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**MEETING OF THE SUPREME COURT ADVISORY COMMITTEE**

August 11, 2017

(FRIDAY SESSION)

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

# INDEX OF VOTES

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

## Documents referenced in this session

17-13 Judges' Use of Social Media (Proposal), 8-8-17

17-14 Code of Judicial Conduct-Pre-2002 and Current Canon 5; Canon 3B(10)

17-15 Rules of Engagement - Texas Bar Journal article

17-16 ABA Formal Opinion

17-17 TAJC Report Amendment and Policies, 6-6-17

17-18 TAJC Proposed Amendment to Code of Judicial Conduct with Combined Exhibits, 5-2-16

17-19 Memo on Suggested Changes to TRCP 145, 4-23-17

17-20 Subcommittee Report on Amendment to TRAP 24, 7-20-17

17-21 Subcommittee Report on TRAP 11, 7-20-17

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CHAIRMAN BABCOCK: Sounds like a win-win.

CHIEF JUSTICE HECHT: Sounds like a win-win. The great concern in all of this had been that revenue would go down, and of course, that would be a concern to the local governments who keep about two-thirds of the money. The other third goes to the state, but at least preliminarily the rules seem to be operating very well.

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

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

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

CHAIRMAN BABCOCK: So it makes you old.

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

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

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

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

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

has been kind of a challenging year for them.

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

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

Another issue that the chiefs are concerned

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

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

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

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

(Applause)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CHAIRMAN BABCOCK: All right.

HONORABLE DAVID PEEPLES: Discussion?

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

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

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

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

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

CHAIRMAN BABCOCK: Robert, and then Frank.

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

think people that go into it should be aware.

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

CHAIRMAN BABCOCK: Frank.

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

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

CHAIRMAN BABCOCK: Hip?

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

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

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

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

CHAIRMAN BABCOCK: Kennon, are you ready to talk?

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

HONORABLE DAVID PEEPLES: Why "platforms"?

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

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

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

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

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

HONORABLE DAVID PEEPLES: Okay.

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

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

CHAIRMAN BABCOCK: Does the -- is it the

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

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

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

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

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

CHAIRMAN BABCOCK: Poison-tipped arrow.

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

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

from?

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

CHAIRMAN BABCOCK: Right.

HONORABLE DAVID PEEPLES: -- that case.

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

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

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

provisions, I'm going to call them, need to be modified. We didn't talk about that, but we may need to go there.

CHAIRMAN BABCOCK: Okay. Yeah, Justice Brown.

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

CHAIRMAN BABCOCK: It's okay -- sorry.

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

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

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

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

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

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

CHAIRMAN BABCOCK: Yeah.

HONORABLE DAVID PEEPLES: Pending cases are different from --

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

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

I'm sorry.

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

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

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

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

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

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

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

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

CHAIRMAN BABCOCK: Justice Bland.

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

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

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

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

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

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

CHAIRMAN BABCOCK: Is that okay?

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

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

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

HONORABLE JANE BLAND: Educating the public and the practitioner.

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

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

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

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

CHAIRMAN BABCOCK: Judge Newell.

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

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

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

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

HONORABLE DAVID NEWELL: Right.

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

HONORABLE DAVID NEWELL: Right.

CHAIRMAN BABCOCK: And somebody else says

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

HONORABLE DAVID NEWELL: Correct. That's correct.

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

HONORABLE DAVID NEWELL: Right.

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

HONORABLE DAVID NEWELL: That's true.

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

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

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

MR. GILSTRAP: I'm sorry.

CHAIRMAN BABCOCK: It might break the system.

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

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

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

CHAIRMAN BABCOCK: She deleted it from her Facebook.

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

CHAIRMAN BABCOCK: Judge. I'm sorry.

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

CHAIRMAN BABCOCK: Yeah.

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

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

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

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

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

CHAIRMAN BABCOCK: Justice Boyce.

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

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

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

CHAIRMAN BABCOCK: Justice Busby.

HONORABLE DAVID PEEPLES: Didn't intend to.

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

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

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

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

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

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

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

HONORABLE DAVID PEEPLES: Good.

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

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

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

CHAIRMAN BABCOCK: Kent.

MS. BARON: So do we agree with that?

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

CHAIRMAN BABCOCK: Richard.

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

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

CHAIRMAN BABCOCK: What if it's interlocutory?

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

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

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

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

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

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

MR. ORSINGER: It does?

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

MR. ORSINGER: All right. Then another reason.

CHAIRMAN BABCOCK: That may be unconstitutional but --

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

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

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

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

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

CHAIRMAN BABCOCK: Justice Boyce.

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

specific context.

CHAIRMAN BABCOCK: Buddy.

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

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

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

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

CHAIRMAN BABCOCK: That's in the comment.

MR. LOW: And there are different rules for

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

CHAIRMAN BABCOCK: Yeah, Justice Busby.

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

CHAIRMAN BABCOCK: Justice Boyd.

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

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

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

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

HONORABLE JEFF BOYD: Sure.

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

restricting.

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

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

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

CHAIRMAN BABCOCK: Okay. Buddy.

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

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

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

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

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

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

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

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

CHAIRMAN BABCOCK: Buddy.

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

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

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

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

CHAIRMAN BABCOCK: Judge Estevez, and then Judge Wallace.

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

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

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

CHAIRMAN BABCOCK: Thanks, Judge. Judge Wallace.

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

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

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

HONORABLE R. H. WALLACE: Yes.

CHAIRMAN BABCOCK: How did you handle that?

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

CHAIRMAN BABCOCK: But did you respond at all?

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

CHAIRMAN BABCOCK: But from a regulatory

standpoint that shouldn't matter, should it?

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

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

HONORABLE R. H. WALLACE: Well, yeah.

CHAIRMAN BABCOCK: -- the League of Women Voters.

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

CHAIRMAN BABCOCK: Have you ever heard a candidate respond?

HONORABLE ANA ESTEVEZ: I have.

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

CHAIRMAN BABCOCK: What have you heard, Judge?

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

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

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

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

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

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

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

CHAIRMAN BABCOCK: Sounds like a promise to me.

HONORABLE ANA ESTEVEZ: Okay. Now,

obviously, I won.

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

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

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

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

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

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

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

CHAIRMAN BABCOCK: Richard.

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

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

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

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

MR. MUNZINGER: Yeah.

CHAIRMAN BABCOCK: Elegant.

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

MR. ORSINGER: Women, women, women.

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

MR. ORSINGER: Better-informed voters.

CHAIRMAN BABCOCK: Kennon.

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

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

CHAIRMAN BABCOCK: Justice Hecht, Chief Justice Hecht.

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

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

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

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

CHIEF JUSTICE HECHT: Yeah.

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

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

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

CHAIRMAN BABCOCK: The boy in the box case.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

HONORABLE DAVID PEEPLES: Let me make two or

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

tainted by the slop.

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

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

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

HONORABLE DAVID PEEPLES: Are you asking for an answer?

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

HONORABLE DAVID PEEPLES: Good.

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

MS. TAYLOR: Holly.

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

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

CHAIRMAN BABCOCK: Yeah. Okay. Judge Estevez.

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

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

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

CHAIRMAN BABCOCK: Yeah.

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

What do you all think?

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

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

MR. MUNZINGER: May I ask a question?

CHAIRMAN BABCOCK: You may. Yes, you may.

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

CHAIRMAN BABCOCK: I don't think so.

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

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

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

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

HONORABLE DAVID PEEPLES: Is that a fair statement?

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

All right. Everybody that thinks we should have something?

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

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

MR. LOW: I agree.

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

CHAIRMAN BABCOCK: Is that okay with you?

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

CHAIRMAN BABCOCK: I don't see a comment to

3B(10).

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

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

CHIEF JUSTICE HECHT: Not that I want to express.

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

MS. HOBBS: That's not true.

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

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

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

HONORABLE TOM GRAY: So are they official comments?

CHAIRMAN BABCOCK: I think I wrote that actually.

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

HONORABLE TOM GRAY: Okay.

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

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

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

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

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

HONORABLE JEFF BOYD: You need a whistle.

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

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

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

CHAIRMAN BABCOCK: There's one more.

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

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

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

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

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

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

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

rights on the committee.

HONORABLE DAVID PEEPLES: Yes.

CHAIRMAN BABCOCK: So granted.

HONORABLE DAVID PEEPLES: Thank you.

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

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

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

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

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

HONORABLE DAVID PEEPLES: I think that would be great.

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

So the question is -- the question that

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

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

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

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

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

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

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

CHAIRMAN BABCOCK: Okay. Judge Estevez.

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

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

CHAIRMAN BABCOCK: Yeah, sure, Trish.

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

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

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

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

CHAIRMAN BABCOCK: Sure.

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

MS. McALLISTER: Yeah.

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

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

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

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

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

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

HONORABLE DAVID NEWELL: On Facebook.

MR. ORSINGER: Do you like them?

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

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

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

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

there's problems with having a policy.

CHAIRMAN BABCOCK: Judge Yelenosky.

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

CHAIRMAN BABCOCK: No?

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

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

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

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

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

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

MS. HOBBS: Right.

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

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

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

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

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

HONORABLE STEPHEN YELENOSKY: Oh, I know her.

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

HONORABLE STEPHEN YELENOSKY: Well, I mean

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

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

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

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

process?

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

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

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

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

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

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

MR. ORSINGER: There we go.

HONORABLE STEPHEN YELENOSKY: That's

different.

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

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

MR. ORSINGER: Yeah.

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

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

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

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

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

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

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

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

them.

CHAIRMAN BABCOCK: Trish.

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

CHAIRMAN BABCOCK: Judge.

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

MR. ORSINGER: No. No.

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

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

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

MR. ORSINGER: Right.

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

MR. ORSINGER: Right.

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

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

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

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

MR. ORSINGER: Okay.

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

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

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

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

MR. ORSINGER: I get that. I know.

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

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

HONORABLE ANA ESTEVEZ: Right.

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

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

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

CHAIRMAN BABCOCK: Stuff.

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

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

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

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

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

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

CHAIRMAN BABCOCK: Judge Yelenosky.

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

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

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

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

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

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

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

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

CHAIRMAN BABCOCK: Eduardo, and then Munzinger.

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

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

HONORABLE DAVID PEEPLES: The answer is little or nothing.

CHAIRMAN BABCOCK: Munzinger, and then Judge Peeples.

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

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

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

CHAIRMAN BABCOCK: Judge Peeples. I'm sorry.

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

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

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

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

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

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

CHAIRMAN BABCOCK: No apologies necessary. Eloquent as always. Judge Peeples.

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

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

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

My question is we're talking as though these

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

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

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

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

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

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

CHAIRMAN BABCOCK: David.

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

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

CHAIRMAN BABCOCK: Frank.

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

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

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

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

CHAIRMAN BABCOCK: Okay. Judge Estevez.

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

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

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

CHAIRMAN BABCOCK: Yeah.

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

CHAIRMAN BABCOCK: Okay. Justice Busby.

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

HONORABLE ANA ESTEVEZ: I don't do those.

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

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

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

CHAIRMAN BABCOCK: Justice Bland.

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

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

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

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

MS. HOBBS: 35.

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

CHAIRMAN BABCOCK: Judge Wallace.

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

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

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

CHAIRMAN BABCOCK: Richard Munzinger.

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

Number (7), "Allow litigants to adopt their

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

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

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

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

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

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

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

CHAIRMAN BABCOCK: I think we've established

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

MR. HARDIN: God help Wisconsin.

CHAIRMAN BABCOCK: Justice Gray.

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

CHAIRMAN BABCOCK: I don't think anybody can.

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

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

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

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

We are members of a profession. That

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CHAIRMAN BABCOCK: It's only hypothetical.

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

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

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

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

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

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

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

HONORABLE TOM GRAY: Excellent.

CHAIRMAN BABCOCK: Don't call her any name.

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

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

HONORABLE JANE BLAND: No.

CHAIRMAN BABCOCK: Oh.

HONORABLE DAVID PEEPLES: Call what question?

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

HONORABLE DAVID PEEPLES: Well --

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

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

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

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

CHAIRMAN BABCOCK: Yeah. Buddy, you've had

your hand up for a while.

MR. LOW: Chip, let me add one addendum. Justice Gray didn't mention it is surely embarrassing to lose a case to a pro se litigant. He didn't tell you that.

CHAIRMAN BABCOCK: Yeah, Judge Estevez.

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

CHAIRMAN BABCOCK: There we go. Point, counterpoint.

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

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

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

for one day.

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

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

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

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

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

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

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

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

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

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

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

CHAIRMAN BABCOCK: Judge Yelenosky wants to

jump into this. But before you do --

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

HONORABLE ANA ESTEVEZ: A lot of them.

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

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

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

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

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

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

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

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

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

HONORABLE STEPHEN YELENOSKY: On a jury case

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

MR. MUNZINGER: I understand.

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

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

CHAIRMAN BABCOCK: Justice Brown.

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

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

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

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

CHAIRMAN BABCOCK: So you lost.

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

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

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

MR. ORSINGER: I think --

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

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

courtroom.

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

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

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

CHAIRMAN BABCOCK: Judge Peeples.

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

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

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

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

CHAIRMAN BABCOCK: Buddy.

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

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

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

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

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

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

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

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

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

CHAIRMAN BABCOCK: What's that?

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

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

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

MR. GILSTRAP: Okay. Which one?

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

HONORABLE DAVID PEEPLES: Clerks, et cetera.

CHAIRMAN BABCOCK: Do you want to split it up?

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

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

CHAIRMAN BABCOCK: Good point.

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

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

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

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

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

MR. GILSTRAP: Concept.

HONORABLE BRETT BUSBY: To have a comment.

MR. LOW: To have that comment.

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

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

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

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

MR. GILSTRAP: This policy statement, this particular?

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

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

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

All right. Everybody against?

MR. LOW: Richard and I.

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

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

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

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

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

MR. ORSINGER: All right.

CHAIRMAN BABCOCK: And thinks we're going to

take the rest of the day on this, right?

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

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

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

CHAIRMAN BABCOCK: Yep.

MR. ORSINGER: Are you okay with that?

CHAIRMAN BABCOCK: Yes, absolutely.

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

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

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

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

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

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

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

reporter's record for appeal.

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

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

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

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

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

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

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

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

allege materially false or changed circumstances.

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

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

evidence of falsity or change that a party would.

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

So we get to (f)(5), notice and hearing. You've got to give the declarant -- meaning the person applying to be exempted from costs of a hearing. It has to be an oral evidentiary hearing, got to have 10 days notice, and at the hearing the burden is on the declarant to prove the inability to afford costs. So now we're talking about the burden of persuasion. Before we were talking about the burden to plead a statement that gave rise to a presumption of inability to pay, and if that was properly pled and it created the presumption that it carried the day unless one of these qualified people filed an opposition under (f)(1) or (f)(3), in which event now the presumption of inability is gone, and now we're in a hearing where the party claiming the exemption has to come forward with proof. There is no statement here or definition in this rule of what constitutes the inability to pay, which is perhaps an issue that we want to discuss.

At the hearing the judge has got to make a ruling, and if the judge denies the leave to proceed without costs the court has to issue detailed findings,

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

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

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

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

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

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

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

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

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

CHAIRMAN BABCOCK: So what was the big disagreement?

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

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

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

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

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

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

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

CHAIRMAN BABCOCK: Justice Bland, then Justice Gray.

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

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

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

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

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

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

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

(Off the record)

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

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

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

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

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

CHAIRMAN BABCOCK: Right.

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

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

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

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

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

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

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

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

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

HONORABLE STEPHEN YELENOSKY: It's a thing.

MR. PERDUE: It's a thing.

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

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

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

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

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

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

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

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

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

MR. HARDIN: Different types of agreements?

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

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

CHAIRMAN BABCOCK: Okay. Yeah, David.

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

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

MR. LOW: Could win on appeal.

CHAIRMAN BABCOCK: Yeah. Yeah. Justice

Busby.

HONORABLE BRETT BUSBY: Call the question.

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

CHAIRMAN BABCOCK: I know.

HONORABLE BRETT BUSBY: I'm trying.

CHAIRMAN BABCOCK: These Houston appellate judges.

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

MR. ORSINGER: Yeah, 20 minutes per side.

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

CHAIRMAN BABCOCK: Scott.

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

CHAIRMAN BABCOCK: She doesn't get that button.

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

CHAIRMAN BABCOCK: What do you think about

that, Rusty?

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

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

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

MR. LOW: I never heard of it.

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

CHAIRMAN BABCOCK: Justice Bland.

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

CHAIRMAN BABCOCK: Justice Gray.

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

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

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

CHAIRMAN BABCOCK: Yeah.

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

CHAIRMAN BABCOCK: Yeah. Judge Wallace.

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

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

CHAIRMAN BABCOCK: Buddy.

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

CHAIRMAN BABCOCK: Indigent.

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

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

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

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

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

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

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

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

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

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

CHAIRMAN BABCOCK: Yeah, Trish.

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

MR. ORSINGER: Okay.

CHAIRMAN BABCOCK: Lisa.

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

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

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

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

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

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

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

CHAIRMAN BABCOCK: No, you had to mention it.

MR. ORSINGER: Oh, okay.

CHAIRMAN BABCOCK: But the charge from the

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

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

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

MR. ORSINGER: Oh, okay.

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

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

CHAIRMAN BABCOCK: Yeah. Richard.

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

CHAIRMAN BABCOCK: That's right.

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

this? I was in it.

CHAIRMAN BABCOCK: Don't get excited now.

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

HONORABLE TOM GRAY: Because it's not --

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

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

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

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

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

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

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

MR. MUNZINGER: True.

CHAIRMAN BABCOCK: Justice Bland.

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

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

CHAIRMAN BABCOCK: Buddy, then Richard.

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

CHAIRMAN BABCOCK: Richard.

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

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

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

CHAIRMAN BABCOCK: Okay.

MR. ORSINGER: Go ahead.

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

MS. BARON: Yes.

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

How many are against?

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

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

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

MR. HARDIN: Justice Gray votes for that.

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

MR. ORSINGER: Okay.

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

MR. ORSINGER: Okay.

HONORABLE TOM GRAY: And we decide it.

MR. ORSINGER: Okay.

HONORABLE TOM GRAY: But if they're trying

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

MR. ORSINGER: Okay. So I think --

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

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

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

trial court fees the trial court ought to decide it?

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

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

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

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

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

CHAIRMAN BABCOCK: Judge Wallace.

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

HONORABLE TOM GRAY: 20.

HONORABLE JANE BLAND: 20.1.

HONORABLE R. H. WALLACE: Is it 20?

HONORABLE JANE BLAND: 20.1.

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

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

CHAIRMAN BABCOCK: You've lost Justice Gray.

MR. ORSINGER: I did?

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

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

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

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

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

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

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

MS. BARON: It does.

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

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

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

the trial court?

CHAIRMAN BABCOCK: Justice Bland.

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

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

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

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

MR. ORSINGER: It is?

CHAIRMAN BABCOCK: Lisa.

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

CHAIRMAN BABCOCK: Right.

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

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

that?

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

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

MS. HOBBS: Right.

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

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

HONORABLE TOM GRAY: What's almost never happened?

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

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

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

since probably 2000 --

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

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

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

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

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

CHAIRMAN BABCOCK: Justice Busby.

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

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

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

HONORABLE BRETT BUSBY: Exactly.

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

HONORABLE BRETT BUSBY: We'll see.

HONORABLE TOM GRAY: Without an abatement order.

HONORABLE BRETT BUSBY: Right.

CHAIRMAN BABCOCK: Any other comments about this? Richard.

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

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

HONORABLE TOM GRAY: 250.

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

HONORABLE TOM GRAY: 20.1(a) makes it clear

that the costs are only the appellate filing fees.

HONORABLE BRETT BUSBY: Right.

MR. ORSINGER: Yeah. I agree.

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

MR. ORSINGER: Right.

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

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

CHAIRMAN BABCOCK: Justice Bland.

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

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

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

HONORABLE JANE BLAND: Right.

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

HONORABLE JANE BLAND: Right.

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

HONORABLE JANE BLAND: Yeah. So what we need to do is consider harmonizing the two rules to

address that problem without -- you know, but at the same time, if there has been no change in status, allowing that status to seamlessly continue through the appellate process would save a lot of time in terms of legal staff and clerk's office staff and judge time on these issues. And I think we've made a lot of progress in that area. It used to be much worse, but we're still not there yet, and partly it's because the rules are not getting looked at in tandem with each other.

MR. ORSINGER: We will be happy to do that. Alex and I will, if the Court wants us to. We do? Okay. That's our job. So somebody will tell us -- hopefully it's not October. We have a lot of things we're doing between now and October.

CHAIRMAN BABCOCK: There's a lot of stuff to be done in October. So you want to defer this until our December meeting?

MR. ORSINGER: Well, I would prefer that we finish our discussion today, Chip.

CHAIRMAN BABCOCK: Well, yeah, of course.

MR. ORSINGER: Yeah. No earlier than December, please, because we --

CHAIRMAN BABCOCK: The additional work will be December.

MR. ORSINGER: Okay.

CHAIRMAN BABCOCK: That's when our next meeting after October is, right? No, let's keep going. I'm sorry.

MR. ORSINGER: Okay. So assuming you don't want to make a vote then the next question is on page two, question three, which is should the judgment or order that's being appealed state the deadline for seeking review? Again, my subcommittee, some people said "yes." One said "no." One said that we're not giving you enough time, and another one said "what's the hurry, why not allow 30 days." So we don't have a unified recommendation. The point is you have a pro se litigant. They've just suffered a loss. The judge is entering the judgment. It's been a long time since I did a criminal plea or a criminal conviction, but don't they tell you at the time that the judgment is entered you have a right to appeal or something like that? Does anybody do criminal?

So these are indigent people. No lawyer. If the judge doesn't tell them orally in the hearing that they have a right to do this within 10 days, they probably won't do it within 10 days, and the best way to make that happen is to put it right in the judgment itself that if you want to appeal this case then you have to file something, let's decide what and where, within 10 days. So that was the question. By the way, Lisa volunteered

usable language, which we're grateful for.

MS. HOBBS: She must be a former rules attorney.

MR. ORSINGER: And a very nice person to boot. And so we have two options to look at. One is, in my view, a little more formalistic and the other one is a little more chatty.

CHAIRMAN BABCOCK: Chatty?

MR. ORSINGER: Well, it's more designed for a nonlawyer to understand. I didn't mean anything negative by that. I just meant, you know, like "If you decide to challenge this order you must file within 10 days." This is all, you know, to the defendant in plain language, whereas the first one that says "is an order must be supported by" -- blah, blah, blah. It's kind of abstract and something that someone may not understand and may not even finish reading the paragraph.

CHAIRMAN BABCOCK: No, I think chatty is a great description.

MR. ORSINGER: Yeah, I would use a different word. I'm just saying more conversational or more --

CHAIRMAN BABCOCK: Plain language.

MS. McALLISTER: Plain language, yeah.

CHAIRMAN BABCOCK: Plain language. Lisa.

MS. HOBBS: So the reason why I suggested

this rule change is again serving on that subcommittee I see a lot of indigents miss this 10 days. It's short. They don't know about it. By the time I'm screening the case the 10 days has passed because I don't get the -- I mean, Jeff Kyle is pretty quick about forwarding me those docketing statements and notice of appeal, but he rarely does it within 10 days. It may sit in my inbox for a day or two, because I don't sit around and screen cases every single day at my job, but by the time we've noticed it it's passed, and so it just seemed like an easy fix would be to just put it in the rule that the judge should let them know in the order that this is a quick turnaround. And I think the 10 days is because of what Justice Bland is saying. I think that's because we wanted to expedite the --

CHAIRMAN BABCOCK: Right.

MS. HOBBS: So I'm not necessarily in favor of changing the 10 days. I'm just in favor of making sure that we're very clear with these indigents that--

CHAIRMAN BABCOCK: Yeah. Makes a little bit of sense. But Justice Gray.

HONORABLE TOM GRAY: Again, you get back into the problem that 30 days is not a problem if it's the plaintiff filing it from the get-go, but if it's the defendant and they've already got a judgment --

MS. HOBBS: That's right.

HONORABLE TOM GRAY: -- and you come up, well, your -- every day you extend this makes the whole appellate process longer because you can't get to the record --

CHAIRMAN BABCOCK: Right.

HONORABLE TOM GRAY: -- until this is decided.

MS. HOBBS: Although, to be clear I get a lot of cases where no one moved to be declared indigent until they realized how costly that record is going to be. So the little fees along the way didn't bother them, but "Oh, my God, I have to pay $10,000 for a record? Well, I can't afford that." So win or lose, plaintiff or defendant, sometimes -- a lot of the time I'm seeing it happen at the end of the case, just because that's when the big fee expense comes in.

HONORABLE TOM GRAY: And so my point is that I'm not opposed to giving them more time, and you know, as long as it's clear, but the next question that we will be asked to decide is what happens when that phrase is not in the order that determines their indigent status.

CHAIRMAN BABCOCK: Yeah, I'm worried about that.

HONORABLE TOM GRAY: You know, I mean, do

they get -- what is it -- 329b where they didn't get notice of an appealable order and they get six months to do it, you know? And when we get to it I want to talk about the motion, too. It's not one of these three questions, but what is that motion.

CHAIRMAN BABCOCK: We will not adjourn until we address that.

HONORABLE TOM GRAY: Well, I don't know about that.

MR. ORSINGER: Well, I might say on the 10-day issue a lot of times the trial lawyer doesn't know anything at all about an appeal, and we had this discussion on the termination appeals where we tried to accelerate that. They get around to getting an appellate lawyer on board by before the 30th day so that the motion for new trial could be timely filed, and they typically miss the request for findings of fact in the bench trial and anything that's quicker than 30 days, because the trial lawyers know about the motion for new trial deadline. They don't know about the others. There is some logic in having this be a 30-day period, and I don't think it will delay anything anyway, because nobody is going to probably request a record from the court reporter until well after the motion for new trial is filed and you have an extended deadline. So I personally think that I

don't see any harm in waiting 30 days, and the people who are likely victims are indigent people that may not realize how quickly they need to act.

We'll cure that if you said, well, you've got 10 days and it's in the judgment that they got 10 days, but I hope they can get out and hire a lawyer, an appellate lawyer, within that 10-day period. I'm not sure they can. So I would be in favor of extending it to 30 days.

CHAIRMAN BABCOCK: Justice Boyd.

HONORABLE JEFF BOYD: What if instead of an order requiring the declarant to pay costs, it's an order that recognizes indigency and says you don't have to pay costs? Doesn't the rule already have a 10-day deadline for challenging that?

MS. HOBBS: I don't think you -- I think if you're declared indigent, I don't think there's an appellate right to that. So it's only if someone says, "I think can you pay for it," you get a right to appeal it, but if they say she can't pay for it, the court reporter doesn't have an appellate right.

HONORABLE JEFF BOYD: There is a 10-day deadline in there. Is it 10 days from the date of the application you have to file an objection? Because we had a per curiam decision this past term where a court

reporter did not get the notice that the rule says the clerk is supposed to provide until after the 10 days had expired, and we ruled that the court reporter was out of luck, she just couldn't challenge.

MS. HOBBS: You're so cruel.

HONORABLE JEFF BOYD: So there is another 10-day deadline in there somewhere that we need to make sure is consistent.

MS. HOBBS: So she has 10 days from the application.

HONORABLE JEFF BOYD: Is that what it is?

MS. HOBBS: Yeah. She has 10 days to challenge it.

HONORABLE JEFF BOYD: Okay.

MS. HOBBS: And then there's a time set for when the hearing is going to happen and then once the judge signs the order the --

HONORABLE JEFF BOYD: You cannot appeal from --

MS. HOBBS: Court reporter cannot appeal.

HONORABLE JEFF BOYD: -- granting indigency, but if instead the order doesn't grant indigency, it requires payment, then you can appeal in 10 days.

HONORABLE TOM GRAY: Where is the 10-day to challenge? I thought that was taken out of the rule.

MS. NEWTON: It was.

HONORABLE TOM GRAY: Yeah.

MS. HOBBS: Oh, sorry.

MR. ORSINGER: The 10 days is tied -- you have to --

HONORABLE TOM GRAY: See, the way it's structured now --

MR. ORSINGER: If you're going to appeal from the denial of your indigency you've got 10 days to appeal.

HONORABLE TOM GRAY: To file the motion.

MR. ORSINGER: By filing a motion, and if you don't then you've got 15 days to request an extension, and I think the other 10-day rule was removed.

HONORABLE TOM GRAY: It was removed because the affidavit is on file, or the declaration of indigency or whatever it's called, and the -- but when the court reporter gets the notice to prepare the record, that's when she can file, he or she can file the motion to determine their ability to pay, and so that's when it comes back up on the court reporter's radar.

MR. ORSINGER: You know, one of the concerns I have is the motion by the clerk, the party, the ad litem, or the court reporter has to be based on sworn evidence, not information and belief. So unless there was

testimony in the trial that came out that somebody had assets, how is the clerk or the court reporter ever going to be able to sign an affidavit. And even if they do, isn't that based on hearsay testimony maybe? Or, I mean, I'm wondering how functional this is that the motion that would require a hearing to prove indigency has to be based on sworn evidence that the representations in the application are materially false.

HONORABLE TOM GRAY: No, the court reporter doesn't have to have any evidence attached to their motion.

MR. ORSINGER: Oh, yeah, you're right. It's just the clerk that does that one.

HONORABLE TOM GRAY: Yeah, just the clerk.

MR. ORSINGER: And we are doing that because we hate clerks and like court reporters, or why are we treating them differently?

HONORABLE TOM GRAY: I don't know. I didn't write the rule. They're sitting over there, but I --

CHAIRMAN BABCOCK: Why are you looking over at us?

HONORABLE TOM GRAY: I thought it had to do with the timing. The clerk is going to get involved early on in the process of nonpayment when the case is filed, whereas the court reporter is not going to get involved in

nonpayment until the record is requested at the end.

MR. ORSINGER: Okay. So the clerk has 10 days -- no, the clerk has to do it based -- only information they have is a petition has been electronically filed by somebody they've never seen, and it's got a statement of inability to pay from somebody they've never seen, and now they have to sign an affidavit, the clerk does, that they have personal knowledge that this person has assets. Now, is that workable? Or is this really just a disguised way to make it impossible for clerks to contest it. That's what it is. Okay. Well, then all right, if that's what you want to do then let's do it.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: Well, and this is one of the places where Rule 20 -- TRAP 20.1 and Rule 145 look different. TRAP 20.1 says that you have to challenge the order within 10 days of the order being signed or 10 days after the notice of appeal is filed, whichever is later. And so if we're talking about the indigency proceeding in the appellate court and the appellate record being part of that analysis, then -- then you get more time than if you're looking at it under Rule 145. So that just brings us back to getting these two rules on the same page and trying to harmonize them, because there really shouldn't

be any difference at what point in the process you're wanting to get this reviewed of indigency accomplished.

CHAIRMAN BABCOCK: That's right. Don't you think, Richard?

MR. ORSINGER: Yes, and in that context can I raise one other ancillary topic?

CHAIRMAN BABCOCK: Certainly.

MR. ORSINGER: We -- Rule -- appellate Rule 20 says that it's basically irrebuttable if you have a certificate of representation from Legal Aid, but I think we had discussions last time if the trial judge has ruled that they're indigent there should be a presumption of continuing indigency so that do we really have to reapply for indigent status on appeal, or can we just say if they were declared indigent the first time they remain indigent unless someone files a contest?

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: So we have that presumption in parental termination cases.

MR. ORSINGER: Yes. Okay.

HONORABLE JANE BLAND: And the question is can't we continue that presumption in other cases where the litigant has already been declared indigent and there's no apparent change in the circumstances, and it would seem like for the same reasons that it was important

to continue the presumption in parental termination cases -- that is, expediency and ensuring that we get these cases addressed in a timely manner -- that would apply to other cases and that, you know, absent any evidence of any change in circumstances there ought to be that presumption.

HONORABLE TOM GRAY: I thought it was -- did continue under 20.1(b)(2).

MR. ORSINGER: (b)(2)?

MS. NEWTON: (b)(1).

HONORABLE TOM GRAY: (b)(1). Well, (b)(2) is the method for establishing it, which is to simply make the -- communicate to the appellate court clerk that the party is presumed indigent.

CHAIRMAN BABCOCK: Holly.

MS. TAYLOR: For what it's worth, we do have such a presumption in criminal cases. Just FYI, there is a presumption of a continuing indigency. Once an indigency determination is made in the trial court throughout those proceedings, unless there is some challenge made. The attorney representing the state may move for reconsideration of the determination if there were material changes.

CHAIRMAN BABCOCK: Okay. Justice Bland.

HONORABLE JANE BLAND: The presumption only

applies in parental termination cases unless this has been amended since this rule I'm looking at.

HONORABLE TOM GRAY: I think it's been amended since the rule you're looking at.

HONORABLE JANE BLAND: I'm looking at the Supreme Court's rule on their website.

MR. ORSINGER: Yeah, my copy of (b)(1) doesn't say that there's a continuing presumption.

MS. NEWTON: Really?

HONORABLE JANE BLAND: It says, you know, you can do it by affidavit where you show that you filed your affidavit, that it's not contestable. It's not contested or not sustained by a written order and you file a notice of appeal. So you have to file an affidavit. And then the presumption of indigence, which is in (3) says "in a suit filed by a governmental entity in which termination of the parent-child relationship is requested, a parent determined by the trial court to be indigent is presumed to remain indigent for the duration of the suit and any subsequent appeal."

CHAIRMAN BABCOCK: Okay.

HONORABLE TOM GRAY: I guess I'm reading out of a different rule book.

MS. NEWTON: Yeah. I'm looking for that, because that's wrong. So it might be --

MR. ORSINGER: That's the old rule?
MS. NEWTON: Yeah.
HONORABLE TOM GRAY: Because 20.1(b)(1) --
MR. ORSINGER: So the texascourts.gov version of the Rules of Appellate Procedure is not accurate? That's pretty scary.
MS. NEWTON: Well, we're looking at the -- we just pulled this from our website, and it has the current version of the rule on our website.
HONORABLE JANE BLAND: I'm looking at your website, too.
MR. ORSINGER: I'm looking at texascourts.gov. I think that's your website.
HONORABLE TOM GRAY: I just have one of these old paper books.
CHAIRMAN BABCOCK: Well, you need to get on a different platform.
MS. NEWTON: One issue is if you Googled it, it may have pulled up a cached version or something.
HONORABLE JANE BLAND: That might be right.
MR. ORSINGER: Could be.
CHAIRMAN BABCOCK: There's a difference between a social media?
MR. ORSINGER: No, a cached version. I don't know. That means that I pulled it up before 2016

and then I keep pulling up the before 2016 version, which is pretty frightening to think that my research is a year and a half out of date.

CHAIRMAN BABCOCK: That's an Orsinger problem, right?

MR. ORSINGER: Well, apparently it's a Justice Bland problem, too.

CHIEF JUSTICE HECHT: But it's malpractice for you.

MR. ORSINGER: It's reversible error for her and malpractice for me.

CHAIRMAN BABCOCK: Man, out of the bleachers comes a fast ball.

HONORABLE TOM GRAY: From center field.

HONORABLE JANE BLAND: Amen.

MR. ORSINGER: Okay. So, you know, I think somewhere in this we've just kind of lost the vote on whether we ought to have 10 days or 30 days written in the judgment.

HONORABLE JANE BLAND: Has that changed?

CHAIRMAN BABCOCK: All right. How many people want 10 days? Raise your hand.

HONORABLE JANE BLAND: So --

CHAIRMAN BABCOCK: Two hands.

HONORABLE JANE BLAND: I would just say, I

would like -- and if I'm not looking at the wrong version again, but if it's 20.1(j) it says 10 days after the order is signed or the notice of appeal, whichever is later. Is that all gone?

MS. NEWTON: Yes. There's no (j).

HONORABLE JANE BLAND: Okay.

MR. ORSINGER: Let me say this, that my subcommittee was asked to make a recommendation on whether or not we should require the judgment in the trial court to tell the indigent litigant that if they wanted to proceed in forma pauperis, right, that they have to -- no, no. No, I'm wrong. It's the order that denies their status to move forward in forma pauperis that they've got 10 days to appeal that on account of interlocutory appeal. That's what we were asked to vote on or recommend. I would like to see a vote on that. I think everybody is going to be in favor of it.

CHAIRMAN BABCOCK: Okay. Why don't you frame the question?

MR. ORSINGER: Should the order denying leave to move forward without paying costs specify the deadline for appealing that order?

CHAIRMAN BABCOCK: All right. Everybody in favor of that, raise your hand.

MR. HARDIN: Let the record --

CHAIRMAN BABCOCK: Everybody opposed? Unanimous.

MR. HARDIN: Let the record reflect Justice Gray did not dissent.

MR. ORSINGER: Are you willing to do 10 versus 30 just to see?

CHAIRMAN BABCOCK: Yeah, just to see.

MR. ORSINGER: Get a sense, okay.

CHAIRMAN BABCOCK: Frame it. Go ahead.

MR. ORSINGER: Should order or should the notice of the order say they have a right to appeal within 10 days or within 30 days?

CHAIRMAN BABCOCK: So what are we voting on first, 10?

MR. ORSINGER: Ten, ten.

CHAIRMAN BABCOCK: All right. Everybody in favor of 10, raise your hand. I was hoping you would. Everybody in favor of 30.

HONORABLE TOM GRAY: 28? 28?

CHAIRMAN BABCOCK: No.

MR. ORSINGER: That's a lunar month, not a solar month.

HONORABLE TOM GRAY: It's a week.

CHAIRMAN BABCOCK: 15 to 1, 30 over 10.

MR. ORSINGER: With one complaint.

CHAIRMAN BABCOCK: And a number of people not voting, including the Chair. Okay.

HONORABLE TOM GRAY: Could we make sure that the record reflects that that was not Justice Gray that was the one vote?

CHAIRMAN BABCOCK: Yes. It was clear that it was a justice, but more bland than gray.

MR. HARDIN: Not bad. Not bad for 3:00 o'clock.

HONORABLE TOM GRAY: Getting late in the day.

MR. ORSINGER: You ready to go on to number four?

CHAIRMAN BABCOCK: Lisa needs a question.

MS. HOBBS: No, I have a comment just for the record. If the appellate deadline for appealing the determination of indigency is 30 days, I feel less strongly about having an order say it. So as the person who proposed this idea it was because of the short time frame that made me want to give them special notice of their appellate rights, but if it's a traditional appellate timetable, which it's not quite, but still, if it's 30 days I just feel less --

CHAIRMAN BABCOCK: Are you asking for a revote?

MS. HOBBS: No, I'm not. I just wanted the record -- to the extent the judges care anything about my opinion, I thought I would just say it for the record.

CHAIRMAN BABCOCK: Okay.

MR. ORSINGER: So No. 4 was an initiative that came of the Access for Justice Foundation, not from Justice Hecht, and Trish McAllister helped us on this, and she gave us a memo. The memo I attached back in April had an inaccuracy in it, and I wanted Trish to correct that if you can on the fly.

MS. McALLISTER: Yeah.

MR. ORSINGER: And then also would you mind -- or do you want me to introduce your proposal or you want to introduce it?

MS. McALLISTER: Either way is fine, whichever way you want to do it.

MR. ORSINGER: Go ahead and make the correction and then present your proposal.

MS. McALLISTER: Okay. One of the issues -- and this is the issue that Richard brought up earlier, which is in cases involving domestic violence or a situation where somebody wants to keep their address confidential. The current statement of inability to afford costs form is just a declaration, and that requires you to list your address. So what we are proposing is

that the statement also be made sort of a dual purpose, that it become a statement/affidavit, and the person can choose whether or not they want to just make a declaration or whether or not they want to have a notarized affidavit.

It's actually something that is done in the protective order kit that -- the form kit that the Supreme Court already has. They have the option of making a declaration, or they already have an option of doing an affidavit where those situations where the address needs to be confidential.

CHAIRMAN BABCOCK: Lisa.

MS. HOBBS: I hate that statute. It's so bad that you have to put your home address in order to make a declaration. I mean, I know we can't override a statute, but I will say that I sometimes put my work address. When I'm doing a declaration in support of my attorney's fees, I just put my work address in there. I don't know why it needs to be a residential address.

CHAIRMAN BABCOCK: So you're violating the statute every time you do it?

MS. HOBBS: Yes. And I'm admitting it on the --

MS. McALLISTER: On the record.

CHAIRMAN BABCOCK: Okay. In case anybody tries to catch you.

HONORABLE JEFF BOYD: This is not number four in the memo, right?

MR. ORSINGER: No. Yes, it is. The question -- yes, on page three, number four. But there was two things, Judge. There was a correction of the copy of the Access to Justice Foundation memo in April was incorrect, and I wanted Trish to correct it.

MS. McALLISTER: No, it's the report.

MR. ORSINGER: And then next is the proposal they're making, which is significant.

MS. McALLISTER: It's the report that's incorrect.

MR. ORSINGER: It's the report, my report?

MS. McALLISTER: Yeah.

MR. ORSINGER: No, the memo was just fine. My recounting of the important part of the memo was flawed. That's been corrected. Now let's move on to the major proposal. Okay.

MS. McALLISTER: Okay. So the other proposal is that we have received several complaints or just several -- I've gotten several e-mails from Legal Aid attorneys in the field that are really wishing that the -- there was still a definition that if somebody who is a recipient of public benefits is defined as poor, which in the former rule they were defined as poor. And then the

second thing is that they are also wanting that anybody who is currently being represented by a Legal Aid program be automatically defined as poor, too, and the reason is, is because there is still -- the whole reason why there was that IOLTA certificate in the last rule was because Legal Aid attorneys were spending a lot of time going in and defending their affidavits, which they are now getting -- the judges are now asking them to -- or clerks are contesting them. So they're now having to go back into court and start proving up that their people are poor, which, you know, is in my personal opinion a waste of their time because not only do people have to -- when you qualify for Legal Aid, you have to not only do an income test, but you also have to do an asset test, and in terms of the public benefits, that's the same situation.

The public benefits people actually are slightly -- some of them, like food stamps, the current SNAP program, they actually can make more money than somebody at Legal Aid, a recipient of somebody who is getting represented by a Legal Aid attorney, but those -- what we're hearing is that judges are seeing somebody who is receiving public benefits, but then they see that they have a cell phone, and they say, "You know what, you can afford that cell phone, so I think you can afford payment of costs," without -- and, you know, I just make a clear

statement that there's a lot of just subjective, I think, sort of subjective and sort of personal --

HONORABLE TOM GRAY: Prejudices?

MS. McALLISTER: Bias or, you know, it's -- I don't know what the right word is to say. I don't want to be offensive, but, you know, some assumptions that are made based on what, you know, their personal beliefs are. And the fact of the matter is like, you know, there's a lot of studies that show somebody who has a cell phone it's actually a very -- a poor person who has a cell phone is a wise financial choice for them for a variety of reasons. Because they have access to the internet through a phone, you know, blah, blah, blah. Most of their phones, by the way, usually expire within 30 days because they only have plans that last, you know, 15 days because they eat up their data. But also, cars, I mean, we've heard, you know, judges who are upset because they have a car, got a new car, which, you know, there's lots of evidence that shows getting a car that's reliable helps people stay out of poverty because they can get to work on time, blah, blah, blah, all of those kinds of things.

So, you know, we would just state that and in the -- well, I don't know that it got into your memo, Richard, but in the memo that we sent to the subcommittee, just sort of a reiteration of the information that was in

the report when we originally filed on Rule 145 a couple of years ago and has all of the information about the kinds of tests that somebody has to go through to be able to receive public benefits and specifically the kinds of assets they're allowed to have. They can't have, you know, a car worth more than $5,000. They can't have this, they can't have that, and all of their accounts are monitored, too, by the government to ensure that they don't have more than $2,000 in savings or a thousand dollars in savings, depending on what benefit they're receiving. So a long-winded way of saying we would just ask that those be -- instead of being what they are now, which is just evidence of indigency that they actually be proof of indigency.

HONORABLE JEFF BOYD: Conclusive proof?

MS. McALLISTER: Rebuttable.

CHAIRMAN BABCOCK: Rebuttable.

MS. McALLISTER: They can be challenged. You know, everything can be challenged.

HONORABLE JEFF BOYD: Why wouldn't it be -- what's the difference between evidence of and proof of?

MS. McALLISTER: Well, I think that -- not that it could be challenged like right away. I mean, if you file a statement and you are attaching proof that you are a current recipient of public benefits, it shouldn't

be able to be challenged by the clerk; but if you go along in the case and someone says, you know, "We just saw that you won the lottery, we want to be able to challenge that, because you were a former recipient of public benefits," I think that should be able to be challenged.

CHAIRMAN BABCOCK: Judge Yelenosky, then Frank.

HONORABLE STEPHEN YELENOSKY: So the rule was changed fairly recently.

MS. McALLISTER: Right.

HONORABLE STEPHEN YELENOSKY: It used to be conclusive and irrebuttable, right?

MR. ORSINGER: No, it was a certificate of representation by Legal Aid or a similar organization that was irrebuttable. Isn't that right, Trish?

MS. McALLISTER: Yes. The --

HONORABLE STEPHEN YELENOSKY: And that's no longer true?

MS. McALLISTER: Yeah. If you were -- it was an IOLTA certificate, but of course, IOLTA has decreased so much we wouldn't want it to be an IOLTA certificate, but, yes, it used to be where if there was an affidavit filed by a Legal Aid entity it was not able to be challenged.

HONORABLE STEPHEN YELENOSKY: And that was

changed.

MS. McALLISTER: And that was changed with the new rule, but under the old rule, "A party who is unable to afford costs is defined as a person who is presently receiving government entitlement based on indigency or any other person unable to afford costs." So the definition of poverty was somebody receiving --

HONORABLE STEPHEN YELENOSKY: Yeah. Well, whatever language is used, the poverty determination -- everybody can disagree about what poverty line is, but so what are we going to use? We're going to use something that's standard, and the standard is federal poverty line. If you don't like the poverty line as a judge, then go lobby for a different poverty line from your Legislature. If you think that somebody is cheating the system I guess you can report them for fraud or something, but it isn't the judge's role to decide that somebody has more money than they're supposed to have. That's the entity that's providing the benefit. And so I don't see on what basis somebody would -- what we would gain by having this refuted, and I guess I don't know why we moved away from that from where we were.

MR. ORSINGER: Chip, if I can respond.

CHAIRMAN BABCOCK: Yeah.

MR. ORSINGER: I think that the debate that

we had was that should we take complete discretion away from the judge to make a fact-based decision. So let's say that somebody --

HONORABLE STEPHEN YELENOSKY: The question is the fact.

MR. ORSINGER: Let's say that somebody is qualified by their degree of poverty to receive benefits, but we can prove that they have money. They have a car or whatever. Is the judge forced to ignore the evidence and required to perpetuate the determination for -- that was done for different purposes for a federal benefit?

HONORABLE STEPHEN YELENOSKY: Yes. Yes. And I'll tell you why. Because you just said, "Well, they have a car or whatever." Yeah, lots of people can qualify under the poverty level if they have the car. You have to have the whole picture, and you don't get the whole picture as a judge. You maybe get something that makes you think, oh, they've got money, and maybe if it does indicate that then it's a case of fraud, but you're not getting the whole picture. I think the fact question ought to be are they, in fact, receiving benefits for which they had to qualify on a poverty basis. That's the fact question for the judge, not whether the judge thinks they have enough money.

MR. ORSINGER: Well, for everyone else it's

a question of whether they have enough money.

HONORABLE STEPHEN YELENOSKY: I know.

MR. ORSINGER: And for purposes of the appellate rules, the standard -- I know I was using an old copy. There's no affidavit anymore on Rule 20 is there, or is there?

HONORABLE STEPHEN YELENOSKY: I mean, the poverty level is low enough that middle income people should probably qualify for indigency even if they're above the poverty level, and so the real problem is the expense that the government is spending through challenges to determine whether or not somebody who has qualified, assuming it was done properly, which I think we have to assume, as being poor, and I thought the determination always was that that game was not worth the candle, and we were spending money determining that people below the poverty line are, in fact, poor.

MR. GILSTRAP: Chip?

CHAIRMAN BABCOCK: Frank, sorry.

MR. GILSTRAP: I think Steve's, you know, kind of practicality cost-benefit approach might be the answer, but I do want to revisit the problem that came up earlier, and that is what is a government entitlement program? I mean, if you're under the Affordable Care Act, is that a government entitlement program?

HONORABLE STEPHEN YELENOSKY: No.

MR. GILSTRAP: If you're on one of these things where they supplement your electric bill, that really covers a wide range of --

HONORABLE STEPHEN YELENOSKY: Well, I thought it was defined not to include those.

MR. GILSTRAP: Is it defined?

HONORABLE STEPHEN YELENOSKY: Isn't that right, Trish?

MS. McALLISTER: Well, the proposal we brought had a list of them, but the current rule obviously doesn't have a list of them, but, you know, I think that you could be specific on anything that requires both an income and an asset test, which not all of the programs that subsidize people's, you know, utilities or something like that, don't necessarily require it. And just for your all's information, I mean, there is not one standard of poor, so every public benefit has a different scale of what poor is. SNAP is 137 percent, TANF is -- you know, the Temporary Assistance for Needy Families is a little higher, like 150 percent of the federal poverty guidelines.

So but the reality is, is that they're all very low income, and they all have certain exemptions, like people can own a home, they can own a car, they can

own a burial plot. I mean, it's very odd the kinds of things that are exempted, but all of that has already been screened, which is what your point is, and it's a very complex -- I mean, even I do not know how to conduct a screen, eligibility screen, for Legal Aid, and I was a Legal Aid lawyer. I mean, it's got many, many steps, and you have to look at bunches of different stuff to determine whether or not somebody qualifies.

HONORABLE STEPHEN YELENOSKY: I mean, if we started out for the first time saying we're going to have affidavits of indigence, right, and we said, well, how are we going to determine that? We're going to have people come in and testify what they have and somebody says, "Hey, the federal government is already doing that, let's just use their decision." Wouldn't that be smart?

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: Trish, explain to me why you think this proposed amendment is different than -- I mean, how this is going to change the analysis. Because I think you said it set up a rebuttable presumption and if --

MS. McALLISTER: Well, no, the definition, no -- well --

HONORABLE JANE BLAND: I'm just trying to figure out --

MS. McALLISTER: Right.
HONORABLE JANE BLAND: -- why is the 2016 rule not working?
MS. McALLISTER: Because it's just evidence, so the problem is is that somebody will say -- will come in and say, "I'm a recipient of public benefits," and the judge will say, "You know what, I see here that you are -- you know, I see that you've got a cell phone." I mean, we have had people say, "I see that you've got a cell phone. I think that you're just using your money inappropriately."
HONORABLE JANE BLAND: But doesn't the rule say that the only reason that you can require them to come forward with more is if their statement is materially false or --
MS. McALLISTER: I'm just telling you what's happening in the field. I mean, it may be that people are --
HONORABLE JANE BLAND: What I'm trying to say is there a problem with the current drafting of the rule?
MS. McALLISTER: Well, it didn't used to be when the -- under the old rule when --
HONORABLE JANE BLAND: Right.
MS. McALLISTER: -- when it basically said,

you know, somebody receiving public benefits is defined to be poor. We never had anybody -- we never had a judge saying, you know, that's --

HONORABLE JANE BLAND: We did.

MS. McALLISTER: Well, we might have, but not to the extent -- I don't know. I'm just saying, you know, these are the -- this is the problems that we are seeing in the field. We would prefer it not to be evidence because I get -- it does give more discretion, when, you know, you can at least point to the rule and say, "Well, that's actually what's defined," rather than pointing to a rule that says, you know, it's now only a piece of evidence. Again, you know, in the old rule it used to be a not -- uncontestable if you were represented by Legal Aid. Now, you can contest it, and they do. So, I mean, I do think there's a difference. I'm not -- I mean, obviously you're looking confused, so I'm not sure what I'm saying --

HONORABLE JANE BLAND: I've been confused all afternoon.

CHAIRMAN BABCOCK: Hang on. Hang on. Richard's got answers.

MR. ORSINGER: Okay. So part of what happened was we used to have a definition of what qualified for poverty, and in 2016 we shifted to a

pleading and counter-pleading requirement with no definition of the ultimate finding. So we have certain criteria that you must swear to under oath in order to get the benefit of avoiding costs, and then we have certain counter-swearing that has to be presented in order to create a contest. If there's a proper swearing and a proper counter-swearing, there is a hearing in which the indigent person has the burden to prove poverty, but there's no definition of poverty, because the definitions now are what's a required pleading and what's a required counter-pleading, not what's a required showing in the hearing.

So part of what Trish's problem is, I suspect, is that we don't have a definition of poverty anymore; and if we have properly sworn and properly counter-sworn, then the judge can do anything they want, including, I believe, ignore the fact that they're represented by Legal Aid. So maybe one thing that we could do is to introduce a definition of poverty for the hearing on the merits and decide whether proof is just some proof of poverty or whether it's conclusive proof of poverty. I think that would help to clear a lot of this conclusion, and then the debate becomes, well, does qualifying for a federal benefit program constitute conclusive proof of poverty? If it does then we have what

Steve Yelenosky wants, which is we use the federal test and the hearing is over. If not, then some judges may use the federal test and some other judges may use the West Texas or East Texas test, so it's kind of like where you want to go, but I really think part of the issue is we don't have a definition of poverty for the hearing on the merits

CHAIRMAN BABCOCK: David Jackson, then Judge Yelenosky.

MR. JACKSON: I pulled up under texascourts.gov Rule 502.3(b), inability to afford fees, and it says, "A statement that is accompanied by a certificate of a Legal Aid provider may not be contested under (d)," which sets out all of the things we're talking about about the possibilities of contesting it, but I've heard several times people say that's gone, but it's here.

MR. ORSINGER: It's in 502?

MR. JACKSON: 502.3.

MR. ORSINGER: Yeah, we were talking about 145 and 20.

MR. JACKSON: It's in here, though.

MS. McALLISTER: I think 502 got updated, though, right, Martha?

MS. WOOTEN: Yeah. I think there's an order 16-91122 that updated.

MS. McALLISTER: When 145 and TRAP 20 and Rule 402 got all updated all at the same time.

MS. WOOTEN: That's right. August 31, 2016.

MS. NEWTON: Yes, it did; however, my recollection is that we did not make all of the substantive changes to 502 that we did to 145 because we wanted to keep that rule as simple as possible and because we had not heard of any problems in the JP court.

MS. McALLISTER: It must have been just the -- I know it also had just --

CHIEF JUSTICE HECHT: 502 was relatively new, and --

MS. McALLISTER: Yeah. It had just been redone.

CHIEF JUSTICE HECHT: The 806 JPs, and they were getting used to it, and we just decided not change it.

HONORABLE STEPHEN YELENOSKY: I'm sorry, I couldn't hear.

CHIEF JUSTICE HECHT: I'm sorry?

HONORABLE STEPHEN YELENOSKY: I'm sorry, I could not hear.

CHIEF JUSTICE HECHT: Yeah, 502 was relatively new, and it had taken some time to rewrite those rules, and the JPs -- there's 804 of them -- had had

a lot of training on the new rules, and we thought it best just to leave those alone.

CHAIRMAN BABCOCK: Go ahead, Judge.

HONORABLE STEPHEN YELENOSKY: Well, I either don't have a memory of this or I was zoned out because I don't remember this going through the Supreme Court Advisory Committee. It's also possible I was out for an extended period of time when my wife was hospitalized, so maybe I missed it then, but I was not aware that there was a retrenchment on this. So that's part of my surprise here, and I think people look at this as either a due process issue where people are getting something that they shouldn't get or -- and/or that it is a moral issue, because it sure isn't a revenue issue.

I don't think anybody can show that the state is taking in more money as a result of the change in the rule, so people are -- want to contest this because of the belief that some people are wrongly receiving benefits, and I don't -- that may be happening, but this is a revenue issue, should people pay for coming into court; and there has to be some provision for indigence, which is going to be imperfect, but the challenges other than those made by the court reporters, if judges are just reluctant to do it, I can't see what it would be other than improperly thinking it's unfair to the other side

because this person shouldn't be in court at all without paying the fee. I mean, that's like when we got objections -- we would be representing somebody at Legal Aid, and the other side would contest our client's right to have a Legal Aid attorney, and the judges I was before rightly said that's an issue between the Legal Aid office and its funding source, the federal government. So I don't really understand why we should respect a judge's desire to get into this as a moral issue.

CHAIRMAN BABCOCK: Anybody else?

HONORABLE DAVID PEEPLES: Richard, how much of the controversy here is from court reporters who have to prepare sometimes lengthy records after a jury case?

MR. ORSINGER: I haven't heard anything from them recently, just in the past, and I'm now very confused because I thought that the court reporters had to do the work for free. I heard today that it may be statewide or at least in some places they're reimbursed, and I really feel like we probably ought to know because the court reporters, the burden of preparing a long record is substantial, and I have been operating under the belief that it was something that they had to bear alone.

HONORABLE TOM GRAY: I think your belief was correct.

MS. McALLISTER: That is correct.

MR. JACKSON: In some jurisdictions the commissioners do pay, but the rule says "may," the commissioners "may pay."

MR. ORSINGER: Okay. Well, to me --

MR. JACKSON: So there are jurisdictions where they won't.

MR. ORSINGER: We can sit over here and talk all we want about the great State of Texas and this multi-billion-dollar budget, but when one court reporter has to do a free transcript that's going to take three weeks of time and then if they can't do their daily work for the district judge, is that judge -- does that county make them pay for their substitute out of their salary? To me that's way more important than saying that -- I mean, that weighs more heavily in the comparison than comparing the revenue issues for a state that has a billion-dollar budget.

HONORABLE STEPHEN YELENOSKY: The problem is that the Legislature doesn't require it to be paid, and so now we're taking on the burden of making it fair to court reporters. The problem is there should be a statewide rule that takes care of court reporters so that they don't have to do it for free. The solution is not to make it a more cumbersome process for determining if somebody is sufficiently indigent when the vast majority of the time

they're going to be found to be indigent.

MR. ORSINGER: That may be, but it's not just an issue of cumbersome, what we're talking about, regardless of how cumbersome it is, we don't want people that should pay to get away without paying. That's what we don't want.

HONORABLE STEPHEN YELENOSKY: Why is that important to us?

MR. ORSINGER: It's important to us as a state because every dollar adds up to a million dollars and every million dollars adds up to a billion dollars, but it's --

HONORABLE STEPHEN YELENOSKY: You're assuming --

MR. ORSINGER: -- really important to the court reporters that are having to subsidize the state's cost because we have a public policy we're not willing to pay for.

HONORABLE STEPHEN YELENOSKY: Well, yeah. But there's two things. One, you said we don't want -- we want them to pay because there's costs. There's money we're losing. What's the evidence of that? There isn't any evidence that I know of that by making it more cumbersome we're bringing in all of these dollars, especially if you monetize the time that judges and others

are spending on it. As for the court reporters, you're basically trying to fix a problem that the Legislature should fix.

CHAIRMAN BABCOCK: Richard Munzinger.

MR. GILSTRAP: But they won't fix it. They won't fix it, so --

HONORABLE STEPHEN YELENOSKY: Well, they won't -- and it doesn't -- if you go through a cumbersome process and the vast majority of the time they're going to be found indigent anyway, we're not solving the problem.

MR. GILSTRAP: Is that the answer? In other words, that in most cases when the court reporter files a contest, the court reporter loses? If that's the case then I agree. But what's the real empirical facts here?

MR. JACKSON: In fairness, if the court reporter knows ahead of time, like it used to be, where you had to get your indigency designation in the beginning of the case, the court reporter then knows that he's dealing with probably -- he or she is dealing with probably a free transcript. They can share the work among court reporters around in their area and split the case up so that they're not all spending a month getting a transcript out. And in cases where the commissioners do pay, you could come up with rates that are like the criminal courts in a criminal case. It's a very low rate,

but at least the court reporter is not out of pocket money. A lot of court reporters are using up their vacation time, their sick time, because they're trying to get out records that they're not -- you know, may not get paid for and while a substitute is in their court.

HONORABLE STEPHEN YELENOSKY: Do you know how often that --

MR. GILSTRAP: How does allowing the court reporter to challenge it help the situation?

MR. JACKSON: It probably doesn't really. Because really they're probably going to lose.

MR. ORSINGER: That would be unless the trial presents evidence of wealth. I mean, some of these situations the evidence comes out during the trial that they've got money, and then at that point I think that's why we put in here if the judge has any evidence that they can pay the judge can order them to pay.

HONORABLE STEPHEN YELENOSKY: That's just anecdotal, and you just heard a court reporter, who is ex officio, I think, say it doesn't solve the problem.

CHAIRMAN BABCOCK: Judge Munzinger.

MR. MUNZINGER: My only point about the counties picking up expense is not everybody lives in Dallas and Houston and Austin and Fort Worth where the counties have a lot of money. I've got to tell y'all,

y'all need to come read the paper and listen to what goes on in El Paso, Texas, and the border cities. We're strapped for money in our communities. Terribly so, because we don't have the industrial base and the monetary base to support an ad valorem tax system like you people do here and in Houston and Dallas, et cetera, and when you're tossing around here "Well, let the county do that," you're saying to the homeowner and to the taxpayer, "You do that." And part of the morality of the whole thing is if you can afford it, you ought to pay for it.

HONORABLE STEPHEN YELENOSKY: But --

MR. MUNZINGER: And if you can't afford it, that's fine, so let's find out who truly cannot afford to pay for it.

HONORABLE STEPHEN YELENOSKY: But you're suggesting that there would be a different standard in a poor county because a poor county doesn't have the money, therefore, either there are a lot of people who are not poor are getting by with it or you're suggesting that people who would get an affidavit of indigence or who would get a free ride on it won't in a poor county. It's not the indigent person who has to deal with the problem that the county doesn't have money if they're truly indigent.

MR. MUNZINGER: Well, the county -- you

know, El Paso County doesn't have money.

HONORABLE STEPHEN YELENOSKY: Well, they --

MR. MUNZINGER: They may not have the volume of the problem either. My only point is there's no such thing as a free lunch anywhere. Somebody is paying for it. Who is going to pay for it? The court reporter? The court reporter works at a discounted rate. Why? Because we're in a hurry about determining who can and can't pay. We want to have it simple instead of having the judge make a true examination of whether or not a person is or isn't indigent.

HONORABLE STEPHEN YELENOSKY: But everything we've heard is you're not going to get a lot of revenue by doing this, right?

MR. MUNZINGER: I think that's true.

HONORABLE STEPHEN YELENOSKY: That's true, right?

MR. MUNZINGER: Yeah.

HONORABLE STEPHEN YELENOSKY: So what you're saying is there's a cost that somebody has to bear, and therefore, you know, we should go through this process, through this fruitless process that is going to end up still costing us the same. When you say El Paso doesn't have the money, what do they do right now?

MR. MUNZINGER: Well, Richard's comment was

a dollar becomes a million dollars, and a million dollars becomes 5 million dollars, or whatever, and that's --

CHAIRMAN BABCOCK: No, he said a billion.

MR. MUNZINGER: Whoever it was that made the comment made the comment correctly.

MR. ORSINGER: At the federal level it's a trillion.

MR. MUNZINGER: That's part of the problem. You're dealing with taxpayer money. "Well, we've got a hell of a lot of money. Let's spend it."

HONORABLE STEPHEN YELENOSKY: Yeah, but $10 here and $50 there doesn't add up to a million, and they're saying it doesn't add up.

MR. ORSINGER: What about $25,000 for a reporter's record added to it, another 35,000 for another reporter's record, and 50,000 --

MR. MUNZINGER: I just was asked to produce a check for several thousand dollars as a down payment on a trial court record. Okay. My client can afford it. That's fine, but there may be some indigent trials where it goes two, three, four days or a week or what have you. Somebody is doing this, and they're doing it at their cost. Why? Why?

HONORABLE STEPHEN YELENOSKY: Well, I mean, then we have to decide that if you're going to appeal and

it's $25,000, you don't really have a right of appeal if you're below a certain level. A lot of us, or at least me, couldn't come up with $25,000 for an appeal like that as a judge. So we're just going to say -- and that's fine, but let's make a decision that way rather than saying we're going to go through this process and try to find some people who might be able to pay $25,000.

CHAIRMAN BABCOCK: Judge Peeples.

HONORABLE DAVID PEEPLES: Richard, where do we stand on an Anders procedure for civil cases? Anders, in criminal cases there's a procedure by which a lawyer can look at the result and certify there's no issue here, and I ask that. Chief Justice Hecht this morning mentioned a big increase -- I think it was termination cases -- of appeals to their court, a lot of those. I'd say the vast majority of those are indigent appeals, and serious consequences, but how much of it is that kind of record, how much of it is private stuff, and is there an Anders proposal here?

MR. ORSINGER: I don't think there is in Texas a civil -- I filed -- on the criminal side I used to file them myself where you were appointed or hired to handle a criminal appeal, and they had no bona fide argument for reversible error but they had a due process right to have their arguments presented anyway, so you

filed an Anders brief, and you briefed it as good as you could, but you still had to have your reporter's record to take that up, because they have nothing to review if you're reviewing the evidence you give them in the record. But I don't think there's an Anders concept in a termination appeal, is there?

HONORABLE TOM GRAY: Oh, yeah.

MS. BARON: Yes, there is.

HONORABLE DAVID PEEPLES: And you would still have the record.

MR. ORSINGER: Do they take the record up for that?

HONORABLE TOM GRAY: Oh, yeah.

MR. ORSINGER: So that doesn't help us answer the question.

CHAIRMAN BABCOCK: You mind restating the question?

MR. HARDIN: Yeah. I was going to ask the same thing.

MR. ORSINGER: The question -- and from my perspective, the question is whether we ought to revise the rule to define poverty on the merits; and if we should, should that say that it's the inability to pay, but if you have an IOLTA certificate or if you're receiving benefits under a federal poverty program, that

itself is irrebuttable evidence of the ability to pay. Or maybe it's rebuttable evidence of the ability to pay, but it is approved that you can't pay.

MR. JACKSON: Which is 502.3 now.

MR. ORSINGER: It is. Yeah. Now, I'm suggesting that we -- that we not stick with just the pleading requirement and the counter-pleading requirement with no definition of what poverty is, because that leaves the trial court no standard to follow in the hearing on the merits if you get to one. I think it's okay to have pleading requirements so we don't have wasted hearings, but once we have a proper pleading and proper counter-pleading, then should we define poverty and should that definition of poverty have what they call automatic qualifiers that nobody can question. You just put that certificate in evidence, and everybody leaves.

MR. GILSTRAP: Do we adopt 502.3? I mean, that's the issue, isn't it? For everybody, not just justice courts.

MS. McALLISTER: 502.3, though, mirrors the old rule significantly.

CHAIRMAN BABCOCK: Yeah. Richard, let's move on to the second TAJC issue because we're running out of time a little bit.

MR. ORSINGER: And that is?

CHAIRMAN BABCOCK: I think it's on page five of your memo. Require 145(a) must be sworn before a notary.

MR. ORSINGER: Well, you know, Trish had -- yeah, that's fine, Chip. Trish addressed that by saying we spent a lot of time talking to a lot of different people and finally figured out that we can't avoid the requirement that an unsworn declaration supporting emergency relief on a protective order has to reveal an address. We can't do that because it's in the statute. We have to do the repealer. We don't ever use the repealer right, so we concluded after some thought -- Trish, do you not agree -- that the best thing for us to do was to change the protective order kit --

MS. McALLISTER: No.

MR. ORSINGER: -- to add an affidavit? No, okay. Would you explain the solution there?

MS. McALLISTER: No. The solution, the protective order kit already has --

MR. ORSINGER: Had the fix?

MS. McALLISTER: -- an affidavit and a declaration in it, so that is not the solution. What we're asking is that people who -- what happens a lot of times is they go to the district -- or, you know, they go to the county attorney and get a protective order. Then

they go over to the district court and file for a divorce, and they are filing this statement; but the statement requires them to list their address, their home address, where they have gotten underneath their protective order a confidentiality, you know, because they don't want this person to know where they are. So what we're saying is just the form statement, if we could make the form statement have two sections, the first one being the declaration, and then they could choose option A or option B. Option B is an affidavit and then it's just a notarized thing. They don't have to put their address. Very simple solution.

MR. GILSTRAP: Like the protective order kit.

MS. McALLISTER: Like the protective order kit.

MR. GILSTRAP: Same way. Yeah, that's the solution.

MS. McALLISTER: The protective order kit has two different forms, but it doesn't need to be that way. It just could be one section and then another section.

CHAIRMAN BABCOCK: Any comments on that proposal? Richard.

MR. ORSINGER: I mean, that seems fine.

We -- I think we noodled this around a little bit and came up with this is the best solution, didn't we?

MS. McALLISTER: Yeah.

MR. ORSINGER: Yeah. I think everybody is agreed that this is the best solution.

CHAIRMAN BABCOCK: Any other comments on that? Okay. The last item I saw we may have already talked about.

MR. ORSINGER: Yeah. We did, and I think we took a vote, and I think all of us but one, with one complainer, agreed that it ought to be a 30-day rule.

CHAIRMAN BABCOCK: Right. Okay.

MR. HARDIN: One independent thinker.

CHAIRMAN BABCOCK: One independent thinker. So we are going to take our afternoon recess and come back at 4:00 o'clock.

(Recess from 3:43 p.m. to 3:57 p.m.)

CHAIRMAN BABCOCK: Pam Baron. This should be easy because there's nobody here.

MS. BARON: I think our subcommittee outnumbers the people in this room. All right. We had two assignments for this meeting. Professor Dorsaneo, you know, is the Chair, and he was unable to participate. We did have Justices Boyce and Busby, Scott Stolley, Evan Young, and myself and Elaine Carlson, and that last person

will be important because we are discussing a supersedeas rule, and Elaine, of course, is the expert in the state on that subject.

The Texas Legislature this past session passed House Bill 2776. It provides that certain government defendants who lose a case in the trial court and are entitled to supersede without posting a monetary bond will not be subject to counter-supersedeas, which means that the trial court does not have discretion to disallow particular government entities from superseding an adverse judgment on appeal, and it directs the Texas Supreme Court to adopt a rule that so provides no later than May 1st, 2018.

So there is a fair amount of time between now and then for the Court to consider this, but our committee jumped right on it, and the three categories of state defendants that this rule apply to are the state, a department of the state, and the head of a department of the state; and the statute provides for an exception, which is a lawsuit concerning a matter that was a basis of a contested case and an administrative enforcement action.

So it's pretty straightforward. Counter-supersedeas is discretionary in the trial court under Texas Rule of Appellate Procedure 24.2(a)(3). The Texas Supreme Court recognized that *In Re: State Board for*

*Educator Certification*, and there they said that trial courts do have that discretion under 24, and presumably to override this case the Legislature passed the legislation when it did. We proposed adding a single sentence to 24.2(a)(3), which is underlined on page two of our memo, and that sentence would provide, "When the judgment debtor is the state, a department of the state, or the head of a department of the state, the trial court must permit a judgment to be superseded, except in a matter arising from a contested case in an administrative enforcement action."

So the suggested language simply parallels, almost quotes in some respects, the statute. And there really wasn't a lot of controversy on our committee, subcommittee, about this. We played around with the wording, and that's what we came up with.

CHAIRMAN BABCOCK: All right. It seems very straightforward, but that must be deceptive, Justice Gray.

HONORABLE TOM GRAY: No. I'll just be quiet.

CHAIRMAN BABCOCK: No, no, no. Justice Busby, any comments about it?

HONORABLE BRETT BUSBY: (Shakes head.)

CHAIRMAN BABCOCK: Justice Bland?

HONORABLE JANE BLAND: I got nothing.

CHAIRMAN BABCOCK: Yeah, I figured you

would.

MS. BARON: It's good to be at the end of the day when people are tired.

HONORABLE JANE BLAND: Please correct -- I'm laughing with grammar, for the record, not --

CHAIRMAN BABCOCK: Did you say you have nothing or something?

HONORABLE JANE BLAND: I got nothing.

CHAIRMAN BABCOCK: You got nothing. All right. Laughter followed. Justice Boyce, anything from you?

HONORABLE BILL BOYCE: I think it's perfect.

CHAIRMAN BABCOCK: Anybody think it's not perfect?

MS. BARON: All right. Next.

CHAIRMAN BABCOCK: As befits work by Pam Baron. Perfect.

MS. BARON: No, it was Elaine and all the members of the subcommittee drafting and agreeing.

CHAIRMAN BABCOCK: So do we go to TRAP Rule 11?

MS. BARON: Yes. TRAP Rule 11, the State Bar Court Rules Committee proposed an amendment to Rule 11. Rule 11, if you're not familiar with it, governs the submission of amicus briefs to the Texas appellate courts,

and the State Bar proposed a change in the rule for I think two different reasons. One is that many amicus participants did not comprehend or the rule did not specify that their submission could be made in a letter, and there's also a problem in that the rule says you have to follow the briefing rules of the parties. So a lot of amicus were including sections that really just weren't that useful, like restating the facts, because the parties are supposed to have a statement of facts.

So the State Bar proposed that a change to section (a) of Rule 11 to add that a brief -- that an amicus submission must either be in the form of a letter or comply with briefing rules for the responding parties. For responding parties because responding parties don't have to put things in like statement of jurisdiction, statement of issue, statement of facts. So it eliminates some repetitive sections.

The question was -- to our subcommittee is do we recommend this change to this committee and the Court, and we voted five to one, with the vice-chair disagreeing, to recommend a change with a slight modification. And the concern was raised that once you -- the way the State Bar wording of the amendment suggested that if you file a letter you didn't have to comply with briefing rules for the parties, so you wouldn't have to do

a response, and you wouldn't have a limit on your words. Parties have to limit various documents to certain numbers of words, and so an amicus could file a 500,000 word letter in 10.5.

So the suggested change to that was to adopt what the State Bar had suggested but add a new section (e) requiring the amicus to certify compliance with the limits of 9.4(i) are applicable to a responding party at that stage of the proceeding. And Evan Young would -- concurred but wanted to write separately that he would place a specific word limit on letter submissions, which is not currently provided for in 9.4 or any other rule. So that's where we are.

CHAIRMAN BABCOCK: Okay. And the vote in the subcommittee was five to one in favor of these changes; is that right?

MS. BARON: Yes.

CHAIRMAN BABCOCK: Okay. With you dissenting?

MS. BARON: Yes.

CHAIRMAN BABCOCK: And why did you dissent?

MS. BARON: I think we're fixing a problem that doesn't exist based on a survey of the court of appeals clerks. They rarely get amicus briefs at all, much less in letter form. They are also of the opinion

that because briefs are considered submitted but not -- received but not filed that they just take anything, because how do you reject a filing if it's not filed? And the Supreme Court clerk's office seems to handle these everyday on a regular basis without issue. So we're just -- there are other problems with amicus that I think are more significant that we probably can't fix in a rule, but here we're just doing something to do something. I don't think we're really fixing much.

CHAIRMAN BABCOCK: Okay. Justice Busby.

HONORABLE BRETT BUSBY: One of my thoughts in voting for the proposal was that, as Pam said, the court clerks are already accepting letter amicus submissions anyway, even though they don't comply with the rules, and so that basically this revision would update the rules to comply with what the clerks are doing anyway, and that that served a valuable notice function for people who might like to submit a letter but would actually read the rule and try to follow it and think that they couldn't submit a letter.

CHAIRMAN BABCOCK: Assuming we do or the Court does want to change, is there any dispute about the language? The language looks fairly straightforward to me. Richard, and -- well, but, of course. Orsinger first. I was looking that way.

MR. ORSINGER: I just wonder, Pam, whether we ought to also make them require with the font size requirement, not just the length? Because they probably -- if they're not a lawyer, they won't have any idea that a 10 point or 11 point font isn't even going to be readable on an iPad.

MS. BARON: Right.

MR. ORSINGER: You would just change that by adding the subdivision that has the font requirement.

MS. BARON: We could do that.

MR. ORSINGER: That's my only suggestion. Otherwise I like the suggestion.

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: Well, I had a few changes that I thought -- I had trouble with the use of the word "brief" three times in the introductory clause and then say, "A brief can be in the form of a letter." It just linguistically it didn't work for me, and then when subsection (a) has an either-or preceded with the word "must" that created a problem for me, and I endeavored to move -- to talk about it in the context of an amicus curiae support, authority, discussion, a comment, a document, something. I think somebody -- Brett just referred to it as something else that I thought would --

MS. BARON: Submission.

HONORABLE TOM GRAY: An amicus curiae submission. I like that and then move the "letter or a document that complies with the briefing requirements" up into the introductory paragraph and then renumber (b), (c), (d), and now (e) to just be (a), (b), (c), and (d).

CHAIRMAN BABCOCK: Okay.

HONORABLE TOM GRAY: It just made it flow better to me.

CHAIRMAN BABCOCK: Great. Richard Munzinger.

MR. MUNZINGER: Is there a page limit on a letter?

MS. BARON: No.

MR. ORSINGER: There's a word limit.

HONORABLE BRETT BUSBY: Not now.

MR. ORSINGER: Under the proposal, at least the second version of the proposal, it's the same length limits, and those limits now are words, total words, not pages.

HONORABLE BRETT BUSBY: Or it can be pages if it's shorter than -- I forget. It's pages if it's pretty short or words if it's longer. I can't remember exactly.

MR. ORSINGER: I see. So you're saying

there might be a page limit applicable to a letter.

HONORABLE BRETT BUSBY: Yes. That's why it says "length limits" deliberately, because it can be page or word depending on how long it is.

MR. ORSINGER: I did not realize that.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: What's the purpose of the second sentence of the rule, "But the court for good cause may refuse to consider the brief and order that it be returned"?

MR. ORSINGER: Well, it may be disrespectful of the court or --

HONORABLE BRETT BUSBY: That's in the current rule, so we didn't --

MR. GILSTRAP: I understand. I understand.

HONORABLE BRETT BUSBY: -- look at that.

MR. GILSTRAP: I just wondered why it's in the current rule since they take everything.

MR. ORSINGER: I think it's there -- you know, sometimes things are stricken because they're contemptuous or would be considered in contempt of court.

MS. BARON: You know, they're almost never struck, and I've had situations where amicus briefs are paid for by the opposing party. I've had amicus briefs that far exceed the word limits for opposing parties.

I've had amicus briefs filed by the expert for the opposing party, none of those have been struck, despite being pointed out to the court.

CHAIRMAN BABCOCK: Okay. Any other comments about this? We'll go Holly first, and then Justice Gray.

MS. TAYLOR: Well, I mean, this rule also would apply to criminal cases I assume, because Rule 11 applies to both.

CHAIRMAN BABCOCK: Right.

MS. TAYLOR: We do receive amicus briefs. I just -- I apologize. I only about a week ago started looking at this, and we tried to address it in our rules advisory committee meeting last week, but we didn't have a chance to get to it because we had a lot on our plate, so I wasn't able to take kind of a census of what people thought of it. I did talk to our staff member who is head of our petitions for discretionary review intake and also our staff member that handles intake on capital case direct appeals, in which we would receive some amicus briefs, and they've never seen one in letter form. I think both of them said they've always been briefs, and they've always been filed by attorneys. So I guess --

CHAIRMAN BABCOCK: You would be in Pam's camp, this is a solution in search of a problem.

MS. TAYLOR: Well, right. And the other

thing is one of the people I consulted with said, "Wow, I wonder if the language is changed if we might see more people filing them" --

MS. BARON: Right.

MS. TAYLOR: -- "as letters," and I don't know. I'm not saying that's good or bad. I don't personally have an opinion, but it might have that effect. Currently we primarily get them filed -- the entities that file them may not be attorneys but attorneys have written the briefs for them.

MS. BARON: Right.

MS. TAYLOR: So and they get filed, and they conform to Rule 38, and Rule 38.2 does allow for the appellee to leave out the statement of facts I think.

MS. BARON: Right.

MS. TAYLOR: So they have that option, and often, in my experience they do, because they're mainly wanting to argue about the law.

MS. BARON: Right.

MS. TAYLOR: So --

CHAIRMAN BABCOCK: Holly, if your advisory committee has any substantive thoughts beyond what we've talked about today, could you communicate that with Martha?

MS. TAYLOR: Yes. But we're not meeting

again until November 3. We just met and unfortunately, like I said, we weren't able to get --

CHAIRMAN BABCOCK: I'm guessing this is not going to get done by November. Just a hunch. Alex.

PROFESSOR ALBRIGHT: I have written some letter amicus briefs, and I would hate to think that I couldn't write a letter because sometimes I -- Justice Boyd and I were just talking about one that I wrote a couple of years ago, and it was just to point out one little thing that I noticed in an opinion, and I would hate to have to -- now I'm in an appellate firm, and I have the ability to do all of that stuff that you have to do with a brief to make it look right, but as a faculty member you don't -- that's very difficult to do, is to follow the form for briefs, so if you could just write it in a letter pointing something out it's very helpful, and I think it can be helpful to the courts as well.

CHAIRMAN BABCOCK: Justice Gray, and then Richard, and then Pam, and then Peter, and then we're going to take up a motion. Go ahead.

HONORABLE TOM GRAY: I was going to echo the vice-chair's comments about this is not a problem for our court of appeals. I'll take any form of help that I can get in a case that's filed, and if -- you know, if we're going to do it, I do think there's merit to Evan's word

count.

CHAIRMAN BABCOCK: Yeah.

HONORABLE TOM GRAY: Because that can blow up on you, but I think we've all probably gotten letter briefs from Ben Taylor, you know, so --

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: I was going to say that I do think that this probably is not a problem that needs to be solved, but I do like the fact that they're putting in the rules that letters can be filed. In my arena in family law, family trial lawyers that get upset about a ruling are going to file a letter because they don't know how to do a brief for the most part, but in my other experience when I was reading the Supreme Court's record in the same sex marriage cases that our Supreme Court decided within the last couple of years, there were many, many, many amicus letters that were filed, some in the form of e-mails and some in the form of conventional letters. I don't know that anybody ever read them except me. Maybe everybody read them, but it was -- I looked at that, and I saw what they were doing, and I saw that they were probably organized groups that were sending the same message, but at the same time, they were petitioning the government for a redress of grievances. They were sharing their view about how public policy should be decided on a

core issue, and I said this is a free society. This is good. They instead of being in the streets setting cars on fire and breaking windows, they're sending letters to the Texas Supreme Court. I think we should encourage that. I think it makes them feel like they have a say in our system. So I like to make it explicit that anybody can file a letter brief.

CHAIRMAN BABCOCK: Justice Busby, did you have anything?

HONORABLE BRETT BUSBY: I was just going to say I took Pam -- maybe I need a clarification from Pam, but I took Pam's point about a solution in search of a problem not to be so much that people weren't filing these letters in the Supreme Court and in other courts, and we don't get a lot of amicus submissions, but when we do I've seen them in the form of letters, and so I think -- I would just -- I think if we're doing it -- if we're accepting these anyway that the rule ought to reflect what the actual practice is.

CHAIRMAN BABCOCK: Pam.

MS. BARON: I was just going to basically talk about what Richard did, and it's my understanding that the clerk of the Texas Supreme Court now when the Court receives e-mails from people commenting on pending cases, they are logged as amicus submissions and noted in

the docket and the parties get notice. None of those are -- or very few of those probably comply with any of Rule 11.

CHAIRMAN BABCOCK: Peter.

MR. KELLY: Richard's point is well-taken in that we are a participatory democracy, but on the other hand, if you explicitly allow for letter submissions you're going to end up with an amicus practice like California state court has, which is in every single case it's a bunch of "me, too" letters saying -- you know, Farmers Insurance will just file a letter saying, "We support State Farm's position." That's -- and so we have 38 to 45 amicus letters in any routine insurance case that don't add anything to it. They're not substantive briefs. They're not citing any case law or making any new arguments. They're just saying "We want you to do what State Farm wants you to do" or whatever the interest group is.

So there might be a way to do that. I mean if it were to have the rules reflect the practice, perhaps we should find a way to not encourage these "me, too" letter briefs, and Justice Hecht enlightened me on this whole idea of appointed amicus briefs. If there's a pro se party, the court will appoint an amicus attorney to brief that party's position. They're not representing the

party, and then if we're going to conform to the practice then maybe we have to conform to that particular practice as well.

On the other hand, if we have a short, succinct rule that seems to cover pretty much every situation, there might not be a need to change it.

CHAIRMAN BABCOCK: There has been made a motion made by -- to adjourn early so the Chair can catch his flight, which the Chair grants.

MR. ORSINGER: After the Chair debated with itself.

CHAIRMAN BABCOCK: It was debated hotly, and the motion was a close one, but it was granted.

HONORABLE TOM GRAY: One-zip.

CHAIRMAN BABCOCK: So thank you, everybody, and we will see you in October.

(Adjourned)

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

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I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above meeting of the Supreme Court Advisory Committee on the 11th day of August, 2017, and the same was thereafter reduced to computer transcription by me.

I further certify that the costs for my services in the matter are $ 1,794.00 .

Charged to: The State Bar of Texas.

Given under my hand and seal of office on this the 2nd day of September, 2017.

/s/D'Lois L. Jones
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