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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

SEPTEMBER 14, 2019

(SATURDAY 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 14th day of September,
2019, between the hours of 9:01 a.m. and 11:58 a.m., at
the Sheraton Austin at the Capital, Creekside Conference
Room, 701 East 11th Street, Austin, Texas 78701.

INDEX OF VOTES

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

<u>Vote on</u>	<u>Page</u>
Ex Parte Communications in Specialty Courts	30,934
TRCP 244	30,987

Documents referenced in this session

19-31 Email from Judge Benton - Eviction Kit Forms
19-32 SB478 Eviction Kit Forms and Instructions
19-33 Memo - Appeals in Parental Termination Cases, 9-5-19

1 *-*-*-**

2 CHAIRMAN BABCOCK: The Chief is going to be
3 a few minutes late because he is giving a speech. And,
4 Nina -- where is Nina?

5 MR. JACKSON: Over there.

6 CHAIRMAN BABCOCK: Nina, you switched on me.
7 That's not fair. I don't think we voted on the two
8 mandatory recusal options. Am I right about that?

9 MS. CORTELL: That is correct.

10 CHAIRMAN BABCOCK: Okay. And so that was
11 unfinished business from yesterday, and for those who
12 weren't here yesterday, we're talking about a comment to
13 Canon 3 of the Canons of Judicial Conduct. We got through
14 all of that, and then we had a vote on discretionary
15 recusal versus mandatory recusal, and then there are two
16 options. Option A is that the judge must recuse from
17 further involvement in the proceedings absent written
18 consent of the party. That's A, and then B, the judge
19 must not, absent that party's written consent, preside
20 over any case brought against that party in which the
21 content of those communications is relevant to the merits
22 of the case. So those are A and B. Do we want to talk
23 about that anymore or -- Judge Evans.

24 HONORABLE DAVID EVANS: I would like to make
25 one comment. It is my understanding, and I'm not sure

1 that it's completely true every time, but in the treatment
2 court the prosecutor is not present. The state's not
3 present when these ex parte communications take place.
4 That's my impression of what goes on, so if you go with B
5 and the defendant is forced to file a motion to recuse,
6 the state will then become aware of what the defendant
7 doesn't believe is relevant to the merits of the case.

8 The presiding judge would then have to make
9 a determination whether or not this revocation, whether
10 those comments are relevant or not. The state would then
11 become privy to information it didn't have. Now, that's
12 my impression of it. Now, I admit it's not real clear to
13 me today that that's right, but I made a couple of calls
14 last night, and at least who I spoke to last night said in
15 their courts they never hear the final hearing. They
16 always send it to another judge.

17 Now, we have the freedom to do that, and so
18 I would add one other item to when we passed 18a and b, we
19 went past -- in some people's mind, at least mine, we went
20 past notice pleadings. We require recusals to be pled
21 with particularity or they're subject to summary
22 dismissal. So they're much more evidentiary pleadings by
23 requirement than they would be on just a simple filing of
24 the petition. That's to let the judge have full knowledge
25 of what might be before them. So you're going to have an

1 open court record filed with all of this material that was
2 confidential and/or privileged and received in ex parte
3 communication placed into the court record and then the
4 trial judge on (b) -- the presiding judge on (b) would
5 have to determine whether the content of those is relevant
6 to the communications. That would be a difficult task.
7 So that's my thought.

8 CHAIRMAN BABCOCK: Okay. Thank you, Judge.
9 Yeah, Justice Gray.

10 HONORABLE TOM GRAY: I'm going to bring
11 forward one of Judge Reyes' comments so that if folks
12 didn't have time to read those yesterday. Under
13 subsection (g) in his comments, he commented with regard
14 to option B that that could reach so far as to he's got a
15 specialty judge -- a specialty court participant in a drug
16 court and now in a county where he's also sitting on a
17 domestic relations matter, family law matter, that
18 involves that same participant, (b) would reach to that
19 subsidiary case. It would not be limited as is option (a)
20 to the proceeding.

21 Now, obviously at any time a participant in
22 a specialty court program that re -- that appears in
23 another proceeding in front of the specialty court judge,
24 but not in that capacity, they still have the right to
25 file their motion to recuse that judge for information

1 that that judge may know. But that is the fundamental
2 difference, as I see it, between A and B. A is specialty
3 court proceeding specific. B reaches a much broader scope
4 of cases any time that communication may come back up.

5 CHAIRMAN BABCOCK: Great. Nina.

6 MS. CORTELL: I think the change or the edit
7 that Judge Chitty suggested would be one I would
8 incorporate in any version we give to the Court, and he
9 said it should only apply in an adjudicatory hearing on
10 the merits, and remember, he's distinguishing that between
11 interim sanctions proceedings, so I think we would want to
12 make that clear, that that's really what we're talking
13 about. I just wanted our full committee to understand
14 that.

15 MR. WATSON: You're talking about B?

16 MS. CORTELL: Really A or B.

17 CHAIRMAN BABCOCK: Any other comments before
18 we vote? Yeah, Justice Christopher.

19 HONORABLE TRACY CHRISTOPHER: Well, on
20 option A, which I think is clearer than option B and
21 easier, if I'm voting between the two, do we need to
22 define "in the proceedings"?

23 MS. CORTELL: That's really what my comment
24 went to, is that Judge Chitty -- they don't want it to be
25 open-ended. They want to make sure that it's restricted

1 to -- and I'll use his phrase -- "an adjudicatory hearing
2 on the merits" as opposed to some interim proceedings.

3 HONORABLE TRACY CHRISTOPHER: With respect
4 to whatever he was referred to the specialty court for to
5 begin with, I want to make sure if you were in a specialty
6 court for offense number one; and, okay, you have to
7 recuse out of offense one; but what if, you know, two
8 years later there's offense number two that wasn't through
9 the specialty court?

10 MS. CORTELL: We would be making clear that
11 it was only offense number one. Only that particular
12 proceeding.

13 HONORABLE TRACY CHRISTOPHER: Yeah, I don't
14 think the way it's written makes it clear.

15 MS. CORTELL: I think that's fair. We will
16 make a revision to accommodate that.

17 HONORABLE TOM GRAY: But remembering that
18 these are appended to the full comment, and the last
19 phrase in that full comment does make reference to the
20 specialty court program that they've just been discharged
21 from.

22 MS. CORTELL: Right.

23 CHAIRMAN BABCOCK: Yeah.

24 MS. CORTELL: Right.

25 CHAIRMAN BABCOCK: Okay. Yeah, Richard.

1 MR. MUNZINGER: Given Judge Evans' comment
2 that -- to seek recusal one must plead the specifics of
3 the ground supporting recusal, it seems to me that you
4 have put the participant in the proceeding at some risk to
5 his future rights either in that proceeding or in another
6 and perhaps have provided a disincentive for him to
7 participate in the program for that reason, especially if
8 he seeks counsel who is astute and prepared; and it may
9 well be that the best thing, even though it's drastic, is
10 to mandate recusal to avoid that possibility so that the
11 participant is encouraged to participate. The long run
12 goal of the courts is to rehabilitate and save the person
13 who is at risk and anything that would weigh against that,
14 it seems to me ought to be discouraged. Recusal is not
15 the end of the world for a trial court judge, I suspect if
16 I were a trial court judge, and I'm sure the judges here
17 don't want there to be a shadow over their rulings. They
18 don't want a question there. So I think it ought to be
19 mandatory.

20 CHAIRMAN BABCOCK: Skip Watson.

21 MR. WATSON: I was just -- this is a
22 question for the present or former judges. And it's just,
23 you know, those of us who aren't you don't know. Is it
24 better for you to have it just automatic, or are there
25 situations you can think of where you would want to hang

1 on, even though the participant doesn't want you to,
2 because he thinks he's been prejudiced?

3 HONORABLE DAVID EVANS: Think about the
4 model we've already passed in Rule 18a and b. A ground of
5 disqualification can't be waived. That's a
6 constitutional, and that's carried forward in the rule. A
7 ground of recusal can be waived after disclosure. In
8 fact, it doesn't require written consent, generally done
9 on a reporter's record or in a letter from the judge,
10 doesn't sign off on written consent. Option A is
11 consistent with 18a and b, which is already the policy of
12 the court and the state that the defendant has in his
13 hands or her hands the right to consent to the judge
14 continuing in the case or not continuing in the case, and
15 so it seems to have a symmetry with our existing rule.

16 MR. WATSON: Thank you, Judge.

17 CHAIRMAN BABCOCK: Yeah, Robert.

18 MR. LEVY: The concern that I have about
19 mandatory recusal is that a party could use that as a way
20 to just get the judge out by saying something that's
21 privileged, and if it's mandatory then the judge has no
22 choice in it, so it could be manipulated.

23 CHAIRMAN BABCOCK: Yep. Nina.

24 MS. CORTELL: I'll just note that the full
25 committee has voted twice on the distinction between

1 discretionary and mandatory, and we've voted each way. At
2 the first meeting we voted in favor of mandatory.
3 Yesterday we voted in favor of discretionary, so I think
4 really what we ought to do is provide both options to the
5 Court --

6 CHAIRMAN BABCOCK: Oh, of course.

7 MS. CORTELL: -- which has had the benefit
8 of the discourse. This committee has been split.

9 CHAIRMAN BABCOCK: There was a motion for
10 rehearing yesterday. That may have swayed those seven
11 votes. We don't know.

12 MS. CORTELL: I hear you. I hear you.

13 CHAIRMAN BABCOCK: Justice Christopher.

14 HONORABLE TRACY CHRISTOPHER: My concern on
15 the specialty court program and the automatic recusal is
16 in smaller counties that might have set up such a program,
17 but I don't know if small counties set up such programs.
18 I mean, I'm familiar with them in the larger counties
19 where there are multiple judges, and it's very simple to
20 say, okay, I'm not going to preside over the case. I
21 just -- you know, from a practical point of view, you
22 know, there's time and money involved in getting a new
23 judge in if it's a mandatory recusal in a smaller county.
24 So -- and I just don't know enough about this as to
25 whether they're in all counties now.

1 CHAIRMAN BABCOCK: Stephen, and then Skip.

2 HONORABLE STEPHEN YELENOSKY: Nina, I voted
3 one way the first time and different the second time,
4 because I was actually persuaded by the judges on the
5 phone. They do it. I've never done it, so I actually can
6 be persuaded.

7 MS. CORTELL: Well, and by way of
8 background, I'll remind the committee the three judges
9 yesterday were against mandatory.

10 CHAIRMAN BABCOCK: Right. Skip.

11 MR. WATSON: Just on the -- on the rural
12 county thing, you know, like Tom, I spent 27 years in that
13 environment of where not only sometimes was there only one
14 judge for a county, but sometimes there was one judge for
15 two or three counties --

16 HONORABLE TRACY CHRISTOPHER: Right.

17 MR. WATSON: -- that rode a circuit, but the
18 reality is, is that when you -- when you hit a recusal,
19 you know, the administrative judge for the district gets
20 in and somebody comes in, and I never had somebody --
21 admittedly it wasn't this kind of program, but I just was
22 always struck by the competence of the judge who came in
23 to pick it up. I just -- you know, that personally for me
24 was never a stumbling block. For that judge I'm sure it
25 was, you know, and that's why I was asking how it works

1 from your standpoint. But from the practitioner's
2 standpoint it was relatively seamless in my personal
3 experience.

4 CHAIRMAN BABCOCK: Holly.

5 MS. TAYLOR: Small counties do have
6 specialty courts. I'm looking at the Governor's offices
7 list of specialty courts, and there are specialty courts
8 in Cass County, Grayson County, Gregg County. Many
9 counties -- Hill County. Many counties with smaller
10 populations do have specialty court programs.

11 HONORABLE DAVID EVANS: Grayson has three
12 district courts.

13 CHAIRMAN BABCOCK: Right.

14 HONORABLE DAVID EVANS: And two county
15 courts at law.

16 MS. TAYLOR: Okay.

17 HONORABLE DAVID EVANS: And Cass, well, I
18 agree they're in smaller counties. I did not mean to
19 be -- I think we're only looking at the truly rural
20 county. I'm sorry.

21 MS. TAYLOR: Well, Jim Wells has a specialty
22 court. Kerr County has a specialty court.

23 HONORABLE DAVID EVANS: Fredericksburg.
24 Yeah.

25 CHAIRMAN BABCOCK: Levi.

1 HONORABLE LEVI BENTON: I just want to
2 support what Robert said. The offensive use of statements
3 to cause a judge to recuse is offensive. It's real. It
4 exists, and so I oppose a mandatory recusal. I trust the
5 administrative or presiding judge of the region to do
6 what's right, but it just -- it is a real problem at every
7 level for people to try to offensively do things to cause
8 a judge to recuse.

9 CHAIRMAN BABCOCK: Justice Gray.

10 HONORABLE TOM GRAY: I was just going to
11 repeat something that David Slayton commented on
12 yesterday, and I don't remember if it was on the record or
13 in a private conversation I was having with him, but the
14 Legislature really likes these programs. They are
15 expanding these programs. They have a large grant program
16 now that they funded to put these type courts in every
17 county across the state, and Slayton said they are already
18 receiving applications for those grants, even though they
19 haven't proposed a form for the application. So this is
20 going to come to every county in the state at some point.

21 CHAIRMAN BABCOCK: Yeah.

22 HONORABLE TOM GRAY: In the near future.

23 CHAIRMAN BABCOCK: Getting back to whether
24 we ought to favor A or B --

25 HONORABLE TOM GRAY: Yeah.

1 CHAIRMAN BABCOCK: -- I think I'll call for
2 a vote now, and you voting for A ahead of time?

3 HONORABLE TRACY CHRISTOPHER: No. Can I
4 just make one point? And I know Judge Estevez wanted to
5 have "transfer" in the rule.

6 CHAIRMAN BABCOCK: Yeah.

7 HONORABLE TRACY CHRISTOPHER: But, you know,
8 part of the problem with transfer is that that also leads
9 to an appearance of impropriety, and because you're
10 picking who to transfer it to, right? So, I mean, to me
11 if you're going to have mandatory recusal, it should be
12 recusal and then the presiding judge of the region
13 appoints someone. That is just my thought on it.

14 CHAIRMAN BABCOCK: Judge Estevez.

15 HONORABLE ANA ESTEVEZ: What if -- thinking
16 outside the box, if you're in a multi-court county,
17 there's an automatic transfer to the originating court.
18 If there's another motion and if you're in a county that
19 only has one judge that they have to file a recusal if
20 something has happened and, therefore, you have a transfer
21 that goes back to the originating judge. It won't look
22 bad because it was my court in the first place, and they
23 know that. When they take the plea they understand that
24 -- at least in my county, not in some of the other ones
25 that don't do this, but they know that if there's going to

1 be a problem then they're going to get kicked out of drug
2 court, and that means they go back to the original court.
3 Or if they started in what's the B court there then they
4 know they'll go to a different judge for the final
5 resolution of their case.

6 So I'm concerned actually with -- and I
7 don't know how much of a problem this is because we don't
8 have it at all since they just transfer the case whenever
9 this happens, so I don't know if Judge Reyes has a problem
10 with this and on occasion he does need to recuse or if he
11 just refuses to recuse on all of them, but assuming it is
12 a problem, then it's just going to cost -- it's going to
13 cost money to do this. I mean, I can't -- when I recuse,
14 I mean, the term "recuse" does not mean I get to send it
15 to someone. It means that I get to call Judge Moore and
16 Judge Moore has to go and appoint somebody, and so you're
17 going through -- and if it's contested, so let's say Judge
18 Reyes doesn't believe he should be recused, so he can't
19 hear it. So Judge Moore has to appoint somebody to come
20 into my county to hear it. And then -- and then you
21 either get one or you don't get one. So it's not an
22 insignificant thing.

23 Recusals take time, if they're not
24 voluntary, and so I don't think that -- I don't think it's
25 worth the money unless we're worried about the small

1 counties. Well, then, you know, what would -- how would
2 it hurt if it says it will transfer, but you know, can --
3 I don't care if it's -- I don't really care if it's
4 discretionary or mandatory. I believe it should be
5 mandatory, but I don't feel so strongly about it. I don't
6 think judges try to abuse this, but --

7 CHAIRMAN BABCOCK: I thought you were just
8 making an argument for discretionary.

9 HONORABLE ANA ESTEVEZ: Well, I think that
10 you need to have something, so if we don't agree to
11 something we get nothing, but I think that it should be
12 transferred. I think that's the better practice.

13 CHAIRMAN BABCOCK: Yeah.

14 HONORABLE ANA ESTEVEZ: But we settle for
15 less than the best all the time or everybody -- not
16 everybody agrees what that is, what the best is, for
17 different reasons. Somebody values time and efficiency.
18 Somebody else values the appearance of impropriety. I
19 value the appearance of impropriety. If they never sit on
20 it, there's no appearance of impropriety.

21 CHAIRMAN BABCOCK: Yeah. Justice
22 Christopher.

23 HONORABLE TRACY CHRISTOPHER: Well,
24 unfortunately this whole idea of transferring versus
25 recusal is an appearance problem. All right. So and just

1 for those of you who don't know how it works, all right,
2 if someone actually files a motion to recuse you, you as
3 the trial judge cannot transfer it to someone else. Okay.
4 Even if you agree to recuse. The recusal then goes to the
5 presiding judge to transfer it to somebody else. When you
6 voluntarily take yourself off the case then you could
7 transfer it to somebody else, you know, if no motion to
8 recuse is filed. So when you use this word "recuse" in
9 the rule, that to me means the presiding judge of the
10 region then has to, you know, assign somebody.

11 And for people that -- I mean, it's easy
12 enough if the case originated in court A, goes to drug
13 court. It's going to go back to court A. All right. In
14 a multi-county court, but, for example, the specialty
15 court judge -- what was his name?

16 HONORABLE ANA ESTEVEZ: Mine is Judge Moore.

17 HONORABLE TRACY CHRISTOPHER: Yeah. So he
18 automatically transfers it. Well, the fact that he's
19 transferring it gives the appearance of impropriety if
20 he's supposed to be recused. You know, it's one thing for
21 it to automatically go back to your court, because that's
22 where it was filed to begin with, but when the judge is --
23 has to transfer it and is recused, that's a problem.
24 Because it can -- it can lead to the impression that
25 you're hand-picking, you know, who -- who the person is

1 that's going to hear it as opposed to the presiding judge
2 hearing it. So, I mean, that's kind of the difference
3 between like a voluntary recusal versus a transfer and how
4 people look at it and feel -- can feel that a transfer is
5 bad.

6 CHAIRMAN BABCOCK: Yeah, I was thinking
7 yesterday about trying to squeeze in this vote before the
8 wedding. We would have totally messed up the wedding.

9 CHAIRMAN BABCOCK: Steve.

10 HONORABLE STEPHEN YELENOSKY: Are we
11 contemplating that if it's discretionary that the judge
12 could refer it without conceding recusal and then you have
13 to appoint -- or the regional judge has to appoint a judge
14 to hear the recusal motion? Is that how it would work
15 here, too?

16 CHAIRMAN BABCOCK: Did you want anybody in
17 particular to answer that?

18 HONORABLE STEPHEN YELENOSKY: Well, no, if
19 you know the answer, please.

20 CHAIRMAN BABCOCK: Judge Evans.

21 HONORABLE STEPHEN YELENOSKY: Based on what
22 we're discussing.

23 HONORABLE DAVID EVANS: My understanding is
24 that the treatment program is one proceeding and is part
25 of a probation out of another proceeding and that when you

1 end the treatment proceeding unsuccessfully you go back
2 for revocation of probation in the original proceeding. I
3 scarily disagree on one minor matter with Justice
4 Christopher, but I may have misunderstood. After we
5 passed the rule recusal is mandatory without written
6 consent, the trial judge that continues when a mandatory
7 ground of -- and there are no discretionary grounds of
8 recusal in 18b and a. They're all mandatory. The trial
9 judge that proceeds without written consent -- without
10 consent has exposure with the Judicial Conduct Commission.
11 The vagueness on the second part puts the trial judge at
12 risk.

13 Even if we were silent, the trial judge has
14 heard matters that aren't relevant. He's heard them
15 outside of the proceeding and has personal knowledge of
16 the defendant. So there's arguably a ground for recusal
17 already, and so I do agree with you that you could
18 transfer if no ground of recusal exists, and I do agree
19 with you that a transfer, especially after a bitter
20 hearing or a disappointing hearing, leads the lawyers to
21 believe that you've just been rooked into.

22 HONORABLE TRACY CHRISTOPHER: Right. So, I
23 mean, I'm arguing against putting "transfer" in the rule.

24 HONORABLE DAVID EVANS: Right.

25 HONORABLE TRACY CHRISTOPHER: I mean, if

1 it's going to be a recusal it should be a recusal, and it
2 should go to the presiding judge to pick somebody. Not
3 allowing the judge who is arguably recused to transfer it
4 to somebody.

5 CHAIRMAN BABCOCK: Steve, and then Nina.

6 HONORABLE STEPHEN YELENOSKY: My only point
7 was that nobody has mentioned the possibility of the judge
8 saying, "I don't want to recuse," and so if that's
9 possible then we have further delay because you appoint a
10 judge to hear whether or not that judge should be recused.
11 So that's -- it's just more time in the process.

12 CHAIRMAN BABCOCK: Nina.

13 MS. CORTELL: I wanted to be clear, because
14 it's not in the current text that you have, but from the
15 judges' comments we received yesterday, the triggering
16 wouldn't be -- if you look at about line six of the
17 comment, would not be after the conclusion of the program.
18 The language we've been given by the judges, by Judge
19 Reyes, he said "upon the unsuccessful completion." Judge
20 Chitty referred to "expulsion, discharge, termination."
21 In other words, there's a clearer line drawn as to the
22 temporal point at which either transfer or recusal would
23 be triggered.

24 CHAIRMAN BABCOCK: You guys getting all of
25 this?

1 MS. DAUMERIE: Yes.

2 MS. CORTELL: I will be helping.

3 CHAIRMAN BABCOCK: Good. Okay. Are we
4 ready to vote?

5 MR. WATSON: Please.

6 CHAIRMAN BABCOCK: Everybody in favor of
7 option A, raise your hand.

8 HONORABLE STEPHEN YELENOSKY: Can you reread
9 it, Chip?

10 HONORABLE TOM GRAY: "Must recuse from
11 further involvement in the proceeding, absent written
12 consent of the party."

13 CHAIRMAN BABCOCK: All right. Option B? So
14 option A garnered 23 votes, option B one vote, unless I
15 missed somebody, the Chair not voting.

16 HONORABLE TOM GRAY: Could the record
17 reflect that that one vote was not Tom Gray?

18 CHAIRMAN BABCOCK: I think that's a healthy
19 addition to the record.

20 MS. WOOTEN: And any time that's not stated
21 we all should assume it is Justice Tom Gray.

22 CHAIRMAN BABCOCK: Great point. Well, Nina,
23 your committee did tremendous work as usual. And thanks
24 and thank Judge Byrne, Reyes, and Chitty for their input.
25 It was very valuable obviously.

1 So, now, I think I've had several requests
2 to return to Rule 244 and Elaine's subcommittee, and I was
3 thinking we would do that anyway, because I wasn't quite
4 sure where we were, if anywhere, when we had to move on to
5 the Canon 3 issue. So, Elaine, can you tell us where we
6 are?

7 PROFESSOR CARLSON: Yes. We are on the
8 fourth paragraph on page seven, but, Chip, I don't want to
9 take too much of the full committee's time because we are
10 going to be in a redrafting mode. There are certain
11 concepts that would be very helpful if we had the full
12 committee's perspective on them.

13 CHAIRMAN BABCOCK: Okay.

14 PROFESSOR CARLSON: Should the ad litem
15 appointment take place before service by publication is
16 ordered or after. Under current Rule 244, it's after.
17 Now we're going to have the application supported by
18 affidavit. The court's going to give its order based upon
19 that proof. Is that the point at which you feel it's
20 appropriate to bring in the ad litem, or do you have the
21 ad litem do their diligence in attempting to assist the
22 court in locating the defendant before you order service
23 by publication?

24 CHAIRMAN BABCOCK: Okay. Anybody have any
25 comments on that? Yeah, Roger.

1 MR. HUGHES: Well, having had a lot of
2 experience with the guardian ad litem issues in the -- my
3 neck of the woods, at some point this becomes a
4 boondoggle; and my feeling is that if we say, well, we're
5 going to -- the whole idea of the counsel, pardon me,
6 appointing counsel is to basically check that everything
7 has been done, that a reasonable effort has been done.
8 Well, if that's the purpose of the appointment, why
9 don't we -- it seems to me appointing the counsel before
10 the plaintiff's lawyer has done anything and service by
11 publication has failed will sooner or later become a
12 boondoggle. And I'm sorry to say that, but, you know,
13 judges will just every time go, "Oh, we're going to do it
14 by publication and I'm going to appoint the next person in
15 the rotation"; and given the number of what I call
16 institutional plaintiffs like tax suits and the like, that
17 could become a source of patronage akin to the old
18 guardian ad litem that eventually had to be completely
19 revamped.

20 So, again, if we're going to say the whole
21 purpose of appointing counsel is to ensure that before we
22 enter a default, efforts -- best efforts -- pardon me,
23 really good efforts have been done, then I think it would
24 be wise to wait and see if publication fails before we
25 start appointing people.

1 CHAIRMAN BABCOCK: Justice Christopher.

2 HONORABLE TRACY CHRISTOPHER: Yes, I also
3 agree that you should not have the ad litem until the
4 order of service by publication issues, because otherwise
5 you've got the attorney ad litem on the wrong side of the
6 docket, in my opinion. If we called them something
7 different that would be okay, but the idea behind an
8 attorney ad litem is, you know -- it's once you're already
9 served then it's your duty as the ad litem to try to find
10 them. Okay. So that's publication is served, and then
11 the ad litem tries to find them. But if you put the ad
12 litem over here, it's like you've changed his or her role
13 to me, because that person is suddenly on the plaintiff's
14 side rather than on the defendant's side. So to me it
15 just messes it up to -- to have the ad litem before the
16 publication is approved.

17 CHAIRMAN BABCOCK: Judge Evans.

18 HONORABLE DAVID EVANS: I'd like to bring to
19 the attention the Tax Code that was -- provision that was
20 adopted in 2015 because I think it's relevant to what 244
21 provides. Senator Zaffirini carried two bills in --

22 CHAIRMAN BABCOCK: Elaine, can you hear the
23 judge?

24 PROFESSOR CARLSON: Yes, I can.

25 HONORABLE DAVID EVANS: Senator Zaffirini

1 carried two bills in the 84 regular session.
2 Representative Thompson brought forward 2710, but it was a
3 companion bill to Senator Zaffirini's bill; and section
4 33.475, which became effective on September 1st, 2005,
5 provides that an attorney ad litem appointed by the court
6 to represent the interest of the defendant served with
7 process, already served with process, by citation by
8 publication or posting shall submit to the court a report
9 describing the actions taken by the ad litem to locate and
10 represent the interest of the defendant; and the court may
11 not approve fees until a report has been filed by the ad
12 litem as to the efforts to locate and represent the
13 defendant; and the court cannot discharge him until the
14 court determines that the attorney has discharged the duty
15 to the defendant.

16 Senator Zaffirini is extremely active with
17 regard to the judiciary and the law. Now, she also passed
18 in that same bill a reform on ad litem selection, and that
19 was Senate Bill 1876 and resulted in the rotation wheels
20 that now exist. I would suggest to you that Senator
21 Zaffirini was aware of the duties of an ad litem, attorney
22 ad litem, as well as others based on what she put in the
23 Tax Code. Also, I would just -- and this is deviating
24 from -- not deviating. When Senate Bill 1876 passed, and
25 we had to post these lists and go to the wheel, we had a

1 number of people enter in and volunteer for ad litem duty
2 who were from other practice areas; and obviously they
3 looked at that as a potential source of income; and so
4 they gradually left when they found out it was not.

5 Now, I agree with Tom Riney about the duty
6 of advocacy, and I certainly would not disagree with him
7 on that, but in these cases your client is planted
8 probably -- is an heir of somebody that's already dead in
9 many of these. You don't have anybody to interview, as
10 Tom pointed out, so no court can allow a fishing
11 expedition based on some suspicion of fraud or deceit in a
12 commercial transaction. So that's why it's not necessary
13 to -- why those services wouldn't be necessary. You're
14 not going to depose the mortgage company to determine
15 whether there was fraud or some sort of irregularity.

16 Now, the economics of this business, the
17 people who take on this business, are charging on a per
18 unit basis, and it is financially against their interest
19 to do an exhaustive search. I won't determine whether
20 it's due diligence or not. I think most of them make a
21 reasonable effort. And so the law firms that bring this
22 are actually transferring to their clients the cost of
23 doing an exhaustive search, because their clients will pay
24 the court costs approved by a judge. That's just an
25 observation, and so in tax -- in the tax world the ad

1 litem has located somebody, and you have a status report.
2 They file the report, and they say, "I don't think we have
3 anything more to do except a couple of mowing lanes out
4 here," and you and the taxing authority have a
5 disagreement over whether mowing a postage stamp is worth
6 \$1,500 or not. Taxing authority settles. The proceeds
7 are released to the person.

8 And so any ad litem, once they're located,
9 is probably going to have a discussion with the judge
10 about whether there's any other necessary action; but I
11 would ask you to think that if you do anything different
12 from what's in the Tax Code, you probably have something
13 inconsistent with the Tax Code unless I'm misreading it;
14 but I'm going to check with this judicial candidate next
15 to me.

16 CHAIRMAN BABCOCK: Kennon is deciphering the
17 Tax Code as we speak.

18 Okay. Anybody -- Justice Gray.

19 HONORABLE TOM GRAY: The question posited by
20 Professor Carlson as to the timing of the appointment of
21 the ad litem in my view can't be separated from what is
22 then the duties of the ad litem. If you continue on the
23 fourth paragraph and you -- I like to start with the last
24 sentence of the paragraph to inform what we're talking
25 about here. "The ad litem must assist the court alone and

1 must not act as an attorney for any party." If that's the
2 scope of this person's responsibility, they don't need to
3 be an attorney. They don't need to carry the label of an
4 ad litem, but I'll set that aside and say if that's the
5 scope then you ought to have that person on board
6 assisting the judge to attempt to find and perform due
7 diligence in locating the prospective defendant before you
8 devolve down and go with the service of last resort, which
9 is publication. Because if this person is successful in
10 their efforts, they find the defendant, and then you don't
11 do service by publication. But there's no need for that
12 person to be an attorney under this scope of duties.

13 CHAIRMAN BABCOCK: How do people feel about
14 that, what Justice Gray just said? Justice Christopher.

15 HONORABLE TRACY CHRISTOPHER: I agree. I
16 mean, it should not be an attorney in this position
17 because it's like kind of perverting the role of -- of an
18 attorney. I mean, this is an attorney for the court; and,
19 you know, well, why am I, the court, getting an attorney
20 involved in, you know, trying to find somebody. I mean,
21 we have to remember this is a civil case. This is not a
22 criminal case. All right. And the duty is on the
23 plaintiff in a civil case to, you know, to find the people
24 and to get the work done; and to me making this person owe
25 a duty to the court is an odd, not perversion, but it's an

1 odd scenario. Because, you know, in a civil case there's
2 no duty to one side or the other. And now I've got this
3 ad litem who -- whatever we call him, whose duty is to the
4 court. It's just a weird idea to me.

5 CHAIRMAN BABCOCK: Did you think that the
6 timing ought to be before publication? The ad litem comes
7 in before a publication?

8 HONORABLE TRACY CHRISTOPHER: No.

9 CHAIRMAN BABCOCK: No.

10 HONORABLE TRACY CHRISTOPHER: I mean, I
11 understand the complaint of the person who raised the
12 complaint, and it was my understanding that that is not
13 the typical kind of case that we use citation by
14 publication in. Okay. The vast majority of citation by
15 publications are tax cases and unknown heirs. All right.
16 So this was a -- if I remember reading it to begin with,
17 this particular case where the client -- where the
18 plaintiff was complaining about the fees, she was swindled
19 by people. She knew their names, but they were hiding.
20 All right. And that is a very rare situation where we use
21 citation by publication. Very rare to use it.

22 Vast majority of cases are the unknown heirs
23 and the tax -- well, same thing, but tax and in the
24 probate category with the unknown heirs. This was very
25 different. My understanding of the case, if I remember

1 from reading it before, it was an actual fraud case
2 against people who somehow swindled her out of her real
3 estate, and she was trying to get it back. It's a very
4 different case than the vast majority of our publication
5 cases, and I really don't think we should rewrite a rule
6 based on that.

7 CHAIRMAN BABCOCK: Professor Hoffman.

8 PROFESSOR HOFFMAN: So I guess I was just
9 going to say, I mean, it seems to me that the -- the court
10 has this duty to make sure before it authorizes service by
11 publication that proper diligence has been done to find
12 the person, and particularly in light of our amendments to
13 106 that we're proposing that we're going to add in
14 electronic services and through social media, it seems
15 like the ability to figure out whether or not due
16 diligence has been done just goes back to David Peeples --
17 is David here today? David, are you here? Yeah, to David
18 Peeples' question yesterday about the kind of questions
19 that the judge should be asking.

20 And so then it's just a question of are we
21 going to have the judge -- are we going to let the judge
22 delegate out those sort of basic responsibilities to
23 figure out diligence; and my inclination is that it ought
24 to be a limited delegation out, that judges ought to be
25 asking the relatively straightforward questions, do you

1 have an e-mail address, do you have a social media
2 address, have you looked at that; and if the judge feels
3 uncomfortable that the plaintiff is not giving straight
4 answers or more can be done, then it seems like we would
5 want them to potentially appoint the ad litem; and it does
6 make sense to me, even though I don't know this area,
7 Tracy, to say that we would want to do that before the
8 judge authorizes service by publication because that's
9 part of the -- isn't that part of the determination, that
10 the diligence has or hasn't been done?

11 HONORABLE TRACY CHRISTOPHER: Well, to me if
12 the plaintiff hasn't done the diligence, you deny the
13 request for service by a citation by publication. You
14 tell the plaintiff, "Go, you know, do some more work."
15 I'm totally in favor of changing the rule to require a
16 judge to order service by publication to the -- I mean, in
17 Harris County we routinely did that, but it is absolutely
18 true that the wording of the rule says that a clerk can do
19 it, and I'm in favor of getting the judge involved in
20 making that decision. But ultimately we are talking
21 about, you know, the plaintiff is trying to recover
22 something; and the plaintiff is the one who needs to do
23 the diligence, right? It shouldn't be court-supported
24 diligence, which is why putting, to me, the ad litem on
25 this side of the equation with the plaintiff seems wrong.

1 CHAIRMAN BABCOCK: Richard, then Judge
2 Estevez, and then Tom.

3 MR. MUNZINGER: I agree with what Justice
4 Christopher said. You're perverting, so to speak, the
5 role of the court. The role of the court is not to seek
6 out people to render a judgment on. What other time does
7 a court say, "I want to resolve your dispute. You come
8 into my court." Our courts are there to decide cases.
9 The language of the rule, proposed rule, of making the
10 guardian ad litem assist the court in finding the
11 defendant expands the role of the court. Is that the role
12 of the court constitutionally, to seek out people to
13 render judgment against them? That's -- it's a
14 frustration of the constitutional order, it seems, on its
15 face.

16 So the guardian ad litem, it's one thing to
17 have the guardian ad litem assist the court in making
18 assurance that the plaintiff has made a good faith
19 diligent effort before the court's jurisdiction is invoked
20 and a case resolved, than it is to have the guardian ad
21 litem help find the proposed defendant. I think that's a
22 frustration of the system, and I think it's wrong, and I
23 share Justice Christopher's idea that there is nothing
24 wrong with appointing a guardian ad litem to help the
25 courts and when they should be appointed, but I don't

1 think that a judge should be helping a plaintiff find a
2 defendant so that the plaintiff can have the plaintiff's
3 day in court. It seems to me that's a perversion of the
4 role of courts under our Constitution.

5 CHAIRMAN BABCOCK: Judge Estevez.

6 HONORABLE ANA ESTEVEZ: I was just going to
7 admit to having done this incorrectly according to the
8 rules for the last 12 and a half years. So yesterday when
9 we brought this up and I read the rule I then looked at
10 our local rules, looked everywhere else, but I will just
11 say I don't know if it's because our clerk makes everyone
12 do this. I don't know why, but I have had an order
13 requesting substitute -- publication, I'm sorry, citation
14 by publication every time I believe that it occurred in
15 the last almost 13 years that I've been on the bench, not
16 even realizing that I didn't need to do that. So I even
17 looked at our forms that are online, and our forms that we
18 refer to to the pro se defendants or plaintiffs regarding
19 divorces and all of those legal kits all have an order for
20 them to submit to me for citation for publication.

21 And I will also say that I denied it,
22 thinking I had the authority to deny it, even though the
23 statute says that if they would have said -- you know, if
24 the transient person has this, this, this, I've told them
25 they have to go to Facebook, they have to go there, they

1 have to do that, they have to come back and give me
2 another affidavit; and then after that I granted it. And
3 then I will say at that time I did appoint ad litem at
4 the same time. So I simultaneously get both motions at
5 the same time, because I get a motion, and I'm sure if
6 they went through the clerk there's no reason to involve
7 the judge until it's been that full day of publication,
8 but since they involve me at the beginning I get them both
9 of them at the same time, and I've always just signed them
10 at the same time. I don't know if that's the best
11 practice.

12 I just -- so when I'm reading -- when I was
13 reading all of this, it seemed fine to me, because it
14 seemed like I always felt like it worked; and I was
15 assuring that people were trying to find the other person;
16 and if I get my attorney ad litem to be working on it
17 right away, and I've never -- you know, if they find them
18 then that's great, and they're removed and that new person
19 can either hire them or hire another lawyer, or so it
20 seemed very efficient. That's all I wanted to say because
21 I feel like I'm admitting to not doing things correctly.

22 CHAIRMAN BABCOCK: Yeah. Well, I think we
23 should note that you show incredibly good judgment by
24 relocating your seat from yesterday to today as far away
25 from Buddy Low as you can sit.

1 HONORABLE ANA ESTEVEZ: I don't know if it
2 was Buddy. I went over there. Somebody put a stack of
3 papers just to make sure I wouldn't sit next to Buddy,
4 because I tried to sit there, and I couldn't find who had
5 planned to sit there. Apparently no one.

6 CHAIRMAN BABCOCK: I think we've got Tom,
7 and then Judge Evans, and then Sharena, and then Roger.

8 MR. RINEY: I ask this question as a member
9 of the subcommittee that's going to have to deal with
10 this. If we change the service by publication rule to
11 require that the court make it clear that it has to be an
12 order of the court, say somewhat similar to the language
13 of the first three paragraphs, do we need an ad litem at
14 all? I mean, don't we meet the constitutional
15 requirements of due process by following, generally, the
16 procedure that's set out in the first part of the amended
17 Rule 109; and if we do, do we need anybody at all? I
18 mean, that solves your issue, Richard, about the court
19 becoming involved in something the court ought not to be
20 involved in. All the court is doing is to make sure that
21 there's -- actually, the court's not really making sure.
22 It's the plaintiff's duty, as someone pointed out, to make
23 sure that the rules are followed so they get a valid
24 judgment; and if we have court involvement with these
25 types of procedures, I'm not sure that we need an ad

1 litem, and that solves a lot of problems.

2 CHAIRMAN BABCOCK: Thanks, Tom. Judge.

3 HONORABLE DAVID EVANS: I think it's that
4 the bias may be from the viewpoint of the members right
5 now is that you can get publication by making a
6 conclusionary affidavit that you've used due diligence, so
7 I think that troubles you as you look at it and you're
8 saying, well, why is that? Because on the backside you
9 know the ad litem is going to do the investigation to see
10 what amount of diligence was used. Now, this idea that
11 the court would spend time investigating the facts before
12 it is issued sounds idealistic. I mean sounds ideal, not
13 idealistic. But 70 percent of my cases are filed by
14 lawyers from outside of Tarrant County. All of my
15 mortgage mills or foreclosure mills are outside of Tarrant
16 County.

17 So this is facetious. After I have my
18 expedited docket, then I have my 91a docket, and then I
19 have my anti-SLAPP docket. Then I have my publication
20 docket, and I've got lawyers traveling on Southwest
21 Airlines coming in. You say, well, what about phones?
22 You can't get a reporter that likes to take testimony over
23 a phone system anywhere in Texas, and you just need to ask
24 about it. So you're going to have to record it. Now, do
25 the lawyers that are doing this on a fixed fee have the

1 time to do that? The constitutional safeguard is an
2 appointment of that ad litem that goes in and goes and
3 finds them.

4 Now, you say, well, process has been issued
5 and service has been accomplished. It's not accomplished
6 until the ad litem makes a report. That's what the Tax
7 Code makes clear. It is not completed until that ad litem
8 report comes in, and it's in writing that you cannot
9 locate that person and personally serve them. And then
10 take a general jurisdiction judge and this is the -- and I
11 do sign all of my orders. My clerk will not issue without
12 a judge signing it, but I only sign it based on the oath.
13 Then take a general jurisdiction judge. Have you ever
14 looked at the priorities on them? They start with
15 criminal. Civil is down here at the bottom. Where is a
16 guy up in Wichita Falls going to find time to talk to
17 anybody about a publication when he can appoint an ad
18 litem who will then go talk to the plaintiff's lawyer and
19 do it.

20 HONORABLE ANA ESTEVEZ: Can I just clarify
21 something about the one I refused?

22 CHAIRMAN BABCOCK: Sure.

23 HONORABLE ANA ESTEVEZ: The ones I refuse
24 are the ones that I don't get an ad litem on under the
25 Family Code. So usually if it's the normal affidavit, I

1 wouldn't have a hearing for it, because I knew about the
2 ad litem, but I'm talking about the family law cases --

3 HONORABLE DAVID EVANS: Yes.

4 HONORABLE ANA ESTEVEZ: -- that fell under
5 that section we talked about yesterday where this is the
6 end of -- this is the end. I made them go back before I
7 would give them a default, knowing that no one is going to
8 respond to it.

9 CHAIRMAN BABCOCK: Great. Sharena.

10 MS. GILLILAND: Thank you. We might be the
11 only district clerk's office issuing citation by
12 publication without an order it sounds like. But when you
13 have attorneys come in and say, "No, the rule says issue
14 it," it can be a very low threshold of what needs to be in
15 the affidavit, but if they present an affidavit that says,
16 "I can't find them, give me my citation," we are obligated
17 to give them that citation. Our two district courts in
18 Parker County are both general jurisdiction courts. I
19 don't know what their preference would be if they want to
20 go through the exercise of an ad litem at the beginning or
21 issue an order for citation by publication or if that's
22 better held when they do their docket for default
23 judgments for that request.

24 But it sounds like you're hitting it at one
25 point or the other, either at the beginning or at the end,

1 of the judge going through that exercise of was this
2 proper service, but I don't know that the clerks would
3 feel one way or the other if before you issue a citation
4 by publication an order is required or not required. I
5 don't think that that would make any difference on the
6 clerks' end.

7 CHAIRMAN BABCOCK: Okay. Roger, and then
8 Professor Hoffman.

9 MR. HUGHES: Well, I -- getting back to the
10 question about whether we should appoint an ad litem at
11 all, I think that question sort of got answered is that if
12 we take that out of the system essentially you're going to
13 encourage people to go to publication, that they will do
14 as little as possible so they can get to the point of
15 publication, and then all you're -- then your only hedge
16 on due process, that due process was accorded this person,
17 is going to be on the back end when they try to get rid of
18 a very nasty judgment that maybe by the time they find out
19 is when the bank -- when the gavel is banging down by the
20 sheriff selling their car or their real estate, et cetera,
21 et cetera. And then all of the sudden you have third
22 parties involved, and things can get very ugly very fast,
23 and it's like, well, the system did what it's supposed to
24 do, so too bad for you. Well, I don't think that's going
25 to be an adequate answer for the public and generally, and

1 not just in a tax issue, but the mortgage docket that's
2 been pointed out.

3 The second thing of it is I think what we
4 need to do is that -- define what the role of the ad litem
5 is going to be in these publication situations or maybe if
6 we go that far to electronic service, and it's -- the
7 devil is going to be in how we define their role. If
8 their role -- and I think we have to define a default
9 role; and if a statute expands that, well, it expands
10 that; but absent a statute I think the attorney's role
11 ought to be to check and report on whether really good
12 efforts were made to locate this person or not. I think
13 the difficult situation that's going to arise is what
14 happens if the ad litem finds the person. Does the ad
15 litem tell them, or does he keep his or her mouth shut and
16 inform the plaintiff or the court? Is he supposed to
17 contact the person and urge them to appear and file an
18 answer? That could be a little tricky, but I think at the
19 very least that we should define a default position is --
20 I hate to say observe and report, but that -- in other
21 words, have that best efforts been made to find this
22 person, what has been done, what more could be done
23 reasonably. So that's my thought.

24 CHAIRMAN BABCOCK: Professor Hoffman.

25 PROFESSOR HOFFMAN: Okay. I am just totally

1 confused. And I actually thought I had a fairly good
2 understanding from our conversation yesterday, and I am --
3 I am -- so I can only say, I'm now paying attention
4 closely, and this is not making any sense to me. Some of
5 what you say, Judge Evans, seems like it cuts one way and
6 then I think, well, it cuts the exact opposite way.

7 HONORABLE DAVID EVANS: That's right.

8 PROFESSOR HOFFMAN: And so at best I can say
9 I think the rules do not do a very good job of defining
10 what the judge's duty is, and sort of layered on top of
11 that, we have the added issue of I'm not sure the rules
12 are particularly clear about that there is a due order,
13 and clearly you should serve personally if you can. The
14 rules make that clear. I'm not even sure from reading the
15 rules that the 106(b) options are preferred over
16 publication. Maybe the case law makes that clear, and I
17 don't know. I sort of hope it does, but I don't know that
18 I can feel confident anymore of that.

19 If we do want to let the judge delegate, to
20 whom do we want the judge to delegate? The rules right
21 now talk about attorneys, but it also talk about attorneys
22 playing this defense role, which, you know, asserting
23 defenses, which seems crazy to most of us, it sounds like.
24 So I would say there's a lot of work to be done here. I
25 hope the Court will sort of seize this as an opportunity

1 to say we're already revamping these other things. These
2 additions to 106 are great, right? I mean, if you can
3 start serving by Facebook and e-mail, yeah, there are
4 going to be problems, but we're probably going to solve a
5 lot more -- we're going to succeed in providing notice
6 probably way more often than we're going to have problems,
7 and so the net improvement is probably there, but we've
8 then got to layer that with how we deal with what the
9 judge's responsibilities are, and then we can figure out
10 what the timing is. I mean, we all agree at some point
11 the judge has a duty to ensure that proper efforts were
12 made, and then it's just a question of when that duty
13 should be exercised and where the incentives are, as Judge
14 Evans was talking about, for people who get hired and who
15 it seems like don't have an incentive to do a ton of work,
16 but maybe I'm wrong.

17 HONORABLE DAVID EVANS: I think -- I
18 definitely think they make a reasonable effort, but
19 remember this is a transient or somebody who is an heir,
20 and they just hadn't been able to locate the heirs is
21 often what's going on. You get past 106, the 106
22 affidavit is very clear. We have found this person here.
23 We have attempted service. We've seen the car in the
24 driveway that has a license plate on it.

25 PROFESSOR HOFFMAN: Yeah.

1 HONORABLE DAVID EVANS: That's what you go
2 down and look at, and there's not a judge here or anywhere
3 else that doesn't peel back to that affidavit to see what
4 the process server says they saw and how many times they
5 went out to attempt to get it.

6 PROFESSOR HOFFMAN: Uh-huh.

7 HONORABLE DAVID EVANS: And they'll show two
8 and three attempts. They'll generally have about five of
9 them. Then you'll sign off on the 106. That is the gold
10 standard, as Judge Peeples says. With publication you're
11 saying they're transient and they're not locatable. What
12 I say is it's the plaintiff who has decided not to follow
13 the gold standard and locate them. It is the plaintiff
14 should bear the cost of the ad litem. It is not me that
15 should supervise the process server, and I don't want to
16 have -- I don't think a trial judge should be making the
17 determination of the efforts to serve and say to this skip
18 tracer, "Now, have you -- have you run a skip trace on
19 this guy on his Equifax account? Have you done this?
20 Have you done that?" I think that's outside the judicial
21 duties, and so that's why I'm having a problem with it.

22 And I think that you think -- I think that
23 the group thinks that service is completed on the 28th
24 day. That's not a fact. The service is not completed
25 until the ad litem reports. You couldn't grant a judgment

1 on publication without an ad litem report. That's why you
2 get -- that's why you have the ad litem. I know that the
3 rule might indicate citation was complete, but no trial
4 judge will grant a default judgment without an ad litem.

5 CHAIRMAN BABCOCK: Kennon, Levi wants to
6 jump ahead of you.

7 HONORABLE LEVI BENTON: Judge Evans used a
8 term of art that some of us who are mature have forgotten
9 its definition, skip tracer. Explain skip tracer.

10 CHAIRMAN BABCOCK: What's skip tracing?

11 HONORABLE DAVID EVANS: Well, when I went on
12 the bench, mine were all in Vancouver, so I wasn't worried
13 about application of certain laws, but I'm thinking back
14 now, maybe that was wrong. Statute of limitations has
15 run. There are tracers out there -- there are serious
16 questions about debt collectors and mortgage lenders about
17 how serious they are about following the gold standard.
18 If you think about all the information they have in a
19 file, why can't they locate somebody? And you have trial
20 judges that have anecdotal evidence and know who the
21 defendant is and Google them and say, well, you can go
22 find them over there, and they don't issue a publication,
23 but it -- to me it comes out in the end because you have
24 an ad litem. That cost is paid -- goes to the plaintiff,
25 who should have followed the gold standard first.

1 A skip tracer now can use a lot more
2 information than they could in 2000, and you think there's
3 more privacy, but that's not true. They can get into all
4 kinds of files, so and you have people now marketing
5 themselves to certain courts as being an expert that could
6 be hired by an ad litem to trace people, but when you ask
7 them for what kind of standards they follow, they are --
8 they won't give you a written standard, so I won't approve
9 them. I have a judge -- I have a judge in the region, two
10 judges in the region, that use them routinely, allow the
11 ad litem to use them.

12 CHAIRMAN BABCOCK: Kennon.

13 MS. WOOTEN: Just a couple of points to make
14 sure the record has information about the Tax Code
15 provision referenced in the legislative session from which
16 it arose. So the Tax Code provision at issue is section
17 33.475.

18 HONORABLE ANA ESTEVEZ: Can you say that
19 again?

20 MS. WOOTEN: 33.475, and it came out of the
21 84th regular session, House Bill 2710, and although I know
22 a lot of weight is in play sometimes on bill analyses, it
23 is interesting to read the bill analysis here and see that
24 the issue seems to have been that attorney ad litem were
25 being appointed to represent the interests of property

1 owners who couldn't be located, and there was concern that
2 maybe the attorney ad litem who went forward with
3 representing the absent parties hadn't really tried to
4 find them first to see what those parties would want to
5 have done in the case.

6 And so it wasn't a question so much of
7 whether you should represent their interests, defend them,
8 et cetera. It was if you're going to have somebody in
9 there representing this person, let's make sure that
10 you've really tried to find them first, and to me that
11 raises an interesting question. Why do we need to find
12 them? Because if you find them that's when you can assess
13 what they want to happen in a proceeding. And so there
14 are two different interests here, trying to find them and
15 then if you can't find them how far do you have to go in
16 representing their interest in a case, and I struggle with
17 the concept that you can truly represent the interests of
18 a person you've never met. You don't know what that
19 person wants.

20 There are times when I'm representing a
21 client, and I would do one thing, but they want something
22 totally different. Well, as an attorney with fiduciary
23 duties to my client I have to communicate with the client
24 and often sometimes I have to defer to the client, even if
25 it's not a decision I would make, unless I get to an

1 ethical point where I really have to get out of the case,
2 because I've got a conflict or something of that sort. So
3 I'm talking about all these concepts because I think we're
4 getting a little confused sometimes between are we doing
5 something that helps the plaintiff, are we doing something
6 that helps the defendant, and this question remains about
7 how far do you have to go to afford due process. I don't
8 know that we have a clear answer to that question yet. I
9 know that in the precedent that's out there that has been
10 cited in the report due process is really about trying to
11 find somebody, you know, using the diligence that's
12 required to try to find somebody; but if you can't find
13 them, I still have a question in my mind about how far you
14 have to go to represent them.

15 And yesterday Judge Yelenosky raised an
16 interesting point that I think is worth raising on the
17 record, even if we don't discuss it further, and that is
18 whether the rule should specify duties to a degree of the
19 attorney ad litem with representing the interests of the
20 missing person. As it stands we just have a phrase about
21 an obligation to defend the suit on behalf of the
22 defendant. That's pretty broad reaching if you read it on
23 its face. I understand that practically it's not often
24 the case that you have individuals doing all kinds of work
25 to represent an absent person, but the text of the rule

1 doesn't make it clear that you draw a line at some point
2 and then say, "My work here is done." I will say that the
3 Tax Code provision also doesn't do that. It just talks
4 about representing the interest of the person who is not
5 around.

6 HONORABLE DAVID EVANS: Uh-huh. And then
7 that -- but the report can be filed after location in the
8 Tax Code.

9 MS. WOOTEN: Yes.

10 HONORABLE DAVID EVANS: And then you have a
11 status conference. Is there anything further you think
12 you have to do in the file with regard to the taxpayer,
13 and they'll say, "Well, there's some mowing liens, and
14 there's some excess proceeds, and we need to get those
15 distributed, and we need to set up accounts for them."
16 Otherwise, all the tax -- all the enforcement has been
17 correct, and there's nothing else, and that's included in
18 my -- my review of the file that's included. In a
19 mortgage case you have a statement of evidence that's
20 already been preapproved by the mortgage lender and the ad
21 litem as to the facts of the case. They know they can't
22 find the original mortgagee, mortgagor, yeah, there we go.
23 Anyway, couldn't find the people that signed the note.
24 There you go. Note maker, and because they're planted out
25 at Rose Hill. You know, they're gone, and their kids have

1 all taken off. So you get there and say, "Well, do the
2 kids want anything." Well, they've already talked to
3 them. No, they don't. It's over.

4 Now, Judge Brown raised an interesting
5 problem. He's had a case was negligence where he had an
6 ad litem try the case all the way through. I've never
7 encountered that. It did -- it does concern me. It's
8 problematic, but I have told a couple of plaintiffs,
9 "Well, I'm going to have to appoint an ad litem, and
10 you're going to have to pay the cost of it. Are you sure
11 you want to proceed on this case?" And this is all about
12 coverage, and they already know they have a noncooperation
13 defense facing them, and generally they say, "No, we
14 don't. We don't need to go on it," and that's if
15 liability is disputed, and I've had it go the other way,
16 but I'm not saying it's a perfect system. It does require
17 diligence from the judge, but I would be more comfortable
18 with Senator Zaffirini's bill on the Tax Code if she
19 hadn't included the language "and the interest" --

20 MS. WOOTEN: Right.

21 HONORABLE DAVID EVANS: Gone "and the
22 interest of the defendant." She's been very, very active
23 in ad litem and guardians.

24 MR. LEVY: Judge, does that mean that you
25 cannot take a default judgment in those cases where an ad

1 litem is appointed? Because the ad litem can enter a
2 defense and answer and deal with the merits.

3 HONORABLE DAVID EVANS: The statement of
4 evidence comes in because the ad litem has filed an
5 answer. That's why the written statement of evidence that
6 has to be approved by the judge is signed, and so the ad
7 litem goes over there and makes sure that the written
8 statement of evidence or their right to recover is in.
9 Now, if that's nine times out of ten in a commercial
10 transaction, I haven't thought it out in negligence
11 because we just, quite frankly, there's no financial
12 incentive against taking a judgment against somebody who
13 you're serving by publication, because unless you know
14 something about their property, and if you know something
15 about the property you've served them.

16 MS. WOOTEN: Right.

17 MR. LEVY: Well, but if somebody has real
18 property in a county, but they're just not there, you
19 know.

20 HONORABLE DAVID EVANS: Hang a paper on the
21 fence post.

22 MR. LEVY: But and that's sufficient
23 service?

24 HONORABLE DAVID EVANS: Well, if it's a
25 place of abode.

1 MR. LEVY: Not a residence.

2 HONORABLE DAVID EVANS: I know, not a
3 residence, not a place, but where they're likely to be
4 found, and you have to have an affidavit in support that
5 they come in and check that property and then you have to
6 do measurement. That doesn't happen very often because,
7 remember, they're paying taxes to the county.

8 HONORABLE ANA ESTEVEZ: Or not. They're
9 not.

10 HONORABLE DAVID EVANS: Well, they're not.
11 But this -- off the tax, because this is in a non-Tax Code
12 case, but people who own property are traceable, unless
13 they're gone. I mean, that's it.

14 CHAIRMAN BABCOCK: Judge Wallace.

15 HONORABLE R. H. WALLACE: Well, we're
16 talking about what the duty of the ad litem should be. I
17 think if you want to change the duty is, we need to -- we
18 definitely have to change the rule, because if you look at
19 the current language of the rule and you go to Westlaw and
20 look at the three or four cases that have determined, that
21 have construed that, they've said they've got a duty to
22 defend even on appeal. So, I mean, if -- I'm just
23 observing that if we want to change that duty, unless we
24 want to just disregard some previous judicial precedent,
25 you've got to change the rule.

1 MS. WOOTEN: I agree.

2 PROFESSOR CARLSON: Which is where I think
3 we should go next, Chip.

4 CHAIRMAN BABCOCK: Okay. And where should
5 we go next?

6 PROFESSOR CARLSON: What is the appropriate
7 role of the attorney ad litem? Should it be limited as
8 you see in this proposal in paragraph (4) to assist the
9 court in attempting to locate the defendant's residence or
10 location where the defendant can probably be found with no
11 other role? That was the recommendation, in effect, of
12 the State Bar Rules Committee. That was the vote of the
13 majority of the subcommittee. Everybody thought that the
14 role should be limited.

15 CHAIRMAN BABCOCK: Before we open it up for
16 that discussion, can I inquire, Levi, how long is it going
17 to take to discuss the eviction kit rules forms?

18 HONORABLE LEVI BENTON: I think 10 minutes,
19 but --

20 MR. LEVY: Have we ever done anything in 10
21 minutes?

22 HONORABLE LEVI BENTON: Chip, the shorter
23 one will be the proposal on going forward with civil rules
24 in municipal courts. That's a two-minute conversation.

25 CHAIRMAN BABCOCK: So if we leave half an

1 hour that would be sufficient?

2 HONORABLE LEVI BENTON: I think so. More
3 than sufficient.

4 CHAIRMAN BABCOCK: Okay. Because we've got
5 guests waiting patiently to talk about that, but anyway,
6 we'll go ahead with this for another 15 minutes, take our
7 break, and then we'll resume. Tom.

8 MR. RINEY: For those judges or otherwise
9 that have had experience with ad litem after service by
10 publication, how frequently does the ad litem locate the
11 defendant or come back and say, "I don't think there have
12 been sufficient efforts to locate the defendant"? I'm
13 just trying to gauge what impact this really has.

14 HONORABLE ANA ESTEVEZ: You know, we have to
15 ask the clerk, because if the ad litem actually found
16 someone I wouldn't know. The case would just keep going,
17 and I never would have gone back to see how they were
18 served. So I wouldn't know. Because the ad litem would
19 come. I guess they would have a fee.

20 HONORABLE DAVID EVANS: Unknown heirs, it's
21 very frequent that they find somebody.

22 HONORABLE ANA ESTEVEZ: Oh, on the heirs,
23 yeah.

24 HONORABLE DAVID EVANS: Unknown heirs it's
25 very frequent they find the children and the siblings and

1 report back that there are known heirs.

2 HONORABLE ANA ESTEVEZ: Very often.

3 MR. RINEY: So an ad litem frequently finds
4 someone that the plaintiff's lawyer couldn't find.

5 HONORABLE DAVID EVANS: In unknown -- and,
6 remember, you're looking for unknown heirs in property
7 cases.

8 MR. RINEY: No, I understand. So, I mean,
9 that just helps us that the process of having the
10 plaintiff's attorney prepare and file an affidavit is
11 apparently not very effective.

12 CHAIRMAN BABCOCK: What about --

13 MR. RINEY: In live I should say.

14 CHAIRMAN BABCOCK: What about the threshold
15 issue Richard Munzinger raised about should we even have
16 an ad litem. Richard, I don't want to misstate what you
17 said. Is he still there? No.

18 Well, good, then I'll totally misstate what
19 he said. He doesn't think we should have them at all,
20 right? Isn't that what he said? Because it upsets the
21 constitutional balance? Buddy.

22 MR. LOW: Are there any federal cases that
23 hold that publication is sufficient, meeting the
24 constitutional guideline notice? I've never heard anybody
25 speak of one, and I don't know of one. Are there any

1 cases on what the constitutional guidelines require for a
2 person to be brought into court or be sued and not know
3 about it?

4 CHAIRMAN BABCOCK: Is it -- Elaine, you
5 probably know the answer to that. Is it *Hanson vs.*
6 *Denckla*?

7 PROFESSOR CARLSON: I don't know.

8 PROFESSOR HOFFMAN: Sorry, what was Buddy's
9 question?

10 CHAIRMAN BABCOCK: The case *Hanson vs.*
11 *Denckla*?

12 PROFESSOR HOFFMAN: The old heir case.
13 Yeah, yeah, yeah.

14 CHAIRMAN BABCOCK: The old Supreme Court
15 case.

16 PROFESSOR HOFFMAN: 1957 or '58.

17 CHAIRMAN BABCOCK: 1957, exactly. Tip of my
18 tongue.

19 PROFESSOR HOFFMAN: But no one reads that
20 case anymore.

21 CHAIRMAN BABCOCK: I knew that.

22 MR. WATSON: No one but Chip.

23 MR. LOW: Apparently we have to meet those
24 guidelines, and maybe they've been changed since then. I
25 don't know, but I know we've had to revise certain things

1 because of federal court cases that said it doesn't meet
2 constitutional guidelines.

3 PROFESSOR HOFFMAN: Yeah, but that's
4 personal jurisdiction, Buddy, in terms of -- I mean,
5 obviously it's related, but I think the more relevant
6 cases are Mullane and then the more recent case is *Jones*
7 *vs. Flowers*, which is a Chief Justice Roberts decision.

8 MR. LOW: Well, I'm a stranger to both of
9 those cases.

10 PROFESSOR HOFFMAN: But those are cases
11 about the sufficiency of notice that notice has to be
12 reasonably calculated under the circumstances to actually
13 give notice.

14 CHAIRMAN BABCOCK: We've got Justice
15 Christopher, Judge Wallace, and then Nina.

16 HONORABLE TRACY CHRISTOPHER: Well, I've
17 lost my train of thought, I apologize. Go on.

18 HONORABLE R. H. WALLACE: Let me before I
19 lose mine.

20 CHAIRMAN BABCOCK: Judge Wallace.

21 HONORABLE R. H. WALLACE: Professor
22 Carlson's memo or her committee's memo has a paragraph,
23 "The practice of appointing an attorney for an absent
24 defendant has its roots in Mexican and Spanish law," et
25 cetera. "This practice reflects a minority view in

1 American jurisprudence, having been adopted by only four
2 states." I mean, as I understand that, is Texas one of
3 only four states that appoints an attorney ad litem? So
4 maybe we don't need one.

5 PROFESSOR CARLSON: Page two of the memo,
6 that came from -- that is an excerpt from the State Bar of
7 Texas Committee on Court Rules report.

8 HONORABLE R. H. WALLACE: Okay.

9 PROFESSOR CARLSON: But I believe it to be
10 accurate. So you don't have to have an ad litem -- I
11 don't know of any case that says you're required to have
12 an attorney ad litem in order to support service by
13 publication. The other states put the onus on the court
14 to determine the reasonable diligence; and in the case
15 law, really when you look at it, really requires under the
16 circumstances what is sufficient diligence; and they go
17 into great detail about checking the public records,
18 checking private records, checking with employees or
19 family members, or which is not, from what I hear Judge
20 Evans saying, is realistic to expect the trial court to be
21 able to do that.

22 HONORABLE DAVID EVANS: Obviously whatever
23 duty we're attached -- whatever duty we're assigned we'll
24 do, but there is a day that you have to organize and
25 prioritize everything, and then you have to get lawyers

1 in, and you -- your coordinator is on the phone trying to
2 schedule all of that, bring it in, and for a criminal --
3 for a general jurisdiction judge, this comes way down on
4 the bottom of the list.

5 On liability, I understand the concern about
6 this lawyer doing all of this defense work, but remember
7 there's a break out there. There's a fire break out here.
8 You can't take discovery unless you have pleadings that
9 will support it. You can't take a deposition. You can't
10 have interrogatories forced to be answered, and you can't
11 do anything else. If this was seriously contested, this
12 is a summary judgment case. You're going to grant it.
13 They can't find the defendant. They can't talk to them.

14 Now, Judge Brown has that one example of a
15 negligence case, but 99.99 percent of these are SJ's, if
16 they were contested. And that's why the ad litem comes in
17 and says, "Judge, I've looked over the file and don't see
18 any issues. Here's my report on location, and I'm ready
19 to go." So you could limit liability, but have you done
20 anything for the lawyer? And by Supreme Court rule you
21 limit this duty to just location, but the lawyer sees
22 something and doesn't communicate it. I don't know that
23 you have, his grievance liability or other.

24 I do like Senator Zaffirini's approach in
25 the Tax Code, that you have this time after location where

1 you get a report that the court has to inspect and
2 determine that you not only made the location, but that
3 you've seen that there's not anything else that needs to
4 be done in the file, and the judge makes a finding for the
5 benefit of the lawyer. Think about that. For the benefit
6 of the lawyer, that he has discharged his duties. That's
7 over.

8 MR. LEVY: Does the defendant have the right
9 to bring a claim against that ad litem?

10 HONORABLE DAVID EVANS: You know, it's been
11 litigated once. It was in Tarrant County, but it was in a
12 guardian ad litem situation. As I recall, I know the
13 parties in the case, but I don't think the liability lay,
14 or it may have been settled at some point. It was only in
15 a guardian ad litem situation. It had to do over, as I
16 recall -- well, Henry had that case.

17 HONORABLE R. H. WALLACE: Who?

18 HONORABLE DAVID EVANS: Mike Henry had that
19 case. But anyway, we haven't ever seen a lawsuit against
20 the ad litem. Granting them immunity wouldn't bother me
21 in the least, but that's it.

22 CHAIRMAN BABCOCK: Nina.

23 MS. CORTELL: I was just going to say,
24 pardon me if it's already come up, but in Rule 171 we
25 already have a default protocol where a judge can appoint

1 someone for a limited purpose. It need not be a lawyer,
2 and the judge can limit whatever it is he wants or she
3 wants that person to do. So even if we don't provide
4 anything here, the judge has that authority under Rule
5 171, as I read it.

6 CHAIRMAN BABCOCK: Skip.

7 MR. WATSON: Well, Nina just answered it. I
8 mean, I don't think we ever resolved the question of
9 whether the ad litem has to be an attorney. Apparently it
10 doesn't. I mean, it's just for the case, and I like the
11 idea of getting -- of leaving the protection in where the
12 court can appoint somebody to do the job to make sure due
13 process has been done. I mean, whether it's plaintiff or
14 defense burden, I don't care. I just want to make sure
15 that due process is done and to ensure that by appointing
16 somebody to go out and say there's a plaintiff, you know,
17 you're going to pay this person's fee, but it's not going
18 to be at a lawyer's hourly rate.

19 CHAIRMAN BABCOCK: Does the ad litem wheel
20 apply to this ad litem?

21 HONORABLE DAVID EVANS: Yes.

22 HONORABLE TRACY CHRISTOPHER: Yes.

23 CHAIRMAN BABCOCK: It does.

24 HONORABLE DAVID EVANS: Yes.

25 CHAIRMAN BABCOCK: And only lawyers are on

1 the wheel, right?

2 HONORABLE STEPHEN YELENOSKY: Yes.

3 HONORABLE DAVID EVANS: Yes.

4 CHAIRMAN BABCOCK: Kennon.

5 MS. WOOTEN: The other issue, I think, is
6 that if we're going to have a provision for the attorney
7 to represent the interests of the defendant or defend the
8 suit, then we have to have an attorney in the role because
9 otherwise you encounter UPL issues.

10 MR. WATSON: That needs to go away, I think
11 is the consensus.

12 MS. WOOTEN: But we have the Tax Code
13 provision to contend with, I suppose.

14 HONORABLE DAVID EVANS: Senator Zaffirini's
15 language might be something you might take some solace in.
16 She requires the judge to review the report, a written
17 report on a file. We don't have that right now in the
18 current Rules of Civil Procedure. Some judges have
19 adopted that, but this is a written report filed with the
20 court under oath, and then the judge talks to the lawyer
21 and sees discharge their duties to the defendant; and it's
22 broad, broader than just getting service, but it's broad;
23 and if the judge signs off the order that you've
24 discharged your duties, doesn't that semi-protect the
25 lawyer?

1 MS. WOOTEN: It should.

2 HONORABLE DAVID EVANS: And the judge.

3 CHAIRMAN BABCOCK: Justice Christopher.

4 HONORABLE TRACY CHRISTOPHER: I think, you
5 know, part of the problem with making a wholesale change
6 to this rule on the basis of one case is the fact that
7 there are a whole bunch of other types of cases that use
8 this rule. So we have this huge number of tax cases
9 where, in my opinion, the rule is working the way it is
10 written. We have the next huge subset is the unknown
11 heirs in probate court, and in my opinion, the rule works
12 in connection with unknown heirs also.

13 It's only the miscellaneous tort cases,
14 which is what this case was, is my understanding, a fraud
15 tort type case where the attorney ad litem process is
16 problematic. I mean, I can certainly understand the
17 plaintiff in this case complaining that she got stuck with
18 this large attorney bill against her when, you know, she
19 had this, you know, good tort cause of action against
20 these defendants who couldn't be found. I can totally
21 understand that, but to try to re -- change the rule
22 without considering the vast majority of time that we have
23 this rule it works, you know, is just not a good reason to
24 change the rule, and you know, we already have a statute
25 that deals with tax cases.

1 Well, you know, the next thing we would do
2 is we would have a probate code provision that would deal
3 with unknown heirs in the probate code. If we try to
4 monkey too much with this, it's going to have to exclude
5 probate. It's going to have to exclude tax cases and then
6 we're down to, I mean, a very tiny subset of citation by
7 publication in a true tort or breach of contract case.
8 Just very tiny, and unfortunately this woman's case was
9 one of those.

10 To me it's not a reason to make a wholesale
11 change to the rule, and if we do, we run -- you know,
12 we're going to have to exempt out the Tax Code, and you
13 know, then we're going to have to exempt out the probate
14 code. I mean, and we're spending a lot of time on a very
15 tiny number of cases where you have citation by
16 publication, because if you have a tort case in the
17 citation by publication and you get a judgment, well, you
18 don't know where the person is, and you'll never be able
19 to execute on it. So it's this whole sort of Pyrrhic
20 victory that you've got a judgment against somebody.

21 Now, I think this case, my understanding of
22 this case, there was some real estate involved and maybe
23 some fraudulent liens against it so that there was
24 something that this woman was trying to get cleaned up,
25 but to make a wholesale change in the rule based upon this

1 one problem when you are disregarding the fact that the
2 rule works in tax cases and the rule works in the unknown
3 heir cases, to me is ill-advised.

4 CHAIRMAN BABCOCK: Robert, and then Kennon.

5 MR. LEVY: I was just going to make a
6 comment about the language in the proposal in the fourth
7 paragraph, that -- where it talks about "assisting the
8 court in attempting to locate the defendant's residence or
9 location where the defendant can be probably be found." I
10 would suggest adding language that points out that "or
11 service by electronic means or other methods" so that
12 finding an e-mail address might be a way to serve the
13 defendant under our proposed new rule, so it's not a
14 residence or a physical location. So I would add --
15 suggest adding that.

16 CHAIRMAN BABCOCK: Kennon.

17 MS. WOOTEN: I have some concerns about
18 doing nothing in light of the fact that there are
19 potentially problems. Even if those problems are only for
20 some small percentage of cases, if there are people who
21 are suffering negative consequences under the rule, it
22 seems worthwhile to consider whether slight modification
23 of the rule might be warranted, even if it's not a
24 wholesale change.

25 The second thing that I know we've done in

1 these rules before is carve out statutory provisions that
2 may require something other than what the rule by default
3 compels. I don't think that's something terribly
4 uncommon, and it's a way to account for the fact that you
5 do sometimes have types of cases under statute that are
6 treated a certain way for good reason. I am sensitive to
7 the possibility that we must up something in the rules for
8 certain types of cases, but again, I just feel like we're
9 not being sufficiently sensitive potentially to a problem
10 that does exist under the current version of the rule.

11 CHAIRMAN BABCOCK: Okay. With that we'll
12 take our morning break and be back in 15 minutes.

13 (Recess from 10:29 a.m. to 10:47 a.m.)

14 CHAIRMAN BABCOCK: All right. One important
15 thing to note, today is Evan Young's birthday. We're not
16 going to sing.

17 HONORABLE ANA ESTEVEZ: Let's sing.

18 MR. WATSON: No, but he is.

19 CHAIRMAN BABCOCK: Yeah, actually, that's a
20 great idea. Get the mike, Evan. Let's see how good you
21 are.

22 MR. YOUNG: Punishment you're not entitled
23 to yet.

24 CHAIRMAN BABCOCK: Judge Estevez has got
25 some things to say, and she's going to say them before she

1 has to catch a plane to Amarillo. So go for it, Judge.

2 HONORABLE ANA ESTEVEZ: Well, as I was
3 reviewing 109 and also based off the comments of Mr. Levy,
4 I realized that these are so out of date that back to the
5 conversations yesterday that I believe this hierarchy is
6 even more important now for this rule regarding what type
7 of service you have to try to do or try to complete before
8 you reach the next level, and specifically, we need to
9 probably add a change to 109 that adds as another
10 requirement before you can serve under 109 that you need
11 to -- you cannot -- you have attempted to but could not
12 procure service through what we are now calling our
13 106(b)(2), which is that electronic service, and what
14 Professor Albright has stated is the virtual abode. So I
15 think if we read literally the words in 109, if you've
16 been in constant e-mail with someone or on Facebook with
17 someone, but you can't figure out where they live because
18 they move around a lot, you can still just do this by
19 publication to that other website.

20 I mean, I guess you can send them an e-mail
21 if you want, but if you're not even having to go through
22 the judge to review this, so under this rule as written
23 the clerk would have to give you permission to -- the
24 clerk would have to give you permission to publish by --
25 I'm sorry, serve by publication; and as we know, if it

1 stays with newspaper they would never receive it; and so,
2 you know, unless the ad litem goes and is a frequent
3 e-mail user that knows the person's e-mail, if they're not
4 talking to the actual plaintiff in this case, they may
5 never even know that they could have served them by
6 Facebook or by e-mail at any time. So I just wanted to
7 suggest based on those other comments, we need to amend
8 109 even further than whatever we're doing today to make
9 sure that people when we do know someone's virtual abode
10 that we take advantage of that so that they would be able
11 to get served that way.

12 CHAIRMAN BABCOCK: Okay. Did you hear that,
13 Elaine?

14 PROFESSOR CARLSON: I did. Thank you. I
15 agree.

16 CHAIRMAN BABCOCK: Okay. One question that
17 was posed to me on the break was does the full committee
18 think that we even need to modify 244. Kennon, what do
19 you think?

20 MS. WOOTEN: I think we need to modify 244.
21 If that was unclear before.

22 CHAIRMAN BABCOCK: Does everybody share that
23 or -- Professor Hoffman?

24 PROFESSOR HOFFMAN: I share that.

25 CHAIRMAN BABCOCK: Oh, you were raising your

1 hand because you share it.

2 HONORABLE TOM GRAY: I certainly don't think
3 it needs to be modified. I think that the rule can be
4 amended to add a court locator assistant or court
5 assistance -- I forgot what I called them, a court search
6 assistant to find defendants, but I think if -- and I
7 guess I'll make the comment. Remember that we have a
8 basically 150, 200-year history under the common law of
9 having the ad litem. The Legislature has amended the
10 common law. Yes, by judicial decision-making we can
11 modify the common law, but the -- I haven't seen where
12 we've modified the common law by rule. We do it by
13 judicial decision or by Legislature, and I would be very
14 nervous about abandoning the system of ad litem to
15 represent defendants that are not present in court.

16 Remember that this is the state putting its
17 imprimatur on a judgment against someone, and I think it
18 is appropriate for that to be done by an attorney,
19 defending someone as best they can, whether they have met
20 them or not. We -- frankly, we see this in termination
21 cases now all the time where the ad litem has never met
22 their -- the parent of the child. We see it on appeal
23 where the parent has been lost in the process, and they do
24 whatever it is they do to represent what they think the
25 parent would want to do, and so I don't think 244 needs to

1 be amended. I think the rules on service need to be
2 substantially modified and strengthened so that we do more
3 on the front end to find the defendant and make them a
4 party than abandoning the ad litem practice as it
5 currently exists.

6 CHAIRMAN BABCOCK: Frank.

7 MR. GILSTRAP: I keep thinking of the two
8 times that Judge Evans has mentioned the collection cases,
9 and nobody else has talked about them, and that really
10 bothers me. I mean, you know, we know the credit
11 companies can locate the people, and if we make it easier
12 for them to take a default judgment, I think that's a step
13 backwards. So rather than -- what I hope we do is we
14 change -- I hope we don't throw the baby out with the bath
15 water.

16 CHAIRMAN BABCOCK: Okay. Yeah, Judge Evans.

17 HONORABLE DAVID EVANS: Well, I should be
18 satisfied with no change, but as Lonny said, I flip-flop
19 all the time. I think we should conform to Senator
20 Zaffirini, what she did in the Tax Code. You require a
21 written report on location and a request for discharge of
22 your duties from the trial judge, and the trial judge
23 signs off on it. Now, here's what would benefit to the
24 public of that. There would be a written document and not
25 a reporter's record on file in the clerk's office so the

1 defendant could see, everybody could see, what the ad
2 litem has done to try and locate them. The trial judge
3 would then have not just heard an oral report, but read
4 over that report. We get guardian ad litem reports all
5 the time on settlements and things like that. That's
6 pretty customary, but I think if you look at what the
7 Legislature did in 2015, you've got a map. Just require a
8 written report and that the attorneys has discharged his
9 duties. I think that puts a brake on limiting the
10 attorney's duties because the judge can look at it and see
11 if the case needs more defense or if it can be just
12 adjudicated. It's on the judge's back, and that's it.

13 CHAIRMAN BABCOCK: Okay. Yeah, Justice
14 Christopher.

15 HONORABLE TRACY CHRISTOPHER: Well, I know
16 in Harris County we have a long set of instructions to our
17 tax ad litem, and it -- it includes some minor defenses,
18 like, you know, you look for statute of limitation
19 defenses, and it's a double check on the paper work of the
20 state in terms of what has and hasn't been paid, what is
21 and isn't barred by, you know, limitations. So, I mean,
22 that would be sort of a good model, a little hard to
23 figure out how you would do that in a court case, which is
24 such a small part of citation by publication, because what
25 is the point in getting a judgment against someone in a

1 tort case that you don't know where they are and you'll
2 never be able to execute on it. So it's such a small part
3 of whatever happens in citation by publication.

4 CHAIRMAN BABCOCK: Okay. Elaine.

5 PROFESSOR CARLSON: Well, I have to say I
6 don't think there is anything unconstitutional about Rule
7 244.

8 CHAIRMAN BABCOCK: Use the mike, Elaine.

9 PROFESSOR CARLSON: Sorry. I don't think
10 there's anything unconstitutional about Rule 244, and I've
11 been very persuaded by how the rules have been working by
12 the comments by all of our trial judges. So it may be
13 best to decouple 109 from 244, which our committee thought
14 should be taken up together, and just focus on the Judge
15 Evans approach and see and bring that back to the
16 committee. Or vote on it now.

17 HONORABLE DAVID EVANS: Can I leave?

18 CHAIRMAN BABCOCK: Say that again.

19 HONORABLE DAVID EVANS: Can I leave?

20 CHAIRMAN BABCOCK: No.

21 HONORABLE DAVID EVANS: I don't know
22 anything about eviction. I promise you.

23 CHAIRMAN BABCOCK: Levi.

24 PROFESSOR CARLSON: But I would like to
25 know, it would be helpful to the subcommittee to know do

1 people want changes, or do you really think this is
2 working fine the way it is?

3 CHAIRMAN BABCOCK: Judge Evans.

4 HONORABLE DAVID EVANS: We have a lot of new
5 judges, and I cast no aspersions, but they don't have the
6 experience, and it's hard to keep up with all of these
7 changes. You will go to the Rules of Civil Procedure on
8 almost all of these appointments and check to see where
9 you are, or Civil Practice and Remedies Code and in tax
10 cases, the Tax Code. Requiring a written report over an
11 oral report has the benefit of being in the clerk's
12 record. That is a permanent record that the defendant can
13 come in and find. Remember, reporter's record will go to
14 the district clerk in shorthand after seven years and you
15 were never able to retrieve it, so whatever effort was
16 used is not there.

17 Think about the person trying to set aside a
18 default. What if the ad litem says, "Yeah, I located
19 them, and they said they didn't want to be a part of it"?
20 Now, the trial judge at that point should say, "Go
21 personally serve them or bring me back a waiver," but if
22 the trial judge overlooks that, you actually have an
23 infirm judgment. Because you have -- you know where they
24 are, you've got to personally serve them. So that person
25 coming in within two years can set that judgment aside.

1 So I think it's -- I think it's significant that you get a
2 written report and for the protection of the lawyer get a
3 discharge that they've fulfilled their obligation. We
4 normally would do that through judicial education as a
5 best practices, but the way we're swinging our judges and
6 on back and forth on elections, we've got a lot of new
7 people that need a lot of help and a lot of guidance, and
8 we have an aging out judiciary.

9 HONORABLE TOM GRAY: Hey, hey, hey, hey,
10 watch it now.

11 HONORABLE DAVID EVANS: What did you say old
12 man? I'm not hearing you.

13 CHAIRMAN BABCOCK: Judge Evans is a little
14 hard of hearing.

15 HONORABLE DAVID EVANS: Yeah, Judge Wallace
16 and I both are. We use the same hearing aid, so we share.
17 But we do have an aging judiciary. The numbers are pretty
18 staggering of how much turnover we're going to have as the
19 years go forward, so that would be my guidance.

20 CHAIRMAN BABCOCK: Well, but are you saying
21 we ought to revise the rules, or we ought to keep it the
22 way it is so that people --

23 HONORABLE DAVID EVANS: I was regretfully
24 saying, because I look forward to the debate, we should
25 just add language that requires a -- just mirror what

1 Senator Zaffirini did. We know she won't change it if we
2 mirror what she passed that requires a written report and
3 a discharge of duties.

4 CHAIRMAN BABCOCK: So you think a minor
5 change is in order.

6 HONORABLE DAVID EVANS: Regrettably.

7 CHAIRMAN BABCOCK: Okay. Well, Professor
8 Carlson, do you want us to take a vote on this or --

9 PROFESSOR CARLSON: Please.

10 CHAIRMAN BABCOCK: Okay. You want to frame
11 the question?

12 PROFESSOR CARLSON: Do you think
13 modification should be made to --

14 CHAIRMAN BABCOCK: Use your mike because
15 nobody can hear you.

16 PROFESSOR CARLSON: Do you think there
17 should be modifications made to Rule 244 or do you think
18 they should not?

19 CHAIRMAN BABCOCK: All those in favor of
20 making modifications to Rule 244, raise your hand.

21 HONORABLE DAVID EVANS: To include report?
22 Is it limited to that?

23 MS. WOOTEN: No. No.

24 HONORABLE DAVID EVANS: See, that's how we
25 got your vote. I knew that. That's how we got your vote.

1 You want to fight again.

2 CHAIRMAN BABCOCK: Everybody that thinks we
3 ought to keep the rule as it is, raise your hand.

4 HONORABLE DAVID EVANS: I'm going to vote
5 both ways then.

6 CHAIRMAN BABCOCK: Although there is certain
7 ballot box stuffing, nevertheless, the number of members
8 who vote to change is 17 and the number to leave the same
9 is 5, so there you get your direction.

10 PROFESSOR CARLSON: Okay. Then we will go
11 back to subcommittee, and I think we've got a lot of
12 comments to look at and try and reframe this in a way that
13 is more workable.

14 CHAIRMAN BABCOCK: Okay, great. Now, Levi
15 tells me that we should in addition to taking up the
16 eviction kit forms we should also look at civil rules of
17 municipal courts.

18 HONORABLE LEVI BENTON: So --

19 CHAIRMAN BABCOCK: No?

20 HONORABLE LEVI BENTON: Yes.

21 CHAIRMAN BABCOCK: Yes, okay.

22 HONORABLE LEVI BENTON: So Chief Justice
23 Hecht's letter to you, Chip, just asks for a
24 recommendation on how to proceed, and we're talking about
25 item 11 on the agenda.

1 CHAIRMAN BABCOCK: Right.

2 HONORABLE LEVI BENTON: Okay. So the
3 underlying story is that there's a municipal court judge
4 in San Antonio, Ryan Henry, who has communicated with the
5 Court and has asked the Court to clarify when and how the
6 Texas Rules of Civil Procedure apply in municipal courts.
7 So we're not asked today to address that specific point.
8 We're asked today just to make a recommendation on how to
9 proceed, and here's the recommendation: The committee
10 would like this committee or the Court to direct that the
11 510 -- the 500 to 510 subcommittee, with Judge Ryan Henry
12 and five or six other municipal court judges from across
13 the state, meet as often as necessary electronically or by
14 conference call to come up with recommendations for this
15 committee to clarify when and how the Rules of Civil
16 Procedure apply in municipal court.

17 CHAIRMAN BABCOCK: Is this -- is there a
18 time limit on this, or what -- by the next meeting or an
19 ongoing basis?

20 HONORABLE LEVI BENTON: I don't think we
21 need a time limit on it. Because so if this committee
22 says, yes, go forth and get the four or five municipal
23 court judges to give us recommendations, the subcommittee
24 will go forward, and we'll endeavor to try to have a
25 recommendation by the next meeting of this committee, but

1 we don't need -- we don't need a time limit, to be honest,
2 Chip. It's just go forth and get it done as soon as
3 practicable.

4 CHAIRMAN BABCOCK: Okay. I'm trying to find
5 the referral.

6 MS. DAUMERIE: There's no --

7 HONORABLE LEVI BENTON: It's --

8 CHAIRMAN BABCOCK: No, there is one. It's
9 the May 31, 2019 --

10 HONORABLE LEVI BENTON: Right.

11 CHAIRMAN BABCOCK: -- letter to me, and it
12 says, "Civil rules in municipal courts. Municipal court
13 Judge Ryan Henry has proposed that procedural rules be
14 adopted for civil cases" --

15 HONORABLE LEVI BENTON: Speak into the mike,
16 Chip.

17 CHAIRMAN BABCOCK: All right. That "Civil
18 rules in municipal courts. Judge Henry has proposed that
19 procedural rules be adopted for civil cases in municipal
20 courts. The committee should set up a process for
21 considering Judge Henry's proposals and making
22 recommendations." So your suggestion is that your
23 subcommittee invite Judge Henry and whatever other
24 municipal judges are interested in this process, and they
25 will tell you what they think should be done and then

1 you'll report to us?

2 HONORABLE LEVI BENTON: That's right.

3 CHAIRMAN BABCOCK: Okay. And you think
4 there should be no particular time limit, but it seems to
5 me that we ought to put you on the agenda for some
6 meeting. It doesn't have to be November, but there ought
7 to be some deadline by which time this group completes its
8 work.

9 HONORABLE LEVI BENTON: When is the next
10 meeting after the November meeting?

11 CHAIRMAN BABCOCK: We haven't scheduled
12 that, but why don't we say that whenever it is, that --
13 and you'll get notice of that, of course.

14 HONORABLE LEVI BENTON: That would not
15 offend my sense of justice.

16 CHAIRMAN BABCOCK: Okay. So we'll pass that
17 until the meeting after the next one. The next one is in
18 November in Houston, but it will be February -- January,
19 February, something like that.

20 HONORABLE LEVI BENTON: Okay.

21 CHAIRMAN BABCOCK: All right. Great. Now
22 eviction kits.

23 HONORABLE LEVI BENTON: Okay. Eviction
24 kits. Excuse me, Senator Zaffirini, another Zaffirini
25 bill, and that bill has been distributed to most of the

1 committee. I think we were short one or two. Instruct
2 that the Supreme Court to promulgate forms for use by
3 individuals representing themselves in residential
4 landlord-tenant matters. The Court formed a task force,
5 chaired -- I forget the name of the judge who chaired that
6 task force. They came back with recommendations. The
7 subcommittee has reviewed the task force proposed
8 instructions and forms and generally the subcommittee was
9 pleased with those forms.

10 The subcommittee had a couple of minor
11 recommendations, but I think perhaps I'd be best if I
12 yield to Trish McAllister, who has joined us around the
13 table. She's the representative from the Access to
14 Justice Commission, and I think Trish probably better than
15 I could describe where we are and what the committee --
16 the full committee should do.

17 MS. McALLISTER: Well, I can just tell you
18 the process that the Landlord-Tenant Task Force has gone
19 through for the eviction kit, and it's chaired by Judge
20 Villa in El Paso. Oh, thank you. Can everybody hear me,
21 or should I repeat? Okay. So this is a group, it's a
22 pretty broad group of people, landlord -- landlord groups,
23 tenant advocates, judges, JP court judges, appellate
24 court -- or not court of appeals, county court judges. So
25 they -- this is the first kit that they wanted to do, and

1 I mean, I think that the subcommittee that reviewed it
2 felt pretty good about the forms themselves.

3 There was a couple of things that they had
4 questions about. A couple of terms that they felt could
5 be made more -- more plain language. So one of the things
6 that they suggested was using the word "cancel" instead of
7 "terminate," but "terminate" has a particular meaning and
8 can also mean end, so we just decided that they were going
9 to do "terminate and/or cancel," so we'll make those
10 changes throughout the forms.

11 Then one of the other things that they --
12 that was suggested was to replace the word "primary" with
13 "main," which is a good idea. We didn't think about that.
14 And then the two other questions that came up were -- oh,
15 one other question that came up was whether the word
16 "tenant" should be replaced with "person renting the
17 home," but I think people are pretty familiar with the
18 words "landlord" and "tenant" because they're in all the
19 leases, so I don't think we are going to recommend making
20 any kind of a change on that.

21 The two -- the two bigger issues is the
22 word -- use of the word "default." There was a question
23 about whether or not the word "default" should be replaced
24 with "fail to make a payment," but default in
25 landlord-tenant situations is pretty tricky because you

1 can -- there's two concepts that go with it, which is, you
2 know, you can -- there's several different ways somebody
3 can default on their lease, which is they can fail to make
4 a rental payment, they can fail to make, you know,
5 payments on late fees, things like that; but they can also
6 have violated the lease in a variety of ways, having too
7 many people living there, too many pets, whatever. And
8 the other issue is that somebody could be violating their
9 lease. We thought about changing it to "violating," but
10 somebody could be violating their lease, but they're not
11 typically in default until the landlord says they're in
12 default, so -- so we just recommend leaving it that way.

13 We talked to some of the member -- you know,
14 some of the practitioners in this area, which there are
15 not that many actually that represent both the landlords
16 and the tenants. So that's -- that's that one, and then
17 the other question was whether the word "vacate" should be
18 replaced with "leave the home," but this was something
19 that was actually discussed at the -- in the task force
20 meeting, and they voted to use the word "vacate"
21 specifically because leave can mean, you know, just leave
22 and then you're actually returning, but vacate connotes
23 you leave and never come back. So they wanted to stay
24 with the word "vacate." But do you have anything else?
25 Judge Benton, do you have anything you wanted to add?

1 HONORABLE LEVI BENTON: No, I don't have
2 anything -- well, I'm sorry, I have one thing to add. On
3 the English versions, I personally am very satisfied with
4 the proposed forms. I'm happy with the committee's
5 recommendations, and I do think the -- this committee and
6 the Court should approve them and order them into use as
7 soon as practicable. Judge [sic] Zaffirini's bill also
8 instructed that we should put the forms in Spanish, and I
9 have no capacity to do that nor capacity to make
10 recommendations or suggestions, and we've not gone that
11 far yet. That -- that part of the instruction from the
12 Legislature remains to be addressed, I think.

13 MS. McALLISTER: The plan is -- I think we
14 had discussed it last time, too. The plan is once the
15 English versions get approved by the Court then we will
16 send them to probably Language Line and have them
17 translated into Spanish by a licensed Spanish interpreter.
18 Or translator, actually. And, you know, I think the best
19 course of action, the best practice in terms of form
20 generation is to have the English and then right
21 underneath that the Spanish in italics. Hopefully these
22 will become automated forms so that they will be sort of
23 like your TurboTax type forms soon, but we're not quite
24 there yet, but that is the best practice.

25 CHAIRMAN BABCOCK: Yeah, Judge.

1 HONORABLE STEPHEN YELENOSKY: Stephen,
2 Judge, whatever.

3 CHAIRMAN BABCOCK: Yeah. Stephen, Judge,
4 whatever.

5 HONORABLE STEPHEN YELENOSKY: I was on the
6 subcommittee, and generally I don't think there's a
7 problem, but the last point sort of highlighted for me the
8 issue of the language because when you do the Spanish
9 language version, are you going to do a translation that
10 is of the legal terms or something that people actually
11 understand in Spanish? And if you're going to do the
12 latter then why aren't we doing the latter in English?
13 Some of these terms, I agree, "tenant" makes sense.
14 "Vacate," well, vacation is the same root of that word, so
15 I always come back from vacation, but I don't know which
16 terms in English are necessarily understood other than
17 "tenant."

18 "Default" I don't think is understood. I
19 think you can say "failed to pay rent" or "failed to
20 comply with terms of the lease," and the point that, well,
21 they haven't defaulted until the landlord has brought it
22 to their attention. If the landlord hasn't brought it to
23 their attention then this isn't even within their thought.

24 MS. McALLISTER: Yeah.

25 HONORABLE STEPHEN YELENOSKY: So it only

1 becomes an issue when there's a claim of default.

2 MS. McALLISTER: I agree. And, you know, I
3 agree with the word "default," frankly, and I also agree
4 with the word "vacate." I mean, I personally don't have a
5 problem with changing those, those two. These were the
6 folks on the committee themselves, and so I'm tasked with
7 bringing you what they --

8 HONORABLE STEPHEN YELENOSKY: Yeah, and the
9 last one is "terminate" and "cancel." Actually, on that
10 one I think it should just be "terminate." I'm not sure
11 if "cancel" has connotation, legally anyway, precision or
12 something else.

13 HONORABLE LEVI BENTON: So, Chip, I felt
14 obliged to raise the issue of the Spanish translation, but
15 having done that, I think what we should do is pause on
16 the translation. The committee should vote to approve the
17 forms with the subcommittee's minor changes so that the
18 Court can at least get on down the road with the plain
19 English forms, and the committee should be charged with
20 coming back in November with the Spanish translation.
21 That's my recommendation.

22 CHAIRMAN BABCOCK: Okay. Would you and/or
23 Trish go over the changes to the forms that the
24 subcommittee is recommending again?

25 HONORABLE LEVI BENTON: Trish, may I invite

1 you?

2 MS. McALLISTER: Oh, sure. We will -- the
3 changes to the forms are basically to the two that
4 everybody wanted to have were just to replace the word
5 "terminate" with "terminate or cancel"; replace the words
6 "primary" throughout with "main"; leaving "tenant" the
7 same; and then, you know, we could revisit the "default"
8 and "vacate," but that is what I was asked to bring to
9 you.

10 CHAIRMAN BABCOCK: Revisit, who do you mean,
11 us or --

12 MS. McALLISTER: No. Revisit with the
13 subcommittee or something, if y'all want me to.

14 HONORABLE LEVI BENTON: I didn't hear your
15 question, Chip.

16 CHAIRMAN BABCOCK: She said it's up in the
17 air about whether "default" should be changed to "vacate."

18 HONORABLE LEVI BENTON: Yeah, I wasn't aware
19 of that. I thought we just had two recommendations. So
20 wherever the form uses the word "terminate" we're going to
21 replace that one word with "terminate or cancel"; and
22 wherever the forms use the word "primary" we're going to
23 substitute the word "main" like primary residence versus
24 main residence.

25 CHAIRMAN BABCOCK: Yeah. And "default" --

1 HONORABLE STEPHEN YELENOSKY: Default is --

2 CHAIRMAN BABCOCK: It's up in the air

3 whether we change that to "vacate."

4 HONORABLE STEPHEN YELENOSKY: No, "default"

5 is to change, Trish has it, but "fail to pay rent" or --

6 the "vacate" goes to whether it should say "vacate,"

7 "leave the home" or something else. But the "default" was

8 should it say something more than "fails to pay rent,"

9 and, Trish, you can pick up on that.

10 HONORABLE LEVI BENTON: Well, you can

11 default in ways other than paying rent.

12 HONORABLE STEPHEN YELENOSKY: Yeah, which is

13 why I suggested "fails to pay rent or fails to comply with

14 the lease."

15 HONORABLE LEVI BENTON: I'm okay with that.

16 CHAIRMAN BABCOCK: Okay. So those are the

17 three changes. Justice Gray.

18 HONORABLE TOM GRAY: I hesitate to even say

19 this, but you've got a document titled "Lease termination

20 after Foreclosure Notice." Is that going to have "lease

21 termination/cancellation"?

22 MS. McALLISTER: No. So here -- no,

23 probably not on that one. Let me just also be real clear.

24 On this packet has every single form you would possibly

25 need if you were either a landlord or a tenant including

1 in the most remote situations. So these lease termination
2 after foreclosures, they don't happen all that often; and
3 they're going to be brought by people who kind of know
4 what they're doing, and so I'm not so worried about
5 "termination"; and also I think "termination" actually is
6 a fairly common word people know because Terminator, you
7 know, I mean, people just kind of know this stuff.

8 HONORABLE STEPHEN YELENOSKY: That's where I
9 learned it.

10 MS. McALLISTER: You know, I'm just looking
11 at it from the clients that I had when I was at Legal Aid,
12 did my clients know what terminate meant, did they not
13 know what terminate meant, they knew what terminate meant.
14 They didn't know "vacate," and they don't necessarily know
15 "default" as well, so I agree that, you know, we can find
16 a little bit simpler language on that.

17 HONORABLE STEPHEN YELENOSKY: Why don't we
18 just stick with "terminate"?

19 MS. McALLISTER: Okay. That's fine. I was
20 accommodating I think it was -- I can't remember whose
21 comment was on the subcommittee.

22 HONORABLE TOM GRAY: Well, now I'm confused
23 because the next instruction is "Notice to vacate prior to
24 filing eviction." Is that a title that is not going to
25 change? Or is that -- are you going to change the word

1 "vacate" there? And I'm just trying to make this clear so
2 that the rules committee understands what it is we're
3 about to agree to.

4 MS. McALLISTER: Yeah. We'll need to
5 change -- if we're going to -- if we're going to revisit
6 the "vacate" we'll need to change the language throughout
7 on the titles, yeah.

8 HONORABLE TOM GRAY: Your titles as well.

9 MS. McALLISTER: Yeah.

10 CHAIRMAN BABCOCK: Yeah, Frank.

11 MR. GILSTRAP: The bill talks about
12 residential landlord-tenant matters and it talks about
13 multiple sets of forms. It looks like we've got two sets
14 of forms, one for eviction, one for lease termination
15 after foreclosure. Is that all that's here, and is that
16 all that's coming?

17 MS. McALLISTER: This is all that's here for
18 it, because the lease termination after foreclosure, you
19 actually have to evict the person, so that's the reason
20 why it's in the eviction kit, but there are also other
21 things that are going to be coming in front of the group
22 for different things like lockouts and utility cut-offs,
23 things like that. But this is probably the most needed
24 kit in the landlord-tenant area, which is why we brought
25 this one first.

1 HONORABLE TOM GRAY: And there were
2 landlords involved in the group --

3 MS. McALLISTER: Yes. Yeah.

4 HONORABLE TOM GRAY: -- that proposed this.

5 MS. McALLISTER: Yeah. The Texas Apartment
6 Association was involved. The Texas Realtors were
7 involved. There were folks that, you know, REPTL folks
8 were involved that represent tenant-landlords, and two
9 folks that represent tenants.

10 CHAIRMAN BABCOCK: Judge Estevez told me
11 before she left -- and I think she did leave, right? That
12 she had a lot of comments about this. Does anybody recall
13 what they were?

14 MS. McALLISTER: These are the comments.
15 These are her comments.

16 HONORABLE LEVI BENTON: Her comments were
17 the first wave. They were modified by Trish's
18 recommendations, and then the last electronic word from
19 Judge Estevez was that she was fine with Ms. McAllister's
20 modifications.

21 CHAIRMAN BABCOCK: Okay.

22 HONORABLE LEVI BENTON: And she'll read
23 that, and she'll concur.

24 CHAIRMAN BABCOCK: Okay. Any other comments
25 about these, these forms?

1 MS. McALLISTER: The only comment I have is
2 that with the suggestion that we come back in November, I
3 don't know if that's realistic because we -- we -- it's
4 very expensive to translate forms, just to give you word,
5 so I would like to suggest that we do the translation
6 after the Court approve the forms. So I don't know when
7 that --

8 HONORABLE LEVI BENTON: Yeah. That makes
9 sense. We can't translate until the Court says go forth
10 and translate these approved forms.

11 CHAIRMAN BABCOCK: And exactly what would
12 this committee have to say about the translation?

13 MS. WOOTEN: No mas.

14 HONORABLE LEVI BENTON: I don't know how
15 many people on this committee read Spanish or speak
16 Spanish, so I don't know that I can answer that question,
17 Chip.

18 CHAIRMAN BABCOCK: Judge Yelenosky.

19 HONORABLE STEPHEN YELENOSKY: Well, are we
20 trying to get approval right now from this committee as to
21 the English language, because we posed some options here?
22 We haven't take any vote on it, and I'm not suggesting
23 that we do, but if we don't have to do it right now, then
24 we can as a subcommittee can draft -- redraft it in those
25 minor ways and bring it back in November. If the

1 committee approves it then it goes for translation, and
2 typically that's been considered really a technical
3 action, and anybody who speaks Spanish or reads Spanish
4 well enough who wants to look at it, then that doesn't
5 require the committee to vote because this committee as a
6 whole doesn't have the expertise to make a decision as to
7 one Spanish version or another.

8 CHAIRMAN BABCOCK: Yeah, following up on
9 that point, I don't know about the translation piece of
10 it, but I do think that the full committee hasn't had much
11 of an opportunity to look at these forms, and it sounds
12 like there were already some agreed changes that are going
13 to be made based on subcommittee comments that are not
14 here. So subject to the urgency of getting this done, I
15 wonder if we should not bring this back in November with
16 the forms as modified by -- by the subcommittee of this
17 committee so that the full committee can have some time to
18 study it and comment. But if there is a time urgency
19 then, you know, we've done the best we can. Judge, what
20 do you -- or, Trish, what do y'all think? Timingwise I
21 mean.

22 HONORABLE STEPHEN YELENOSKY: I think we can
23 tell you now orally what the changes would be, and I think
24 Levi has suggested that, and other than that obviously if
25 you think it needs more discussion, fine, but if it's just

1 those changes that are under consideration, I think we
2 almost reached consensus on that, but we could read them
3 off and vote one, two, three, and then move ahead with the
4 English version.

5 CHAIRMAN BABCOCK: Okay.

6 MS. McALLISTER: I guess my suggestion would
7 be the only things we're really talking about are
8 "default" and "vacate," and to the extent that we've
9 talked about substitutions for those here, you know, I'm
10 fine with them. The only thing that I really would like
11 to do is because I don't practice in this area I just want
12 to make sure that there's not some reason, specific
13 reason, that we couldn't go with the suggested language
14 here. So we've done this before, which is, you know,
15 maybe we -- on these very two things we could get back
16 with the subcommittee, and if everybody is fine with them,
17 then we could just submit them with the Court, because I
18 know we've done that in other situations where they're
19 minor changes. That would be my suggestion, would be to
20 work with the subcommittee until we get these two little
21 tweaks done and send them over to the Court unless you
22 guys would prefer not obviously.

23 CHAIRMAN BABCOCK: Yeah. Well, I'll -- that
24 should be done, no matter what we do about November, but
25 why don't you plan on doing that as expeditiously as y'all

1 can, and then I'll confer with the Court about whether
2 there's more input needed from the full committee. How
3 about that?

4 MS. McALLISTER: Sounds great.

5 CHAIRMAN BABCOCK: And if the Court believes
6 there is then you'll see it on the November agenda. If
7 the Court believes there's not, then you won't.

8 MS. McALLISTER: Perfect. Thank you.

9 CHAIRMAN BABCOCK: Okay, great. So that
10 will take care of that. And, Pam, do you want to start
11 tackling suits affecting the parent-child relationship, or
12 do you want to defer?

13 MS. BARON: Well, Bill Boyce is heading this
14 up for our subcommittee, so I will ask him that question.

15 HONORABLE BILL BOYCE: I'm happy to
16 introduce the topic, and we can start the discussion. I
17 think we've probably got more than 40 minutes of
18 introduction and discussion. I'll follow your lead, Chip,
19 about how you want to --

20 CHAIRMAN BABCOCK: Let's use the time that
21 we have. So fire away.

22 HONORABLE BILL BOYCE: All right. So the
23 appellate rules subcommittee has looked at a group of
24 issues that were referred in the Chief Justice's May 31st
25 referral letter around procedures and issues related to

1 appeals in cases involving the termination of parental
2 rights, constitutionally protected right in some
3 circumstances when the government is seeking termination
4 or other actions. There's a statutory right to counsel,
5 and this has given rise to a group of related issues also
6 affected by the circumstance that there are significant
7 time limits for determining appeals in these particular
8 cases, and these factors come together to create
9 difficulties in a couple of circumstances.

10 The participants in these proceedings, the
11 parents, may be unstably housed. They may be difficult to
12 find. They may be in and out of incarceration, depending
13 on the circumstances, and so we have a combination of
14 significant rights needing protection, tight timelines,
15 occasionally and not infrequently difficulties in finding
16 and communicating with the clients, leading to a number of
17 different questions. Some of those questions addressed in
18 the referral talk about how to handle out of time appeals
19 occurring against the backdrop of the accelerated
20 timetables. In the circumstance that when the appeal is
21 untimely, there may be a contention that the delay results
22 from ineffective assistance of counsel, and so the
23 potential referral topics cover some additional ways to
24 try to address that. Do we have a specific narrow late
25 appeal procedure for this subset of cases, do we have some

1 kind of abate and remand procedure, do we have a bill of
2 review style procedure, or other steps.

3 An additional backdrop for this discussion
4 is the House Bill 7 task force that was appointed to draft
5 rules in connection with statutes -- statutory changes
6 passed by the 85th Legislature. That task force has
7 produced two reports, a phase one report and a phase two
8 report. The phase two report recommend changes affecting
9 the appellate rules in that they also interact with the
10 out of time appeal issue involving right to counsel, folks
11 showing authority as counsel to pursue an appeal, how to
12 handle frivolous appeals. A procedure in the court of
13 appeals for considering ineffective assistance of counsel
14 claims, rules addressing how an Anders brief type
15 procedure might be used when an appeal is available as of
16 right, but counsel has a good faith belief that there's no
17 nonfrivolous grounds to pursue it, and then relatedly
18 opinion templates for use in parental termination cases.

19 The full committee has looked at aspects of
20 this area before, including a prior report, a July 2017
21 report, on late filed petitions for review in this area
22 that is one facet of the larger appellate considerations.
23 Those July 2017 proposals are pending before the Supreme
24 Court, and the indication is that the topics that we
25 address and vote on as we work our way through this list

1 of issues would be consolidated with that process as well
2 so that we're looking at a comprehensive presentation of
3 recommendations to the Court for dealing with different
4 facets of these issues, both in intermediate courts of
5 appeals and in the Texas Supreme Court.

6 So if you want a road map for how we propose
7 to have this discussion unfold, if you look at page two of
8 the September 5 memo, under "Issues for discussion," we
9 tried to take the different topics captured by the
10 referral and break them down into stages and parts and
11 subparts. So we've got stage one, out of time appeals and
12 related issues. Subsection A, one portion of the House
13 Bill 7 gave these two recommendations involving counsel on
14 appeal, notice of right to appeal, and authority to
15 appeal.

16 The next stage would be assessing proposals
17 for addressing the untimely appeal issues and ineffective
18 assistance claims, and that covers the potential areas
19 that I listed off earlier about different ways to try to
20 address that. Stage two will focus on briefing in
21 opinions and Anders procedure, discussing that for cases
22 in which counsel believes that there is a right to appeal,
23 but there's no nonfrivolous grounds to pursue, briefing
24 approaches, briefing checklists, and then opinion
25 templates.

1 So to break this down into manageable
2 portions and get the discussion underway, the committee
3 decided as a step one to focus on stage one, subsection A
4 on the issues for discussion, and that's what this
5 September 5 memorandum focuses on starting on page three.
6 So really the areas that this memo discusses that we can
7 start discussing today actually dovetail pretty nicely
8 with the discussions that we had earlier in this meeting
9 with respect to what we're trying to accomplish in terms
10 of service and notice. Obviously this is the contents of
11 citation. This is not the mechanics of citation, but it
12 dovetails because these two are situations that can
13 involve defaults. Important rights are at stake, and so
14 we'll unpack that a little bit. The discussion addressed
15 in the September 5th memo really has two portions to it.
16 I'll introduce them both and then we can start the
17 discussion that I anticipate is going to carry forward.

18 With respect to notice of right to appeal
19 and notice of right to representation by counsel, there is
20 a statutory right to counsel when the suit is filed by a
21 government entity seeking termination of the parent-child
22 relationship or appointment of the government entity, the
23 CPS entity as conservator. The indigent parent, whose
24 rights are sought to be terminated, is entitled to
25 representation by counsel.

1 The House Bill 7 task force addressed this
2 by making a recommendation regarding inclusion of indigent
3 parent's notice of the right to appeal and the right to
4 counsel on appeal in the form of citation, and I'm going
5 to take a brief detour here to highlight the fact that
6 there has been separate discussions under Richard
7 Orsinger's subcommittee with respect to form of citation
8 and recommendations about amendments to Rule 99. And the
9 base -- and just to be specific about it, I'm looking at
10 an October 2017 report of the Rules 15 to 165a
11 subcommittee entitled "Modernizing Texas Rule of Civil
12 Procedure 99 issuance and form of citation." The main
13 recommendation here with respect to the form of citation
14 was a recommendation after serving rules in a number of
15 states and jurisdictions to reform, revise, Rule 99. As
16 presently constituted Rule 99 describes in more general
17 terms the types of information that need to be in the
18 citation, and the recommendation was to replace the
19 description of the types of information and instead
20 promulgate forms of citation, specific forms of citation
21 specifying the information that should be contained that
22 the clerks should issue, and so the recommendations that
23 we're going to discuss in terms of parental termination
24 citation dovetail with that recommendation, because the
25 House Bill 7 task force has specific citation language

1 that is recommended for the parental termination context
2 to apprise the parent that you have a right to counsel and
3 you have a right to appeal.

4 If you look at page three of the September 5
5 memorandum, you'll see proposed language that House Bill 7
6 task force came up with to put in the citation to make
7 sure that the parent is receiving multiple opportunities
8 to understand both the right to counsel and the right to
9 appeal, and so in addition to kind of the boilerplate
10 language about you have been sued and so on and so forth,
11 it would go on and say, "You have the right to be
12 represented by an attorney. If you're unable to afford
13 one, you have the right to request an appointment." It
14 also goes on to say -- I'm not going to read the entirety
15 of it. It's there in the memo, but it goes further to
16 say, "And you have a right to appeal," and then there's
17 the reference there to the separate discussion that I just
18 mentioned about revisions to Rule 99 to include
19 standardized form citations.

20 The subcommittee has reviewed the House Bill
21 7 task force recommendation in terms of the language
22 for -- proposed language for the citation; and if you go
23 to the top of page four of the memorandum, you'll see
24 reprinted there the House Bill 7 task force recommendation
25 with a small tweak, and I think this was Professor

1 Carlson's suggestion. At the bottom of the first
2 paragraph the task force recommendation language was, "If
3 the court determines you are indigent and eligible for
4 appointment of an attorney, the court will appoint an
5 attorney to represent you." The suggested addition is "at
6 no cost to you." That makes it parallel with the
7 following paragraph, which contains the same reference to
8 "at no cost to you," and it puts more in plain language
9 terms what it means to be eligible for appointment of an
10 attorney. That language by itself doesn't necessarily
11 indicate what happens when the attorney is appointed.
12 This makes it clear, "appointed at no cost to you."

13 So there were -- there was some discussion,
14 and I guess this parallels the plain language discussion
15 that we had just now in terms of the eviction forms and in
16 other contexts, about whether the use of the word
17 "indigent" is helpful or needs further consideration when
18 the goal is to provide notice to nonlawyers whose
19 important rights are going to be litigated, whether the
20 word "indigent" really captures what we want to
21 communicate. We had some discussion on the subcommittee
22 about whether a more plain language term such as "poor" or
23 "financially unable to pay for it," something along those
24 lines would be appropriate in place of the term
25 "indigent." That's a legal term well known in many

1 contexts for lawyers and the courts, perhaps less apparent
2 to the people who would be receiving proposed forms of
3 citations. And Pam remembered that there was a discussion
4 that we had somewhat briefly at a prior meeting, the June
5 meeting, in conjunction with name change forms and about
6 whether "poor" was an appropriate or a useful term to use,
7 whether that conveyed an appropriate meaning, whether it
8 has any pejorative connotations, whether it's too informal
9 and imprecise, those types of discussions.

10 And so I think that's an introduction to the
11 first portion of this report, and I guess I would ask,
12 Chip, for your guidance. Do you want me to introduce the
13 second part, or do you want me to start with discussion
14 from the committee about reactions to this, this first
15 piece of it?

16 CHAIRMAN BABCOCK: I would rather have
17 reaction to this first piece because I noticed -- not
18 because I noticed, but on the -- on page three, your
19 proposed language, you have "at no cost to you" in the
20 second paragraph but not in the first paragraph.

21 HONORABLE BILL BOYCE: Yes.

22 CHAIRMAN BABCOCK: And so then you move over
23 to page four, and you have it in both paragraphs.

24 HONORABLE BILL BOYCE: Correct. And that
25 was the subcommittee's consensus about a proposed change

1 to the House Bill 7 task force proposal on what the
2 expanded citation language might look like.

3 CHAIRMAN BABCOCK: Yeah, great.

4 HONORABLE BILL BOYCE: So I guess the larger
5 question that would be -- that would kick off the
6 discussion and inform the subcommittee's discussions is
7 whether or not that particular change or any other
8 specific language should be considered for inclusion in an
9 expanded citation form, and I guess that is a subset of
10 the larger question about the sub -- the full committee's
11 views about the utility and the cost benefit of having an
12 expanded citation form with this much more specific
13 information in it.

14 CHAIRMAN BABCOCK: Great. Pam, were you
15 waving to say hi or --

16 MS. BARON: I was waving bye.

17 CHAIRMAN BABCOCK: Oh, bye. Okay. All
18 right. Great. Chief Justice Hecht.

19 CHIEF JUSTICE HECHT: And let me just add as
20 an aside, these cases are about 12 to 15 percent of the
21 Supreme Court's docket, and --

22 HONORABLE TOM GRAY: It's your own fault.

23 HONORABLE TRACY CHRISTOPHER: I was going to
24 say down here --

25 CHIEF JUSTICE HECHT: I don't know how much

1 of the courts of appeals docket they are, but they get
2 more of them than we do obviously, so it's gotten to be a
3 big issue. In the late Nineties if we got four parental
4 rights termination cases a year, it was a lot, and now we
5 get four a week, so it's a lot of them.

6 HONORABLE TRACY CHRISTOPHER: But that's
7 because you said they had to go to you.

8 CHAIRMAN BABCOCK: Robert.

9 MR. LEVY: A couple of questions. One is
10 I'm just wondering what the time frame is between the
11 actual district court proceeding and then the appeal. My
12 sense is that if you put the notice of the right to appeal
13 and the appointment of counsel in the citation, most pro
14 se parties are not going to remember that by the time the
15 appeal comes around, so I just don't know how effective
16 the notice would be versus thinking about, you know, some
17 process to notify them towards the end of the case that
18 they have the right to appeal. I just wonder if that
19 would be truly effective, and also, I wonder do you have a
20 right to appeal to the Supreme Court, or do you have the
21 right to seek the Supreme Court's review?

22 And so I think if we put the language that
23 says you have the right to appeal, that's misleading that
24 you have the right to request review, and -- and the other
25 point is that in the -- I know that you have a process in

1 family court. If you are indigent, you do an affidavit to
2 file a divorce petition, and I believe it does reference
3 indigency in those forms. So I think that that is a term
4 that people understand, and I, frankly, would prefer that
5 term over the reference of "poor." I think "poor" does
6 have a negative connotation, and but I guess the question
7 is do we need that detail in the affidavit -- or, I'm
8 sorry, in the citation, rather refer them to the process
9 of seeking -- you know, you can seek to have an attorney
10 appointed for you, but that process is in other forms with
11 the detail, because you know, the affidavit and then, you
12 know, proving it up and all of that seems a little bit
13 more detailed than a citation might warrant.

14 CHAIRMAN BABCOCK: Yeah, Steve.

15 HONORABLE STEPHEN YELENOSKY: I think last
16 time -- and you'll remember it was Trish bringing it up
17 when we were talking about the terms, and I think I spoke
18 up, too, about it. I don't know to be consistent where
19 "indigency" is used elsewhere other than perhaps an
20 affidavit of indigency, but I don't think for my clients
21 who -- I represented poor clients for 10 years. I don't
22 think "poor" was derogatory. And it's clear. "Indigent"
23 is fine, too. It may not be as clear to people who are
24 poor, but is Trish still down there?

25 CHAIRMAN BABCOCK: No.

1 HONORABLE STEPHEN YELENOSKY: Oh, okay.
2 Well, I can't speak for her then, but I think I said that.

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

5 MS. WOOTEN: On page four, kind of
6 piggybacking on what Robert said in regard to when you're
7 entitled to representation and for what, I wonder whether
8 it would be clearer to strike the first sentence,
9 because --

10 HONORABLE BILL BOYCE: I'm sorry, the first
11 sentence of which one?

12 MS. WOOTEN: The first sentence of the first
13 paragraph. "You have the right to be represented by an
14 attorney." Because you only have the right to be
15 represented by an attorney if you're indigent.

16 HONORABLE TOM GRAY: No.

17 MS. WOOTEN: Right?

18 MR. LEVY: Everyone has the right to be
19 represented, but you have the right to have counsel
20 appointed if you're --

21 MS. WOOTEN: Oh, okay. So maybe I stand
22 corrected. In that first paragraph of the discussion I
23 thought it was narrower. So everybody has the right and
24 then indigency is the prong for appointment. Okay.

25 Then one small, small nit in the first

1 paragraph after "claim indigence," I would just put a
2 comma. In terms of "indigent" as a term that might be
3 confusing, I do feel like most people don't really know
4 what that means; and so I would say that if we're going to
5 use the term it might be worthwhile to provide some sort
6 of explanation.

7 CHAIRMAN BABCOCK: Judge Wallace, and then
8 Hayes.

9 HONORABLE R. H. WALLACE: How about just
10 "unable to afford an attorney"? That's what it is.
11 That's the language.

12 CHAIRMAN BABCOCK: No, that's too simple.

13 HONORABLE R. H. WALLACE: Well, that's the
14 Miranda warning you get, "if you are unable to afford an
15 attorney."

16 CHAIRMAN BABCOCK: Yeah.

17 MS. WOOTEN: Well, I did wonder if we could
18 strike -- because it says right now, it says, "If you are
19 indigent and unable to afford an attorney," implying that
20 they're two separate concepts.

21 CHAIRMAN BABCOCK: Hayes.

22 MR. FULLER: I think you could do that
23 because if you were to strike "indigent," just go with "if
24 you are unable to afford an attorney," down below in the
25 last sentence, you could substitute "unable to afford an

1 attorney" for "indigent," because the "eligible for
2 appointment of attorney if the court determines" you're
3 still going to protect -- you're still going to keep the
4 system in place.

5 MS. WOOTEN: Uh-huh.

6 MR. FULLER: In other words, they don't get
7 to determine --

8 HONORABLE STEPHEN YELENOSKY: Right.
9 That's --

10 MR. FULLER: -- what unable to afford is.

11 CHAIRMAN BABCOCK: Justice Christopher, and
12 then Judge Yelenosky.

13 HONORABLE TRACY CHRISTOPHER: Well, if we
14 want to make it useful, we should require that the form
15 affidavit of indigence be included.

16 MS. WOOTEN: Uh-huh.

17 HONORABLE TRACY CHRISTOPHER: Because the
18 vast majority of these cases are indigent parents, and
19 that would just make it a little bit easier for them not
20 to have to find it.

21 MR. LEVY: And do you have to do a form at
22 every level?

23 HONORABLE TRACY CHRISTOPHER: Well --

24 MS. BARON: No. You don't.

25 HONORABLE STEPHEN YELENOSKY: Not under the

1 current rules.

2 CHAIRMAN BABCOCK: Steve.

3 HONORABLE STEPHEN YELENOSKY: Well, I was
4 just going to say, if you say, "unable to afford," yes,
5 then there's the subjective thought about that, is I'm
6 unable to afford an attorney, but it is true that the vast
7 majority really are unable to afford an attorney on
8 objective standards.

9 MR. FULLER: Plus when you get down to the
10 second part, the court has to agree with it.

11 CHAIRMAN BABCOCK: Justice Gray.

12 HONORABLE TOM GRAY: My recollection is that
13 most of these cases do not start with termination or
14 managing conservatorship as the objective, and I don't
15 remember what paperwork gets served prior to that
16 determination and then whether or not a new citation is
17 required when the department makes the transition that
18 termination and/or managing conservatorship is now the
19 goal, and that is the point at which they are entitled to
20 counsel. It's not prior to that. So the timing of this
21 citation is going to be critical to that process, because
22 they're probably already engaged with the department in
23 some type of services, and so that's a -- that's part of
24 the problem with this in understanding it.

25 In a criminal arena we have a form that has

1 had kind of mixed success. It's the certification of the
2 right to appeal, and in that form the CCA has mandated
3 that they be advised of their right to appeal, and they
4 have to sign that form at the judgment, and it's most
5 often signed when the judgment is pronounced in court,
6 when the sentence is pronounced. And so you wind up with
7 a document in the file that advises them of their right to
8 appeal, and I think that we should really study that in
9 connection with this process as well, because it does give
10 you a piece of paper, and it does give you a confirmation,
11 and what I would like to see because of what I see in our
12 docket at the Tenth Court is a statement by the parent
13 whose rights have been terminated that they not only know
14 they have the right to appeal, but whether or not they
15 want to appeal, because we have a fair number --
16 anecdotally I would say probably 25 percent of the appeals
17 that we see where the attorney has lost contact with their
18 client, and I think there should be a statement by the
19 party, because they were there at one point, that they do
20 want to appeal before they go through this whole process,
21 that they've got to ask for the attorney. They have to
22 ask for the appeal, and if they don't or they've lost --
23 you know, they've moved on and they've lost contact with
24 their attorney, that they walk away from it. I mean,
25 they've abandoned it at that point.

1 If y'all are interested I can give you the
2 citation to a case that we issued in August that they
3 never did find the father before trial. They didn't
4 introduce any evidence to support the termination at
5 trial. They just all agreed to terminate, and they
6 terminated his rights, and then the ad litem filed a
7 notice of appeal to protect his rights, and when it came
8 time to file the brief, the ad litem filed a motion for
9 extension of time to file the brief and a motion to
10 withdraw. And the motion to withdraw was granted, and the
11 judgment was affirmed, and I'm screaming bloody murder in
12 a dissent because the guy, if he was -- and they actually
13 kind of knew where he was. It was funny the AG's office
14 had always been able to find this guy and get him served
15 for past due child support, but they couldn't find him to
16 terminate his parental rights. It's just amazing.

17 So, anyway, this whole concept of a CRA --
18 the certification of the right to appeal and the fact that
19 I actually want to appeal needs to be part of that, and
20 then to further what Hayes was talking about on the
21 determination, if you take out the word "indigent" and in
22 the first paragraph you can take out "indigent" and at the
23 last sentence, and it makes it parallel and that the trial
24 court is making the determination of eligibility for
25 appointment. That's it.

1 CHAIRMAN BABCOCK: Frank. Thanks, Judge.

2 MR. GILSTRAP: Maybe it's because I'm
3 sitting next to Commissioner Sullivan, but I'm suddenly
4 overtaken by a passion for plain language, and with these
5 revisions, it ain't plain at all.

6 MS. WOOTEN: Yeah.

7 MR. GILSTRAP: I mean, why don't you say,
8 "You have the right to a lawyer. If you can't afford
9 lawyer, the court will give you one if you sign the
10 affidavit. If the court takes your child away from you,
11 you have a right to an appeal." I mean, this is
12 gobbledygook.

13 CHAIRMAN BABCOCK: Okay. Commissioner.

14 HONORABLE KENT SULLIVAN: I think the most
15 important thing that we need to do in an arena like this
16 is be practical. I agree with Frank's comments, and I was
17 also going to agree with Tracy's comment, and that is
18 there's nothing that's going to be more practical for
19 someone who is trying to navigate this who meets the
20 description that has been made to have ready access to a
21 form they need to file in order to get that process
22 started and get a determination made as to whether or not
23 they meet the test for obtaining that, a court appointment
24 of a lawyer.

25 CHAIRMAN BABCOCK: Kennon.

1 MS. WOOTEN: I want to make a similar
2 comment and say that the language here is somewhat hard to
3 understand. In addition to the terms we've discussed
4 already, I think telling somebody that they have to appear
5 in opposition to a suit in order to have rights is
6 confusing.

7 One additional thing I'll just share with
8 this committee is that recently the State Bar Court Rules
9 Committee proposed amending the citation language to
10 direct people to rules that are available free of charge
11 online, for example, on the Texas Supreme Court's website,
12 because so often we tell people about their rights, but
13 don't give them any context for assessing those rights.
14 So in addition to having a form affidavit, I think
15 directing people to free searchable rules might be
16 worthwhile, particularly in this context.

17 CHAIRMAN BABCOCK: Okay. Robert.

18 MR. LEVY: Just picking up on Judge Evans'
19 comment. I think that the way to immediately solve the
20 issue of notifying a party of their right to appeal is to
21 include language that that right should be stated in the
22 order terminating the parent-child relationship, because
23 that's -- and that presumably has to be served on them as
24 well, but that -- that is important for the appellate
25 right. For the trial court right obviously there should

1 be language in the citation, but I do wonder how that
2 process gets kicked off if there's already an existing
3 proceeding taking place. Do they have to be reserved
4 through a citation if -- if a proceeding that involves
5 like a child being removed from the home because of some
6 exigency, and then they serve -- do they have to serve
7 them with a citation saying now we're going to take your
8 rights -- your parent rights away?

9 CHAIRMAN BABCOCK: Okay. Great. Well, I
10 think we're at the point of adjournment. I think this has
11 been a great discussion, and for the sake of reminding
12 myself and Marti, we'll pick this up as the first item
13 when we meet in November. And that meeting is November 1
14 and 2, Saturday morning, at the South Texas College of Law
15 thanks to Professor Carlson and her colleagues, right?

16 PROFESSOR CARLSON: Yes. And I just want to
17 say if you need to park, the parking lot is behind the
18 school, and if you push the button security will let you
19 in.

20 CHAIRMAN BABCOCK: Okay. Great. Well,
21 thanks, everybody. I think we've had a productive day and
22 a half, and thanks for hanging in there, the 20 of you who
23 have hung in there. We're adjourned.

24 (Adjourned)

25

1 * * * * *

2 **REPORTER'S CERTIFICATION**
3 MEETING OF THE
4 SUPREME COURT ADVISORY COMMITTEE

5 * * * * *

6
7
8 I, D'LOIS L. JONES, Certified Shorthand
9 Reporter, State of Texas, hereby certify that I reported
10 the above meeting of the Supreme Court Advisory Committee
11 on the 14th day of September, 2019, and the same was
12 thereafter reduced to computer transcription by me.

13 I further certify that the costs for my
14 services in the matter are \$ 823.75.

15 Charged to: The State Bar of Texas.

16 Given under my hand and seal of office on
17 this the 14th day of October, 2019.

18
19 /s/D'Lois L. Jones
20 **D'Lois L. Jones, Texas CSR #4546**
21 Certificate Expires 04/30/21
22 P.O. Box 72
23 Staples, Texas 78670
24 (512)751-2618
25

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