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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

December 1, 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 1st day of December,
2017, between the hours of 9:07 a.m. and 4:50 p.m., at the
Texas Association of Broadcasters, 502 East 11th Street,
Suite 200, Austin, Texas 78701.

INDEX OF VOTES

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

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Documents referenced in this session

- 17-29 Rule 308b Final Draft with Orsinger Email, 11-29-17
- 17-30 TAJC Supplemental Report & Exhibits
- 17-31 Revised Proposed Court Staff Policy on Patrons Assistance, 11-27-17
- 17-32 Revised Proposed Clerk Policy on Court Patron Assistance, 11-27-17
- 17-33 Proposed Changes to Disciplinary Rules, Access to Juror Social Media, 11-28-17
- 17-34 Summary of Changes to Protective Order Kit, 11-21-17
- 17-35 Protective Order Kit Final Draft, 11-21-17 (highlighted)
- 17-36 Protective Order Kit Final Draft, 11-21-17

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CHAIRMAN BABCOCK: All right, welcome, everybody. Chief Justice Hecht is going to be a little delayed, and in his absence Justice Boyd is going to deliver the remarks from the Court, so Justice Boyd.

HONORABLE JEFF BOYD: Thank you, Chip. Good morning. Just a couple of updates on the Court since we met a month ago. There's not as much that has occurred as there often is between these meetings for the Chief to report on, but there are a couple of things. One, those of you who were here at the last meeting will remember that Martha made the announcement because both the Chief and I were absent last time, so we've gotten lots of votes that from now on she should do it. We are taking that to heart, but don't count on it. But she unfortunately had to announce her own good news, which should not have happened, so I want to add on behalf of the Chief and I our congratulations to Martha, who has been serving faithfully as the rules attorney but is now staff attorney for the Chief Justice and is taking on that role as her primary role, but has agreed to continue serving as, I guess, supervisor of the rules attorney. She's not giving up her rules obligations, but will be primarily -- her primary responsibility will be to the Chief as his staff attorney.

1 What that means, as she mentioned last
2 month, is that we are hiring a new rules attorney, and I
3 can tell you we have now done so, and so we will have a
4 new rules attorney joining us at our next committee
5 meeting, and her name is Jackie Lynch. Jackie is a UT
6 undergrad and UT law grad who clerked for Justice Lehrmann
7 2012 to 2013, which was my first half-year with the Court,
8 so I had her next door to me on my first -- when I first
9 joined the Court. Jackie went to V&E in Houston in the
10 litigation department there and then earlier this year for
11 personal reasons wanted to move to Austin and came to
12 Austin and has been working at HHSC this year, but when
13 this opportunity came up was interested, and we were all
14 very interested in her, and so she will be joining us next
15 meeting. Jackie Lynch. So look forward to welcoming her.

16 And then the only other thing -- well, I
17 should say also, as we look at changes in the staff at the
18 Supreme Court it appears as if it may include changes on
19 the Supreme Court, and so we're all anxious to see how
20 that plays out. Justice Willett was with us in our
21 conference yesterday, and I told him that in the old
22 Thompson & Knight tradition that we were really going to
23 miss -- "Are you taking that plant?" So we'll all start
24 figuring out how to move offices and do all the things you
25 do, but it's interesting because his departure will be the

1 first change in the Court in well over four and a half
2 years. Justice Brown just last month became the longest
3 serving junior coffee justice in the history of the Texas
4 Supreme Court, so it's almost as if we're due for a change
5 having had pretty good stability for now almost five
6 years.

7 The last thing I would say is that --
8 talking about changes, is that at the end of this month,
9 December, all of you are officially off this committee.
10 Thank you for your service. Your three-year terms have
11 all come to the end this month, but fear not because the
12 Court recognizes that you are all in the middle of very
13 important projects, and we just yesterday at our
14 administrative conference distributed the first memo to
15 the Court recommending the continued establishment and
16 reappointment, with maybe some new members. I know
17 there's a couple of retiring and there are a couple of
18 changes that will occur, but we expect that at our
19 December 12, December 11 conference -- December 12
20 administrative conference the Court will officially
21 approve that and will continue -- I expect you to continue
22 working when our first 2018 meeting occurs.

23 MS. GREER: So are we going to have to
24 interview for the job like in Office Space?

25 HONORABLE JEFF BOYD: Yeah. No, we have all

1 of your resumes on file. And that's all I have, Chip.

2 CHAIRMAN BABCOCK: Great. Thanks very much.
3 We'll go right to Jim Perdue and the continuation of the
4 discussion on rules of enforcement of a foreign judgment
5 or arbitration award in family law cases.

6 MR. PERDUE: Well, this is a continuation of
7 the conversation from last time on HB 45. You should have
8 the proposed Rule of Procedure 308b. Mr. Orsinger has
9 headed this for the subcommittee, and I think he's
10 probably in the best position to give a report since it
11 deals particularly with a family law -- Family Code issue,
12 and most of the subcommittee has been very respectful of
13 deferring to greater knowledge on this topic, as it is
14 pretty arcane and there are specialists in it, and they
15 were responsible for drafting the bill, and they are now
16 responsible for drafting the rule that you have.

17 CHAIRMAN BABCOCK: Somebody other than
18 Orsinger on your --

19 MR. PERDUE: There are others. There are
20 others than Orsinger.

21 MR. WEBB: Even more arcane than --

22 CHAIRMAN BABCOCK: Richard.

23 MR. ORSINGER: Chip, happy to go forward
24 here. Today we have on my right Karl Hays and on my left
25 Brian Webb, family lawyers who worked on this project for

1 the Texas Family Law Foundation. Steve Bresnen cannot be
2 here. He had to go to Mexico for a wedding, not his own,
3 but at any rate, Karl took over the drafting and was
4 responsible for the most recent draft. Much of what we
5 discussed last time led to the conclusion that the
6 timetables originally suggested in the rule were not good
7 because some were too focused on the start of the lawsuit
8 and some were too focused on the end of the lawsuit, and I
9 think the feeling that we took away from the meeting was
10 that we needed more flexibility. We still need an early,
11 active disclosure of the intent to rely on foreign law or
12 oppose foreign law, but we were probably trying to do too
13 much too quickly. And so what we've done in this revision
14 is to still have the initial disclosures of your intent to
15 rely on law or foreign law at the early part of the
16 lawsuit; but rather than try to micromanage when exactly
17 the judge is going to rule on that, we loosened it up a
18 little bit and gave the court the power to set deadlines
19 for filing affidavits, certified translations where you're
20 going to have a paper war over what the language is, and
21 set deadlines, appropriate deadlines, for expert testimony
22 on foreign law or some of these other issues that may come
23 up in connection with it; and then still keep a very tight
24 rein on the trial court's having the hearing, making the
25 ruling, making the findings. And then even more

1 flexibility is required for temporary hearings, which
2 sometimes occur in family law cases, because they might
3 occur within 3 to 10 days of when service occurs, and we
4 can't possibly build rigid deadlines into a fight over the
5 enforceability of a foreign decree or arbitration award
6 when you're only a week or two into the lawsuit. So in
7 the temporary hearing situation we have revised this to
8 kind of let the judge make up the rules that will work
9 with the exigency of the circumstance.

10 So I don't think we really need to take the
11 whole rule one by one, line by line like we did last time.
12 Maybe I could call out some high points and then people
13 could either comment on that or raise their own issues.
14 The first thing is, is that we've tried to coordinate the
15 disclosure of the intent to seek enforcement and the
16 response deadline to the deadline for the court to resolve
17 the issue on the front end of the lawsuit. So the party
18 who is seeking recognition or enforcement of the foreign
19 judgment has to provide notice of that within 60 days of
20 filing the first pleading. Originally we had thought it
21 ought to be in the first pleading, but sometimes it's the
22 responding party who is going to be trying to prove the
23 foreign law or the foreign arbitration award, and they may
24 not realize that that issue is present in the case where
25 there are initial pleadings. So I think the idea was we

1 are not going to make the deadline to disclose your intent
2 to raise foreign law in your initial pleading, but within
3 60 days of your initial pleading by which time the lawyer
4 should be familiar with the fact that that issue is in the
5 case. And like before you have to not only give notice of
6 your intent, but you have to explain what you're trying to
7 do and why you're trying to do it.

8 So then let's move to the responding party.
9 Within 30 days of receiving notice that the other party is
10 going to seek enforcement of a foreign -- a judgment under
11 foreign law or arbitration award. You have 30 days to put
12 forward your opposition, and likewise, it's not just
13 notice, but you have to explain your situation. However,
14 you're not required to paper your entire case at that
15 time. You're only required to give the notice, and so we
16 have a notice within 60 days of filing of the first
17 pleading. Then the response notice is 30 more days and
18 then the -- the rule says that within 75 days of when the
19 first notice was filed the court must have a pretrial
20 conference to set deadlines and make other orders relative
21 to proving foreign law or translations; and then that's
22 the end of the -- if you will, the making of the issues or
23 drawing of the issues together. And then there's no
24 deadline on the court under this current version of the
25 rule, and then you shift to a trial-related deadline,

1 which at least 30 days before trial the court has to have
2 a hearing on the record -- I mean more than 30 days, no
3 less than 30 days before the trial, the court has to have
4 a hearing on the record and must sign an order within 15
5 days, and the order must contain findings of fact and
6 conclusions of law, which was in the statute.

7 And if there's a temporary hearing then all
8 of these deadlines are set aside, and the judge has to do
9 something that is going to work within the context of an
10 abbreviated hearing on limited issues. And it may be that
11 they'll do nothing for the temporary hearing on proving
12 the enforceability of the foreign law, or it may be
13 they'll do some kind of super fast deadlines or kind of a
14 limited preliminary assessment. Whatever. We're leaving
15 that up to the trial judge, depending on what the
16 emergencies are and what the issues are.

17 The one other thing I want to mention and
18 I'm sure will be discussed today is the provision in the
19 rule on page one, subdivision (b)(1) of Rule 308b, and
20 that's the exception that says, "This rule does not apply
21 to an action brought under the Hague Convention on
22 International Child Abduction," which we in the field call
23 the Hague Convention, "including the International Child
24 Abduction Remedies Act," which is the federal statute. We
25 call it ICARA in the trade, and ICARA is the federal

1 statute that Congress enacted to fulfill its obligation to
2 create a governmental procedure to implement the
3 provisions of the Hague Convention. And the Hague
4 Convention is not -- it's just a very broadly stated
5 treaty, international treaty, so it doesn't have the kind
6 of mechanics you need to establish which court has
7 jurisdiction and what the procedures are.

8 So the Congress adopted ICARA, but one of
9 the complications is that even though there may be the
10 interstate movement of a child, it is not necessarily true
11 that litigation involving an international situation will
12 be under the federal statute, because there are some state
13 laws that could be invoked; and so the question became how
14 do we articulate this exception that said that all of
15 these provisions in this rule don't apply "if," and what
16 is the "if"? Is the "if" that the lawsuit is brought
17 under the federal ICARA statute or is the "if" that the
18 lawsuit is brought somehow invoking the rights and
19 conventions under the Hague Convention or what? How do we
20 define it?

21 We don't want to overdefine the exception
22 because we might create holes for people to circumvent
23 this, this rule, but then if we under except we might lead
24 trial judges into error of making rulings and making
25 decisions that are in violation of federal law or federal

1 treaty, which are both the supreme law of the land. So
2 this is the revised version. Fundamentals of it are
3 similar, but what's happened is that the timetables have
4 been adjusted to be more consistent with the comments from
5 the last meeting, Chip.

6 CHAIRMAN BABCOCK: Great. All right.
7 Anybody have any general comments? And we can take up
8 some of the issues that Richard raised. Anybody have any
9 general comments about the rewrite, the redraft? Okay.
10 You want to take specific issues?

11 MR. ORSINGER: Well, okay. The first one we
12 come to if we look chronologically here is the exception
13 under 308b, subdivision (b)(1), and that's what I was
14 talking about.

15 CHAIRMAN BABCOCK: Right.

16 MR. ORSINGER: Hague Convention and how you
17 define the exception and is it just limited to ICARA or is
18 it broader than that, and Justice Busby was very actively
19 involved in our analysis, and I see that he would like to
20 speak.

21 CHAIRMAN BABCOCK: Justice Busby.

22 HONORABLE BRETT BUSBY: Good morning. Thank
23 you. My concern on this one is the word "including"
24 because there is a Second Circuit case and several others
25 that have analyzed this, and no court apparently has ever

1 held that the Hague Convention creates a private right of
2 action. It's -- it's ICARA, the federal statute, that
3 creates the right of action; and so my concern with saying
4 "including" in this rule is that it may suggest to a
5 practitioner that doesn't know this area of law very well
6 or to perhaps a general jurisdiction judge that may not
7 have had one of these before that a suit can be filed
8 under the Hague Convention and not under ICARA. And the
9 Second Circuit case goes to great lengths to explain why
10 Congress enacted ICARA to avoid that very circumstance and
11 all of the uncertainty and nonuniformity that would result
12 if people were just suing under the Hague Convention and
13 not under ICARA.

14 So my suggestion -- and I visited with some
15 of the experts about it this morning -- is to change
16 (b)(1) to say, "This rule does not apply to an action
17 brought under ICARA concerning rights under the Hague
18 Convention." And I believe that satisfies their concern
19 that we mention the Hague Convention, and it also would
20 address my concern that we not suggest that there's a way
21 that you can sue just under the Hague Convention but not
22 ICARA, and that way not confuse anybody.

23 CHAIRMAN BABCOCK: Right. Great. Thank
24 you. Richard, what do you or Brian or Karl have to --
25 Brian, do you have --

1 MR. WEBB: Sure. Brian Webb. I am the
2 so-called expert, one of them, with Karl. We talked --
3 Justice Busby talked with us this morning, and, Karl, I
4 think we're on board --

5 MR. HAYS: Yes.

6 MR. WEBB: -- with the language change. Our
7 only concern had to do with the fact that what the
8 convention is is in effect an international venue
9 decision, which court is going to get to hear it, and it's
10 got -- it's supposed to be expedited like a writ of habeas
11 corpus would be in a Texas case, and the time lines were
12 in the way, and what we wanted to do was make a clear
13 statement to the judges that the time lines of this new
14 law don't apply to Hague Convention cases, which is what
15 we refer to them as. We never say ICARA. It's kind of
16 like when you talk about conservatorship you better say
17 "custody" if you want people to know what you're talking
18 about. So we're happy with the language. It signals to
19 the court that this doesn't apply to a Hague Convention
20 case, an ICARA case, and in the discussion I think we're
21 all on the same page as to what the effect is and how it
22 all operates, so --

23 CHAIRMAN BABCOCK: Thanks, Brian. Karl,
24 you --

25 MR. HAYS: Yes, I concur.

1 CHAIRMAN BABCOCK: Yeah, okay. Good, thank
2 you. Chalk one up in the win column for Busby.

3 MR. PERDUE: He fought hard for it, so give
4 him due props.

5 MR. ORSINGER: The next one, Chip, is under
6 308b, subdivision (c)(1). This was a change that we need
7 to be sure I guess everybody buys into, that we're no
8 longer suggesting that you must raise the enforcement
9 issue in your initial pleading, but it's within 60 days
10 from the date you file your original pleading. And I
11 don't know -- we don't have any feedback yet on whether
12 that's a good idea or not. 60 days is -- seems to me like
13 a lot of time to become familiar with your case and figure
14 out you've got some kind of foreign law issue that you
15 want to bring forward, and is everybody okay with the idea
16 of moving away from requiring it in the initial pleading
17 to requiring it afterward, after the initial pleading and
18 give two months? Is that enough? Is that too much time,
19 or where are we on that?

20 CHAIRMAN BABCOCK: Okay. Any comments?
21 Yeah, Justice Gray.

22 HONORABLE TOM GRAY: Not directly related
23 but somewhat, is -- because I don't do these. I've never
24 seen one, but is there any possibility that that foreign
25 judgment or arbitration award would be rendered during the

1 time that another proceeding was pending to which it would
2 apply? In other words, is it possible to have two of
3 these going on in different locations at the same time and
4 wind up with a foreign judgment that you want to use long
5 after the stateside case has been filed and being
6 prosecuted? And this doesn't really address how what --
7 conceptually linguistically what I was thinking about was
8 "or enforcement of a judgment, arbitration award, or entry
9 of the judgment or arbitration award" such that if it's
10 entered during the period of existing litigation, the
11 60-day period doesn't necessarily kick in. And I don't
12 know if I've even begun to explain my question.

13 MR. ORSINGER: I think I understand,
14 Justice. For example, it may be that you're within a
15 month or two of getting your foreign judgment, which was
16 obviously initiated beforehand, and under the rules of
17 comity frequently the first filed gets to go forward. So
18 what if someone says, "I'm planning to raise a foreign law
19 issue, but I don't quite have my judgment yet." Is that
20 what you're saying?

21 HONORABLE TOM GRAY: That or actually what
22 concerned me a bit more is there's a suit going on here in
23 the United States, and it doesn't -- maybe it's not
24 looking well for the person, and they run to a foreign
25 country where they have more control of the judicial

1 process or the laws there are more favorable to them and
2 they in effect get an expedited result that is favorable
3 to them and then they want to come back in, and how does
4 that factor into this? And maybe the comity is where it
5 kind of gets resolved, but still I'm concerned about both
6 the situation you described as well as the other side of
7 an abuse of that possibility of getting a judgment or
8 arbitration award during the pendency of another
9 proceeding.

10 CHAIRMAN BABCOCK: Justice Gray, what I -- I
11 thought you were driving at a third point, which was that
12 there's a parallel proceeding that after 60 days ripens
13 into a judgment or an award, and under this rule have you
14 now lost your ability to raise that because you haven't
15 done it within 60 days?

16 HONORABLE TOM GRAY: That's a much more
17 eloquent way of saying what I was trying to say, but yes.

18 CHAIRMAN BABCOCK: Got another first for
19 eloquence from the Chair. Richard, what do you think?

20 MR. ORSINGER: Well, we could -- I think
21 that's a very valid point because there is no question
22 that this is written from the perspective that you have
23 the judgment before --

24 CHAIRMAN BABCOCK: Yeah.

25 MR. ORSINGER: -- you file a lawsuit or at

1 least before the 60 days. Maybe there should be something
2 in there 60 days or within so many days of when the
3 judgment or arbitration award is issued, whichever is
4 later, and that would catch that problem.

5 CHAIRMAN BABCOCK: What do you think about
6 that, Karl and Brian?

7 MR. HAYS: I think that would work.

8 MR. WEBB: I think that works, and again,
9 you're talking about non-Hague cases because you really
10 don't have that issue --

11 CHAIRMAN BABCOCK: Right.

12 MR. WEBB: -- in a Hague case. Hague case
13 the rules are pretty clear.

14 CHAIRMAN BABCOCK: Yeah. Okay, good.
15 Peter.

16 MR. KELLY: Or you could phrase it like
17 Chapter 74 is phrased. You have to file the expert report
18 after the pleading is filed stating a cause of action
19 against the health care provider. So it could be you have
20 an ongoing Texas proceeding, and there's no allegation or
21 no cause of action associated with a foreign judgment.
22 Later that foreign judgment ripens, then you can amend
23 your pleading. So instead of the original pleading, the
24 first pleading stating a cause of action or invoking the
25 foreign judgment. I don't know the -- drafting on the

1 fly, so I don't know how you would phrase that.

2 CHAIRMAN BABCOCK: Roger, then Frank.

3 MR. HUGHES: Well, the other thing that did
4 occur to me during the commentary was what do you do about
5 a default judgment situation? In other words, we have a
6 situation here where they don't have to plead that
7 they're -- whatever it is they need to do to enforce a
8 foreign judgment for 60 days, but within 60 days they
9 could have the other side served. The person for whatever
10 reason may have defaulted. I mean, it may be they have a
11 good excuse for defaulting, but they've defaulted, and now
12 you're having a default judgment hearing within the 60-day
13 period. Now, it's clear at least from the commentary that
14 the rule was drafted to apply whether or not there was a
15 default. In other words, the person appears, person
16 doesn't appear, you still have to plead it; but now we
17 have the possibility that the person could, so to speak --
18 the petitioner could lay behind the log, get them served,
19 and get a default judgment hearing, all before they even
20 have to bring up the enforcement. And then maybe they
21 waltz into the hearing on the default judgment and say,
22 "Oh, by the way, I've got this judgment for Iraq that I
23 want enforced," and the other side hasn't answered. So
24 maybe I'm not familiar enough with family law proceedings
25 and that could never happen, but it seems to me the intent

1 is that whether you seek a default judgment or not, this
2 rule is going to apply to make the other person prove up
3 their ability to enforce the judgment.

4 CHAIRMAN BABCOCK: Is your concern that the
5 respondent would say, "I'll default on what I see here,"
6 but that they don't know that they're defaulting to a
7 foreign judgment or arbitration award?

8 MR. HUGHES: Or maybe they've given the plea
9 to their answer to an attorney who has forgotten to file
10 an answer on time, et cetera, et cetera.

11 CHAIRMAN BABCOCK: Okay. Frank.

12 MR. GILSTRAP: Well, I'm going to continue
13 down that road on these time limits. I mean, in a perfect
14 world one party gives notice of foreign law, that they're
15 going to try to use the foreign judgment within 60 days.
16 The other side responds within 30 days, and then the trial
17 court sets a pretrial conference and a hearing. That's
18 what the rule says. But in the real world, you know,
19 people are going to miss these deadlines, and I have no
20 doubt that these deadlines can be waived. They're not
21 jurisdictional.

22 So what happens if, for example, the person
23 gives notice of foreign law and the other person just
24 doesn't respond? He's answered, but he doesn't respond.
25 Surely the court is not going to say, "Well, the default

1 is that the foreign judgment is going to apply." Or what
2 happens -- you know, and it seems to me depending on the
3 judge to set these hearings, I don't know, maybe family
4 court judges are more diligent than civil judges, but, I
5 mean, I can't see -- I can see these deadlines being
6 missed easily. Maybe the burden ought to be on the person
7 seeking to enforce the foreign judgment to meet these
8 deadlines instead of the court.

9 CHAIRMAN BABCOCK: Justice Busby.

10 HONORABLE BRETT BUSBY: I share the concern
11 that Roger and Frank have mentioned, and I think one place
12 that we could address at least part of it is in the new
13 part (h), which talks about default orders; and right now
14 it's limited to the circumstance where the opposing party
15 doesn't file an answer; but as Frank mentioned, I could
16 easily see a situation where the other party does file an
17 answer, but then doesn't respond to the motion or the
18 order that we are asking the -- what are we calling it, a
19 written notice of intent to enforce a judgment or
20 arbitration award. If the other side doesn't respond,
21 what do we want to do with that? The rule is silent right
22 now on whether you still have to go through the hearing
23 and have the findings and things like that, and I think
24 that would probably be something good to require, that --
25 not just in a total default situation, but in an answer

1 situation where you don't respond to the foreign law
2 motion, that you would also want the court still to have a
3 hearing and an order. And you might be able to accomplish
4 that in (h) by saying just something like, "The court must
5 conduct a hearing and sign an order even if no party
6 opposes the recognition of a judgment or arbitration award
7 to which this rule applies." And then you would pick up
8 both the default situation and the nonresponse situation.

9 CHAIRMAN BABCOCK: Richard, what do you
10 think?

11 MR. ORSINGER: I like that. You're
12 suggesting a replacement of (h)(1) with what you just
13 said?

14 HONORABLE BRETT BUSBY: I think you could
15 replace all of (h) with that language that I have
16 suggested. I don't think you need -- I think that that
17 accomplishes both (1) and (2).

18 MR. ORSINGER: Can you repeat that again?

19 HONORABLE BRETT BUSBY: Sure. "The court
20 must conduct a hearing and sign an order even if no party
21 opposes the recognition or enforcement of a judgment or
22 arbitration award to which this rule applies." And I
23 don't know if that's -- I mean, because I can also imagine
24 a situation where the parties agree that they want the --
25 you know, maybe they don't in the beginning but ultimately

1 they come to agree that they want the award enforced, and
2 so I don't know if you want to require the court to have a
3 hearing or sign an order in that situation. I'm just
4 thinking off the top of my head because this is new in the
5 rule for this meeting, so maybe you might want to carve
6 out for that circumstance, but it would be interesting to
7 hear other people's views on that.

8 MR. ORSINGER: Okay. So we still need to
9 capture the thought that the court must have a hearing on
10 the record rule and have a written decree with findings,
11 so we probably need to leave some version of subdivision
12 (h)(2) in there so that even in a default situation the
13 court knows that it's got to go on the record and it's got
14 to give findings.

15 HONORABLE BRETT BUSBY: That's why I
16 suggested the language "must conduct a hearing and sign an
17 order."

18 MR. ORSINGER: Containing -- yeah.

19 HONORABLE BRETT BUSBY: I mean, you
20 could refer -- yeah, I think -- I mean, you could also
21 just refer the court -- I know we don't like to do
22 cross-references very often, but you could just refer to
23 (e) and (f). "The court must comply with (e) and (f),
24 even if" -- "even if no party opposes the recognition or
25 enforcement," et cetera. And that way you would pick

1 up -- rather than restating what we've already said about
2 what the court has to do in the hearing in the order I was
3 just looking for a shorthand way to refer back to those
4 without using (e) and (f), but I suppose you could just
5 use (e) and (f).

6 MR. ORSINGER: So then what about the point
7 you make if there's an agreed -- not a default but an
8 agreement? Are we going to let the parties agree and
9 circumvent this requirement of a judicial analysis? Or is
10 the judicial analysis required even if the parties agree?

11 HONORABLE BRETT BUSBY: I can see good
12 reasons why we would want a judicial analysis either way,
13 but I welcome other people's thoughts on that.

14 MR. ORSINGER: We hadn't addressed that
15 previously, but --

16 MR. GILSTRAP: Is that the goal of the
17 statute, that even if the parties agree the court is still
18 going to have a duty to say, well, this -- this award is
19 based on the law of Iran, and I'm going to go into that
20 sua sponte?

21 MR. ORSINGER: You know, I wasn't part of
22 the legislative process, but I think I understand. There
23 is a concern the dynamics of certain families in certain
24 cultures that someone may not stand up and demand their
25 rights that they have under American law that they don't

1 have under the law of a foreign country, and so are you
2 going to require someone who is familiar with American law
3 and who is willing to stand up for due process of law to
4 say, "I don't care that you agree, I don't care that you
5 won't let your lawyer file an opposition. In my
6 assessment you didn't get due process or they don't
7 recognize fundamental rights."

8 MR. GILSTRAP: That's a real leap forward or
9 leap backwards from the adversarial system. I mean,
10 presumably this individual has a lawyer and they've made a
11 decision, well, we want to go -- we want to go with
12 Iranian law, and the court is going to say, "No, no, I'm
13 not going to do that, even though both sides want to."

14 CHAIRMAN BABCOCK: Pete Schenkkan.

15 MR. SCHENKKAN: Surely the Legislature did
16 mean that there would be a hearing and order and findings
17 anyway, and it's really easy to imagine a situation --

18 HONORABLE STEPHEN YELENOSKY: Could you
19 speak up? I'm sorry.

20 MR. SCHENKKAN: Surely the Legislature
21 really did intend that there be a hearing and order and
22 findings anyway, and it's easy to imagine the scenario in
23 which the family law judge would want that. Consider the
24 standard the best interest of the child. Consider a
25 culture in which female genital mutilation is considered

1 proper, necessary, or something.

2 CHAIRMAN BABCOCK: Yeah. Good point. Peter
3 Kelly.

4 MR. KELLY: Just looking at the statute,
5 which is in the act, actually not the statute, in tab (b),
6 I mean, it's phrased very generally about protecting the
7 litigants from violations of constitutional law. It
8 doesn't say anything about agreement. So even if the
9 parties want to circumvent protections of the Constitution
10 and agree to the application of Iraqi law or whatever, I
11 think that the statute contemplates the judge having a
12 duty to still enforce the constitutional protections.

13 CHAIRMAN BABCOCK: Right. Roger.

14 MR. HUGHES: Well, the only thing I do want
15 to avoid here is the flip side of constitutional
16 objections, which is, you know, it is involving the best
17 interest of the child. So I understand perhaps imposing
18 an independent duty on the judge to make findings, which
19 usually are probably going to be drafted by counsel in the
20 event of an agreement. I don't see a big impediment to
21 them drafting the necessary findings. What I want to
22 avoid here is any argument that somehow we're baking into
23 this statute a prejudice against enforcing foreign law
24 simply because these people are -- may be foreign
25 nationals.

1 I mean, I could see the objection in some
2 argument that the law -- that if we go too far down this
3 road the -- possibly an objection to the statute that
4 we're baking into it some form of racial prejudice. I
5 don't think that was the intent at all. I think if
6 anything the intent is that the court has an independent
7 obligation to protect the best interest of the child,
8 which may mean taking a look at whether there is public
9 policy or constitutional reasons not to enforce the law,
10 but I don't think we want to bake into it some idea that
11 simply because, you know, two people from some African
12 nation happened to be here in the United States when
13 they're trying to enforce the order that they can't say
14 "Look, we're happy with the law of our own nation. We
15 just want you to enforce it because this is where we are
16 right now. This is where we are geographically located."
17 That's my only thought.

18 CHAIRMAN BABCOCK: Yeah. Yeah, I don't --
19 I'll get you in a minute, Frank. I don't think there's
20 any issue of racial prejudice --

21 MR. HUGHES: No.

22 CHAIRMAN BABCOCK: -- in the statute. I
23 mean, this is not a new concept. There's a thing called
24 libel tourism, and you know, there are many jurisdictions
25 where you can win a libel case in ways that you can't win

1 it here, and there's a federal statute now that is a
2 similar concept.

3 MR. GILSTRAP: Like New Hampshire.

4 CHAIRMAN BABCOCK: If the judgment in
5 England would not comport with our, you know, *New York*
6 *Times* standard then maybe you can't enforce the judgment,
7 so this is not a different concept. Frank.

8 MR. GILSTRAP: Maybe, maybe we could
9 alleviate the concern here. Are you telling me -- let's
10 suppose there's no issue of foreign law. Husband and wife
11 want to get a divorce, and they want to award custody of
12 the child to the husband, whatever the current term is.
13 Is it true that the divorce court judge still has an
14 independent duty to go behind that if he thinks it's not
15 in the best interest of the child? Even if there's no
16 foreign law involved?

17 MR. HAYS: There is a provision in the
18 Family Code. It's 153.0071 that if the parties reach a
19 mediated settlement agreement there's -- under those
20 instances the court can decline to follow that mediated
21 settlement agreement, but it's in limited circumstances.
22 What the Legislature has defined is that if the party was
23 a victim of family violence, one of the parties to the
24 agreement, the court can say, "I'm not going to do that."
25 That's the *In Re: Stephanie Lee* case that the Supreme

1 Court decided, and it was recently changed last
2 legislative session to involve the issue that was involved
3 in the *In Re: Stephanie Lee* case, which has to do with if
4 you're going to give custody or possession to someone who
5 is a registered child -- a sex offender, the court can
6 decline. But those are the only two circumstances in
7 which a court can decline. Otherwise, they -- even the
8 courts -- the Supreme Court has already said that the best
9 interest doesn't trump that, that the court is stuck
10 having to approve the mediated settlement agreement unless
11 it falls into these two narrow categories that 153.0071
12 talks about.

13 MR. GILSTRAP: This already --

14 MR. ORSINGER: Hold on a second. I think
15 that there's a higher level that needs to be discussed.
16 Karl is talking about the special case of a mediated
17 settlement agreement. We may have -- well, you can have
18 an agreement that's not a mediated settlement agreement,
19 and it's my belief that in that situation the court is
20 free to reject it if it's not in the best interest of the
21 children. So what I think is that Karl had a more
22 specific application.

23 What I would say generally is, yes, the
24 court can reject the custody agreement if they think it's
25 not in the best interest of the children, but if that

1 custody agreement was reached in mediation and contains
2 the clause that "This agreement is not subject to
3 revocation," there's a special rule that trumps the
4 court's power to disregard or override the agreement;
5 however, there are exceptions that would reinstitute the
6 court's power to do that. So what we've got here is we
7 don't have a mediated settlement agreement here, at least
8 not a Texas mediated settlement agreement. We have an
9 order that comes out of a foreign court, or we have an
10 arbitration award, and that's being brought here, and I
11 don't think the mediated settlement agreement rule would
12 apply, and therefore, I think that would be more in the
13 category of just consensual agreement to settle the case,
14 which I think is subject to the court's approval. What do
15 you think, Brian?

16 MR. WEBB: I tend to agree with everything
17 they've both said. But what's concerning me as I sit here
18 and listen to it is I don't know how many of these cases
19 there are that involve enforcing foreign orders. I don't
20 run across them much, and the idea that we would impose
21 upon a part of the court system that's already burdened
22 with about half the civil docket, depending on whose
23 statistics you look at, would then have to have a not
24 insignificant hearing based on some agreement. Nobody
25 wants to be there, nobody wants to hire a lawyer to do it.

1 You've got to prove all this due process. I mean, this
2 isn't just a five-minute deal. I'm not sure it's a good
3 idea to build that in. I would much rather have that
4 right in my domestic cases, meaning in the U.S., in Texas
5 than in foreign ones, but I just have a real concern about
6 building a mandatory hearing that the judge doesn't want,
7 the parties don't seem to want, and I don't know that
8 there's a huge problem with people being disadvantaged in
9 these circumstances. It's more of a practical than a
10 legal concern.

11 CHAIRMAN BABCOCK: Pete.

12 MR. SCHENKKAN: For those of us who don't do
13 family law --

14 CHAIRMAN BABCOCK: Speak up, Pete.

15 MR. SCHENKKAN: For those of us who do not
16 do family law cases, perhaps some of you like me were
17 thinking I wonder if there are other situations where this
18 kind of issue arises in which we really want the judge to
19 look at the situation, despite the fact that the parties
20 agree on it; and the first thing that came up is class
21 action settlements where we have reason to doubt that the
22 party on one side is actually a party representing the
23 interests of all the people whose real interests are being
24 decided and, therefore, are not willing to take that
25 party's lawyer's agreement with the real party on the

1 other side as to the terms of the settlement; and we ask
2 the judge to see if the settlement really is in the best
3 interest of the people who are really affected. The
4 counterpart here would be the children.

5 And the problem with that scenario is a
6 practical problem. Judges don't want to have to dig into
7 something that the parties have agreed on, and they are
8 crippled in their ability to do so since they don't have
9 their own ability to go get facts and that sort of thing,
10 but it's better than nothing is essentially, as I
11 understand it, the policy underlying it. And I think the
12 same thing would be true here.

13 CHAIRMAN BABCOCK: Okay. Yeah, Justice
14 Gray, and then Justice Peeples.

15 HONORABLE TOM GRAY: Just in reading the
16 statute I thought it was fairly clear that the trial court
17 would have this affirmative duty to do this type hearing
18 and determine whether -- if there's a foreign judgment
19 involved, whether or not they were going to enforce it
20 based upon -- and that's in sections (5) and (6) of the
21 statute. And, you know, my question from an appellate
22 standpoint is what happens when it gets to me and the
23 trial judge did not do this and it's an issue on appeal?
24 Is it -- is that something that has to be preserved by
25 objection, or is this like we seem to be getting more and

1 more of these situations where, okay, this didn't happen
2 at the trial court level. It was supposed to be. We're
3 going to remand this to the trial court for a hearing now
4 to determine whether or not that's going to happen, and,
5 you know, it really slows down our process when we have to
6 abate an appeal to send it back to the trial court and
7 have some evidentiary hearing or policy hearing or
8 whatever this is, but I didn't think, even in reading the
9 draft that had been proposed there was any question that
10 there were -- even if the parties agree, that there was an
11 affirmative duty of the trial court to make those findings
12 and have the hearing. So --

13 CHAIRMAN BABCOCK: Justice Peeples.

14 HONORABLE DAVID PEEPLES: I'm thinking about
15 having to put my name on something that would make me
16 squirm to see my name on it, and so that's an interest
17 that's different from I've got two people that nobody is
18 objecting. And I'm trying to figure out, Richard, how the
19 principle applies that Texas doesn't have to enforce
20 foreign laws that would violate public policy. I mean, I
21 understand family law dockets are crowded. I think these
22 cases are going to be pretty rare, and I don't see them
23 clogging up the courts, but I just -- and I think the
24 Legislature would probably agree with what I'm going to
25 say here, is judges shouldn't have to put their name on

1 something that in their opinion would violate Texas policy
2 even if people from another part of the world have agreed
3 to it, and I just wonder if there's comfort for me in that
4 point of view in this proposal.

5 CHAIRMAN BABCOCK: Richard or Brian or Karl,
6 what do you think?

7 MR. WEBB: Let me just say this. When -- in
8 the lead up to this legislation what we -- "we" being the
9 family law section and the foundation -- what we came up
10 with was that all of the concerns that they were trying to
11 address in this were already addressed in other parts of
12 Texas law. And so you've always had the right on the
13 bench to be able to not approve -- except in these very
14 limited -- the Family Code mediated settlement agreement
15 is the only thing I know of that doesn't require some
16 judicial approval. Okay. So you've always had that
17 ability to question; and as far as I know this issue has
18 never come up as a practical matter in your experience or
19 anybody else's; and then when I look at the delays that
20 we're all running into at the courthouse everyday, to add
21 a layer of mandatory hearings that are going to take an
22 hour or two to -- I mean, you're not just going to have a
23 five-minute deal with this.

24 I assume all of these agreements that you
25 would reach would be subject to being proved up before the

1 court, so the people would be appearing. The judge could
2 ask any questions they wanted to at that point, which I
3 think is how they handle it if they see a decree, for
4 instance, that doesn't award child support or doesn't have
5 specific visitation rights. Then they make inquiry. So I
6 think that opportunity will be there, but to have a
7 mandate of something that's going to look like a
8 full-blown hearing of analyzing whether the foreign law
9 meets our due process standards and that sort of thing
10 seems -- I don't know. It seems a little much for the
11 system to bear.

12 CHAIRMAN BABCOCK: Richard.

13 MR. ORSINGER: To follow up on Pete
14 Schenkkan's analysis of the class action approval and not
15 being confident that the adversaries are fully
16 representing those whose interests are at stake, in other
17 parts of the Family Code where there's litigation
18 involving children and the court is concerned that neither
19 parent's adequately representing the interest of the
20 children because they're just after their own interest,
21 but maybe not the best interest, the court has the power
22 to appoint a lawyer to represent the kids, which under the
23 Family Code we call the attorney ad litem. Or the court
24 can appoint a lawyer to assist the court, which we call an
25 amicus attorney or amicus attorney, depending on whether

1 you're born in Texas or not, and so we could do something
2 like that here.

3 We could implement a case involving minor
4 children and say that the court is empowered to appoint an
5 amicus attorney to evaluate this claim when the interest
6 of children are involved, and then if the judge was
7 suspicious that the two parents were not -- not
8 necessarily serving the best interest of the children, the
9 court could appoint a lawyer, and that lawyer would then
10 have the power to do the research, file the notice, and
11 file the translations and say, "Hey, look, both of these
12 people are making decisions that's convenient to them as
13 parents, but it's not in the best interest of the kids."
14 That's an option.

15 CHAIRMAN BABCOCK: Doesn't the judge have
16 that power anyway?

17 HONORABLE TRACY CHRISTOPHER: Yes.

18 MR. WEBB: I think so.

19 MR. ORSINGER: I guess so

20 MR. WEBB: I think so. Judges in family law
21 cases where kids are involved have an enormous amount of
22 leeway; and as a practical matter, if the case isn't over,
23 they pretty much can do what they want to, or at least
24 that's what a lot of them seem to think; but, in fact,
25 yeah, I think -- I don't know of any situation where a

1 court has to just sit there and see something they don't
2 like unfolding and not be able to step in and do
3 something. Even in Stephanie Lee that's how it got
4 started, and Stephanie Lee, it fixed the law, but I think
5 any good judge is going to find a way to protect the
6 children. They're going to say, "Y'all come back here in
7 an hour and bring the kids with you. Even though I have
8 to enter your order." You know, those kinds of things are
9 what go on, so --

10 MR. GILSTRAP: But we're talking about more
11 than the children. What I heard were about the concerns
12 of the wife who maybe is oppressed and who is agreeing to
13 something that she wouldn't agree to. Even though she's
14 got a lawyer, we're saying the court has the right to go
15 behind the agreement. I mean, that's what I'm hearing.

16 CHAIRMAN BABCOCK: Pete.

17 MR. SCHENKKAN: And again, my analogy to
18 class action, there's nothing wrong with that, that in the
19 class action we have a party plaintiff who is supposed to
20 have been vetted at the beginning of the process as an
21 adequate representative of the interests of all of the
22 other people similarly situated whose stakes are similar
23 or may be greater in significance, and we can still say at
24 the proposed end of the case when the lawyers for the
25 party stand up saying, "We've got an agreement, Judge,"

1 just say, "I'm sorry, I'm not sure that's good, and in
2 fact, I'm rejecting it."

3 CHAIRMAN BABCOCK: Yeah.

4 MR. SCHENKKAN: "Try, try again, come back
5 to me with a better agreement."

6 CHAIRMAN BABCOCK: Justice Christopher, and
7 then Judge Yelenosky.

8 HONORABLE TRACY CHRISTOPHER: If children
9 are not involved I think it's very paternalistic to say
10 that two adults cannot waive constitutional rights.
11 People can waive constitutional rights all the time, and
12 so to me as long as children are not involved, we
13 shouldn't have to -- the trial judge should not have to
14 have some hearing where neither party will be prepared to
15 present any sort of evidence on whether there was some due
16 process violation in connection with that divorce decree,
17 and to impose the cost of a lawyer on whom, I don't know,
18 you know, the county in this situation when we have two
19 adults who are willing to waive constitutional rights
20 strikes me as wrong.

21 But I do have one question on the default
22 situation, and maybe this is obviously clear. It would be
23 one thing if you filed a "I want a divorce" and spouse
24 chooses to default. It might be another if you said, "I'm
25 going to file a divorce, and here's my divorce decree from

1 another country." So to the extent that you're going to
2 get a divorce based upon this decree from another country,
3 I think it should be in the pleading rather than just a
4 notice. So --

5 CHAIRMAN BABCOCK: Okay. Judge Yelenosky.

6 HONORABLE STEPHEN YELENOSKY: I think it's a
7 difficult question. If the question -- from my
8 perspective if the question is does the court have
9 authority right now, putting aside the MSA, which is a
10 particular situation, and even outside the family context
11 and outside the class action context, at least in my
12 experience, and not just me, the other district judges, if
13 there's a concern about whether or not a person is
14 competent or oppressed or afraid, we will typically do
15 something like appoint someone. I can think of a
16 nonfamily case where there was a dispute over an elderly
17 man's money, and you had the family and then you had the
18 paramour, and he wasn't even there. So they're arguing
19 over his money, and the deposition testimony was such that
20 I doubted his competence. Now, they were adversarial, but
21 had they reached an agreement I still would have said,
22 "You've got to go down to the probate court or have him
23 evaluated for a guardianship or at least an ad litem." So
24 I don't think anybody would question -- well, if they do I
25 haven't seen case law saying a court can't do that. And

1 so I think a court has authority right now to do the
2 things that a judge might want to do, and the question is
3 does the law require judges to do certain things that they
4 wouldn't do given current authority.

5 CHAIRMAN BABCOCK: Yeah, Pete.

6 MR. SCHENKKAN: I think Justice
7 Christopher's point is well-taken that there is a risk of
8 paternalism of -- in this situation, when you have
9 children involved, but I think that the kind of issues
10 that Judge Yelenosky just identified is more widespread in
11 the family law context and more important than it can be
12 almost anywhere else, and I think the Legislature has in
13 mind that we are going to run some risk of paternalism
14 when it says in section (1)(5) "The Family Code should not
15 be applied to" -- so-and-so -- "if the foreign law does
16 not, (c), consider whether domestic violence or child
17 abuse has occurred and is likely to continue in the
18 future." And I don't know that it's fully responsive to
19 your concern about adults being able to waive
20 constitutional rights, but the doctrine of waiver does
21 have built into it a requirement of some kind of conscious
22 knowing -- you might doubt that under the circumstances in
23 some cases.

24 HONORABLE STEPHEN YELENOSKY: And if I could
25 add to that, we have uncontested divorces all the time

1 brought in by one spouse, and I don't think there is a
2 judge in Travis County who will sign an uncontested
3 divorce agreement which waives child support if the likely
4 recipient of that child support is not present to be
5 questioned. We just won't do it.

6 HONORABLE TRACY CHRISTOPHER: But that's for
7 the benefit of the children. It's not for the benefit of
8 the spouse who is getting the child support, and in your
9 situation you were talking about an incompetent man.

10 HONORABLE STEPHEN YELENOSKY: Well, I didn't
11 know. But you can determine if somebody is competent and
12 still question, as Pete has, a volitional -- a waiver, and
13 yes, that's in the interest of the child, but I guess
14 you're suggesting that if the -- if somebody came in with
15 an uncontested agreed divorce in which all of the
16 property -- all of the community property went to one, no
17 children, the other person wasn't there, and they had
18 signed off on that, I would want to hear from the other
19 person. I wouldn't take just the signature. Maybe I
20 should, but I wouldn't.

21 CHAIRMAN BABCOCK: Justice Peeples.

22 HONORABLE DAVID PEEPLES: Speaking of
23 paternalism and waiver, most criminal cases are disposed
24 of by plea, and the defendant waives -- this is adults,
25 not children, waives the right to a trial, the right to a

1 jury, cross-examine, cross-examination, call witnesses,
2 confront -- self-incrimination, waives a bunch of things,
3 but judges routinely have a little discussion to make sure
4 it's knowing and intelligent and voluntary. Sometimes
5 those are very perfunctory, admittedly, but they do it,
6 and I'm not for mandating a bunch of hearings, but I want
7 to be sure that judges who want to inquire are not
8 confronted by some black letter law that says you're
9 straight outside the bounds. That's really all I am
10 concerned about.

11 CHAIRMAN BABCOCK: Roger.

12 HONORABLE DAVID PEEPLES: And I think in
13 terms of time taken up on the dockets it will be few and
14 far between.

15 CHAIRMAN BABCOCK: Roger.

16 MR. HUGHES: I still favor that the -- that
17 there be this kind of hearing and findings. If you have
18 an agreement between the parties, I think the analogy to a
19 class action is appropriate because someone else's
20 interests are involved, namely the minor's. If it's a
21 default judgment situation, I think there is a value to
22 having it anyway because, you know, I have seen people get
23 involved in multi-state fights. You know, there's a
24 lawsuit going in Texas and then one spouse runs to
25 Louisiana or Oklahoma and starts a countersuit, and so

1 these sorts of findings may even be a value in saying,
2 well, this is collateral estoppel or res judicata on this
3 particular issue, that it's enforceable or it's not
4 enforceable, one way or the other.

5 And finally, I think to deal with the
6 question of what happens if the findings are not made,
7 well, I think in most cases the findings are going to be
8 made if the parties are in agreement. The victor, whoever
9 wins, will want them, but, you know, if for some reason it
10 doesn't get done, we have a whole body of law about what
11 the appellate court does if faced with a situation where
12 findings were required and not made. My experience,
13 that's not law, but it's experience, is that most
14 appellate courts are going to want these findings.
15 They're not going to want to indulge in the usual
16 appellate review that, well, we'll just imagine what could
17 be the grounds and see if they're there or whatever could
18 be supported that's what we'll buy off.

19 In this particular situation where you're
20 talking about the enforcement of a foreign judgment or
21 denial on public policy or constitutional grounds, I think
22 they're going to want that trial judge to have crossed
23 those bridges and said, you know, what are the grounds
24 that you thought you're doing this, just don't wave your
25 hand and say, "Well, I'm not going to enforce it" or "I

1 will," and let us try to figure out what you're doing it.
2 I think most appellate courts are going to want to see
3 the -- the grounds supporting the order set out rather
4 than have to imagine them.

5 CHAIRMAN BABCOCK: Justice Gray.

6 HONORABLE TOM GRAY: I share the concern of
7 Frank about the impingement on the adversarial system and
8 Tracy's concern over the undue paternalistic nature of
9 this, but the statute says that the rule that the Supreme
10 Court adopts "require a hearing on the record after notice
11 to the parties to determine whether or not the proposed
12 enforcement of a judgment or an arbitration award based on
13 foreign law that violates a marriage relationship or a
14 parent-child relationship violates constitutional rights
15 or public policy." So we're in a different role than we
16 are as judges deciding whether or not that's valid or
17 appropriate under our adversarial system or democracy of,
18 you know, where we separate powers, but the Legislature,
19 if we're going to do this rule, unless we're just going to
20 tell the Legislature, "Thank you, but, no, we're not going
21 to do it that way," which I actually think there's some
22 validity to that, but I won't go down that road, the rule
23 that we propose has to have that required hearing, and
24 required findings of fact is in the next section in the
25 statute.

1 CHAIRMAN BABCOCK: Justice Gray, do you
2 think that the rule as proposed here faithfully implements
3 the statute?

4 HONORABLE TOM GRAY: I think it does.

5 CHAIRMAN BABCOCK: And you guys all do, too,
6 right? Talking to Karl and Richard and Brian.

7 MR. ORSINGER: Well, this discussion, Chip,
8 has caused me to wonder these -- these responsive
9 deadline -- what is the consequence if you don't meet the
10 deadlines here? What if you don't raise the foreign law
11 until the -- until the 61st day? What if you don't
12 respond at all? And the tenor of the discussion is the
13 trial judge is going to be obliged to conduct this
14 analysis even if there's not a timely opposition filed,
15 and maybe that's good, but I think we should recognize
16 that we don't put a consequence in here for failing to
17 meet the timetable, and the discussion is the trial judge
18 is going to be required to analyze this whether the
19 timetables are met or not.

20 MR. GILSTRAP: Chip?

21 CHAIRMAN BABCOCK: Yeah, Frank.

22 MR. GILSTRAP: Well, there are plenty of
23 instances in which the Court by way of rule and the
24 Legislature by way of statute has said that there is some
25 procedure must be followed, and they can almost all be

1 waived. Just because the Legislature has said it has to
2 be done doesn't mean the parties can't waive it.

3 CHAIRMAN BABCOCK: Pete.

4 MR. SCHENKKAN: Well, it doesn't mean the
5 parties -- it doesn't necessarily mean that the parties
6 can't waive it, but the statute can be drafted in a way
7 that contemplates that it isn't a question of whether they
8 waive --

9 CHAIRMAN BABCOCK: You mean the rule, not
10 the statute?

11 MR. SCHENKKAN: The rule. In this case the
12 rule, the same as generally the statute, but here the
13 statute requires rules that --

14 CHAIRMAN BABCOCK: Right.

15 MR. SCHENKKAN: -- can require this. And I
16 think it -- I think this statute does contemplate that.

17 CHAIRMAN BABCOCK: Well, do you think this
18 rule that they've drafted is --

19 MR. SCHENKKAN: That's what I was trying to
20 see, and I think the one concern I have is in response to
21 Justice Peeples' question. I think perhaps more is
22 necessary than there not be -- than the absence of --
23 making sure the absence of something that discourages the
24 judge from doing this I think, in fact, we need to make it
25 clear that they must do this even if the parties

1 ultimately agree.

2 CHAIRMAN BABCOCK: Frank.

3 MR. GILSTRAP: I'll just depress this to its
4 logical conclusion. The parties don't do it. They sign
5 off. The judge signs off. This mandatory thing that
6 can't be waived wasn't done. Does that mean the losing
7 side can come back in and say that, you know, it was
8 jurisdictional? Couldn't be waived, it can be raised in a
9 new proceeding. I mean, that's the consequence of what
10 happens when we say something can't be waived.

11 CHAIRMAN BABCOCK: Yeah. Roger.

12 MR. HUGHES: Well, I think the answer to
13 that concern is that the trend has been that procedural
14 prerequisites or procedural compliance, et cetera, et
15 cetera, are not going to be treated as jurisdictional. I
16 think -- and I think we've -- I think the Supreme Court
17 has already said that in a couple of cases, and so I'm not
18 worried that saying the judge has to have this hearing and
19 has to make these findings will be treated as
20 jurisdictional. I think what will happen, at least under
21 standard law and certainly under the Texas precedent, is
22 going to be those are procedural prerequisites but not
23 necessarily jurisdictional. My concern or perhaps -- I
24 don't know if it's a concern, but my thought is that if
25 the judge doesn't make these findings, you know, does that

1 mean the judgment will be collateral estoppel or res
2 judicata if the two of them decide to have a fight over
3 this in another state?

4 Maybe yes, maybe no, but certainly if the
5 findings are made or something approaching the findings
6 are made that puts an end to it, at least in the United
7 States under collateral estoppel or res judicata. And, of
8 course, that ought to also give us some pause to concern
9 that if the judge decides that this agreement meets
10 federal due process standards and public policy, that's
11 the end of the battle for that child forever, at least in
12 the United States.

13 HONORABLE STEPHEN YELENOSKY: Chip?

14 CHAIRMAN BABCOCK: Yeah, Judge Yelenosky.

15 HONORABLE STEPHEN YELENOSKY: Is 76a
16 instructive at all? Because it requires a court to hold a
17 hearing or at least at the beginning to consider at the
18 very least independent of the parties' agreement whether
19 or not something should be sealed; and if the they -- --
20 there are plenty of judges, probably too many, who don't
21 do that; and the consequence of that, I guess if it were
22 jurisdictional would be somebody on appeal could bring
23 that up again and although it gets mooted out for obvious
24 reasons, but at least that's an example of an instruction
25 to the court that overcomes any agreement of the parties,

1 and I don't know what that teaches us, but that's the only
2 one I could think of.

3 CHAIRMAN BABCOCK: Yeah, Pete.

4 MR. SCHENKKAN: I've looked more closely
5 through, and I think the answer to -- my answer to your
6 question, Chip, about whether the rule as presently
7 drafted accomplishes this is, no, it does not, and we --
8 what I would look at is (h), default orders.

9 CHAIRMAN BABCOCK: Uh-huh.

10 MR. SCHENKKAN: And I think it needs to be
11 explicitly provided in what might need to be retitled
12 "Default orders or agreed judgments," that the hearing --
13 that a hearing is still required and the order and the
14 findings required.

15 In response to the concern about the
16 disruption of process, I would say as a practical matter
17 if the parties stick to their agreement, there won't be a
18 party appealing; and so the real question would be whether
19 the judge, knowing that he or she is supposed to actually
20 look closely at whether domestic abuse or child abuse has
21 occurred and is likely to continue to occur, is going to
22 decide whether I believe this or not, can prove it or not;
23 and if the judge goes ahead and approves it there is
24 little -- I would imagine little practical risk of a
25 problem for the judicial system.

1 The one that's been identified is one of the
2 parties changes -- and if you'll permit me this -- her
3 mind about whether she's willing to agree to what the
4 United States law would consider to be domestic violence
5 and waive rights against that and then comes back into the
6 system, and then these questions that have been raised
7 would have to be confronted. I'm suggesting we don't try
8 to resolve that in a rule. We just require so that the
9 judge knows not only that he can, but that he must look
10 closely at this despite the fact that the parties agree.

11 CHAIRMAN BABCOCK: But, Pete, why doesn't
12 subsection (e) of the draft rule cure the issue that's
13 being raised about implementation of the statute? Because
14 (e) doesn't talk about whether it's agreed or not agreed.
15 It just says there must be a hearing.

16 MR. SCHENKKAN: Well, is -- I'm sorry.

17 HONORABLE STEPHEN YELENOSKY: But you still
18 might not have one is I think his point, right?

19 MR. GILSTRAP: Judge signs the decree, no
20 hearing.

21 CHAIRMAN BABCOCK: Judge what?

22 MR. GILSTRAP: Judge just signs the order
23 without a hearing.

24 HONORABLE STEPHEN YELENOSKY: Right.

25 MR. GILSTRAP: Doesn't have a hearing.

1 CHAIRMAN BABCOCK: Well, but somebody has
2 given notice of reliance on a foreign judgment or
3 arbitration award. I mean, otherwise the judge doesn't
4 even know about it. So somebody has had to trigger the
5 foreign law, and if you trigger the foreign law then the
6 judge has to have a hearing. Isn't that right, Richard?

7 MR. WEBB: Uh-huh.

8 CHAIRMAN BABCOCK: So if he's got to have a
9 hearing then you "must" have a hearing, then why can't --
10 why doesn't this draft rule accomplish what the
11 Legislature set out to accomplish in the statute by having
12 the judge look at it?

13 MR. SCHENKKAN: And perhaps --

14 CHAIRMAN BABCOCK: I'm not arguing. I'm
15 just asking.

16 MR. SCHENKKAN: I do understand the
17 question, and my answer would be that I didn't even read
18 it that way as I looked at it. I now see what you're
19 saying, and I think that the problem is the natural
20 instinct of people to say that if the parties agree then
21 that's the end of the matter, and so I would suggest some
22 additional clause in (e) that makes it clear that this
23 hearing is required.

24 CHAIRMAN BABCOCK: Whether they agree or
25 not.

1 MR. SCHENKKAN: Whether they agree or not.

2 CHAIRMAN BABCOCK: Okay. Justice Busby.

3 HONORABLE BRETT BUSBY: I agree. I think on
4 your argument, Chip, if --

5 CHAIRMAN BABCOCK: No, just a question.

6 HONORABLE BRETT BUSBY: Okay. Well, on your
7 question, it does say you have to have a hearing and you
8 have to have an order. I think the family law drafting
9 team had come up with this -- this new idea that you have
10 to -- under (h) that you have to go through this procedure
11 even if there is a default in order to make clear that
12 indeed those two requirements continue to apply even if
13 nobody ever responds, and my suggestion was to change that
14 to make clear that you have to conduct a hearing even if
15 no party opposes the recognition or enforcement of the
16 judgment, and I think if we make that change to (h) then
17 that would take care of the agreement situation.

18 CHAIRMAN BABCOCK: That along with (e) would
19 take care of it.

20 HONORABLE BRETT BUSBY: Right.

21 CHAIRMAN BABCOCK: Justice Christopher.

22 HONORABLE TRACY CHRISTOPHER: Well, I had
23 forgotten that the rule required the Supreme Court to have
24 training for trial judges on this point, so I assume we're
25 going to get some form orders that would cover agreements

1 and a set of questions that the judges are going to have
2 to ask and find out about from that training. So with
3 that caveat, then the rule works, but, I mean, otherwise,
4 you know, two people coming in and agreeing to something
5 and the judge is like, "Looks all right to me, but now I
6 have to go through this long list of questions that the
7 Supreme Court is going to provide good training on, and
8 they're going to provide me a form order that I can
9 put" --

10 CHAIRMAN BABCOCK: Whoa, whoa. Let's stay
11 away from forms.

12 HONORABLE TRACY CHRISTOPHER: So that I can
13 put my findings of fact and conclusions of law in my
14 order.

15 CHAIRMAN BABCOCK: Judge Yelenosky.

16 HONORABLE STEPHEN YELENOSKY: Well, I think
17 it still leaves open Pete's point, which we can't address,
18 which is nonetheless if the judge doesn't do that what
19 happens. I can tell you -- here's the sentence from 76a.
20 "A hearing open to the public on a motion to seal court
21 records shall be held in open court as soon as
22 practicable." That's ignored all the time.

23 MR. GILSTRAP: Widely ignored. Yeah.

24 HONORABLE STEPHEN YELENOSKY: Widely
25 ignored, and we attempt to do it in CLE. Now, maybe this

1 won't be ignored by 99.99 percent, but there's going to be
2 some judge who is going to ignore the requirement of a
3 hearing, and we can't resolve what will happen I don't
4 think here, but we're not answering what happens either.

5 CHAIRMAN BABCOCK: Okay. Yeah, Peter. And
6 then Karl.

7 MR. KELLY: I would agree that it's all
8 paternalistic, but it is a policy choice the Legislature
9 has made for us already, but I think that we can solve the
10 problem with default judgments that -- the subsection (h)
11 default order issue just by putting in subsection (e)
12 "requires a hearing at least 30 days before trial," and
13 put in "or entry of judgment" and then you're going to
14 have a hearing to determine the appropriateness of the
15 application of foreign law before trial or entry of a
16 judgment even if it's a default judgment.

17 CHAIRMAN BABCOCK: Yeah. Yeah, that's a
18 good point, and you could combine that with Pete
19 Schenkkan's, the two Pete's fixing this problem for us,
20 combining that with saying it's not only default but
21 agreed orders as well. Richard. Or, I'm sorry, Karl was
22 next.

23 MR. ORSINGER: Oh, I'm sorry. Can I make a
24 brief point?

25 MR. HAYS: Sure. Go ahead.

1 MR. ORSINGER: Let's change "entry of
2 judgment" to "rendition of judgment" because the divorce
3 decree becomes effective when it's orally rendered and the
4 entry sometimes will occur later, so we really want to
5 focus on when the judgment of that occurs. I'm sorry.

6 CHAIRMAN BABCOCK: Good point. Karl.

7 MR. HAYS: I was going to speak to both Pete
8 and Justice Busby's issue on the -- if we went with the
9 wording that you're suggesting under the default and just
10 retitle that section "Agreed orders or default orders" I
11 think that would work. Because then it makes it clear
12 because it doesn't really necessarily make it clear to
13 say, "The court must comply with sections (e) and (f) even
14 if no party objects." Does that mean they agree, or does
15 it mean that just somebody defaults? I think if you put
16 the title "Default or agreement" that people will go, "Oh,
17 that's what you meant by if either party objects. It can
18 either be a default situation, or it can be an agreement
19 situation."

20 HONORABLE BRETT BUSBY: Or it could be a --
21 it could be a situation where it's not a default in the
22 sense that you failed to file an answer, but it's a
23 default in that you failed -- not really default, but you
24 failed to respond to the motion -- to the notice of an
25 application of foreign law. So it seems like there are

1 really three circumstances. There's an agreement, there's
2 a default, and then there's a nonresponse.

3 MR. HAYS: Right.

4 CHAIRMAN BABCOCK: Yeah, good point. All
5 right. Richard, let's talk about any other big issues
6 that you want to talk about in this rule.

7 MR. ORSINGER: We may have just answered it,
8 but there's just nothing said about what happens if you
9 miss a deadline.

10 CHAIRMAN BABCOCK: We just answered that.

11 MR. ORSINGER: It seems to me if we make
12 these changes if you miss a deadline it doesn't make any
13 difference.

14 CHAIRMAN BABCOCK: We just answered that.

15 MR. ORSINGER: Okay. Okay. So then does
16 anyone have any issues? Assuming the timetables are going
17 to be in the rule. There was a little opposition to not
18 requiring it in the initial pleading. This rule says
19 within 60 days of when you file. Then you have to oppose
20 it within 30 days of when you hear a notice that it will
21 be -- the foreign judgment will be pursued and then the
22 judge has 75 days after it's originally filed to conduct a
23 hearing. Pardon me, to have the pretrial conference in
24 which --

25 CHAIRMAN BABCOCK: Yeah.

1 MR. ORSINGER: -- all of these -- I haven't
2 heard much debate about that other than Justice
3 Christopher felt like it should be in the initial
4 pleading.

5 HONORABLE TRACY CHRISTOPHER: Well, I just
6 think it needs to be clear that if you do it via notice
7 and no one has answered that you have to serve the notice
8 the same way you would have served the original petition.

9 MR. ORSINGER: That's a good point. Due
10 process of law requires that the person who suffers the
11 default judgment have the judgment consistent with the
12 pleadings that were served on them, and if the relief is
13 different from the pleadings or if the pleadings are
14 amended that's a denial of due process. So what you're
15 saying, Justice Christopher, is if you don't plead it and
16 then they don't answer and then you issue your notice and
17 you get down there, you haven't given due process.

18 HONORABLE TRACY CHRISTOPHER: Right.

19 CHAIRMAN BABCOCK: Yeah, Justice Gray raised
20 that point about an hour and 15 minutes ago.

21 MR. ORSINGER: Okay. So I'm giving it due
22 process since I had --

23 CHAIRMAN BABCOCK: All right. Any other big
24 issues? Frank.

25 MR. GILSTRAP: I'm taking a closer look at

1 what we're talking about here, and it says that we're
2 talking about "the recognition of an arbitration award or
3 judgment." It doesn't say "by a foreign court." It talks
4 about any arbitration award or judgment. It can be a
5 judgment of an award -- a judgment of a court in Ohio that
6 applies Iranian law would be subject to attack here. The
7 judgment of a private arbitration tribunal in Dallas that
8 applies Iranian law would be subject to attack here.

9 Okay. Now, what if we have, say, a court in
10 Nigeria that's applying American law? We said -- we had
11 some testimony that people like to attack the courts of
12 Nigeria because they're corrupt. If they're applying
13 American law it doesn't -- it doesn't come under the
14 statute, right?

15 Next question. The court in Iran is not
16 applying Iranian law. It's applying religious law. You
17 know what I'm saying? You know, this is all about --
18 Sharia law was kind of the high profile thing, but there
19 are several schools of Muslim law, and if you're schooled
20 in the area it means something, so they agreed to apply
21 Hanafi law. I think that's one of them. That's not -- as
22 I read, that's not a determination of foreign law because
23 foreign law means the law, rule, or code of a jurisdiction
24 outside of a jurisdiction outside the states of -- of the
25 United States. So if it's the law of Iran, it's covered,

1 but if it's religious law it's not. And is that where we
2 come down on that?

3 CHAIRMAN BABCOCK: I wouldn't read it that
4 way myself.

5 MR. SCHENKKAN: I wouldn't either. It's
6 outside the jurisdiction of the United States.

7 MR. GILSTRAP: No, no, no. It says "a law
8 of a jurisdiction." For example, a court in Italy applies
9 canon law, not the law of Italy, canon law, which is not
10 the law of that jurisdiction.

11 CHAIRMAN BABCOCK: But the law of Italy, the
12 law of Italy allows that court to apply the canon law.

13 MR. GILSTRAP: The law of Ohio allows the
14 court to apply, you know, a -- that law, but is that the
15 law of that jurisdiction?

16 MR. KELLY: Yes, it is.

17 CHAIRMAN BABCOCK: I would think so.

18 MR. KELLY: In most Muslim countries
19 constitutionally they adopt Sharia law, whether they are
20 Shiite variant or Sunni variant, and so by applying
21 foreign law you're applying that adoption of Sharia law.
22 That is the statute that you're -- the foreign
23 jurisdiction law.

24 MR. GILSTRAP: And so what about the
25 tribunal in Dallas that applies Muslim law?

1 MR. KELLY: Well, they would be applying in
2 theory, say, you know, that portion of the Iraqi
3 constitution, which is --

4 MR. GILSTRAP: No, no. We're not applying
5 Iraqi law. We're not applying Iranian law. We're
6 applying Muslim law. That's not the law of the state.

7 MR. KELLY: Well, you're applying on
8 religious principle that has been codified into a foreign
9 jurisdiction statute, so --

10 MR. GILSTRAP: So if it's codified in some
11 civil law somewhere it qualifies as foreign law?

12 CHAIRMAN BABCOCK: Richard, you have a -- a
13 salient point here?

14 MR. ORSINGER: I was going to comment on
15 Frank's list of hypotheticals. If a court of another
16 state adjudicates this question of enforceability then the
17 Full Faith and Credit Clause of the U.S. Constitution will
18 require Texas to observe that, and there's a provision in
19 here that the rule does not apply -- in the event of
20 conflict between that and federal law, the federal law
21 prevails. So I think that the Full Faith and Credit
22 problem eliminates a conflict with another American court
23 that's pre-adjudicated the question.

24 CHAIRMAN BABCOCK: Judge Yelenosky.

25 HONORABLE STEPHEN YELENOSKY: Well, is it

1 just semantics? I mean, would it help, Frank, if we said
2 instead "Foreign law means a law, rule, or code that is
3 not within the jurisdiction of any state or territory of
4 the United States or of the United States"? So you define
5 jurisdiction as that and say if it's not that then it's
6 foreign law.

7 CHAIRMAN BABCOCK: Yeah.

8 MR. ORSINGER: Let me point out that this
9 definition is exactly out of the statute.

10 MR. GILSTRAP: Out of the statute, yeah.

11 MR. ORSINGER: So we would be varying the
12 statute, if that matters, if we redefine foreign law.

13 HONORABLE STEPHEN YELENOSKY: Well --

14 CHAIRMAN BABCOCK: Probably shouldn't do
15 that. Justice Busby.

16 HONORABLE BRETT BUSBY: I was going to make
17 the same point.

18 CHAIRMAN BABCOCK: Okay. Well, it must have
19 been a good one then. Peter.

20 MR. KELLY: Just to finish my point, it's
21 frequently -- you should think of it as an arbitration
22 clause where what it does is transfer authority to
23 adjudicate these family type issues to an imam or
24 religious leader. So it's just a change of forum to apply
25 those laws. That's how it's actually structured usually

1 in the statutes of the Muslim country. It's a transfer of
2 jurisdiction.

3 MR. GILSTRAP: Well, I think the Mormons do
4 private arbitration under Mormon law. Is that going to be
5 covered here? Because that does happen. I've come across
6 that. They have private courts.

7 CHAIRMAN BABCOCK: Okay. Judge Yelenosky.

8 HONORABLE STEPHEN YELENOSKY: Well, I'm
9 trying to fix that.

10 CHAIRMAN BABCOCK: What is your response to
11 that?

12 HONORABLE STEPHEN YELENOSKY: Is there --
13 since we can't change the language, is the problem the
14 definition of "jurisdiction"? And, Frank, are you stuck
15 on that jurisdictions have to be associated with
16 certain -- certain types of entities and not others?

17 MR. GILSTRAP: Yeah, jurisdiction, when we
18 talk about a foreign jurisdiction, we mean a foreign
19 state --

20 HONORABLE STEPHEN YELENOSKY: Right, but --

21 MR. GILSTRAP: -- of some sort.

22 HONORABLE STEPHEN YELENOSKY: Well, we don't
23 think that was the intent here because that would suggest
24 that if you have some law that's not connected with any
25 recognized jurisdiction, that's not foreign law, and

1 that's not the intent. We can't change the statute, but
2 can we comment or elaborate on what "jurisdiction" means?

3 CHAIRMAN BABCOCK: Okay. That's one
4 possible fix. Okay. Any other big issues on this rule?

5 MR. ORSINGER: I think the three of us are
6 satisfied we've discussed everything that we can think of.

7 CHAIRMAN BABCOCK: Justice Gray apparently
8 isn't.

9 MR. ORSINGER: Oh, well, sorry.

10 HONORABLE TOM GRAY: I just, again, from the
11 appellate perspective I would kind of like to know what
12 "urgent circumstances" in section (f) is because that's
13 not a term that I have run across in creating -- carving
14 out an exception. It has a time factor, it seems like, in
15 it as opposed to a gravitas or serious implication. We
16 usually see something like "exceptional" or
17 "extraordinary" or something like that. "Urgent" seems to
18 have more of a time factor in it to me.

19 CHAIRMAN BABCOCK: What subdivision are you
20 talking about?

21 HONORABLE TOM GRAY: Section (f), last two
22 words in the sentence.

23 MR. ORSINGER: What word would you prefer,
24 Justice Gray?

25 HONORABLE TOM GRAY: "Extraordinary."

1 MR. ORSINGER: Okay. We'll put it in there.
2 Okay.

3 CHAIRMAN BABCOCK: All right. All right.
4 Anything else? All right. We are done with this rule.

5 MR. ORSINGER: Excellent.

6 CHAIRMAN BABCOCK: Great job by the
7 subcommittee under your leadership, Richard and Jim.
8 Thank you.

9 MR. PERDUE: No.

10 CHAIRMAN BABCOCK: But you can take credit.
11 All right. I think Justice Peeples is going
12 to take charge of the discussion on proposed amendments to
13 the Code of Judicial Conduct and policies on assistance to
14 court patrons by court and library staff. This is a
15 continuation of the discussion a month ago, I believe.

16 HONORABLE DAVID PEEPLES: Yeah, we did the
17 Code of Judicial Conduct last month. You need to have one
18 of two documents before you. They were both three-pagers.
19 One of them, the proposed Texas Supreme Court policy on
20 assistance to court patrons, and it's broken down. One
21 involves the clerks and the other involves court staff,
22 librarians, and volunteers. They are identical, and the
23 thought was that it would be helpful because district
24 clerks, they're elected and they're kind of assertive, to
25 have something directed at them alone would be more useful

1 than having it mixed in with the others, but the two
2 proposals are the same, and so if you have one or the
3 other, well, that's all you need for our discussion.

4 Just a little bit of context and background.
5 The Access to Justice Commission appointed by the Supreme
6 Court came up with a two-prong proposal, and I would say
7 you could divide it into the court part for judges, trials
8 in the courtroom, which we dealt with last month, and we
9 made it a little bit easier for judges to help people and
10 to cut them some slack with the proposal to change 3B(10)
11 in the Code of Judicial Conduct, and there was a comment
12 that had some -- that's done. For today we have -- I'm
13 going to call it the pretrial part, which deals with what
14 personnel short of the judge can do to help people who are
15 trying to navigate their way through the system.

16 CHAIRMAN BABCOCK: Judge, can I interrupt
17 for a second?

18 HONORABLE DAVID PEEPLES: Yes.

19 CHAIRMAN BABCOCK: Brian and Karl, thank you
20 so much for your help on that.

21 MR. WEBB: Thank y'all very much for having
22 us in the room.

23 MR. HAYS: Thank you.

24 CHAIRMAN BABCOCK: Nicely done.

25 (Applause)

1 CHAIRMAN BABCOCK: Sorry, Judge.

2 HONORABLE DAVID PEEPLES: Yeah, I
3 understand. So it's the pretrial part that we're doing
4 today, and just personally on this, I don't speak for the
5 committee. I think this is vastly more important than
6 what we did last month because most cases settle.
7 Everybody goes through the pretrial process. Most of them
8 don't go to court. It would be approved in a family law
9 case, but most cases are disposed without a trial, and so
10 what we're talking about today is really more hands-on
11 and, frankly, more important in the real world I think to
12 people than what we did last month. Not to minimize that,
13 but what we're doing today is important.

14 Now, the subcommittee, let me just identify
15 them. I think everybody is here except one. No, two.
16 Nina Cortell chairs this, but she couldn't come today.
17 Tom Gray is here. Lonny Hoffman is here. David Newell
18 from the Court of Criminal Appeals. Bill Boyce, Mike
19 Hatchell, and Kennon Wooten. I haven't seen her, but I'm
20 sorry she's not here, and then we were helped also -- we
21 had several phone calls, sometimes with 11 people on them.
22 Brett Busby and Lisa Hobbs from the commission -- let's
23 see, the Access to Justice Commission, and also Trish
24 McAllister, who has privileges of the floor, so that's the
25 committee and very, very helpful.

1 I want to say that the committee was not
2 unanimous on much of anything, but we did reach consensus
3 on a lot, but votes were taken. I think it was two
4 meetings ago, may have been last meeting, that we want to
5 do this, this project needs to be done. The Court wants
6 us to do it if nothing else, but there was a pretty
7 decisive vote, do the project. I need to say that Tom
8 Gray is against doing anything and Mike Hatchell and David
9 Newell, but they -- you know, once they had their say,
10 they were team players and helped with good criticism and
11 constructive criticism and really helped with the final
12 product or the proposal today.

13 And so let's just look briefly at the
14 handout before you. There's six parts to it, but we're
15 going to go through them chronologically. (a) might be
16 called an introductory part. (b) is some definitions.
17 There's some discussion about whether we ought to have
18 definitions or not, and then (c) and (d), (c) says you can
19 do these things. They're a safe harbor for several things
20 that court helpers can do, and then (d), several things
21 you can't do. And then you see (e) and (f), unauthorized
22 practice of law, is always in the background here and then
23 the final section. One thing that you will -- that we'll
24 have some discussion on I'm sure. There's a distinction
25 between providing legal information and assistance to

1 people as opposed to legal advice. There's a distinction
2 that's an important one. It's not an easy one, and that's
3 always in the background.

4 So I think what we would like to do is just
5 work through this (a) to the end and start with section
6 (a), purpose and scope. Any comments, problems,
7 suggestions, et cetera, about (a)? And let me -- anybody
8 on the subcommittee that would like to speak up, please
9 do. I think that would probably be better than getting
10 into (a) right now.

11 CHAIRMAN BABCOCK: Okay.

12 HONORABLE DAVID PEEPLES: Engage the
13 subcommittee.

14 CHAIRMAN BABCOCK: Talking about
15 subparagraph (a).

16 HONORABLE DAVID PEEPLES: Well, I just want
17 -- if anybody on the subcommittee wants to disagree or
18 supplement what I said, I think this is a good time to do
19 it.

20 CHAIRMAN BABCOCK: Yeah. I'm sorry, I
21 misunderstood you.

22 HONORABLE DAVID PEEPLES: If they don't,
23 that's fine.

24 CHAIRMAN BABCOCK: Subcommittee members have
25 the floor.

1 HONORABLE TOM GRAY: Mine is only going to
2 be a comment about the procedure. We had several very
3 productive conference calls. The last one that resulted
4 in the current draft, we didn't have enough time to get
5 some of the -- to individual comments and discussions, so
6 I'm not going to comment on anything that we've already
7 worked into this, but I may -- I'm going to have more than
8 the average number of comments, I guess you would say, on
9 individual items as we go through, only because we did not
10 have time in the last phone call to talk about those.
11 Anything that we've talked about and I was voted down on
12 the subcommittee, I'm not going to revisit that in this
13 forum, so --

14 CHAIRMAN BABCOCK: Okay.

15 HONORABLE TOM GRAY: -- unless David
16 specifically wants me to articulate some comment.

17 CHAIRMAN BABCOCK: Thanks, Judge. Yeah,
18 Justice Busby.

19 HONORABLE BRETT BUSBY: I might just draw
20 folks' attention to the accompanying memo as well, which
21 gives some history of how we got here, and in particular
22 since the last version of these policies that you saw we
23 have gone back and done some additional work to be sure
24 that we were not running afoul of the statutory
25 prohibitions on unauthorized practice of law, and there's

1 some discussion in the memo of precisely what we did in
2 order to be sure that we're respecting the line that the
3 statutes and the Supreme Court have drawn to be sure that
4 these folks while they're -- court personnel and clerks
5 while they're assisting and providing legal information
6 that they're not engaging in the unauthorized practice of
7 law.

8 CHAIRMAN BABCOCK: Okay. The memo is -- I'm
9 having trouble finding it.

10 HONORABLE BRETT BUSBY: It's entitled
11 "Supplemental report on proposed Supreme Court policies"
12 on the Access to Justice Commission letterhead.

13 CHAIRMAN BABCOCK: Yeah, okay. I've seen
14 that. That's what threw me.

15 HONORABLE BRETT BUSBY: Sorry.

16 CHAIRMAN BABCOCK: Access to Justice
17 letterhead. Okay.

18 PROFESSOR HOFFMAN: Chip, I have a comment
19 on (a).

20 CHAIRMAN BABCOCK: Yeah. Okay. Professor
21 Hoffman.

22 PROFESSOR HOFFMAN: So I'm confused about
23 why we say "assistance and legal information" in the first
24 sentence, but then only refer to "assistance" in the
25 second sentence, and before we get there I just note that

1 the title of the entire thing is "Proposed policies on
2 assistance." So court personnel are encouraged to provide
3 assistance and legal information.

4 HONORABLE DAVID PEEPLES: And assistance
5 would encompass information, wouldn't it?

6 PROFESSOR HOFFMAN: And so if so why say --
7 why say both then? It seems confusing that we would say
8 they're encouraged to provide assistance and legal
9 information and then in the second sentence say the policy
10 is intended to give them guidance as to what is
11 assistance.

12 CHAIRMAN BABCOCK: A conundrum for sure.

13 HONORABLE DAVID PEEPLES: Well, just how we
14 got there, the previous drafts talk about "information."
15 The word "assistance" was brought in late. As I said, it
16 does -- assistance I think is broad enough to encompass
17 the giving of information, and it might be better to
18 collapse those. Yeah. Good thought.

19 HONORABLE TOM GRAY: The term originally
20 that was working its way through was "services," and that
21 became a -- in place of "assistance," and that became a
22 focus of some concern, and I agree with your comment that
23 "assistance and legal information" needs to be collapsed
24 into a single term. As presented to the subcommittee and
25 previously to this committee, it's my understanding that

1 the perceived failure of the previous educational efforts
2 to get staff to do this needed a hook in the canons, which
3 is what we did previously, and we used that as
4 accommodation. We used the term "accommodation."

5 I actually think that we need to focus the
6 title and the introduction so that it is "The Texas
7 Supreme Court policy on accommodation to court patrons by
8 judges and court staff." And that introduces another
9 concern of mine, is that judges are not specifically
10 included within the context of this philosophy. If this
11 is going to be a policy, one of the bigger concerns that I
12 have in the similarity or identical nature of these two
13 purported policies is that we have lumped in law
14 librarians, court volunteers, and -- if you read down into
15 it -- bailiffs, into this policy; and there's a very real
16 distinction between some of those players because court
17 staff over whom judges have control are bound by the
18 canons of judicial conduct.

19 Court staff that we do not control, if there
20 is such a thing, but certainly law librarians and bailiffs
21 may be outside our ability to control, they are not
22 subject to the canons of judicial conduct nor are the
23 clerks and their staff. For that reason I think the
24 non-canon-bound policy should encompass all of those that
25 are not bound by the canons, the clerks, clerk staff,

1 librarians, bailiff, if you are going to do those, I
2 wouldn't do them at all, but as far as the parallel nature
3 of the pool between the title and the paragraphs, I think
4 we can boil it down, use one term, whether we use
5 "assistance" or "accommodation" and possibly include that
6 "legal information" as a definition in the definition
7 section. Well, it is a definition in the section.

8 CHAIRMAN BABCOCK: Okay. The two Peter's
9 raised their hand almost exactly at the same time, so --

10 MR. KELLY: I'll let Pete go, and I'll --

11 CHAIRMAN BABCOCK: All right. So the
12 right-wing Peter will go first.

13 MR. GILSTRAP: Which one is that?

14 MR. SCHENKKAN: I think that -- yeah, I
15 think that your right is what --

16 CHAIRMAN BABCOCK: To my right.

17 HONORABLE STEPHEN YELENOSKY: He's to my
18 left.

19 CHAIRMAN BABCOCK: Well, which is saying
20 something.

21 HONORABLE STEPHEN YELENOSKY: Yeah, exactly.

22 MR. SCHENKKAN: I think it's very important
23 that the people who we're trying to get to follow this
24 policy understand that assistance includes legal
25 information, and my suggestion would be it's fine to have

1 the word "assistance" throughout the document, but in the
2 definitions we should add a definition of (3), assistance,
3 and say "including legal information" and then renumber
4 (3) as (4) so they can immediately see what we're saying
5 legal information is.

6 CHAIRMAN BABCOCK: Before you go, if anybody
7 has a car parked in space A11, A10, or TAB 20, you're
8 going to have to move your car because -- does anybody
9 remember where they parked so that you know if you're in
10 these?

11 HONORABLE STEPHEN YELENOSKY: They don't say
12 "visitor," do they?

13 CHAIRMAN BABCOCK: Excuse me?

14 HONORABLE STEPHEN YELENOSKY: None of those
15 say "visitor" on them. That's all I know.

16 MS. WALKER: I don't believe they say
17 "visitor," but the parking spaces that are right in front
18 on the side of the TAB, on the church side, A11, A10, and
19 TAB 20.

20 PROFESSOR ALBRIGHT: I parked in one that
21 said nothing. Is that okay?

22 MS. WALKER: These are numbered. These are
23 numbered spaces, and they're all right alongside here.
24 I'm in A1, which is the very first one, and then they all
25 run alongside going towards the back. Ana just said that

1 if we had people that were parked in those spaces --

2 CHAIRMAN BABCOCK: And are there
3 alternatives that they can park in?

4 MS. WALKER: Yes. There's some alternative
5 spaces that I can show you if anyone is parked in those
6 spaces.

7 CHAIRMAN BABCOCK: I tell you what, would
8 you -- does anybody remember those numbers? Would you
9 mind going down there and getting the cars that are in
10 these spaces and text me, and just wait until I send
11 people down, and you can direct them --

12 MS. WALKER: I can do that.

13 CHAIRMAN BABCOCK: -- to the new space, that
14 would be great. Parking issues. Okay. Sorry. The
15 left-wing Peter.

16 MR. KELLY: My comment is very similar to
17 the right-wing Peter's.

18 MR. SCHENKKAN: I want everyone to
19 understand that this may be the first time in my entire
20 life I've been --

21 MR. KELLY: It's merely a geographic
22 reference, not a philosophical one. In the first -- I
23 think if you say "provide assistance including legal
24 information," and that way assistance will always include
25 legal information going forward. Take the definition of

1 "legal information," move that into -- under (c),
2 "permitted assistance," because you have sub (1) under (c)
3 is providing information. Then you can just follow that
4 up with "including legal information as defined," and I
5 don't think you need a separate definition of "assistance"
6 because we have all of subsection (c) defining what the
7 assistance is. But I think that -- because the only time
8 you see "legal information" is in the definition and in
9 that very first line, so you probably don't need to have
10 it in the defined terms as long as you say what it is
11 under subsection (c).

12 MR. SCHENKKAN: A rare instance of
13 bipartisanship.

14 CHAIRMAN BABCOCK: The two Peter's meet in
15 the middle. Any other comments about subsection (a)?

16 HONORABLE TOM GRAY: We do use several
17 different terms in there. "Court personnel," "court
18 staff," and then "court volunteers," "law librarians,"
19 "bailiffs." Whatever we do, we could sharpen this purpose
20 and scope if we use the term "court staff" and then have a
21 definition for "court staff" in section (b).

22 CHAIRMAN BABCOCK: You would propose taking
23 bailiffs and law librarians out?

24 HONORABLE TOM GRAY: I would take bailiffs
25 out entirely because you will see one of the things that

1 bailiffs or that court staff must -- or may be required to
2 do under the policy is read a judgment or order to a
3 person, and if the -- the bailiff really doesn't need to
4 be distracted by assisting another court patron in that
5 fashion while they have security duties. Just I just
6 don't think bailiffs should be covered by this at all.

7 There's also the problem of bailiffs are --
8 some are court staff, they are employed by the court,
9 directed by the court. Others are employed by the
10 sheriff, and I really don't want to create a political
11 situation where we are trying to give instructions or
12 bring the sheriff's personnel into a court staff policy
13 directive of some type. So I would -- I wouldn't put
14 bailiffs in here at all, but if the librarians are
15 controlled by the court then they can be included in the
16 definition of "court staff" in that manner. Now, I would
17 think that court volunteers are necessarily going to be
18 included in court staff as well.

19 CHAIRMAN BABCOCK: Well, what is the general
20 practice in the counties? Are the librarians controlled
21 by the courts? I wouldn't think so.

22 HONORABLE TOM GRAY: We don't have one.

23 CHAIRMAN BABCOCK: Judge Wallace.

24 HONORABLE R. H. WALLACE: Well, I remember
25 from our conversation the last meeting -- I realize that

1 there's a lot of difference in what a court staff is I
2 think in various jurisdictions. I think maybe Travis
3 County or somewhere the courts have an assistant or
4 associate or something.

5 HONORABLE STEPHEN YELENOSKY: Court --
6 well, yeah. I mean, they have a name that's changed, but
7 basically they're bailiffs without guns or any security
8 responsibilities.

9 HONORABLE R. H. WALLACE: Well, for
10 instance, the -- what we have in Tarrant, the court staff
11 in Tarrant County would be the court coordinator and the
12 court reporter. The clerk, we have an administrative
13 clerk, but they work for and are hired by the clerk, and
14 they get their directions from the clerk. The bailiff, as
15 you point out, works for the sheriff. So the only staff
16 we have is a court reporter and a court coordinator, and
17 if I look through the list of things that it says those
18 two people could do, number one, they wouldn't know how to
19 do some of that; and it's just -- I'm not -- I think it's
20 very difficult having one size fits all like this.
21 Because from what I'm hearing, although I don't practice
22 family law, it's vastly different in the family courts
23 than it is in the civil courts, but I don't want people
24 asking my court coordinator to review documents for
25 clerical completeness, checking signatures, and things of

1 that nature. And also, as I understand this, this would
2 apply not only to self-represented litigants but to
3 attorneys. I don't -- I don't get that, having to assist
4 an attorney on these type of things.

5 CHAIRMAN BABCOCK: Judge Estevez, and then
6 Judge Peeples.

7 HONORABLE ANA ESTEVEZ: And just real quick
8 because Judge Wallace made a point that staff is
9 different. I carry the commission for my bailiff. He
10 does not work for the sheriff's department. He works just
11 for me, and he is my staff, and I hired him. So it's
12 not -- I don't think that's going to be the same for
13 everyone, but some staff it would be my court staff.

14 CHAIRMAN BABCOCK: Justice Peeples.

15 HONORABLE DAVID PEEPLES: There's a lot of
16 discretion built into this. Let me just walk you through
17 it. Look at the first page of the handout. "Court
18 personnel are encouraged" -- not mandated, "encouraged,"
19 et cetera, and the last two or three lines of that same
20 paragraph as to what assistance may and may not be
21 offered. Those are permissive discretionary words.

22 The next sentence, "Assistance permitted
23 under this policy," and so that's an important sentence
24 because basically it says that if you're going to be
25 helpful to some litigants, you've got to be helpful to

1 everybody. You can't pick and choose and discriminate.
2 And the second sentence, you can't grant this to some
3 people and deny it to pro se people on the grounds that
4 they are self-represented. So but it's still
5 discretionary, the whole thing, and at the very bottom,
6 just look and see "permitted assistance, court personnel
7 acting in a nonlawyer capacity on behalf of the court may
8 provide assistance" and so forth.

9 So there is a lot of discretion built in,
10 and that means a judge could say, "Bailiff, I want you
11 over here." But there are lots of times -- just take
12 bailiffs, for example. They have a lot of down time, lot
13 of down time, and sometimes they're the most helpful
14 person in the courthouse, so I would say you certainly
15 would want to include them, but the people who are running
16 things are going to have a lot of discretion as to how
17 this operates and do they want to pull somebody off of
18 this task and put them on another one, but the language is
19 in there, and nobody can claim that they are mandated to
20 do anything here, except be equal.

21 HONORABLE STEPHEN YELENOSKY: Why can't it
22 refer to their job descriptions or their duties as
23 assigned within your job description so that the job
24 description for a bailiff doesn't include filing anything?
25 Why can't we make reference to "You're permitted to do

1 these things consistent with your job description and/or
2 instructions of superiors"?

3 CHAIRMAN BABCOCK: Yeah, Lisa.

4 MS. HOBBS: Well, my concern on that one
5 would be judges who don't want to do accommodation might
6 put in someone's job description that you can't
7 accommodate, and that would kind of defeat the whole
8 purpose of this rule.

9 HONORABLE STEPHEN YELENOSKY: Well, that I
10 guess should go in the rules on judicial conduct then,
11 because that's directing a judge, but, I mean, if you
12 don't put it in there, there is a concern that this
13 overrides a job description.

14 CHAIRMAN BABCOCK: Okay. Hold on for a
15 minute, the great parking lot escapade.

16 (Off the record)

17 CHAIRMAN BABCOCK: All right. Richard, you
18 can go back to the --

19 MR. ORSINGER: Yeah.

20 CHAIRMAN BABCOCK: For the moment.

21 MR. ORSINGER: I have a question. The
22 subdivision (c) says "court personnel may provide," so it
23 looks to me like this statement of policy is directed to
24 the individual employee, and I wonder if -- is there any
25 sense that a judge can countermand this and say, "I will

1 not allow you to do this," or is this a directive that
2 authorizes the court personnel to do it even if the judge
3 doesn't want it?

4 HONORABLE DAVID PEEPLES: Well, I think it
5 depends on who the person is, Richard. The bailiff works
6 for the judge, and I think bailiffs are probably going to
7 do what the judge says. The clerk really works for the
8 district clerk or the county clerk, and sometimes -- you
9 know, they're also in your court obviously, and they'll do
10 what you want them to do, but they have that other boss.
11 The librarian, it never has occurred to me I could tell a
12 librarian what to do, but I did want to make the point
13 there's just a lot of discretion for people like judges
14 and district clerks and, you know, supervisors and things
15 like that to say, "We're going to do this and we're not
16 going to do that."

17 CHAIRMAN BABCOCK: Judge Yelenosky.

18 HONORABLE STEPHEN YELENOSKY: But this can't
19 control what a judge does, right or wrong. There are
20 situations in which a judge might tell a librarian to do
21 or not do something, and whether he or she does it should
22 be determined by other things than what this says, because
23 otherwise librarian -- a judge tells a librarian
24 something. Is she allowed to pick this up and say, "No,
25 you can't tell me to do that or not do that." It seems to

1 me it goes too far. If we want to tell judges what they
2 can do, that's one thing, but I don't think this should be
3 empowering people to say, "Well, the judge can't tell me
4 to do that." What the judge can tell them to do needs to
5 be determined by other factors, which are job
6 descriptions, hierarchy; but I imagine most people in a
7 courthouse if the judge tells them to do something,
8 they're going to do it anyway. So if we want to instruct
9 judges, we can do that, but not in here.

10 CHAIRMAN BABCOCK: Justice Christopher, and
11 then Justice Busby.

12 HONORABLE TRACY CHRISTOPHER: Well, I do
13 understand the concern is that judges won't, you know,
14 encourage their staff to do things, but what is the plan
15 with respect to this policy? Is it going to be printed
16 somewhere? Is it going to be tacked on a door? Is it
17 going to be given to a judge to pass out to their people?
18 And if it's going to be given to a judge to pass out to
19 their people, then if one of your people is the bailiff,
20 you can say, "Here's what I want you to do, bailiff.
21 Here's what I want you to do, librarian." If they're one
22 of your people. So I'm a little -- you know, and that way
23 it could be tailored to your particular people. I don't
24 know what the plan is with, you know, what we're doing
25 with the policy.

1 CHAIRMAN BABCOCK: Anybody else? Justice
2 Busby. Sorry.

3 HONORABLE BRETT BUSBY: Well, I think we
4 were contemplating an effort similar to the one that we
5 had before, except that now we have some guidance that we
6 can provide in terms of an educational effort, and we
7 could certainly look at customizing these further if we
8 want to do that. I don't know that we need to have a
9 separate policy for law librarians, for one, for other
10 types of staff or volunteers, but if it's helpful to
11 people in the educational process I'm sure we could break
12 it down that way.

13 HONORABLE TRACY CHRISTOPHER: Well, I mean,
14 the Harris County law librarian, you know, is the Harris
15 County law librarian. So, I mean, none of the judges in
16 the county are going to be telling the Harris County law
17 librarians what to do.

18 HONORABLE BRETT BUSBY: Right, but the point
19 was made that in some jurisdictions they do work for the
20 courts. So it's county by county. It differs.

21 HONORABLE TRACY CHRISTOPHER: Right, which
22 is why I thought the judge should be able to pick this and
23 tailor it as to whom to give it to and what to --

24 MS. McALLISTER: And it does say, you know,
25 "The policy is intended to provide guidance to court

1 personnel subject to a judge or judicial administration's
2 direction and control." So it does say that right in
3 there, that unless they are subject to their control, you
4 know, we're not -- there's not an attempt to go supersede
5 their -- you know, somebody else's authority over that
6 particular person.

7 CHAIRMAN BABCOCK: Frank, and then Richard.

8 MR. GILSTRAP: I just would add on the
9 subject of law librarians, law librarians or librarians
10 are a professional group. They have ethics, and they are
11 actually pretty fierce about it. Maybe, I don't know,
12 have we run this past a professional law librarian?
13 Because they may say, "Well, wait, my duty is to assist
14 the patrons, and this is what that means."

15 CHAIRMAN BABCOCK: Richard, before your
16 comment, breaking news.

17 (Off the record)

18 CHAIRMAN BABCOCK: Okay. Richard, back to
19 you.

20 MR. ORSINGER: So I'm getting the sense now
21 that this is not mandating anything. This is just giving
22 cover to people who want to do it by saying you won't get
23 prosecuted or an injunction for the unlawful practice --
24 unlicensed practice of law, and if you're a judge you're
25 not going to get a judicial conduct complaint. So this

1 isn't forcing anybody to do anything. This is just giving
2 them a safe harbor. If they do it, they won't be
3 punished.

4 HONORABLE DAVID PEEPLES: And giving --
5 exactly, and giving people fair notice with these details
6 in (c) and (d) about you can do this and you cannot do
7 that.

8 CHAIRMAN BABCOCK: Okay. I lost -- Judge
9 Wallace, and then Justice Brown.

10 HONORABLE R. H. WALLACE: I would raise the
11 same question that was raised a moment ago, and that is
12 how is this going to be promulgated? I mean, is this
13 going to be a -- posted at the courthouse door, at the
14 clerk's office, at your chambers? Is it going to be in
15 the State Bar Journal? Who is -- I mean, because some
16 people -- my concern is some people will try to abuse this
17 process, some self-represented litigants --

18 CHAIRMAN BABCOCK: Yeah.

19 HONORABLE R. H. WALLACE: -- who are
20 constantly down at the clerk's office filing stuff. So
21 that's one question, because even though I appreciate the
22 fact that it says "may," if there's going to be a Supreme
23 Court policy that says "court personnel are encouraged,"
24 that's kind of the Supreme Court is encouraging you to do
25 this. But also I wonder -- there's so much difference in

1 the job descriptions, if in paragraph (c), "court
2 personnel acting in a nonlawyer capacity on behalf of the
3 court may provide assistance and legal information to
4 court patrons, which fall within their realm of job
5 responsibilities," or I don't know how -- that's not good
6 wording, but, for instance, I don't think -- some of these
7 things that are listed here clearly the clerk's office
8 probably would be responsible for, but not court
9 personnel, not in Tarrant County. Maybe in other
10 counties, may be different.

11 So, for instance, we don't provide forms for
12 waiver of filing fees and other forms as required by law.
13 The clerk's office may. So if there is some language that
14 could be added that the court personnel whose job
15 descriptions encompasses these functions can do those
16 things, then you can say, you know, if they don't, they
17 don't. I'm sure somewhere in Tarrant County, in most
18 counties, there's probably job descriptions for court
19 coordinators, administrative clerks, and things of that
20 nature. It wouldn't include all of this, but --

21 CHAIRMAN BABCOCK: Yep.

22 HONORABLE BRETT BUSBY: You could probably
23 say something like "in their areas of responsibility."

24 HONORABLE R. H. WALLACE: Yeah. Or
25 something like that.

1 CHAIRMAN BABCOCK: Justice Brown.

2 HONORABLE HARVEY BROWN: I had a big picture
3 question; that is, what happens if the bailiff gives the
4 wrong answers? In other words, says, "Your answer date is
5 this," or, you know, "This doesn't need to be verified" or
6 "This is sufficient," et cetera? I'm -- I think it's a
7 really good idea, but I am concerned when I see a lot of
8 people saying, "I did just what they told me to do."

9 CHAIRMAN BABCOCK: And the bailiff is going
10 to say, "I never told her that."

11 HONORABLE HARVEY BROWN: So I just wonder if
12 you've thought about that problem or how to -- if there's
13 a solution.

14 HONORABLE DAVID PEEPLES: Well, I hope that
15 people get guidance from (c) and (d) about things like
16 that. I think to tell someone when their answer is due is
17 getting pretty close to legal advice, isn't it? Let's
18 see.

19 HONORABLE STEPHEN YELENOSKY: If we don't
20 know, they're not going to know. But may I respond?

21 CHAIRMAN BABCOCK: Yeah, yeah. Sure. Yeah.

22 HONORABLE STEPHEN YELENOSKY: I think if the
23 point is -- and Trish can tell us -- that you want to
24 educate judges to what they can do, I think you need --
25 this may be fine. I like it. I mean, it's great if you

1 put in job description or, as Judge Wallace said,
2 something that says "consistent with your job
3 description," but I think there needs to be another
4 document that's addressed to judges if it's just
5 educational, because, you know, I mean, I agree with all
6 of this, but at the same time it's just not going to work
7 if it says in here that court staff -- and that includes a
8 staff attorney -- can do these things if the judge just
9 says, "No, I don't want you to do that." That's what will
10 happen, and so there has to be some direction to judges
11 other than what judges can do on the bench that -- that
12 the Supreme Court is asking judges to act consistently
13 with this to the extent that they can. Otherwise, you're
14 leaving these people supposedly to stand up to a judge
15 with this, and that's not going to happen.

16 CHAIRMAN BABCOCK: Levi.

17 HONORABLE LEVI BENTON: So both R. H. and
18 Tracy have invited I think David as the chair of the
19 committee to speak to where is this headed, how is this
20 going to be promulgated, and I don't know, David, that
21 you've answered that question, and I think it needs an
22 answer because it influences our thinking on this.

23 And then Steve just really spoke to
24 something that is not reconcilable with something that
25 David said earlier. David has pounded the table in a

1 figurative sense twice and said this gives cover to people
2 who want to provide assistance and information, and indeed
3 it does. But, you know, on Monday -- Monday I'm in the
4 295th, but on Tuesday I'm in another court, and that court
5 says, "Oh, I don't want" -- "Our judge says we can't
6 answer those questions," and we need -- I mean, justice
7 and the assistance to get justice needs consistency, needs
8 consistent application. I like the policy generally, but
9 I think we need to fix how it's promulgated. You know,
10 just publish it -- publishing it in the *Texas Bar Journal*
11 won't be enough. So those are my comments.

12 CHAIRMAN BABCOCK: Okay. We'll ask Justice
13 Newton in a minute how she plans to promulgate it.
14 Eduardo.

15 MR. RODRIGUEZ: Could they not discuss this
16 at the clerks' annual meetings that they have? I know our
17 district clerks go to an annual meeting and county clerks,
18 and I mean, it should be discussed at that -- at those
19 meetings so that they could be given information.

20 CHAIRMAN BABCOCK: Yeah. Yeah. Anything
21 you want to add, Martha, about promulgation?

22 MS. NEWTON: No. That will be the Court's
23 decision. So, I mean, the idea is that the Court would
24 issue an administrative order approving the policy, and
25 the order can say anything that the Court wants as far as,

1 you know, directing clerks to make it available or to
2 publish it certain places, so an analogy might be in
3 the -- the affidavit of indigency rule or whatever we're
4 calling it now. That rule says that the clerk must make
5 the form statement available, so the order could include
6 language directing clerks or court personnel to, you know,
7 post it somewhere or make it available, if that's what the
8 Court wants to do. Of course, there's no way really to
9 police that.

10 CHAIRMAN BABCOCK: Sure. Yeah. Yeah.
11 Justice Peeples.

12 HONORABLE DAVID PEEPLES: You know, how the
13 Court promulgates this is the Court's task and not ours,
14 and I think that Chief Justice Hecht will ask us for our
15 advice on that if he wants it, but to me that's not the
16 important thing. The content of it is much more important
17 than the form of it. Let me just say judges around this
18 state and clerks get e-mails all the time about things
19 that have happened. Here's a new -- whatever, and I
20 envision this being e-mailed to people. I'm sure it will
21 be posted somewhere. I don't know if hard copy will go
22 out. I think there will be conferences. You know, clerks
23 have conferences just like lawyers do and just like judges
24 do, and sometimes there might be a program that mentions
25 this. I mean, it might be part of a program that explains

1 it. It might just be a throwaway that people get. People
2 talk about it. That kind of thing is common, and I think
3 that this would fall into that category.

4 CHAIRMAN BABCOCK: Levi.

5 HONORABLE LEVI BENTON: But, David, speak to
6 how we handle district judge Tom Gray who says to his
7 staff, "I don't want you giving any assistance to these
8 people involved in this politically unpopular cause."

9 HONORABLE DAVID PEEPLES: Okay. One of the
10 realities is that there are people of goodwill --

11 HONORABLE LEVI BENTON: And Tom Gray.

12 HONORABLE DAVID PEEPLES: -- reasonable,
13 intelligent, and experienced and everything else who
14 disagree about things like this, and that's just the
15 reality. And, frankly, there's more -- I think more to be
16 said for doing the best you can and making it voluntary
17 and giving people cover. There's more to be said for that
18 than there is for ramming it down their throats and say,
19 "You're unreasonable, fall in line," which is basically
20 what that would require. And sometimes change comes very
21 slowly, and I understand the desire for uniformity and
22 consistency, but I think there's a need for discretion,
23 too, and sometimes reform goes a step at a time and not at
24 all in one fell swoop. So that's the best I can do to
25 answer that.

1 CHAIRMAN BABCOCK: Justice Bland.

2 HONORABLE JANE BLAND: So to take from what
3 Judge Peeples just said, this is an aspirational document.
4 There is no enforcement mechanism, but what it does is it
5 shifts -- it shifts or nudges the default. The default
6 now is "I can't talk to you." This is a nudge toward "I
7 can talk to you, and I can make the courts a little bit
8 demystified and help you at least know where to go to file
9 something." Not everybody will be an early adopter of
10 this new paradigm, but if we shift the default a little
11 bit, it may nudge people into adopting some of the good
12 efforts that we want to have happen out there so that
13 people find the courts an easier place to be, and when I'm
14 talking about easier I'm talking about less bureaucratic,
15 because they're never easy. No one that comes to court is
16 it easy for them. So, you know, taking a page off of the,
17 you know, this year's Nobel Prize winner in economics who
18 basically talks about how you can shift behavior by
19 shifting these guidelines, this is something that we
20 should do. That's it.

21 CHAIRMAN BABCOCK: David Jackson.

22 MR. JACKSON: In going to the far other side
23 of that, it's okay for me as a court reporter to say, "I
24 don't know how to tell you how to access a file," or "I
25 don't know a pro bono legal service." I don't have to

1 learn how to do all of this stuff. Is that -- I mean,
2 we're not saying that we're having court personnel learn
3 how to do all of these things.

4 HONORABLE DAVID PEEPLES: Absolutely
5 correct, in my opinion.

6 CHAIRMAN BABCOCK: Judge Estevez, and then
7 back to Justice Bland.

8 HONORABLE ANA ESTEVEZ: Well, I just wanted
9 to echo Justice Bland and Judge Peeples, because I'm going
10 to give you a concrete example. Yesterday I was talking
11 to a different court coordinator that wasn't mine, and I
12 was telling her where I was going today and some of the
13 things that we've been working on, and she was telling me
14 about another court coordinator in one of our counties
15 that refuses to give any assistance to anyone, says that
16 it's totally against her ethics, totally not allowed to
17 do, and this is the document that that other court
18 coordinator could just send to her and say, "No, it's
19 allowed. You don't have to do it, but you can."

20 You know, and this -- it's an opening --
21 it's an opening of the door to allow people to do things
22 that they didn't know they could do, and they can refer to
23 this and look at it, and it's going to make a difference.
24 There's no question. It's going to make -- and over time
25 I think we will reach that point where everyone will be

1 doing it, but I had the same type of concerns as you. I
2 would love to have equality, but maybe we don't -- maybe
3 we don't fight for equality first. You just go for the
4 first step, and this is a great first step.

5 CHAIRMAN BABCOCK: Justice Bland, and then
6 Richard.

7 HONORABLE JANE BLAND: Just liken it to
8 401(k) plans. There are risks and drawbacks to
9 participating in a 401(k) plan. People can make bad
10 decisions associated with a 401(k) plan. They can get bad
11 advice in connection with a 401(k) plan, but a lot of
12 companies realize that people, because it was difficult
13 and there were procedural obstacles to investing in a
14 401(k) plan, weren't even evaluating that. They just
15 weren't participating, and so what did a lot of companies
16 do based on behavioral economic research? They said we're
17 going to set the default that we're going to have
18 everybody in a 401(k) plan. You don't have to
19 participate. You can opt out, but we're going to make the
20 preference be opt in.

21 And by -- you know, by virtue of that small
22 change, you know, millions more Americans are now saving
23 for their retirement, and of course, there are risks and
24 benefits associated with that, but I think economists
25 would tell you that overall it was a -- you know, it was a

1 good thing to move the default to a point where people
2 would actually look at the alternative between not
3 investing or saving for your retirement and taking
4 something out of your paycheck and doing it, and same
5 thing here. We present the litigants with more
6 information about the court system, about where they can
7 go to do research, about our rules, which are difficult
8 for anyone. They're going to be more informed users of
9 our court system.

10 CHAIRMAN BABCOCK: Richard, and then Justice
11 Busby.

12 MR. ORSINGER: One of the things that I
13 think recommends this idea is that I think there are a lot
14 of people who simply won't get into this area at all for
15 fear that they're doing something illegal or unethical,
16 and by giving them comprehensive rules that they can
17 follow and know that they're safe, I think it will
18 encourage people to do something that before they may have
19 been afraid to do. And, secondly, even for people who are
20 already doing this, they may inadvertently be going over
21 the lines that are drawn in here, and we may be able to
22 pull them back to an acceptable practice that doesn't
23 invade the practice of law.

24 So both as an encouragement to doing
25 something safe and a discouragement from doing something

1 dangerous, to me this is a good policy. The only downside
2 I can think of it is that some people may think this
3 creates an entitlement to be helped in courts that are not
4 helping or in librarian offices that are not helping, and
5 there's nothing in here that says that this doesn't create
6 any rights, and perhaps we should just let everybody work
7 it out or perhaps we should say that this doesn't create
8 obligations or rights for everyone.

9 CHAIRMAN BABCOCK: Justice Busby, then
10 Trish, and then Justice Boyce.

11 HONORABLE BRETT BUSBY: I think Trish was
12 before me.

13 MS. McALLISTER: Really I just wanted to
14 kind of say -- address some of the concerns that people
15 have had about, you know, with this being that people who
16 don't know this information would be required to learn it.
17 I mean, I think really the bigger picture thing would be
18 they would say, "No, I don't have that information, but,
19 you know, let me point you to the person who does."
20 Because the whole point really is to make the system more
21 helpful to people who are coming rather than simply just
22 saying, "I don't know and I can't help you" and that --
23 that's just not helpful, you know. So for the bailiffs
24 and everybody else that aren't going to have this
25 information clearly for some it would just be to have them

1 send them onto the right place so people feel like they're
2 at least moving through the system.

3 CHAIRMAN BABCOCK: Justice Boyce, and then
4 Peter, and then we're going to take our morning break.

5 HONORABLE BILL BOYCE: Justice Busby, did
6 you --

7 HONORABLE BRETT BUSBY: Oh, I was just going
8 to add I think part of the philosophy of this is the same
9 as the one that we discussed in conjunction with the
10 amendments to the Code of Judicial Conduct, which is we're
11 not compelling judges to do anything, but we're giving
12 them -- we're letting them know that this is not an
13 ethical violation if they want to do these things in order
14 to try to make clear across the state, you know, because
15 practices differ so much right now from county to county,
16 to provide sort of a baseline so that everybody knows what
17 is permitted and so it's basically just we're carrying
18 that down to the next level of staff below the judges that
19 people interact with, as Judge Peebles said, even more
20 often; and so for the reasons Richard mentioned I think
21 that, you know, this is -- and Justice Bland and others --
22 that, you know, this is permissive. It's not mandatory,
23 but it's trying to make clear what is permitted so that
24 people across the state will feel more comfortable in
25 providing these to people who need them.

1 CHAIRMAN BABCOCK: Justice Boyce, and then
2 Peter, and then a break.

3 HONORABLE BILL BOYCE: So the comments,
4 particularly Richard's and Justice Bland's, highlight a
5 concern I have not about the overall goal but about
6 implementing it and about the risk of over-definition in
7 this current draft. I'm focused specifically on (b)(3)
8 and the effort to distinguish between legal information
9 and legal advice. My take on it would be that to serve
10 the goals that have been articulated, which is
11 aspirational, which is to provide examples of what you can
12 do, which is to combat an attitude that says, "I'm not
13 sure what I can do, so I'm not going to do anything."
14 That goal is better served by focusing the definitional
15 effort on what you can do is permitted assistance and what
16 you can't do is prohibited assistance. And particularly
17 for a document that, as I understand it, is being devised
18 to be used and applied by nonlawyers entirely or mostly, I
19 think we've got to be careful about tying ourselves in
20 definitional knots.

21 And so to be specific about it, if I'm
22 looking at the draft right now, the person trying to
23 figure out whether they can or cannot respond to a
24 particular inquiry from a particular court patron is going
25 to need to decide whether the information at issue

1 involves assistance, information, guidance, advice, legal
2 skills, analysis, or strategy. If you go through (b)(3)
3 and then some of the prohibited assistance under (d)(5),
4 for example, there's a lot of amorphous terms swimming
5 around here. So my discussion point would be did we feel
6 that we need to define "legal information"? That may need
7 definition, but as the discussion continues I think we
8 want to be wary of over-definition in broad terms and
9 focus the effort on concrete examples of what you can do
10 and what you can't do, because I think that's what's going
11 to promote the goal that Richard was describing and I
12 think the aspirational goal that Justice Bland was
13 describing.

14 CHAIRMAN BABCOCK: Thank you, Judge. Peter.
15 Pre-break wisdom.

16 MR. KELLY: This may be a distinction --

17 CHAIRMAN BABCOCK: It's got to be good.
18 It's got to be big. Let us leave on a high note.

19 MR. KELLY: On a high note, I can't
20 guarantee that, trust me. Looking at the Supreme Court
21 website, so they have things posted, and we have the Rules
22 of Professional Conduct, Rules of Civil Procedure, local
23 rules, and standards. And then I was looking at the
24 standards for appellate conduct, which I refer to
25 relatively frequently. What is a policy? Is it something

1 that's enforceable? I think it fits more into the idea of
2 the aspirational and exhortative standards for appellate
3 conduct. These would be standards for conduct of court
4 personnel, and the standards for appellate conduct has
5 some good language in there about "This shall not be a
6 basis for a cause of action or a motion for sanctions" or
7 anything, but if we phrase it as standards and perhaps
8 flesh out the purpose and scope a little bit more, I think
9 that would resolve a lot of the issues that are raised
10 about enforcement of this and who this is actually for.

11 CHAIRMAN BABCOCK: Thank you, Peter. We'll
12 take our morning break, and be back at 20 minutes before
13 12:00. Thank you.

14 (Recess from 11:24 a.m. to 11:40 a.m.)

15 HONORABLE DAVID PEEPLES: Move for approval.

16 CHAIRMAN BABCOCK: Move for the approval of
17 the whole thing. Hearing no opposition? We've had a sort
18 of a rambling discussion, which I think has been very
19 helpful. I think you would agree, Judge Peeples.

20 HONORABLE DAVID PEEPLES: Yes.

21 CHAIRMAN BABCOCK: But it hasn't been
22 focused on some of the things we need to look at, so why
23 don't we focus on subsection (b)?

24 HONORABLE DAVID PEEPLES: I would like to do
25 that, and we certainly need to get to (c) and (d)

1 eventually.

2 CHAIRMAN BABCOCK: Yeah. Let's not take too
3 long on (b) if we can help it. Subsection (b).

4 HONORABLE DAVID PEEPLES: (b) is definition
5 of terms that are used elsewhere, and the thought was that
6 they need to be defined.

7 CHAIRMAN BABCOCK: Okay. Any comments on
8 (b) that haven't already been made? Richard.

9 MR. ORSINGER: I would just support the
10 suggestion that we define "assistance." I know there was
11 some opposition to that, but I think it would be helpful.

12 CHAIRMAN BABCOCK: Okay. Any other comments
13 about definitions?

14 HONORABLE TOM GRAY: I think we need a
15 definition for "court staff" that defines who they are by
16 their nature of the control from the judge. That also
17 helps us with the clerks in the appellate courts are court
18 staff, where the clerks at the trial court level are not
19 court staff.

20 CHAIRMAN BABCOCK: Okay. Anything else on
21 definitions? Yeah, Justice Busby.

22 HONORABLE BRETT BUSBY: I think the intent
23 in preparing this was that the definition of "assistance"
24 was provided in (c).

25 CHAIRMAN BABCOCK: Okay. Any opposition to

1 putting it in the definitions?

2 HONORABLE BRETT BUSBY: Well, if -- I think
3 it would -- I think it would be hard to see it. People
4 would be less likely to see it there, and so we're
5 defining "assistance" in terms of what's permitted and
6 prohibited in (c) and (d), and I think having those be
7 their own sections draws more attention to them than --
8 and I think it might compound the problem that Justice
9 Boyce was mentioning if we put (c) under (b) as a
10 definition.

11 CHAIRMAN BABCOCK: Okay. Yeah, Justice
12 Christopher.

13 HONORABLE TRACY CHRISTOPHER: I agree with
14 Justice Boyce that we shouldn't have the definitions at
15 all, and we should rely on (c) and (d) or maybe just (c)
16 alone.

17 CHAIRMAN BABCOCK: Okay. Anything else on
18 definitions? Okay. Let's move on to (c), permitted
19 assistance. The guts of the matter. Judge Peeples,
20 anything you want to say in a preliminary way about this?

21 HONORABLE DAVID PEEPLES: No, not to
22 highlight. There are -- there's 14 of them. The last one
23 is sort of a catch-all, and I'm not inclined just to go
24 through them one by one.

25 CHAIRMAN BABCOCK: No, I'm not either.

1 HONORABLE DAVID PEEPLES: But if people have
2 looked at them and have comments or questions, we would
3 like to hear that.

4 CHAIRMAN BABCOCK: Judge Yelenosky.

5 HONORABLE STEPHEN YELENOSKY: Well, one that
6 stands out for me is internet-based resources, because all
7 the --

8 HONORABLE DAVID PEEPLES: Where are you?

9 HONORABLE STEPHEN YELENOSKY: I'm sorry?

10 HONORABLE DAVID PEEPLES: Why don't you tell
11 us where you are?

12 HONORABLE STEPHEN YELENOSKY: Oh, I'm sorry,
13 I hope I'm in the right place.

14 HONORABLE DAVID PEEPLES: Yeah, in (2)(h).

15 HONORABLE STEPHEN YELENOSKY: (c)(2)(h).
16 The other one is "domestic violence resources." Those are
17 resources that are created and are free, and they're
18 directed for the pro se litigant. The internet is, you
19 know, the wild west, and so you're either going to say,
20 "Go to the internet," which people do anyway, or are you
21 suggesting they specify particular websites? And I'm
22 concerned about that, because that seems that could go
23 awry.

24 HONORABLE DAVID PEEPLES: I'm not sure
25 there's a suggestion that they do anything. There's a

1 statement "You may do this."

2 HONORABLE STEPHEN YELENOSKY: Right.

3 HONORABLE DAVID PEEPLES: So if there is a
4 good website or something available on the internet, which
5 of course is true, and somebody in the clerk's office, you
6 know, whoever it is, wants to make a referral, this would
7 cover that. I think that's the intention.

8 HONORABLE STEPHEN YELENOSKY: Some of those
9 are -- some of those are profit-making enterprises, so but
10 anyway, I don't have a suggestion other than taking it
11 out, so --

12 CHAIRMAN BABCOCK: Okay. By the way, during
13 the break several aged members of our committee asked that
14 we all try to speak up so that everybody can hear. I
15 won't identify the aged members, but --

16 HONORABLE STEPHEN YELENOSKY: What?

17 CHAIRMAN BABCOCK: You know, in fact, that's
18 exactly what I said to the person who was standing right
19 in front of me, "What did you say?" Anyway, if we could
20 do that, that would be great. Who is next? Frank.

21 MR. GILSTRAP: (b)(7), it says that
22 "recording on forms verbatim information provided by the
23 self-represented litigant if that person is unable to
24 complete the forms due to language disabilities or
25 literacy barriers." We say "language" do we mean "foreign

1 language" or just problems with language? Because that's
2 a very broad thing, and I could see a situation where, you
3 know, "Well, I'll help you fill it out."

4 HONORABLE DAVID PEEPLES: Well, the form is
5 going to need to be in English, and so I would think that
6 would be the main thing someone might need help on.

7 MR. GILSTRAP: I'm just saying do you want
8 to add the word "foreign" before "language"?

9 HONORABLE BRETT BUSBY: Why wouldn't we want
10 to help them if they have other language difficulties?

11 MR. GILSTRAP: Because it's -- you know,
12 "Well, I have problems with the language. I don't
13 understand it. Explain them to me." Easy to say about --
14 it's a very broad thing, and if you want to be broad,
15 fine, but if you meant "foreign" we ought to say
16 "foreign."

17 CHAIRMAN BABCOCK: Holly.

18 MS. TAYLOR: So we had a lively discussion
19 about all of this at our November 3rd meeting of the Court
20 of Criminal Appeals Rules Advisory Committee, and we have
21 some individuals on our committee -- we have a district
22 clerk. We also have an individual who's a criminal
23 defense attorney, but he was a municipal judge for 10
24 years; and he had a lot of reservations about all of this
25 in general, but specifically number (6), number (7), and

1 number (8) on this, which have to do with helping court
2 patrons locate forms and fill out forms. He had a lot of
3 concerns about this, and these aren't necessarily my
4 concerns, but I thought I would share them because he had
5 a good perspective having worked as a municipal judge in
6 Houston for 10 years of working with lots of unrepresented
7 litigants, who many of them didn't speak English.

8 But anyway, he said that -- he offered a
9 hypothetical situation in which someone helps a pro se
10 litigant fill out a one-page application for probation,
11 and he noted that even on such a simple form a party can
12 inadvertently commit perjury if the defendant is mistaken
13 about his conviction history, for example, and this is
14 something that as an attorney when he's assisting his
15 clients he double-checks all of that information, but he
16 was concerned that court staff might not have that
17 expertise. So that was one of his concerns, and he
18 basically just said he was a hard-liner on this issue. He
19 felt like the judge should have a role of a neutral
20 arbiter and that if the judge couldn't do it then his
21 court staff shouldn't be assisting with it as well. So, I
22 mean, he expressed a lot of concerns, specifically about
23 these forms-related items.

24 CHAIRMAN BABCOCK: Okay. Yeah.

25 HONORABLE JANE BLAND: Given that --

1 CHAIRMAN BABCOCK: Go ahead, Jane.

2 HONORABLE JANE BLAND: -- you know, indigent
3 criminal defendants can have counsel appointed, and if
4 they are self-represented, you know, a judge will go
5 through all of the Faretta warnings, is it going to cause
6 a lot of problems on the criminal side to have a policy
7 like this? And in particular since it's a policy
8 promulgated by the Texas Supreme Court, you know, it's
9 going to deal mainly with self-represented litigants. Or
10 what do you think? Is it going to create issues on the
11 criminal side?

12 MS. TAYLOR: Well, again, this is not my
13 perspective, but the concern of this particular attorney
14 and other members of our committee and the Court that I
15 work for is if there's sort of general change in policies,
16 that it could undermine the Faretta warnings, and people
17 might tend to think they can move forward on their own and
18 decline the appointed attorney. I think that's -- I hate
19 to put words in people's mouths, but I think that the
20 concern is that it might undermine Faretta warnings and
21 folks might think, well, the judge is going to help me,
22 the court staff is going to help me, the court-appointed
23 attorney is not going to be a good attorney. I mean,
24 people often have these preconceived ideas.

25 CHAIRMAN BABCOCK: Okay. Judge Yelenosky,

1 and then Justice Brown.

2 HONORABLE STEPHEN YELENOSKY: It seems like
3 that's a false alternative, you saying, well, it would be
4 better if I did it because I'll look over it and make sure
5 that it's all right, and whether that's an attorney or a
6 judge presumably the situation is there isn't going to be
7 a judge who's overlooking it before they sign it. There
8 isn't an attorney who's going to be looking over it before
9 they sign it, and the person if they're fluent in Spanish
10 at least can get down in English what they would put down,
11 so I don't see why taking that away from them when there's
12 not the alternative he would prefer is a bad thing, or
13 taking -- it's a good thing.

14 CHAIRMAN BABCOCK: Okay. Justice Brown.

15 HONORABLE HARVEY BROWN: I had a question
16 about item (6) and (8) where it talks about forms. It
17 wasn't that long ago we had a big debate about forms in
18 this group, and I want to make sure when we talk about
19 forms we're not just talking about forms off the internet
20 or something like that. To me we're talking about some
21 form that's been approved by the Court that's part of our
22 rules, et cetera, not something that we are getting off
23 the internet where you can get a whole bunch of different
24 forms that are completely different.

25 CHAIRMAN BABCOCK: Yeah. Good.

1 HONORABLE HARVEY BROWN: So I think that
2 should be clarified.

3 CHAIRMAN BABCOCK: Okay. Justice Busby, you
4 had your hand up. I know you're in conference right now.

5 HONORABLE BRETT BUSBY: I wanted just in
6 reference to the comment about -- from the municipal judge
7 about completing the forms, I don't think we run into any
8 perjury issues if they're just recording verbatim
9 information that's provided by the litigant. I mean, the
10 litigant might perjure themselves, but I don't think there
11 would be any perjury by the person who's recording the
12 information that they were told verbatim on the form. And
13 we did look at the Cortez case, which is provided with the
14 memo, where the Supreme Court said the act of recording
15 responses to questions is not -- doesn't require a legal
16 skill or knowledge. So I don't think we're running afoul
17 of any unauthorized practice of law by just having people
18 record the information on the form.

19 CHAIRMAN BABCOCK: Okay. Yeah, Justice
20 Gray.

21 HONORABLE TOM GRAY: In (c)(4) we make
22 reference to "providing information about security
23 protocols." I won't be doing that ever, although I might
24 suggest to someone items not permitted past the security
25 checkpoint. Security protocols are set by the sheriff at

1 our courthouse, so I just don't think that's a good term.

2 In item (6), this sort of brings home the
3 need for separate policies and a focus on who's in each
4 policy. The last phrase is "Court personnel must provide
5 forms for the waiver of filing fees." That's not
6 accurate. It is the clerk and their personnel that have
7 to provide the statement of -- statement regarding the
8 inability to afford payment of court costs. I think the
9 last sentence needs to be entirely stricken from the
10 policy that may be adopted for judges and court staff.
11 I'll yield the floor. I've got some other comments, but I
12 want to take them quickly and --

13 CHAIRMAN BABCOCK: Okay. You won't yield
14 the floor quickly because Richard Orsinger is about to be
15 recognized.

16 MR. ORSINGER: I am concerned about just the
17 use of the word "forms" because there are a lot of forms
18 out there that have not been vetted and don't have
19 necessary information, and the forms are used several
20 times, and I'm thinking perhaps we should have a
21 definition of "forms" as "officially approved forms"
22 because, first of all, that encourages someone if they
23 come and ask for help filling out something screwy that
24 came out of California the person can say, "I can't help
25 you because I can only do, you know, official Supreme

1 Court-approved forms or local-approved forms," and I do
2 want to encourage the use of the carefully crafted forms
3 and not forms off of the internet.

4 CHAIRMAN BABCOCK: All right. Yeah, Trish.

5 MS. McALLISTER: One thing I actually --
6 this was I think an error on our part in terms of the
7 court forms, the reason why I'm concerned with leaving
8 court forms in there is because there's not very many
9 court-approved forms, so that's not going to be useful to
10 the majority of the people that are going to be coming in,
11 and there may be some local court-approved forms, and
12 that's great, too. I think those things, both of them,
13 are helpful, but the main source of forms that have been
14 developed by lawyers who are for -- you know,
15 traditionally targeted towards low income people is
16 texaslawhelp.org, which is run by the Texas Legal Services
17 Center, which is a statewide Legal Aid entity here; and as
18 a part of the Texas Access to Justice Foundation
19 requirements for their grantees, all of the Legal Aid
20 organizations basically have to ensure that the
21 information on that website is up to date and the forms
22 are accurate.

23 So that would be a source where I would feel
24 very comfortable, and as a matter of fact, that's where
25 most people send people to forms, and in the last

1 legislation and the statute -- I can't remember the
2 numbers anymore. Was it Senate Bill 1911? Anyway,
3 basically in that bill that required the courts to post
4 information on where people could find a lawyer and where
5 they can get information and forms, and that was
6 determined -- OCA and the commission had to, you know,
7 bite the statute, had to decide, you know, which site to
8 send people to, and the site that was determined was to be
9 texaslawhelp. So I think if we're already saying in the
10 courthouse you can go to this place then this policy
11 probably could do that as well.

12 CHAIRMAN BABCOCK: Okay. Thanks. Justice
13 Gray, you want the floor back?

14 HONORABLE TOM GRAY: Yes, please.

15 CHAIRMAN BABCOCK: All right, you got it.

16 HONORABLE TOM GRAY: All right. Item (8) in
17 the "permitted," I've got several problems in that
18 section. We use the term or the phrase "clerical
19 completeness." We also use it over in (d)(2), something
20 similar, and they need to be parallel. I would think that
21 "information needed for filing" as opposed to "clerical
22 completeness" may be more helpful. We don't accommodate
23 where it might be appropriate. It talks about "items
24 necessary for filing" and including a notary, but we don't
25 accommodate the sworn statement in lieu of a notary in

1 light of the recent statute that was passed on the
2 availability of the use of that statement.

3 And probably the one that gives me the most
4 pause for concern is the word "correct" in reference to
5 county name. That has a very qualitative aspect of
6 whether or not you are filing this document in the correct
7 county. Venue is an enormous issue in many cases. You
8 know, I think the intent of the policy would be the county
9 in which you intend to file is identified. I mean, we do
10 get some documents that are clearly intended for the Tenth
11 Court of Appeals, although they may have the -- the ones
12 that are most commonly listed for us are the First and the
13 Fourteenth due to the history of Brazos County, but they
14 identify other courts of appeals, but they clearly
15 intended it to be filed there, and so something like that
16 to clean that up. I just don't think the word "correct"
17 -- that to me crosses the line.

18 The next item is in (10). We sort of drop
19 it. We assume that you're getting a copy of an order in
20 item (10)(b), but it doesn't say that, and it caused me to
21 think that we actually need to expand that and say
22 "order" -- "pleading, motion, judgment, or order" in both
23 (b) and (c) so that it's clear that what it is we are
24 getting information about. I don't think it should be
25 limited to just an order.

1 If somebody else has got one ready to go, I
2 yield again.

3 CHAIRMAN BABCOCK: David Jackson has got
4 one.

5 MR. JACKSON: I just have one on (6). I
6 think that the last sentence there, "Court personnel must
7 provide," takes this document out of a helpful phase and
8 puts it into sort of a mandatory obligation created for
9 court personnel.

10 CHAIRMAN BABCOCK: Good point.

11 HONORABLE BRETT BUSBY: And that was the
12 intent because there are certain statutes that mandate
13 that the forms be provided, and so we didn't want to try
14 to indicate by the policy that we were trying to override
15 those mandates.

16 CHAIRMAN BABCOCK: Frank.

17 MR. GILSTRAP: Well, we skipped over the
18 general definitions, but it's cropping up here. Several
19 places they use the term "court patrons," like in (6),
20 "helping court patrons locate court forms and related
21 instructions based on the court patron's description of
22 what he or she wants," et cetera. Court patrons means any
23 person -- the definition, "any person such as an attorney,
24 self-represented litigant, or other member of the public
25 who is accessing the judicial system." I'm not sure what

1 that's meant -- or does that mean we don't want -- I could
2 read it to say, well, we don't want to encourage them to
3 talk to the press, for example. Like TMZ is calling up
4 and wanting to know the latest lowdown on this
5 controversial decision, and we don't want them saying,
6 well, you know, we've got to talk -- they're not a court
7 patron. That may not be what's there, but I'm just
8 wondering what the idea behind the idea of court patron
9 was.

10 CHAIRMAN BABCOCK: Yeah, and by the way,
11 Frank, we didn't miss the definitions section. There was
12 a pause in the comments, and I raced past it.

13 MR. GILSTRAP: Okay. Okay.

14 HONORABLE BRETT BUSBY: In response --

15 CHAIRMAN BABCOCK: Justice Busby.

16 HONORABLE BRETT BUSBY: In response to
17 Frank's question, we did have a discussion about this on
18 the subcommittee call, and the reason that "court patron"
19 is written broadly rather than limiting it to litigants or
20 attorneys is that someone may come to the courthouse
21 before they actually file their petition and need some
22 information, and so they wouldn't yet be a litigant at
23 that point.

24 CHAIRMAN BABCOCK: All right. Justice
25 Brown.

1 HONORABLE HARVEY BROWN: I don't know that I
2 have a view as to whether this is a good or bad idea, but
3 (14) at least raises some concerns in my eye, the broad
4 catch-all. You know, we had more before. We had 16, I
5 think. We've cut it two back. There's been a debate here
6 as to what is proper, and it just seems like to me we're
7 going really pretty well and taking a good step with the
8 new default, if you will, by doing the first 13, but I
9 think number (14) is so amorphous that it may create more
10 problems than it's worth. You know, what's the intent
11 here? Well, I think the intent is kind of a fine line.
12 We want to go this far but not that far, and I think it's
13 more helpful to have something concrete than go that
14 broad.

15 CHAIRMAN BABCOCK: Okay. Judge Yelenosky.

16 HONORABLE STEPHEN YELENOSKY: Back to (6),
17 "Court personnel must provide forms for the waiver of
18 filing fees." First of all, I don't know the answer to
19 this, but I assume that certain people have an obligation
20 to do that, but not every single category of court
21 personnel; and secondly, it's not parallel because when
22 you get into prohibited assistance, number (d)(2) is
23 "refuse to file documents"; and so if you want to -- if
24 it's correct as is, it should be among the things that
25 you're not do, which is refuse to -- (2) is refuse to file

1 documents, refuse to provide waiver of filing fees, and
2 does it apply to everybody? If not, it does sound like
3 it's mandating that the bailiff and everybody else has to
4 do those.

5 CHAIRMAN BABCOCK: Okay. Any other comments
6 on subsection (c)? Yeah, Skip.

7 MR. WATSON: You've probably gone over this,
8 but it occurs to me that while the inclusion of "must" in
9 among the permitted things makes it clear that some is
10 must and some is permitted, but the tag of the "assistance
11 permitted should be provided in the same manner to all" to
12 me raises that "must" once it's been done once; and it
13 just occurs to me that we might soften that a bit by
14 making it clear that there are primary duties, that this
15 is not overtaking the work designation of the employee;
16 and just by saying "time permitted assistance," blah,
17 blah, blah. I think that would head off some problems of
18 people lining up saying, "No, no, no, don't leave. I need
19 the same help you gave him."

20 CHAIRMAN BABCOCK: Okay. Any other comments
21 on (c)? Yeah, Justice Gray, back to you.

22 HONORABLE TOM GRAY: In (12) we use the term
23 "case," and I think it's used at least one other place in
24 the policy. In number (13) we use the term "action,"
25 which they obviously I think mean the same thing in this

1 context. In the Civil Practice and Remedies Code, Chapter
2 11, the Legislature has used the term "litigation," which
3 I have become comfortable with because of -- I'm sorry,
4 for the vexatious litigant chapter. We've become familiar
5 with that at the Tenth Court, but in deference to the need
6 to make this thing understandable, I think "case" is the
7 better term. It shouldn't be used in (13), but actually
8 we can eliminate that problem if we simply made (13) read
9 "providing the same assistance to all court patrons" and
10 then that makes it actually much easier to read, and I
11 think is the intent of the subcommittee.

12 Could I jump back to -- I think it was
13 Frank's comment on accessing the judicial system for just
14 a moment?

15 CHAIRMAN BABCOCK: Certainly. Yeah.

16 HONORABLE TOM GRAY: I don't think it's
17 intended to be limited to those that are in the system or
18 trying to get into the system. There may be other persons
19 who need assistance navigating within the judicial branch,
20 and the questions that I frequently get asked as I'm going
21 through our courthouse is "Where can I go get a copy of
22 the divorce decree?" Already done. They may not even be
23 either spouse. And so I think the -- in definition (b)(1)
24 that "accessing the judicial system," my mind just locks
25 up every time I read that because it seems to be limited

1 to those that are trying to get in the door as opposed to
2 those that are already inside or trying to get in is
3 covered, but then there's no third parties that are, and I
4 just think we need to accommodate -- bad choice of words.
5 We need to build that into the policy if that's what we're
6 trying to do, catch all three groups of people. (c), I
7 rest.

8 CHAIRMAN BABCOCK: Resting now.

9 HONORABLE TOM GRAY: On (c).

10 CHAIRMAN BABCOCK: On (c).

11 HONORABLE TOM GRAY: Yeah. I'm ready to go
12 to (d) whenever y'all are.

13 CHAIRMAN BABCOCK: All right. Justice Gray
14 rests. So Judge Yelenosky.

15 HONORABLE STEPHEN YELENOSKY: I guess Skip's
16 point, I don't think we can put a blanket of time permits
17 on this, because it includes some things that are mandated
18 by federal law. So, for example, number (11), "informing
19 court patrons of the process before requesting foreign
20 language or sign language interpreter," if our document
21 says if there's permitted -- time permitted that's a
22 violation of federal law right there, so we have to solve
23 that problem.

24 MR. WATSON: He's right.

25 CHAIRMAN BABCOCK: Okay. Yeah. Anything

1 else on (c), or are we all willing to rest? Looks like
2 we're willing to rest. Let's go to (d). Judge Peeples.

3 HONORABLE DAVID PEEPLES: All ears.

4 CHAIRMAN BABCOCK: Any other comments, Judge
5 Yelenosky?

6 HONORABLE STEPHEN YELENOSKY: This is
7 perhaps nickeling, but number (4) sort of sticks out like
8 a sore thumb to me. It's sort of like telling the LVN not
9 to perform surgery. I mean, you go through a variety of
10 things that they might need advice on, but number (4) says
11 basically don't play attorney and walk into court, and so
12 I -- it just seems out of place, and maybe it's just
13 because it's number (4). I don't know. It's just sort of
14 set in there in the middle.

15 CHAIRMAN BABCOCK: Okay. Yeah, that's a
16 good thought. Frank.

17 MR. GILSTRAP: Well, just stylistically each
18 of the parts in (c) begins with i-n-g, providing,
19 reviewing, offering. (d), they don't start with i-n-g. I
20 think they need to match, however you want to do it, but
21 more specifically in (d)(2) it says, "Refuse to file
22 documents and forms because they are incomplete or
23 otherwise insufficient." That implies to me that there
24 are other reasons they can refuse to file. I mean, is
25 that -- are there reasons they can refuse to file, for

1 example, a petition? And if there are not, do we need to
2 strike "because they are incomplete or otherwise
3 insufficient."

4 HONORABLE DAVID PEEPLES: They don't pay the
5 filing fee.

6 HONORABLE BRETT BUSBY: They don't pay the
7 filing fee would be --

8 MR. GILSTRAP: What's that?

9 MR. SCHENKKAN: Not paying the filing fee.

10 MR. GILSTRAP: Good one. Anything else?

11 HONORABLE STEPHEN YELENOSKY: Not signing
12 it. Not signing it.

13 HONORABLE BRETT BUSBY: Well --

14 MR. GILSTRAP: And they can refuse to file
15 it?

16 HONORABLE STEPHEN YELENOSKY: I don't know.
17 I'm guessing.

18 MR. GILSTRAP: See, I don't know either.

19 HONORABLE BRETT BUSBY: I think that would
20 fall under (c)(8) where they could say, "You didn't sign
21 it. Go ahead and sign it."

22 CHAIRMAN BABCOCK: This "represent court
23 patrons in court" thing bothers me a little bit, and I'm
24 trying to think about that. Are there any circumstances
25 where court personnel might say, "Well, normally I would

1 introduce this pro se litigant to the judge because, you
2 know, they have an ex parte problem or something, but I
3 see I can't represent them." Probably not. I mean,
4 that's probably overly technical.

5 HONORABLE STEPHEN YELENOSKY: But do we need
6 it? Like I said, it's like telling the LVN "Don't go in
7 and perform surgery." If they don't know they're not
8 supposed to represent people, we've got a big problem, and
9 like you say, if it discourages something perfectly
10 innocent then why bother?

11 CHAIRMAN BABCOCK: Yeah. Yeah. Justice
12 Gray.

13 HONORABLE TOM GRAY: (4) is also in direct
14 conflict with Canon 4G of the Code of Judicial Conduct
15 where judges and court staff can represent themselves in
16 court and family members. Or they can represent court --
17 family members. It's an open question of whether or not
18 they can do it in court. Number (7), you ready to move
19 on?

20 CHAIRMAN BABCOCK: Oh, yeah.

21 HONORABLE TOM GRAY: Number (7), I've got --
22 I'm okay generally, you know, obviously subject to my
23 other concerns about the first two provisions of this, but
24 it's the third one that will cause me as a judge to --
25 which says that you have to deny -- you're prohibited from

1 denying a self-represented litigant access -- or litigant
2 "any assistance provided to other court patrons." If
3 that's in the policy as the executive director or whatever
4 my administrative capacity is as chief of our court, we
5 will cease all discretionary assistance, and I won't have
6 a choice because I can't afford to make the same level of
7 assistance available to every court patron. Every time we
8 make some type of assistance, we have to evaluate things
9 like how much time is it going to take or the other
10 pressures on us at the time, the risk of -- you know, the
11 value, if you will, of the particular decision, and the
12 risk of being wrong in what is done.

13 We do not have the resources to do what we
14 might choose to do under the circumstances for one court
15 patron for every, and that's what makes this a like -- I
16 don't know if you would characterize it as lowest common
17 denominator or highest common denominator, but when we
18 make a decision to provide an inmate involved in a civil
19 litigation a -- they've written in. They want a copy of
20 an order; and we exercise our discretion and say, okay,
21 it's a three-page order, it's going to cost us a buck
22 fifty to send them a letter that says they owe us 30 cents
23 and, you know, get that letter back and then to send them
24 a copy of the order. I can choose now and do choose to do
25 that as kind of a best practice kind of decision; and I

1 send them something that I'm not required to; and in fact,
2 some people would say I'm required to charge them 10 cents
3 a page for that copy; but if I provide them a free one,
4 then the guy that's been there 30 times wanting the same
5 copy of the same document, still got to do it for him. Or
6 the -- or when it goes through the prison system that, oh,
7 the Tenth Court of Appeals, they'll send you a copy of a
8 case, because they sent me a copy of a case; and so now
9 I've got to send this to everybody. If I have to do the
10 same level of assistance to every person that comes in the
11 door, I can't afford it. I can't do it. Don't have time
12 for it.

13 CHAIRMAN BABCOCK: What if a clerk says,
14 "These Tea Party guys are just a pain in the butt, and I'm
15 not going to service them. I'll take care of the pro ses
16 that come through, but if you're a Tea Party person, not
17 going to do it"? Is that okay, or is that prohibited by
18 some other law?

19 HONORABLE TOM GRAY: I'm sure that one's
20 probably prohibited by many laws, but the -- I mean, the
21 ability to be responsive to one particular court patron
22 may be very, very minimal, and I'm okay with that. I
23 mean, I told the subcommittee one of the reasons that I
24 have found this so -- for lack of a better word --
25 offensive is that I think I make every reasonable

1 accommodation that we have the time and the resources to
2 make. And in 30 some years of practicing law and being on
3 the bench I can think of one time when I would think that
4 anybody that I had -- that was in my sphere of practice
5 failed to live up to this policy and concept, and so I
6 don't see this as a systemic problem, but I want to do the
7 right thing, and I try to help people that are in my court
8 that are having their problems.

9 But, for example, just yesterday while I was
10 trying to print all of this and get ready to come down
11 here, one of the deputy clerks stopped me and wanted to
12 know about checking one box on some form that she had
13 someone on the phone about as to whether or not they
14 should -- and it had to do with indigency, and I was able
15 to determine from what she knew that it was not the notice
16 of appeal, so he was already in the court, and so the risk
17 of ultimate harm by him not getting that document filed
18 was minimal, and my response to her was to simply tell him
19 to fill it out the best he can, but he wanted to know
20 whether or not that this affidavit should be coming up
21 from the trial court or whether or not it needed to be
22 filed and whether or not this box needed to be checked and
23 it -- in one question it was a series or fostered a series
24 of questions from me about what did this person need, what
25 help did he need, where in the system were they, and I

1 didn't have time to do it then or on a --

2 CHAIRMAN BABCOCK: Do you advocate taking
3 out (7), or are you advocating taking out -- or rewriting
4 (7) to go further to saying, furthermore, the court
5 personnel have discretion to help whatever court patron
6 they want?

7 HONORABLE STEPHEN YELENOSKY: What did the
8 committee intend there? I don't read it at all like
9 Justice Gray.

10 HONORABLE DAVID PEEPLES: My thought on that
11 -- and maybe the rest of the committee needs to speak up.
12 If this said "deny self-represented litigants assistance,"
13 blah, blah, blah, "provided to represented litigants."

14 HONORABLE STEPHEN YELENOSKY: Represented,
15 yeah.

16 HONORABLE DAVID PEEPLES: That's what I
17 think it is intended to mean. It certainly doesn't mean
18 that the guy that's going after you 30 times for the same
19 thing, you would make the same decision on every
20 self-represented litigant who did that. So I think that's
21 not covered, but it could be rewritten.

22 HONORABLE STEPHEN YELENOSKY: Right. Right.

23 CHAIRMAN BABCOCK: Judge Estevez.

24 HONORABLE STEPHEN YELENOSKY: I think that
25 is a real issue.

1 HONORABLE ANA ESTEVEZ: I have the same
2 issues that he does, except, I mean, I have so many
3 examples that, I mean, we treat our criminal defense
4 attorneys that are representing indigent clients different
5 than we treat anyone else. They can come in and make
6 copies because it's -- the government is going to pay it
7 back. We let them use our copy machine, but are we going
8 to let a self-represented person that comes in and says,
9 "Well, you just let that lawyer make a copy"? You know,
10 it creates -- and I read it the same way he did. I also
11 have dress issues. I mean, if I have a pro se litigant
12 that comes totally dressed inappropriately, I'm going to
13 tell them they have to go change, and I would do the same
14 thing for an attorney that did that, but that doesn't
15 happen. So they could be saying that I am denying them
16 access at least at that moment when I am allowing the
17 other lawyer to stay until they get back. I mean, I don't
18 know what (7) means, but unless we put either something in
19 there that says, you know, without a reasonable reason --
20 I don't understand what (7) means, but I know that I don't
21 do (7), and I don't believe that we should do (7). So as
22 written, I don't believe that that's really the intent
23 of --

24 CHAIRMAN BABCOCK: Yeah. Okay. Judge
25 Yelenosky.

1 HONORABLE STEPHEN YELENOSKY: Well, I think,
2 I mean, first of all, as I said, I didn't read it as
3 Justice Gray did; and if I did read it that way, I agree
4 with him entirely. It doesn't say treat everybody exactly
5 the same, and since Justice Peeples suggested putting in
6 "represented," I think that's the intent here; and the
7 reason for it is that right now attorneys sometimes get
8 things that self-represented people don't give -- get, and
9 I could give you an example. Sometimes only attorneys can
10 access documents online in some instances, and to me that
11 is something that shouldn't happen.

12 With respect to your example, Judge Estevez,
13 I don't think it's -- I mean, there has to be a law of
14 reason in this, and the distinction there would be you
15 don't give it free to anybody, it gets paid by somebody
16 else, but the main point is you don't treat
17 self-represented people less well than other people, and
18 that is a problem that needs to be addressed.

19 CHAIRMAN BABCOCK: Okay. Anything else on
20 (d)?

21 HONORABLE TOM GRAY: (d)(8).

22 CHAIRMAN BABCOCK: I thought you were done.

23 HONORABLE TOM GRAY: I didn't rest on (d)
24 yet.

25 CHAIRMAN BABCOCK: Oh, okay.

1 HONORABLE TOM GRAY: I rested on (c).

2 MR. MEADOWS: That's true.

3 HONORABLE TOM GRAY: (d)(8), "Tell a court
4 patron anything he or she would not repeat in the presence
5 of any other party involved in the case." There's a
6 problem in that in that there are canon exceptions to the
7 ex parte rule, and they need to be recognized. The
8 simple -- the fix is relatively simple. It should read,
9 "Tell a court patron anything he or she would not tell any
10 other court patron other than ex parte communications
11 permitted under the Code of Judicial Conduct." And --

12 HONORABLE DAVID PEEPLES: What section are
13 you on?

14 HONORABLE TOM GRAY: (d)(8).

15 HONORABLE DAVID PEEPLES: No, I mean in the
16 code of conduct.

17 HONORABLE TOM GRAY: It's the one we -- you
18 know, the ex parte -- 3B(8).

19 HONORABLE DAVID PEEPLES: 3B(8).

20 HONORABLE TOM GRAY: The one other (d)
21 comment is related to -- okay, maybe I didn't rest on (c).
22 I'm not sure what the introductions to these two sections
23 actually mean when they say, "Court personnel acting in a
24 nonlawyer capacity on behalf of the court shall not," and
25 that seems to me a very cumbersome way to say whoever this

1 applies to, which under my writing of it would say "Judges
2 and court staff shall not."

3 CHAIRMAN BABCOCK: Yeah.

4 HONORABLE TOM GRAY: Or under the (c)
5 provision, "Judges and court staff are permitted to," and
6 because, I mean, my staff attorneys are acting in a lawyer
7 capacity for the court, but I don't know, I just had
8 trouble with that intro.

9 CHAIRMAN BABCOCK: Yeah, what's the reason
10 for including "nonlawyer capacity"? Judge Peeples.

11 HONORABLE DAVID PEEPLES: An example would
12 be in Bexar County we've had for maybe 15 years a lawyer,
13 a very experienced lawyer, who is paid by the county; and
14 she's the staff attorney for the civil district courts;
15 and she has, oh, three or four people working for her, law
16 students and one or two lawyers; and this would not cover
17 them. I'm sure they could say, "Look, in your kind of
18 case, you know, the statute of limitations has already
19 run." I don't know, but they could -- "The judge is going
20 to divide up community property." I would feel much more
21 comfortable with our staff attorney going beyond some of
22 this than a nonlawyer, and I think that's the intention.
23 Now, maybe there's more that -- Justice Busby.

24 HONORABLE BRETT BUSBY: Lisa was going to
25 say something.

1 MS. HOBBS: Well, it does -- that is one of
2 the things, but also lawyers are governed by other rules,
3 and so what a lawyer can and can't do would be governed
4 perhaps by our ethical rules and not by this court policy,
5 so I think we were trying to carve out those lawyers from
6 this as well.

7 CHAIRMAN BABCOCK: Justice Busby.

8 HONORABLE BRETT BUSBY: If we -- if we do
9 have a definition of court personnel then perhaps we could
10 include that in there and then not have to restate "acting
11 in a nonlawyer capacity on behalf of the court" at the
12 beginning of (c) and (d) to avoid the cumbersome clause
13 there.

14 CHAIRMAN BABCOCK: Justice Christopher.

15 HONORABLE TRACY CHRISTOPHER: This is just a
16 stylistic problem, but you call (d) "Prohibited
17 assistance" and then number (2) and number (7) are really
18 denying assistance, so you're prohibited -- it's just
19 backwards to me. It should be a separate category. And
20 then maybe you can clear it up a little bit, especially on
21 the refusing to file documents.

22 CHAIRMAN BABCOCK: Yeah. Okay. Any other
23 comments on (d)? All right. Let's go to (e),
24 "Unauthorized practice of law and privilege." Anything
25 you want to say about it, Judge Peeples?

1 HONORABLE DAVID PEEPLES: No. Interested in
2 comments.

3 CHAIRMAN BABCOCK: Okay. Any comments on
4 (e)? Going once. All right. Let's go to (f). Any
5 comments on (f)?

6 HONORABLE TOM GRAY: So if we -- if this
7 policy is promulgated by the Supreme Court it's an
8 absolute defense if we can bring it under one of these
9 provisions?

10 CHAIRMAN BABCOCK: You would think so.

11 HONORABLE TOM GRAY: Good luck with that.

12 CHAIRMAN BABCOCK: Frank.

13 MR. GILSTRAP: This says this is going to be
14 a Texas Supreme Court policy. What vehicle is the Court
15 going to use -- I mean, does it have a place where we say,
16 "These are our policies and look, look here," or is it an
17 order, or is it some other vehicle?

18 CHAIRMAN BABCOCK: Yeah, Martha talked about
19 that a minute ago.

20 MR. GILSTRAP: Okay.

21 CHAIRMAN BABCOCK: Justice Brown.

22 HONORABLE HARVEY BROWN: We have the chair
23 of your committee is an expert on recusals. Do you think
24 it might be helpful to say that providing this assistance
25 also would not be a basis for recusal of the judge,

1 because the judge's staff is, you know, helping one side?

2 CHAIRMAN BABCOCK: Everybody hear that?

3 HONORABLE STEPHEN YELENOSKY: It may depend
4 on what they did.

5 HONORABLE ANA ESTEVEZ: Yeah, I think you
6 shouldn't have that because if they did too much then
7 maybe it should be recusal, and so you should probably
8 just leave it open, and if somebody brings it up then --

9 CHAIRMAN BABCOCK: Yeah.

10 HONORABLE ANA ESTEVEZ: -- take it up at
11 that time.

12 HONORABLE DAVID PEEPLES: I think the
13 existing rules can handle that without a problem, and I,
14 frankly, hadn't thought about it. Good question.

15 CHAIRMAN BABCOCK: Okay. Well, it's in the
16 record, and if it needs to be thought about it, it will be
17 thought about. Anything else? Okay. So we're now done
18 on that as well.

19 HONORABLE DAVID PEEPLES: Chip, do you want
20 the subcommittee to go back and take a look at these
21 things, I assume?

22 CHAIRMAN BABCOCK: Yes, please.

23 HONORABLE DAVID PEEPLES: Thank you.

24 CHAIRMAN BABCOCK: So we're not done.

25 HONORABLE DAVID PEEPLES: Very helpful

1 discussion and comments, and I know I speak for everybody.
2 We appreciate it.

3 CHAIRMAN BABCOCK: Okay. We do want you to
4 go back and look at it, but, you know, unless something
5 extraordinary happens we're not going to bring it back to
6 the full committee. All right.

7 HONORABLE TOM GRAY: They're done with us.

8 CHAIRMAN BABCOCK: So we're going to eat in
9 a second. I can see how eager you are to do that, but
10 when we come back we're going to skip around a little bit
11 because John Browning, who is going to be asked to provide
12 some expertise on item six on our agenda, the new rule on
13 lawyer access to juror social media activity -- no, I'm
14 sorry. Is that wrong?

15 PROFESSOR CARLSON: Six and seven.

16 CHAIRMAN BABCOCK: And guidelines for social
17 media use by judges. So he's going to be here, what,
18 Elaine, at 1:30?

19 PROFESSOR CARLSON: Yes.

20 CHAIRMAN BABCOCK: So he'll be here at 1:30,
21 and so we'll start with those topics at 1:30. Has he got
22 any -- he's going to be here at a time. Has he got any
23 end time, a stop time?

24 PROFESSOR CARLSON: I told him about our
25 committee.

1 CHAIRMAN BABCOCK: All right. So he has got
2 a warning. Have you put that in writing?

3 PROFESSOR CARLSON: No.

4 MR. DAWSON: I'm sure these will not be
5 controversial, and we'll sail through.

6 CHAIRMAN BABCOCK: We'll break for lunch and
7 be back at 1:30. Thank you, everybody.

8 (Recess from 12:29 p.m. to 1:32 p.m.)

9 CHAIRMAN BABCOCK: Okay. We're going to
10 skip item five and get to item six and seven on our
11 agenda, which is new rule on lawyer access to juror social
12 media activity. That's six, and then seven, continuation
13 of guidelines for social media use by judges, and we have
14 John Browning with us, who is a expert in this area. He
15 can -- he can waive a transcript of a trial where he was an
16 expert qualified by the court and called by me on behalf
17 of Judge Slaughter from Galveston, who was accused by the
18 Commission on Judicial Conduct of violating the canons by
19 her Facebook page, which talked about things that were
20 going on in her courtroom, and John must have been
21 persuasive because the -- because the panel of three
22 judges unanimously exonerated Judge Slaughter. So he's
23 here to be a resource for us and will be here until 3:00.
24 So, Elaine, who is the chair of this, lead us through it.

25 PROFESSOR CARLSON: All right. And I did

1 not know John's connection to Chip when our subcommittee
2 invited John to participate in some conference calls
3 because when you get into the reading of the materials in
4 this area, John is a national expert, although he happens
5 to be a Texan who litigates in Dallas with the firm of
6 Passman & Jones. And I'm going to make a little bit of a
7 plug just because I think you would like to know about
8 this book. John's latest book is *Legal Ethics and Social*
9 *Media*, and it's just an excellent source for practitioners
10 the way it's laid out with the ethical considerations and
11 then asks various questions that you would want to know
12 the answer to when you're not sure about social media.

13 So we're beginning today in looking at --

14 CHAIRMAN BABCOCK: Wait a minute, you're not
15 going to plug his candidacy while you're at it?

16 PROFESSOR CARLSON: Well, I didn't know how
17 501(c) we were going to be about this.

18 CHAIRMAN BABCOCK: Okay. We'll leave that
19 behind us then.

20 PROFESSOR CARLSON: Okay. But you can speak
21 to John about that on a break. So under what
22 circumstances we're looking at is it ethically permissive
23 for a Texas lawyer to properly view or request access to a
24 prospective juror's social media pages, I'll call them,
25 and we currently have nothing in the disciplinary rules

1 that precisely answered that question, but of course, the
2 disciplinary rules also apply to all forms of
3 communication, and we all know that under our disciplinary
4 code that a lawyer is prohibited from communicating with
5 prospective or sitting jurors until they're discharged.
6 They're not to communicate except in the formal way in a
7 courtroom, and so the issue really becomes if you're in a
8 courtroom where the judge does allow you access to the
9 prospective jurors' list, the venire panel, is it okay for
10 you or your colleagues to investigate their social media,
11 or is that an impermissible communication?

12 And so I'm going to ask John to kind of give
13 us the ABA view on that and the national view and then
14 we'll circle back to what our committee's --
15 subcommittee's recommendation is.

16 MR. BROWNING: Well, thank you very much.
17 Great to be here. Can everybody hear me okay? I've never
18 been accused of being soft-spoken; and this experience,
19 expertise, really is an outgrowth of the fact that I've
20 been trying cases for 28 years; and when a little thing
21 called Facebook came along in 2004 and Twitter in 2006, it
22 didn't take long for some lawyers to realize people were
23 sharing all kinds of things; and I've always been of the
24 school of thought that more information about my juries is
25 better than less information and considering the fact that

1 we live in a climate now where over 80 percent of the
2 population has at least one social networking profile of
3 some kind or another. 58 percent have two or more.

4 People are very active on it. Just in the
5 60 seconds or so, you know, of introductory remarks there
6 were 400 hours of footage uploaded to YouTube. There were
7 293,000 status updates posted on Facebook, and you can do
8 the math. There are 6,000 tweets processed by Twitter
9 every second, roughly a billion in a 48-hour span. So
10 there's a lot of content floating out there, and it's only
11 natural that lawyers, you know, like myself are going to
12 want to have as complete a picture of the folks who are
13 possibly going to serve on the jury as they can.

14 But, of course, we have to respect all of
15 the ethical rules that we have, and some folks have been
16 of the school of thought that we perhaps need to adopt
17 some new ones that are specifically addressing social
18 media. So in terms of where things have shaken out, it is
19 natural that there have been some courts that have been
20 resistant to allowing jurors to do this. There have been
21 several federal court cases where citing concerns of juror
22 privacy a court has elected not to allow lawyers to do
23 this sort of research.

24 The most recent example in a high profile
25 case came out of federal court in California in the *Oracle*

1 vs. *Google* case. Judge William Alsup there in the -- I
2 think it's the Northern District of California. Both
3 sides wanted to conduct online research, including social
4 media research, of the jury pool. Obviously with a high
5 stakes case like that they wanted to be as well-informed
6 as possible. Judge Alsup said, "Well, I want to see
7 briefing from both sides on what the ethical landscape is
8 in this area." Both sides submitted, you know, citing
9 some of the opinions I'm going to talk about in a moment,
10 and then Judge Alsup wanted some more. And then finally
11 he came to sort of a choice that neither side wanted to
12 agree to, which was "I'll let you undertake this research,
13 but you have to disclose to everyone on the panel that
14 you're doing it"; and obviously lawyers don't want to come
15 across as creepy, at least not lawyers who want to win
16 their trials; and so they elected, "Thank you very much,
17 Judge, we'll forego the research, neither side will do
18 it."

19 But juror privacy is probably the most cited
20 reason that comes across in some of the cases; and,
21 however, the majority of opinions out there and the
22 majority of ethics opinions -- in fact, virtually every
23 ethics opinion -- has been on the side of allowing lawyers
24 to undertake this sort of research with certain caveats.
25 And one of the purposes that, you know, certain courts

1 have acknowledged as this being a good thing is that we're
2 also concerned about another problem involving jurors and
3 social media, and that is online juror misconduct, another
4 topic I've written extensively for, most recently for the
5 *Texas Bar Journal*. There are trials -- and we read about
6 them on a regular basis -- where verdicts are overturned,
7 sentences are set aside, new trials granted because of
8 some form of online juror misconduct where jurors have
9 engaged in improper research on the internet, have
10 communicated with people via social media, have in some
11 cases attempted to contact parties or lawyers; and
12 obviously this poses serious threats to the sanctity of a
13 fair trial.

14 So that is one of the reasons that judges
15 have said, you know, there may be some benefits to
16 allowing lawyers to engage in this sort of research. One
17 judge in Florida even said, you know, "I think we ought to
18 require it" because it will cut down on these type of, you
19 know, overturned verdicts. As a matter of fact, one
20 state, Missouri, after a case, *Johnson vs. McCullough*, the
21 Missouri Supreme Court not only said lawyers should be
22 doing it, they said, "We're now imposing an affirmative
23 duty on lawyers to engage in online research of
24 prospective jurors or else be forever barred from raising
25 this" -- you know, something you've discovered online as

1 grounds for a new trial. So, you know, that's one
2 jurisdiction that's actually said not only is it a good
3 idea, you have to do it, and so proceed at your own peril
4 if you don't.

5 But the ethics opinions that have addressed
6 this, including most prominently the ABA's ethics opinion,
7 have generally come down -- almost unanimously come down
8 on the side that it is okay for lawyers to engage in what
9 we refer to as passive review of a publicly viewable
10 online presence of a prospective juror. In other words,
11 you can look. You cannot engage. You cannot communicate.
12 You cannot send a friend request, for example. You -- the
13 one jurisdiction that has expressed some reservations
14 about even the extent to which this would be done comes
15 out of a couple of ethics opinions from New York where
16 they said, you know, in the age of the internet people get
17 these auto notifications. On Twitter you'll get a
18 notification that someone is following you. On LinkedIn
19 you'll get a notification that someone has viewed your
20 profile. Now, they don't say who is doing it, but there's
21 been enough of a concern on the part of New York at least,
22 that they urge lawyers to be very cautious and to ideally
23 avoid that sort of review.

24 The majority of jurisdictions, however, and
25 the ABA have said, no, this really is unfounded because

1 it's not the lawyer who is communicating. It's the site
2 that's giving an auto-notification. It's the site that's
3 communicating with the user, the juror, not the lawyer;
4 and indeed the ABA and everyone but New York that has
5 addressed this has said passive review of what's publicly
6 viewable is perfectly fine.

7 Now, there, you know, is inevitably going to
8 be some issue; and I'm familiar with at least one Texas
9 appellate case that I think may be working its way up the
10 appellate pipeline, so I won't say too much about it; but
11 it involved whether or not a lawyer who had sent a
12 LinkedIn request, connection request, was communicating
13 with a juror and whether that impacted the outcome of the
14 trial. You know, there -- for the most part not only have
15 the ethics opinions, including the ABA, said passive
16 review is fine, publicly viewable fine, but certain
17 decisions have come out that have upheld an attorney's
18 right to engage in this.

19 A case out of New Jersey, *Carino vs. Muenzen*
20 involved a med mal trial where the plaintiff's attorney
21 had his laptop and was, you know, Googling the members of
22 the jury. The defense attorney didn't have those
23 resources. The trial judge said, "What are you doing?"
24 The lawyer explained, and then he said, "Well, that's not
25 fair." You know, "Don't do that," and he protested. He

1 said the other side could have brought a laptop, too,
2 could do the same thing, and, you know, the judge
3 disagreed. This was made the subject of a motion for new
4 trial. The appellate court said, yeah, the lawyer had
5 every right to do that. There's nothing wrong. The
6 playing field could certainly be level, you know, if both
7 sides elect to engage in this.

8 It's become such a -- I would say accepted
9 practice, and I do it routinely in the cases I try that
10 I've seen some jury consultants and others and plenty of
11 lawyers argue that it might even be malpractice not to
12 engage in this type of online research, and in an age in
13 which lawyers are increasingly being held to a higher
14 standard of technological competence the idea that a
15 lawyer may not avail himself or herself to resources and
16 technology that is available when the other side does
17 could be grounds for a malpractice claim, you know, and
18 certainly don't want to encourage that.

19 The -- so the cases have generally come down
20 on this on the pro side; and, in fact, there's even the
21 beginning of a trend that I've observed among courts to
22 adopt -- to recognize that this practice is taking place
23 and to adopt standing orders that will offer guidance to
24 lawyers. Federal judges in New York, in Idaho, state
25 judges in Florida, because they consulted me on the

1 wording of that order, and probably the best known example
2 right here in Texas, Judge Gilstrap in the Eastern
3 District adopted a standing order that largely tracks the
4 language of the ABA ethics opinion and says, "If you're
5 going to do this online research here's how we want to
6 make sure that you do it," you know, and that you adhere
7 to these ethical parameters.

8 So in a nutshell and I want to, you know,
9 reserve as much time as you'll need for any kind of
10 questions or discussion. The landscape on that subject is
11 that it has become generally accepted in practice. It's
12 become largely acknowledged with, you know, certain
13 exceptions here and there by judges as something that
14 lawyers are going to do anyway. We just want to make sure
15 that they're doing it ethically, and the ethics opinions
16 and case law that have discussed it have almost
17 unanimously said, yes, this is fine. We just want to make
18 sure, you know, you don't, you know, violate the rule
19 about communicating with jurors; and in some instances,
20 some of the guidelines from at least a couple of ethics
21 bodies have gone a step further and said "and if you do
22 this, by the way, and you observe something, whether it's
23 favorable or unfavorable for your client but it's online
24 misconduct by the juror" that you become aware of, you are
25 reminded of your duty to bring that to the attention of

1 the tribunal. So with that I'll --

2 PROFESSOR CARLSON: Couple of things I want
3 to clarify before we go to the proposal. What can a
4 prospective juror who uses social media do to protect
5 their privacy?

6 MR. BROWNING: Well, they can adopt
7 heightened privacy settings. Unfortunately statistically
8 most people are either unaware of or ill-informed. We'll
9 put it that way. And some people just don't care about
10 privacy settings. It sort of -- I asked one of my law
11 students, you know, is it ignorance or apathy? He said,
12 "I don't know and I don't care." So in a nutshell that
13 kind of sums up the American public's view of it, because
14 statistically if you look at any of the social networking
15 platforms, it is an issue that's underused; but jurors can
16 adopt greater privacy. Also judges can set parameters by
17 informing the jurors that "Hey, this is probably going to
18 be done anyway by one or both sides, and you may even want
19 to consider, you know, keeping private the things that you
20 want to be private and maybe, you know, reconsider things
21 that you might post in light of that."

22 PROFESSOR CARLSON: The second thing --
23 thanks, John. The second thing I want to go over before
24 we look at our proposal is this obligation that's been
25 adopted I think now in 23 states -- Texas has not as of

1 yet -- of requiring lawyers to maintain technical
2 competency. How do you know if you're looking at a
3 juror's Twitter account or looking at their LinkedIn
4 whether they're going to know that you've been there?

5 MR. BROWNING: Yeah, and that's -- we don't
6 have -- Texas has not formally adopted that modification.
7 It's in Rule 1.1 of the model rules, comment 6, that
8 lawyers are now under a heightened duty in terms of what
9 constitutes competent representation to be cognizant of
10 the benefits and risks associated with technology, but a
11 growing -- and the number keeps on growing higher. A
12 number of states have adopted that, and there's been some
13 case law that's already indicated even before the adoption
14 of that change to the model rules in late 2012 by the ABA
15 that courts in light of technology were holding lawyers to
16 a higher standard. I call it a duty to Google. You know,
17 if you have these sort of technological resources at your
18 fingertips, it's really -- there's no good excuse, whether
19 it's a matter of diligence or what have you in not using
20 it.

21 So, you know, this is a standard, and we're
22 seeing this pop up in all kinds of contexts with, you
23 know, lawyers getting in trouble because they weren't
24 familiar enough with e-discovery and so they bungled
25 something. A lawyer -- a law firm in Florida just had a

1 pretty extensive attorney's fees award affirmed against it
2 because they didn't maintain the right level of spam
3 filter; and they got an order electronically from the
4 Court that they supposedly weren't aware of until after
5 the deadline had passed to contest it; and the appellate
6 court said "No excuse. You know, you're charged with the
7 duty of being technologically competent." So, you know,
8 we are being held to a higher standard.

9 PROFESSOR CARLSON: So we can't just click
10 "I agree."

11 MR. BROWNING: Not a really good idea.

12 PROFESSOR CARLSON: At your own risk.

13 MR. BROWNING: Yeah, click at your own risk.

14 PROFESSOR CARLSON: So on the handout that
15 says, "Attorney use of social media to investigate a
16 juror," on the last page of that memo, page seven, you'll
17 see under heading (f), that is the standard for technical
18 compliance that has been adopted in many states and is
19 advocated by the American Bar Association. John, did you
20 say California now requires it, or three more years of CLE
21 just on --

22 MR. BROWNING: Florida, yeah.

23 PROFESSOR CARLSON: On technical. Lawyers
24 in technical compliance. And, of course, this goes to
25 safeguarding your client's records in the cloud and all of

1 that good stuff.

2 MR. BROWNING: And California issued an
3 ethics opinion that was specifically addressing
4 e-discovery, but its language went beyond and essentially
5 said not just in an e-discovery context, but with regard
6 to technology in general, lawyers have a duty. Either
7 know it, hire somebody who knows it, or you know, don't
8 get involved in that, in something that involves that use
9 of technology. Don't get involved in that type of case.
10 So that has basically been, you know, the landscape in
11 terms of that.

12 And I will say a little plug for the
13 professional ethics committee and for what the State Bar
14 computer and technology section are doing. We are
15 increasing offerings for Texas lawyers, including free
16 offerings, of technology-related CLE, including free CLE;
17 and the professional ethics committee, which I have the
18 pleasure of sitting on, actually has been issuing more and
19 more ethics opinions designed to give Texas lawyers
20 guidance on technology-related ethical issues, ranging
21 from maintaining privacy of -- confidentiality of client
22 communications, and addressing encryption with e-mail and
23 other communications that are electronic in nature, to
24 things like dealing with anonymous commenters on the
25 internet and what you can and cannot say in terms of

1 defending yourself.

2 PROFESSOR CARLSON: Particularly about the
3 quality of your lawyering.

4 MR. BROWNING: Yes.

5 PROFESSOR CARLSON: Yeah, and there was an
6 opinion that just came out in May by the ABA -- it's kind
7 of unrelated but related -- that sets forth when it is
8 ethically impermissible to use e-mail for client
9 communications under some circumstances; and I know we've
10 been using -- a lot of cases that I consulted, you
11 constantly get e-mail correspondence about the case, so
12 you want to be familiar with that just as a practicing
13 lawyer.

14 But getting back to our subject, I digress,
15 page five of that same handout you see that our
16 subcommittee recommendation really parallels the ABA
17 approach. We thought the ABA approach was best, and we
18 advocate including comment 5 to current Disciplinary Rule
19 of Professional Conduct 3.6, the thou shall not
20 communicate with a prospective or sitting juror except in
21 the open courtroom. This comment, 5, "A lawyer's review
22 of a venireperson's website or electronic social media
23 that is available without making an access request is not
24 an improper ex parte communication." So you go to
25 Facebook or whatever platform, you put in their name,

1 stuff pops up, it's public, you don't to ask for any
2 access, that would be ethically permissible, and I think
3 that's mainstream.

4 MR. BROWNING: Yes. Yes.

5 PROFESSOR CARLSON: We then have also agreed
6 with the second perspective, and that is whether an
7 attorney could ethically access -- we're on page four,
8 passive review of a juror's or prospective juror's social
9 media when the juror might become aware that their social
10 media had been accessed. We agreed with the ABA, our
11 subcommittee, that that is not a communication and is
12 okay. It's probably not real smart for the lawyer to do
13 that because, as John said, the prospective juror or juror
14 may think you're -- to use your words -- creepy, but we
15 agree with the ABA that that's not a lawyer communication,
16 and it's not impermissible. It may not be strategically
17 wise.

18 MR. BROWNING: And as a practical matter
19 there are services available that lawyers can consult and
20 should consult that implement what I call an anonymous
21 follow feature so that if a juror does receive a
22 notification that "Hey, you're being followed" or "someone
23 has viewed your LinkedIn profile," it's not something that
24 they can then link or connect to the lawyer himself or
25 herself. It's something that, you know, does not disclose

1 that.

2 CHAIRMAN BABCOCK: Elaine, before you go on,
3 on the creep factor --

4 PROFESSOR CARLSON: Yeah.

5 CHAIRMAN BABCOCK: You know, I would
6 instinctively think, man, if a juror finds out that I'm
7 looking at Facebook or something, you know, that they
8 would immediately look at me pretty sharply, but we've
9 done some research on that, and it depends a lot on the
10 age of the juror. And people of our age, the three of us,
11 do think it's creepy, but younger people think, "Nah, it's
12 Facebook. You know, we all look at everybody's Facebook."

13 PROFESSOR CARLSON: Interesting.

14 MR. BROWNING: People have gotten used to or
15 accepted, if not maybe embraced, the idea that so much of
16 ourselves is being shared online. You know, Chief Justice
17 Hecht, not to, you know, tell tales out of school, but in
18 his remarks this morning to the computer and technology
19 seminar said after making a recent online purchase,
20 whenever he went online or Googled something he was
21 getting pop-up ads based on his purchasing history. This
22 is just a function of the algorithms that these sites use,
23 whether it's Amazon and so forth. So, you know, some, you
24 know, folks are of an age where they almost expect that,
25 welcome it, and are more sharing of the details of their

1 lives than folks of maybe my age or older, but it is
2 something that is enough of a concern that I know I may
3 learn something about a juror. Let's say something about
4 her favorite movie or favorite book; and if this is maybe
5 my presiding juror or someone that, you know, I'm trying
6 to connect with in my, you know, limited addressing of the
7 jury, I may reference something from that book or from
8 that movie, you know, as a way of making that little, you
9 know, connection, gaining that trust with the juror; but
10 I'm certainly not going to take the step further in creepy
11 land by going "As I noticed on your Facebook wall the
12 other day, you know, juror number 4." I'm not going to do
13 that, but I am going to be more subtle in it and make use
14 of that information.

15 CHAIRMAN BABCOCK: So, what, you're closing
16 argument is "I've always tried to model my life after
17 Atticus Finch. That's the kind of lawyer I am"?

18 MR. BROWNING: Yep.

19 CHAIRMAN BABCOCK: Knowing that they all
20 read *To Kill A Mockingbird*.

21 MR. BROWNING: Yeah. And Mark Lanier
22 agrees, and, you know, he's made extensive use of what
23 he's learned in juror research and what he finds, you
24 know, that certain things are resonating, you know, with
25 jurors, he'll make use of that, and I think that's a smart

1 thing to do. He's, you know -- he's on the other side and
2 has won a whole lot more money than, you know, than I
3 will, but, you know, you can't argue with success.

4 PROFESSOR CARLSON: Okay. We drew the line
5 on page five, last paragraph on our proposed comment, that
6 "A lawyer's review of a juror's social media when the
7 lawyer or someone acting for the lawyer requests access to
8 the venireperson or juror's electronic social media such
9 as making a friend request or commenting on their social
10 media page is prohibited because it constitutes an
11 improper ex parte communication." You notice the
12 bracketed language. That's where the subcommittee had
13 some disagreement and said let's throw this out to the
14 full committee, but whether or not that prohibition should
15 extend to "or otherwise communicates with a veniremember
16 or juror." To me it's already within the prohibition in
17 3.06.

18 So I guess at this point, Chip, we would
19 open it up for discussion, that proposal, that comment,
20 and go from there.

21 CHAIRMAN BABCOCK: Okay. I think we ought
22 to start with a vote. How many people think you're
23 creepy?

24 PROFESSOR CARLSON: I want to know how many
25 people think I'm old.

1 CHAIRMAN BABCOCK: Same thing. I was trying
2 to be nice. Okay. What comments -- Professor Hoffman.

3 PROFESSOR HOFFMAN: It seems like at least
4 on the second issue that the really question seems to turn
5 on what's the standard you're holding the lawyer to. Are
6 you holding him to a standard of, you know, they -- they
7 know that by asking for access their anonymity will go
8 away and the juror will have this communication, or would
9 we hold them to a standard of, you know, negligence in
10 doing something and not having done homework to realize if
11 you make a friend request that they'll find out who you
12 are? And so I guess I'm wondering whether -- and then
13 sort of relatedly, the way it's phrased here, the "request
14 access" being a consequence, you know, as opposed to do
15 something the result of which is that the juror finds out
16 it was them, seems like that's really more what you're
17 trying to get at. But again, that seems like that would
18 get us to a negligence standard, which maybe is where you
19 want to end up, but I want to just flag that I think the
20 way it's drafted doesn't sort of answer that question. It
21 just sort of passes it.

22 PROFESSOR CARLSON: I think it was a matter
23 of degree of communication. The realization being that if
24 you use LinkedIn and a person finds out that you used
25 LinkedIn, the attorney isn't communicating that. We

1 agreed with the ABA on that. So it's a matter of is the
2 lawyer directly trying to communicate.

3 PROFESSOR HOFFMAN: So maybe I'll just
4 follow up. I guess maybe then we should sort of think
5 about that, maybe spend our time thinking about that
6 issue. There are a lot of times that people do things and
7 they know the inevitable consequence will be that
8 information will come out. I'm thinking of in the news
9 the somehow surprisingly leaked story about Rex Tillerson
10 no longer being the Secretary of State. Hmm, I wonder
11 where that came. I mean, the White House knew what it was
12 doing and made that choice, so maybe we need to think
13 about that.

14 CHAIRMAN BABCOCK: Tom.

15 MR. RINEY: There was an analogy in the
16 materials that we reviewed about investigating jurors in a
17 traditional sense. For example, you could drive by a
18 juror's house, see what their house looked like, and no
19 one would suggest that that was inappropriate. The
20 LinkedIn was sort of analogous to if the juror looked out
21 and recognized you, you may not want that but it's not
22 really an improper communication; therefore, if they get a
23 notification that you've looked at your LinkedIn page it
24 was sort of the same situation. That helped me understand
25 it, and I think it is a pretty good analogy.

1 PROFESSOR CARLSON: And then the third
2 analogy when you request access was --

3 MR. RINEY: That's right. When you stop and
4 knock on the door and say, "Can I come in and look around
5 your house and see what kind of paintings you have on the
6 wall?" That's --

7 HONORABLE ANA ESTEVEZ: Creepy.

8 MR. RINEY: That's creepy, yeah.

9 CHAIRMAN BABCOCK: Do you need to not only
10 request but also gain access for there to be an ex parte
11 communication?

12 MR. BROWNING: I mean, I think just making
13 the request is improper communication. I think -- and
14 there's been at least one case in which the lawyer not
15 only sent the LinkedIn request, but then carried on an
16 ongoing dialogue because the juror thought, hey, you know
17 -- I forget what business he was in, but he thought the
18 lawyer would make a good business contact, so he wanted
19 him as a LinkedIn connection, and the two of them were
20 conversing online. You know, that's taking it to, you
21 know, an extreme. I think even making the request is
22 improper, and following up and communicating, you know,
23 thereafter is even worse.

24 CHAIRMAN BABCOCK: If you make the request
25 but it doesn't go through or gets blocked or you -- and

1 the juror never knows that you've made it, that may be
2 improper, but is it ex parte communication? Think about
3 that. Justice Busby.

4 HONORABLE BRETT BUSBY: I'm not sure I agree
5 with the analogy of driving by and having the juror
6 recognize you. It seems to me it's more like if you
7 follow somebody on Twitter or follow them on Facebook
8 without requesting access, without sending a friend
9 request, or, you know, you look at their LinkedIn profile.
10 It's more like putting a sign up across the street with
11 your name on it than it is -- and so, you know, I think
12 right now the way the policy is written leaves unanswered
13 whether that's okay or not, and I think we need to be
14 clear about whether it is or isn't so people know, because
15 we've got two categories saying passive review is okay.
16 Requesting access is not okay, but what about this sort of
17 signaling function that the policy doesn't address it
18 right now, and I agree with Professor Hoffman. We need to
19 be clear about is it okay or not.

20 PROFESSOR ALBRIGHT: I have a --

21 HONORABLE BRETT BUSBY: Personally I think
22 it is okay.

23 PROFESSOR ALBRIGHT: Brett, I just wanted to
24 interrupt. What is "it"? I'm confused as to what you're
25 talking about.

1 HONORABLE BRETT BUSBY: The examples I
2 mentioned of following someone on Facebook without
3 requesting -- without sending a friend request or
4 following somebody on Twitter, which notifies them that
5 you're doing that, but doesn't get you any additional
6 access than you would otherwise.

7 PROFESSOR ALBRIGHT: How can you follow
8 without them knowing about it?

9 HONORABLE BRETT BUSBY: You can't.

10 PROFESSOR ALBRIGHT: I can search.

11 HONORABLE BRETT BUSBY: Well, maybe you can.
12 John says there's a way you can do it. But what I'm
13 concerned with is "it" is anything that is sending a
14 signal to the juror that you're looking at them but not
15 requesting any sort of access, and so I think this
16 signaling function is exactly what the comment is talking
17 about when it says, "A lawyer shall not communicate or
18 cause another to communicate with a veniremember or a
19 juror." You are causing the website to communicate with
20 that juror, so to me it's just as -- just as either bad or
21 not bad as sending a LinkedIn -- as sending a Facebook
22 friend request of access if the idea -- if the problem
23 with the request is that you sent it, not that it's
24 accepted and you looked at what was on there, I don't see
25 any real distinction between those two, sending a friend

1 request versus a follow on Twitter, because both of them
2 are having a communication with the juror. You're causing
3 the website to communicate with the juror.

4 MR. BROWNING: And that was the concern on
5 the part of the New York bar with their ethics opinion,
6 which has kind of been the outlier. The ABA addressed
7 that, and every other ethics opinion has said, yeah, we're
8 really not worried about that, because, again, they draw
9 the distinction between who is making the communication.

10 HONORABLE BRETT BUSBY: Well, and I
11 understand it's an outlier, but I'm happy to be the
12 outlier because I think our comment says "communicate or
13 cause another to communicate with a veniremember or
14 juror," and that's what you're doing if you're following
15 on Twitter or something like that.

16 MR. BROWNING: Well, and if that's the
17 definition or how you construe an auto-notification as
18 being the lawyer causing it as opposed to something that
19 is, you know, part of the way the website has chosen to
20 set itself up and respond, and I'll just say not every one
21 is like that. Twitter is. LinkedIn is. We're familiar
22 with those are probably the two best examples.

23 HONORABLE BRETT BUSBY: Based on following.

24 MR. BROWNING: Right. But not every social
25 network and platform takes that approach. There are

1 plenty of ways for what I call lurkers on social media to
2 merely observe, but, you know, not take that further step
3 or be in any sort of danger of, you know, the viewee being
4 notified.

5 CHAIRMAN BABCOCK: Elaine.

6 MR. BROWNING: But your concern is one
7 that's been voiced by New York.

8 CHAIRMAN BABCOCK: Elaine.

9 PROFESSOR CARLSON: The committee actually
10 flip-flopped on that.

11 HONORABLE BRETT BUSBY: So that's why it
12 didn't come down either way?

13 PROFESSOR CARLSON: Well, no, the longer we
14 studied the issue the more we decided, you know what, it
15 is the social media platform that's giving the
16 notification.

17 HONORABLE BRETT BUSBY: Not the attorney who
18 is causing it by going and looking at their social media?

19 PROFESSOR CARLSON: Yeah. That's where we
20 came out, but that would be a good subject for --

21 HONORABLE BRETT BUSBY: It seems like a
22 little bit of dancing on the head of a pin, but I guess if
23 that is where we come out I would just -- I think we
24 should come out the other way, but if that is where we
25 come out I think we should be clear about it.

1 PROFESSOR CARLSON: I guess that would be
2 something for a vote when we're ready.

3 CHAIRMAN BABCOCK: Okay. Justice
4 Christopher.

5 HONORABLE TRACY CHRISTOPHER: Does it matter
6 on these auto response things that it identifies who the
7 person is? So if you're telling me a lot of them are just
8 anonymous, it will tell you, "You have a new follower
9 today." So what if it says "You have a new follower,
10 juror number 5," you know? Or I'm sorry, it would be "You
11 have a new follower, attorney in the trial."

12 MR. BROWNING: Yeah, and I think --

13 HONORABLE TRACY CHRISTOPHER: Does that make
14 a difference?

15 MR. BROWNING: I think it -- it's troubling
16 as a practical matter, just speaking from the lawyer
17 viewpoint because you don't generally want that to be the
18 purpose. There is a case in the Southern District of New
19 York, a federal case, and it was -- I think it was Judge
20 Rickhoff, who had a juror -- this was the subject of a
21 pretrial order saying the attorneys can engage in this
22 sort of research, and a juror got a LinkedIn or got a
23 notification someone had looked at his profile. Putting
24 two and two together, given the timing of it, he assumed
25 it was one of the lawyers, and the judge had a conference

1 in chambers about who had engaged in that. There wasn't
2 anything improper, but it was embarrassing to the folks,
3 the lawyers, on that particular side who had evidently
4 shown their hand that they were doing that. I think it's
5 more troubling to the attorney as opposed to, you know, to
6 the juror.

7 CHAIRMAN BABCOCK: Judge Yelenosky.

8 HONORABLE STEPHEN YELENOSKY: Well, I mean,
9 there may be a difference of opinion about what it does
10 when a juror finds out the attorney is looking for him or
11 her; but combining that question with your earlier point
12 about attorneys have to know technology, you've just
13 pointed out that there are ways to do it in which they
14 cannot know who it is. So if you're supposed to know
15 technology and there's a way to do it so that you're
16 anonymous, isn't it incumbent on you to do that? And if
17 not, then not, but you are choosing. I mean, you have the
18 choice of driving by the house with your -- behind your,
19 you know, glass that reflects or driving by the house and
20 standing up and waving; and if you have that choice, you
21 have to stay in the car.

22 MR. BROWNING: I think it's a good point. I
23 think it's something for the committee to consider. I
24 know there are a lot of lawyers who are going to do --
25 engage in this research. They're not always going to do

1 it to the same standard or degree as I hold myself to.
2 I'm aware of, you know, the various functionalities, and
3 I'm aware of various options through software or third
4 party vendors that I can do this in as least intrusive a
5 way as possible, and I make use of that. I don't know
6 whether that should be the standard. It's the standard to
7 which I hold myself.

8 HONORABLE STEPHEN YELENOSKY: Well, and I'm
9 just saying just consistent with everything else that's
10 said the court of appeals doesn't let you excuse yourself
11 by saying, "Well, I didn't know any better." If it's in
12 the rule then people will learn how to do it or they face
13 an ethical problem.

14 CHAIRMAN BABCOCK: Eduardo.

15 MR. RODRIGUEZ: Yeah, okay.

16 CHAIRMAN BABCOCK: Speak up.

17 MR. RODRIGUEZ: Can a lawyer have his staff
18 look on their website to see if they have -- this person
19 is on their social media?

20 MR. BROWNING: First of all, I think, you
21 know, we have the ethical constraint that anyone working
22 under a lawyer's supervision is held to the same standard,
23 and it's for the same reason that, you know, whether it's
24 a paralegal working for me or an associate or even a third
25 party like a private investigator or a jury consultant,

1 you know, they are held to the standard of, you know, not
2 violating the ethical rules.

3 MR. RODRIGUEZ: Okay, but say, yeah, I have,
4 you know, a paralegal and a secretary and maybe an
5 investigator that work directly with me, but, you know,
6 can I ask all of the other partners in my firm to have
7 their staff look and see if any of these people are on
8 their social media?

9 MR. BROWNING: Yeah, I think if it's anyone
10 connected with you. I mean, the only exception to this
11 that I'm aware of is, for example, I can't communicate
12 directly with a represented party obviously. That's black
13 letter law. However, and as a practical matter in many
14 cases where parties are in a dispute with each other, they
15 have a relationship and they have communicated with each
16 other; and there have been cases where my client is still,
17 you know, access -- accessible, you know, and is one of
18 the accepted friends and is within the privacy settings
19 within the circles that the other side has already
20 acknowledged. And sometimes your own client can say,
21 "Okay, here's this information that I got. It's not
22 through any subterfuge. They still have me on their
23 Twitter feed and their Facebook circle of friends, and
24 here you go." Now, I'm not violating ethical rules. I'm
25 not making contact with that represented party, but I'm

1 making use of information that had the other side taken
2 appropriate steps to limit or change their settings would
3 not have been otherwise available to me.

4 CHAIRMAN BABCOCK: Justice Christopher.

5 HONORABLE TRACY CHRISTOPHER: I think what
6 he was asking was can you ask people "Are any of you
7 friends with this juror?" And already friends, no friend
8 request needs to be sent. You're already friends. It
9 would be basically the same thing as, you know, semi-open.
10 All right. And so my employee is already a friend with
11 this juror, and my employee can look at that page. Can I
12 look at it?

13 MR. BROWNING: Yeah, if there's a
14 preexisting -- and this has come up in several cases. The
15 examples I'm familiar with have been in criminal cases
16 where a person who is on the jury had a friendship, a
17 Facebook friendship -- which again, I'll use that term in
18 quotes in terms of whether or not it's friendship -- with
19 someone who may have worked in the DA's office and said,
20 oh, well, you know, that tenuous level of connection has
21 been held by the cases not to be enough to constitute any
22 sort of improper conduct in the case of judges who have
23 had some sort of tenuous Facebook friendship or a member
24 of their family. That's been held in multiple states to
25 be too remote to justify recusal, for example.

1 So I think it really depends. If you're
2 certainly not the lawyer who is making the communication,
3 but if he's the beneficiary of the fact that a
4 relationship exists, and I'll give an example from an
5 actual case, *U.S. vs. Meregildo*. It was a criminal court
6 case in which the defendant was arguing that his privacy
7 restricted setting, the information on it, that it was a
8 violation of his Fourth Amendment rights for the
9 government to make use of that, because he had not
10 consented, he had not given them that. But they had
11 gotten that information from some people who were his
12 friends and who were within his private circle and who
13 chose to cooperate with the government; and the court held
14 there's no Fourth Amendment communication, you've just got
15 lousy choice in friends. So, you know, I think that is,
16 you know, fair game.

17 PROFESSOR HOFFMAN: Chip?

18 CHAIRMAN BABCOCK: Yeah. Professor Hoffman.

19 PROFESSOR HOFFMAN: So just to kind of try
20 to clarify my earlier comment, so what I'm speaking about
21 in the second paragraph is that I think our -- it sounds
22 like the concern the committee had and where you ended up
23 is not that the lawyer requests access, but that the
24 lawyer requests access and the juror finds out. That is
25 to say, that, right, communication has to be in such a way

1 that the juror finds out; and so my point is as drafted --
2 notice that as drafted you wouldn't even -- it wouldn't be
3 ethical to follow what you were saying is best practice,
4 which is to use one of these anonymous entities because it
5 says -- the literal words say "When the lawyer or someone
6 acting for the lawyer requests access," but the whole
7 point of doing the anonymous entity is that the juror
8 doesn't find out.

9 MR. BROWNING: But they're not requesting
10 access.

11 PROFESSOR HOFFMAN: Oh.

12 CHAIRMAN BABCOCK: What do you mean by that,
13 John?

14 MR. BROWNING: Well, for example, and the
15 example that I'm thinking of is where someone, you know,
16 like a private investigator or a paralegal is making a
17 friend request and in order to gain access to a
18 privacy-restricted profile. You know, that would still be
19 improper because they're acting under auspices of the
20 attorney. That's what I mean by access. When I say
21 follow, you know, the anonymous follow features just
22 viewing what is publicly viewable; and these resources,
23 these different services, do not go into a privacy
24 restricted setting. They just provide what would be
25 publicly viewable, but they provide essentially a screen

1 or a filter separating you from the juror.

2 PROFESSOR HOFFMAN: In the event of sort of
3 like inadvertent disclosure sort of thing.

4 MR. BROWNING: Or an auto-notification.

5 CHAIRMAN BABCOCK: More than that, because
6 sometimes just the mere fact of looking at it, you know,
7 the --

8 PROFESSOR HOFFMAN: Triggers it.

9 CHAIRMAN BABCOCK: Triggers a communication
10 to the person saying, "Hey, Hecht is looking at you."

11 MR. BROWNING: And, in fact, the better
12 services and the ones specifically that I have referenced
13 and I use, they will tell the lawyer right up front we're
14 not going to do your dirty work for you. We're not going
15 to go into something that's privacy restricted or make a
16 friend request or a connection request. We are only going
17 to look at what's publicly viewable. We're essentially
18 just running interference for you.

19 PROFESSOR HOFFMAN: So my core point, Chip,
20 was simply that I think that it sounds like what we want
21 to prohibit is the jury person finding out, and so that as
22 written doesn't have that piece in it.

23 CHAIRMAN BABCOCK: Oh, I agree with you.

24 PROFESSOR HOFFMAN: So we ought to deal with
25 that.

1 CHAIRMAN BABCOCK: Yeah, I think a lawyer
2 who because he's inept or because he didn't know what he
3 was doing or for whatever -- inadvertently or maybe trying
4 to request access but doesn't get it, surely that's not
5 going to be an ethical violation. And then you take it
6 the next step, well, he requests access, he gets through,
7 but the juror doesn't know. Is that a communication with
8 the juror? Is that an ex parte communication? I wouldn't
9 personally think so, but Richard.

10 MR. ORSINGER: To follow up on the same
11 focus of the paragraph, I read this to mean that it
12 doesn't matter whether the juror knows it's a lawyer or
13 not. If the lawyer knows that somebody is communicating
14 with the juror on his or her behalf, that's out of bounds.
15 So is the test here that the juror becomes aware that a
16 lawyer is looking at him, or is the test here that the
17 lawyer is having an intermediary communicate with the
18 juror?

19 CHAIRMAN BABCOCK: Well, you know, the word
20 "communicate" is the important one.

21 MR. ORSINGER: Well, so --

22 CHAIRMAN BABCOCK: Ex parte communications.

23 MR. ORSINGER: I hire an anonymous service
24 so that no one can know who really is behind the anonymous
25 request, and that service makes a request to become a

1 friend so it can access private information. A
2 communication has occurred that was instigated by the
3 lawyer --

4 CHAIRMAN BABCOCK: That's different.

5 MR. ORSINGER: -- but the juror can never
6 figure out that it was a lawyer doing it, but we know it
7 was a lawyer doing it, and the question is is that ethical
8 or not because it's indirect communication with the juror
9 even though the juror doesn't know it's the lawyer
10 communicating.

11 CHAIRMAN BABCOCK: Yeah, private settings I
12 think is different. I was focusing on public settings.

13 MR. BROWNING: And all of these services
14 that I'm referring to are only to look at what would be
15 publicly viewable and merely provide a layer between the
16 lawyer and the prospective juror, the account holder, or
17 user of the account, so that they don't know, you know,
18 who is looking at their publicly viewable page. It does
19 not go to the additional extreme that you've identified,
20 which is requesting access, sending a friend request, a
21 connection request, or something like that. That in my
22 opinion is improper communication.

23 MR. ORSINGER: And I think that's prohibited
24 by this paragraph.

25 CHAIRMAN BABCOCK: Okay. Let's get Marcy,

1 and then Roger, and then Justice Busby, and then Justice
2 Bland, and then Alistair. I hope everybody remembers that
3 order.

4 MS. GREER: I totally agree that if you
5 reach out and try to access somebody, even if they don't
6 know it's you, I think it's even worse if you do it
7 anonymously, and I think what he's talking -- what you're
8 talking about is like on LinkedIn if I go and look at
9 what's publicly available without becoming a LinkedIn
10 friend then sometimes that will send a message. Because
11 I've gotten it before where it says, "People have been
12 looking at your profile. Do you want to see who they
13 are?" And sometimes you can tell who they are, and
14 sometimes you can't. That to me is a completely different
15 situation because you've put it out there for the world to
16 see as the juror or the individual, and so whoever looks
17 at it is no big issue there, but I raise the automatic
18 notification issue for a different reason.

19 As the parent of millennial, they actually
20 like to know that people are looking at their Facebooks
21 and Twitter and all of that kind of stuff; and these
22 automatic notices might be perceived by some of the
23 younger jurors as, well, that side did it but why didn't
24 this side do it, and do we want to get -- do we want to
25 level the playing field so that that is no longer an issue

1 and say you've got to do it in a way that doesn't trigger
2 an automatic notice, because to me, you know, I would be
3 creeped out by that. And "creep" is actually a verb now,
4 I am led to believe. You creep someone on Facebook,
5 but --

6 CHAIRMAN BABCOCK: So totally.

7 MS. GREER: But I think that it would be
8 best if the jurors don't know what's out there, what's
9 going on, because I think no good can come from that
10 personally.

11 CHAIRMAN BABCOCK: Okay. Roger.

12 MR. HUGHES: Well, picking up on something
13 which you said, is the word is "communicate." It's not to
14 offend. It's not to just initiate some contact, because
15 there are contacts that aren't communication. I mean, the
16 idea is to prevent ex parte communication outside the
17 courtroom when the judge and the other side is not there.
18 The fact that the person finds out you're investigating
19 them is offended or perhaps titillated I don't think is
20 what the rule is seeking to prevent any more than if you
21 hire a private detective to go talk to their friends but
22 not talk to them. The person may find out about it
23 because, hey, you talked to my friends, my friends talked
24 to me. What's the difference? So I'm not offended by the
25 possibility that someone might, you know, just access a

1 public website and you find out simply because that
2 software tells you, hey, somebody called you -- somebody
3 checked out your page. That doesn't trouble me. But it
4 does -- I mean, once again, I don't see that as a
5 communication.

6 I think, though, this gets back to what
7 Professor Hoffman raised at the beginning, well, what
8 is -- what is the level of intent here. I mean, one issue
9 is, gee, I didn't realize if you push that button it's a
10 friend request. Okay. Well, maybe that's one of those
11 things is if you don't know what the button is, don't push
12 it or you violated -- you've got an ethical violation. On
13 the other hand, if the -- if their software does something
14 that you don't intend, you don't really want to talk to
15 this person. You just want to know what are you showing
16 the whole world. I'm not sure that's a communication.

17 CHAIRMAN BABCOCK: Well, and communication
18 is a word that can have many meanings. For example, in
19 the Circuit Court of Cook County they interpret
20 communication to mean having a party or the party's lawyer
21 in the vicinity of a juror, which means you can't take an
22 elevator up with them. You can't say "good morning" to
23 them, as we typically allow.

24 MR. HUGHES: Yeah.

25 CHAIRMAN BABCOCK: You can't -- you can't be

1 near them in the hallway, and if the judge finds out that
2 you are then you'll be reprimanded because they view that
3 as a communication. Now, Cook County has had its own set
4 of problems over the years with jurors, which has maybe
5 led to that, but, you know, I'll reemphasize what you just
6 said emphasizing what I just said, which is the word
7 "communication" is important. Justice Busby.

8 HONORABLE BRETT BUSBY: I think it is
9 important, but the rule that we're looking at also
10 prohibits seeking to influence a veniremember or juror.
11 So it's not just communication. It's also -- it's seeking
12 to influence, and I think Marcy's point is a really great
13 one. Somebody might really like it if the lawyer is
14 checking them out on -- you know, and gets the website
15 notification that they're being looked at. So I think,
16 you know, that could be a way of influencing someone. I
17 think --

18 CHAIRMAN BABCOCK: Everybody on my team is
19 looking at you.

20 HONORABLE BRETT BUSBY: Right. They think
21 you're really cool.

22 CHAIRMAN BABCOCK: I've got 18 people on the
23 defense side looking at you.

24 HONORABLE BRETT BUSBY: But I also think the
25 communication point is important because this part of the

1 rule, this part of the comment, is suggesting that what
2 we're -- what we're saying you can't do here is an
3 improper ex parte communication, but it seems to me that
4 the request for access should be what we're focusing on,
5 not the review, because right now it says a lawyer's
6 review of the information when they request access is an
7 ex parte communication, but I don't think review is a
8 communication.

9 CHAIRMAN BABCOCK: I agree with you.

10 HONORABLE BRETT BUSBY: So I'm not sure why
11 it's written that way. You might want to add the words
12 "privacy restricted," which you mentioned a couple of
13 times, to convey the idea that if we retain this request
14 access idea that it's requesting access to a privacy
15 restricted place. I think that would be a helpful
16 clarification; but I still think that there's two issues
17 that need addressing beyond that; and one is we need to be
18 clear about can you cause communication or not by a
19 website with a juror; and we just need to say yes or no is
20 it okay that they get these kind of notifications, given
21 Judge Yelenosky's observation that you have the means to
22 prevent them from doing so; and so you're making a choice
23 or negligently failing to make a choice by allow -- by
24 having the website say, "Lawyer X is checking you out on
25 this website." We just need to be clear is that -- yes or

1 no is that a communication that we want to prohibit and
2 then, you know, which way should we come down on that.
3 And I tend to think that because it could influence the
4 juror one way or the other that we should say you need to
5 avail yourself of the tools that -- if you're going to do
6 it and look at publicly available information, you need to
7 avail yourself of the tools to do that without causing the
8 website to communicate with the juror that you're doing
9 it.

10 CHAIRMAN BABCOCK: Justice Bland.

11 HONORABLE JANE BLAND: If we amend the
12 disciplinary rules along these lines, should we amend the
13 instructions to the venire and to the jury in Rule 226a to
14 tell the jurors that making a review of your website or
15 electronic social media without making an access request
16 is okay, but a lawyer or someone acting on behalf of a
17 lawyer may not make a friend request or otherwise request
18 access to your social media that's -- that's personal or
19 private? In other words, we tell the jurors, you know,
20 don't offer rides -- don't accept rides, food, or any sort
21 of refreshment. We tell the jurors what sort of
22 communications they can have with lawyers, which we allow
23 casual greetings like "hello," but we should tell the
24 jurors what the rules are governing the lawyers for two
25 reasons.

1 One is then if a juror wants to go "I need
2 to hide my privacy settings," you know, let them do that
3 if they want to do that. All should be fair in love and
4 war. And then secondly, it's a check on the lawyers', you
5 know, obedience to these rules and against any inadvertent
6 violation, which could be then handled, you know, easily
7 on the front end by the judge because the juror would, you
8 know, presumably promptly report any sort of improper
9 request for access to his or her social media. So I think
10 we need -- you know, if we're going to have a rule on the
11 lawyers, we need to tell the jurors what those rules are.

12 CHAIRMAN BABCOCK: So I get my jury list,
13 and I immediately have my guys looking for Facebook or
14 whatever, you know, whatever I can properly do, public
15 stuff, and then you tell that juror that "Hey, by the way,
16 they're going to be looking at Facebook," and that juror
17 immediately goes and puts on privacy settings, and we see
18 that. It was there 10 minutes ago, but now it's not
19 because -- and we can deduce that that juror has got
20 privacy concerns. Is that a communication with us?

21 HONORABLE JANE BLAND: Well, no, the court
22 has told the juror to act accordingly now that you're here
23 and --

24 CHAIRMAN BABCOCK: But she's communicating.

25 HONORABLE JANE BLAND: -- it's no different

1 than you driving down my street, and I see Chip, and I
2 lower all of my shades.

3 CHAIRMAN BABCOCK: This is getting kind of
4 personal, isn't it?

5 HONORABLE JANE BLAND: You may have in the
6 wild west the opportunity to find out information about
7 me, but I should have an equal opportunity to try to
8 protect my privacy --

9 CHAIRMAN BABCOCK: Oh, no question.

10 HONORABLE JANE BLAND: -- to the extent that
11 it complies with the law and my obligations as a juror
12 venireperson.

13 CHAIRMAN BABCOCK: No question about that.
14 I'm just positing is that a communication?

15 HONORABLE JANE BLAND: Well, I mean, the
16 court has now told you that the lawyers may be looking at
17 your social media. You're acting according to what the
18 court has told you, not according to what any individual
19 lawyer has or has not done.

20 HONORABLE TOM GRAY: But have you
21 communicated with him by changing your Facebook setting so
22 that now you have effectively communicated to him that you
23 have something in your Facebook page that you do not want
24 him to see? Isn't that what you're trying --

25 CHAIRMAN BABCOCK: That's what I'm trying to

1 say.

2 HONORABLE BRETT BUSBY: Not ex parte because
3 both sides can see it.

4 HONORABLE JANE BLAND: Everybody knows that.
5 Everybody knows that, and obviously we're going to ask
6 jurors to act differently than they do in their ordinary
7 normal life from the moment they become jurors. They
8 can't just get a ride from anybody. They can't talk about
9 the case in front of other people, including their spouse.
10 They have to -- they have a number of rules they have to
11 abide by. We should tell them that somebody may be
12 looking at their social media.

13 CHAIRMAN BABCOCK: Yeah.

14 HONORABLE JANE BLAND: And, you know, and we
15 should also tell them that we shouldn't be friending them.

16 CHAIRMAN BABCOCK: Yeah.

17 HONORABLE JANE BLAND: Because then somebody
18 could say, "Oh, I know somebody at that law firm. I'm
19 already a friend," and that would come out on the front
20 end where it's easily curable and doesn't lead to
21 allegations of misconduct or a new trial or anything like
22 that.

23 CHAIRMAN BABCOCK: No, I agree with what
24 you're saying. Alistair.

25 MR. DAWSON: So I think I was in the

1 minority on the subcommittee, and I would have voted or
2 did vote to prohibit the LinkedIn communications when you
3 know that the juror could be notified that you're -- that
4 you're looking at their page or their profile or following
5 on Twitter. I would have prohibited that because I view
6 that as a communication. You are communicating to the
7 juror that you've looked at their page or their profile,
8 or you're communicating to the juror that you're following
9 them on Twitter, and so I view that as an ex parte
10 communication.

11 So I would have advocated that we prohibit
12 any following of social media where the lawyer knows or
13 should know that the member of the panel or the juror can
14 find out that they're engaging in that conduct, and I
15 don't see a distinction between that, that is doing a
16 LinkedIn -- looking at their LinkedIn page and sending a
17 request that is never responded to. I view those as
18 essentially the same. I mean, you are -- you could send a
19 friend request on Facebook, and if they don't accept it,
20 that's the same communication as they get if you looked at
21 their LinkedIn page and they say, you know, "Lawyer Dawson
22 looked at your LinkedIn page."

23 So I agree with I think it was Justice Busby
24 or somebody earlier who said one way or another we need to
25 address it, whether it's prohibited or not prohibited,

1 because we -- the ABA has sort of three categories. You
2 know, the first permissive, the second permissive, and
3 then the -- whatever they call it, the one that's
4 prohibited, and we only address one and three. We don't
5 address two. I think we should address it, and I would
6 vote to prohibit it.

7 CHAIRMAN BABCOCK: Justice Gray.

8 HONORABLE TOM GRAY: Two sort of
9 observations kind of following up on one of the other
10 comments. Can I look around to find someone -- Eduardo's
11 comment. Can I look around to find someone who is on
12 their Facebook page, not otherwise affiliated with a law
13 firm or under my control? I don't know a thing about this
14 because I don't do Facebook. I don't do Twitter. So but
15 from what little I've heard y'all talk about it seems like
16 with the ability to see who are friends, sooner or later
17 in the six -- what, Six Degrees of Separation with Kevin
18 Bacon or something like that, I can find somebody who
19 knows somebody that is a friend --

20 HONORABLE TRACY CHRISTOPHER: That's right,
21 you could.

22 HONORABLE TOM GRAY: -- and I don't see
23 anything in this that would prohibit me from finding that
24 person and looking at the Facebook page through their
25 already preexisting right. Just an observation.

1 Number two, what if one lawyer has access to
2 a Facebook page and the other one doesn't, and is this
3 something that is the subject of discovery? As to the
4 specific recommendation of the subcommittee I am really
5 curious about why the term "ex parte" even appears in the
6 recommendation because ex parte has to do with
7 communications --

8 HONORABLE STEPHEN YELENOSKY: With the
9 court.

10 HONORABLE TOM GRAY: -- with the court. And
11 in the rule that it's appended to, maintaining integrity
12 of the jury system, there's a lot of discussion about
13 communication but not ex parte communication, which
14 appears in the previous section, 3.05, maintaining
15 impartiality of the tribunal. So I think the word "ex
16 parte" needs to be stricken from the proposal, just the
17 word "communication" is all you need.

18 CHAIRMAN BABCOCK: Yeah, because you could
19 have both the defense lawyers and the plaintiffs lawyers.

20 HONORABLE TOM GRAY: Interrogating the juror
21 while --

22 CHAIRMAN BABCOCK: Yeah. Judge Yelenosky,
23 and then Pete.

24 HONORABLE STEPHEN YELENOSKY: You mentioned
25 two different things I think that I would separate. One

1 is what the juror knows about what the attorney is doing
2 and what the attorney is able to find out about the juror,
3 and the latter is a privacy issue. You know, if you can
4 get the private site of the juror without the juror
5 knowing then it's just a privacy issue and maybe it's a
6 fairness issue with the other side. But the -- we don't
7 want to do a friend request for a couple of reasons, and I
8 think the same thing applies, as Alistair said, if there's
9 any indication of a communication, and by that I mean what
10 the juror knows about what the attorney is doing.

11 If -- the problem with all of this stuff is
12 by the time it gets to the Supreme Court technology will
13 have changed, one. Two, we need you all to bring your
14 millennial here so we can ask them questions, but the way
15 I look at it is I don't know technology right now or what
16 it's going to be, but I can imagine a time when you have
17 two choices. I'm going to look at this public website.
18 Choice A is that person will know it's me. Choice B is
19 they won't know it's me. So the technology thing goes
20 away. Would we require attorneys to choose part B? And
21 if so, then we should say something like "Lawyers are
22 required to use the latest technology to remain anonymous
23 whenever viewing social media."

24 CHAIRMAN BABCOCK: Pete, what do you think
25 about that?

1 MR. SCHENKKAN: I want to follow up on your
2 continuing point about what constitutes communication here
3 and suggest that knowing the juror would get notice that
4 you are looking at his or her social media is a
5 communication and that it would be comparable to the
6 analogy we talked about, about driving down the street but
7 driving down the street with your car having a sign on it
8 that says "The Gilstrap Law Firm," and a little bit more
9 than that because driving down the street Justice Bland
10 may have her shades down. She may not see it, and so I'm
11 saying driving down the street when she's out in the front
12 yard with the children. And that makes it -- so far it's
13 hypothetical. Now let's assume this juror is a juror in a
14 criminal trial of a person who is known to be a made man;
15 and the lawyer from that firm, The Gilstrap Firm -- I
16 don't think you probably ever -- but drives down the
17 street when she's playing with the children with a sign on
18 a deal. Is that a communication? I think it might be
19 interpreted as one, which in this case is probably all
20 that matters.

21 CHAIRMAN BABCOCK: Well, and to add to your
22 hypothetical with a true fact, you know, the car with
23 Gilstrap's sign would be "The Gilstrap Firm, we'll get you
24 money." So there you go. Justice Christopher.

25 HONORABLE TRACY CHRISTOPHER: Well, I'd like

1 to take the position that neither (2) or (3) are
2 communications with the jury, and I mean, because you
3 know, the funny thing is y'all are sitting here saying,
4 "Oh, number (1), absolutely, that's fine." In fact, you
5 have a duty to go out and look at everybody's Facebook
6 page that, you know, fails to put a privacy setting on it.
7 Okay. You've got a duty to do that. So why on earth
8 don't you have a duty to get together with your co --
9 co-counsel, opposing counsel, and send a friend request so
10 that you can both look at it.

11 Y'all aren't saying that it's wrong to look
12 at the information. What you're saying is it's wrong to
13 have this request to get the information. I don't see
14 that as a communication. What if I got up in voir dire
15 and said, "Hey, I'm going to send all of y'all a friend
16 request because I really want to see what's on your friend
17 page"? And y'all say, "Oh, my gosh, no lawyer would do
18 that because of the creep factor." Well, I mean, what are
19 we -- what are we trying to prevent here? Is it really an
20 ex parte communication, or is it somehow let's prevent the
21 creep factor from happening? If a juror is willing to
22 give somebody access to their Facebook page then you ought
23 to have access to it.

24 CHAIRMAN BABCOCK: What if they put up
25 messages that -- on their page that are either direct or

1 subliminal messages to one party or the other?

2 HONORABLE TRACY CHRISTOPHER: Well, I mean,
3 they're told not to communicate with us, but to me access
4 to the Facebook page is not a communication.

5 CHAIRMAN BABCOCK: But the Facebook page is
6 a living thing.

7 HONORABLE TRACY CHRISTOPHER: Well, I know,
8 but we tell them during the trial don't post about this
9 case, you know. I mean, we tell them not to do it. They
10 might do it anyway. I know that that's an extreme view
11 and not -- but I'm wondering what it is that we're trying
12 to protect by rule number (3). It seems to me we're
13 trying to protect the lawyer and not the jurors in rule
14 number (3).

15 CHAIRMAN BABCOCK: Yeah. Well, as you point
16 out, as written, Tracy, it says "a lawyer's review of the
17 information," and that's how it starts. It's not
18 communication. It's me reading a piece of paper. Judge
19 Yelenosky.

20 HONORABLE STEPHEN YELENOSKY: Well, again, I
21 think that's conflating the issue of the privacy because
22 the last thing you said is if a juror wants to do it, no
23 problem. That's a privacy issue. The other issue, which
24 is not the same, is whether it is a communication from one
25 attorney to a juror by allowing that juror to know that

1 you're looking. Now, some people would say that's not a
2 problem, but some of us think that's a problem, and it
3 doesn't have to do with privacy. It has to do with will
4 the juror get some information that makes the juror think,
5 hey, this attorney is smarter than the other attorney or
6 this attorney -- actually I'm afraid because this attorney
7 represents a made man or whatever. So it's not the
8 privacy of the juror, and it's not protecting the
9 attorney. It is dealing with a problem in the process
10 that allows something to go to a juror from an attorney.

11 And another way to look at that is, well, we
12 can look at their website. We're -- the lawyer who
13 doesn't do it anonymously is basically saying, "Hey, I'm
14 looking at your website" and doesn't need to do that, and
15 so why shouldn't it be prohibited?

16 CHAIRMAN BABCOCK: Justice Bland, and then
17 Pete.

18 HONORABLE JANE BLAND: The very fact that a
19 juror would know that a lawyer is looking at their website
20 can be intimidating on the juror's thought processes, or
21 it can be -- you know, evoke sympathy. It affects -- it's
22 the same reason we don't let people in while they
23 deliberate about the case. It affects the process, the
24 very fact that the juror knows they're being watched by
25 one of the lawyers in the case. With respect to, you

1 know, offering to all of the venire to make a friend
2 request, well, what happens when some accept and others
3 don't and accept this lawyer but not that lawyer because
4 already that lawyer seems to be somebody I'd like to be a
5 friend with on social media, and in the days where the
6 strengths of our social connections are measured by the
7 numbers of friends on Facebook or Twitter followers, there
8 is a real, you know, social effect that comes with -- it
9 may not be friendship in the way that we describe it, but
10 there is an effect that comes with accepting one of -- a
11 friend request or, you know, communicating how -- how much
12 it is just on the surface, surface communicating with
13 another person.

14 That's why in our instructions to the jury
15 we don't allow any communication except for casual
16 greetings. We don't say just don't talk about the case,
17 which we tell them that, but we also say don't talk to the
18 lawyers. Don't talk to them about anything. Don't talk
19 to them about what happened at the football game last
20 Friday night, and it's the same thing with Facebook. You
21 know, a juror posts -- you know, juror is off for the
22 weekend, doesn't post anything about the case, posts about
23 the high school football game. You know, that's still a
24 communication about what's going on in that juror's life,
25 and it's being made to one of the lawyers in the case and

1 maybe not the other lawyers.

2 HONORABLE STEPHEN YELENOSKY: And what if
3 the lawyer said in the hallway, "I looked at your Facebook
4 page." Would that be bad? Would that be a problem?

5 HONORABLE JANE BLAND: "Congratulations,
6 your son had a touchdown."

7 HONORABLE STEPHEN YELENOSKY: Yeah.

8 CHAIRMAN BABCOCK: Pete.

9 MR. SCHENKKAN: I had a --

10 CHAIRMAN BABCOCK: Then Elaine.

11 MR. SCHENKKAN: I had a similar point with
12 the exact words. There is a third issue here, and there's
13 judicial privacy. There's a lawyer creep factor, but
14 really the most important one is the judicial process, and
15 the part of the judicial process that is at issue here is
16 it's true it's not technically ex parte, but it is very
17 much like it in the sense that we want the judge to be
18 able to control the interactions because of the potential
19 effect of uncontrolled communications on the trial, and
20 therefore, I would respectfully suggest that an agreement
21 between the lawyers on both sides that they're going to do
22 this together wouldn't solve the problem because the judge
23 isn't going to be there to stop them from doing something
24 they shouldn't do.

25 CHAIRMAN BABCOCK: Professor Carlson.

1 PROFESSOR CARLSON: Yeah. The third example
2 on the ABA was not the lawyer driving down the street and
3 sees the juror. It's -- second example. It's the lawyer
4 is driving down the street, and the neighbor sees the
5 lawyer and tells the prospective juror, and that's kind of
6 a distinction we were making. It's not a direct
7 communication, and we agreed with the ABA, not a full
8 committee --

9 MR. DAWSON: Right.

10 PROFESSOR CARLSON: -- with that reasoning.
11 Judge Busby, you talked about the disciplinary Rule
12 3.06(a)(2), "A lawyer should not seek to influence a
13 veniremember or a juror," it goes on to say "concerning
14 the merits of a pending matter by any means that would be
15 prohibited by law or the rules of procedure and practice."
16 So there's a question, does that go to the merits.

17 Eduardo, you were talking about a non -- a
18 lawyer not connected communicating through their already
19 existing Facebook post. Rule 3.06 of the disciplinary
20 rules (a) -- (c) says -- sorry, (1)(c) says "During the
21 trial of a cause a lawyer not connected therewith shall
22 not communicate with or cause another to communicate with
23 a juror or alternate juror concerning the matter." So
24 those seem to be restrictions concerning the matter, so
25 with that clarification I would just say we could use a

1 vote on whether people think a lawyer accessing a
2 prospective juror or sitting juror's page without a
3 request but with knowledge of -- potential knowledge by
4 the juror that their page or platform has been visited is
5 permissible or not. Because that seems to be the
6 disagreement.

7 HONORABLE STEPHEN YELENOSKY: Does it apply
8 to --

9 CHAIRMAN BABCOCK: Professor Albright.

10 PROFESSOR ALBRIGHT: I just wanted to kind
11 of take it down or back a little bit. I think in -- we
12 all got -- coming from big cities we think you -- it's
13 this sense of anonymity that you can't know the jurors.
14 You can't know the judges. You can't know witnesses.
15 When you think about smaller towns the way that the United
16 States was for many, many years and still is in many, many
17 places, you do know that that juror's son made the
18 touchdown last night.

19 HONORABLE JANE BLAND: You do.

20 PROFESSOR ALBRIGHT: And I think what social
21 media has done is it's made us all know a whole lot more
22 about each other and in some ways made the world smaller
23 because I do know that one of you-all went on vacation
24 last week where I might not have known it otherwise
25 because we haven't had a conversation about that, but it's

1 made our worlds smaller and closer together. We know more
2 about each other, but in this world we can choose -- like
3 there were recluses and are recluses who don't talk to
4 people and don't let people know what they are doing, we
5 can choose to do that by locking down your Facebook and
6 not posting on Twitter and putting very limited stuff on
7 LinkedIn. Or you can choose to have a huge website, make
8 it all open, friend anybody that wants to friend you, and
9 you ask to friend whoever you happen to recognize their
10 name when it comes across. So you have a -- you have lots
11 of choices in how public you want to be.

12 And I think in this world to pretend that
13 somebody's not going to look at this is crazy. I
14 guarantee you the jurors that have come in, as soon as
15 they find out the names of the litigants and the lawyers
16 and the judges they have Googled every single one of them
17 on their phone and probably looked at your Facebook page
18 to whatever is available; and if we -- you know, but we
19 try to limit, if we try to say "Don't do that," that's
20 nuts. It's just not going to happen.

21 CHAIRMAN BABCOCK: Professor -- I'm sorry.

22 PROFESSOR ALBRIGHT: So I believe in, you
23 know, not bothering the juror, but I think we have to
24 recognize that all of this stuff -- that whoever --
25 whatever you make public is public.

1 CHAIRMAN BABCOCK: Justice Busby.

2 HONORABLE BRETT BUSBY: I agree that, as
3 Professor Carlson pointed out, seeking to influence a
4 venireman or juror concerning the merits is what the rule
5 says. Although the next paragraph, I think it's (b), of
6 the rule says that "The lawyer connected therewith shall
7 not communicate with or cause another to communicate with
8 anyone he knows to be a member of the venire," and there's
9 no restriction to the merits there. So I think it applies
10 to lawyers in the case as well as lawyers who are not
11 connected to the case, but it seems to me what we're
12 trying to prohibit by saying you can't send a friend
13 request is not a -- a friend request is not a
14 communication about the merits, but yet everybody seems to
15 acknowledge we shouldn't be doing that. So I think we're
16 past whether it's about the merits at this point.

17 CHAIRMAN BABCOCK: Okay. Justice Bland.

18 HONORABLE JANE BLAND: Well, I mean,
19 tangentially it's about, you know, gaining an advantage in
20 an adversarial setting; and, you know, lawyers fight about
21 who gets the counsel table closest to the jury box, you
22 know; and some of them get there an hour early to try to,
23 you know, mark that territory as theirs. And, you know,
24 there's thinking behind that; and I think our rules were
25 designed for the small towns where everybody knows

1 everybody; and that's why our rules say don't talk to, you
2 know, anybody connected with or interested in this case,
3 any witness. Don't talk to them because they do know
4 everybody; and, you know, there is no better way to get to
5 a mother's heart than to talk to her about her football
6 hero son. And you can say that's not about the merits of
7 the case or trying to persuade her, but we all know that
8 that's not really true. It's not just completely, you
9 know, "I'm just so happy for you." It's not just
10 completely altruistic that you would happen to talk to a
11 juror about her son's -- and that's whether it's in a
12 small town where everybody knows everybody or because you
13 read about it on their Facebook page, and it's no
14 different than seeking a request to be their friend. Even
15 though that doesn't have the same connotation as, you
16 know, a true friend, it does pander to a juror or a
17 prospective juror.

18 HONORABLE TRACY CHRISTOPHER: But it's okay
19 to say that in voir dire if you know that the kid's --

20 CHAIRMAN BABCOCK: Yeah, you can pander all
21 you want.

22 HONORABLE TRACY CHRISTOPHER: -- won the
23 football game. You're allowed to say that. "Hey, you
24 know, your son won." You know, "Got that catch, that's
25 wonderful." If you know that, it's okay to say it.

1 HONORABLE STEPHEN YELENOSKY: Maybe or not,
2 depends on the judge.

3 HONORABLE JANE BLAND: The other side could
4 object.

5 HONORABLE STEPHEN YELENOSKY: Yeah, maybe
6 not.

7 HONORABLE TRACY CHRISTOPHER: It's in open
8 court.

9 HONORABLE STEPHEN YELENOSKY: Would you
10 allow them to say, "Everybody here, I'm going to be
11 checking on your Facebook page"? I wouldn't let -- I
12 wouldn't let somebody say that because it could be
13 intimidating.

14 HONORABLE TRACY CHRISTOPHER: They're doing
15 it.

16 HONORABLE JANE BLAND: And when Blake
17 Jefferson left the bench, you know, people would file
18 motions in limine about the fact that, you know, he can't
19 bring up that he played on a national championship UT
20 football team and talk about his ring, not that I think he
21 would have necessarily done that, but, you know, people
22 were worried about it. It doesn't have anything to do
23 with the case, but obviously people thought that there
24 might be an advantage gained by -- or disadvantage by
25 being up against a lawyer who had played for a national

1 championship football team for the Texas Longhorns.

2 CHAIRMAN BABCOCK: Judge Yelenosky, would
3 this be okay? "Mrs. Smith," who is juror number three,
4 "are you the same Mrs. Smith whose son Bobby just scored
5 six touchdowns for Katy High last weekend?"

6 HONORABLE STEPHEN YELENOSKY: In my court?
7 That would be a problem.

8 CHAIRMAN BABCOCK: Really?

9 HONORABLE STEPHEN YELENOSKY: Oh, yeah.
10 Yeah. I tell the lawyers not to talk about the facts, and
11 I don't want them getting chummy like that. And at least,
12 as Justice Bland said, there would be an opportunity
13 whether I did something or not for the other side to
14 object to it, but if --

15 HONORABLE JANE BLAND: Or to stand up and
16 say, "That's terrific. I'm so happy for you, Mrs. Smith."

17 HONORABLE STEPHEN YELENOSKY: Yeah. Then
18 the other side can get up and say the same thing.

19 CHAIRMAN BABCOCK: Yeah. Well, I wish Rusty
20 was here, because Rusty would say that and way more. "By
21 the way, he went two ways, and he had seven tackles, too."
22 Judge Wallace.

23 HONORABLE R. H. WALLACE: I think sending a
24 request crosses over the line because that -- the person
25 may interpret that as, oh, wow, look, this lawyer wants to

1 be my friend. You know, I like him. I'm flattered by
2 that, yes; and whereas, if you can do it, you know,
3 passively that's different; but I think that is a little
4 over the line.

5 As far as the juror privacy, I mean,
6 Facebook is the -- if you want to find out about -- you
7 don't have to drive by their house. You can go to Google
8 Earth and look at their house and their neighborhood, and
9 you can go to the -- you can find out if they voted in a
10 Republican or Democratic primary. There's all kinds of --
11 tax appraisal, all kinds of stuff, if they've ever been
12 arrested, that if you want to you can get stuff to look up
13 on jurors. I don't have a problem in terms of their
14 privacy.

15 CHAIRMAN BABCOCK: Yeah.

16 HONORABLE R. H. WALLACE: But I just think a
17 friend request, I'm not comfortable with that.

18 CHAIRMAN BABCOCK: Elaine, what's this vote
19 you're wanting to have? Have we taken a vote today? I
20 don't think so.

21 PROFESSOR CARLSON: We have not.

22 CHAIRMAN BABCOCK: Except the creepy thing,
23 but we didn't really vote on that.

24 PROFESSOR CARLSON: We stipulated to that.

25 CHAIRMAN BABCOCK: Yeah. Okay, so frame the

1 vote.

2 PROFESSOR CARLSON: Yes. Should it be
3 ethically permissible for a lawyer to passively review a
4 juror's social media when the juror may find out about the
5 lawyer's doing that?

6 CHAIRMAN BABCOCK: Okay. Everybody in favor
7 of that, raise your hand. Want to say it again? They
8 don't understand.

9 MS. GREER: Can I ask a clarifying question
10 before you say it?

11 PROFESSOR CARLSON: Yes, you may.

12 CHAIRMAN BABCOCK: Speak up.

13 MS. GREER: Is there any way that -- I mean,
14 I guess what I'm trying to figure out is, is there always
15 a way to anonymize the thing that might be sent to the
16 juror? In other words, like on -- is the alternative
17 don't do it because it might generate something, or is
18 there always a way to prevent that something from being
19 generated when you're just looking at what's publicly
20 available?

21 MR. BROWNING: There is. I'm not -- I don't
22 believe all lawyers use that, hence the auto-notification,
23 but --

24 MS. GREER: But they could be educated.

25 MR. BROWNING: They could be educated, yes.

1 PROFESSOR CARLSON: And that's today's
2 technology.

3 MS. GREER: Right.

4 PROFESSOR CARLSON: That may change
5 tomorrow.

6 MR. BROWNING: And we have no control over
7 what algorithm changes a site may engage in to the point
8 where, you know, in the hypothetical or the example I gave
9 earlier about Chief Justice Hecht and purchasing
10 something, you know, the fact that he didn't choose to
11 share his buying preferences, you know, it's the site that
12 made use of information, data that they collected, that
13 then through the use of an algorithm generated educated
14 guesses. Like you're going to get -- if you purchase a
15 pregnancy test at Target or CVS, you may get because of
16 the algorithm, you know, coupons timed, you know, later on
17 down the road for prenatal vitamins, diapers, formula,
18 things like that. That's simply the consumer America that
19 we now live in thanks to technology.

20 We can't control what algorithms they're
21 going to do, but we can caution lawyers that these
22 anonymous follow features or functions are available, and
23 we should caution lawyers that whatever means are
24 available to be taken to avoid something that would be --
25 would indicate their actions to jurors, that they can or

1 should make use of that.

2 CHAIRMAN BABCOCK: Professor Carlson, listen
3 carefully because Justice Busby has got a question about
4 your question.

5 PROFESSOR CARLSON: All right.

6 HONORABLE BRETT BUSBY: I was wondering
7 whether we should take a vote on -- and this goes back to
8 something that Professor Hoffman said about what the
9 standard should be. You had used the word "might" find
10 out. I think he used "know or should know," which I think
11 is a different way to look at it; but I wonder if there's
12 a way to take the vote without being influenced by which
13 of those standards we choose. I'm not exactly sure what
14 it would say, but, you know, do we want lawyers to be
15 doing this and do we want lawyers to be looking at social
16 media in a way that causes a notice to go to the juror
17 that they're doing it? And once that comes out we can
18 figure out sort of what the proper mens rea is, if you
19 will, or, you know, whether it's "might" or "knows" or
20 "should know" or -- does that make sense?

21 PROFESSOR CARLSON: Sure. We can just --

22 PROFESSOR ALBRIGHT: Are we talking about
23 where you know that someone looked or you know that Marcy
24 Greer looked?

25 MR. DAWSON: The identity.

1 PROFESSOR CARLSON: Is Marcy the juror?

2 PROFESSOR ALBRIGHT: No, Marcy is the
3 lawyer.

4 HONORABLE STEPHEN YELENOSKY: Marcy, it
5 doesn't matter if it's anonymous.

6 PROFESSOR ALBRIGHT: I get things all the
7 time that say "15 people looked at your LinkedIn" thing.

8 HONORABLE STEPHEN YELENOSKY: Yeah, that's
9 fine. That's anonymous.

10 PROFESSOR ALBRIGHT: That's anonymous. So
11 what we're talking about is non-anonymous. That was what
12 my question was.

13 MS. GREER: Yeah, good point. Right, but --

14 CHAIRMAN BABCOCK: Tom, then Skip.

15 MR. RINEY: But the lawyer doesn't
16 necessarily have control of that because the individual
17 can pay LinkedIn a certain subscription price, and they
18 get to know the identity of everybody who's looked at
19 their page.

20 HONORABLE STEPHEN YELENOSKY: But our expert
21 is saying there's a way around that, and that's a
22 technological question. So let's assume the technology
23 allows it, and if that's wrong that's why I said to the
24 extent technology allows it.

25 MR. DAWSON: Let's vote on the question.

1 CHAIRMAN BABCOCK: Wait a second. Skip
2 didn't get his --

3 MR. WATSON: Well, I just -- Elaine, tell me
4 how to vote if I want to be secretly creepy.

5 HONORABLE STEPHEN YELENOSKY: Vote with me.

6 CHAIRMAN BABCOCK: Actually, Skip, the
7 secret's out on you.

8 PROFESSOR CARLSON: I'll never get that out
9 of my head. I noticed that John does quote in his book
10 from Einstein, and it says, "Technology has exceeded our
11 humanity." I'm afraid we're there.

12 CHAIRMAN BABCOCK: No question. But frame
13 the question.

14 MR. BROWNING: And I did not advise
15 Congressman Barton on any use of technology.

16 PROFESSOR CARLSON: Well, in light of
17 Justice Busby's request we could go back to pages three
18 and four, which tees up the three different levels of
19 lawyer review of jurors' social media and take a vote as
20 to each one of those. And then we can frame the mens rea.

21 HONORABLE BRETT BUSBY: Good idea.

22 CHAIRMAN BABCOCK: Do you want to do that?
23 That acceptable? Okay, everybody --

24 MR. ORSINGER: Hold on a second. May I
25 comment on that?

1 CHAIRMAN BABCOCK: Sure thing.

2 MR. ORSINGER: I think in light of the
3 discussion, number one, it should be the juror is unaware
4 that the website was reviewed by the lawyer, because I
5 think there's a feeling here that it doesn't matter if
6 they think somebody reviewed it. They have to think it's
7 the lawyer that reviewed it. So I think you need to
8 change paragraph one. You see what I'm saying?

9 HONORABLE JEFF BOYD: Yes.

10 MR. ORSINGER: Just add "by the lawyer" to
11 the word -- after the word "reviewed."

12 PROFESSOR CARLSON: All right.

13 CHAIRMAN BABCOCK: Wouldn't that change --
14 wouldn't that change number (2) as well?

15 MR. ORSINGER: No, because identity is built
16 into number (2).

17 HONORABLE STEPHEN YELENOSKY: Identity of
18 the viewer.

19 CHAIRMAN BABCOCK: Just identity of
20 somebody, but it doesn't mean it's the lawyer or somebody
21 acting for the lawyer. Maybe it does.

22 HONORABLE STEPHEN YELENOSKY: Everybody has
23 the concept.

24 MR. ORSINGER: I agree to that change, too.
25 I think that that's safe.

1 CHAIRMAN BABCOCK: Let's just take it one by
2 one.

3 MR. ORSINGER: Okay.

4 CHAIRMAN BABCOCK: Do you accept that
5 amendment, Elaine?

6 PROFESSOR CARLSON: Yes.

7 CHAIRMAN BABCOCK: Okay. So everybody who
8 is in favor of permitting a passive lawyer review of a
9 juror's website or electronic social media, ESM, that is
10 available without making an access request or where the
11 juror is unaware that a website or ESM has been reviewed
12 by the lawyer, raise your hand.

13 Everybody opposed, raise your hand. So
14 that's unanimous, 26 to nothing. So that was easy. So
15 now, Elaine, we're going to vote on number (2)?

16 PROFESSOR CARLSON: Yes.

17 CHAIRMAN BABCOCK: And is there any
18 amendment to number (2) proposed? All right. So
19 everybody in favor of --

20 MR. DAWSON: The vote is to -- that we would
21 permit number (2). If you vote in favor, you're
22 voting --

23 PROFESSOR CARLSON: Yes, to permit.

24 MR. DAWSON: -- to permit.

25 CHAIRMAN BABCOCK: Yes, permitting number

1 (2), passive lawyer review where the juror becomes aware
2 through a website or electronic social media feature of
3 the identity of the viewer. Everybody in favor of that,
4 raise your hand.

5 Wait a minute. And everybody against, raise
6 your hand. Okay. That failed by a vote of 11 to 14.

7 Now, number (3), any amendments to number
8 (3)?

9 PROFESSOR CARLSON: No. No.

10 MR. DAWSON: (3) would be to prohibit,
11 correct?

12 PROFESSOR CARLSON: Yes.

13 HONORABLE JANE BLAND: Oh, wait a minute.
14 Is that allowed?

15 HONORABLE BRETT BUSBY: We might as well do
16 it the same way.

17 MR. ORSINGER: Well, a "yes" vote is to
18 permit it, and a "no" vote is to prohibit it.

19 PROFESSOR CARLSON: You can do it to permit
20 again.

21 CHAIRMAN BABCOCK: Yeah, we're doing
22 permitted.

23 MR. DAWSON: Oh, okay.

24 CHAIRMAN BABCOCK: So if you want the lawyer
25 to be able to do this, you'll vote "yes." If you want the

1 lawyer not to do this, you'll vote "no." So permitted,
2 this active lawyer review where the lawyer requests access
3 to the juror's electronic social media. Everybody in
4 favor of that, raise your hand.

5 MR. SCHENKKAN: In favor of prohibiting?

6 MR. ORSINGER: No, in favor of allowing it.

7 CHAIRMAN BABCOCK: Frank. Get your sign out
8 and beat him over the head with it.

9 MR. ORSINGER: Chip, can't you make it
10 easier than yes or no?

11 CHAIRMAN BABCOCK: I can't make it easier
12 than yes or no. Schenkkkan is challenged, we all know
13 that, ever since he became a right-winger.

14 MR. SCHENKKAN: It's Friday afternoon at
15 3:00 o'clock, I respectfully submit. Some of us are
16 getting challenged.

17 CHAIRMAN BABCOCK: Get him a five-hour
18 energy drink.

19 MR. SCHENKKAN: That's right.

20 CHAIRMAN BABCOCK: All right. We'll say it
21 again. You're going to vote "yes" if you think it's okay
22 for active lawyer review where the lawyer requests access
23 to the juror's electronic social media. Everybody thinks
24 that should be permitted, raise your hand.

25 And everybody opposed? That fails by a vote

1 of 2 in favor, 24 against. So there you have your votes.

2 MR. SCHENKKAN: I want to ask about the --
3 on the voting, though, it seems to me that number (2) is
4 the one where the scienter issue matters; and the way this
5 was worded was where the juror becomes aware, which is an
6 after-the-fact fact; and what we were otherwise talking
7 about was something like a negligence standard, when the
8 lawyer knew or should have known that the juror -- now
9 you've got another fork in the road -- would know or might
10 know. And it seems to me that all of those are ones that
11 there might be fewer supporters for permitting that than
12 there were for just where it turns out that it's known. I
13 don't know whether that matters to your drafting task or
14 not.

15 PROFESSOR CARLSON: It seems like number (2)
16 is out.

17 MR. SCHENKKAN: Okay. Just as it is.

18 CHAIRMAN BABCOCK: It failed. 11 to 14.
19 Three votes. If Rusty had been here --

20 PROFESSOR CARLSON: Read 'em and weep.

21 CHAIRMAN BABCOCK: Justice Brown.

22 HONORABLE HARVEY BROWN: Well, I didn't vote
23 on number (2) because I'm concerned about the jurors
24 knowing the identity of the viewer if it's the attorney,
25 but if it was an anonymous group like we've heard about, I

1 wouldn't mind the jurors knowing that some anonymous
2 person has viewed it or somebody who is in my law office
3 but not in the courtroom, that they're not going to know
4 the person is connected with the case.

5 CHAIRMAN BABCOCK: Right.

6 HONORABLE HARVEY BROWN: To me it's I don't
7 want the jurors to know the people in the courtroom that
8 they're observing are doing it, and I thought I heard
9 Richard saying that.

10 MR. ORSINGER: Chip actually suggested that
11 we amend it to make that clear, but I agree with you. It
12 would change my vote.

13 CHAIRMAN BABCOCK: To a "yes" or a "no"
14 vote?

15 MR. ORSINGER: I would want to be sure that
16 the juror didn't think they were being examined by a
17 lawyer. I wouldn't care if they didn't know who was
18 examining them.

19 MR. WATSON: I think that would change a
20 lot, Chip.

21 CHAIRMAN BABCOCK: You know, amend it anyway
22 you guys want. We'll vote on it. We're vote happy right
23 now. Marcy.

24 MS. GREER: I think the problem is you can't
25 guarantee that they won't know that it's you. There's

1 really no way to do that, and so I was wondering if we
2 needed to say it's not so much whether the juror becomes
3 aware but the juror could become aware, and are you taking
4 a risk -- I mean, we have to think about how we want to
5 put the permission or prohibition on it knowing that a
6 lawyer will not necessarily know.

7 CHAIRMAN BABCOCK: David Jackson.

8 MR. JACKSON: Because someone could get a
9 friend -- a request. Somebody could view someone's page,
10 Sarah Smith, and the person who got you could search Sarah
11 Smith and find out she works for Jones Day. I mean,
12 that's the problem you would run into if somebody in your
13 office did it, is they could research that person and find
14 out where they work.

15 CHAIRMAN BABCOCK: Judge Yelenosky.

16 HONORABLE STEPHEN YELENOSKY: Yeah, two
17 different issues. The "could be" or whatever is the fork
18 that Pete was talking about. The viewer, it depends --
19 the policy question is do we want lawyers to be able to
20 try to be anonymous by having somebody who will be
21 identified to the juror on the chance or the hope that
22 that person will not be connected with the lawyer,
23 depending on how we word that we could make it a
24 free-for-all for the lawyer to simply ask his or her
25 partner to do it and Jones & Day, so they know -- the

1 jurors know Jones & Day, so Jones has Day do it. On the
2 other hand, we could be -- we could go the other way and
3 be more restrictive and say that the identity of the
4 viewer, which would then mean it has to actually be
5 totally anonymous. I mean, they don't know who the person
6 is, period.

7 CHAIRMAN BABCOCK: Okay. Justice Busby.

8 HONORABLE BRETT BUSBY: Well, I guess, this
9 is a rule written for lawyers, so I guess my question is
10 if we're going to reword number (2) somehow do we want to
11 be focusing on what the juror becomes aware of or what the
12 lawyer knows? It seems to me like it might be more
13 relevant what the lawyer is thinking than what the --
14 what -- about what the juror might know, which I guess
15 takes me back to Professor Hoffman's standard of where the
16 lawyer knows or should know that the juror will become
17 aware through the website of -- or that the juror will be
18 notified by the website, whether they read the
19 notifications or not, of the identity of the viewer as the
20 lawyer, that the lawyer is the viewer.

21 CHAIRMAN BABCOCK: Okay. Judge Wallace.

22 HONORABLE R. H. WALLACE: Well, how would
23 the lawyer ever know or should know? I mean, I don't
24 know. How would the lawyer ever know that?

25 HONORABLE BRETT BUSBY: By becoming

1 technically competent I think was the --

2 HONORABLE R. H. WALLACE: Pardon me?

3 HONORABLE STEPHEN YELENOSKY: By the
4 technology they use or don't use, and it's an educational
5 thing.

6 HONORABLE R. H. WALLACE: Maybe they've got
7 a gadget that is better than my gadget. I don't know. I
8 mean, I think you almost -- I would almost have to assume
9 under number (2), okay, the juror knows that somebody made
10 an inquiry, maybe the lawyer, maybe someone else, and can
11 we live with that? Because I just don't see how the
12 lawyer -- I don't know how as a lawyer you could ever
13 really say for sure this person -- I can go to their
14 website or whatever and they'll never know.

15 HONORABLE STEPHEN YELENOSKY: Well --

16 CHAIRMAN BABCOCK: Judge Yelenosky.

17 HONORABLE STEPHEN YELENOSKY: Yeah, I mean,
18 technology changes. As I said, you can look at it as
19 suppose you have two buttons, and one says they're going
20 to know who it is and the other one says it will show up
21 as anonymous. Then lawyer has to push the "anonymous"
22 button. That's simple. The problem for us is that's not
23 the technology now, but there is technology we're told by
24 people who understand it that will accomplish the same
25 thing. It's just a little more complicated, and basically

1 we're putting the burden on the lawyers to learn that
2 technology.

3 CHAIRMAN BABCOCK: Yeah, Richard.

4 MR. ORSINGER: For me the crux of the
5 question is whether the juror is influenced by some --
6 some issue other than the evidence they hear in the
7 courtroom, and if there is a private investigative agency
8 that's going to allow its identity to be known but they
9 don't know who hired -- the juror doesn't know who hired
10 that investigator, to me that's not harmful because all
11 the juror knows is that they're being investigated. They
12 don't know whether it's in connection with this or
13 anything other, even if you don't have pure anonymity,
14 which I think you can achieve pure anonymity on the
15 internet today; but to me the focus is whether the juror
16 might be influenced by knowing that they're being looked
17 at; and if they can't tell who's looking at them, then why
18 do we care if they know someone looks? They may have 20
19 people that look at them that day. It doesn't matter
20 unless they can connect it up with the lawsuit and the law
21 firm.

22 CHAIRMAN BABCOCK: Well, how does that come
23 up? It mostly comes up in jury selection, doesn't it? So
24 you've got a paralegal most often or a young lawyer, and
25 you get your list, and they start going through it trying

1 to find information about the people that are on the list,
2 and one of the most rich sources is Facebook, and so you
3 go to Facebook, and does Facebook automatically notify the
4 person that you're looking? I don't think so. It
5 doesn't. So that's okay, right?

6 PROFESSOR CARLSON: Yeah.

7 CHAIRMAN BABCOCK: Under current law and
8 what we're proposing.

9 John, thanks very much.

10 MR. BROWNING: Thank you, and as I indicated
11 to Professor Carlson, I'm at your disposal for the other
12 issues you'll be considering, and I'm happy to come back.

13 CHAIRMAN BABCOCK: Thank you. Safe trip.

14 It's usually done under very tight time
15 circumstances, isn't it? More often than not you don't
16 even get overnight to look at it once you get the list.
17 Are we just leading people into trouble with this?

18 MR. ORSINGER: I'm not -- in the jury trials
19 that I try I get the jurors list about the time when the
20 first one is walking through the front door.

21 CHAIRMAN BABCOCK: Yeah.

22 MR. ORSINGER: And I've got to start my voir
23 dire right then and there, and it's over by lunch. So
24 this would only apply in my world if I were doing it to
25 the petit jury that's in the box, and that's when you have

1 some time and it's not as critical for you to know what
2 your jurors are thinking if you're already stuck with
3 them, but if you found out that they were particularly
4 strong about one issue it might influence the way you try
5 your case or the questions you ask or what you say in
6 closing argument. So to me it is applicable during a
7 trial, but I would never do this. I'm too old for this.

8 CHAIRMAN BABCOCK: You don't do any internet
9 investigation --

10 MR. ORSINGER: No.

11 CHAIRMAN BABCOCK: -- of your jurors?

12 MR. ORSINGER: No.

13 CHAIRMAN BABCOCK: Okay.

14 MR. ORSINGER: But I'm going to be retired
15 or dead soon, so --

16 CHAIRMAN BABCOCK: Well, we hope not too
17 soon.

18 MR. ORSINGER: That is a rule for younger
19 people.

20 CHAIRMAN BABCOCK: Justice Gray.

21 HONORABLE TOM GRAY: I just had to say this
22 in response to Richard's comments because it hasn't been
23 mentioned yet, and that's Bull.

24 MR. JACKSON: We're all thinking it.

25 HONORABLE TOM GRAY: Not BS, but Bull as in

1 the series of where all of this stuff is supposedly used,
2 and I tend to think Richard's example is probably more
3 common for most cases, but when you get into a big case,
4 you're going to spend money. I mean, had this been
5 available back in '92, '93, we were trying a case in a
6 county that had 2,200 registered voters, and we called in
7 10 percent of the folks to sit on the initial jury to pick
8 from, and had this been available we would have found the
9 Facebook page on every juror in the panel, you know, that
10 was available out there. So, I mean, it's just going to
11 depend on your resources and, like he says, time; and we
12 got the -- you know, even when I was back in Corsicana, we
13 got the list, and we had people that we knew that knew
14 people, and we would -- in town, you know, the movers and
15 shakers; and we would call them and say, "Here's our list"
16 and do what investigation we could, but, you know, that's
17 30 years ago, and now you've got this, and you can have
18 somebody sit there and do it, so --

19 CHAIRMAN BABCOCK: When you say Bull you're
20 talking about the TV show?

21 HONORABLE TOM GRAY: Yeah.

22 CHAIRMAN BABCOCK: Everybody know about
23 Bull?

24 MR. ORSINGER: No. If the attack was on me,
25 I didn't even know I was being insulted, or was I being

1 complimented?

2 CHAIRMAN BABCOCK: You weren't. David knows
3 about Bull.

4 MR. JACKSON: That comes from Dr. Phil.

5 CHAIRMAN BABCOCK: Dr. Phil, former jury
6 consultant, when he was just plain old Phil at Courtroom
7 Sciences, Inc., is the creator and executive producer of
8 Bull, about a jury consultant.

9 MR. ORSINGER: Oh, it's a fictional program.

10 CHAIRMAN BABCOCK: Tuesday nights, CBS.

11 MR. ORSINGER: I'm too busy to watch TV,
12 Chip. Sorry.

13 CHAIRMAN BABCOCK: That's all right. You
14 just don't get references like this. Roger.

15 MR. HUGHES: Well, again, it gets back to
16 what is it we're trying to prevent, and you know, there's
17 communications and there's communications and there's
18 communications. I mean, we could say, you know, pinning
19 an American flag on your lapel is a communication. Are we
20 going to prohibit that? And maybe it's a generational
21 thing that what you and I might regard as an offensive
22 communication is just considered the way of the world to
23 another generation. But what I get back to is if I had to
24 prove in court that my opposing counsel had a
25 communication with a juror during the trial that

1 influenced them and all I had was, well, I can prove they
2 accessed their LinkedIn thing, but I can't prove that the
3 person even had any way of finding out it was the
4 attorney, I mean, do we really want to start encouraging
5 that kind of arguments in court? And or --

6 CHAIRMAN BABCOCK: So where does that lead
7 you vis-a-vis this rule?

8 HONORABLE STEPHEN YELENOSKY: Yeah, we've
9 already decided, though.

10 MR. HUGHES: I guess right back where I said
11 in the first place. I think that if all you do is just
12 access their page and it sends them a tickler saying
13 "Somebody accessed your page," it's up to you to use your
14 Sherlock Holmes, the entire powers of deduction, to figure
15 out who it is, I'm not sure that's a communication. Not a
16 communication that we're trying to prohibit.

17 HONORABLE STEPHEN YELENOSKY: We voted
18 unanimously that it wasn't.

19 CHAIRMAN BABCOCK: That it wasn't -- yeah.

20 HONORABLE STEPHEN YELENOSKY: That you could
21 do that.

22 CHAIRMAN BABCOCK: That you could do that.

23 HONORABLE STEPHEN YELENOSKY: So that's not
24 an issue anymore.

25 CHAIRMAN BABCOCK: Yeah, Justice Gray.

1 HONORABLE TOM GRAY: I think it maybe bear
2 worth mentioning that the subsection (b) to which this --
3 or section (b) that is going to be amended to the comment
4 -- and I think this follows up on one of Tracy's
5 observations. During the course of the trial, I would
6 still view it as improper for the lawyer or somebody
7 associated with the lawyer to get on that person's
8 Facebook page because of the way that that section is
9 written. There can't be any communication between the
10 juror and the lawyer during the course of the trial. And
11 a post to the Facebook page that, you know -- any change
12 in the Facebook page becomes a communication to everybody
13 that has access to it. Do you understand what I'm saying?
14 I mean, I think there's a point up to which when you're
15 doing your investigation that you can't go beyond as the
16 lawyer because then it becomes a communication during the
17 course of the trial. In other words, it's a two-way
18 street.

19 CHAIRMAN BABCOCK: Right. Elaine.

20 PROFESSOR CARLSON: Well, I think we will
21 redraft. My personal feeling is it's better to have a
22 bright line because I think most lawyers beyond a certain
23 age, since you brought it up, probably just clicked "I
24 agree," and they don't really know whether LinkedIn -- if
25 they look at someone's LinkedIn social media page whether

1 it gives them a message or not or what happens on Twitter.
2 I don't think they just know or care.

3 So if we just have the blanket allowance
4 that you can as a lawyer review -- I would say the
5 veniremember or when they're sitting as a juror, social
6 media that is available without making any kind of access
7 reports, so it's publicly available, that is not an
8 improper communication. It's an anonymous. It's
9 anonymous, but as I understood the committee's vote
10 anything that could lead to disclosing that identity and
11 lawyers would have to know what the different social media
12 platforms, which is like 20 now, then that is an improper
13 communication. That's a bright line, and it kind of
14 relieves lawyers of the requirement of figuring out for
15 every different possible type of social media platform
16 could the juror find out that this is from us. We can't
17 do it. We're simply going to prohibit it. It takes away
18 the benefit to the lawyer of perhaps being able to gain
19 additional information about the juror. So --

20 CHAIRMAN BABCOCK: All right.

21 PROFESSOR CARLSON: And that's what I heard
22 the bottom line being of the votes we took today.

23 CHAIRMAN BABCOCK: Justice Bland.

24 HONORABLE JANE BLAND: Well, I think that's
25 where we get back to Justice Busby and Professor Hoffman's

1 comments about the mens rea, and perhaps what we do is,
2 you know, put an intent require -- where the lawyer
3 intends or knows that the communication will be disclosed
4 or that the juror will be made aware. And that way -- I
5 mean, I voted -- the reason I voted in favor of it was
6 because I thought it was a trap for the unwary, that a
7 lawyer may not realize that their passive search sends a
8 tickler to the juror, and so maybe what we want to do is
9 say the lawyer has to intend or know that the search is
10 going to do something like that.

11 PROFESSOR CARLSON: That's fine, but we
12 don't have yet engrafted in our rules a technical
13 compliance or technical competence requirement.

14 HONORABLE JANE BLAND: Right.

15 PROFESSOR CARLSON: So being stupid is still
16 unexcused.

17 HONORABLE JANE BLAND: Well, and I just want
18 to -- I just want to say why don't we let that -- you
19 know, why don't we make that clear in the rule. I mean,
20 I'm just trying to solve what I think you have pointed out
21 is a serious problem with, you know, the unintended
22 consequence of somebody doing a passive search; and if
23 there is an unintended consequence we shouldn't have
24 lawyers be in violation of the disciplinary rules because
25 of that.

1 CHAIRMAN BABCOCK: Tom.

2 MR. RINEY: I think we need to kind of back
3 up and look at what we're trying to accomplish here. We
4 know lawyers are using social media to investigate jurors,
5 period. Right now we have no guidelines at all. A lot of
6 states do, and I think we need to try to give some
7 preliminary guidance. It's not going to be perfect. It's
8 going to change, and so I think we need to just have some
9 general principles, and I don't see a bunch of people
10 being in front of the grievance committee because they
11 checked someone on LinkedIn, and there was a risk that the
12 person could find out who took a look at it. So I think
13 we need to just try to make some general principles to
14 guide people who want to do it right.

15 A lot of people are like you said, Elaine.
16 They don't have a clue as to what happens when they check
17 a social media page, and they're going to keep on doing
18 it, and maybe that's okay, maybe it's not okay, but I
19 don't think it's horrible. But we have to have some
20 general principles, and I think communicating the idea
21 that if it's not a good idea, you cannot communicate with
22 the juror directly. If they find out you've looked at it,
23 that's a separate category, and I think that's the most
24 difficult one of the three that we're dealing with based
25 on the vote.

1 CHAIRMAN BABCOCK: Okay. Judge.

2 HONORABLE STEPHEN YELENOSKY: If we just put
3 "knew" then we -- you know, I mean, I don't know that we
4 encourage it, but we allow those of us who are older just
5 not to learn it. I think it's taken care of by "knew or
6 should have known," and that's a huge area for the
7 disciplinary committee, "knew or should have known." I
8 imagine that it could be very lax at the beginning and
9 then when you get to the point of -- which we may, as I
10 said, two buttons, then "should have known" becomes a lot
11 clearer, but --

12 CHAIRMAN BABCOCK: And are you talking about
13 (2) or (1)?

14 HONORABLE STEPHEN YELENOSKY: I'm just
15 talking about "know or should have known," (2). Yeah.

16 CHAIRMAN BABCOCK: Okay. Pete.

17 MR. SCHENKKAN: I agree with that, but I
18 think part of our obligation is to move the learning curve
19 along, and I think we should say, "Some of these social
20 media platforms have automatic notice features that will
21 identify you unless you do something about it" and then
22 say, "A lawyer who sends it in this" -- "makes a request
23 in this situation where he knew or should have known
24 knows."

25 CHAIRMAN BABCOCK: Yeah. Yeah.

1 MR. SCHENKKAN: In other words, he's got to
2 find out if that is likely to happen with this one.

3 CHAIRMAN BABCOCK: As somebody pointed out,
4 the algorithms, the technology, everything is changing by
5 the minute it seems like, but anyway, so you've got
6 guidance.

7 PROFESSOR CARLSON: Yeah, we can do that.

8 CHAIRMAN BABCOCK: You've got some votes and
9 you've got some other things --

10 PROFESSOR CARLSON: It's very helpful.

11 CHAIRMAN BABCOCK: -- that you can deal
12 with. So let's take our afternoon break, and we'll be
13 back at quarter of 4:00. Thanks, everybody.

14 (Recess from 3:29 p.m. to 3:48 p.m.)

15 CHAIRMAN BABCOCK: Okay. Here's some more
16 scheduling news. We're going to take up social media for
17 judges in the morning, not now, and we're going to go to
18 the proposed amendments to the protective order kit forms,
19 and tomorrow -- and we'll finish that this afternoon I'm
20 sure, won't we, Richard?

21 MR. ORSINGER: I think so.

22 CHAIRMAN BABCOCK: And so after that in the
23 morning we'll go back to the social media use by judges
24 and then follow that up with forms for an application for
25 injunctive relief in cyberbullying cases. And then,

1 Bobby, on the discovery rules, I hope this won't drive you
2 and your people away, but I think we'll defer that to the
3 next meeting, rather than try to do an hour or so.

4 MR. MEADOWS: When is the next meeting? Do
5 we have a date for the next meeting?

6 CHAIRMAN BABCOCK: We don't have a date. We
7 don't have a committee either.

8 MR. MEADOWS: Well, that's true. I will say
9 this. I personally start trial in California on February
10 the 5th.

11 CHAIRMAN BABCOCK: You're always in trial in
12 California.

13 MR. MEADOWS: But that doesn't mean that
14 Justice Christopher and Bland and others can't carry on.
15 I just --

16 CHAIRMAN BABCOCK: No, you're indispensable.
17 We'll figure it out, Bobby.

18 MR. MEADOWS: But we're ready.

19 CHAIRMAN BABCOCK: I should have asked you
20 first before I told you we were deferring it.

21 MR. MEADOWS: Thank you.

22 HONORABLE JANE BLAND: Oh, no.

23 CHAIRMAN BABCOCK: That stupid rookie
24 mistake for a judge, not to see if you were ready. Okay.
25 So let's go to the protective order kits. And that would

1 be the great Richard Orsinger.

2 MR. ORSINGER: Okay, Chip. Thank you. I'm
3 assisted today by Jocelyn Fowler, who is an attorney with
4 the Access to Justice Commission and who is responsible
5 for making the edits. This is a simple task overall, but
6 it's kind of complicated in terms of details, and so I
7 think we need to talk first about what's in front of us.
8 Now, what's in front of me starts with an e-mail. Oh, I
9 see Trish McAllister is with us, too. She's going to be
10 here as a resource if we need her. It starts with an
11 e-mail dated November 21, 2017, from Jocelyn to me. Does
12 everyone have that? Is that what your package starts with
13 is an e-mail? The memo, okay. The memorandum is your
14 start.

15 Then we have a memorandum that has yellow
16 and green marks on it called "Summary of changes to
17 protective order kit," and this is a highlight of the
18 changes that are reflected in the following explanation
19 documents, or what do we call them here? We have the
20 forms, and we have the samples.

21 MS. FOWLER: Right, yes.

22 MR. ORSINGER: And then, yes, okay. So this
23 is the explanation of the changes that will follow but
24 we're not going to walk through the explanations. They're
25 there if you want to read them, but I think our time is

1 best served if we go directly to the changes in the actual
2 documents that are being used out there in the practice.
3 So I would like to go to the first page that's called
4 "Protective order kit approved by the Supreme Court," and
5 these are not -- they're internally numbered one through
6 three or four or five, but it starts over with each form.
7 So you're going to have to follow along or else you'll
8 lose your place.

9 So the first thing we have is protective
10 orders FAQ, and that's a white page with black print, but
11 it's got blue highlighting, and it's got orange or yellow
12 highlighting on it, protective orders FAQ, upper left-hand
13 corner, "What is a protective order?" A little about the
14 color coding. The blue colors are in the actual form for
15 users to call attention to important titles. The orange
16 or that you see in here is highlighted, those are changes
17 that have been made to the existing forms. So what we
18 probably need to focus on today is the things that are
19 highlighted in orange because you've already seen and the
20 Supreme Court has already promulgated the rest of it, so
21 we're just going to focus on the changes.

22 MS. FOWLER: If I may interject, you
23 received two copies. You received a clean version and the
24 highlighted version.

25 MR. ORSINGER: Uh-oh.

1 MS. FOWLER: So hopefully -- hopefully you
2 printed both. The clean version was just because the
3 highlighting can sometimes be a little unwieldy if you're
4 trying to see what the final version would look like for a
5 user.

6 MR. ORSINGER: If have you a clean version
7 I'll just try to tell you where the colors are if you
8 can't see them on this page. So on this page let me point
9 out that the forms were originally promulgated in 2005,
10 and they were amended in 2012 to reflect changes
11 implemented by the 82nd Legislature. But we've had an
12 83rd Legislature, an 84th Legislature, and an 85th
13 Legislature, but there have been no updates, so we
14 actually have three legislative changes, three rounds of
15 legislative change that have been folded into these
16 amendments, and so we're kind of playing catch-up on the
17 Legislature. Plus there are some changes that are based
18 on the practicalities of the experience of using the
19 forms.

20 So the first change to look at is on the
21 page "Protective orders FAQ." It's the upper right-hand
22 corner, and the title is "Where do I file the forms?" And
23 it was added, second line, second sentence, "You may file
24 the forms in one of three places. The county where you
25 live, the county in which the other person lives, or any

1 Texas county in which the violence occurred." So you want
2 to comment on that?

3 MS. FOWLER: Sure. So that was from the
4 83rd Legislature. There was an addition to Family Code,
5 section 82.0033, which just created an additional venue
6 for filing the protective order, which is the applicant
7 may file in the county where the violence occurred, so
8 that's the new addition, so we added it to the FAQs, and
9 it is also included in the application.

10 MR. ORSINGER: Okay. So then we'll move on
11 from the FAQ to the next segment, which is called "Sample
12 only. Do not file. Protective order application" --
13 "affidavit and declaration forms." So this is the start
14 of the packet, and the first page is an application for
15 protective order, and it's got circles all over it. The
16 circles are there to help the users who are filling these
17 forms out to know what kind of information goes there, but
18 the form itself, of course, has blanks and not circles.
19 This is just a guide to tell you what kind of information
20 to put in the form that has the blanks, and some of the
21 people who use these forms are assisted with professionals
22 who are familiar with the forms. Others are doing them on
23 their own, and so they're having to rely on the forms
24 themselves as well as this explanation form to figure out
25 what the proper information is.

1 So if you have found the application for
2 protective order, the only change on that page is at the
3 very bottom in orange right above "Sample only, do not
4 file" on page one of five. There's the third checkbox,
5 "The Texas Office of Attorney General support division has
6 been involved with the child support case. List the
7 agency case number for each open case, if known." So
8 it's -- you're supposed to say, "Check if applicable." Is
9 there a final order attached? Is there a final order that
10 will be filed before the hearing on the application? Was
11 the AG involved, and if so, what was the case number? And
12 that's in there. Is that statutory, or is that a
13 practical problem?

14 MS. FOWLER: That is statutory from the 83rd
15 as well. Section 82.0045 created requirements that if
16 there was an active IV-D case then the agency case number
17 needed to be included in the application. So it's
18 reflected in the sample as well as the clean version of
19 the application for filing.

20 MR. ORSINGER: So the next change is the top
21 of the next page, and that's page two of five of the
22 application for protective order form approved by the
23 Supreme Court, and the very top line says, "4b,
24 Presumption of family violence." And perhaps you might
25 want to read this closely because there is a little bit of

1 complexity about this. I notice there's a circle on the
2 right that says the judge will assume family violence has
3 occurred if any of these boxes are checked, so what's
4 happening here is that a checking of this box creates a
5 presumption, and I think we need to be sure whether it's a
6 rebuttable presumption or nonrebuttable presumption, but
7 we are dealing in lawyer's terms with a presumption here.
8 Has the respondent been convicted -- oops, I'm going to
9 have to shift over to the other.

10 MS. FOWLER: Oh, yeah.

11 MR. ORSINGER: "Has the respondent ever been
12 convicted or placed on deferred adjudication community
13 supervision for any crime under Title 5 or 6 of the Penal
14 Code. See the list of crimes at the end of the kit." Yes
15 or no. "If yes, say what kind of case," and there's a
16 blank; and then it says, "If the respondent was convicted
17 or placed on community supervision for a Title 5 crime" --
18 and, Jocelyn, help us. The difference between the Title 5
19 crime and a Title 6 crime, do you know off the top of your
20 head? Look it up.

21 MS. FOWLER: I don't -- the list is in the
22 last page of the kit for reference for people filling this
23 out because they're not going to know what the case is.

24 MR. ORSINGER: We will be checking that out.
25 I saw that list here a minute ago, but let's keep on.

1 MR. RODRIGUEZ: On the last page.

2 MS. FOWLER: The very last page.

3 MR. ORSINGER: Very last page.

4 MS. FOWLER: Of the entire packet.

5 MR. ORSINGER: Of the entire packet?

6 MS. FOWLER: Yeah, we put it at the very
7 end.

8 MR. ORSINGER: Oh, so Title 5 crimes look
9 like -- well, I don't know how to characterize these,
10 because all of these top ones are serious felonies, but
11 some of these other ones here are pretty serious, too.
12 So, all right, so they're going to have to cross-refer to
13 5 and 6, but let's go on because the checkmarks are what
14 create the presumption. If -- on convicted after title --
15 pardon me. "If the respondent was convicted or placed on
16 community supervision for a Title 5 crime did the court
17 make a finding that the crime involved family violence?"
18 Yes or no. A "yes" check creates a presumption that
19 family violence has occurred. Do you agree with that if
20 you check it "yes"?

21 MS. FOWLER: So the reason that I needed to
22 edit the bubble in the sample is because it -- and when I
23 reread the statute it's not necessarily "any." It's an
24 "and" test, so there's element -- so there's either the
25 Title 6 crime, the Title 5 -- or the Title 5 crime with an

1 added family violence and the respondent's parental rights
2 with respect to the child have been terminated, and the
3 respondent seeking or attempting to seek contact. So it's
4 an elements test, which is why we need to edit the bubble
5 just slightly to give the user an idea that it's if
6 certain boxes are checked.

7 MR. ORSINGER: So we're looking for three
8 things to be. There has to be a Title 5 violation
9 together with a termination, together with somebody coming
10 in and seeking access.

11 MS. FOWLER: Right.

12 MR. ORSINGER: Okay, but we are not
13 expecting the user to make that connection.

14 MS. FOWLER: Right. This --

15 MR. ORSINGER: It's the court that makes
16 that connection.

17 MS. FOWLER: This is the application, and
18 the purpose is to provide the court with the information
19 the finding, the presumption of family violence really
20 comes in on a protective order under findings. That's
21 where the court makes the determination. The applicant is
22 filling this out.

23 MR. ORSINGER: So the second question is
24 "Was the crime against the child listed in this petition
25 under number (2), 'children.'" So we're wanting to know

1 whether these particular children were the victim or
2 whether it was another child.

3 MS. FOWLER: Correct. The children that are
4 included in the protective order application.

5 MR. ORSINGER: Then "Have the respondent's
6 parental rights been terminated? Is the respondent
7 seeking or attempting to seek contact with this child?"
8 If the right combination of yesses is checked then that
9 tells the judge, whatever it is, that there's a
10 presumption of family violence?

11 MS. FOWLER: Correct.

12 MR. ORSINGER: Okay. So then why is under
13 number (2) "children" is in blue as well as in orange?
14 Why is that?

15 MS. FOWLER: Sorry, that's green.

16 MR. ORSINGER: That's green.

17 MS. FOWLER: That was a notation for you as
18 far as we changed that after the original file.

19 MR. ORSINGER: Okay. Okay. So then moving
20 on down the page, the next change is under about almost to
21 the bottom quarter, last quarter, "The applicant also asks
22 the court to make these orders," checkmark, "to suspend
23 any license to carry a handgun issued to the respondent by
24 the state of Texas." Is that a legislative requirement,
25 too?

1 MS. FOWLER: So that is in response to the
2 84th Legislature which passed open carry law, so it
3 changed the Family Code 85.002, or 022, sorry, striking
4 "concealed," because now we have open carry. Before it
5 said it prohibited concealed -- concealed license, and now
6 it's all license. So we struck that from the -- from
7 everywhere it appeared in the kit as well as conforming
8 all of the language to say "by the state of Texas"
9 rather -- it said something different between the
10 application and the order.

11 MR. ORSINGER: Huh. So if the license to
12 carry is issued by another state, that's not a factor?

13 MS. FOWLER: Technically under state law I
14 believe -- state law of Texas is what the --

15 MR. ORSINGER: Interesting. Okay. So then
16 below that paragraph (k) on page two of five has been
17 added or altered. "Prohibit the respondent from taking,
18 harming, threatening, or interfering with the care,
19 custody, or control of the following pet, companion
20 animal, or assistance animal."

21 MS. FOWLER: That is from the 83rd
22 Legislature, I believe. Yes. The -- there was a change
23 to 85.021(1)(c) and 85.022(b)(7) which just added "from
24 the possession or actual or constructive care of a person
25 named in the order," and we changed that to "taking" or

1 "take" in every place that it existed in the kit.

2 MR. ORSINGER: Pets were previously
3 protected, but the description of the connection between
4 the pet and the applicant is revised?

5 MS. FOWLER: Yeah. They wanted to make --
6 I'm sorry, I'm trying to remember exactly. That was so
7 many years ago now. The -- the reason for the change in
8 the code was to make -- to ensure -- just add an extra
9 level of protection because pets are often unnegotiated --
10 you know, they're something that's used against the victim
11 a lot of times in these cases, and the -- the pet could
12 really be the victim's pet, but it's actually, you know,
13 in the respondent's care at the time, and so this was just
14 adding another -- the actual or constructive care. It
15 already had -- it already had the "harming, threatening,
16 or interfering," so we just added that the respondent
17 can't take the pet from the victim.

18 MR. ORSINGER: So the next change is on the
19 same explanation form, but it's page four of five,
20 paragraph 12. There's a warning that is set out there and
21 says, "A copy of this court document will be served to the
22 respondent with any information that you include available
23 for public inspection, making the box on number 12" --
24 "marking the box on number 12 means that you are asking
25 the judge to order the clerk to remove some addresses or

1 telephone numbers from the final order so that the public
2 cannot see them. If you are requesting this, do not
3 include this personal information in this form or a
4 temporary ex parte form." And I think that's the same
5 language as before but it's been relocated.

6 MS. FOWLER: Yeah, but it is new since
7 the -- new to the current version of -- the current
8 approved version doesn't have this language. And then --

9 MR. ORSINGER: So the warning is new.

10 MS. FOWLER: And then I relocated it.

11 MR. ORSINGER: Okay. The warning is new
12 then, completely from scratch, and the reason is to tell
13 the applicant that if -- you know, probably she, but he
14 wants to keep a residence information or other personal
15 information then they shouldn't put it in the application.

16 MS. FOWLER: Right. So this is not a
17 statutory change. This came from feedback from a court
18 clerk who was concerned that if an applicant marks the
19 "keep confidential" box, they might think that applies to
20 all of their documents when it actually only applies to
21 the final protective order, and so she wanted -- she
22 suggested this language to give an extra warning that if
23 you want your information protected and confidential in
24 the ex parte in the application that you needed to use the
25 correct forms.

1 MR. ORSINGER: Okay. So then the next
2 change, last change on this form, page four of five, is
3 the signature line, and it's circled here, "Sign here or
4 digitized signature is acceptable."

5 MS. FOWLER: And that was a change from the
6 84th Legislature, I believe, that just allowed digitized
7 signatures on protective orders.

8 MR. ORSINGER: So let's move on then to the
9 affidavit. You want to stop?

10 CHAIRMAN BABCOCK: Excuse me. Eduardo wants
11 a question.

12 MR. RODRIGUEZ: How do we go about
13 recommending that the Legislature add in (6)(i) for where
14 it talks about "license to carry hunting gun issued by the
15 State of Texas or any other state"? In other words, if
16 you come from Oklahoma, and you have a license to carry a
17 gun in Oklahoma, this doesn't prevent you from carrying it
18 in Texas.

19 MR. ORSINGER: So that's a question of what
20 does the statutory directive say, because this needs to be
21 consistent with that. I don't think we can reach out
22 there and -- further than the statutes provide.

23 MR. RODRIGUEZ: I know, but I mean, my
24 question is what can we do to facilitate the changes that
25 has to be done the next legislative session.

1 CHAIRMAN BABCOCK: Maybe Trish knows.

2 MS. McALLISTER: Well, I do want to do
3 further research on this. I was actually not involved in
4 this kit, but VAWA, the Violence Against Women Act, has
5 provisions in there about protective orders that are
6 issued throughout the nation, and they have gun provisions
7 in there. So I just want to make sure, because even years
8 ago when I was still doing a bunch of violence work,
9 there's very specific information in VAWA, and VAWA will
10 trump state law on this particular issue, so I just want
11 us to double-check on that --

12 MR. ORSINGER: Well --

13 MS. McALLISTER: -- and make an amendment if
14 we need to that says --

15 MR. ORSINGER: We don't have a timetable
16 right now for the revision of these forms I don't think,
17 so if that's something you do, we could probably get it
18 into this set of forms.

19 MS. McALLISTER: Yeah, I agree.

20 MR. ORSINGER: But the question is going to
21 become in our forms are we going to just concern ourselves
22 with state law, or are we going to recognize preemption by
23 the federal statute Violence Against Women Act and so our
24 form then conforms with the supreme law of the land.

25 MS. McALLISTER: That's the question.

1 MR. ORSINGER: So we probably ought to
2 discuss that at the time. Okay. So then we move on to
3 the affidavit form if you want, and the first change on
4 the affidavit form, page five of five, is in paragraph
5 two. It's orange on some of your copies. "In which
6 county did this happen," and you mentioned that before.

7 MS. FOWLER: Yes, that's been --

8 MR. ORSINGER: We've changed the number of
9 counties where venue is proper.

10 MS. FOWLER: Correct.

11 MR. ORSINGER: Then the next page is on page
12 five of five, but this is the declaration, and it's the
13 same thing, in what county did this happen.

14 MS. FOWLER: Yeah. And then there's this
15 change as well.

16 MR. ORSINGER: And I forgot to mention the
17 green change. Okay.

18 MS. FOWLER: Which is from the 85th
19 Legislature. It's --

20 MR. ORSINGER: Just let me put it in the
21 record. "Describe below in detail how respondent
22 threatened or hurt you, including dates, if possible."
23 That's paragraph (8) on both the affidavit and the
24 declaration.

25 MS. FOWLER: So this is in response to a

1 change to the code. The Family Code 85.025(a-1)(1), which
2 was a result of Senate Bill 712. That adds another basis
3 for a protective order exceeding the normal two-year, and
4 it says, "No charge or conviction for such offense is
5 required for the court to determine extension of the final
6 protective order," and in order to prompt the right
7 information from an applicant for the court to determine
8 whether or not this -- this statute applies, we added some
9 more descriptor language because it's not related to any
10 conviction information. It's just has -- have they ever
11 threatened or hurt you. The first question was in there
12 before. We just added the "describe below in detail to
13 help the court have more information" and added some lines
14 to the document as well.

15 MR. ORSINGER: So just as a point of
16 interest --

17 PROFESSOR HOFFMAN: Justice Christopher has
18 a question.

19 MR. ORSINGER: Oh, I'm sorry.

20 HONORABLE TRACY CHRISTOPHER: I have a
21 question, I mean, on this declaration versus the
22 affidavit; and I know that the reason why you say, you
23 know, "Don't use the declaration if you don't want your
24 address or date of birth to be public information," but
25 isn't there some other way to allow someone to use a

1 declaration without having to go find the notary? I mean,
2 can't -- can't they file like one with the pertinent
3 information in the clerk's office, but then the one that's
4 public would be blacked out? I mean, is something like
5 that possible?

6 MR. ORSINGER: You know, we do have
7 sensitive information that we try to keep track on, and we
8 struggled with this for a long time and really concluded
9 the best thing to do is to direct the applicants to the
10 affidavit if they want to keep their address confidential,
11 but, Trish, what is your idea about creating some kind of
12 two-tiered information system where the declaration
13 information is filed with the clerk to comply with the
14 Civil Practice and Remedies Code, but we make that
15 information secret from the respondent?

16 MS. McALLISTER: Well, I mean, I think in
17 theory that would be a really good thing, but I'm just
18 worried about whether or not that would actually -- I
19 mean, you know, whether or not the clerks would actually
20 redact all of that stuff.

21 MR. ORSINGER: So we might have to have a --
22 I think one solution we used at one time here was to
23 submit sensitive information on a separate piece of paper
24 that the clerk could associate with the pleading, but
25 would not put in the file with the pleadings.

1 HONORABLE TRACY CHRISTOPHER: Right.

2 MR. ORSINGER: But this is going on all over
3 the state. I don't know. I mean, our assessment was that
4 all of the choices available to us, probably the best one
5 was to just say don't give us the information at all if
6 you don't want it to get out.

7 MS. McALLISTER: Yeah.

8 MR. ORSINGER: And that means you need to
9 use the affidavit and not the unsworn declaration and then
10 there can't be any mistakes.

11 MS. McALLISTER: Yeah. I mean, that's my
12 preferred thing. I mean, because people who are seeking
13 this information are very dangerous actually. They're
14 really trying to find where they are, you know, these are
15 ones people get killed.

16 HONORABLE TRACY CHRISTOPHER: Maybe this
17 would be a good legislative change.

18 MR. ORSINGER: Well, you always have --

19 HONORABLE TRACY CHRISTOPHER: To allow this
20 declaration under oath without putting the address and
21 phone number.

22 MR. ORSINGER: For this particular pleading
23 make an exception?

24 HONORABLE TRACY CHRISTOPHER: Yeah.

25 MR. ORSINGER: Yeah. We discussed whether

1 to recommend for the Supreme Court to invoke its repealer.
2 It could. If you want to, if you're willing to, but we
3 can solve the problem practically by just warning people
4 don't use the unsworn declaration. If the Legislature
5 would fix it, that would be great. If the Supreme Court
6 would fix it and is comfortable doing that, that would be
7 great, too.

8 CHAIRMAN BABCOCK: But for the Supreme Court
9 to do it would require the repealer.

10 MR. ORSINGER: It would, but all we're doing
11 is creating a small exception to protect victims of family
12 violence from the perpetrator, so --

13 CHAIRMAN BABCOCK: The Legislature may not
14 feel that way.

15 MR. ORSINGER: You're right. So anyway,
16 that's an option, but the easier option is to just say
17 don't use this form and don't give us the information if
18 you don't want it to leak out.

19 CHAIRMAN BABCOCK: Right. Sensible. Judge
20 Yelenosky.

21 HONORABLE TRACY CHRISTOPHER: But then they
22 have to find a notary and get it notarized.

23 MR. ORSINGER: Yes, they do.

24 HONORABLE STEPHEN YELENOSKY: Yeah, they do.
25 It's the same issue with the cyberbullying, but if they're

1 going to look at this again, why is the address needed for
2 any declaration? Do you know? Does anybody know? I
3 mean, you're doing a declaration in the context of some
4 suit, and if your address needs to be known it's going to
5 be provided somewhere else, right? Or not, if it's
6 confidential. I don't understand that part, but I guess
7 that's for the Legislature. The other point is -- and I
8 just remind, I guess, those folks who do go to the
9 Legislature, if you're trying to provide some
10 confidentiality in these violent situations, there is
11 nothing to protect women, usually women, when they change
12 their names to avoid somebody, because the order always
13 has to have both names, so it kind of defeats the purpose.

14 MS. FOWLER: And I will mention about the
15 confidentiality that this past session in the 85th they
16 amended Family Code 82.011 to -- which really is addressed
17 in the temporary ex parte and the final protective order
18 that allows the petitioner to provide an alternate address
19 for service, and the clerk -- and it's laid out in the
20 temporary and in the final. It did not necessarily, as
21 far as I know, really address the declaration versus
22 affidavit issue.

23 MR. ORSINGER: Okay. So the next thing is
24 to actually take up the blank form itself that's to be
25 filled out, protective order application, affidavit, and

1 declaration forms. The first one we come to is
2 "Application for protective order." It's all blank. It
3 has an orange down on the very bottom. The change was "If
4 completed, check one of the following," and we've
5 discussed this in the previous application. "Copy of the
6 final order," "final order will be filed," or "the AG's
7 office has been involved." We already commented on that.

8 MS. FOWLER: Yeah, correct.

9 HONORABLE TOM GRAY: Quick question.

10 MR. ORSINGER: In fact, I guess we've
11 commented on all of these, haven't we? Yeah, question.

12 HONORABLE TOM GRAY: Under 4a there where
13 that's added, it says, "If completed, check one." Just I
14 don't do this, but it seemed like more than one of those
15 could apply. One of the first two boxes and the third
16 box.

17 MR. ORSINGER: Yeah.

18 MS. FOWLER: Yeah. Thank you.

19 MR. ORSINGER: It's possible that the first
20 and the third might both be checked.

21 HONORABLE TOM GRAY: Yeah.

22 MR. ORSINGER: Or even actually even --
23 yeah, first and third.

24 MS. FOWLER: Thank you.

25 MR. ORSINGER: Okay. Good catch.

1 HONORABLE TOM GRAY: And while I've got you
2 interrupted may I ask another question?

3 MR. ORSINGER: Absolutely.

4 HONORABLE TOM GRAY: On the next page you've
5 kind of already covered it, but why are some of the boxes
6 checked?

7 MS. FOWLER: So the task force -- since the
8 first version in 2005 has always automatically checked a
9 few items that are pretty standard in an ask for -- in the
10 application in the temporary and also in the final
11 protective order. So that that's why. Some of them have
12 been there since the beginning. We did add the one under
13 6(i) this past time because it's already automatically
14 checked in the -- in the final protective order, and it's
15 required under law. So there was no reason to not check
16 it for that.

17 HONORABLE TOM GRAY: What do you mean, it's
18 required under law?

19 MS. FOWLER: If a final protective order is
20 issued the -- the Family Code requires that the person who
21 the order is against, that their license -- their license
22 be suspended, and there's an exception for --

23 HONORABLE STEPHEN YELENOSKY: Peace
24 officers.

25 MS. FOWLER: Sorry.

1 HONORABLE STEPHEN YELENOSKY: Peace
2 officers.

3 MS. FOWLER: Yes, thank you.

4 HONORABLE TOM GRAY: But as a protectee
5 under an order you can't waive that protection?

6 HONORABLE STEPHEN YELENOSKY: No.

7 MS. FOWLER: Right.

8 HONORABLE STEPHEN YELENOSKY: No, I don't
9 think so.

10 HONORABLE TOM GRAY: Bad policy.

11 MR. ORSINGER: So to answer your question,
12 the boxes are checked when they're absolutely necessary.
13 So they just eliminated the possibility of forgetting to
14 check a box when the law requires that it be checked.
15 Now, you could take the check away and just have it as
16 part of the form, which we discussed. There -- because we
17 don't really need a checkmark by the 6 because this is
18 going to be every order, but anyway, the checkbox is to
19 tell them that this is automatically going to happen.

20 CHAIRMAN BABCOCK: Frank wants to make a
21 comment.

22 MR. GILSTRAP: This comes up every time this
23 comes up, but I don't believe the law requires -- requires
24 a check for an ex parte order about firearms. The law is
25 that they can take it away after a hearing. This has

1 always been in here. It's always a problem, but I don't
2 believe -- maybe the state law has been changed, but I
3 suspect this talks about the final order, not the ex parte
4 order, which requires -- which requires a judge to tell
5 the person to give his firearms up without a hearing.

6 HONORABLE STEPHEN YELENOSKY: Well, this is
7 the permanent order, right?

8 MR. ORSINGER: No. This is the application,
9 and it's -- it could support temporary relief or permanent
10 relief.

11 MR. GILSTRAP: And we've got a temporary ex
12 parte order coming up with that checked in it.

13 MR. ORSINGER: So let's carry along the
14 discussion then, if you don't mind, Frank. The question
15 is whether, in fact --

16 CHAIRMAN BABCOCK: No more interruptions,
17 Frank.

18 MR. ORSINGER: We -- you're saying that this
19 shouldn't be automatically checked because it's
20 automatically checked for final orders but not
21 automatically checked for temporary orders?

22 MR. GILSTRAP: Without a hearing, yeah.

23 MR. ORSINGER: Yeah. Okay. So will you
24 make a note of that?

25 MR. GILSTRAP: It's not the temporary order.

1 It's the ex parte.

2 MR. ORSINGER: Ex parte temporary orders.

3 MR. GILSTRAP: Right.

4 MR. ORSINGER: So if you move on through to
5 page four of five of this application, again you'll see
6 changes that we've already discussed in the informational
7 sheet. A copy of this court document will be served. So
8 let's move on to the affidavit. You can see the same
9 changes. "What county did this happen?" "Describe in
10 detail the event or the offense." And the declaration,
11 oh, and of course, there's no warning up here, but I was
12 discussing with Jocelyn a little earlier today that
13 perhaps we should have a warning box in the upper
14 right-hand corner of the declaration saying, "Do not use
15 this form if you want to keep your residence address
16 confidential." And I would prefer that it actually be on
17 the form itself, just in case they skip the instructions
18 and go straight to the form, and they might not realize.
19 They might think that the court could keep it
20 confidential.

21 MR. KELLY: A very minor question is why
22 just -- "in which county did this happen?" Why not say
23 "In what city and county?" Because if it happened away
24 from the home, the person might not know which county.
25 You know, Conroe is actually Montgomery County and not --

1 MR. ORSINGER: But the venue is driven by
2 the county. So if you put in city, you're going to have
3 to know which city the county is in.

4 MR. KELLY: But someone -- you can determine
5 which county it is from the city, but the actual applicant
6 might not know which county it is.

7 CHAIRMAN BABCOCK: Some cities are in two
8 counties. Richard.

9 MR. KELLY: There's that as well, but most
10 aren't. I mean, Houston is in two counties. Some of it
11 bleeds over into Fort Bend, but it just might be helpful
12 for some people who -- if the violence occurs away from
13 the domicile, they might not know which county that, you
14 know, Conroe is in, for instance. Just a question.

15 MR. ORSINGER: So it's a question of would
16 you ask which city and county or just ask which city and
17 rely on the judge to figure out the county?

18 MR. KELLY: City and county. I mean, if
19 someone knows that it's the Harris County portion of
20 Houston, they can say "Houston, Harris County," but if
21 someone says, "I know it happened in Conroe, but I don't
22 know what county that's in" then the judge can fill in
23 "Montgomery County."

24 MS. FOWLER: Just a hypothetical on that.
25 If they only end up putting the city because they don't

1 know the county, would there be a concern that they --
2 that their application might get rejected somehow because
3 they didn't fill out venue proper in their county?

4 MR. KELLY: I haven't thought that through.
5 I don't know.

6 CHAIRMAN BABCOCK: Well, and to take your
7 Conroe example, if they said "Woodlands," it could either
8 be Montgomery County or Harris County, just like Fort
9 Bend, just like Houston and Richardson, so --

10 MR. KELLY: But they might not know the
11 county either way. If all they know is it happened in the
12 Woodlands --

13 MR. ORSINGER: We need to force them to
14 declare --

15 CHAIRMAN BABCOCK: To find out.

16 MR. ORSINGER: -- the county at the time the
17 application is made because if they got the county wrong,
18 they filed in the wrong county and they have no venue.

19 MS. McALLISTER: Right, exactly.

20 MR. ORSINGER: So we have to force them to
21 know when they're filing this out what county it's in. If
22 they don't know, they just have to say, "It happened in
23 Conroe. Do you know what county it is?" And based on the
24 work we did this morning, the clerk will tell them what
25 county.

1 HONORABLE TOM GRAY: Yeah, don't worry about
2 it. We're going to assist them, and we'll figure out the
3 county.

4 MR. KELLY: Is the venue the domicile of the
5 complainant or where the violence actually occurred?

6 MR. ORSINGER: You have three potential
7 venues.

8 MS. McALLISTER: Where the person lived,
9 where the respondent lives, or where the violence
10 occurred.

11 MR. ORSINGER: There we go. Okay. So then
12 the next form is the actual empty form called "Temporary
13 ex parte protective order form with instructions," and
14 page one of three, we have temporary ex parte protective
15 order, paragraph one, "Respondent. The person named below
16 is ordered to follow all orders marked." This is an
17 informational form. No, this isn't a blank form. This is
18 the information form on how to fill it out. And you've
19 added "is ordered to," and why did you do that? Just for
20 clarity?

21 MS. FOWLER: The task force just liked the
22 clarity of it. Because it is an order they wanted it to
23 state it was an order. "It is ordered to." It used to
24 say they must follow all orders.

25 MR. ORSINGER: "Must follow" versus "is

1 ordered to follow."

2 HONORABLE STEPHEN YELENOSKY: To Frank's
3 point, 85.026 of the Family Code says, "Each protective
4 order issued under this subtitle, including a temporary ex
5 parte order, must contain the following" -- blah, blah,
6 blah. "It is unlawful for any person other than a peace
7 officer as defined by" da-da-da, da-da-da-da-da, "who is
8 subject to a protective order to possess a firearm or
9 ammunition"

10 MR. ORSINGER: So that makes it sound like
11 even an ex parte temporary order automatically must
12 contain a prohibition.

13 HONORABLE STEPHEN YELENOSKY: Well, it says
14 that.

15 MR. GILSTRAP: That's what it says.

16 HONORABLE STEPHEN YELENOSKY: That's what it
17 says.

18 MR. ORSINGER: You may have lost, Frank, on
19 that one.

20 MR. GILSTRAP: Well, it's only by -- you
21 know, it's only by a recent act of the Legislature that
22 I've lost, and it's probably unconstitutional. So, I
23 mean, it's unconstitutional --

24 MR. ORSINGER: We're going to stick with the
25 Legislature until the Supreme Court overturns it.

1 MR. GILSTRAP: -- to deprive someone of
2 their rights by simply checking a box.

3 HONORABLE STEPHEN YELENOSKY: Ask that --

4 MR. ORSINGER: I'm glad that Richard --

5 THE REPORTER: Wait a minute, wait a minute.

6 MR. ORSINGER: -- is not here, or he would
7 really go off on this one.

8 MR. GILSTRAP: It happens every time it
9 comes up, and I'm not going to make a big deal of it, but
10 that is the law.

11 MR. ORSINGER: Okay. So we'll go on then.
12 Is that all right? Okay. The next page, page two of
13 three, under (f), the last blank for a description, you
14 know, don't go within 200 yards, workplace or school,
15 check all that apply. Other, you -- here you may give the
16 name and mailing address of another person to receive
17 documents on your behalf.

18 MS. FOWLER: And that again is referring to
19 go the 85th Legislature change that I talked about
20 earlier, 82.001 -- 011, sorry, that allows an alternate
21 address for service of process.

22 MR. ORSINGER: So the addresses of the
23 prohibited locations are -- why would you put your
24 alternate person's? Is that because they might harass the
25 person that's receiving your mail? This is on a list of

1 addresses that the respondent cannot go within 200 yards
2 of, right?

3 MS. FOWLER: These are the -- these are the
4 places that the order would go to.

5 MR. ORSINGER: The order would go to, not
6 that the respondent is prohibited to going to but where
7 the order is going to go?

8 MS. McALLISTER: Where are you guys? I'm
9 sorry. I'm a little lost.

10 MR. ORSINGER: I'm on page two of three of a
11 form that's called -- that's the instruction form for the
12 temporary ex parte protective order form. So we've just
13 been going page after page after page, and now we're to
14 the instruction form on the temporary ex parte order, and
15 on the second page of that paragraph (f) we have what
16 appears to be a prohibition to going to certain addresses,
17 and then below that, "The addresses of the prohibited
18 locations are: Check all that apply." "Applicant's
19 residence," "applicant's workplace or school," or "other."

20 Now, this "other" is not a place where the
21 information is mailed or copies of motions or responses or
22 orders. This is a prohibited location. Maybe this should
23 be in a different place. Unless you're worried that your
24 designee to receive your mail might be harassed
25 personally, in which event you would be 200 yards away

1 from them. See what I'm saying?

2 MS. FOWLER: I do see what you were saying.
3 This was an addition by one of my task force members.

4 MR. ORSINGER: Okay. We're going to take a
5 look at that. We're going to take a look at that because
6 maybe that should be in a different place.

7 MS. McALLISTER: Well, the logical reason to
8 have it there, though, would be the --

9 THE REPORTER: I can't hear you.

10 MS. McALLISTER: The logical reason to have
11 that in there would be if you're designating somebody else
12 because you don't want to put your address down there,
13 you're going to go get your mail from them, so you will be
14 there. So you don't want them not to be -- you don't want
15 somebody just sitting in the driveway, which God knows
16 they do, waiting for you. But, anyway, we should -- we
17 should look into it.

18 MR. ORSINGER: If that's true, Trish, we
19 might ought to rewrite the language, the name and address
20 of the mailing address of the person you have designated
21 to receive documents. Something.

22 MS. McALLISTER: Right, I agree.

23 MR. ORSINGER: Okay. It's a minor tweak.
24 So then let's move on down the page to paragraph (1), and
25 this is the checkbox about not harming pets or companion

1 animals. "Care, custody, and control," that's the wording
2 change, right?

3 MS. FOWLER: The "take" was the addition.

4 MR. ORSINGER: Okay. So that's the end of
5 the sample ex parte protective order form. Now we go to
6 the actual blank form itself that the judge is going to
7 sign, and we've got the -- on page one of the temporary ex
8 parte protective order, "The name below is ordered to"
9 rather than "must" follow the orders. The second page of
10 that form, you can see the green. "Name and address of
11 another person to receive documents." We're going to
12 analyze that location and language. (1) is again
13 protecting the pet, and that's the only changes to the
14 temporary ex parte order form itself.

15 MS. FOWLER: Correct.

16 MR. ORSINGER: So then we go on to the
17 protective order form. This is the final order with
18 instructions, and so we're going to have the circles
19 throughout. There's no changes on the first page. The
20 second page, two of seven, under the statutory grounds for
21 protective order have been established. You have to check
22 either "Family violence against the applicant or children"
23 and "likely to commit in the future" or "under Texas
24 Family Code 81.0015, there is a presumption that the
25 respondent has committed family violence and is likely to

1 commit family violence in the future." So we now have --

2 MS. FOWLER: And that relates back to the
3 paragraph 4b on the application from the 84th
4 Legislature's change to 81.0015, which creates a
5 presumption of the elements of that.

6 MR. ORSINGER: Okay. So bottom line is at
7 the hearing you either have actual evidence of family
8 violence in the past and a likelihood in the future or you
9 have evidence of a preliminary fact that gives rise to a
10 presumption of family violence in the past or probable in
11 the future. Would you agree with that?

12 MS. FOWLER: Under -- for statutory grounds
13 for it, yes.

14 MR. ORSINGER: Okay. So all this is, as I
15 see it, is a statutory inference that would be in addition
16 to direct evidence, but a statutory inference that because
17 of the conviction and determination and an application to
18 have access there's now a presumption that family violence
19 occurred and is likely to occur in the future. Having
20 said that, the question I have in my mind is, is that a
21 rebuttable presumption, or is that irrebuttable
22 presumption, or does it make any difference? You know, if
23 you prove those facts, but it can be conclusively proven
24 that it wasn't family violence -- let's say the grounds
25 for termination was failure to pay child support.

1 Can someone come in and say you can't
2 presume family violence in the absence of evidence of
3 family violence because all I did was fail to support my
4 child for six months? It would seem to me that the
5 presumption should be rebuttable. I don't know if this
6 form needs to get into that, but it worries me a little
7 bit that a judge might just checkbox this because a few of
8 the predicate facts have been proven, even though the
9 evidence might show there was no family violence. Any
10 thoughts on that?

11 MR. HUGHES: This is for an ex parte order?

12 MR. ORSINGER: No. This is the order at the
13 end of the hearing.

14 MR. HUGHES: Oh, at the end of the hearing.
15 Well, the judge is the finder of fact, right?

16 MR. ORSINGER: The judge is the finder of
17 fact unless you have a statute that says if these two
18 facts are proven, three facts are proven, then there's a
19 presumption of family violence, but one of those three
20 facts is terminating the parent-child relationship, but
21 they terminate the parent-child relationship for things
22 other than family violence. So what if the parent-child
23 relationship was terminated for lack of support? There's
24 no violence there. How can you conclude that there was
25 family violence in the past when there's no evidence of

1 it, but the statute says you have to presume it because
2 there was a termination?

3 MS. McALLISTER: I have a question for
4 Jocelyn, which is that a lot of times what will happen is
5 these -- they'll get agreements on protective orders, but
6 they don't want a finding of family violence even though
7 it's clear there's been family violence because it's going
8 to affect the criminal case. So people wind up settling
9 and with -- they'll get the protective order, but they'll
10 not have the finding of family violence, even though
11 that's been statutory for a long time. So my -- my
12 question is, you know, what -- what was the dialogue
13 around that? Is that what this is for, is to allow people
14 to kind of negotiate these deals?

15 MS. FOWLER: No, this is in direct reaction
16 to the addition of 81.0015 during the 84th Legislature.

17 MS. McALLISTER: Okay.

18 MS. FOWLER: That is very, very short and
19 just says, "For purposes of this subtitle there is a
20 presumption that family violence has occurred and is
21 likely to occur in the future if" and then all of the
22 elements. "Respondent has been convicted of or placed on
23 deferred adjudication community supervision for any of the
24 following offenses against the child for whom the petition
25 is filed," and those offenses are either an offense under

1 Title 5 Penal Code for which the court made an affirmative
2 finding that the offense involved family violence or an
3 offense under Title 6 Penal Code, and the respondent's
4 parental rights with respect to the child have been
5 terminated, and the respondent is seeking or attempting to
6 seek contact with the child.

7 MR. ORSINGER: So does this only apply if
8 there's been a conviction or deferred adjudication of
9 Title 5 or 6?

10 MS. FOWLER: Correct.

11 MR. ORSINGER: So there has to be violence
12 if you've been convicted.

13 HONORABLE STEPHEN YELENOSKY: Yeah.

14 MS. McALLISTER: Right.

15 MR. ORSINGER: Under 5 or 6 you did commit
16 violence.

17 MS. McALLISTER: Yeah.

18 HONORABLE STEPHEN YELENOSKY: The
19 termination is just an add-on.

20 MS. McALLISTER: Yeah.

21 MR. ORSINGER: Okay, I get it. So it's okay
22 to have an irrebuttable presumption then because you've
23 already had an adjudication of violence.

24 MS. FOWLER: Correct.

25 MR. ORSINGER: I see. Okay. All right. So

1 then that's the last change on that page. So we go to
2 page three of the actual order we're talking about the
3 judge signing. Paragraph (i) is this is a prohibition of
4 things you can't do and that includes you cannot "take,
5 harm, threaten, or interfere with the care, custody, or
6 control of the following pet."

7 CHAIRMAN BABCOCK: Richard, for the sake of
8 the record, I think it's page two.

9 MR. ORSINGER: That's page three.

10 CHAIRMAN BABCOCK: No.

11 MR. ORSINGER: No, we were on page two where
12 we were talking about whether the presumption is
13 rebuttable or irrebuttable. So page three of the actual
14 order is where paragraph (i) is. (i) and (j) have been
15 changed.

16 CHAIRMAN BABCOCK: I'm sorry.

17 MR. ORSINGER: And (i) is for the pet or the
18 assistance animal.

19 CHAIRMAN BABCOCK: Right.

20 MR. ORSINGER: And I think that was already
21 in there, but it was described differently.

22 MS. FOWLER: It's just adding the word
23 "take" to the -- in response to the legislative change
24 that added actual or constructive care.

25 MR. ORSINGER: Actual or constructive care.

1 MS. FOWLER: Yeah.

2 MR. ORSINGER: Did you delete "actual
3 constructive care" or is it --

4 MS. FOWLER: No. It was never in there. We
5 just added -- we put "take." The task force determined
6 that's the best way to relay that for laymen's term, was
7 to say "take."

8 MR. ORSINGER: So before it was just harming
9 or threatening to harm or steal, but now this is actually
10 taking -- taking is now included.

11 MS. FOWLER: Yes.

12 MR. ORSINGER: Okay. So the next change is
13 in (j), and we discussed it. "Any license to carry a
14 handgun issued to respondent by the State of Texas is
15 hereby suspended." So it doesn't work for other states.
16 If we skip over to page five of the final order to be
17 signed by the judge, paragraph 10, "The court clerk is
18 ordered to strike contact information for protected
19 people, including addresses, mailing addresses, phone
20 numbers, employment, businesses, childcare facilities,
21 schools from public records of the court and maintain a
22 confidential record of this information. The clerk of the
23 court is prohibited from releasing contact information of
24 protected people except to the court or law enforcement
25 for the purposes of entering the information into the DPS

1 information system. It is ordered that all contact
2 information of the protected people is confidential."

3 Now, is that entirely new, or is that reworded from --

4 MS. FOWLER: No. This is an entirely new
5 paragraph in response to the 85th Legislature, the
6 confidentiality statute, 82.011 that creates a new
7 paragraph to address this statute requirement for the
8 requirements of confidentiality for protected people.

9 MR. ORSINGER: So when you say "strike this
10 information," do they just get a big, black Marks-a-lot
11 and go through the file and mark it out, or how do they
12 strike this information? Do we know? Does anybody know?
13 Do they even do it, or is it just a statute that nobody
14 does?

15 MS. FOWLER: Well, it is brand new, so I
16 guess that might remain to be seen.

17 MR. ORSINGER: So this gets back to Justice
18 Christopher's issue before. Is the best way to preserve
19 confidentiality is to not come in at the end of the case
20 and, quote, strike something from a piece of paper that's
21 already been scanned? Maybe the best thing to do is to
22 file that under a separate document that's carried along
23 with the file, but is not ever part of the public file.
24 That's not for us. That's I think for the Legislature to
25 think through, but I'm a little concerned about how you

1 strike information from PDF scans or from pieces of paper
2 that are in a folder. What do you think?

3 HONORABLE TOM GRAY: That part's easy.

4 MR. ORSINGER: That's easy?

5 HONORABLE TOM GRAY: Yeah.

6 MR. ORSINGER: You just use a razor or what?

7 HONORABLE TOM GRAY: If it's PDF, there's an
8 app for that.

9 HONORABLE STEPHEN YELENOSKY: There's an app
10 for that.

11 MR. ORSINGER: And is there a counter-app to
12 undo the app?

13 HONORABLE TOM GRAY: I don't think so, not
14 once you -- I'm sure you can recover it from a file. I
15 mean, a backup file, but the ones I've seen used, once
16 they block it out on the original, it's -- it becomes the
17 substitute for the original.

18 MR. ORSINGER: And do clerks keep paper
19 files anymore, or do they always return or shred, and
20 therefore, we don't have to worry about a paper document?

21 HONORABLE TOM GRAY: That's -- I mean, at
22 our office we've still got some paper, but the bulk of it
23 is scanned, and the original is tossed.

24 MR. ORSINGER: Okay. So the next subpart of
25 item 10, paragraph 10, of this order to be signed by the

1 judge is "It is ordered that the following person is
2 designated to receive notice of documents filed," and this
3 is elective with the applicant if they want to have
4 someone else receive their notices, correct?

5 MS. FOWLER: Correct.

6 MR. ORSINGER: And if the judge decides to
7 go that route, the name and address is put in here, and
8 then next choice is "It is ordered that applicant's
9 mailing address is confidential and shall only be
10 disclosed to the court." This is all a result of that
11 statutory change?

12 MS. FOWLER: Correct.

13 MR. ORSINGER: So on the next page, six of
14 seven, Paragraph 14, copies forwarded, has been added that
15 "forwarded copies of the protective order are to be
16 forwarded not later than the next business day." This is
17 the time deadline that wasn't there before, correct?

18 MS. FOWLER: Yes. It was from the -- I
19 believe it was the 84th Legislature that just mandates
20 that the court clerk shall send copies no later than the
21 next business day. 85.042(a).

22 MR. ORSINGER: Okay. So moving down on 14,
23 added to the list of people to receive copies are the
24 Title IV-D agency if there was a prior proceeding, and
25 then the next one is the judge advocate general at the

1 military installation where the respondent is assigned
2 "whose address is as follows." And are these statutory,
3 or are these practical changes?

4 MS. FOWLER: These are statutory from the
5 85.042(a)(3) and (a-1), that just added those two entities
6 to receive it as well.

7 MR. ORSINGER: Okay. So then the paragraph
8 right beneath, under those, but still within 14, "Any law
9 enforcement agency receiving a copy of the protective
10 order must" -- and this has been added -- "immediately but
11 not later than the third business day enter all required
12 information on the DPS computer system."

13 MS. FOWLER: And that was the 84th
14 Legislature, 86.0011(a).

15 MR. ORSINGER: Moving down the page of the
16 order signed by the judge, paragraph 15, duration of
17 order, the third block has been added. "The court finds
18 that the respondent committed an act constituting a felony
19 offense involving family violence against the applicant or
20 a member of the applicant's family or household,
21 regardless of whether the respondent has been charged with
22 or convicted of the offense." Is that a new statutory
23 ground for a protective order?

24 MS. FOWLER: It is -- not for grounds for a
25 protective order, but for expansion. The normal statutory

1 length is two years, and all of these reasons down here
2 are the basis for the judge to be able to extend the
3 duration past the two years, and that is new from the 85th
4 Legislature, 85.025(a-11).

5 MR. ORSINGER: So the next paragraph says,
6 "If the protective order is scheduled to expire while
7 respondent is confined or imprisoned or within one year of
8 release, the protective order will expire one year after
9 the respondent's release if the respondent was sentenced
10 to more than five years or two years after the date of
11 respondent's release if respondent was sentenced for five
12 years or less."

13 MS. FOWLER: This is from the 84th
14 Legislature that just laid this out as another reason to
15 extend the two-year under 85.025(c)(1) through (2), and
16 that is really mostly -- you know, that is a notice to the
17 judge essentially.

18 MR. ORSINGER: Okay. So we have -- we have
19 the sample fully explained, and we have the identical
20 mirror image changes in the form itself, so we don't
21 really need to discuss them because one for one they're
22 exactly the same, aren't they?

23 MS. FOWLER: You're saying sample versus the
24 filing? Yes.

25 MR. ORSINGER: Yeah. So, Chip, I would

1 suggest that we don't go through the order, the actual
2 protective order, on account of it has identical changes
3 to the application we just discussed. Are you okay with
4 that, or do you want to repeat them? You see what I'm
5 saying?

6 CHAIRMAN BABCOCK: Yeah, I do, and I don't
7 think we need to repeat it.

8 MR. ORSINGER: Okay. Then that moves us on
9 to the respondent information form for protective order,
10 and there were no changes to that.

11 MS. FOWLER: No.

12 MR. ORSINGER: And that takes us to the last
13 page, which is the Title 5 and Title 6 convictions that
14 would trigger the presumption, and that just has a title
15 that's been changed. "List of crimes under Texas Penal
16 Code Titles 5 and 6." How is that different from the
17 existing form.

18 MS. FOWLER: No. This -- I'm sorry, I just
19 didn't highlight the whole thing in yellow because I
20 thought it might blind you all, but that entire page is
21 added after the 84th Legislature, I think, the presumption
22 that we were talking about of family violence.

23 MR. ORSINGER: So when the presumption was
24 added, and it refers globally to Title 5 and 6, there is
25 nowhere in the packet that tells you what a 5 or 6 crime

1 is, so you added the list here at the end of the
2 information packet.

3 MS. FOWLER: Correct.

4 MR. SOLTERO: So that the applicant and the
5 court would know whether it's a Title 5 or Title 6
6 conviction.

7 MS. FOWLER: Yes.

8 MR. ORSINGER: Now, is that all of the
9 changes that we're proposing?

10 MS. FOWLER: Yes.

11 MR. ORSINGER: Okay. Chip, there we are.

12 CHAIRMAN BABCOCK: Okay. Anybody -- we've
13 been making comments as we've gone along. And, by the
14 way, could somebody turn the heat up in here? Isn't it
15 awful cold? Does anybody have any other comments about
16 any of this? Roger.

17 MR. HUGHES: More of an information since a
18 lot of this turns on --

19 CHAIRMAN BABCOCK: Speak up.

20 MR. HUGHES: This is more of a question
21 rather than a comment, but in light of the recent massacre
22 at a local church by someone whose information should have
23 been in a federal database and wasn't in a federal
24 database, when these orders are issued is there anything
25 in the -- the statutory implementation that requires the

1 order to go to the federal database when people try to buy
2 firearms? I thought maybe someone might be aware of that.

3 MR. ORSINGER: You're talking about the
4 state information being fed to the federal system firearm?

5 MR. HUGHES: Yes.

6 MR. ORSINGER: I don't think this covers it.
7 I don't think the order provides for that.

8 MR. HUGHES: I'm just curious.

9 MS. McALLISTER: I don't know. I think
10 that's something for us to find out. I don't know
11 personally. I know it also has to go into the state
12 stuff, but I don't know if that automatically means that
13 the state has to turn it into the federal, but I think we
14 could look at that, especially with the VAWA stuff.

15 MR. HUGHES: I'm just curious.

16 MS. McALLISTER: Yeah. I mean, honestly if
17 it doesn't, that might be something that we would want to
18 talk to the Legislature about. I don't know.

19 CHAIRMAN BABCOCK: Okay. Any other comment?
20 Yes, Judge. Justice Gray.

21 HONORABLE TOM GRAY: One, I can't imagine
22 that the DPS database wouldn't automatically be uploaded
23 into the federal system, but my comment is if there is any
24 way to include in these instructions the -- what the
25 checkboxes mean, I think that could potentially take away

1 a very -- the ignition point for a potential victim,
2 particularly with regard to the firearms. As Frank and I
3 have talked about, that can be the ignition source of a
4 problem if one of these orders gets entered on, you know,
5 October -- or August the 31st, and he's planning on going
6 deer hunting -- dove hunting the next day, something that
7 the applicant did not -- was not able to control needs to
8 be explained in there is what I'm suggesting.

9 In other words, if that is included because
10 of some other -- in other words, what it does is it keeps
11 the victim from being the one that said, "Yes, I asked for
12 your guns to be taken away." Do you understand what I'm
13 saying? I mean, that's the trigger point, is, you know,
14 maybe all he did was didn't pay his child support or
15 whatever the --

16 MS. McALLISTER: Well, I guess what you're
17 saying is that -- essentially what you're saying is don't
18 put a checkmark there because it's going to trigger --

19 HONORABLE TOM GRAY: No, no. No, I am not
20 saying -- if the law says that it's mandatory, it's
21 mandatory. If you don't put a checkmark there
22 automatically then it looks like she did choose it.

23 MS. McALLISTER: Well, that's what I'm
24 saying. It's like if you just took out the checkbox then
25 it doesn't look like she chose it, but we just put the

1 language in there because it's mandatory. I agree with
2 you on that, but I agree with you on that, actually,
3 because stuff like that does trigger lots of stuff to
4 happen, but anyway, I mean --

5 MS. FOWLER: The only problem with that on
6 the application is that the application is requesting
7 relief, and so you would have to --

8 HONORABLE STEPHEN YELENOSKY: It doesn't
9 have to request it if the statute says "every order must."

10 MS. McALLISTER: Right.

11 HONORABLE STEPHEN YELENOSKY: And it does.
12 I have a question, though, on our last point when you're
13 ready.

14 HONORABLE TOM GRAY: I was just thinking
15 even an explanation of "the checkmarks on this form are
16 mandatory" or something of that nature. Anything to
17 ameliorate the ignition point.

18 MR. GILSTRAP: Well, the order may have
19 other things checked.

20 HONORABLE TOM GRAY: Yes.

21 MR. GILSTRAP: You've got some orders that
22 are mandatory in the form, but when the recipient, if
23 that's the proper term, is served with an order, that may
24 not be the only thing checked. There may be four things
25 checked. You see what I'm saying?

1 MR. ORSINGER: But he's talking about the
2 application.

3 MS. McALLISTER: Yeah.

4 MR. ORSINGER: Because if you're a
5 respondent and you've never seen this before, you don't
6 know whether somebody used a black pen to make that
7 checkmark or whether it was in the form itself. And what
8 Justice Gray is saying at least is let's make that a
9 default like it's printed into the form so it's not
10 elective, because we know it's not elective, and nobody
11 can be accused of making the checkmark because you don't
12 have a checkmark.

13 MR. GILSTRAP: Just take the checkmark out
14 and just put it in there without a checkmark.

15 MR. ORSINGER: But Justice Gray wants
16 further an explanation that if you file this at all -- I
17 guess is what you're saying, you're automatically going to
18 disarm this person, but then I would ask is that good or
19 bad because? Then they're going to say you knew that they
20 were going to come take my gun.

21 HONORABLE STEPHEN YELENOSKY: Why don't we
22 just take it out of the application altogether, right, and
23 so nobody has checked it, nobody has talked about it, but
24 the judge has put it in the order; and the judge knows the
25 judge has to put it in the order; and your form order has

1 it there; but there need not be any discussion or notice
2 about it at all in the application unless you want to warn
3 people "Hey, don't file this because they're going to take
4 his guns away"; and I don't think that's a good idea, but
5 Justice Gray may --

6 MR. GILSTRAP: At some point the recipient
7 has to receive notice.

8 MR. ORSINGER: The recipient will receive
9 the order, and that's the notice that the recipient gets.
10 The respondent.

11 HONORABLE TOM GRAY: Isn't that a little bit
12 violative of due process to get it after the -- in the
13 form of an order?

14 HONORABLE STEPHEN YELENOSKY: No. No.
15 Because there isn't any question. It has to be in the
16 order.

17 HONORABLE TOM GRAY: No. Okay, in the
18 temporary TRO, but in the subsequent it doesn't have to be
19 in there because there doesn't even have to be the order
20 entered. You may not win this.

21 HONORABLE STEPHEN YELENOSKY: Oh, if you
22 lose, sure.

23 HONORABLE TOM GRAY: I may come and want to
24 contest the whole thing for one reason, I want to go deer
25 hunting.

1 HONORABLE STEPHEN YELENOSKY: Right.

2 HONORABLE TOM GRAY: I mean, they spend far
3 more than that on a deer lease than the cost of a lawyer.

4 HONORABLE STEPHEN YELENOSKY: So you're
5 saying you need notice that this is important because you
6 could lose your license.

7 HONORABLE TOM GRAY: Yeah.

8 HONORABLE STEPHEN YELENOSKY: Well, I mean,
9 I guess you could write it in the application without any
10 opportunity to check it or not and put an explanation, is
11 what you're saying. Okay. Okay. I understand that.

12 The statute that we talked about the
13 termination and it requires a -- it requires a couple of
14 things, and does the form actually reflect the statute?

15 MS. FOWLER: Can you tell me which one
16 you're talking about?

17 HONORABLE STEPHEN YELENOSKY: Well,
18 presumption of family violence.

19 MS. FOWLER: The 85.0015.

20 HONORABLE STEPHEN YELENOSKY: Yeah, I guess.
21 It says "The judge will assume family violence has
22 occurred if any of these boxes are checked."

23 MS. FOWLER: Oh, are you talking about the
24 instructional bubble?

25 MR. ORSINGER: Yes. The instructional form

1 doesn't reflect that the conjunctive and -- the
2 conjunctive nature. You've got to have A or B and (2) and
3 (3), 1 A or B and (2) and (3).

4 HONORABLE STEPHEN YELENOSKY: Right, but so
5 you're going to change the bubble?

6 MR. ORSINGER: Yes. We have to rewrite
7 that.

8 CHAIRMAN BABCOCK: Any other comments?
9 Everybody wants to get out of here.

10 MR. ORSINGER: This is a good time to bring
11 this up. Everybody is worn out.

12 CHAIRMAN BABCOCK: You know, a little
13 planning here never hurts. Jocelyn and Trish, thank you
14 so much --

15 MS. FOWLER: Thanks for having us.

16 CHAIRMAN BABCOCK: -- for your help and for
17 your work on this thing. It's very much appreciated, and
18 everybody will be back tomorrow? Anybody not going to be
19 here? Well, Trish, you're excused. All of the committee
20 members going to be back tomorrow?

21 MR. RODRIGUEZ: 9:00?

22 CHAIRMAN BABCOCK: 9:00 o'clock. See you
23 then. Thank you.

24 (Recessed at 4:50 p.m. until the following
25 day.

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REPORTER'S CERTIFICATION
MEETING OF THE
SUPREME COURT ADVISORY COMMITTEE

* * * * *

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 1st day of December, 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 \$ 1,919.00.

Charged to: The State Bar of Texas.

Given under my hand and seal of office on
this the 3rd day of January, 2018.

/s/D'Lois L. Jones
D'Lois L. Jones, Texas CSR #4546
Certificate Expires 12/31/18
3215 F.M. 1339
Kingsbury, Texas 78638
(512) 751-2618

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