that rule.  
14 You wouldn't want to disincentivize getting lawyers  
15 involved at the most appropriate or early time, so it  
16 seems like an odd thing.

17                   Number two, if we are going to have it the  
18 word shouldn't be "privilege," right. 192.5 is work  
19 product, and we always confuse work product and privilege.  
20 Let's just call it "work product" because that's what it  
21 is. The bigger point is I can say very quickly amen to  
22 what Richard said, and that's the reason why we shouldn't  
23 deviate from the common law standards from *Wal-Mart vs.*  
24 *Johnson*, the reindeer case, from *National Tank vs.*  
25 *Brotherton*, versus -- Brookshire Brothers. I mean, so



1 there's a standard here, and we shouldn't build a  
2 different standard, certainly one that has the safe harbor  
3 exactly as Richard is talking about. We are really asking  
4 for spoliation to happen and giving a pass.

5 CHAIRMAN BABCOCK: Okay. Justice Bland.

6 HONORABLE JANE BLAND: So I think this is  
7 part of the reason the federal rule declined to articulate  
8 the duty in their rule, and that's an option for our rule  
9 as well, but we received feedback that relying on the  
10 common law for determining the duty is a challenge,  
11 because it's not tethered to any -- anything, and I think  
12 the -- even though the reindeer case is -- you know,  
13 mentions reasonable anticipation of litigation, but not --  
14 it doesn't adopt it as the duty, and so we were reluctant  
15 to adopt it as the duty. This was an effort to try to  
16 frame it in a way that people could look at it and go,  
17 "Here's your obligations," but it does come with all of  
18 the problems that you're describing, Professor Hoffman.

19 MR. MEADOWS: Well, it's a very important  
20 point that both of you are talking about, because the way  
21 the rule is structured, unless you have one of the three  
22 events, there is no duty, and you don't have a spoliation  
23 of evidence unless there's a duty and a breach, so  
24 Richard's right. We would either need to create a fourth  
25 event, something that would capture this concern of this

1 bad conduct that would impose a duty, or recognize that it  
2 doesn't exist under this formulation.

3 CHAIRMAN BABCOCK: Justice Christopher, then  
4 Harvey.

5 HONORABLE TRACY CHRISTOPHER: I think what  
6 we were trying to -- and it's a difficult rule to draft.  
7 We were trying to get around the one person in some -- or  
8 even a manager in Shell Oil Company gets notice of some  
9 sort of accident, industrial accident, right, and  
10 electronically stored information starts accumulating in  
11 connection with that, but then they don't just sue Shell.  
12 They sue Shell, you know, North America, they sue Shell  
13 this, they sue Shell that; and there's federal case law  
14 that says, you know, all of those other entities, you  
15 know, were put on notice because of, you know, the one  
16 notice to this -- this Shell company about, you know, some  
17 bad tire, let's say or, you know, whatever; and so we were  
18 attempting to limit it because of the incredibly broad  
19 nature of discovery requests that come in. So I don't  
20 know exactly how to limit it, because we thought that that  
21 was a potential desire.

22 CHAIRMAN BABCOCK: Justice Brown.

23 HONORABLE HARVEY BROWN: So going back to my  
24 idea about "should have," would it work to have something  
25 as a number four that says something like "from the time a

1 party reasonably should anticipate litigation"?

2 CHAIRMAN BABCOCK: Yeah, that's what I was  
3 thinking.

4 MR. MEADOWS: But then you don't need any of  
5 the others.

6 HONORABLE TRACY CHRISTOPHER: Right. That's  
7 just common law.

8 MR. MEADOWS: That just goes back to what we  
9 have right now.

10 CHAIRMAN BABCOCK: Yeah, Judge Wallace.

11 HONORABLE R. H. WALLACE: Yeah, I mean, from  
12 the time a claim of privilege arises under Rule 192.5(a)  
13 there's a lot of jurisprudence of what that means. Right?  
14 I mean, we're not -- that's not a phrase that we pulled  
15 out of the air. I mean, I would think that's all we --  
16 it's sort of codifying and saying, okay, but, yeah, you're  
17 going to have to -- there's a lot of the case law to help  
18 you determine -- even though it hadn't been claimed. I  
19 mean, at first I thought, well, as long as they don't  
20 claim a privilege they can do anything, but really that's  
21 not the case. It's when they -- when they claim this  
22 privilege could arise, and I think you could go look at  
23 the case law to help you understand what that means.

24 CHAIRMAN BABCOCK: Robert.

25 MR. LEVY: One quick comment on why the

1 federal rule did not address this, and they made a  
2 explicit determination that they did not have the  
3 authority to decide trigger because of the potential and  
4 the reality the trigger would take place before the case  
5 in controversy exists, and so they might have ducked the  
6 issue, but the -- so that's the difference with the  
7 federal rule, and I definitely understand the point  
8 Richard makes and Professor Hoffman. The challenge is if  
9 we have a rule that talks about reasonable anticipation,  
10 we're not addressing one of the significant problems that  
11 our preservation duty will establish, which is the  
12 gargantuan overpreservation of information; and even today  
13 I can tell you from where companies like ours sit, that we  
14 preserve in effect 95 percent of the data that we put on  
15 preservation on hold is never ever used in any litigation,  
16 and in -- of that, the five percent that is used, most of  
17 it never ever gets to the other side of the court because  
18 it's all, you know, still overbroad and over -- you know,  
19 it's in a subject matter that then needs to be narrowed  
20 down and then produced. So when there is a potential  
21 litigation, we're going to put a hold in place and then  
22 we're going to capture any person that might have any  
23 connection to that hold and preserve data, and that  
24 preservation process is very disruptive. It's very  
25 costly. It impacts individuals involved and also the

1 systems that have to be built to protect it.

2           So the goal I hope is to try to provide a  
3 more precise guidepost in terms of when that duty should  
4 go into effect, and obviously you want to avoid a  
5 situation where a party would deliberately delete  
6 information when they are on notice of a potential lawsuit  
7 without the fact that they were, you know, in this  
8 preservation zone. I think that's an issue that we can  
9 also address.

10           By the way, I think that the party -- that  
11 the work product doctrine and the party work product  
12 doctrine could also be a triggering point, but the -- the  
13 other issue, if you want to go with the question of  
14 reasonable likelihood of litigation, the Sedona Conference  
15 has articulated language on when a duty to preserve might  
16 exist in terms of credible probability or substantial  
17 likelihood, something that is a little bit of a higher  
18 standard to avoid this real problem of overpreservation  
19 and then the gotcha concept of, well, I thought it, you  
20 know, it could have happened, therefore, you should have  
21 preserved. So that -- that might be another way to  
22 approach this question.

23           CHAIRMAN BABCOCK: Jim.

24           MR. PERDUE: I might could get behind that  
25 last point, but there was a prior point that suggests that

1 the federal rule specifically punted; and, frankly, the  
2 commentary to the 2015 amendments specified that 2006  
3 changes couldn't keep up with the ESI growth. I would  
4 commend the comments to everybody, but it says -- I mean,  
5 it says very specifically that it incorporated the concept  
6 of a duty to the extent of which there is an anticipation  
7 or conduct of litigation. "The new rule applies only if  
8 the lost information should have preserved in the  
9 anticipation or conduct of litigation and the party failed  
10 to take reasonable steps to preserve it." There was a  
11 specific consideration of that in the amendment and the  
12 purpose for it, and that's the federal language which at  
13 least this rule proposal breaks from.

14           Now, I also can get behind the concept of  
15 amending (c) to maybe capturing what Mr. Orsinger is  
16 talking about, because that's kind of the problem in this  
17 rule. That split is not only deviates Texas law, it  
18 creates this duty, but it splits from the federal rule  
19 because of this -- even the federal rule acknowledges the  
20 effort to tailor this down to the ESI concern, but it  
21 still recognizes that if you know litigation could be  
22 involved in that data, there is a responsibility to  
23 preserve of which there is reasonable efforts considered,  
24 if there wasn't likely litigation, the scope is too much.  
25 The federal rule managed that, and the commentary talks

1 about all of that. So I reject the proposition they  
2 didn't think specifically about this.

3 MR. LEVY: No, and just to clarify, my  
4 comment was they didn't feel they could define the trigger  
5 because of the Rules Enabling Act. They certainly talked  
6 about it, as you point out, in the comments.

7 CHAIRMAN BABCOCK: Justice Christopher.

8 HONORABLE TRACY CHRISTOPHER: I think that  
9 there would be an advantage to still defining duty in the  
10 rule even if we expanded it to in anticipation of  
11 litigation, back to the old common law standard, because  
12 we have defined it as a duty to take reasonable and  
13 proportional steps to preserve information relevant to the  
14 dispute or lawsuit. Okay. So, remember, that's a  
15 limitation on what -- what we currently have in terms  
16 of -- because we -- we eliminated -- we proposed  
17 eliminating in other parts of this rule "likely to lead to  
18 the discovery of relevant evidence" as, you know, our  
19 standard; and now it's just, you know, reasonable and  
20 proportional relevant evidence. So I think we can keep  
21 duty but expand it to the common law anticipation of  
22 litigation, and still have a little bit more of a  
23 limitation on the scope.

24 CHAIRMAN BABCOCK: Jane, and then Richard.

25 HONORABLE JANE BLAND: Well, I agree that we

1 should try to capture the intent to deprive -- the direct  
2 intent to deprive the court and the parties of  
3 electronically stored information. You know, there are  
4 cases involving programs called Evidence Eraser, and  
5 obviously if you're using one of those programs, you are  
6 intentionally destroying evidence that you think is going  
7 to be used against you some day. So, you know, I would  
8 favor that.

9           I agree with Judge Christopher that if we  
10 define the duty, reasonable anticipation of litigation,  
11 there are -- one of the other aspects of the rule is a  
12 safe harbor so that if you are in the ordinary course of  
13 business, you know, you can submit that as a defense to  
14 the intentional destruction, so -- so it would be helpful.  
15 This was our effort because we were getting comments that  
16 anticipation of litigation was not -- you know, is not --  
17 is in the eye of the beholder, and there had to be some  
18 way of anchoring it to the party that has the duty to  
19 preserve; and so the idea was, well, if you are -- if you  
20 are claiming work product for something, by that point  
21 then obviously you have anticipated litigation; and it's  
22 kind of a goose and gander thing; but if we can make it,  
23 you know -- if the committee -- the sense of the committee  
24 is that we should adopt anticipation of litigation, you  
25 know, we were just getting pushback on that, so that's how



1 we came out the way we did.

2 CHAIRMAN BABCOCK: Okay. Skip.

3 MR. WATSON: I understand and am sympathetic  
4 to any general counsel not wanting to be the trigger that  
5 says, "I anticipate litigation, therefore, you're about to  
6 spend a lot of money on my say-so." I know that can be  
7 daunting, and I sincerely understand and appreciate that,  
8 but the potential for mischief that I see in creating a --  
9 a red line that is a clear demarcation that's not my  
10 decision, this is what the rule says we have to do, really  
11 bothers me about this. I can really see that departing  
12 from the common law standard will create a gray area that  
13 will be manipulated. I mean, there's no question about  
14 it's going to be manipulated, and I'm not sure that the  
15 benefit outweighs that risk.

16 CHAIRMAN BABCOCK: Richard.

17 MR. MUNZINGER: Before I say what I raised  
18 my hand to say I want to say I think Skip has a point. I  
19 remember when Robert first raised -- when we first started  
20 discussing this two or three meetings ago and he outlined  
21 the cost of what it meant to his company to store this  
22 information, I was aghast. It's stunning, and raising the  
23 price of goods in a world economy has something to say  
24 about who gets employed in Texas. You can't just throw  
25 these rules around and not have an effect in the real

1 world, and the stunning cost on people who have the volume  
2 of information -- and his is just one company. Just think  
3 of the companies and the volume of information out there  
4 raises Skip's point.

5           Now, I raised my hand because Justice Bland  
6 made the comment that the rule as drafted limits the  
7 material to be saved to that which is relevant and then in  
8 the words of 192.3 "and proportional to the needs of the  
9 case," but that is not what Rule 215.7 says. 215.7 says,  
10 "A party has a duty to take reasonable and proportional  
11 steps to preserve electronically stored information  
12 relevant to the dispute." There is no limitation that it  
13 be also reasonably proportional to the dispute or that has  
14 a safe harbor provision in it at all. If it's relevant,  
15 keep it.

16           Now, I hate to go back to my personal  
17 experience, but I've seen this in a case involving a  
18 sulfur plant in Oklahoma. There were guys walking around  
19 with these little computers and they're sending e-mails  
20 and this and that, saying what the pressure was on A, B, C  
21 day, and you have to keep all of this stuff? It's  
22 relevant. And it is -- it's astonishing the amount of  
23 information that has to be kept if it's relevant. It may  
24 not be discoverable, but if you're talking about  
25 spoliation and punishment of a party, I can tell you that

1 there are a lot of district court judges whose desire to  
2 punish large corporations is part of their makeup.

3 HONORABLE DAVID EVANS: There goes that bus  
4 over my --

5 CHAIRMAN BABCOCK: Richard --

6 MR. MUNZINGER: Well, I mean, I've  
7 represented a lot of people in different circumstances,  
8 and I have to say, I mean, we're all human beings. Trial  
9 judges are human beings, too, and I have worked in front  
10 of a lot of them that don't have too much of a guilty  
11 conscience in saying something to a large corporation,  
12 "Give me your money" or "give him his money," and I've  
13 worked in front of them that aren't -- I'm too old to  
14 worry about offending anybody and worry about running for  
15 office, so I'm just going to say what the truth is in my  
16 personal experience. I've tried to do that ever since  
17 I've been on this committee. The truth of the matter is  
18 you need to be careful about the cost here, and you're  
19 creating a situation where you have to keep everything  
20 that is relevant as opposed to that which is relevant  
21 reasonably under the circumstances, bearing in mind what  
22 he said two or three meetings that you're spending  
23 millions and millions of dollars in keeping this  
24 information. We're dealing with changes in technology  
25 that none of us knew when we started practicing. I've

1 been practicing 53 years, and these rules have developed.  
2 This stuff that we're dealing with today is mind-boggling  
3 at the changes.

4 CHAIRMAN BABCOCK: Richard, the younger.

5 MR. ORSINGER: Okay. So I wanted to point  
6 out something here that the proposed Rule 215.7, the three  
7 cut-offs, or if we amend one to reasonable anticipation of  
8 litigation, are all objective tests about when the event  
9 occurred, not internal thought processes. The idea of  
10 acting with intent to destroy evidence is subjective, and  
11 the subjective approach of intent to me is important to  
12 catch those people who are wise in the litigation process  
13 and know when their window of opportunity to freely  
14 destroy evidence is going to arrive and they act soon. So  
15 I like the idea of capturing intent for those situations  
16 where it's appropriate, but there's a cost with the  
17 subjective test of mental intent, and that is you have to  
18 have all the discovery associated with the person's  
19 thoughts and motives. So there's a whole different series  
20 of depositions you have to take and documents you have to  
21 request to determine whether this act of destruction or  
22 direction to destruct something was motivated by a certain  
23 intent, and so while there's a benefit to capturing that  
24 intent because we can get back before our objective  
25 standard to the wrongdoer who acts quickly, but there is a

1 cost, because they're going to be -- in almost every case  
2 there's going to be an allegation of malevolent intent  
3 that's going to warrant all of this discovery about intent  
4 and depositions with assistants and secretaries and  
5 vice-presidents and e-mails to look for intent.

6               So there's a cost that goes with intent; and  
7 when I started here today I looked at this and I said, you  
8 know, I'd like to stick with the objective standards.  
9 First of all, you know, they don't involve a person's  
10 thinking; and second of all, they're reviewable by the  
11 court of appeals and the Supreme Court because the  
12 objective test is a reasonable person test; but the  
13 specific intent or the subjective goes into the minds of  
14 the individual and then the courts of appeals and the  
15 Supreme Court are very ill-equipped to evaluate a trial  
16 judge's decision, but in light of the debate I'm inclined  
17 to say I would prefer an earlier objective test, such as  
18 the reasonable anticipation of litigation, and even add an  
19 exception on there for destroying it with the intent to  
20 keep the other party from having it. On the whole, even  
21 though I know it's going to cause satellite litigation and  
22 a bunch of peripheral discovery about what was the state  
23 of mind in the time that it was destroyed, I am very  
24 concerned about creating a safe harbor to freely destroy  
25 evidence; and when we put this rule in black and white

1 we're telling them you can destroy evidence that you know  
2 is important as long as you do it before X. And that's  
3 very -- I think that's a really big policy problem.

4 CHAIRMAN BABCOCK: You want to expand this  
5 list to add number four to say reasonably anticipated  
6 litigation, but then you want to limit that by saying, but  
7 only --

8 MR. ORSINGER: No. I want to add to that,  
9 or if you can prove at an earlier date that it was  
10 destroyed with intent, you've got spoliation then, too.

11 CHAIRMAN BABCOCK: Reasonably anticipate or  
12 if prior to that time with the intent to --

13 MR. ORSINGER: Done with the intent to  
14 deprive another of actual potential prior to the use of  
15 that information.

16 CHAIRMAN BABCOCK: But if you're acting to  
17 deprive evidence wouldn't you be anticipating litigation?

18 MR. ORSINGER: Gosh, not according to the  
19 common law standards. I think that's a reasonable person  
20 test about you look at all the surrounding circumstances  
21 and determine whether a reasonable person in the same or  
22 similar circumstances would anticipate a lawsuit. To me  
23 that's an objective test, has nothing to do with the  
24 thinking of the individual, and we have -- my memory of  
25 the work product litigation is that it's fairly late in

1 the game that you're held to a duty of anticipating  
2 litigation.

3 CHAIRMAN BABCOCK: Well, work product.  
4 Yeah, work product is different. But if you say -- the  
5 president who sent the e-mail about destroy the tire --

6 MR. ORSINGER: Yeah.

7 CHAIRMAN BABCOCK: Okay, surely that  
8 president reasonably anticipated litigation, otherwise he  
9 wouldn't have said, "Destroy the evidence."

10 MR. ORSINGER: Well, I think you're mixing  
11 subjective intent with objective intent, and --

12 CHAIRMAN BABCOCK: I agree with that, but --

13 MR. ORSINGER: Yeah, so the question is, is  
14 the standard of reasonable anticipation of litigation  
15 specific to the thoughts of that president who sent that  
16 e-mail, or is it an objective standard for all companies  
17 in similar circumstances that have this number of  
18 accidents or this number of employee --

19 CHAIRMAN BABCOCK: Not necessarily, but it  
20 would subsume that, wouldn't it?

21 MR. ORSINGER: I don't think so, but if the  
22 Supreme Court were to say that I would go along with it,  
23 but I've always interpreted the reasonable anticipation of  
24 litigation standard to be a reasonable person test like  
25 you have in a negligence case, rather than an actual

1 intent like you do in an intentional tort case.

2 CHAIRMAN BABCOCK: Robert is going to  
3 respond to your --

4 MR. LEVY: Yeah, Richard, an interesting  
5 challenge is that what you're actually talking about could  
6 be even a pre-event decision to deliberately destroy  
7 information. So there's a software product called Wickr,  
8 which is designed for the business communication stream,  
9 and it deliberately deletes the e-mail after the recipient  
10 reads it. It's like Snapchat, if you know Snapchat, for  
11 the business world. We don't use it, but they advertise  
12 that, and so that would be a deliberate decision to delete  
13 communication so that it could not be used later against  
14 the person who wrote it or the company. So I don't think  
15 it's really a line that you can draw because it could, in  
16 fact, be before the injury takes place, but it could be  
17 after the events that lead to that injury, and so where do  
18 you define that line.

19 And we're also all subsuming -- or assuming  
20 this being in a situation of our -- of our litigation  
21 process where the party that holds the information is  
22 entrusted with the good faith obligation to produce it, to  
23 speak honestly about it, and we don't open up our  
24 information stores to the opposing party or to government  
25 to come in and grab everything, that we still trust the



1 parties to produce what they produce and do it honestly  
2 and openly, and so we're -- if we start to get overly  
3 focused on the deliberate decision to delete information,  
4 a party could delete that information and claim they never  
5 had it in the first place, so it's a very difficult path  
6 to delineate.

7 CHAIRMAN BABCOCK: Skip.

8 MR. WATSON: Chip, I think what I heard you  
9 saying was that actual in anticipation of litigation  
10 trumps reasonable anticipation of the litigation --

11 CHAIRMAN BABCOCK: That's a better way of  
12 saying it.

13 MR. WATSON: -- as a matter of law, and I  
14 think you two are kind of talking past each other, because  
15 if it would make Richard feel better to say you either did  
16 anticipate or in reasonable anticipation, then that's  
17 fine, but I think we need to be clear here that actual  
18 anticipation of litigation is reasonable anticipation of  
19 litigation. We're not going to get down to worrying about  
20 whether actual anticipation might have been unreasonable,  
21 you know.

22 CHAIRMAN BABCOCK: Yeah. Yeah. I think  
23 that's right, Skip, but, yeah, Justice Brown.

24 HONORABLE HARVEY BROWN: Well, I hadn't  
25 thought about this before, but what about a company that

1 just routinely destroys all e-mails within a week, because  
2 they say those are going to be used against us some day or  
3 because we want to save the cost or whatever, but all of  
4 that evidence is destroyed before this lawsuit. So I'm  
5 getting ready to release a new product with Ford, and Ford  
6 says we don't want any of the e-mails that talk about the  
7 problems we had in this design. Get rid of them all  
8 before we sell one. I guess under the (3) that we have  
9 now, subpart (a), no duty; under the (4), reasonable  
10 anticipation of litigation, no duty; under Richard's  
11 (4)(b), if you will, the subjective intent, maybe there  
12 was a duty. Is that right?

13 MR. LEVY: Right. I mean, the thing Richard  
14 was talking about would trigger a potential duty, which I  
15 think is a real challenge.

16 HONORABLE HARVEY BROWN: So why wouldn't  
17 Exxon buy a software package like the one you were talking  
18 about and say we're just going to get rid of all of this  
19 because it hurts us more than it helps us?

20 MR. LEVY: Well, I think that a company,  
21 let's say a generic company, wants to have a reasonable  
22 records program that manages and keeps the information  
23 that they need to keep and for regulatory purposes, for  
24 business continuity purposes, as well as for litigation  
25 purposes. You don't want to keep everything, and you want

1 to get rid of things, and you need something that a week  
2 might not be enough time, but maybe a year is an  
3 appropriate time to get rid of e-mails unless you have a  
4 specific reason to keep it, and that's part of a policy, I  
5 think, that companies should make in the abstract without  
6 looking at specific litigation, and there are a number of  
7 factors that you look at with that, and so I think that  
8 the one that just immediately deletes e-mails or text  
9 messages is a little bit more problematic, because it's  
10 indiscriminate.

11 MR. MUNZINGER: Because why?

12 MR. LEVY: It's indiscriminate.

13 CHAIRMAN BABCOCK: Jane.

14 HONORABLE JANE BLAND: I think Robert is  
15 talking about a general intent to deprive everyone of this  
16 information, and Professor Hoffman and Richard are talking  
17 about the specific intent to deprive, like you would say  
18 in a theft statute, you know, the specific intent to  
19 deprive the parties to this litigation. So perhaps you  
20 could make the subjective intent piece of it require the  
21 specific intent for that litigation as opposed to some  
22 general intent. To get the person that's, you know,  
23 wildly shredding -- or because we're not doing paper  
24 maybe, but wildly deleting e-mails and proving their  
25 specific intent, you knew you were going to be sued and

1 that's why you did it.

2 CHAIRMAN BABCOCK: Judge Wallace.

3 HONORABLE R. H. WALLACE: Well, that -- it  
4 also works into the safe harbor provision here at one  
5 time. I do recall representing a company, a big  
6 legitimate company, not like some I represented; but their  
7 policy was there was a contract dispute; and they brought  
8 the contract for me to look at; and I said, "What about  
9 any drafts and stuff"; and their company policy was once  
10 the contract was signed, all drafts, notes, and everything  
11 else were destroyed; but that was every -- you know, that  
12 wasn't just that particular one. It was every one, so I  
13 would say they would say, well, that's ordinary course of  
14 our business.

15 CHAIRMAN BABCOCK: Should we -- should we  
16 vote, Richard, on -- first, on whether we should add a  
17 number (4) that reasonable anticipation of litigation, and  
18 then we can go to your thought about intent? Okay. So  
19 everybody that is in favor of adding a subparagraph (4) to  
20 215.7(a), raise your hand.

21 All opposed? Well, that's our first  
22 unanimous vote of the day. 22 to nothing, the Chair not  
23 voting.

24 MR. WATSON: Of the date?

25 CHAIRMAN BABCOCK: Of the day.

1 MR. WATSON: I thought it was history.

2 CHAIRMAN BABCOCK: It may be history.

3 MR. PERDUE: Eleven years.

4 CHAIRMAN BABCOCK: Now, how about adding  
5 Richard's concept of having a subjective intent to destroy  
6 provision? Everybody in favor of that, raise your hand.

7 Everybody opposed, raise your hand. All  
8 right. That passes by a vote of 11 to 7, with the Chair  
9 not voting, and we're going to take our lunch break.

10 (Recess from 12:06 p.m. to 1:00 p.m.)

11 CHAIRMAN BABCOCK: As you saw from the  
12 agenda we're going to take ex parte communications right  
13 now because we have Judge Ruben Reyes on the line or  
14 shortly on the line and then Justice Boyce is calling in  
15 as well. And, Nina, maybe Andrew Van Osselaer.

16 MS. CORTELL: Andrew Van Osselaer is here,  
17 right here. He's a deputized member of our subcommittee,  
18 and also we should be listing Holly Taylor as a member of  
19 our subcommittee.

20 CHAIRMAN BABCOCK: Holly is on the present.  
21 Okay. Hey, Bill, it's Chip Babcock, and the rest of the  
22 committee and --

23 HONORABLE BILL BOYCE: Yes, sir.

24 CHAIRMAN BABCOCK: -- I think Judge Reyes  
25 might be joining if he hasn't already.

1 MS. CORTELL: Yes, is Judge Reyes on the  
2 line?

3 HONORABLE RUBEN REYES: Yeah, I'm here.

4 CHAIRMAN BABCOCK: All right, great.  
5 Welcome, Judge.

6 HONORABLE RUBEN REYES: Thank you.

7 CHAIRMAN BABCOCK: Okay. Nina, take it  
8 away.

9 MS. CORTELL: Well, we are now at the -- I  
10 think it's Tab G. So Tab G, you have a memorandum from  
11 our subcommittee, the judicial administration  
12 subcommittee. We have been asked to make a recommendation  
13 as to whether Canon 3 of the Code of Judicial Conduct  
14 should be amended to permit ex parte communications or to  
15 make clear that ex parte communications are permitted in  
16 what's called the specialty court context. Specialty  
17 courts are also called problem-solving courts, but Judge  
18 Wallace mentioned to me aren't all courts problem-solving  
19 courts, so I think for purposes of today we'll call them  
20 specialty courts. You may not know, but we have over 190  
21 specialty court dockets across Texas. This includes DWI  
22 courts, drug courts, family drug courts, veterans court,  
23 mental health courts, and commercially sexually exploited  
24 persons courts.

25 These courts function in a way that's

1 fundamentally different from the traditional court in that  
2 there are situations where a number of persons provide  
3 information to the judge so that certain decisions may be  
4 made outside of the contested proceeding context. To gain  
5 more information about specialty courts and to better  
6 understand the needs of those courts, we asked Andrew from  
7 Haynes & Boone to please interview a number of judges who  
8 deal in that realm, and he's going to report. You also  
9 have his memorandum. It's attached to our memo to you at  
10 Tab B, and hopefully you've had a chance to look at that,  
11 but Andrew will report on that, and also we're very  
12 pleased to have Judge Ruben Reyes from the 72nd District  
13 Court in Lubbock County, who also has responsibilities in  
14 this area, to provide his own experiences to better  
15 educate this committee on the needs of these courts and  
16 whether either by amendment of the code or by comment we  
17 should provide greater latitude for ex parte  
18 communications by those courts. So if it's okay with you  
19 I'm going to turn it over to Andrew right now, who very  
20 generously took his time to interview a number of judges,  
21 and he'll give you what he determined from his interviews;  
22 and after that, Judge Reyes, if you could provide your  
23 insights in this area as well, that would be wonderful.  
24 Thank you.

25 MR. VAN OSSELAER: Thank you, Nina.

1 HONORABLE RUBEN REYES: Thank you.

2 MR. VAN OSSELAER: So I was asked to reach  
3 out to specialty court judges to get their take on this  
4 issue. I interviewed five judges. The first is Ruben  
5 Reyes in Lubbock County. He is a drug court judge. We'll  
6 hear from him in a second. I also talked to Ray Wheless,  
7 who is a Collin County drug court judge, and he's chair of  
8 the Specialty Courts Advisory Council. I talked to Judge  
9 Darlene Byrne, who is here in Travis County as a family  
10 drug court and juvenile mental health court judge; and I  
11 talked to Nancy Hohengarten, Travis County mental health  
12 court judge; and Wayne Christian, a Bexar County veterans  
13 court judge; and I asked the judges two things really.

14 First, in trying to figure out whether this  
15 Canon 3 ex parte prohibition is an issue, I asked them how  
16 Canon 3's ex parte prohibition affects their specialty  
17 court program and how the flow of communication works in  
18 their program. From there I asked them their opinion on  
19 three potential changes that the subcommittee was  
20 considering. The first is adding a party consent  
21 exception to the prohibition. The -- we also talked about  
22 explaining the "when authorized by law" exception that  
23 exists in Canon 3, to explain that to include authorized  
24 by local court rule, and then we also talked about adding  
25 an ABA-like comment to the canon that explains the



1 prohibition should not operate to the detriment of  
2 specialty court operations.

3           So all of the judges agreed that if there  
4 was a conflict it would exist in what are called  
5 staffings, which are these meetings that are often weekly.  
6 They're meeting with the court, the prosecutor, the  
7 defense, social service providers, law enforcement, and  
8 they update on the defendant's progress through the  
9 program. Most judges noted that the communications within  
10 the staffing meetings are not ex parte communications  
11 because there's defense counsel there, but in talking to  
12 Judge Reyes -- he can talk more about this -- there's the  
13 potential sometimes that the defense counsel does not  
14 represent a specific defendant, but is more of an advocate  
15 for all defendants of the program, so that might cause an  
16 issue, but a lot of judges noted that there's a lot of  
17 prestaffing meeting communications, a flurry of  
18 communications from all of these different parties,  
19 updating on the defendant's case, and that is with the  
20 court staff in preparation for the staffing. So that  
21 might be prohibited ex parte communication under Canon 3.

22           One judge, Judge Christian, who is of the  
23 Bexar County veterans court, he said that this wasn't  
24 really an issue because he goes out of his way to make  
25 sure that all communication goes to all parties, but the

1 four other judges that I talked to felt that you can't get  
2 communication fast enough if you have to bring everybody  
3 in the loop. It's more of a facilitating thing to  
4 facilitate these staffings, that it has to be very rapid  
5 communication.

6           So I then posed to the judges these three  
7 possibilities of exceptions essentially to Canon 3's  
8 prohibition. Of the four judges that thought there was an  
9 issue, all agreed that the consent exception would solve  
10 the problem, but one judge, Judge Byrne here in Austin,  
11 cautioned that there might be issues with more complicated  
12 specialty court proceedings like in her family drug court  
13 where you have -- you might have a parent that is in the  
14 family -- that is in this drug court program and then a  
15 hostile other parent of a child who might be seeking  
16 custody in another proceeding that would withhold consent,  
17 so there might be complications in obtaining consent. But  
18 otherwise, most of the judges favored the consent  
19 exception.

20           A lot favored the local rule exception,  
21 explaining as authorized by law to include local rules,  
22 but Judge Byrne and Judge Hohengarten explained that  
23 creating local rules is not very easy. They have to be --  
24 they have to be approved by the Texas Supreme Court, so  
25 that might not be as simple as adding a ABA-like comment,

1 and the ABA model comment is that "A judge may initiate,  
2 permit, or consider ex parte communications expressly  
3 authorized by law, such as when serving on therapeutic or  
4 problem-solving courts, mental health courts, or drug  
5 courts. In this capacity judges may assume a more  
6 interactive role with parties, treatment providers,  
7 probation officers, social workers, and others." And so  
8 because of that the committee went forward with a  
9 proposed -- a proposed comment because that seemed like it  
10 had the most approval over all of the judges.

11           And, Judge Reyes, would you offer some -- I  
12 guess your experience on the specialty court, kind of  
13 explaining what your processes are and how the flow of  
14 communication works and then your thought on some of these  
15 alternatives?

16           HONORABLE RUBEN REYES: I'll be happy to do  
17 that. Thank you for allowing me to participate. I really  
18 appreciate that. This is a change that has been long in  
19 coming, a discussion that's been long in coming. When  
20 Professor Shannon wrote his article he was kind enough to  
21 reach out to me because he knew of my involvement with the  
22 specialty courts at multiple levels, and I told him, I  
23 said, "Brian, be nice to us because I do think that  
24 specialty court judges are kind of in this area where we  
25 are mandated by statute to follow best practices,

1 evidence-based practices, and now what's been codified as,  
2 you know, really adopting the standards for drug courts,  
3 effective September 1st of this year." I said but that  
4 can potentially be in conflict of the canons, and so I  
5 really appreciated his article. I thought it was very  
6 timely.

7                   I would tell you this. I do think ex parte  
8 communication is vital and necessary for these courts to  
9 run the way they should. I think it's vital for them to  
10 run efficiently. I saw some of the feedback, and thank  
11 you for sharing that memo with me. You know, there are  
12 times -- there was a comment about, well, let's do it when  
13 the entire team is present. That kind of defies the  
14 reality of what we're dealing with at times, and I'll just  
15 give you some innocuous examples as opposed to some more  
16 serious ones. I can go into those if we need to, but just  
17 during lunch I received e-mails and texts from our  
18 probation officer wanting to know if a travel request that  
19 had just come to her attention, if I would approve that.  
20 A curfew extension, if I would approve that, and if that  
21 has to be shared with the entire team and we wait for  
22 feedback from the entire team on something that really is  
23 not that critical, you know, that really slows down the  
24 process. You know, a travel request may come up because  
25 somebody's family member just passed away. I really don't

1 need the input from the entire team on that. I can decide  
2 that and say based upon how this person has been  
3 performing in the program are they at risk if we let them  
4 go, or are they stable enough that we do let them go.

5           So I would add that, that it's not just ex  
6 parte communications during staffing. It's staffing plus  
7 other daily things that come up, and I will also tell you  
8 that I'm very fortunate to have a team that really just  
9 doesn't take Monday through Friday 8:00 to 5:00 as when  
10 they work. I get requests in the evenings. I get  
11 requests during the mornings. I get communication on the  
12 weekends. I get communications during the holidays, and  
13 part of that is because it's just the nature of what we're  
14 dealing with.

15           I'll give you a short example. About two  
16 weeks ago I got word of one of our participants passing  
17 away. She had overdosed, and so this is one of those  
18 calls that as a drug court judge you dread receiving, but  
19 it's what we're dealing with, and so I had to respond  
20 quickly, because there were some other participants who  
21 had known this individual, were close to this individual,  
22 and this could have triggered a relapse for some of them,  
23 and for one it did. He became despondent, depressed, and  
24 wanted to escape what had happened, so he used heroin. So  
25 sometimes we have to respond that quickly.

1           The other thing I would add is this: During  
2 staffings, yes, we do have a defense lawyer who is  
3 present. However, I have made it a point not to have that  
4 defense lawyer represent the participants because it puts  
5 that defense lawyer in a very awkward position. There's  
6 actually an article written on best practices for defense  
7 lawyers who serve on specialty court teams, and the  
8 recommended practice is that you not do that. The reason  
9 is kind of a precursor to what we're dealing with here.  
10 The defense lawyer may become privy to communication  
11 shared by the participant with that defense lawyer, and  
12 then if that defense lawyer has to participate in team  
13 discussions, there may be something that the participant  
14 told the lawyer and the lawyer is not able to communicate  
15 it. It's privileged attorney-client communication, but  
16 the defense lawyer is saying I think our -- he's thinking  
17 our team doesn't have full information, maybe could not  
18 be -- would be making a different decision or a better  
19 decision, but I cannot share that information.

20           So as a point of practice, I do not put my  
21 defense lawyer in that position. Now, I will also add  
22 this, because we have had a few veterans in my program,  
23 and so what we do is we just modify. If there's a defense  
24 lawyer representing a participant who wants to come in and  
25 communicate with the team, I just bring them in, and I

1 say, "Tell us what you want to tell us. We may ask you  
2 some questions that we need to ask you. If you can answer  
3 them, great. If you cannot, we understand." But then  
4 they leave the staffing. They do not participate and hear  
5 what is being discussed about any of the other  
6 participants. So there are ways that local programs can  
7 modify that to address whatever you're needing.

8           As far as the potential changes, I will add  
9 this. I think Professor Shannon's article is a really  
10 good article. He mentions adding to Canon 3(B), a  
11 subsection (12) on page 162 of his article, and I think  
12 that that's a good idea, if y'all want to discuss that a  
13 little bit more. It simply talks about the court's  
14 ability to recuse themselves if they have gained knowledge  
15 that -- that goes beyond what they might hear in a  
16 contested hearing, and if you get a chance to read his  
17 article, the Stewart case out of Tennessee is a case that  
18 I gave him. It is a horrible case for the judge, I will  
19 tell you that, but it's good for the program. That  
20 program was not being run the way it should be run. The  
21 participant was being sanctioned inconsistent with best  
22 practices and as noted in the opinion and in Shannon's  
23 article, the participant ended up serving more jail time  
24 than if he had just taken and done his time.

25           That's not what these courts are. Whenever

1 I talk about these courts I tell people if you -- if you  
2 don't do them correctly, you are hurting people. So best  
3 intentions are insufficient. You've got to know what  
4 you're doing, and you've got to do it correctly. So that  
5 opinion, you know, basically hammered a judge for running  
6 a program that was not being run well, and so I would just  
7 say that the Stewart opinion, you take that with a grain  
8 of salt, because that was not a well run program, but he  
9 does comment that adding that statement would be a good  
10 statement that when you have a feeling or a belief that  
11 you need to recuse, then you should.

12           So let me say this: We have a practice here  
13 that if one of my participants disagrees with a sanction  
14 or doesn't believe that they should be terminated from the  
15 program, which will in essence be then a violation of  
16 their term of probation and then potentially subject them  
17 to being sent to jail or prison, that does impact a  
18 liberty interest and, therefore, they are entitled to full  
19 due process. While I am able to and comfortable handling  
20 that hearing, I just have an agreement with one of my  
21 other judges here, I will hear your conflicts, you hear  
22 mine, and so we just trade. That to me is the better  
23 practice, but I am sensitive to the fact that you may not  
24 have that ability. You may be the sole judge in that  
25 community, and I will tell you I have talked to judges



1 about that. We don't have a case on point in this -- in  
2 Texas. There are some outside of Texas. Most judges say,  
3 you know, we feel we can do that. We ask jurors to do  
4 that when a piece of evidence is admitted for one purpose,  
5 but don't consider it for the other, and how can we not  
6 think that a judge can do that? You have to be cautious,  
7 but you have to be cognizant of what you're dealing with,  
8 and so that would just be my comment on that with regard  
9 to Professor Shannon's article.

10 I know the other thing that he mentioned as  
11 things to suggest in rewording, I'm not -- I would say  
12 this. He makes a comment on page 160 about "or by written  
13 documents provided to all members of the specialty court  
14 team." Again, I think that defies ex parte doesn't have  
15 to be in written form. It can be something that arises  
16 quickly, and it should cover any and all aspects of ex  
17 parte communication. He talks about waivers. Well, we  
18 know from case law that's out there that we cannot  
19 prospectively waive certain things because of the  
20 Constitution, the federal Constitution and the state  
21 Constitution, so you just have to be cautious about that.

22 With regard to the changes that Andrew  
23 mentioned in his memo, I would direct you to page three  
24 where he talks about possible changes to Canon 3(A). I  
25 think you can do that. It say basically "authorized by

1 law or by party consent." Andrew, I'm sensitive to your  
2 comment that in a family drug court one party may consent,  
3 the other one may not. The way I would deal with that is  
4 you just deal with it up front. "You folks understand  
5 that you're being approved to come into a family drug  
6 court. Do you understand that that might require some  
7 communications that are considered ex parte?" Define  
8 that, talk to them in real terms, not legal terms, and  
9 "You understand that by agreement to come into this  
10 program you are agreeing that that can happen." Okay.  
11 That's what you're doing. I think that would get you  
12 there, and if later on somebody tries to say, "Well, I'm  
13 not consenting in this situation," then that may be an  
14 area where we need to have an appellate opinion.

15 I will tell you there is one opinion in  
16 Texas that talks about UA testing. A probationer objected  
17 to his probation being revoked because it was based upon a  
18 dilute urinalysis, and he said, "I never agreed that I  
19 would -- I would supply a valid UA specimen to be tested."  
20 Well, it's a creative argument, but it defies the nature  
21 of probation when you're, you know, told you've got to pee  
22 in a cup and we need to know you're not using drugs, so  
23 the court of appeals in that opinion basically said if you  
24 have a problem, if you were going to say, "I will submit a  
25 UA sample here under these situations, but not here" then

1 you should have raised it at the time of the plea, and you  
2 didn't, so you've waived it.

3           So kind of within that background, I'm  
4 thinking this issue of party consent, get it up front. I  
5 know when I -- and I specifically handle my pleas coming  
6 into drug court because otherwise I am a civil court here  
7 in Lubbock. I go over a variety of things. You  
8 understand this, you understand that, you're knowingly  
9 coming into this program knowing that I can sanction you  
10 to a couple of days if you don't comply, because we know  
11 treatment without accountability is not effective. "You  
12 understand that?" "Yes." "Yes." "Yes." "Yes." It's  
13 all on the record. And so if somebody had a problem with  
14 that, I'm thinking that the appellate court would say, if  
15 you didn't like it, if you didn't agree, if you disagreed,  
16 why didn't you say so at the time you came into the  
17 program?

18           The comment that Andrew has at 3(B) kind of  
19 modeled after the ABA model code, I think that's fine,  
20 too. The comment he has under 3(C), and, Andrew, I may  
21 have misspoken to you, and if I did, I apologize. I am  
22 not a fan of doing it by local -- by local rule. I think  
23 local control is critical, and that's the beauty of this  
24 model, is it allows for local adaptation, but I do think  
25 that if you get into the practice of doing it locally

1 here's what I think is going to happen. One, because  
2 these courts are mandated to follow best practices, if  
3 somebody files a complaint against a drug court judge --  
4 and I use that in the generic sense. Let me just say a  
5 specialty court judge, okay, then that's going to  
6 ultimately have to be dealt with and the question is going  
7 to be, well, let's do an analysis of their local rule; and  
8 there's a potential then for inconsistencies because each  
9 jurisdiction is going to have a specific local rule that  
10 they just have excepted.

11           Because I serve on the Commission for  
12 Judicial Conduct, I can also tell you that if somebody  
13 makes a complaint against that judge it puts our  
14 investigators in a situation of basically going and  
15 looking and tracking down these local rules, and I think  
16 it's just too specific. I think it's too restrictive. I  
17 am much more in favor of doing something that's a little  
18 bit more global, if you will. I don't want to make it too  
19 broad, but I think if you start getting into too much of  
20 the weeds in this thing it's going to become very  
21 cumbersome and just kind of set up some inconsistencies,  
22 so I would rather not get that -- that detailed and that  
23 local.

24           There is a reference in Andrew's memo to,  
25 you know, the statute that was passed. It's subtitle (k)

1 in the Government Code under Title II. You know, and I  
2 helped with passing that legislation. We talked about how  
3 specific to get because the 10 key components for drug  
4 courts are pretty -- pretty broad and ambiguous, and the  
5 discussion ended up being this: If we get too specific,  
6 every time this -- this evolves, and it will. It's a  
7 growing field. I mean, this year we're celebrating our  
8 30th birthday because it started in 1989. So 2019, 30  
9 years old. We're young. We're still developing. We're  
10 still growing. Every time something changes we would have  
11 to go back and have a legislative change to catch up with  
12 a trending field. Don't want to do that. Let's just do  
13 something that -- that allows for the evolvement of this.

14           So that would be the final comment I would  
15 say about local rules. I've shot a lot of information at  
16 you guys, probably in a much too quick of a time frame,  
17 but I know that you also have other things to do besides  
18 listen to Reyes on this call. If you have any questions,  
19 I'll be happy to answer them.

20           MS. CORTELL: Thank you, Judge. We really  
21 appreciate it. That's very helpful, and I should also  
22 mention that the subcommittee meeting, Judge Byrne also  
23 participated and she provided a lot of similar input. I'd  
24 like to walk the committee now through what we've handed  
25 out to you and kind of frame some issues for discussion by

1 the committee and invite you to ask questions of Judge  
2 Reyes or the subcommittee, but we've given you a four-page  
3 memo. It gives you the background, our referral, request  
4 from Chief Justice Hecht, the original e-mail, the memo  
5 that Andrew prepared that's been referenced as at Tab B.  
6 There is some pending proposed legislation at Tab C to  
7 provide increased oversight and reporting by the specialty  
8 courts. In a minute Holly can provide a little more  
9 background on that. The Government Code sections that  
10 authorize specialty courts is at Tab D and then we set out  
11 Canon 3 for you, which is the general, and subsection A,  
12 prohibition of ex parte communications. The exception  
13 that might be triggered here would be that which allows ex  
14 parte communications expressly authorized by law. I think  
15 it was the belief of the subcommittee that that's -- that  
16 you could arguably say that applies here, but we were  
17 concerned it may not.

18           We also saw our charge as providing you with  
19 some proposed solution should the Supreme Court want to go  
20 that direction. So we're providing for your consideration  
21 the proposed comment to Canon 3, on page four of our memo.  
22 Our -- we have a wonderful subcommittee. We never are  
23 unanimous. This was not any different from our usual  
24 situation, so but I think there was a general consensus to  
25 give you the body of the comment. We've given you some

1 proposed alternatives.

2           What Judge Reyes was referring to is there's  
3 sort of a front end problem and there's a back end  
4 problem. So permitting ex parte communications in the  
5 front end, while the courts are doing their staffings and  
6 providing the -- addressing the immediate issues before  
7 them, but if later at the back end there is a contested  
8 proceeding, there is a question as to whether the judge  
9 should -- has heard things that if didn't prevent a fair  
10 adjudication might give the appearance of not allowing for  
11 a fair adjudication. So we have in our comment both a  
12 permission for ex parte communications, but then also a  
13 recognition that the court might have to consider recusal  
14 at the back end if there's a contested proceeding,  
15 although we have some reiterations of that here.

16           Finally, the article that Judge Reyes  
17 mentioned to you is an excellent one. You had it at the  
18 time of the last meeting. I hope a number of you had the  
19 chance to review it by Brian Shannon, which talks deeply  
20 about the issues that confront specialty courts and why  
21 there may be a need for a special comment here.

22           We did go the comment route at the  
23 subcommittee. Another way to do it, as mentioned, was if  
24 you looked at Canon 8(E) you could say "considering an ex  
25 parte communication expressly authorized by law or

1 consent." We did not recommend that, but that could be  
2 considered. Some on the committee would provide no  
3 comment whatsoever, but again, we wanted to provide  
4 something.

5           The last thing I want to give the committee  
6 by way of information is, Holly, if you could speak a  
7 little bit about the pending legislation on specialty  
8 courts.

9           MS. TAYLOR: Sure, I'd be happy to do that.  
10 First I'd like to mention the legislation that happened in  
11 2013 that Judge Reyes kind of alluded to, so I think  
12 initially when these specialty courts were being created  
13 they were isolated statutes in the Family Code and the  
14 Health & Safety Code and the Government Code, and I think  
15 there was some legislation in 2013 that kind of  
16 consolidated all of it into the Government Code, and that  
17 legislation in part defined these things as specialty  
18 courts, so that's one of the reasons that we use the term  
19 "specialty court" in the proposed language that we've  
20 provided.

21           In addition, it set out some requirements.  
22 They have to be registered with the state, and  
23 furthermore, they have to follow what's called  
24 programmatic best practices, and I think Judge Reyes  
25 alluded to those as well. Only as far as I know so far



1 one set of programmatic best practices has been adopted,  
2 and those are for adult drug courts. But the programmatic  
3 best practices would be recommended by the Specialty  
4 Courts Advisory Commission and then I guess adopted by the  
5 Judicial Council, and that's happened with regard to one  
6 set of programmatic best practices. Judge Reyes kind of  
7 alluded to some of these best practices, which include  
8 this process of having staffings outside of court in which  
9 most of the real work is done in these specialty courts in  
10 these staffings where there's a treatment team for the  
11 person, and the judge is sort of the head of the treatment  
12 team.

13               So in this current legislative session there  
14 are two bills working their way through the Legislature,  
15 and I have been in communication with the Office of Court  
16 Administration, David Slayton and Megan LaVoie, and they  
17 believe that these pieces of legislation are likely to  
18 pass; and what they do is basically they continue this  
19 effort of centralized registration and supervision of  
20 specialty courts; and they have identified an issue in  
21 which Texas is kind of an aberration. Apparently there's  
22 only two states that don't house their supervision of  
23 specialty courts within the judicial branch, and in Texas  
24 they're with a division of the Governor's office, so  
25 they're effectively in the executive branch. So this new

1 legislation moves that over to primarily being supervised  
2 within the judicial branch, and it gives a big role to the  
3 Office of Court Administration to assist the specialty  
4 courts with some technological assistance and to collect  
5 data and to help them with -- and also the legislation  
6 focuses on this process of the programmatic best  
7 practices.

8                   So I think they're going to basically be  
9 putting more funds into it, and there's going to be more  
10 supervision, and it's going to be housed within the  
11 judicial branch. I think that's overall the intent of the  
12 new legislation. There are at this point, as I understand  
13 it, over 190 specialty courts of at least seven different  
14 types in Texas.

15                   MR. PERDUE: Did you say 70?

16                   MS. TAYLOR: Seven different times. Seven  
17 different types. Over 190 different courts.

18                   MS. CORTELL: You heard Judge Reyes refer to  
19 one other way this could be handled, which would be by  
20 local rules, and our subcommittee did not recommend going  
21 the local rule route for some of the reasons that have  
22 already been mentioned, but other than that we would open  
23 for discussion the proposed comment that we're giving you  
24 at page four of our memo or any other solutions the  
25 committee might want to discuss to the question of how

1 best to accommodate the needs of specialty courts in the  
2 area of ex parte communications.

3 CHAIRMAN BABCOCK: Professor Carlson.

4 HONORABLE RUBEN REYES: This is Judge Reyes.  
5 May I say one thing, because I'm about to have to get off  
6 the phone? I've got a hearing scheduled, and the lawyers  
7 are waiting for me.

8 MS. CORTELL: Okay.

9 HONORABLE RUBEN REYES: I had mentioned to  
10 Andrew -- and, Andrew, I don't know if you've mentioned  
11 this, but I want to throw it out there. It's not related  
12 to the issue at hand, but I think it's something that we  
13 would like to have looked at. As I indicated to you, I  
14 serve on the Commission for Judicial Conduct. One thing  
15 that I mentioned to Andrew, and, Andrew, I hope I'm not  
16 speaking out of turn here, but since I have an audience  
17 I'm going to take advantage of it. Okay. We -- the  
18 commission hears complaints against judges on whether they  
19 have violated the canons. Okay. A judge has an  
20 opportunity if they disagree to take a certain course of  
21 conduct, including having a contested hearing before a  
22 panel of three justices, and that ends up being the final  
23 say-so. As a result, we do have some opinions that are  
24 inconsistent with one another.

25 What I had mentioned to Andrew in one of our

1 talks was the idea -- and I've talked to Justice Guzman  
2 and Justice Hecht about this. The idea of having the  
3 Supreme Court have the ability to review those tribunal  
4 decisions. They can look at it, if they decide they want  
5 to, you know, delve into it, great. If they decide they  
6 don't want to, that's fine, too, but we have a system set  
7 up here in Texas where the Supreme Court writes these  
8 canons, but they're not the final say-so on whether a  
9 violation of that same canon has occurred or not.

10           So I just throw that out there for maybe a  
11 future point of discussion, that that is something that  
12 would be really, really helpful. I know that they -- I  
13 know Justice Guzman told me she's not too excited by  
14 taking more work on, and I understand that, and if that's  
15 what they decide, that's fine, but I just think it's  
16 remiss that the body who writes these rules cannot  
17 ultimately comment whether their interpretation is done  
18 correctly. So with that being said, again, thank you so  
19 much for allowing me to participate. I'm going to go and  
20 have a hearing. Okay?

21           MS. CORTELL: Thank you, Judge.

22           HONORABLE RUBEN REYES: Thank you so much.

23           CHAIRMAN BABCOCK: Thank you, Judge.

24           MS. CORTELL: We appreciate it.

25           HONORABLE RUBEN REYES: Bye-bye.

1 MS. CORTELL: Bye.

2 CHAIRMAN BABCOCK: On that last point, I  
3 think Judge Reyes was talking about when there is a  
4 special court of review, which is impaneled for certain  
5 violations of the canons, but if they are on the removal  
6 track then the Supreme Court does have appellate  
7 jurisdiction. So it's -- he's half right and right for  
8 most of the cases, but if there's removal then the Supreme  
9 Court is --

10 PROFESSOR CARLSON: Removal of a judge?

11 CHAIRMAN BABCOCK: Yes. Professor Carlson.

12 PROFESSOR CARLSON: Yeah. No, I just wanted  
13 to ask you, Nina, is alternate one included because of the  
14 internal disagreement on the subcommittee --

15 MS. CORTELL: Yes.

16 PROFESSOR CARLSON: -- or did the  
17 subcommittee --

18 MS. CORTELL: Both footnotes give  
19 alternative language of -- we've had several discussions  
20 and didn't reach ultimate agreement on it, so we wanted to  
21 provide to the full committee some alternative wording,  
22 and we can speak to it, so the thought was that -- and  
23 this goes to the first sentence, that it was too  
24 uncertain, not tethered enough to a specific rule and so  
25 forth. The reason we didn't make it the majority view was

1 because we thought that was too narrow, that there were --  
2 there isn't enough in the statute to really guide -- to  
3 provide the general guidance that was needed.

4           The second sentence, I'll go ahead and  
5 explain that, and that's a very substantive issue and that  
6 is how do you treat recusal, so do you have a rule that  
7 opens up the possibility that you'll need to have recusal,  
8 even though you have a permitted ex parte communication.  
9 So the -- in the main text we're saying, yes, that is a  
10 possibility that recusal may be appropriate, even though  
11 the communication is permitted. The alternative in  
12 footnote two goes the other direction and says that a  
13 permitted communication cannot be the basis of recusal.

14           PROFESSOR CARLSON: Oh.

15           MS. BARON: A forced recusal. Right?

16           MS. CORTELL: Sorry?

17           CHAIRMAN BABCOCK: Stephen.

18           HONORABLE STEPHEN YELENOSKY: A couple of  
19 things and maybe -- and maybe it's not intended this way.  
20 First of all, in the second one, it's not a ground to  
21 force recusal of a judge, well, the document seems to  
22 entertain the possibility, or maybe it's the article, that  
23 the same judge could move from a problem-solving court to  
24 my court like a nonproblem-solving court -- we just rule,  
25 and I don't know that we've ever solved the problem -- in

1 the same matter, and that should not be something you  
2 consider. That should be mandatory recusal, because  
3 you've received confidential information. You should not  
4 be able to -- you should self-recuse or be subject to  
5 forced recusal if you get confidential information in a  
6 problem-solving court and in that same problem-solving  
7 court or another court you're going to decide a matter  
8 that involves that confidential information. That should  
9 be clear.

10 MS. CORTELL: Well, that's a third way to  
11 go, right. I think there's concerns in some jurisdictions  
12 that you don't have enough available courts for that  
13 purpose. You may not have a good option if that judge  
14 recuses. A number of the judges interviewed felt that  
15 they could be fair. It's really almost more of an  
16 appearance issue. So we went sort of in a middle ground  
17 saying you should consider whether recusal is appropriate.

18 HONORABLE STEPHEN YELENOSKY: Well, can I  
19 follow-up on that?

20 MS. CORTELL: Sure.

21 HONORABLE STEPHEN YELENOSKY: The fact that  
22 you may not have enough courts to me is not grounds either  
23 for appearance purposes or for actual ethical issues to  
24 say, okay, we're going to take the middle ground. The  
25 only instance in which I know of it being okay -- and I

1 don't even think this is okay -- is in the context of  
2 agreement between attorneys that they're going to do a  
3 mediation, get confidential information, and they're going  
4 to agree that that mediator if not resolved will become  
5 the arbitrator. I've been asked to do that, and I said I  
6 can't ethically do that, even if they agree, so I don't  
7 know. I don't see how it could be done in a court, just  
8 from my point of view.

9 CHAIRMAN BABCOCK: Chief Justice Hecht.

10 CHIEF JUSTICE HECHT: Nina, did your  
11 inquiries turn out whether there have been any motions to  
12 recuse?

13 MS. CORTELL: I don't -- I think Judge Byrne  
14 might have said that she has voluntarily recused and that  
15 she has someone she can trade off with, and I believe  
16 Judge Reyes may have said that as well, but it may not  
17 have gotten to the point of formal recusal or a contested  
18 recusal. It was voluntary.

19 CHAIRMAN BABCOCK: Judge Estevez.

20 HONORABLE ANA ESTEVEZ: Well, in our courts  
21 we have a specialty drug court, and it's an automatic  
22 transfer -- I mean, we just -- they keep the letter. We  
23 don't actually have to do the normal transfer because we  
24 have the ability to sit at each other's benches, but  
25 they -- he never hears them once he's out. So if they are



1 failing drug court then there is an automatic recusal. I  
2 just hear his case or one of the other judges do. So we  
3 are following the -- and he felt very -- it's Judge Board,  
4 and he feels very uncomfortable, you know, having that  
5 confidential information because the confidential  
6 information usually is "All right, you need to go to  
7 SAFP."

8 "I don't want to go to SAFP." So he's got  
9 some -- they are all recommending something, and he's  
10 saying "no." Well, it's the same as having a plea offer  
11 and then you're either going to intentionally go under or  
12 over, but you're going to claim you put it aside. Well,  
13 you know all the information. You know all the  
14 background. It isn't fair to that individual, and so they  
15 come to another court where it's just even with all of the  
16 other defendants that weren't in drug court. They have  
17 the same opportunity to get on the stand, make whatever  
18 plea they want to whatever type of treatment or prison  
19 sentence or stay on probation or whatever it might be.

20 CHAIRMAN BABCOCK: Is that a form of  
21 recusal?

22 HONORABLE ANA ESTEVEZ: It is not a formal  
23 recusal, but it's --

24 CHAIRMAN BABCOCK: No, a form of, it's like  
25 recusal.

1 HONORABLE ANA ESTEVEZ: Yeah. Yeah, it's a  
2 total -- it's an absolute transfer. They never -- I mean,  
3 without the transfer, it's just -- it's a faster way, and  
4 someone else just hears the case. They send out the  
5 e-mail saying, "We're out, who can take this," and one of  
6 us will pick it up, so I believe it's the same. I mean,  
7 it's the same effect. No one has anything to complain  
8 about. The judge isn't there. It's a different judge.  
9 They can't object to -- it's not the same as civil, so in  
10 civil cases --

11 CHAIRMAN BABCOCK: Right.

12 HONORABLE ANA ESTEVEZ: -- you can object to  
13 a visiting judge or any other type of judge that's  
14 assigned, but you can't do that in criminal cases.

15 CHAIRMAN BABCOCK: Yeah. Any other  
16 comments?

17 HONORABLE TOM GRAY: I'm going to defer,  
18 though, to --

19 HONORABLE TRACY CHRISTOPHER: Well, I think  
20 we -- before I would vote on alternative proposals one,  
21 two, or the current rule, I need to know whether that's  
22 the practice everywhere and so, you know, on these  
23 specialty courts. So the specialty courts are -- they're  
24 just problem-solving and then if it goes to trial  
25 somewhere is it in front of a different judge? I mean,

1 because that would make a big deference to me as to what I  
2 would vote on.

3 MS. CORTELL: Well, from what we understand  
4 and what Judge Estevez was talking about is a protocol  
5 that's often followed. I can't tell you that it's in all  
6 courts, and the concern expressed was whether that  
7 procedure is available in a smaller county where you may  
8 not have another judge you can shift it to, so that may be  
9 really where the challenges are.

10 CHAIRMAN BABCOCK: Justice Gray.

11 HONORABLE TOM GRAY: Realizing that I'm on  
12 the losing end of this process, I'm going to read what I  
13 wrote and then explain how it's modified based on some  
14 information that I learned from Holly during our  
15 conversation and how it led to part of what I proposed in  
16 the -- that was -- that was accepted by the subcommittee's  
17 subcommittee.

18 I want to record my opposition on the belief  
19 that we are making -- and, first of all, I do have to say  
20 to the judges that participate in these courts and that  
21 cause them to function, kudos to them. I think it is a  
22 huge public service in that regard, but I believe that  
23 what we're doing is making social workers out of our  
24 judges, which is I believe beyond the independent neutral  
25 arbiter of resolving legal disputes and the front to the

1 concept of separation of powers by invading the role of  
2 the legislative and executive branches of our trial court  
3 system of government. It is a fundamental violation of  
4 one of the most revered tenets of our judicial system. We  
5 do not make decisions based on evidence that is not  
6 presented in the presence of mine enemy for the sake of  
7 openness and a sense of fairness to obtain justice. That  
8 would be the view from the top looking down.

9           I think it is a fundamental violation of due  
10 process for a judge -- emphasis on judge -- to make a  
11 decision, any decision, based on information that is not  
12 known to all the parties, and that I would view is from  
13 sort of looking from the bottom down from the point of  
14 perspective of the person's involved.

15           In summary, I could not say it better than  
16 one of the judges interviewed, which was actually Judge  
17 Reyes, albeit he was using it as the basis of arguing for  
18 this need, and I use the same language that is attributed  
19 to him to argue against it wherein he said that judicial  
20 impartiality is itself out of step with the role of  
21 specialty court judges who often act more like coaches  
22 than arbitrators, or arbiters, excuse me.

23           My response is let us be judges, not social  
24 workers. If addressing specific problems and society  
25 needs a specific type of fix of some type, social worker

1 or program, let the Legislature create it, define it, and  
2 fund it, while at the same time empowering the executive  
3 to run it. It is -- if it needs a neutral arbiter to be  
4 involved, then incorporate the role of the judge as a  
5 judge, but do not attempt to make the judge act as a  
6 social worker. You do not employ a blacksmith to do  
7 dental work.

8                   Holly then directed me to where the  
9 Legislature has, in fact, actually, engaged -- sort of  
10 dipped its toe into this and has created these courts; and  
11 there is, as she said, a -- that the Legislature has said  
12 that the programs shall comply with the programmatic best  
13 practices recommended by the Specialty Courts Advisory  
14 Council under section 772, and it goes -- and approved by  
15 the Texas Judicial Council. So there is a very specific  
16 process. Apparently they're about to amend it and throw  
17 it over into the judicial branch, which I think would be a  
18 mistake; but it's in pattern with what they've been doing  
19 as delegating their work to other branches.

20                   And so, but with that said, that's what we  
21 need to focus on and what it is that the -- the judge  
22 needs in trying to stay out of a violation of the canons  
23 of ethics or the conduct, Judicial Conduct Commission, and  
24 so I did propose and the subcommittee of the subcommittee  
25 did accept that we change the focus of the recommended

1 comment that it was not about what was permissible, but  
2 rather what was not a violation of the existing canons,  
3 and that's why it says it is not a violation of the  
4 prohibition. What I am trying to do or was trying to do  
5 is remove the uncertainty so that a judge would have  
6 comfort in front of the Judicial Conduct Commission when a  
7 complaint was lodged that they had participated in ex  
8 parte communications and then proceeded to be an arbiter  
9 in the actual proceeding.

10 I think, in fact, that if the ex parte  
11 communication is not a violation of the Code of Judicial  
12 Conduct, that you can't recuse the judge on that basis.  
13 You can't force the recusal, and the best example I can  
14 give in practice of that currently is a Rule 412 hearing,  
15 which apparently is also about to be amended over in  
16 the -- but that's the rape shield law. If the judge  
17 becomes privy to that running up to whether or not this  
18 disclosure needs to be made about prior sexual conduct of  
19 the victim, and so the judge is aware of that, and the  
20 judge may be doing both the guilt/innocence and/or the  
21 punishment, but that can't be the basis for a recusal of  
22 the judge, just because they sat on that hearing.

23 Same way trial court judges, they see the in  
24 camera privileged information of one party or the other  
25 that's being sought by the other. That is by definition

1 an ex parte communication. It is not the subject of a  
2 forced recusal. Cannot be. So I think if you're going to  
3 allow this type ex parte communication for a trial judge,  
4 it can't be the grounds of a recusal. There's one other  
5 one, area that I could go into as far as tweaking the  
6 language, but I'll skip for now. But it's just I think  
7 the whole concept is that we need to rely upon what the  
8 Legislature has approved, and if that's approved then  
9 it's -- and it is, and it fits within the existing Code of  
10 Judicial Conduct, subsection (e), that a judge can  
11 consider an ex parte communication expressly authorized by  
12 law, those that are approved in the proper process now,  
13 that is expressly authorized by law, because it's best  
14 practices, and we don't need to tweak the canons to make  
15 what we're already doing comply.

16 MR. ORSINGER: I haven't prepared my  
17 comments so they won't be as articulate as what Justice  
18 Gray just shared.

19 CHAIRMAN BABCOCK: Or as long.

20 MR. ORSINGER: Or as long.

21 HONORABLE STEPHEN YELENOSKY: I didn't have  
22 time to --

23 HONORABLE TOM GRAY: That's okay. It was  
24 mostly extemporaneous, and I really don't normally get to  
25 do that like Richard Munzinger does, so --

1                   CHAIRMAN BABCOCK: Just you wait.

2                   MR. ORSINGER: Okay. So the proposal to me  
3 is a little confusing as to what's intended, because if  
4 you read the last sentence of the proposed comment, all it  
5 says is that a court should consider whether to recuse  
6 based either under Canon 3 or Rule 18b for forced recusal.  
7 We're not actually requiring that they recuse or even  
8 setting up a standard for recusal. We're just asking to  
9 consider it, which seems odd to me because it doesn't  
10 really accomplish anything. I mean, it doesn't give you a  
11 rule to go by. It just says, "Would you please think  
12 about this before you do it?"

13                   So I looked at what the standards are that  
14 are supposed to be referenced the judge is supposed to  
15 think about. Well, if you look at Rule 18b, you're  
16 supposed to recuse either voluntarily or force another  
17 judge off the bench because impartiality might reasonably  
18 be questioned or because of a personal bias or prejudice.  
19 So that standard is telling the judge ask yourself whether  
20 your impartiality might reasonably be questioned because  
21 of the ex parte activities that have gone on, or ask  
22 yourself whether you have a personal bias or prejudice  
23 because of the activities that have gone on.

24                   It's been a while since I read the recusal  
25 case law, but I believe that personal bias or prejudice



1 can't be something that arises out of the events in the  
2 case. Because a lot of people tried to recuse judges  
3 based on prior hearings or comments or rulings, and so I  
4 think the Supreme Court of Texas basically said you can't  
5 look at rulings and decisions and information the judge  
6 acquires about the litigants and then say that in reaction  
7 to the evidence the judge now has a bias or prejudice. So  
8 I'm not even sure that 18b(2)(b) would apply.

9           Go back to Canon 3. Canon 3 says, "The  
10 court shall not initiate, permit, or consider ex parte  
11 conversations." So initiate and permit doesn't work here  
12 because we are allowing them to both initiate and permit.  
13 So the real question is under Canon 3, the judges are  
14 supposed to ask themselves are they able to not consider  
15 the ex parte conversation, because they're prohibited  
16 under Canon 3 from considering. So if a judge's personal  
17 assessment is, okay, I know that this person was dirty on  
18 this test or whatever, but can I still listen to the  
19 evidence presented at the hearing and make a decision  
20 based on the hearing without considering what I know? If  
21 the judge says, I'm sorry, I can't get that out of my  
22 head, then we are asking them to think through whether  
23 they should recuse or not.

24           I think that's valid, but I think we ought  
25 to set up a test rather than just ask them to go through a

1 thought process. For example, perhaps we should say if  
2 the court believes that it cannot -- cannot -- refuse or  
3 avoid considering what it learned in an ex parte basis, it  
4 should recuse. So we're giving the judge a little  
5 direction there, which is, look, if you know too much, you  
6 can't hear the adjudication, so that's for the internal  
7 thought process, but I think we need an external standard,  
8 too, and I don't -- maybe the good external standard is  
9 impartiality reasonably be questioned, but your court  
10 system, Ana, where you automatically recuse because you  
11 have any ex parte knowledge --

12 HONORABLE ANA ESTEVEZ: It's a transfer,  
13 because when we say recuse that means we're taking it up  
14 and --

15 MR. ORSINGER: I know. In this context I  
16 don't really want to talk about the procedural  
17 differences. The functional effect of it is that you're  
18 automatically recused, quote, transferred, if you heard  
19 any ex parte information. So it's kind of like it doesn't  
20 matter whether you can ignore it. It doesn't matter  
21 whether it's trivial or significant. If you can prove  
22 that there was any ex parte communication, it's out of  
23 your court and into somebody else's court, and, of course,  
24 that guarantees an absolutely neutral magistrate, but is  
25 that necessary, do we have to do that? Does it need to

1 be --

2 CHAIRMAN BABCOCK: Richard, you're crowding  
3 the judge here.

4 HONORABLE ANA ESTEVEZ: I know, I just want  
5 to -- I want to make sure everybody understands what kind  
6 of court we're talking about because it makes -- it will  
7 give you a different perspective of what type of  
8 relationship you're having with this judge. It is not a  
9 normal relationship. It's probably more than you see your  
10 girlfriend. It is every single week. They come for years  
11 to see this judge, and the judge knows everything about  
12 what happened during the week and if they had a dirty -- a  
13 dirty UA or if they -- how much community service. It is  
14 so -- the accountability level is so extreme that there is  
15 absolutely no way there isn't an ex parte communication.  
16 I mean, they know more -- that judge knows more than the  
17 person's probably spouse, kids, and parents about all of  
18 their personal issues, because they'll talk about their  
19 issues and what they're overcoming, and just like he said.  
20 He was calling those people to tell them that someone  
21 died. Judge Reyes said that somebody had overdosed on  
22 heroin, and so he had to get to everybody to tell them  
23 that they had died so he could do this damage control. I  
24 mean, it is a very close relationship that they have with  
25 them.

1                   There is no doubt that they should not be  
2 ruling the next level, because all of these people pled  
3 guilty to these crimes. There is no doubt that these  
4 people did it. We don't start -- there might be a  
5 pretrial diversion, but no matter what, everyone that's in  
6 this court has pled guilty to whatever that crime is, and  
7 now it is a one-on-one relationship to try to get you  
8 either to get through probation or a pretrial diversion so  
9 you never get any type of conviction or -- well, either  
10 way, either no conviction or you just get it expunged  
11 depending on if you're in veterans court or whatever, but  
12 that relationship is a very -- I mean, it's -- there's  
13 nothing else to compare it to. It is a very emotionally  
14 driven -- they're doing it for the judge. And that makes  
15 a difference, because when you say, if, if the judge is  
16 doing it the way he's supposed to do -- do their job,  
17 there's no question there is a lot of ex parte  
18 communication.

19                   CHAIRMAN BABCOCK: But isn't that all  
20 authorized by law?

21                   HONORABLE ANA ESTEVEZ: It's all authorized  
22 by law, but the question is they never really talked about  
23 what happens if they fail, and what happens when they fail  
24 is now it's a revocation, and so this person that has been  
25 thrust into this relationship now gets to decide whether

1 they go to prison, whether they go to more treatment even  
2 though they've already proven that they're not going to do  
3 the treatment, knowing all of the things that no other  
4 judge would necessarily know or find as relevant, you  
5 know, that their brother died, that their sister -- you  
6 know, that he lost his job three years ago and it took him  
7 that long to get a new job. Whatever it might be.

8 I'm just saying, I just want you to know --  
9 I want you guys to realize that this is not a normal  
10 relationship. It's not a judge just having a phone call  
11 or somebody walked in and gave him a short ex parte. This  
12 is a -- those people become dependent on that relationship  
13 with their judge. They are working for their judge. It  
14 would be like if -- you know, it is they're struggling  
15 through life's problems hoping to get a final solution and  
16 trusting that judge to help them get through it.

17 MR. ORSINGER: Well, I would say that in  
18 light of that, taking that as a given, that we should do  
19 more than just ask judges to consider whether they should  
20 remove themselves because the argument you just made is  
21 that we should require that they remove themselves because  
22 inevitably they're going to be intertwined in all of these  
23 personal --

24 HONORABLE ANA ESTEVEZ: And they should.

25 MR. ORSINGER: -- successes and failures.

1 HONORABLE ANA ESTEVEZ: And they really  
2 should.

3 MR. ORSINGER: And we really shouldn't say  
4 think about it before you rule. We ought to just say,  
5 "Look, guys, you're so immeshed with these people you  
6 can't make an independent judgment."

7 HONORABLE ANA ESTEVEZ: And I would say the  
8 smaller jurisdictions, I don't know anyone that really has  
9 a drug court when they only have one judge, because you  
10 don't really -- I mean, why isn't everybody in drug court  
11 then? I mean, there's no way they could. As far as I  
12 know, unless the county judge is doing it. And then --

13 MS. CORTELL: This is what we've heard from  
14 the judges.

15 CHAIRMAN BABCOCK: Nina, you had your hand  
16 up. Munzinger, keep warming up in the bullpen.

17 MS. CORTELL: I just want to say the reason  
18 we didn't feel wholly comfortable going under the  
19 authorized by law permissive language in the canon is  
20 because, although the courts are authorized by law, these  
21 particular practices are not. The best practices that  
22 we've seen promulgated are very narrow and only relate to  
23 maybe one of the courts, so we weren't able to connect the  
24 dots as to authorized by law in all instances.

25 CHAIRMAN BABCOCK: Okay. Richard.

1                   MR. MUNZINGER: Is the judge of the court  
2 required to state that he is making a ruling or has been  
3 influenced in his ruling by an ex parte communication? If  
4 he is, he has revealed the ex parte communication without  
5 revealing the ex parte communicator, but I'm just curious,  
6 is he required to make that statement? If he isn't,  
7 you're really appealing to his conscience or her  
8 conscience here when you have a rule that says you've got  
9 to recuse yourself, and I don't know that. It would seem  
10 to me, given the relationship that you describe, the judge  
11 could say, "Yes, but I was told that you took some heroin"  
12 or you did whatever the thing is that you weren't supposed  
13 to do, or you have yielded to whatever the temptation is  
14 at least once in the last two weeks. "Did you?" And they  
15 go on with that.

16                   Now, you couldn't do that if you were a  
17 judge in a district court case, litigating with people.  
18 That would be an ex parte communication that ought to  
19 disqualify the judge immediately. In this kind of  
20 context, I don't see that that would be, given the  
21 relationship that you've described and that they've done.  
22 Perhaps a solution may be to require the court to state on  
23 the record or what have you that there was an ex parte  
24 communication. At that point in time you've either  
25 destroyed the trust or the person says "yes" or "no" or

1 they say "recuse yourself," and you don't have a problem  
2 anymore. I don't know whether that is meaningful or  
3 helpful or not, but it just occurred to me.

4 CHAIRMAN BABCOCK: Eduardo.

5 MR. RODRIGUEZ: I just had a question, but  
6 it just seems to me that this whole process is ex parte.  
7 I mean, that's the whole purpose of the thing, is for them  
8 to get into a one-on-one relationship, so to help the  
9 people. So either -- either we have to -- if an issue  
10 comes up, it's got to be presented to another judge, and  
11 he has to recuse -- he or she has to recuse himself or  
12 else, you know, this -- I mean, I don't see how -- how  
13 it's going to work otherwise, and, I mean, because the  
14 whole thing is the ex parte. And the other question -- I  
15 mean, I just have a question that -- are these -- are  
16 these judges -- I mean, is this program working? I mean,  
17 is it being -- is it beneficial?

18 HONORABLE ANA ESTEVEZ: It's beneficial.  
19 It's just so costly. I mean, there's so much effort that  
20 goes in, for one, but, yeah, it works. I'm going to say  
21 that they have a better recidivism rate than we do. You  
22 know, they do better than the overall system.

23 CHAIRMAN BABCOCK: Chief Justice Hecht.

24 CHIEF JUSTICE HECHT: Yeah, it's working all  
25 over the country and has for years. And I don't know -- I



1 couldn't remember if Nina said this, but Judge Reyes just  
2 finished a two-year term as the chair of the National  
3 Association of Drug Court Professionals, so he is very  
4 plugged in on the national debate and practices about what  
5 the courts do.

6 CHAIRMAN BABCOCK: Has there ever been a  
7 complaint that's gone to the conduct commission?

8 CHIEF JUSTICE HECHT: I don't know.

9 CHAIRMAN BABCOCK: Of course, you might not  
10 know because of their procedures.

11 MR. RODRIGUEZ: Are we making up a -- are we  
12 making an issue about something that's inherent in how the  
13 program is working?

14 CHAIRMAN BABCOCK: Well, that occurred to  
15 me, Eduardo, because this proposed rule says if the ex  
16 parte communication is reasonably necessary to fulfill the  
17 court's function. Well, I mean, it sounds like that's the  
18 essence of the court's function.

19 HONORABLE DAVID NEWELL: Right.

20 CHAIRMAN BABCOCK: So it would always be  
21 necessary. Judge Newell.

22 HONORABLE DAVID NEWELL: That's sort of the  
23 thing I had mentioned in the committee, too, is that this  
24 has been going on and judges have been adapting to this  
25 with -- and they've been dealing with this all this time,

1 and if it is ex parte communication, they seem to be  
2 proceeding with the idea that it's already authorized by  
3 law, which all of this -- and they are very careful,  
4 knowing that this is really confidential information that  
5 they shouldn't be sitting on these disputed matters  
6 afterwards, which strikes me as cautioning for doing very,  
7 very little.

8                   If you start to do more, it's starting to --  
9 it starts to look like all this time everyone has been  
10 doing something wrong, and we should really just try and  
11 do as little as possible because it sounds like all of  
12 these things are working and working well, and the judges  
13 in their normal role are figuring out what the problems  
14 are and trying to find ways to avoid them so that they  
15 maintain their -- they act ethically within the existing  
16 canons.

17                   CHAIRMAN BABCOCK: Well, the other  
18 observation I had about this proposal is it goes on to  
19 say, you know, if you're going to go on to the next level  
20 where there is a contested proceeding, that it -- the  
21 recusal is permissive, not mandatory.

22                   HONORABLE DAVID NEWELL: Right.

23                   CHAIRMAN BABCOCK: And that doesn't seem  
24 right.

25                   HONORABLE DAVID NEWELL: Right.

1                   CHAIRMAN BABCOCK: It seems like in every  
2 instance there's going to be ex parte communication, and  
3 so that if it's going to go to a contested proceeding they  
4 always ought to recuse or transfer or whatever you want to  
5 call it, but they should not be hearing it.

6                   HONORABLE TOM GRAY: Why?

7                   CHAIRMAN BABCOCK: Huh?

8                   HONORABLE TOM GRAY: Why? It's a permitted  
9 -- it's a permitted ex parte communication.

10                  HONORABLE STEPHEN YELENOSKY: It's a  
11 different kind of permitted ex parte communication.

12                  CHAIRMAN BABCOCK: Right. That would be one  
13 answer. I would add to that that because they are  
14 learning things of the most -- potentially most private  
15 nature that might not get into evidence, but surely would  
16 influence their feeling about something and should you be  
17 sitting in a contested matter when you would have all of  
18 this body of information. That's why they ought to  
19 recuse, I would think, but maybe not. Stephen.

20                  HONORABLE STEPHEN YELENOSKY: Well, yeah, I  
21 mean, you've pointed out some things that are already  
22 authorized by law, ex parte communications that can remain  
23 in a traditional court and should remain in a traditional  
24 court, but we can define those differently as long as you  
25 have a clear delineation as to what is a traditional court

1 and what's a specialty court, and it makes logical sense  
2 because, as Chip is saying and others have said, the  
3 information that you get in a specialty court is of a  
4 different nature and kind than in district court. In  
5 district court, yeah, you may look at privileged  
6 information, but you may look at it only to see that it's  
7 written by an attorney to another attorney or the party,  
8 you know, involved in the -- another attorney on the same  
9 side or a party on the case. You're not necessarily  
10 reading all of it, but if you have to read all of it,  
11 that's a necessary evil that's -- that we have to have,  
12 otherwise we would have separate courts all the time  
13 deciding those ex parte issues.

14 HONORABLE TOM GRAY: So it's expedient here,  
15 but not -- or expedient there to have the same guy do it,  
16 but not expedient here.

17 HONORABLE STEPHEN YELENOSKY: No, no. Well,  
18 it -- it is because it's a more limited ex parte  
19 communication. I think -- I think we're going to have to  
20 have some, but there's no reason to fail to -- if we need  
21 ex parte communications in the specialty courts for the  
22 reasons that have been said, then we cabin off those,  
23 define them either by statute or Supreme Court rule, not  
24 local rule, and I can address that. And then we make very  
25 clear what's permissible there as opposed to what's

1 permissible in a traditional trial court, and just because  
2 they both use the word "ex parte" doesn't mean there has  
3 to be a relationship between the two.

4           You're saying it's already authorized. Some  
5 people are saying it's already authorized because it's  
6 essential to the court's function, but that's too squishy  
7 for me, and local rule is not a good idea. Local rules  
8 are near and dear to me because I worked on ours, got it  
9 through the Supreme Court. It does take a while; but it's  
10 about procedures custom tailored to the court, group of  
11 courts, not to ethics; and the ethical rule shouldn't  
12 differ by size of courts or where the court is or how  
13 their court administrator operates, so I think things can  
14 be very clear cut and avoid a lot of the concerns that  
15 people have.

16           CHAIRMAN BABCOCK: Richard.

17           MR. ORSINGER: One of the concerns I have in  
18 light of the discussion we've had is that it's my  
19 understanding that there's an interactive relationship  
20 between the probationer or the applicant for diversion and  
21 the judge and there's direct communications between the  
22 judge and the individual, and I don't know that they are  
23 ever on the phone, but apparently they're directly the  
24 judge talking to the person, person talking back, and of  
25 course, they have a Fifth Amendment privilege not to say

1 anything self-incriminatory, but they're attempting to  
2 convince the judge not to send them to prison so they're  
3 going to try to have a working relationship with the judge  
4 I would assume. And so can you imagine conversations in  
5 which someone has admitted that they made a mistake or did  
6 something that was a violation of the terms of probation  
7 or something like that, but trying to extenuate in getting  
8 the judge not to send them to prison and then all of the  
9 sudden, the prosecutor files a motion to revoke or  
10 whatever, and now they want to invoke their Fifth  
11 Amendment privilege, and they've already told the judge  
12 what happened when it happened, and one of the things  
13 about privileges is it encourages open exchange of  
14 information.

15           If I'm representing somebody that's in a  
16 diversion program I have to tell them "Don't ever tell" --  
17 "Don't admit anything to the judge. I don't care what she  
18 asks you, deny it because if you admit to criminal  
19 activity, then when it comes to the revocation proceeding  
20 they're going to know that you admitted it already, even  
21 if I don't put you on the witness stand." So I think that  
22 it puts people in a quandary of whether they want to work  
23 with the judge and be honest with the judge or whether  
24 they want to hide their wrongdoing in fear that later on  
25 this judge is going to decide whether to revoke their

1 probation. To me the better approach is to say, "Be  
2 candid with the judge and if you fail the program and  
3 there's a motion to revoke, you start over with a clean  
4 judge, and you've got all of your rights."

5 CHAIRMAN BABCOCK: There's a Supreme Court  
6 case on what you just talked about.

7 MR. ORSINGER: How did it come out?

8 CHAIRMAN BABCOCK: It came out that it was a  
9 constitutional violation to have the accused speak to a  
10 court officer without --

11 MR. ORSINGER: But according to Judge  
12 Estevez they do that constantly in these.

13 HONORABLE ANA ESTEVEZ: That's my  
14 understanding, but maybe they stopped it. When did  
15 that --

16 CHAIRMAN BABCOCK: Long, long time ago.  
17 Different context.

18 HONORABLE ANA ESTEVEZ: I think they  
19 probably have paperwork that waives some of those to get  
20 into the program, and I think that's how they do it.

21 HONORABLE DAVID NEWELL: That's right.

22 HONORABLE ANA ESTEVEZ: And she's -- Holly  
23 is saying --

24 CHAIRMAN BABCOCK: Holly has got her hand  
25 up.

1 HONORABLE ANA ESTEVEZ: She's saying yes, so  
2 she must know all the paperwork.

3 MS. TAYLOR: Well, I --

4 HONORABLE ANA ESTEVEZ: I get it on the  
5 other side.

6 MS. TAYLOR: My recollection is that there's  
7 waivers as part of the process to qualify for this  
8 program. It's a privilege essentially to participate in  
9 the program, but what I was going to say is that, you  
10 know, some of these authorizing statutes for the  
11 particular specialty court programs specifically  
12 contemplate -- like this is in Government Code, section  
13 125.001, which has to do with mental health court  
14 programs, but it specifically contemplates on -- this is a  
15 quote, "ongoing judicial interaction with program  
16 participants." So, I mean, the statute -- and it doesn't  
17 use the term "ex parte," but it seems to me implicit in  
18 the legislation, and the other thing I was going to say is  
19 that if you look at Professor Shannon's article, he did a  
20 pretty thorough nationwide survey of these programs. Now,  
21 it is a little bit dated because this article was in 2014,  
22 but he did -- he did look at one state, Idaho, that does  
23 kind of what Mr. Orsinger I think is kind of talking  
24 about, and they basically said -- say, "A judge who has  
25 received any such ex parte communication regarding the



1 defendant or juvenile while presiding over a case in a  
2 problem-solving court shall not preside over any  
3 subsequent proceeding to terminate that defendant or  
4 juvenile from the problem-solving court, probation  
5 violation proceeding, or sentencing proceeding in that  
6 case." So they bar it after that point. But I just went  
7 back through it, and I think that's the only state that he  
8 discussed that does that. Most of the other ones either  
9 don't, specifically don't, and do -- many of them do  
10 permit the judge to preside over a contested hearing after  
11 the fact, or some of them have a case-by-case  
12 determination, which is the kind of thing that we were  
13 getting at with the proposed language.

14           Professor Shannon specifically recommends a  
15 kind of a case-by-case approach. His language that he  
16 recommends is "If ex parte communications permitted by  
17 this canon become an issue at a subsequent adjudicatory  
18 proceeding at which a specialty court judge is presiding,  
19 the specialty court judge shall either, one, recuse  
20 himself or herself if the judge gained personal knowledge  
21 of disputed facts outside the context of the specialty  
22 court program or, two, make disclosure of any such ex  
23 parte communications." So that's what he wrote.

24           CHAIRMAN BABCOCK: Stephen.

25           HONORABLE STEPHEN YELENOSKY: Well, I mean,

1 it adds a cumbersome level, first of all. As for those  
2 other states, some states are smarter than others.

3 Apparently one that has prohibited it.

4 CHAIRMAN BABCOCK: Not smarter than us.

5 HONORABLE STEPHEN YELENOSKY: But disclosure  
6 of it, I mean, that doesn't -- that's --

7 CHAIRMAN BABCOCK: Is that part of the  
8 problem.

9 HONORABLE STEPHEN YELENOSKY: That doesn't  
10 solve the problem, and so the other part is we're adding  
11 something cumbersome that in every instance, if you did it  
12 ad hoc properly in every instance, there ought to be  
13 recusal.

14 CHAIRMAN BABCOCK: Judge Estevez.

15 HONORABLE ANA ESTEVEZ: I'm not sure if the  
16 issue is really the ex parte communication that I'm more  
17 concerned about. It's that relationship that you've  
18 established with the judge, because the state's -- there  
19 is someone from the state that's there, that is part of --  
20 someone from the county is part of that process as well.  
21 So they know everything, and then the defendant is there,  
22 so you've got two parties. But the problem is that  
23 confidential information that you are acquiring in a  
24 different type of role I think is really why the recusal  
25 issue should come up, not because you've called them on

1 the telephone when the state wasn't present. So --

2 CHAIRMAN BABCOCK: Richard.

3 MR. MUNZINGER: What she just read  
4 contemplated a judge making a disclosure that the judge  
5 had received and had acted upon a ex parte communication.  
6 If then there is some kind of subsequent judicial  
7 proceeding to revoke probation, to do whatever is going to  
8 happen, it would seem to me that the person who is the  
9 subject of the proceeding has the right at that point in  
10 time to say, "I want you to recuse yourself." The judge I  
11 suspect would recuse himself. I don't know if you want to  
12 say he requires it, but the person who has developed this  
13 personal relationship with the judge is in a position of  
14 having to make a decision to make that judge recuse  
15 himself or herself. Heretofore that judge has been  
16 friendly, has been supportive, has been helping and what  
17 have you, and now I've got to make the decision do I want  
18 to have a stranger come in here and put me in prison, or  
19 do I want to have one last plea in front of my friend who  
20 I've been working with for two years or three years or  
21 what have you. You've satisfied the need of Justice Gray,  
22 which I think is correct. This is a judicial proceeding,  
23 an officer of the court of the State of Texas is making a  
24 judicial decision respecting a citizen's freedom or right  
25 or what have you, so the judge should disclose the ex

1 parte communication. If he does, he's done what's  
2 required.

3 He's making a decision that he has been  
4 authorized to make. The communication is one which has  
5 been presumptively authorized, and now the decision is  
6 left to the subject -- the person who is the subject of  
7 the proceeding to determine whether you do or don't want  
8 to have a recusal. What's wrong with that procedure?  
9 What's wrong with the rule saying we contemplate these  
10 communications, but when a decision is made based upon one  
11 or influenced by one, the court shall make it clear or  
12 make a statement, et cetera. That then puts the onus on  
13 the citizen whose right is being affected to do something  
14 about it, and that person has to make a judgment, and his  
15 lawyer or her lawyer has to make a judgment. Do you want  
16 this judge listening to you? He's listened to you for  
17 three years. He's held your hand for three years. He's  
18 prayed with you. He's cried with you. Do you want this  
19 guy to -- I'd let this guy try and put you in prison, or  
20 do you want Justice Babcock?

21 CHAIRMAN BABCOCK: A hard case.

22 MR. MUNZINGER: I like that rule. I like  
23 the rule of disclosure. The onus is there. All of the  
24 due process matters have been addressed in that rule.

25 CHAIRMAN BABCOCK: Stephen.

1 HONORABLE STEPHEN YELENOSKY: Well, two  
2 things. One, it's our responsibility to have a judicial  
3 system that doesn't have an appearance of impropriety, and  
4 what you described may be considered an appearance of  
5 impropriety because he's in good with the judge, so he  
6 gets that judge. As far as disclosure, you know, it's  
7 great to have the freedom to do something, but if you  
8 don't know you can do it, it's not very helpful. If you  
9 have a lawyer you know. Maybe you don't have a lawyer or  
10 your lawyer is not that astute. I don't think that  
11 absolves us of responsibility in that situation. So  
12 putting those two things together, to me it should be  
13 mandatory.

14 CHAIRMAN BABCOCK: Okay. Nina, where are  
15 we?

16 MS. CORTELL: Well, I just wanted to offer a  
17 couple of thoughts. One, the judges for the most part  
18 that we spoke with wanted clarity in this area, did not  
19 feel like "expressly authorized by law" was clear enough  
20 in this context; and I think Holly, who has looked pretty  
21 carefully into the various statutes in the area, feel  
22 there are gaps, so the judges did want some sort of  
23 protective language. So I do think we have to vote on  
24 whether we want some type of comment or something else to  
25 provide that.

1                   In the back end issue on recusal, I would  
2 suggest that we vote. I think there is certainly a number  
3 of people here who would like to see a mandatory recusal,  
4 so I think we should have a vote on that as well.

5                   CHAIRMAN BABCOCK: Okay. I'm for voting,  
6 but the two Richards and Eduardo -- you had your hand up  
7 first.

8                   MR. RODRIGUEZ: Let them -- because I forgot  
9 what I was going to ask. I'll get back to it.

10                  CHAIRMAN BABCOCK: Speak long enough and  
11 they will, too. Go ahead, Richard.

12                  MR. ORSINGER: So I'm beginning to question  
13 whether this ought to be just a footnote to the ex parte  
14 communication or whether it ought to be a footnote to a  
15 more general statement about a judge performing their  
16 duties without bias or prejudice. The problem is not just  
17 an ex parte communication with the defendant when the  
18 state is not present. There is equally or maybe just as  
19 troubling is privileged statements made by the defendant  
20 to the judge in the presence of the state, and perhaps we  
21 should broaden this out not to just apply to ex parte  
22 communications, but to any information received in this  
23 kind of informal personal relationship, that the judge  
24 should at least consider whether they're impartiality  
25 might or bias -- or something, but not limit it to just

1 the ex parte, because even if the state is there, the  
2 damage is done, just the same as if the state is not  
3 there.

4 CHAIRMAN BABCOCK: Yeah, just a footnote to  
5 what you said, if the statement is made in the presence of  
6 the state how can it be privileged?

7 MR. ORSINGER: Well, it wasn't until -- I  
8 mean, it was privileged until they made the disclosure in  
9 this informal context, which we're trying to encourage so  
10 they don't go to prison, and then all of the sudden when  
11 we decide they do go to prison then they've lost all their  
12 privileges. So I don't know, I mean --

13 CHAIRMAN BABCOCK: Richard Munzinger.

14 MR. MUNZINGER: My only point, I understood  
15 Judge Yelenosky to say he believed that it should be  
16 mandatory, and I assume you meant disclosure should be  
17 mandatory, not -- no, you meant recusal.

18 HONORABLE STEPHEN YELENOSKY: I meant  
19 recusal, and you're going the next step that we haven't  
20 voted on yet, I guess.

21 MR. ORSINGER: Which is what?

22 HONORABLE STEPHEN YELENOSKY: We haven't  
23 even voted on mandatory recusal when there's an ex parte  
24 communication.

25 MR. MUNZINGER: Let me just speak to

1 mandatory recusal, if I may for just a moment. The  
2 concern is that the judge who is listening to this is  
3 concerned that he or she has violated the canons of ethics  
4 in some way. Have I given fodder to an election opponent?  
5 By doing my best in this context, have I violated some  
6 rule, have I violated my oath, whether there is or isn't  
7 an opponent? Have I done what is right? The amendment of  
8 the rule that would contemplate the specific category of  
9 ex parte communications takes care of the ethical issue,  
10 takes care of the moral issue, takes care of the political  
11 issue, authorizes the communications. My proposal is that  
12 then you make the statement and the guy can say, "Recuse  
13 yourself or get out." Give me a second chance. No, then  
14 I ask you to be recused. You've met all of the  
15 requirements, and Justice Gray's requirement is a  
16 significant point here. This is the State of Texas  
17 acting. This is government. And so we can't mesh the  
18 three branches of government. We do have to do all of  
19 these things, and frankly, I think if you require recusal  
20 you take away a element of discretion that is in the hands  
21 of the subject of the proceeding.

22 CHAIRMAN BABCOCK: Yep. Okay.

23 HONORABLE ANA ESTEVEZ: I'm just going to  
24 talk against what he just said because when we set up our  
25 drug court, Judge Board wanted to have a better



1 relationship with his clients in the drug court, and so he  
2 wanted to make sure that we would take them voluntarily if  
3 there was ever a motion to revoke, so that they would  
4 never feel like he was saying --

5 MR. ORSINGER: Inhibited.

6 HONORABLE ANA ESTEVEZ: Inhibited, because  
7 they wouldn't tell him the truth, and so it would inhibit  
8 their progress because they would always feel like he was  
9 going to use it against them at some point, but the way  
10 they had that relationship, I don't know if he discloses  
11 it to them or not, but basically if you can disclose,  
12 "Look, if you don't make it through this program I'm not  
13 going to be the one that determines what happens to you,"  
14 then you're going to feel freer to share things because  
15 you're in a safer environment. It makes it more  
16 successful. So at the end of the day, even though we may  
17 or may not want to put that discretion, it's going to make  
18 the whole program more successful because there's not  
19 going to be that feeling, that threat of punishment from  
20 this judge, the one that you're disclosing to.

21 CHAIRMAN BABCOCK: So Nina says we ought to  
22 vote on whether we even need a comment, right? That's the  
23 threshold issue?

24 MS. CORTELL: Right. Right.

25 CHAIRMAN BABCOCK: All right. So everybody

1 that thinks -- regardless of what it says, everybody that  
2 thinks we need a comment, raise your hand.

3 And everybody that thinks we don't need a  
4 comment?

5 HONORABLE DAVID NEWELL: I was going to say  
6 I think it's a good idea. I just don't think it's a need.

7 MR. ORSINGER: Are you for or against?

8 MS. CORTELL: Put your hand down.

9 CHAIRMAN BABCOCK: Okay. 22 people think we  
10 need a comment, and three people think we don't.

11 HONORABLE TOM GRAY: Two of which were on  
12 the subcommittee.

13 CHAIRMAN BABCOCK: Two of which were on the  
14 subcommittee, so kudos to Nina for navigating that.

15 HONORABLE TOM GRAY: We were on the sub  
16 subcommittee, though.

17 HONORABLE DAVID NEWELL: Right, exactly.  
18 Part blue tower.

19 CHAIRMAN BABCOCK: The subcommittee has  
20 combined two different things into one comment.

21 HONORABLE DAVID NEWELL: Right.

22 MR. ORSINGER: One is approving ex parte  
23 communications.

24 CHAIRMAN BABCOCK: Right.

25 MR. ORSINGER: And the other one is what is

1 the consequence if the person who received them later on  
2 is in an adjudicative capacity. I'm in favor of breaking  
3 the two comments out because the second one is very  
4 important, but it's not limited to just ex parte. So I  
5 would prefer if we're going to vote on the comment, can we  
6 have the option of commenting on ex parte in one comment  
7 and commenting on recusal in a different comment?

8 CHAIRMAN BABCOCK: I yield my answer to  
9 Kennon.

10 MS. WOOTEN: Well, one of the things that's  
11 coming to mind is that if we're talking about an  
12 additional ground for recusal, that it should be addressed  
13 in 18b of the Rules of Civil Procedure. If we're talking  
14 about people should recuse themselves because they somehow  
15 fall within the existing grounds for recusal then I don't  
16 know that we need to say more than what Rule 18b already  
17 says, but it strikes me as odd to be thinking about it  
18 more -- it strikes me as a little odd to put in something  
19 about recusal in a comment to Canon 3, when we have a  
20 whole rule, 18b, that specifically addresses grounds for  
21 recusal.

22 CHAIRMAN BABCOCK: Yeah. Judge Estevez may  
23 have an answer to that, but I think the prior discussion  
24 was that this would be outside of 18b because it would be  
25 permitted ex parte. So it would be discretionary with the

1 judge.

2 MS. WOOTEN: But I think the point is that  
3 it's not necessarily a concern about ex parte  
4 communication. It might be the relationship, close nature  
5 of the relationship, and so the question that's running  
6 through my mind is, is there anything that's not already  
7 addressed in 18b that would give rise to recusal? Because  
8 the close nature of the relationship might come you under  
9 18b(1).

10 CHAIRMAN BABCOCK: Judge Estevez.

11 HONORABLE ANA ESTEVEZ: Well, I just want to  
12 suggest that if -- if and when we ever get to the recusal  
13 part that we don't use the word "recusal", and we just use  
14 the word "transfer." Because if they're going to consider  
15 it, they should consider whether they should transfer the  
16 case or have another judge hear it. I don't think that  
17 we're necessarily always going to go up to a recusal  
18 standard, as she just stated that we have these other  
19 standards, and I think that with that -- for these courts  
20 to be the most successful, we don't need to have that type  
21 of standard.

22 CHAIRMAN BABCOCK: Okay. Yes, Scott.

23 MR. STOLLEY: If I'm hearing correctly,  
24 these courts are almost always criminal courts, right?  
25 These are criminal proceedings?

1 HONORABLE ANA ESTEVEZ: They are all  
2 criminal.

3 MR. STOLLEY: So I don't see how 18b would  
4 apply because it's a Rule of Civil Procedure.

5 MR. ORSINGER: It doesn't apply to criminal.

6 MR. STOLLEY: Right.

7 MR. ORSINGER: What are the recusal  
8 standards in criminal court?

9 HONORABLE ANA ESTEVEZ: We must have a  
10 similar one.

11 CHAIRMAN BABCOCK: Nina.

12 MS. CORTELL: I think whether the concept is  
13 recusal or transfer -- and I thought that was a good  
14 comment -- I think still we have to hear from the  
15 committee whether it should be automatic or not. That's  
16 where the main disagreement seems to be.

17 CHAIRMAN BABCOCK: Yeah, that seems to be  
18 where the split is, so let's call it transfer for the sake  
19 of a vote.

20 MS. CORTELL: Sure.

21 CHAIRMAN BABCOCK: How many people think the  
22 transfer ought to be automatic? Raise your hand.

23 HONORABLE ANA ESTEVEZ: Can I just say the  
24 only exception would be let's say they got into drug court  
25 and they never showed up? I don't think you would have to

1 recuse at that point or transfer.

2 CHAIRMAN BABCOCK: How many people think it  
3 should be discretionary with the judge? Is your hand up,  
4 Harvey?

5 HONORABLE HARVEY BROWN: I'm sorry, I  
6 misheard.

7 CHAIRMAN BABCOCK: All right. 13 in favor  
8 of mandatory, six in favor of discretionary. The  
9 particular language of the proposed comment, is everybody  
10 happy with it or --

11 MR. ORSINGER: Well, Chip, this goes back to  
12 my point is that this particular thing about asking  
13 yourself whether you can be impartial is not limited to ex  
14 parte. It's also the stuff that happened in chambers with  
15 the state present. So I would suggest that we not limit  
16 the comment to look in your own heart and see whether you  
17 can be impartial. That shouldn't be limited to ex parte.

18 CHAIRMAN BABCOCK: Yeah, I think that's a  
19 good point. Nina, do you think you have enough direction  
20 based on these votes that you could -- your subcommittee  
21 with two members dissenting could redraft and come back to  
22 us next time with it?

23 MS. CORTELL: We would be happy to. Yes, I  
24 think we have enough information.

25 CHAIRMAN BABCOCK: Okay. All right. So

1 that's what we're going to --

2 HONORABLE TOM GRAY: I worked very hard with  
3 this subcommittee to get a better rule, even if we're  
4 working on a better rule that I completely disagree with.

5 HONORABLE DAVID NEWELL: That is very true.

6 MS. WOOTEN: I agree.

7 CHAIRMAN BABCOCK: You are totally awesome.  
8 We know that.

9 HONORABLE TOM GRAY: Dee Dee, could I have  
10 an excerpt of that part of the --

11 CHAIRMAN BABCOCK: All right. Let's go back  
12 to discovery. Robert, we have talked about the scope of  
13 the duty, and we're on to the next topic, I believe, so  
14 you're going to have to unpack your bag.

15 MR. LEVY: Yeah. So I think the next issue  
16 was --

17 MR. MEADOWS: Well, if we've concluded the  
18 discussion and obtained direction on how to write the  
19 scope of the discovery, the only remaining issue is  
20 whether or not there will be a prelitigation judicial  
21 avenue for resolving disputes over the discovery demand.

22 CHAIRMAN BABCOCK: We talked about that. I  
23 thought Robert had another subject. I wrote down  
24 something, but I didn't write very clearly, so --

25 MR. LEVY: I don't think so. I think that

1 was the other main issue.

2 CHAIRMAN BABCOCK: Okay. Why don't -- if  
3 you don't mind, refresh us or refresh me about what the  
4 thought is about a presuit demand, the pros and the cons.

5 MR. LEVY: Presuit demand, and this is  
6 something Commissioner Sullivan had proposed.

7 CHAIRMAN BABCOCK: Commissioner Sullivan to  
8 you.

9 MR. LEVY: Kent had proposed that we have a  
10 process where if a party wants to get guidance from a  
11 court before the litigation has commenced, similar to  
12 presuit discovery, that we could go and get basically a  
13 blessing that our preservation practices are appropriate  
14 and address either the duty or otherwise are reasonable.  
15 And there are some advantages to that concept, but there  
16 are also some challenges as well.

17 My sense is that most companies will  
18 probably not avail themselves to that process. There  
19 might be some situations where a company or a party would  
20 feel that they've got an untenable burden in terms of  
21 preservation of information, that even though on its face  
22 might violate the spirit of the duty to preserve, that  
23 they need relief from the court because of whether it's  
24 cost or unusual circumstances, let's say their computer  
25 system fails and they need to redesign it, but that might



1 result in technical spoliation, and yet they don't know  
2 which court a case that's contemplated but not yet filed  
3 would have fallen. So I think that's the intent behind  
4 it, but I'm not sure that in this case we see a lot of  
5 traction on the use of it.

6 CHAIRMAN BABCOCK: Okay.

7 MR. LEVY: Kent, did you have other thoughts  
8 on that?

9 HONORABLE KENT SULLIVAN: My thought was  
10 pretty straightforward in that this was an attempt to  
11 address an obvious gap, and that is if someone is in  
12 receipt of a prelitigation hold notice and there is a  
13 substantial disagreement that is material to the parties,  
14 that there ought to be a way to obtain some resolution of  
15 the disagreement and relief. And as it currently stands  
16 I'm not aware of any formalized opportunity to do that.  
17 Some creative lawyer might be able to avail themselves of  
18 something, perhaps a -- I don't know, a declaratory  
19 judgment action or some such alternative, but it seems to  
20 me that having absolutely no alternative available to the  
21 parties to resolve a potentially very significant, could  
22 be very expensive and burdensome, dispute, prefiling of a  
23 lawsuit, it seems to me that's a gap and we ought to  
24 address it in some form or fashion, and this was just an  
25 intent -- an attempt to do just that.

1                   CHAIRMAN BABCOCK: So -- so the scenario  
2 you're painting is you're Robert at a company that's got a  
3 lot of data, and Robert gets a notice under 215.7(b) that  
4 complies with the notice, but it is wildly overbroad; and  
5 now Robert says, "Hey, I'm going to have to keep, you  
6 know, for who knows how long, a bunch of stuff that I  
7 don't think I should have to keep"; and the other side, he  
8 calls the other side and he says, "Hey, it's overbroad,  
9 it's not proportional"; and they say, "What are you trying  
10 to hide? No, I'm not going to give up on this."

11                   And so Robert says, "Well, we're going to  
12 go into court now under 215.7(b)(1) or (c) and have a  
13 quick little hearing, and we'll let the judge decide.  
14 That's your concept. That's the way it would work?

15                   HONORABLE KENT SULLIVAN: That is  
16 essentially it, and I would throw out one other thought,  
17 and that is some parties are more risk averse than other  
18 parties, so even in a situation which someone might view  
19 the risk as more modest, some parties simply may want the  
20 resolution, and it seems to me that ought to be available  
21 to them.

22                   CHAIRMAN BABCOCK: So you're GC of the  
23 company that doesn't want to take any risks on discovery,  
24 so you want to go in there and say, "Judge, it seems to us  
25 this is kind of overbroad, but if you say this is what

1 we've got to do, we're going to do it, but don't anybody  
2 come back and say later that we haven't done what we're  
3 supposed to do."

4 HONORABLE KENT SULLIVAN: Provides the  
5 parties with that sort of alternative.

6 CHAIRMAN BABCOCK: Yeah.

7 HONORABLE KENT SULLIVAN: Should the parties  
8 informally negotiate a resolution to this? Sure. Are  
9 there lots of ways this can and should and currently  
10 probably are being resolved? Sure. But the fact is, is  
11 that we have absolutely no alternatives currently  
12 available. It seems to me there ought to be one.

13 CHAIRMAN BABCOCK: Okay. Justice Brown.

14 HONORABLE HARVEY BROWN: It seems to me one  
15 potential risk of this is that if a party has this  
16 opportunity to come to court and doesn't, that the other  
17 side then is going to argue, well, obviously what I  
18 requested was reasonable, otherwise they would have  
19 contested it. So the party -- so the rule might actually  
20 make it that you have more obligation to produce than if  
21 you were just silent and let a judge decide after the fact  
22 what was reasonable.

23 CHAIRMAN BABCOCK: All right.

24 HONORABLE KENT SULLIVAN: Aren't you in a  
25 position now where you've either got to resolve it --

1 you've either got to resolve it informally between the  
2 parties. You've either got to decide we're going to take  
3 this risk, we simply don't care, we'll run whatever risk,  
4 or you want to go in and formally resolve it with a court  
5 decision.

6 HONORABLE HARVEY BROWN: That's true. I  
7 just think the risk might be higher if there's a rule that  
8 said you could have come. I could see myself as a trial  
9 judge just saying, well, if you really thought it was that  
10 bad, why didn't you come here and file a motion? The rule  
11 lets you.

12 CHAIRMAN BABCOCK: Professor Carlson, then  
13 Justice Kelly.

14 PROFESSOR CARLSON: I can see the need for  
15 this, but it sounds like a purely advisory opinion.

16 HONORABLE KENT SULLIVAN: Yeah.

17 PROFESSOR CARLSON: And how is it binding on  
18 the subsequent judge? How do you determine  
19 proportionality without pleadings?

20 CHAIRMAN BABCOCK: Well, because the notice  
21 is supposed to give --

22 PROFESSOR CARLSON: Oh, okay.

23 CHAIRMAN BABCOCK: -- notice of the claim.  
24 Justice Kelly.

25 HONORABLE PETER KELLY: But the claim can

1 have several -- I mean, you don't know whether it's a  
2 negligence provision claim where the tire just blew out,  
3 you know, what actually caused the injury, and you're not  
4 going to know that until you have an actual pleading. So  
5 the idea that you can determine this early on, you know,  
6 it could have been a personnel issue, could have been an  
7 equipment issue, could have been a design issue. You need  
8 to actually know that before you even had any discovery,  
9 and trying to determine what's relevant, you know, what  
10 might be admissible at trial, this is way too premature.

11 HONORABLE KENT SULLIVAN: If there is some  
12 dilemma for the judge, think how much bigger the dilemma  
13 is for the party. It's entirely speculative then for the  
14 party.

15 CHAIRMAN BABCOCK: Richard Orsinger, and  
16 then Justice Christopher.

17 MR. ORSINGER: I'd share the same concern  
18 about whether this is an advisory opinion, and I was  
19 trying to pull up Rule 202. I was unsuccessful in doing  
20 it, but the prelawsuit deposition presents a similar kind  
21 of difficulty that you've got a judicial ruling in a  
22 matter where there's no case pending and there's dispute  
23 and then there's res judicata questions because if you're  
24 not a party at the time that was done, this ruling, you  
25 may have gotten a letter from one lawyer on behalf of one

1 client but then another client out of the same incident  
2 hires a different lawyer or hires that same lawyer. It's  
3 problematic.

4 I'm wondering if a better solution than  
5 having a presuit ruling is to say that one of these  
6 letters, hold letters, expires within 10 days or 15 days  
7 if a lawsuit isn't filed, and then you are going to get  
8 your lawsuit -- or maybe it has to be contemporaneous with  
9 the filing of the lawsuit, and then once the lawsuit is  
10 there we've got all the jurisdiction we need, but the idea  
11 that I think I might sue them so I don't want them to  
12 destroy any e-mails and then you have until the statute of  
13 limitations run for this thing to sit there, that's not  
14 right. Can't do that either.

15 CHAIRMAN BABCOCK: Justice Christopher.

16 HONORABLE TRACY CHRISTOPHER: We thought the  
17 procedural obstacles to a presuit determination just could  
18 not be overcome. This would be a defendant, first of all,  
19 going into court, and, you know, we have a long tradition  
20 of allowing the plaintiff to set the venue for their case.  
21 So we have no idea where the defendant is going to go to  
22 court. The draft that Kent had proposed says it's without  
23 waiver to a special appearance or, you know, whatever,  
24 which also very problematic; and most importantly, one  
25 trial judge's decision is not binding on another trial

1 judge's decision. So, you know, so you could go in and  
2 get a ruling from one judge, and, well, I don't like that,  
3 I'm going to sue you in federal court now. So there were  
4 just so many procedural problems with this presuit ruling  
5 that it was like a whack-a-mole. You just couldn't hit  
6 them all down. You would have to change dramatically --

7 CHAIRMAN BABCOCK: Were you here this  
8 morning?

9 HONORABLE TRACY CHRISTOPHER: Change  
10 dramatically how things get done.

11 CHAIRMAN BABCOCK: Is it right that the  
12 plaintiff couldn't -- the potential plaintiff couldn't  
13 file one of these presuit things?

14 HONORABLE TRACY CHRISTOPHER: Well, why  
15 would they want to?

16 MR. LEVY: They actually would.

17 CHAIRMAN BABCOCK: They get a letter back  
18 from Robert saying, you know, "You're out of your mind.  
19 I'm not saving all of this stuff."

20 HONORABLE TRACY CHRISTOPHER: Well, then  
21 they can file their lawsuit if they're ready to file their  
22 lawsuit, and then venue is set, then we have a special  
23 appearance. A special appearance can be lodged. I  
24 mean --

25 MR. LEVY: I think that, you know, you're

1 right that it is possible that a plaintiff could file that  
2 motion and that it creates a lot of risk with that,  
3 because a company, you know, that gets sued repetitively  
4 is going to have a protocol about how to manage these  
5 situations. Usually they're not related to a particular  
6 case, but they're designed generally to address the issue,  
7 and it becomes very challenging if you have to change your  
8 preservation processes case to case to case.

9           I do think actually that the notice  
10 provision in 215.7(b) is actually really superfluous now  
11 if we define that a reasonable anticipation or whatever  
12 the language we have, credible probability of litigation,  
13 is a trigger for the duty, then that duty to preserve  
14 exists. So if you get a notice from a party saying, "I'm  
15 going to sue you," then the duty is triggered, so I don't  
16 know that we need a separate notice provision that a party  
17 saying, "Well, save all of your information." Either  
18 they're going to bring a lawsuit or they're not. If they  
19 say that, well, we're thinking about bringing a lawsuit,  
20 should that be enough if -- you know, because there is a  
21 significant consequence to the preservation if they  
22 decide, oh, I changed my mind, it's not like there's no  
23 harm there.

24           CHAIRMAN BABCOCK: Robert, if you get a  
25 215.7(b) notice and you look at it and you say, "This is



1 nuts," are you just going to -- you'll preserve what you  
2 think you should preserve?

3 MR. LEVY: Right.

4 CHAIRMAN BABCOCK: But you think 80 percent  
5 of it's nuts, are you just going to sit there and wait for  
6 a year until he sues you, or are you going to write back  
7 and say, "Hey, if you think we're saving all of this  
8 stuff, you're wrong. You better get about it."

9 MR. LEVY: I think that depends in terms of  
10 what that notice says. We got a notice that said -- this  
11 is about a royalty dispute in East Texas, and the notice  
12 said, "You need to save every bit of electronic data that  
13 you have wherever you have computers worldwide including  
14 don't turn off any of your computers, don't make any  
15 changes to your electronic data." I mean, it was a very,  
16 very hugely expansive demand, and we determined that we  
17 felt we knew what we needed to do to preserve the data,  
18 and we did what we -- we did that, and we did not do what  
19 this lawyer suggested, and it never became an issue  
20 because there wasn't a challenge about any lost  
21 information.

22 CHAIRMAN BABCOCK: But did you write him  
23 back and say, "We're not doing this"?

24 MR. LEVY: I think in that situation I don't  
25 think we did. I think they had a discussion subsequent to

1 that, that -- actually, we did. We wrote back and said  
2 we're going to handle the preservation issue, you know,  
3 basically.

4 CHAIRMAN BABCOCK: Trust us.

5 MR. LEVY: In a nice way.

6 CHAIRMAN BABCOCK: Yeah. I think Stephen  
7 had his hand up, and then Bobby, and then Frank, and then  
8 Richard.

9 HONORABLE STEPHEN YELENOSKY: As far as an  
10 advisory opinion, I think it is. I think 202 shouldn't be  
11 there either, but if you wanted to draw a distinction  
12 between the two, what they're suggesting is a decision  
13 that is binding later on; isn't that right? Isn't that  
14 the suggestion, it's binding? A 202 deposition is you can  
15 do this, but it doesn't have any binding effect on  
16 anything. So I see a distinction between the two, but it  
17 seems to me it's completely advisory and people may want  
18 it, but I once saw a contract where they said, "If we  
19 can't agree on this, a district judge will decide,"  
20 without filing suit. Well, you know, okay, you might have  
21 wanted that, but the state doesn't provide a judge just  
22 because you want one.

23 CHAIRMAN BABCOCK: Bobby.

24 MR. MEADOWS: Well, I was just going to say  
25 that while the discovery subcommittee didn't see -- didn't

1 think we should provide for a pretrial or presuit  
2 procedure, we recognize that there could be overreaching  
3 demands or notices on a corporation, and we didn't want to  
4 leave the receiving party unarmed, so we included the  
5 second part of the language you find in paragraph (b)  
6 where we say that "A party receiving such notice must take  
7 reasonable and proportional steps to preserve the data,"  
8 and that -- what the steps taken may differ from the steps  
9 that the party seeking information demands. So you get  
10 the notice, and all you're required to do under this rule  
11 is to take reasonable and proportional steps, and so it's  
12 a little bit of a self-help resolution, but you at least  
13 have something to stand on.

14 CHAIRMAN BABCOCK: Okay. Richard, and then  
15 Pete.

16 MR. ORSINGER: I think we're overempowering  
17 the right of a potential future litigant to alter the  
18 processes of someone who hasn't been sued yet by just  
19 sending them a letter and creating all of these duties.  
20 What if we were to say that a letter like this has no  
21 effect unless they file a lawsuit and get a court ruling  
22 on the proper scope of destruction within 14 days, just  
23 like a temporary restraining order. The idea that  
24 somebody can send a letter and make a large company alter  
25 all of their processes based on letter with no judicial

1 review, and you're a defendant, so you can't file a  
2 lawsuit unless you filed a dec action on their letter, and  
3 so it's kind of crazy. It seems to me that what we're  
4 doing is we're overempowering the letter writer to have  
5 all of these absolute rights, and duties are triggered and  
6 liability is now -- you can sue people or get sanctions  
7 for all kinds of stuff, based on nothing.

8 MR. MEADOWS: We can definitely --

9 MR. ORSINGER: And so why don't we force  
10 them to get into court, if they believe their letter and  
11 if their letter is meritorious, then get into court and  
12 get a judge to rule on it and then at that point the court  
13 order rather than the letter applies.

14 CHAIRMAN BABCOCK: Pete.

15 MR. SCHENKKAN: Well, I think there are some  
16 circumstances in which -- I think that can be right in  
17 certain circumstances, but in others it can be that you  
18 have a sufficiently complex and large enough potential  
19 matter to where there are people on both sides of the  
20 issue who are thinking about how are we going to proceed,  
21 and by allowing the potential plaintiff to send in this  
22 letter, you can start a conversation that will have some  
23 consequences later on, primarily in the following  
24 practical way, which I think is worth emphasizing.

25 The later part of this proposed rule within

1 the heading "sanctions," which I think ought to be revised  
2 to read "consequences," provides that in general you won't  
3 get sanctions for this if there has been a dispute about  
4 what is reasonable and proportionate, and it turns out  
5 that the defendant has not done as much as was thought  
6 now -- found now to have been reasonable and  
7 proportionate, that the judge will order what's  
8 necessary -- the minimum necessary to cure it. But it's  
9 not a sanction, it is just let's solve the problem.

10           In order to get the sanction, what we've  
11 been thinking of traditionally as spoliation and the  
12 sanction and inferences to the jury and all of that sort  
13 of thing, you've got to go back to what we talked about at  
14 the very beginning, an actual intent to prevent the other  
15 party from having access to this. What I see the notice  
16 process as being designed to do is in a handful, I hope,  
17 at least some not extraordinary number of cases, help very  
18 responsible and senior counsel on both sides of a  
19 potential dispute think with each other about how far am I  
20 going to try to pressure you to go and how far are you  
21 going to go, realizing at the end that we're trying to  
22 take off the table almost as completely as it's humanly  
23 possible to do the possibility of an actual spoliation  
24 dispute. We're only dealing about we've got an  
25 information problem here, guys. What are we going to do

1 about it, and I -- so I think the rule as a whole is a  
2 good step forward and that I guess to tie back to what got  
3 us into this particular conversation, I'm inclined to  
4 think that the notion that a party, either party,  
5 potential party, should be able to go to court before the  
6 lawsuit has been filed and test the limits before a judge  
7 who will have almost nothing to go on is not contributing  
8 positively to this goal and may actually detract from it,  
9 and, therefore, I am with the subcommittee on the notion  
10 that we ought to go with the rest of what we've got here,  
11 but not add that.

12 CHAIRMAN BABCOCK: Justice Kelly, and then  
13 Jane.

14 HONORABLE PETER KELLY: A lot of the  
15 discussion seems to focus on some ill-intentioned  
16 plaintiff's lawyer sending an overbroad notice letter to a  
17 potentially liable defendant. In most of the cases that  
18 I've been involved with, admittedly not early on in the  
19 discovery process, but from what I've seen, an exception  
20 to doing -- well, I guess Robert left. ExxonMobil, a  
21 large self-insured retention, you're going to have an  
22 insurance company, and they're going to insist as part of  
23 the duty to cooperate that they get notice of any claim  
24 very early on, the next day. If there's catastrophic  
25 involving multiple fatalities, they are going to notify

1 their insurance carrier. The first thing the insurance  
2 carrier is going to do is say, "Preserve all the  
3 evidence." Not just for litigation, but also to do a  
4 safety analysis later on, to do root cause analysis, to  
5 make sure that similar accidents don't occur in the  
6 future.

7           The vast majority of the time when you have  
8 insurance involved, the evidence is going to be preserved  
9 anyway. They would want to trace the cause of that  
10 incident anyway, rather than because of litigation or to  
11 do a root cause analysis. So it's not necessarily  
12 something that's going to occur. This duty to arise is  
13 not necessarily solely in the context of litigation, but  
14 has already been contractually surrendered to the insurer,  
15 and if it's already being preserved, why not just preserve  
16 for the litigation purposes. Well, I don't think this is  
17 a litigation rule or a civil procedure rule problem, and  
18 it is just the way the economy works, and we don't need to  
19 do anything to it, because I think the vast majority of  
20 the time it's going to be preserved anyway.

21           CHAIRMAN BABCOCK: Jane.

22           HONORABLE JANE BLAND: I think as you  
23 pointed out, Chip, that already a number of cases have  
24 these letters, and so this was an effort to say the  
25 letters are not the last word on what's reasonable and

1 practical, but I think Pete has a good point that not  
2 everything in connection with this preservation process  
3 probably rises to the level of sanctionable conduct. So  
4 maybe what we need to do is put the duty and the notice  
5 provisions that we're looking at here under sanctions back  
6 with the electronic discovery rule so that parties are --  
7 that there's duties and there's a notice provision and  
8 then make -- make this 215.7 just the sanctions, kind of  
9 starting with part (c) because we haven't even gotten to  
10 the point where we're talking about the sanctions in this  
11 rule yet. We're still talking about sort of what -- what  
12 kind of conduct should we all be engaged in in exchanging  
13 electronic discovery, and it seems like some things the  
14 parties are just seeking clarity about the scope of  
15 discovery and then some things are truly sanctionable  
16 where they've withheld discovery.

17           So maybe we split that out of the sanctions,  
18 and as far as -- you know, it seems like an incredible  
19 waste of judicial resources to have courts involved in the  
20 preservation process ahead of a lawsuit that could be  
21 completely ephemeral and go away, and I think we should  
22 make every effort to write clear rules that the parties  
23 themselves can work out, and if they can't work it out  
24 that determination can be made when and if a lawsuit is  
25 filed.



1                   CHAIRMAN BABCOCK: Yeah. Frank, Judge  
2 Wallace, and then Justice Christopher.

3                   MR. GILSTRAP: As long as we're talking  
4 about unexpected or unforeseen consequences, there's a  
5 whole collection of claims involving dissemination of  
6 information such as contract interference, trade secrets,  
7 and a presuit -- a presuit lawsuit or even a notice is  
8 probably going to trigger the Texas Citizens Participation  
9 Act, and we can't exclude that out by rule, and so at  
10 least we want to be mindful of that possibility while  
11 we're giving these people these tools to act prior to  
12 suit.

13                  CHAIRMAN BABCOCK: Okay. Judge Wallace.

14                  HONORABLE R. H. WALLACE: First of all, I  
15 want to second everything Justice Bland said about not  
16 doing this pretrial. I just don't see how that would  
17 work, but also, and it seems like we're assuming that this  
18 notice letter would contain a whole list of stuff to be  
19 preserved; but as I read it, probably the best notice  
20 letter would be say, "This is a written notice to preserve  
21 relevant electronically stored information relating to a  
22 potential claim with", such-and-such, period, because  
23 that's all that it required. I mean, I guess they could  
24 list a big laundry list of stuff, but --

25                  CHAIRMAN BABCOCK: Justice Christopher.

1 HONORABLE R. H. WALLACE: -- they don't need  
2 to even do that.

3 CHAIRMAN BABCOCK: I'm sorry. Yeah.  
4 Justice Christopher.

5 HONORABLE TRACY CHRISTOPHER: Well, I did  
6 want to say that I think having the notice is a good  
7 component to put in there because sometimes an accident  
8 will happen. Let's say there is a tire blowout, and, you  
9 know, a year later someone discovers or figures out that  
10 it -- you know, it was a defect in the tire and then they  
11 notify the tire manufacturer. The tire manufacturer would  
12 have not been in any position to anticipate litigation, so  
13 -- in that particular situation, so that's when you get  
14 these kind of notice letters, I think, that would be a  
15 separate step from the in anticipation of litigation  
16 issue.

17 CHAIRMAN BABCOCK: Yeah. Good point. Does  
18 everybody agree with Jane's point about maybe the duty and  
19 the notice ought to go into the -- into the earlier rule  
20 about ESI? Anybody disagree with it? Okay. Justice  
21 Gray, but besides Justice Gray. No. Just in terms of  
22 maybe redrafting, Bobby, that struck me as a sensible  
23 thing, but maybe not.

24 MR. MEADOWS: Well, we just somehow need to  
25 think it through, but, yeah, it certainly doesn't bother

1 me, but --

2 CHAIRMAN BABCOCK: I just didn't want to go  
3 past that too far. Richard.

4 MR. MUNZINGER: The opening sentence of Rule  
5 215.7(a), "A party has a duty to take reasonable and  
6 proportional steps." The opening sentence to (c)(1), "A  
7 court may order sanctions described in 215.7(b) if  
8 electronically stored information that should have been  
9 preserved is lost because a party failed to take  
10 reasonable steps." No mention of proportionality. Is  
11 that intentional? If it is, why have proportional  
12 anywhere in the rule? I suspect it's not intentional, but  
13 it does raise a question as -- I certainly would be  
14 arguing that your arguments, Mr. Defendant, that it costs  
15 too damn much are not contemplated by the rule because the  
16 rule didn't repeat proportionality.

17 HONORABLE TRACY CHRISTOPHER: We can add  
18 that.

19 CHAIRMAN BABCOCK: There's your answer.  
20 Yeah, Richard Orsinger.

21 MR. ORSINGER: So, Chip, your last  
22 suggestion is that one of these presuit demand letters is  
23 nothing more than subdivision, I guess, (4), or did we add  
24 another subdivision to 215.7(a), which is receipt of  
25 notice of -- what do you call these letters, preservation

1 letters you call them? Receipt of a --

2 CHAIRMAN BABCOCK: We could call them  
3 notice.

4 MR. ORSINGER: -- preservation letter. In  
5 other words, what we're debating here is whether a letter  
6 from a potential claimant triggers the duty under the  
7 Rules of Procedure to preserve evidence, right? So we  
8 have yet another objective ground for when the duty  
9 arises, even before citation, before notice is served, but  
10 after the time for the claim of work product, we would  
11 have receipt of a notice, a nondestruct notice.

12 CHAIRMAN BABCOCK: We talked about that this  
13 morning, and we actually took a vote on it. We were going  
14 to add a number (4).

15 MR. ORSINGER: Which is?

16 CHAIRMAN BABCOCK: Reasonably anticipated  
17 litigation.

18 MR. ORSINGER: Okay, but we're adding  
19 another one now, which is a three and a half.

20 HONORABLE TRACY CHRISTOPHER: No, no, that's  
21 number (2).

22 MR. SCHENKKAN: No, it's number (2).

23 MR. ORSINGER: Number (2) is notice that  
24 complies with 215.7(b).

25 HONORABLE TRACY CHRISTOPHER: Yes.

1 CHAIRMAN BABCOCK: Yeah.

2 MR. ORSINGER: Okay. So then this whole  
3 debate really is only about -- well, I don't know what it  
4 was about, because we voted that this morning, right?

5 CHAIRMAN BABCOCK: On a break just ask  
6 Munzinger. He'll tell you.

7 MR. ORSINGER: Okay. I apologize. So we're  
8 not debating whether the notice should have legal effect.  
9 Or we're really just debating whether we ought to have a  
10 pretrial motion to limit the scope of the notice or define  
11 the duty, prelawsuit proceedings.

12 CHAIRMAN BABCOCK: That's what we're talking  
13 about right now.

14 MR. ORSINGER: Okay.

15 CHAIRMAN BABCOCK: Whether there should be a  
16 proceeding --

17 MR. ORSINGER: Okay. I get it. Sorry, I  
18 apologize.

19 CHAIRMAN BABCOCK: -- that allows  
20 adjudication of a dispute over that. Okay. Judge  
21 Wallace.

22 HONORABLE R. H. WALLACE: Well, and I like  
23 the way the rule is written very broadly, like I pointed  
24 out before, but that doesn't preclude anyone from if there  
25 is some specific electronically stored record that they

1 think exists and, you know, they can still specifically  
2 mention something like this, but otherwise --

3 CHAIRMAN BABCOCK: Jim.

4 MR. PERDUE: I am the last person who should  
5 speak on behalf of Robert Levy, but he said something --  
6 he said something that's very relevant to the  
7 conversation, which is this concept of this prelitigation  
8 of the scope. A corporation like Exxon has established  
9 preservation procedures. If either Exxon or its opponent,  
10 let's say Chevron, in a trade dispute between equally  
11 powerful parties goes to court and gets a ruling that is  
12 in a posit and fundamentally disagreeable to their  
13 standard preservation systems, that's a huge problem for  
14 him. That's what I think he was trying to explain. I  
15 don't mean to speak for him, because I'm the last person  
16 who should, but that's a reality in big time litigation  
17 and small, and, you know, you -- all the other reasons  
18 that have been mentioned go to what to me is just the  
19 oddity of this proposal, which is the whole process of  
20 these rules was supposed to decrease litigation or the  
21 expense of litigation, and you're going to build in more  
22 expense and more litigation? That makes no sense in the  
23 concept of the policy that was behind that.

24 CHAIRMAN BABCOCK: Before we take our  
25 afternoon break we're going to vote on whether or not we

1 should have this procedure, this presuit procedure to  
2 resolve the preservation issue, and a good time to do that  
3 would be now in my opinion.

4 MR. GILSTRAP: Are we talking about the  
5 notice or the presuit suit?

6 CHAIRMAN BABCOCK: The presuit suit.

7 MR. GILSTRAP: Okay.

8 CHAIRMAN BABCOCK: So everybody in favor of  
9 the presuit suit, raise your hand. Oh, come on. What  
10 have we been talking about?

11 Everybody against?

12 MR. SCHENKKAN: Kent has left the room.

13 HONORABLE TRACY CHRISTOPHER: You can put  
14 Kent in favor.

15 CHAIRMAN BABCOCK: Okay. The Chair and the  
16 commissioner not voting, it's 20 against, zero in favor.  
17 So with that --

18 HONORABLE TOM GRAY: Put me down for an in  
19 favor just so there's one vote on there. I don't even  
20 know what it was.

21 CHAIRMAN BABCOCK: I'll put you down for  
22 that. Here's an amendment: One in favor, 19 against.  
23 We'll take our afternoon break.

24 MR. PERDUE: No, still 20 against.

25 (Recess from 3:04 p.m. to 3:20 p.m.)

1                   CHAIRMAN BABCOCK: Somewhat surprisingly, to  
2 me anyway, we're not going to meet tomorrow. The last  
3 item six and item eight apparently -- item seven and item  
4 eight are not ready for discussion today; and item four,  
5 which we started with, Elaine had to -- had to get back to  
6 Houston, so she can't be here to continue that discussion,  
7 so that will be on the docket for next time as well. The  
8 good news is that Bobby really wants to spend the rest of  
9 the afternoon on discovery, and he's going to be  
10 disappointed if we don't do it, so let's have a strong  
11 finish to Friday, and we've just gotten our Saturday  
12 morning given back to us.

13                   MR. MEADOWS: All right. So where were we?

14                   CHAIRMAN BABCOCK: We were on the 215.7.

15                   HONORABLE TRACY CHRISTOPHER: We did all of  
16 the threshold questions. Now we're on drafting.

17                   MR. MEADOWS: Okay. I think that's it. We  
18 think that the big questions that I asked about at the  
19 beginning of the meeting have been answered, and we have  
20 direction on that, and so now perhaps what we can do is  
21 just march through the rule. We know we could benefit  
22 from some polish and editing, but --

23                   CHAIRMAN BABCOCK: Right.

24                   MR. MEADOWS: -- if we could just kind of  
25 march through it we will know how to finish this whole



1 project.

2 CHAIRMAN BABCOCK: Justice Brown.

3 HONORABLE HARVEY BROWN: So on (b) why did  
4 you not put anything that required the notice to describe  
5 the types of documents that they wanted? Do you think  
6 that just invited a problem or --

7 CHAIRMAN BABCOCK: Harvey, what was it that  
8 you were asking?

9 HONORABLE HARVEY BROWN: (b) does not  
10 actually say that they have to describe the types of  
11 documents they want retained. It just says you have to  
12 give notice to retain, I guess, generally.

13 CHAIRMAN BABCOCK: Yeah.

14 MR. MEADOWS: Well, what we did is we said  
15 you had to give notice with specificity of the claim or  
16 claims.

17 HONORABLE HARVEY BROWN: Right. Couldn't  
18 you add "and the types of documents that should be  
19 retained"? Or is there a reason not to? That's what I'm  
20 asking.

21 MR. MEADOWS: There was no -- it was not --

22 HONORABLE ANA ESTEVEZ: You wouldn't know.

23 MR. MEADOWS: That was not discussed in  
24 terms of that level of demand. I mean, there probably  
25 would have been some concern about inviting -- you know,

1 giving an invitation for an overbroad discovery, but we  
2 didn't talk about it.

3 CHAIRMAN BABCOCK: Judge Wallace.

4 HONORABLE R. H. WALLACE: Well, yeah, I  
5 would -- I think it would be better left as-is, and if you  
6 say describe the documents, I'd be concerned that it's  
7 going to look like a document request that defines  
8 document as and then a whole page of stuff that I think --  
9 I'd leave what you have.

10 HONORABLE TRACY CHRISTOPHER: Well, the only  
11 thing is our second sentence is implying that they have  
12 said what they want to preserve and that you can disagree  
13 with it, which may differ from steps that the party  
14 seeking preservation demands.

15 CHAIRMAN BABCOCK: Judge.

16 HONORABLE R. H. WALLACE: If you send a  
17 notice in the word of the rule how can they say that's  
18 overly broad?

19 HONORABLE TRACY CHRISTOPHER: Right.

20 HONORABLE R. H. WALLACE: You can just say  
21 that's what the rule says you're on notice for, and that's  
22 what I'm putting you on notice for.

23 MR. MEADOWS: There is a little bit of a  
24 disconnect.

25 HONORABLE TRACY CHRISTOPHER: There's a

1 disconnect.

2 MR. MEADOWS: There's a disconnect between  
3 notice of claim and then the right to have some different  
4 view of what you need to preserve. So maybe we can -- I  
5 mean, we've got some thought on it, Harvey, but I don't  
6 think we want to invite what you're talking about, which  
7 is a whole boilerplate response where you're going to get  
8 some --

9 HONORABLE HARVEY BROWN: Right.

10 MR. MEADOWS: -- you know, this exhaustive  
11 list of documents with definitions and so on and so forth.

12 CHAIRMAN BABCOCK: Frank.

13 MR. GILSTRAP: Maybe there's no answer to  
14 this, but it looks like the notice could come from  
15 anybody. There's no -- citizens -- a citizens watchdog  
16 group could send out the notice. It just says -- it's in  
17 the passive voice. I don't know how you limit who could  
18 send the notice, but you get the notice you've got to do  
19 it with anybody.

20 CHAIRMAN BABCOCK: Well, it suggests an  
21 anticipated action.

22 HONORABLE TRACY CHRISTOPHER: Right.

23 MR. GILSTRAP: I didn't file one, and it may  
24 not be my action. I think that's implicit, but it doesn't  
25 say so. You know, in Rule 202 it says a person and you --

1 either to investigate or to preserve evidence, and it's  
2 that person who wants to investigate or preserve evidence,  
3 but this thing, it doesn't say who can send it.

4 MR. PERDUE: It's the problem with having a  
5 duty that is untethered to anticipation of litigation.

6 MR. HATCHELL: Right.

7 MR. PERDUE: And so by expanding duty to  
8 anybody who wants to invoke it, that is the ramification.

9 HONORABLE TRACY CHRISTOPHER: Well, no,  
10 because it says "the claim or claims of the anticipated  
11 action." I mean, that's anticipation of litigation.

12 MR. MUNZINGER: Well, it doesn't say that  
13 the person sending the notice must possess the anticipated  
14 action. I'm the committee for preservation of oak trees  
15 in downtown Austin, and I'm going to write a letter and  
16 say you did A, B, C and by God, the oak trees are turning  
17 yellow, and you better keep all of your records regarding  
18 whatever. Don't think that doesn't happen or won't.

19 CHAIRMAN BABCOCK: So you're with a  
20 nonprofit, and you send a letter to Jim's client, which is  
21 the City of Austin, and you say, you know, you're doing  
22 something powerful bad to the trees, and I anticipate  
23 filing an action against Jim's client, the City of Austin,  
24 so preserve your documents.

25 MR. MUNZINGER: I don't know why, given the

1 text of this rule, and I'm not being critical of the  
2 authors, but I agree with what Jim just said. You are a  
3 global warming denier, you son of a sea cook. The world  
4 is warming, keep all your records --

5 CHAIRMAN BABCOCK: Don't take this  
6 personally.

7 MR. MUNZINGER: -- relating to your  
8 refinery.

9 HONORABLE TRACY CHRISTOPHER: We'll include  
10 this language from 202.2.

11 MR. MUNZINGER: What's that?

12 HONORABLE TRACY CHRISTOPHER: We'll include  
13 this language from 202.2, which we'll reword it, but  
14 "State that the petitioner anticipates the institution of  
15 a suit in which the petitioner may be a party." That's  
16 who can send the notice.

17 MR. GILSTRAP: That would certainly address  
18 that.

19 HONORABLE TRACY CHRISTOPHER: We'll fix that  
20 wording with that idea.

21 CHAIRMAN BABCOCK: Okay. Any other comments  
22 about the subpart (a)?

23 MR. JEFFERSON: That first sentence is  
24 confusing me a little bit. So a written notice to  
25 preserve electronically stored information is the first

1 prong, or a written notice of litigation?

2 HONORABLE TRACY CHRISTOPHER: Yeah, we've  
3 already fixed that.

4 MR. JEFFERSON: Okay.

5 HONORABLE TRACY CHRISTOPHER: Someone else  
6 has already noticed that was not --

7 CHAIRMAN BABCOCK: We're so far down the  
8 road on that.

9 HONORABLE TRACY CHRISTOPHER: Got that one.

10 MR. JEFFERSON: Okay. Cool.

11 CHAIRMAN BABCOCK: Okay. Anything more on  
12 (a)? Yeah. Mike Hatchell is in the building. He's in  
13 the house.

14 MR. HATCHELL: The rule throughout seems to  
15 operate on the concept of a party, but I learn in (a)(2) I  
16 don't have to be a party to litigation, so that concept  
17 flows throughout the whole rule, so I wonder if that's  
18 misleading.

19 CHAIRMAN BABCOCK: Could you repeat that  
20 comment, Mike? It's so deep that --

21 MR. MEADOWS: Only Richard understood it.

22 MR. HATCHELL: It begins with "a party,"  
23 what we think of as party. Does that mean a party to  
24 litigation? Well, obviously not because (a)(2) says I  
25 don't have to be a party to litigation. And that fits in

1 with what Frank just said.

2 MR. MUNZINGER: And it goes back again to  
3 what Robert Levy has been talking about and we all are  
4 sensitive to, the cost of preservation of this stuff, and  
5 how long is it required to be preserved, given the cost.  
6 What's the statute of limitations on global warming  
7 actions? I mean, I have a petroleum refinery that emitted  
8 whatever it emitted on Monday in 2011, and I'm warming the  
9 climate, and I'm going to have to keep these records from  
10 2011 until the end of time.

11 MR. GILSTRAP: Just until the end of the  
12 world.

13 MR. MUNZINGER: Or until it melts.

14 CHAIRMAN BABCOCK: Jane.

15 HONORABLE JANE BLAND: So I think the  
16 comment gets back to what the federal rules struggled  
17 with, which is how can we write in the rules something  
18 that oversees the conduct of people before there's ever a  
19 lawsuit, so we're talking about notice before a lawsuit.  
20 We're talking about preserving documents before a lawsuit,  
21 and the idea would be that those things are out there, but  
22 they don't really become effective. They don't like  
23 spring until the lawsuit is filed, and certainly the  
24 discovery sanctions don't spring until everybody is a  
25 party to the lawsuit. So you couldn't go in and just say

1 I want -- I want sanctions for failure to preserve without  
2 having a lawsuit attached to that motion, so it's kind of  
3 a -- it's kind of a springing thing.

4 CHAIRMAN BABCOCK: You've got to take it on  
5 faith.

6 HONORABLE JANE BLAND: I mean, there is  
7 discussion about whether, you know, that -- and  
8 potentially our rule would be subject to a similar  
9 challenge in that, you know, we're in the Rules of Civil  
10 Procedure. We're not really governing conduct outside of  
11 lawsuits, that kind of thing.

12 CHAIRMAN BABCOCK: Is there a way to fix it,  
13 Mike?

14 MR. HATCHELL: Yeah. I would use a  
15 different term other than "party."

16 CHAIRMAN BABCOCK: Like "person"?

17 MR. SCHENKKAN: Yeah. A person.

18 HONORABLE R. H. WALLACE: Person or entity.

19 MR. SCHENKKAN: Well, a person or entity if  
20 we don't have a generic definition of person that includes  
21 it.

22 MR. GILSTRAP: That's what Rule 202 does.  
23 It says person.

24 CHAIRMAN BABCOCK: Okay, Richard.

25 MR. MEADOWS: You could just say the



1 recipient of such notice.

2 MR. MUNZINGER: Well, others have touched on  
3 this in the earlier discussion today, but what duty do I  
4 have as a citizen right now, whether I'm a company or an  
5 individual to preserve my electronic information? What is  
6 my obligation? I am a free citizen presumptively in a  
7 free country. I am protected by the United States  
8 Constitution, and I have a duty to keep stuff on my  
9 computer for whom? For someone who may sue me. Why?  
10 Well, because.

11 CHAIRMAN BABCOCK: Because you reasonably  
12 anticipated that he was going to sue you.

13 MR. MUNZINGER: No, I understand, but here  
14 is my point. The Supreme Court is enacting a rule that is  
15 now imposing a duty upon me. It is a duty that can be --  
16 can result in a default judgment. The New Mexico Supreme  
17 Court entered a default judgment some years ago for a  
18 billion dollars, and it was paid 100 cents on the dollar,  
19 and under the circumstances, that could happen in Texas.  
20 Those were -- they were very egregious circumstances, and  
21 it was a sanctions judgment, but again, my point here is  
22 here is a rule that is now creating a duty on a person to  
23 do something, and most of the spoliation cases that I have  
24 read are cases where somebody knew there was a photograph  
25 of something and they tore it up, or they knew there was a

1 letter and they tore it up or they did something else.  
2 They're not necessarily intentional -- or unintentional  
3 actions.

4 I mean, some of the problems that can go  
5 along with creating a rule not only for electronic  
6 information but other information, you're a businessman.  
7 I go back to the case I had many years with a refinery  
8 that had a valve. It's a very complicated valve. It  
9 could have been repaired for -- I'm going to make these  
10 numbers up. \$15,000 and done quickly and put back on the  
11 job and what have you. If they couldn't make the changes  
12 to that thing and had to hold it, it disrupted the  
13 refining process for X months and cost income for Y  
14 dollars. What rule does the -- where does the government  
15 get off telling me to do that? I'm supposed to be free.

16 CHAIRMAN BABCOCK: Well, suppose you're a  
17 person working for an entity, and you get -- and you're  
18 driving a truck, but you're drunk, and you've had a bunch  
19 of e-mail texts with people saying, "I'm so wasted I can  
20 barely see straight," and you kill somebody. Is it unfair  
21 to have a duty to you and the company to preserve those  
22 text messages and e-mails?

23 MR. MUNZINGER: Again, under what law  
24 enacted by a Legislature made it a duty for me to keep  
25 them? Where does law come from?

1 HONORABLE JANE BLAND: We can add -- we can  
2 add -- I mean, there is no independent cause of action for  
3 spoliation of evidence. The Texas Supreme Court has  
4 already held that, and if you think that by incorporating  
5 this in the discovery rules we might somehow be suggesting  
6 that, we could add a comment, "There is no independent  
7 cause of action for spoliation of evidence." So the only  
8 time that this sanction can be triggered is in a lawsuit  
9 for something else, and during that process it's, you  
10 know --

11 MR. MUNZINGER: Yeah, but --

12 HONORABLE JANE BLAND: These conditions for  
13 sanctions were coming --

14 MR. MUNZINGER: I understand, but --

15 HONORABLE JANE BLAND: -- from that.

16 MR. MUNZINGER: But when your rule is  
17 forcing me to do certain things prior to litigation --

18 CHAIRMAN BABCOCK: Your rule, Jane.

19 HONORABLE JANE BLAND: Not my rule.

20 MR. MUNZINGER: The Supreme Court's rule.

21 HONORABLE TRACY CHRISTOPHER: You already  
22 have a common law duty to do that.

23 MR. MUNZINGER: Again, my point is who makes  
24 the law? How is law made?

25 CHAIRMAN BABCOCK: Well, the Supreme Court

1 has ruled that there's a duty to preserve evidence.

2 There's just not an independent cause of action, but

3 there's certainly a duty to preserve evidence.

4 MR. MUNZINGER: Pretrial?

5 HONORABLE TRACY CHRISTOPHER: Yes.

6 CHAIRMAN BABCOCK: Yeah. Sure.

7 MR. MUNZINGER: All right.

8 CHAIRMAN BABCOCK: I mean, I would think.

9 MR. MUNZINGER: To me it's --

10 CHAIRMAN BABCOCK: Lamont.

11 MR. JEFFERSON: I like the idea of using the  
12 term "party" here because I agree with Jane that this only  
13 makes sense in the context of the lawsuit. I mean, so the  
14 rule doesn't -- it doesn't create an independent duty and  
15 if you use something besides "party," you might suggest  
16 that there is -- outside of the context of a lawsuit there  
17 is an independent duty to simply preserve evidence, and  
18 really, there's not. There's got to be a civil lawsuit  
19 involving something where that evidence is relevant, and  
20 it matters to a party.

21 CHAIRMAN BABCOCK: The only problem is that  
22 Richard being the sharp-eyed litigant that he is,  
23 litigator that he is, is going to say, "The rule says  
24 party, and at the time I got this letter I wasn't a party.  
25 There wasn't any lawsuit, so this rule doesn't apply to

1 me."

2 MR. JEFFERSON: Right, but by the time it  
3 mattered, by the time someone is complaining about you not  
4 preserving evidence you're a party.

5 CHAIRMAN BABCOCK: Well, no, Hatchell says,  
6 wait a minute, this -- this notice goes to -- supposed to  
7 go to a party, but you're not a party.

8 MR. JEFFERSON: It doesn't say -- it  
9 doesn't -- the rule says "a party" -- "a party," in other  
10 words, a party to a lawsuit.

11 CHAIRMAN BABCOCK: Right.

12 MR. JEFFERSON: Has a duty to take  
13 reasonable and proportional steps to do this and that. I  
14 mean, so they're a party -- by the time they get the  
15 notice or by the time it becomes important, they are a  
16 party to a suit, and they'll say that I didn't have --  
17 this is a timing issue to them?

18 CHAIRMAN BABCOCK: Right. They could say a  
19 party had a duty.

20 MR. JEFFERSON: I think that the downside to  
21 that is if you say a person has a duty outside of the  
22 context of a suit then you're suggesting that there is a  
23 private cause of action.

24 CHAIRMAN BABCOCK: Mike.

25 MR. HATCHELL: I think the rule does create

1 an independent duty, because if you will look at (c) it  
2 says, "The court may order sanctions if electronically  
3 stored information that should have been preserved."  
4 Well, the "should have been preserved" is not tied to  
5 anything previous. In other words, it's not tied to a  
6 court order, so just as a person should have preserved  
7 this. You don't have to have notice of litigation or  
8 anything in order to do that, so I think it does create a  
9 cause of action.

10 MR. JEFFERSON: That section says "party"  
11 also. I mean, it has to have been the party that failed  
12 to take reasonable steps to preserve it, and that -- and  
13 the party is, therefore, subject to sanctions.

14 MR. HATCHELL: It doesn't say that.

15 CHAIRMAN BABCOCK: Where do you come out on  
16 that, Jane?

17 HONORABLE JANE BLAND: We don't live in a  
18 perfect world.

19 CHAIRMAN BABCOCK: But would you -- would it  
20 be less imperfect if you had person or entity versus party  
21 in (a)?

22 HONORABLE JANE BLAND: Well, it would seem  
23 like --

24 CHAIRMAN BABCOCK: And (c).

25 HONORABLE JANE BLAND: It would seem like

1 we're really trying to focus on litigation conduct. Not  
2 all litigation conduct starts at the moment the lawsuit is  
3 filed. So, for example, we sanction plaintiffs who  
4 don't -- who when they file their petition haven't made a  
5 reasonable investigation. Well, none of that happened  
6 ahead -- you know, after the lawsuit. It happened all  
7 before the lawsuit, but it was in anticipation of filing  
8 the pleading that you signed your name to, so in this case  
9 you're a defendant in a lawsuit. You've received this  
10 notice or you have reasonable anticipation of litigation  
11 and you intentionally destroy documents.

12           The common law already says, you know, there  
13 is some sort of ill-defined duty to preserve, and that's  
14 all ahead of the litigation, but -- but the consequence  
15 that attaches to failing to do that only attaches after  
16 the suit is filed, after you can't -- and there are  
17 other -- other requirements before you even get to this  
18 remedy of spoliation. In other words, you can't -- you  
19 haven't been able to replicate, recreate the documents,  
20 all of these other things, and it's all in the context of  
21 a claim against either the plaintiff or the -- I mean, it  
22 could go either way, but it's all in the context of a  
23 claim that can't be presented because something -- some  
24 piece of evidence is not recoverable. So it doesn't seem  
25 to me like it does much violence to use "party," and it

1 better signals what the intent is here.

2 CHAIRMAN BABCOCK: Okay. Justice Gray.

3 HONORABLE JANE BLAND: Since you asked.

4 CHAIRMAN BABCOCK: Did you have a view on  
5 it?

6 HONORABLE TOM GRAY: I'm trying to find one  
7 word in the Brookshires case, and I'm having difficulty,  
8 so I was not --

9 MR. ORSINGER: There are too many words in  
10 there to find one.

11 CHAIRMAN BABCOCK: We have two authorities  
12 here on the -- all right. So that's your view on party  
13 versus person. Mike, anything else --

14 MR. HATCHELL: No.

15 CHAIRMAN BABCOCK: -- on that?

16 HONORABLE TOM GRAY: Oh, if that was what  
17 you were asking about, Mike's deal on person was spot on.

18 CHAIRMAN BABCOCK: That's what I thought  
19 you'd say. Okay. Yeah, Justice Christopher.

20 HONORABLE TRACY CHRISTOPHER: We do use the  
21 word "party" in work product, and it's dealing with  
22 conduct that happens before litigation, and we still call  
23 them a party, and no one that I know of has made the  
24 argument that somehow there was -- there is no work  
25 product because they weren't a party at the time.



1                   CHAIRMAN BABCOCK:   Only because Munzinger  
2 wasn't around to think of that.

3                   HONORABLE TRACY CHRISTOPHER:   I'm just  
4 saying.

5                   MR. MUNZINGER:   Well, the only --

6                   CHAIRMAN BABCOCK:   You might have missed  
7 that meeting.

8                   MR. MUNZINGER:   The only point that I want  
9 to make, again, is that we are dealing with people's  
10 rights here, and business goes on, commerce goes on. Not  
11 everybody is Exxon. Not everybody has the wherewithal to  
12 sit down and figure out a means of preserving this stuff  
13 and paying for it.

14                  CHAIRMAN BABCOCK:   Right.

15                  MR. MUNZINGER:   And I can make it terribly  
16 expensive. His point, Chevron sues Exxon. I can make it  
17 terribly expensive for you by writing you a letter, and I  
18 don't even have to sue you. This rule says service of a  
19 notice. By whom? It doesn't say it has to be a person  
20 asserting a claim or intending to file a claim or who  
21 later files a claim or anything. Any citizen can trigger  
22 these obligations, and the general counsel of Exxon or  
23 whoever it might be has to sit down and weigh the cost and  
24 the risk of not obeying this rule; and his counsel, when  
25 he calls his lawyer, his lawyer has got to say to him,

1 "Well, there's this damn rule and whether they sue you or  
2 not you've got" -- "How long do I have to keep it?" Well,  
3 the statute of limitations on this cause of action is 10  
4 years, the statute of repose is 20, or whatever it might  
5 be; and you're sitting there looking at this stuff; and  
6 I'm not trying to make a problem; but, again, we're  
7 dealing with people's rights, fortunes, and sacred honor.

8 CHAIRMAN BABCOCK: Got it.

9 HONORABLE JANE BLAND: Amen. And we -- we  
10 took that already as a valid comment, and we're going to  
11 try to fix that by incorporating that language from Rule  
12 202.

13 MR. MUNZINGER: I'm not being critical of  
14 the committee. Please don't misunderstand me.

15 HONORABLE JANE BLAND: No, no. No, just on  
16 that specific --

17 MR. MUNZINGER: I've worked these  
18 committees. This is hard work, and we --

19 HONORABLE JANE BLAND: It's a good point,  
20 and we're going to fix it.

21 MR. MUNZINGER: -- respect it.

22 HONORABLE JANE BLAND: Yeah. We're going to  
23 fix that.

24 MR. MUNZINGER: It's a problem here.

25 HONORABLE TRACY CHRISTOPHER: But you as a

1 counsel for a corporation should know that they have a  
2 common law duty to preserve these documents anyway, so I  
3 don't see that we're creating something horrendous --

4 MR. MUNZINGER: Well, you may have a duty,  
5 depending upon the circumstances. I've got a client who  
6 fires people for writing e-mails. He fires people for  
7 writing e-mails. Get up and walk down the hall or call on  
8 the telephone, I don't want an e-mail; and he's very, very  
9 successful with a big international company; and that's  
10 his -- he's the sole owner; and they do what he tells  
11 them; but, you know, wait a minute, do I have to write  
12 e-mails? No. And if I don't have to write them, why do I  
13 have to keep them? I'm supposed to be free.

14 CHAIRMAN BABCOCK: Got it.

15 MR. RODRIGUEZ: If you haven't written them,  
16 there's nothing to keep.

17 HONORABLE TRACY CHRISTOPHER: Right.

18 MR. MUNZINGER: Exactly so, and that's one  
19 of his points.

20 HONORABLE TRACY CHRISTOPHER: Okay.

21 CHAIRMAN BABCOCK: All right. Subparagraph  
22 (b), anything else on the notice paragraph? Subparagraph  
23 (c), failure to preserve. Any other comments on (c)?

24 MR. SCHENKKAN: I wonder if it wouldn't --  
25 it's complicated to do and probably not the sort of thing

1 we can draft in committee in the whole here, but if it  
2 wouldn't be a good idea to separate (c) into two subparts  
3 or a (c) and (d) that are -- the first of which is the  
4 what happens if a party fails to take reasonable and  
5 proportional steps to preserve the information and there's  
6 prejudice, but there's not an actual intent. Because  
7 that's one scenario that's important, and then the other  
8 is the one that presently would be triggered only by what  
9 is now (d)(3), only upon the trial court finding that the  
10 party acted with intent to deprive may he do these other  
11 things.

12 I would call (c) as redone, "consequences  
13 for failure to take reasonable and proportionate steps to  
14 preserve"; and I would call what the new (d), if it's done  
15 in separate (c) and (d), "sanctions."

16 CHAIRMAN BABCOCK: Okay. Richard.

17 MR. MUNZINGER: I'm going to show my  
18 ignorance. Is there a jury right to have a finding on  
19 intent, or has that been foreclosed by the courts already?  
20 In number (d)(3), "Only upon the trial court finding that  
21 the party acted with intent to deprive another party  
22 information used for litigation," the trial court may do  
23 all these things. I've got a jury demand. It's a jury  
24 trial, and it turns out that (d)(3) is satisfied by the  
25 trial court judge. Do I have a right to a jury trial

1 before he can enter a default judgment of a billion  
2 dollars against me?

3 CHAIRMAN BABCOCK: Or could it be part of  
4 the charge.

5 MR. MUNZINGER: Or could it be part of the  
6 charge, and even then if it's part of the charge he's made  
7 a finding.

8 CHAIRMAN BABCOCK: No. No. Under your  
9 scenario, the jury would be asked to find out --

10 MR. MUNZINGER: If it was intentional.

11 CHAIRMAN BABCOCK: -- if there was intent,  
12 and if there was intent, then --

13 MR. MUNZINGER: Well, and should it be in  
14 the same case?

15 CHAIRMAN BABCOCK: Right. That's what I  
16 mean.

17 MR. MUNZINGER: You know, this is a mess.

18 HONORABLE JANE BLAND: The Texas Supreme  
19 Court has held that it's a matter for the trial judge, not  
20 for the jury.

21 MR. MUNZINGER: I wasn't sure of that.

22 HONORABLE JANE BLAND: Yeah, no, that's why  
23 I was just letting you know.

24 CHAIRMAN BABCOCK: Jim.

25 MR. PERDUE: That's what I was going to say.

1 CHAIRMAN BABCOCK: There you go. Okay.

2 Anything else on (c)?

3 MR. SCHENKKAN: Yeah.

4 CHAIRMAN BABCOCK: Pete.

5 MR. SCHENKKAN: Well, I'm sorry, no, I guess  
6 this is under (d) as it's presently drafted.

7 CHAIRMAN BABCOCK: Anything else on (d)?

8 MR. SCHENKKAN: On (d), I'm confused by "the  
9 party may present evidence concerning loss of the  
10 evidence."

11 CHAIRMAN BABCOCK: What part are you talking  
12 about?

13 MR. SCHENKKAN: This is (d) --

14 MS. CORTELL: (d)(1).

15 MR. SCHENKKAN: I've been editing things in  
16 ink so much I've changed it. I think it's (d)(1).

17 MR. MUNZINGER: (d)(1). It's party,  
18 singular, instead of parties, plural.

19 MR. SCHENKKAN: "The party may present  
20 evidence concerning the loss of the evidence." Which  
21 party? Both parties? Either party?

22 MR. MEADOWS: Probably should be "the  
23 parties."

24 CHAIRMAN BABCOCK: Plural? Yeah.

25 MR. SCHENKKAN: And so now, given what you

1 were just saying about it's up to the trial judge, not the  
2 jury, to do these things what do we mean by presenting  
3 evidence to the judge outside the presence of the jury?  
4 Is that what we're talking about? I think you better say  
5 that, something like that. Because this is -- one of the  
6 big things being decided here is the more details of what  
7 the judge does and what the jury does, and I was confused  
8 about that, and I might not have been the only one.

9 MR. PERDUE: Y'all tell me what you were  
10 thinking, but I read that when I first saw it to -- again,  
11 this is the struggle with the rule, as I recall it, that  
12 we looked at years ago with the idea of putting in the  
13 rule the various measures that a court may take when  
14 evidence is missing; and in that circumstance if I  
15 can't -- if I can't replace it, but -- so I don't have it,  
16 but I haven't been able to prove subjective intent to the  
17 standard which would satisfy the trial court, I at least  
18 can present evidence as to why I don't have it; and I  
19 think that's the practice.

20 HONORABLE JANE BLAND: Yeah.

21 HONORABLE TRACY CHRISTOPHER: Right. So --

22 CHAIRMAN BABCOCK: Justice Bland.

23 HONORABLE TRACY CHRISTOPHER: I mean, I  
24 think like --

25 CHAIRMAN BABCOCK: Or Christopher.

1 HONORABLE TRACY CHRISTOPHER: -- you know,  
2 you asked for, you know, daily logs, and a daily log is  
3 missing. Right? You get to -- but you couldn't prove  
4 that the daily log was intentionally destroyed. You can  
5 still say, "Look, the daily log is missing" and present  
6 evidence that the daily log is missing. They have one for  
7 everyday except the really important day in question.

8 MR. SCHENKKAN: So, again, this is, seems to  
9 me, a reason for separating the failure to take reasonable  
10 and proportional steps from the potential sanctions one  
11 because you've got some of that evidence, that intent  
12 evidence I guess is only going to go to judge, the intent  
13 to destroy, but the evidence that this -- that the log is  
14 missing, if the judge has not found intent, that goes to  
15 the jury.

16 MR. MEADOWS: I think so, yes.

17 HONORABLE TRACY CHRISTOPHER: Right.

18 CHAIRMAN BABCOCK: Justice Bland.

19 HONORABLE JANE BLAND: I mean, the way that  
20 it works in reality is the log is missing this critical  
21 day and then the defense witness gets up and says, "I  
22 spilled coffee on the log that day and so that's why it's  
23 not there." I mean, you know, and so leaving aside the  
24 whole idea of spoliation, this happens all the time where  
25 there's some piece of information that somebody doesn't



1 have and the reasons behind that become a piece of the  
2 evidence at trial, and the idea is that that can still --  
3 that evidence -- that should be presented to the jury,  
4 just as, you know, a matter of course about what evidence  
5 is there and why is it there and not there. I mean,  
6 subject to other reasons that it -- that the jury  
7 shouldn't hear about it, but there are some things that  
8 are so prejudicial, like this idea of intentional  
9 destruction and all of that, that the Texas Supreme Court  
10 has said that's got to all be heard by the judge.

11 CHAIRMAN BABCOCK: Justice Brown.

12 HONORABLE HARVEY BROWN: So a friendly  
13 amendment would be after the word "evidence" just say "at  
14 trial." "May present evidence at trial to the jury."

15 HONORABLE JANE BLAND: I think we have to  
16 think about it because I think we're talking about two  
17 different kinds of evidence and maybe go back and look at  
18 Brookshire Brothers, because I think that's where the  
19 discussion is about what should be handled by the trial  
20 court and what should -- what can come in in front of the  
21 jury.

22 MR. MEADOWS: Because the Supreme Court says  
23 that "We recognize that all references to missing  
24 evidence, whether lost due to a party's spoliation or  
25 missing for some other reason, cannot and should not be

1 foreclosed." And then it goes on to talk about how you  
2 might introduce evidence to demonstrate what was in the  
3 missing evidence, through other -- indirect evidence. So,  
4 I mean, I think we just need to talk -- you know, bear  
5 down on the language and make sure that what we're talking  
6 about here is clear.

7 CHAIRMAN BABCOCK: Okay. Anything else on  
8 (d)?

9 MR. MEADOWS: Beg your pardon?

10 CHAIRMAN BABCOCK: Anything else on subpart  
11 (d)?

12 MR. JEFFERSON: Can I just ask a question?  
13 And this may be foreclosed, but the intent question and  
14 the intent issue that I think we're assuming is a matter  
15 for the trial judge. That seems so fact-laden to me  
16 it's -- that's something that a trial judge, like the  
17 trial judge in Brookshire, would prefer to submit to the  
18 jury there, at least include in the instruction, and I --  
19 I guess the question is could -- could the court now by  
20 rule change who decides that question?

21 CHAIRMAN BABCOCK: Jane.

22 HONORABLE JANE BLAND: The competing concern  
23 is that you end up having a trial about --

24 MR. JEFFERSON: Evidence --

25 HONORABLE JANE BLAND: About the horrible

1 conduct and engaged in destroying evidence, which  
2 completely directs the jury to this issue rather than what  
3 they really ought to be considering, which is, you know,  
4 liability and damages for the cause of action that's  
5 presented.

6 MR. JEFFERSON: Yeah. No, I understand  
7 those are the competing interests, but I'm just wondering  
8 if we're constraining or should we deliberately say or  
9 come to a conclusion about which is better? I mean, I  
10 understand both sides of the argument.

11 CHAIRMAN BABCOCK: Justice Christopher.

12 HONORABLE TRACY CHRISTOPHER: Well, before  
13 Brookshire when I had the daily log missing out of, you  
14 know, 10 days, I said to the jury, "If you find the  
15 destruction was intentional then you can infer it was  
16 unfavorable," and I did let the jury decide that, but the  
17 Court seemed to think we shouldn't.

18 MR. MEADOWS: It's clear. Brookshire is  
19 clear on that in terms of which way this goes. It's the  
20 court's decision.

21 HONORABLE TRACY CHRISTOPHER: I mean, if the  
22 Court chooses to rewrite the rule it could.

23 CHAIRMAN BABCOCK: Harvey.

24 HONORABLE HARVEY BROWN: I think some judges  
25 might prefer to let the jury decide that and have an

1 instruction like Tracy had. I've asked for that once when  
2 a judge said, "I'm not sure, but I'm leaning towards  
3 giving an instruction," and I asked for the jury to decide  
4 the issue basically the way Justice Christopher said she  
5 did. So close call, the judge might think let the fact  
6 finder decide.

7 CHAIRMAN BABCOCK: That's what Richard would  
8 want.

9 HONORABLE HARVEY BROWN: So I'd like the  
10 rule to give discretion to the trial court to do that,  
11 since we're going to rewrite everything anyway.

12 CHAIRMAN BABCOCK: Justice Bland.

13 HONORABLE JANE BLAND: Well, the rule does.  
14 If you look down to (3), the trial judge makes an initial  
15 determination about intent to deprive, and if the trial  
16 judge finds intent to deprive the judge may order -- can  
17 instruct the jury that it may presume or must presume. So  
18 it does give the trial judge the ability to say to the  
19 jury, "If you see it the way I see it then you may presume  
20 that the information was unfavorable."

21 HONORABLE TRACY CHRISTOPHER: I don't know.  
22 I kind of got the impression in Brookshire Brothers that  
23 they wanted -- the Court wanted the whole discussion of,  
24 you know, when did the duty arise, all of those sort of  
25 questions, to be handled not in front of the jury.

1 HONORABLE JANE BLAND: Right. But this is  
2 -- this is the information. They can presume it was  
3 unfavorable, or it gives the trial judge the idea of "may"  
4 or "must," which means not an instructed verdict on that,  
5 but I mean, if that's what you're wanting.

6 HONORABLE HARVEY BROWN: Yeah.

7 HONORABLE JEFF BOYD: Chip?

8 CHAIRMAN BABCOCK: Yes, sir.

9 HONORABLE JEFF BOYD: At the risk of not  
10 speaking on behalf of the Court --

11 CHAIRMAN BABCOCK: So you are speaking on  
12 behalf of the Court.

13 HONORABLE JEFF BOYD: Yeah, I am not, just  
14 one member of it, who was on the Court when we decided  
15 this case, but it has been several years ago, but I think  
16 it may help and it at least goes to subsection (3)(a) and  
17 the language on that that I'll make a recommendation on  
18 that. Yeah, the prevailing concern was that the jury  
19 ought to be deciding whether the product was defective,  
20 not whether this defendant ought to pay because it tried  
21 to hide evidence; and that was the ultimate concern, was  
22 that allowing the evidence before the jury creates too  
23 great a risk that the jury decides the case based on  
24 something other than the true basis for liability; and so  
25 the theory behind it was that if the party -- okay. So if

1 the evidence was missing, but no -- the trial -- well,  
2 forget about who decides first, but there's no basis to  
3 conclude that it's missing because someone wanted it to go  
4 missing, it's just what was the case where they put it  
5 in -- we had that they put it in a warehouse and whoever  
6 was in charge of the warehouse disposed of it before they  
7 should have, and the expert said that's never happened  
8 before and they shouldn't have, but they did. Then the  
9 theory at least is you can't infer from that that the  
10 party who was in control of the evidence thought it was  
11 harmful to them; but if, on the other hand, you conclude  
12 that they intended to destroy or hide the evidence then  
13 you certainly can infer from that.

14               So the thinking was keeping in -- to protect  
15 the jury from deciding the case on the wrong issue, you  
16 have the trial court make all of the determination, was  
17 there intent, and the difference -- and here's where the  
18 language ought to be different. I can't remember if  
19 Justice Lehrmann was as careful in the opinion on this  
20 language or not, but the thinking was, and if you do the  
21 research, there's a difference between an inference and a  
22 presumption. It's the trial court that from the -- from  
23 the finding that the party intended to hide or destroy the  
24 evidence, the trial court can -- may, (3)(a), infer that  
25 the lost information was unfavorable to the party, and

1 then, (b), instruct the jury to presume that it was. The  
2 jury doesn't have to infer anything because they're not  
3 hearing any evidence from which they can make that  
4 inference. Instead a presumption is a legally imposed  
5 leaning towards the finding. It's not an irrebuttable  
6 presumption, but it is a presumption, so I do think that  
7 was the thinking.

8 I'd have to go back and reread -- now, what  
9 Bobby said, that doesn't mean that evidence of whatever  
10 the lost evidence was is, therefore, not admissible in any  
11 way. If you can prove that up some other way, you can  
12 prove it up. If the evidence was a memo saying that the  
13 skim stock compound on the tire was improperly mixed, then  
14 you can still prove that fact if you have other evidence  
15 to do it. What you can't distract the jury with is  
16 evidence that that evidence is lost, and I think that was  
17 the intent. So I do think if you dig into the research on  
18 this, there's a difference between inference and  
19 presumption, and it's the trial court's role to infer and  
20 then give the jury an instruction to presume. Without any  
21 evidence of that that's a legal instruction. You presume  
22 it as a matter of law.

23 HONORABLE TRACY CHRISTOPHER: Okay. We got  
24 that change.

25 CHAIRMAN BABCOCK: Okay.

1                   MR. PERDUE: Well, but in that -- I think I  
2 heard you -- because I recall the language in Brookshire a  
3 little bit, and so if the -- if the inference has been  
4 made then the instruction gets given, which is you  
5 presume.

6                   HONORABLE JEFF BOYD: You presume.

7                   MR. PERDUE: Not may or must, but you  
8 presume.

9                   HONORABLE JEFF BOYD: Yeah, I can't --  
10 honestly, I can't remember how that came out, and so I  
11 don't want to speak on the Court's behalf. I can't  
12 remember how that was written. I don't have it in front  
13 of me, but it's not inconsistent with my memory. I just  
14 want to make sure.

15                  HONORABLE JANE BLAND: I think it was "may"  
16 or "must," and so the idea is what we have in (a) really  
17 shouldn't be (a). It should be part of that prefatory  
18 language, that the trial court may infer that the lost  
19 information was unfavorable to the party and -- and in (a)  
20 instruct the jury and in (b) dismiss, so the next two are  
21 the ones that are the -- right. So we can do that.

22                  HONORABLE TRACY CHRISTOPHER: We'll fix  
23 that.

24                  HONORABLE JANE BLAND: We'll fix that.

25                  CHAIRMAN BABCOCK: Okay. Anything else on



1 (d), on sanctions? Any other comments?

2 MR. MUNZINGER: Chip, (d)(1) the parties --  
3 I think it's going to be plural now. "The parties may  
4 present evidence concerning the loss of the evidence." I  
5 read that to say the loser can try and explain the  
6 circumstances of the loss. The other party can try and  
7 explain the effect of the loss on that party's case.  
8 That's the way I would read that, and I am assuming that  
9 that is the intent, that during the trial of the case  
10 those two subject matters may be the subject of evidence  
11 offered by each party.

12 HONORABLE JEFF BOYD: Chip, I think that's  
13 right, but I think (d)(1), to be clear should say, "The  
14 party may present evidence to the trial court," not to the  
15 jury, "concerning the loss of the evidence."

16 HONORABLE TRACY CHRISTOPHER: No, I don't  
17 think so. No.

18 HONORABLE JANE BLAND: No.

19 HONORABLE JEFF BOYD: I didn't author any  
20 opinion in that case.

21 CHAIRMAN BABCOCK: We've got two court of  
22 appeals against one Supreme Court judge. Justice Bland.

23 HONORABLE JANE BLAND: We could just take  
24 out (1). I think (1) was put in because -- because of  
25 this idea that -- that, well, you can always talk about

1 something that's not there that's relevant and, you know,  
2 why -- and why it's not there.

3 HONORABLE JEFF BOYD: Didn't we say the  
4 trial court could give the jury an instruction about the  
5 loss of the evidence or unavailability of the evidence?

6 HONORABLE JANE BLAND: No, this is just like  
7 in the regular presentation of the evidence separate and  
8 apart from any sanction. You can refer to things that,  
9 you know, are not there and examine witnesses about why  
10 they are or aren't there, you know, subject to all of the  
11 other Rules of Evidence; and so it probably isn't  
12 something that should even be in the sanction rule; and we  
13 may have added it because we -- we wanted to be sure that  
14 people knew they could --

15 HONORABLE ANA ESTEVEZ: Talk about it.

16 HONORABLE JANE BLAND: -- still talk about  
17 evidence, but I think that's probably clear from the other  
18 discovery rules that we have.

19 CHAIRMAN BABCOCK: Okay. Judge Wallace.

20 HONORABLE R. H. WALLACE: That's where this  
21 issue gets very sticky in the trial of the case, I think,  
22 because when you say the party may present evidence, well,  
23 there's certain things that a jury is going to wonder  
24 where is that? You know, for instance, railroad cases,  
25 usually the engines have video cameras showing what's

1 happening, but they record over each other periodically,  
2 and sometimes that will be the result -- that will result  
3 in a spoliation message. Well, if there's going to be  
4 evidence that there are video recordings, that it's normal  
5 to have these videos, then the jury is going to obviously  
6 want to know where is the video; and I think you need to  
7 tell them something. It's just that how far do you let  
8 them go. Okay, it's not here because it was recorded  
9 over.

10           The hard part then I think is drawing the  
11 line and not turning it into a trial over, well, you  
12 shouldn't have recorded over it, you should have preserved  
13 it, or just letting the judge then later decide at the end  
14 of the case is he going to give an instruction on that;  
15 but there's some -- there's some things that a jury is  
16 just going to naturally want to know from the evidence  
17 that they hear where is the -- where is that object or  
18 where is that piece of paper; and if they don't hear any  
19 evidence of it, they'll go back in the jury room and  
20 figure it out themselves. It may not be right.

21           CHAIRMAN BABCOCK: Harvey, Pete, and then  
22 Richard.

23           HONORABLE HARVEY BROWN: Well, I don't think  
24 it belongs in the rule because it's not a sanction. It's  
25 really an evidentiary rule, but I do think it deserves a

1 comment because as we see in here we have a disagreement  
2 about it among experienced practitioners. I think both  
3 sides should be able to present evidence about it  
4 basically like Justice Christopher was saying, because  
5 this happens all the time in small litigation. You know,  
6 the driver's log that's missing, the piece of paper that  
7 gets lost, or somebody didn't go to -- somebody didn't  
8 obtain something. So it's common, it seems to me, and it  
9 should be perfectly permissible, and the judge should be  
10 able to control it in his or her discretion as to how much  
11 time they allow.

12 HONORABLE TRACY CHRISTOPHER: I think the --  
13 I think the important thing about Brookshire is that we  
14 don't want the jury being instructed about duty to  
15 preserve, right? And -- because that is something that  
16 the court is supposed to decide, and then only if you find  
17 intent do you get into the sanctions under (3). So we  
18 need to move (1) and (2) someplace different.

19 CHAIRMAN BABCOCK: Okay. Pete.

20 MR. SCHENKKAN: I think it might help, given  
21 that 215.7 is about a duty to preserve electronically  
22 stored information, to replace the word "evidence" the  
23 second time the word "evidence" appears in (1), "a party  
24 must present evidence" -- "may present evidence concerning  
25 the loss of the evidence" and the three times that "the

1 evidence" is used in (2) with "electronically stored  
2 information" because we keep falling back into discussions  
3 of entirely different scenarios with a log, piece of paper  
4 log is missing; and it's tempting, but the premise of  
5 there being a special rule on electronically preserved  
6 information is there may be some material differences  
7 about this particular kind of potential evidence that we  
8 should draw up a special rule for; and so I would  
9 encourage us to put that back in. This is not to take a  
10 position that I don't feel qualified to take on which of  
11 this happens in front of the jury and which doesn't, but  
12 it's a question of presenting evidence or not presenting  
13 evidence about the loss of electronically stored  
14 information about the intent, you know, to destroy  
15 electronically.

16 HONORABLE JANE BLAND: But at that point  
17 doesn't it have to be some sort of admissible evidence?  
18 It can't just be --

19 MR. SCHENKKAN: It presumably does. I'm  
20 saying it's helpful to point out to ourselves and to all  
21 the readers of this rule that it's a particular kind of  
22 evidence that I'm talking about here. It's evidence, if  
23 it still existed, it could be in the form of information  
24 that had been electronically stored; and if it has been  
25 lost, we're going to be talking to -- to the extent you're

1 talking -- and whether it's to the judge or the jury I'm  
2 just not quite sure about -- how come it got lost and what  
3 the alternative solutions are to it being lost.

4 HONORABLE JANE BLAND: So like are you  
5 suggesting "electronically stored evidence" or some other  
6 adjective?

7 MR. SCHENKKAN: "Electronically stored  
8 information." That's the particular kind of evidence  
9 we're talking about.

10 HONORABLE JANE BLAND: But it would have to  
11 be admissible at that point.

12 MR. SCHENKKAN: Yes. It would.

13 MR. RODRIGUEZ: It may not be electronic.

14 MR. SCHENKKAN: And if it wasn't admissible,  
15 you wouldn't be talking about it at all.

16 MR. MUNZINGER: The fact that it is missing  
17 is a fact that the plaintiff or somebody wants to make  
18 noise to the jury about, the very fact that it is missing.  
19 So it's a computer program, and the daily log -- got an  
20 electronic daily log for every day except this day, and  
21 the plaintiff wants to make a big tadoo about that missing  
22 log. He ought to be able to do that. The videotape,  
23 you've got a videotape of your premises, and it doesn't  
24 repeat over itself except every so many days, but in this  
25 case it repeated over itself, but you have claimed it, the

1 work product privilege, on a day -- eleven days before it  
2 was overwritten. You knew there was going to be  
3 litigation going, and you let that dadgum tape be used  
4 again. Now, how can I prove that if I'm the plaintiff?  
5 I'm making a point about the claim of work product  
6 privilege, which I think the Rules of Evidence say I can't  
7 comment on and the court can't comment on a party's making  
8 a claim of privilege.

9 HONORABLE TRACY CHRISTOPHER: No, no.

10 MR. MUNZINGER: Isn't that what the -- isn't  
11 that what the Rules of Evidence say?

12 HONORABLE TRACY CHRISTOPHER: Right. So  
13 that's why Brookshire Brothers envisions in this case you  
14 have a hearing in front of the trial judge; and you say,  
15 okay, here's when they anticipated litigation, here's when  
16 they allowed this tape to be overwritten, and they don't  
17 have any explanation for it; and so the trial judge says,  
18 "Well, I find that you intended to deprive another party  
19 of the use of that information." The trial judge makes  
20 that determination and then you get the sanctions in (3).

21 MR. MUNZINGER: But the party is not  
22 permitted to point out that -- to the jury that the tape  
23 was used over again or the computer program was changed or  
24 what have you on a date after the losing or destroying  
25 party, whatever the case may be, knew that there was a

1 possibility of litigation under the work product  
2 privilege.

3 HONORABLE TRACY CHRISTOPHER: That's my  
4 understanding of the case, the Brookshire case, that  
5 you're not allowed to talk about that.

6 MR. SCHENKKAN: Well, just to come back to  
7 the point you were raising, actually it seems to me that  
8 since the scope of discovery is not limited, expressly not  
9 limited to material that is admissible, it has to be  
10 relevant to the subject matter of the litigation, but it  
11 doesn't -- information within the scope of discovery need  
12 not be admissible in evidence to meet your burden  
13 according to 192.3. You could have a scenario under which  
14 it is the loss of electronically stored information, the  
15 inability to get it in discovery, that has impaired your  
16 ability  
17 to --

18 HONORABLE JANE BLAND: To otherwise present  
19 your case.

20 MR. SCHENKKAN: Yeah. To generate some  
21 other evidence, to locate or generate some other evidence.  
22 Your expert has to confess, "I'm missing a data point,  
23 you're right," that counsel can cross-examine you on and  
24 say, "Well, you've only got 19 data points and divisibly  
25 that's not enough." He says, "Yes, and the reason is that



1 we took discovery and the 20th data point wasn't there,  
2 and we have in our particular subset of this science or  
3 technology," whatever it is, "a system for replacing  
4 missing data points because this happens in science, too,  
5 and I used it" and --

6 HONORABLE JANE BLAND: Yeah, I agree. And I  
7 checked the federal rule, and they use "information."

8 CHAIRMAN BABCOCK: Lamont.

9 MR. JEFFERSON: Quick question on this. So  
10 -- so I'm trying to determine what has to go to the jury,  
11 so judge has decided that the spoliating party acted with  
12 the intent to deprive the other of information, and then  
13 there's a choice that -- the court has a choice, right,  
14 about how to submit it to the jury. The court can say the  
15 jury must presume the information was unfavorable or the  
16 jury may, so the jury gets -- the judge decides the level  
17 of culpability that the jury gets to decide. In other  
18 words, it's not -- there's not an automatic instruction to  
19 the jury that you must presume the information was  
20 unavailable, even if that's already predicated on a  
21 finding by the judge that there was an intent to deprive  
22 the nonproducing party of the information. And how does  
23 that get -- how do you determine whether it's "may" or  
24 "must," in other words?

25 MR. MEADOWS: Well, it may have to do with

1 whether there's prejudice. I mean, the whole  
2 determination is about whether or not -- and this is for  
3 the court, whether or not there is a duty to preserve it,  
4 whether or not it's been breached, and the culpability  
5 involved in the loss of the evidence and whether or not  
6 there is prejudice resulting from it. All of that gets  
7 decided outside the presence of the jury, and the court is  
8 supposed to fashion some sort of remedy.

9 MR. JEFFERSON: But we're there. If we get  
10 to (3)(a), (b), and (c) we've already decided that the  
11 party acted with the intent to deprive the other party of  
12 information for use in the litigation and that -- and  
13 instruction is necessary because no lesser sanction would  
14 be effective. And -- but in that event we're still saying  
15 the court has discretion to allow the jury to either  
16 presume the information was unfavorable, that is,  
17 irrebuttably presume it, or just allow the jury to  
18 conclude that it was unfavorable.

19 MR. MEADOWS: I've got Brookshire in front  
20 of me, and I haven't found that, but it's in the federal  
21 rule I believe, "may" or "must" and so maybe we need to  
22 look at that.

23 MR. PERDUE: It's straight out of the  
24 federal rule.

25 MR. MEADOWS: Yeah. I mean, it's definitely

1 in the federal rule, and I just can't put my finger on it  
2 in here.

3 MR. JEFFERSON: I'm just wondering how it  
4 works. I mean, what is the jury asked? I mean, so if the  
5 trial judge says -- the trial judge has now concluded  
6 there was evidence, it was intentionally spoliated. It's  
7 not here now. Jury, you may presume that that evidence  
8 would be unfavorable, or you must presume that that  
9 evidence would be unfavorable.

10 MR. MEADOWS: I think it's the judge's --

11 MR. JEFFERSON: His discretion based on  
12 whatever.

13 CHAIRMAN BABCOCK: Jane.

14 HONORABLE JANE BLAND: So there's degrees of  
15 culpability that probably are implicated, and there's a  
16 whole -- there's "may" or "must" in that and then  
17 obviously even stronger result would be to dismiss the  
18 action or enter a default judgment, and so it's sort of an  
19 escalating -- and it gives some discretion to the trial  
20 judge for the -- to fashion the remedy.

21 MR. JEFFERSON: So but if the jury -- so  
22 it's not -- the question is not, jury, you may -- you get  
23 to decide whether it's may or must. Jury doesn't get to  
24 decide that. The judge says it's either you may presume  
25 or you must presume.

1 HONORABLE TRACY CHRISTOPHER: Right.

2 MR. MEADOWS: That's right.

3 CHAIRMAN BABCOCK: Okay. Harvey.

4 HONORABLE HARVEY BROWN: My recollection is  
5 you don't tell the jury, "I've made a finding that there  
6 was intent to deprive."

7 HONORABLE TRACY CHRISTOPHER: Right.

8 CHAIRMAN BABCOCK: You know, somebody said  
9 something a minute ago about how you can't talk to the  
10 jury about a work product privilege, but isn't the way you  
11 would do it by sending an interrogatory saying, "When did  
12 you reasonably anticipate litigation," and the answer will  
13 be June 2nd, you know, 2014, and so then you read that  
14 into evidence, and in argument you say they -- "They  
15 anticipated litigation on June 2nd, 2014, and after that  
16 they destroyed this thing." Can you do that? Why can't  
17 you do that?

18 HONORABLE TRACY CHRISTOPHER: Because  
19 Brookshire says you can't.

20 CHAIRMAN BABCOCK: You can't do that?

21 HONORABLE JANE BLAND: Right.

22 HONORABLE TRACY CHRISTOPHER: That's my  
23 reading of it. You can read it again.

24 CHAIRMAN BABCOCK: I haven't read it with  
25 that in mind.

1                   MR. PERDUE: I'm not sure I read it that  
2 narrow, because I think the effect of Brookshire was to  
3 narrow the sanction that was the ramification and narrow  
4 the classification of what qualified as spoliation. It  
5 narrowed that universe massively and then it narrowed the  
6 sanction for that universe that was substantially smaller.  
7 Lamont, the reason I don't know the answer to your  
8 question is I don't know anybody who has gotten to the  
9 jury on a spoliation question since Brookshire. So, you  
10 know, it may or must and whether that gets in the charge  
11 and whether that's discretionary, I don't know who's  
12 thread that needle because the intent standard massively  
13 limited the universe. I mean, it just -- it just does,  
14 and so, you know, whether it be the federal rule and  
15 this -- this section in the rule currently tracks (e)(2)  
16 pretty closely from the federal rule; and obviously the  
17 federal rule is not necessarily based on Brookshire; but  
18 in some regards you have to have evidence of this intent.

19                   The court has to find there's no other way  
20 to get it, even if it was intentionally destroyed because  
21 if you can't get it another way, even if it was  
22 intentionally destroyed you're still not -- and it had to  
23 be prejudicial; and assuming then it was intentional and  
24 it was prejudicial and you cannot hear it, then maybe you  
25 get a -- an instruction that tells the jury they may

1 presume it was hurtful. I mean, that's not that bad if  
2 they intentionally destroyed something.

3 MR. MEADOWS: But to your question, your  
4 hypothetical, I mean, whether you like it or not, the  
5 direction is pretty clear from the Court. It says, "There  
6 is no basis on which to allow the jury to hear evidence  
7 that's unrelated to the merits of the case, but serves  
8 only to highlight the spoliating party's breach and  
9 culpability. While such evidence may be central to the  
10 trial court's spoliation finding, it has no bearing on the  
11 issues to be resolved by the jury."

12 CHAIRMAN BABCOCK: Well, I mean, you say,  
13 "Ladies and gentlemen, you heard the president of this  
14 company say that the accident happened in this particular  
15 way. Well, there's a way for you and I to know whether  
16 that's true or not, but unfortunately after they knew that  
17 there was litigation, they got rid of that tape. That  
18 bears on the credibility of that man. He's not credible  
19 because of it." I'm close to getting it in. Come on,  
20 Judge, let me get that in.

21 HONORABLE JANE BLAND: You have to add --

22 HONORABLE ANA ESTEVEZ: I'd let it in.  
23 You're in.

24 CHAIRMAN BABCOCK: I'm entitled to get that  
25 in, Judge. The jury needs to know that. Okay. Yes,

1 Justice Christopher.

2 HONORABLE TRACY CHRISTOPHER: Well, I've  
3 seen a mandamus asking us to review the trial judge's  
4 finding of intentional destruction, but --

5 CHAIRMAN BABCOCK: Right.

6 HONORABLE TRACY CHRISTOPHER: -- I haven't  
7 seen the jury trial from it yet, because we denied it.

8 CHAIRMAN BABCOCK: Okay. Anything else on  
9 (d)? Yeah. Justice Kelly.

10 HONORABLE PETER KELLY: Does the finding  
11 have to be in writing or included in the written order?  
12 It seems we're asking the trial court to make some  
13 specific findings about intent, and it might be helpful if  
14 it's being reviewed on appeal if those were reduced to  
15 writing, especially giving the trial court the discretion  
16 to even enter a default judgment or dismiss a case, might  
17 have as much information as possible to review the  
18 exercise of that discretion.

19 PROFESSOR HOFFMAN: Spoken like a new  
20 appellate judge.

21 HONORABLE PETER KELLY: Exactly.

22 CHAIRMAN BABCOCK: What is all of this  
23 appellate stuff all of the sudden? Richard.

24 MR. ORSINGER: This may be out of order, but  
25 I don't understand exactly how you're supposed to let the

1 jury infer something from destroyed evidence without  
2 telling them that the evidence was destroyed. Are you  
3 supposed to say "missing" and not use the word  
4 "destroyed," or how do you actually implement the  
5 sanction? Ladies and gentlemen -- you ask the president  
6 "Did you-all destroy this or throw this away or lose  
7 this," and then he says "yes," so now it's in evidence,  
8 and you tell the jury you either can or must infer from  
9 that testimony that the evidence was adverse? I mean, it  
10 seems to me like we're going to inform the jury about --  
11 about the evidence that was missing or destroyed. We're  
12 just not going to tell them whether we found that it was  
13 accidental or intentional, right?

14 CHAIRMAN BABCOCK: Judge Bland is not going  
15 to let this in. She's thinking about it, but she's not  
16 going to let it in.

17 HONORABLE JANE BLAND: I have no power  
18 anymore.

19 CHAIRMAN BABCOCK: We're going to do a mock.

20 HONORABLE JANE BLAND: Do a mock.

21 CHAIRMAN BABCOCK: Justice Kelly.

22 HONORABLE PETER KELLY: If you want to  
23 avoid, you know, destroyed, lost, maybe you just say  
24 "absent information was unfavorable to the party." That  
25 would be a neutral term for it.



1 MR. JEFFERSON: Are you going to say why?

2 MR. PERDUE: Now you're getting into  
3 drafting the actual instruction that potentially is in the  
4 charge in the sanction. That seems to be over-engineering  
5 of the sanction rule. I think that what -- my scenario is  
6 you're trying a brain-damaged baby case. The baby is born  
7 with a zero APGAR. They resuscitate. The law says  
8 they've got to maintain the medical records for five  
9 years. That's state law. One of those records is the  
10 fetal monitoring strip, which is stored electronically.  
11 Mysteriously it goes missing two days after that baby is  
12 born, and I have nothing about the prebirth monitoring of  
13 that child. That evidence has now been destroyed, and I  
14 can prove it's been intentionally destroyed because I get  
15 the audit trail from the computer system of the hospital.  
16 This is literally as narrow I think a scenario as I can  
17 get to satisfy Brookshire, and the audit trail establishes  
18 that user C entered the computer system and hit delete on  
19 that.

20 So a statutory duty to preserve, a baby  
21 that's been born with massive brain damage that's known on  
22 the second day, and clearly someone accessing the system  
23 and intentionally hitting delete a medical record which is  
24 to be preserved. A medical record without which I cannot  
25 prove that the nurses had notice that the baby was

1 desaturating for the two hours prior to delivery, and the  
2 whole idea of causation of the case. In that scenario,  
3 which is really, really, really hard to get to, the only  
4 way that then the jury can have any way to get to the  
5 evidentiary burden that causation could be met is a  
6 presumption that the evidence prior to birth would be  
7 hurtful, would be damaging for the defense of the case;  
8 and so, therefore, the -- that presumption allows me under  
9 the law to satisfy an element, which I could not satisfy  
10 otherwise.

11 MR. ORSINGER: So you don't tell the jury  
12 about the missing evidence?

13 MR. PERDUE: No, I think the -- I think  
14 the -- I think the missing evidence, you are to presume  
15 that the missing evidence either assists the plaintiff's  
16 case or is hurtful to the defendant's case, however it's  
17 written. The expert still has to say, "It's my  
18 understanding that the evidence is not available. Without  
19 it I cannot tell you, but I can presume under the law that  
20 it doesn't -- that it hurts the defense or assists the  
21 plaintiff and, therefore, I presume given how bad this  
22 baby is hurt that there were desaturations on this strip  
23 for the prior two hours that should have been addressed  
24 and would have led to a C-section, preventing this baby's  
25 injury." And in that scenario then I've satisfied the

1 burden of proof only through the assistance of the  
2 presumption but only with the proof of the intent, but I  
3 mean, that's -- I think that's how close it gets. I mean,  
4 whether it be a -- you know, a slip and fall case in  
5 Brookshire with ice on the floor and the --

6 MR. ORSINGER: Camera.

7 MR. PERDUE: -- video of the fall is gone, I  
8 mean, I don't know that you can navigate that which needs  
9 to be navigated in that scenario. So, I mean, that to me  
10 is how narrow you kind of have to get on this; and in that  
11 scenario, with -- but my point is without the presumption  
12 and without an instruction, whether it be the missing  
13 evidence or destroyed evidence, I don't really care, but  
14 I've got to have a presumption that the evidence that is  
15 unavailable is to be considered helpful to the plaintiff's  
16 case. Because that's the only way you can get to there.

17 HONORABLE JEFF BOYD: The caveat in  
18 Brookshire, if I remember it correctly, was that if the  
19 evidence is that crucial to your case then the judge can  
20 make the inference and instruct on the presumption even  
21 based on negligent loss, but you wouldn't have to prove  
22 intentional loss. If I remember right, something like  
23 that --

24 MR. PERDUE: Something like that.

25 HONORABLE JEFF BOYD: -- was a caveat that

1 was added in there.

2 MR. ORSINGER: So can I ask would you  
3 instruct the jury that you are instructed that you may  
4 conclude that the deficiency existed?

5 HONORABLE JEFF BOYD: Yeah, so --

6 MR. ORSINGER: Or you must include the  
7 deficiency existed?

8 HONORABLE JEFF BOYD: To be fair, all I was  
9 trying to do was make sure the difference between the  
10 inference and the judge's role to make the inference and  
11 the presumption, which is a legal presumption instruction  
12 to the jury that that was clear for the drafting process,  
13 because I do think that was pretty clear in the opinion.  
14 What was not clear in the opinion was much detail as to  
15 what the instruction could say.

16 MR. ORSINGER: Okay.

17 HONORABLE JEFF BOYD: Can it only say you're  
18 to presume that the strip was harmful, or can it say  
19 you're to presume -- you may or you must presume that the  
20 strip showed desaturation over a period of two hours? I  
21 don't remember the opinion addressing that kind of detail.

22 MR. PERDUE: But I think that's why  
23 engineering the instruction in the rule on the sanction  
24 is -- has the ability to over-engineer the rule, because  
25 at the end of the day even Brookshire says the sanction is

1 somewhat tailored to the identified crime and the case at  
2 issue.

3 CHAIRMAN BABCOCK: Right. Pam.

4 MS. BARON: Okay. On findings by the trial  
5 court, the Texas Supreme Court in *Transamerica vs. Powell*  
6 in 1991 said, "It would be very helpful for appellate  
7 review of sanctions, especially when severe, like death  
8 penalty sanctions, to have the benefit of the trial  
9 court's findings concerning the conduct which it  
10 considered to merit sanctions, and we recommend this  
11 process to our trial courts. Precisely to what extent  
12 findings should be required, however, we leave for further  
13 deliberation the process of amending the Rules of  
14 Procedure."

15 MR. ORSINGER: That's us. Yeah, that's us.  
16 I remember that well.

17 CHAIRMAN BABCOCK: You remember that well.

18 MR. ORSINGER: When it came down I said,  
19 "Oh, we're going to get a chance to write on this," and we  
20 never did.

21 MS. BARON: I just want to note I found that  
22 in Richard Orsinger's article on sanctions.

23 MR. ORSINGER: Well, that's why.

24 HONORABLE JEFF BOYD: You did get to write  
25 on it.

1 HONORABLE ANA ESTEVEZ: You found a way.

2 MR. ORSINGER: No, but we were supposed to  
3 do the rules about the findings and we never got around to  
4 it.

5 MR. SCHENKKAN: Now we are, 27 years later.

6 CHAIRMAN BABCOCK: Here we are. Yeah,  
7 Richard.

8 MR. MUNZINGER: What do you do about  
9 punitive damages? In the case that he just outlined,  
10 change the facts a little bit so that the destruction  
11 comes -- something could have been done for the child or  
12 the patient on day three, and the destruction was made, so  
13 it's not done; and, now, here it is day five, and had that  
14 been known or seen by people something could have been  
15 done. That to me raises punitive damage issues on its  
16 face. Now, you're in a trial and you're talking about  
17 sanctions, and you're talking about spoliation.

18 CHAIRMAN BABCOCK: Spoliating.

19 MR. MUNZINGER: Spoliation. And you're  
20 talking about punitive damages. It seems to me that the  
21 proof of spoliation is evidence relating to the standard  
22 of care of punitive damages. Not the standard of care but  
23 the standard for the award of punitive damages.

24 CHAIRMAN BABCOCK: Frank doesn't agree.

25 MR. PERDUE: I've -- the day in Texas has

1 not come where I'm seeking punitive damages in a medical  
2 malpractice case.

3 HONORABLE PETER KELLY: It happened once.  
4 It didn't last long.

5 CHAIRMAN BABCOCK: Justice --

6 HONORABLE TOM GRAY: Got reversed.

7 MR. PERDUE: I don't think it -- I'm not  
8 sure it does even in a -- I can draw up as bad a scenario,  
9 but given the definition of malice and intent, I don't  
10 know that Brookshire would give you -- that you can  
11 satisfy the intent element of -- that gets you to the  
12 spoliation instruction, but that's not relevant to the  
13 cause of the child's injury where the intent is, you know,  
14 the indifference, the gross indifference, and that --

15 MR. MUNZINGER: Well, not every case is a  
16 medical malpractice case.

17 MR. PERDUE: Amen.

18 MR. MUNZINGER: But the issue of punitive  
19 damages can come up with the knowledge that has been  
20 secreted or destroyed in some case and what you do when it  
21 does.

22 CHAIRMAN BABCOCK: Got it. Justice Bland,  
23 and then Richard, and then Lonny.

24 HONORABLE JANE BLAND: I was just going to  
25 ask that we save enough time to go through subsection (e)

1 since I think this is going to be our last look at this,  
2 and I didn't want us to not have time to do that.

3 CHAIRMAN BABCOCK: Okay. We'll take two  
4 more comments, then we'll go to (e).

5 MR. ORSINGER: So I'd like to support what  
6 Jim is saying about being careful in here about stating  
7 what the proper sanction is. For example, in the scenario  
8 that he had, if I was the trial judge the sanction would  
9 be I would instruct the jury that the strip showed  
10 whatever the plaintiff claimed the strip showed. This  
11 requires that as a judge I just have to say, "You must  
12 assume the information is unfavorable." Well, how  
13 unfavorable? Slightly unfavorable? Very unfavorable?

14 I can grant a default judgment on the whole  
15 case, but what if they haven't proved the other prongs of  
16 their negligence case? So as a trial judge I ought to be  
17 able to instruct the jury to infer a fact or permit the  
18 jury to infer a fact, which is not the same as  
19 unfavorable. Unfavorable is vague. I don't know whether  
20 that makes the plaintiff's case or doesn't, and so what  
21 I'm saying is I'm seeing Jim's understanding suggestion  
22 here is that when we limit these to these broad remedies  
23 we're taking away from the trial court the ability to  
24 fashion a remedy that makes sense in the particular case,  
25 and therefore, I'm reluctant in (3) to say there's only



1 three things you can do. You can either presume it was  
2 unfavorable, or you can instruct that it was unfavorable,  
3 or you can dismiss or grant a default judgment. I think  
4 we ought to take that out, and we ought to just say  
5 "appropriate sanctions" for something that allows the  
6 trial judge to fix the problem that he's presented --  
7 she's presented with.

8 CHAIRMAN BABCOCK: Professor Hoffman.

9 PROFESSOR HOFFMAN: My comment was to go  
10 back to Justice Boyd's question and in turn ask a  
11 question. Just so that I can -- and the rest of us can  
12 understand, was it the intent of the draft to depart from  
13 Brookshire Brothers on the issue of negligence? In other  
14 words, the caveat exception that Justice Boyd was talking  
15 about in extraordinary circumstances is not captured by  
16 the draft, or am I just misunderstanding the draft? So in  
17 Brookshire there's the exception for -- you can still have  
18 negligence spoliation when it so prejudices the  
19 nonspoliating party. That's what Justice Boyd was talking  
20 about. But there's no -- unless I'm misunderstanding it,  
21 there's no such exception in this draft, and my question  
22 is, is that intentional? Was it on purpose that we are  
23 going to limit spoliation instructions only to intentional  
24 destruction?

25 CHAIRMAN BABCOCK: Justice Kelly with a

1 short comment.

2 HONORABLE PETER KELLY: Very short comment.

3 On (c), you might want to give the trial court some  
4 flexibility to dismiss a claim or a part of the action or  
5 enter a default judgment not on the entire claim, but on a  
6 portion of the claim. They probably could get a partial  
7 default judgment on causation and not on damages, for  
8 instance.

9 CHAIRMAN BABCOCK: Yeah, Jane.

10 HONORABLE JANE BLAND: We were tracking the  
11 federal rule, but I don't have any problem with just  
12 saying "appropriate sanction." We've got a bunch of other  
13 sanctions that are in Rule 215, and that way we're not --  
14 like, that's a good point. It would seem like that would  
15 be a better remedy than wholesale dismissal if it only  
16 goes to one piece of the case.

17 CHAIRMAN BABCOCK: Okay. It's good that you  
18 just made that comment because now you can talk about (e).  
19 Unless Pete wants to talk about it first. Anything on  
20 (e)?

21 MR. SCHENKKAN: Yeah, I do have two things  
22 on (e).

23 CHAIRMAN BABCOCK: Okay. Pete.

24 MR. SCHENKKAN: One is that I'm having a  
25 little difficulty parsing the "unless a party is subject

1 to the duty to preserve described in (a)," then stuff  
2 being missing, electronically stored information being  
3 missing as a result of the management in the usual course  
4 of business does not constitute an intent to deprive  
5 another party. That -- I'm worried that that suggests  
6 that if a party is subject to the duty to preserve that it  
7 does, and I don't think that's the intent, is it?

8 MR. MUNZINGER: I agree with that.

9 MR. SCHENKKAN: I mean, surely you can have  
10 failure to take reasonable and proportionate steps to  
11 override your normal course of management of your  
12 electronically stored information that is a failure to  
13 take sufficiently reasonable and proportionate steps but  
14 was not intentionally -- it was a good faith dispute about  
15 what were reasonable and proportional steps, and you just  
16 came out on the wrong side of it, and you didn't modify  
17 your usual course of business by enough. I'm assuming  
18 that isn't really all the way to what we're talking about  
19 with the actual intent to destroy.

20 HONORABLE JANE BLAND: Yeah, that's a really  
21 good point. What we were trying to do here is where  
22 there's nothing, the -- you haven't received a notice from  
23 anybody. You haven't reasonably anticipated litigation;  
24 and you've just been, you know, going along in your  
25 ordinary course of business. The idea behind it was that

1 that would never be enough, but I know what you're saying.  
2 By saying that we're suggesting the other, but if you have  
3 received the notice, that potentially it could -- it could  
4 be a specific intent to deprive, so that you're right, we  
5 need to fix that.

6 CHAIRMAN BABCOCK: Richard.

7 MR. MUNZINGER: Well, Bob Levy just gave us  
8 the example here not long ago that he got a letter from  
9 somebody saying, "We want you to keep everything all over  
10 the world" and what have you. He said, "We wrote them  
11 back and said we'll keep it the way we keep it." So here  
12 I am, I'm Exxon or someone like Exxon with this massive  
13 amount of information, and I get a letter from somebody  
14 threatening a lawsuit, and my management team sits down  
15 with the general counsel and the IT people, and we all  
16 conclude that our normal processes for saving information  
17 will save all of the information which is relevant  
18 proportionally speaking to these issues. Why? Well,  
19 because it will determine if the refinery was functioning  
20 this, and they go through the whole issue, and they say  
21 our normal procedures will catch this. This is what we  
22 have to report to the United States of America, for God  
23 sakes.

24 Okay. Now we write them back, and all we do  
25 is honor our good faith policies to preserve this

1 information for our own purposes, and we're told that  
2 we're now subject to a -- to a Rule 215 procedure. That's  
3 not -- that's not good law, in my opinion, not good  
4 policy. It's not realistic. It's not cost-effective.  
5 It's punitive. That's what it is. It's punitive and  
6 leaves the punishment up to a jury and a trial court  
7 judge. That's not prudent law and prudent policy under  
8 the circumstances.

9           That whole sentence, that "unless a" -- that  
10 needs to be taken out of that rule, and then that lets  
11 people say they form a good faith judgment, they have to  
12 defend it in front of the trial court. This is what we do  
13 for everybody, Judge. Here was our manual. Our manual  
14 was written in 1999 or 2012. We followed the manual.  
15 Here's the guy that wrote it. He did everything that he  
16 was supposed to do. We met in the committee, and we  
17 decided this would work, and we did it exactly, and we  
18 thought it was right, and this thing is missing.

19           CHAIRMAN BABCOCK: Isn't the thrust of this,  
20 Richard, for the -- again, hypothetically, but for the  
21 company that every 90 days purges its e-mails, and there's  
22 a claim out there, but they don't know about it. They're  
23 not on notice from getting a letter. Nobody -- nobody  
24 thought that there was going to be a claim, and then after  
25 90 days a claim comes in, there's a lawsuit, and the

1 argument is made that they have destroyed documents.

2 Well, sure, we did, but that's in the ordinary course, and  
3 so don't get mad at us because we didn't even know there  
4 was going to be a lawsuit, didn't know there was a claim.

5 MR. MUNZINGER: Well, maybe you could make  
6 this read, "A party's management of electronically stored  
7 information in accordance with the usual course of  
8 business or ordinary practice does not necessarily  
9 constitute an intent to deprive or is not proof alone of  
10 an intent to deprive" or something else, but other than --  
11 otherwise, people could make a good faith decision and be  
12 wrong about it.

13 CHAIRMAN BABCOCK: Right. Right. Richard.

14 MR. ORSINGER: So my concern is not the  
15 people who make a good faith decision but the people who  
16 make a bad faith decision, and in Richard's description he  
17 talked about businessmen who in good faith are entering a  
18 practice on the destruction of evidence, but let's say  
19 that my ordinary business practice in my company is to  
20 destroy every e-mail that contains information that's  
21 negative about my product or my operations. It's  
22 selectively done. It's intentionally done.

23 CHAIRMAN BABCOCK: You've got an algorithm.

24 MR. ORSINGER: We've been doing it for  
25 years, and we do it before there is a lawsuit, and we do

1 it after the -- unless we get one of these letters we do  
2 it. Now, that's my usual course of business, and that's  
3 my ordinary practice is to destroy all negative e-mails.  
4 This safe harbor says I'm okay for doing that.

5 CHAIRMAN BABCOCK: Well, Richard would say  
6 this is America and you get to do that.

7 MR. MUNZINGER: What I said in response to  
8 your question was make it read "necessarily."

9 MR. ORSINGER: Okay.

10 MR. MUNZINGER: Or "is limited to."

11 MR. ORSINGER: So hold on a second here.  
12 What about people that destroy all of their e-mails the  
13 second that they are read? Or what about people that go  
14 back and selectively destroy e-mails that some executive  
15 doesn't want other people to read?

16 MR. MUNZINGER: Well, I don't --

17 MR. ORSINGER: Is there no limit on what  
18 someone can do and still be in this safe harbor just by  
19 saying, "It's our usual practice for this vice-president  
20 to go through all the e-mails and delete everything  
21 negative"?

22 MR. MUNZINGER: I have always thought in my  
23 own mind and tried to say to my associates in my law firm  
24 and my partners when we've had debates on the issues of  
25 what the law is and what the law isn't, this is America,

1 and the presumption ought to be that in America that which  
2 is not specifically forbidden is permitted, otherwise I'm  
3 not free. If the Legislature wants to pass a law that  
4 says keep your dadgum e-mails, pass it. If the Supreme  
5 Court does that, it raises to me at least the question  
6 whether the Supreme Court outside the context of  
7 litigation has the power to make such a rule. Who are you  
8 to tell me to keep my e-mails, Richard Orsinger? We share  
9 the same first name. We're citizens. Where do you get  
10 the authority to tell me to keep my e-mails?

11 MR. ORSINGER: It's not outside the context  
12 of litigation because if you never get sued no one cares  
13 if you destroy selectively negative e-mails, but if you do  
14 get sued and you've been selectively destroying evidence  
15 all the way along the way, the question is can the court  
16 do anything about that or not?

17 MR. MUNZINGER: That's different. If you've  
18 got a rule that says when you are a party to a lawsuit.

19 MR. ORSINGER: No, no. I'm talking about  
20 before the lawsuit is filed.

21 MR. MUNZINGER: That's different.

22 MR. ORSINGER: I'm talking about before the  
23 lawsuit is filed. That's the question here. We're --

24 MR. MUNZINGER: And again --

25 THE REPORTER: Wait a minute.



1 CHAIRMAN BABCOCK: Hold on.

2 MR. MUNZINGER: The rule of law makes me  
3 keep an e-mail. Why should I? Why should I? The other  
4 day the Attorney General said, "Did you make notes of that  
5 conversation?"

6 "Yes, I did."

7 "May we have them?" He said, "No. Why do  
8 you want them? What gives you the right to ask me for  
9 them?" And I'm a citizen. I'm not being political here.  
10 I'm a citizen. Who is the government of the United States  
11 of America to tell me to keep all of my e-mails? I am no  
12 longer free. And who is the state of Texas to do that? I  
13 am no longer free, and I dang sure don't want to do it  
14 because Richard Orsinger told me to or this group of  
15 people told me to. I'm a free citizen.

16 MR. ORSINGER: You know, it's all a  
17 question --

18 MR. MUNZINGER: Let me be free.

19 MR. ORSINGER: It's all a question of degree  
20 because I've heard you agree that once a demand letter is  
21 received or a lawsuit is filed then now all of the sudden  
22 the government can trample all over your rights and  
23 destroy evidence, but it's only after a lawsuit is filed  
24 or after a letter is sent or something that suddenly your  
25 constitutional right to destroy evidence is inviolate.

1 MR. MUNZINGER: When the letter is --

2 MR. ORSINGER: It's a policy decision, and  
3 the question is if you're running a lawsuit and you've got  
4 a defendant that's been destroying negative evidence in  
5 anticipation that they might get sued for some harm they  
6 cause, are we powerless to do anything about it? That's a  
7 policy decision. It's not a constitutional question

8 MR. MUNZINGER: You presume that because I  
9 want to destroy my e-mails I'm doing it for some  
10 ulterior --

11 MR. ORSINGER: I'm not presuming that.  
12 That's for the judge to decide.

13 CHAIRMAN BABCOCK: Okay. The zingers are  
14 going to have to take this outside. Don't get too wet.

15 MR. MUNZINGER: If my client gets a letter  
16 saying --

17 CHAIRMAN BABCOCK: Or continue. Either way.

18 MR. MUNZINGER: If my client gets a letter  
19 saying, "I'm going to sue you," I'm going to tell my  
20 client, "You need to start keeping your e-mails if you're  
21 smart," but until there is a lawsuit or some reason, why  
22 must I keep them? It isn't anybody's concern what I do as  
23 a private citizen. It's nobody's concern. It's nobody's  
24 concern.

25 MR. ORSINGER: I think you're stating a

1 position on a policy question and not a constitutional  
2 issue.

3 MR. MUNZINGER: That may be.

4 CHAIRMAN BABCOCK: I've completely lost  
5 control of this meeting.

6 MR. ORSINGER: Okay.

7 CHAIRMAN BABCOCK: Professor Hoffman.

8 PROFESSOR HOFFMAN: At the risk of  
9 substantially reducing the entertainment value, I just was  
10 going to make the observation that just as a reminder in  
11 the 2006 version of the federal rule they essentially had  
12 this safe harbor provision in it, and then it was deleted  
13 in 2015, and part of the reason is the comment talks about  
14 is that they didn't feel like it was getting anywhere, so  
15 they -- they still think that the routine good faith  
16 operation of an ESI system is a relevant factor to  
17 consider whether the party acted reasonably. So, again,  
18 we're sort of departing from the current version of the  
19 federal rule. That may have been a choice that you-all  
20 made, but just to kind of flag that history for the  
21 Court's thinking.

22 CHAIRMAN BABCOCK: Okay. No more yelling  
23 about this, but the drafters down there, anything else  
24 about the safe harbor that you want to bring to the  
25 attention of the committee?

1 HONORABLE JANE BLAND: I think we have the  
2 tenor of the debate.

3 MR. ORSINGER: You call that a debate? I  
4 call that an argument.

5 CHAIRMAN BABCOCK: That was a massacre.  
6 That was a slaughter. All right.

7 MR. PERDUE: I hesitate to weigh in, but the  
8 concept -- the concept of a harbor is a harbor from  
9 something, and the invocation of this is this new creation  
10 of duty, so I assume that y'all were dealing with a  
11 constituency that wanted some harbor if the duty hadn't  
12 been invoked, and I can kind of understand that at some  
13 level, but if you take out the harbor from which it is,  
14 then it's rendered somewhat relevant -- irrelevant unless  
15 you go back to Hoffman's point, which is the experience of  
16 the federal system was the usual course of business  
17 practice or ordinary practices outside of litigation is a  
18 factor that's then considered when you get into litigation  
19 and the system has been invoked, especially with the  
20 anticipation of litigation. So whether it turns out 10  
21 years from now that this is irrelevant or not, I think  
22 you've at least got to know the scope of a harbor.

23 CHAIRMAN BABCOCK: Yeah. When I first read  
24 this I didn't think it was going to be that controversial,  
25 but --

1 MR. PERDUE: It's America.

2 CHAIRMAN BABCOCK: Apparently so. Well, I  
3 know. All right. Anything more about safe harbor? You  
4 guys want to crank it up again, Richard?

5 MR. ORSINGER: No.

6 CHAIRMAN BABCOCK: The answer is no.

7 MR. ORSINGER: But I did notice that when  
8 Lonny was reading the federal rule, a system that was  
9 maintained in good faith -- didn't I hear you say that?  
10 Sorry. I'm pretty sure you did.

11 CHAIRMAN BABCOCK: Okay. Anything else?  
12 Bobby, you want to -- you want anything else?

13 MR. MEADOWS: No. We're grateful for all  
14 the thoughtful consideration.

15 CHAIRMAN BABCOCK: And you're going to come  
16 back to us next meeting with a rule that's tweaked based  
17 on the comments, right?

18 HONORABLE TRACY CHRISTOPHER: Or we could  
19 just give it to the Court and not have more comments.

20 CHAIRMAN BABCOCK: I tell you what, why  
21 don't you -- why don't you send it to -- just send it to  
22 Marti and then we'll see if the Court wants any further  
23 discussion about it. That be okay?

24 MR. MEADOWS: That will be fine. Yeah.  
25 That's what I thought we would do, is in the next few days

1 we're going to rework this, and what we do with it is --  
2 that's the best approach, and you can decide whether it  
3 needs some additional --

4 CHAIRMAN BABCOCK: Okay. So subject to that  
5 we're done with the discovery rules. So just for my own  
6 and Marti's edification, at the next meeting, which is  
7 June 21st and 22nd, and it's at the State Bar. Okay. And  
8 we're going to bring up 244 again, and we're going to  
9 bring up -- we're going to continue discussion on ex parte  
10 communications, Rule 167, and name change forms, and  
11 whatever else is ripe for discussion.

12 CHIEF JUSTICE HECHT: And if we get any  
13 legislative assignments that are due September the 1st  
14 we'll have to -- you'll have to dole them out --

15 CHAIRMAN BABCOCK: Right.

16 CHIEF JUSTICE HECHT: -- in time, and we'll  
17 try to get something going on that.

18 MR. GILSTRAP: Chip, hey, thanks for the  
19 picture.

20 MS. CORTELL: Yes, thank you.

21 CHAIRMAN BABCOCK: All right. If nobody  
22 else has anything we'll adjourn until --

23 MS. BARON: I had a question, Chip. If we  
24 do get assignments from the Legislature, are we going to  
25 be adding meetings in the summer, I would guess, or do we

1 know?

2 CHAIRMAN BABCOCK: Yeah, I think it would  
3 depend on how many and --

4 MS. BARON: We go from June and the next  
5 meeting is, when, September?

6 CHAIRMAN BABCOCK: After June the next  
7 meeting I think is not until September. September 6th.

8 MR. ORSINGER: Are we not having a July  
9 meeting anymore? I mean late June meeting.

10 MS. NEWTON: Yeah, we do.

11 CHAIRMAN BABCOCK: Late June meeting. Thank  
12 you, everybody. And thank you for the Munzinger-Orsinger  
13 debates. The zinger debates.

14 (Adjourned at 4:49 p.m.)

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2 **REPORTER'S CERTIFICATION**

3 MEETING OF THE

4 SUPREME COURT ADVISORY COMMITTEE

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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 3rd day of May, 2019, and the same was thereafter

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13 I further certify that the costs for my

14 services in the matter are \$ 2,045.00.

15 Charged to: The State Bar of Texas.

16 Given under my hand and seal of office on

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