

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

* * * * *

MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

December 2, 2017

(SATURDAY SESSION)

* * * * *

 Taken before *D'Lois L. Jones*, Certified
Shorthand Reporter in and for the State of Texas, reported
by machine shorthand method, on the 2nd day of December,
2017, between the hours of 9:00 a.m. and 12:05 p.m., at
the Texas Association of Broadcasters, 502 East 11th
Street, Suite 200, Austin, Texas 78701.

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

Documents referenced in this session

17-37 Final Proposed Changes to Code of Judicial Conduct,
11-28-17

1 New York probably has the most extensive.
2 We looked in Texas, and we did find a couple of
3 disciplinary actions and a few appellate opinions that
4 touched upon judicial use of social media. Texas is one
5 of 33 states that does not have a separate judicial ethics
6 opinion, just disciplinary opinions on electronic social
7 media. 17 states have those kinds of opinions, and of
8 course, the American Bar Association and the ABA, of
9 course, have extensive provisions, model provisions. And
10 in addition, we looked at the National Center for State
11 Courts because that has a separate section within it that
12 addresses just judicial ethics independently.

13 So when we looked at what was happening in
14 Texas we ran across maybe about a half a dozen situations
15 where the issue arose. The first one being *Youkers vs.*
16 *State*, which is a Dallas court of appeals opinion, in
17 which a gentleman was up for revocation of probation for
18 apparently allegedly abusing his ex-wife; and the judge in
19 that case was a Facebook friend of the son's
20 ex-father-in-law. They had ran for the same office years
21 previously, but there was no further communication on the
22 Facebook page between them. So when I say "friends" they
23 really weren't friends. Nevertheless, during the
24 proceeding the father-in-law, the ex-father-in-law sent a
25 posting on -- I think it was a posting on Facebook saying,

1 you know, "Please use leniency because he's really not a
2 bad guy." The guy has beaten up his daughter, but
3 apparently he wasn't buying into it or whatever. The
4 judge took a picture of the posting, instructed the poster
5 to take it down and to not communicate further about the
6 case. He made that available to all counsel in the case
7 and the parties, and he also sent it to the judicial
8 commission.

9 Subsequently probation was ordered -- was
10 revoked, I'm sorry, and in a motion for new trial the son
11 said that the judge engaged in improper ex parte
12 communications and so he should get a new trial, and the
13 Dallas court of appeals noted that we really don't have
14 anything on the books about this, but this judge did
15 everything that a model judge would do when faced with an
16 inappropriate communication, ex parte communication,
17 advised the parties, advised the commission, instructed
18 him to take it down and not to further communicate, and so
19 they upheld the denial of the motion for new trial. So
20 it's not really an ethics opinion, but it is an opinion
21 that touches on the subject.

22 And then we have the *In re: Slaughter* case
23 in which Chip was counsel for Judge Slaughter, where Judge
24 Michelle Slaughter apparently ran for office and part of
25 her campaign promise was transparency and keeping the

1 public informed of what was going on in her courtroom, and
2 she maintained a public Facebook page for her courtroom
3 and had on the Facebook page information apparently that
4 would mirror what would be on the court's docket, physical
5 docket. She had a very high profile case coming up in her
6 court, and she posted the following: "We have a big
7 criminal trial starting Monday. Jury selection Monday and
8 opening statements Tuesday morning." After the trial
9 began she posted, "Opening statements this morning at 9:30
10 in the trial called by the press 'The boy in the box
11 case'"; and then she posted "After we finished day one of
12 the case, trustees from the jail came in and assembled the
13 six by eight box inside the courtroom"; and in that last
14 post she included apparently a link to a Reuters article
15 that dealt with that issue, "Texas father on trial for
16 putting boy in a box." The defense counsel filed a motion
17 to Judge Slaughter to recuse. The recusal was granted,
18 and another judge tried the case.

19 HONORABLE STEPHEN YELENOSKY: Did she
20 concede recusal, or was it heard?

21 PROFESSOR CARLSON: I don't think she
22 conceded to the recusal.

23 CHAIRMAN BABCOCK: She did not. It was a
24 second level judge.

25 PROFESSOR CARLSON: Presiding judge, I

1 guess. And then a judicial complaint was filed against
2 Judge Slaughter, and initially she was reprimanded, I
3 guess publicly admonished, and ordered to take additional
4 education on the subject, ethics education; and the
5 initial findings were that her conduct violated 3B(10) and
6 that she was commenting on an impending case and that also
7 her behavior cast reasonable doubt on her capacity to act
8 impartially as a judge and interfered with the proper
9 performance of judicial duties. The court also looked at
10 -- the state commission, I should say, also looked at a
11 couple of other Facebook postings she had. "We have jury
12 deliberating on punishment for two counts of possession of
13 child pornography, probably one of the most difficult
14 types of cases for jurors," parentheses, "and the judge
15 and anyone else," parentheses, "to sit through because of
16 the evidence they have to see. Bless the jury for their
17 service and especially bless the poor child victims." And
18 then on another trial she posted, "We finished up
19 sentencing today with a very challenging defendant." The
20 commission found both of those to be improper statements.

21 She then hired Chairman Babcock and went to
22 the special court of review where that court was convinced
23 that she had not violated any of the Code of Judicial
24 Conduct. None of her posts violated the -- that code
25 because they didn't indicate how she would rule. They

1 were neutral factual statements about publicly available
2 information, so she was completely exonerated, but the
3 court of special review did note the absence of any
4 particular provisions in the Code of Judicial Conduct
5 addressing specifically social media.

6 Then we have a case of James Oakley, who is
7 a county judge in Burnet County. The San Antonio police
8 department posted on their Facebook page a mug shot and
9 then posted this, "Today at 1545 hours Otis McKane was
10 taken into custody for the capital murder of San Antonio
11 Police Department Benjamin Marconi. The arrest was made
12 by San Antonio Police Department and a joint effort with
13 multiple law enforcement agencies. The arrest was made
14 without incident. The San Antonio Police Department would
15 like to thank everyone who assisted in locating the
16 suspect." In response Judge Oakley posted to the San
17 Antonio Police Department Facebook, quote, "Time for a
18 tree and a rope," end quote.

19 Again, an editor of a local newspaper took a
20 screenshot. You know how you take your phone and press
21 certain buttons and you can get a copy of your screen, and
22 then it's basically an attachment if you want to send it
23 out, so it's forever. And disseminated that screenshot,
24 the editor did, to the news media, and of course, that
25 became very infamous. He went before the commission, and

1 they concluded that by posting the Facebook matter Judge
2 Oakley cast reasonable doubt on his capacity to act
3 impartially in the performance of his duty and in
4 violation of Canon 4A(1) and engaged in willful conduct
5 that cast public discredit on the judiciary and the
6 administration of justice in violation of Article 5. He
7 had a public reprimand, and he was ordered to take
8 additional education and ethics.

9 Then we have the famous Johnny Football post
10 by municipal Judge Lee Johnson, who was a Baylor graduate,
11 and he went on Facebook to comment on Johnny Manziel,
12 Johnny Manziel, after the Heisman trophy winner was given
13 a speeding ticket in Ennis, Texas, outside of Dallas; and
14 he was a judge in that town; and his posting was -- didn't
15 use Manziel's name but did refer to him as "a certain
16 unnamed very recent Heisman trophy winner."

17 CHAIRMAN BABCOCK: Who knew?

18 MR. GILSTRAP: It could be anybody.

19 CHAIRMAN BABCOCK: It could be anybody.

20 PROFESSOR CARLSON: He posted "It appears
21 even though the OU defense couldn't stop him, the Ennis PD
22 is a different story altogether. Gig 'em, MD." He later
23 added, "I meant to say allegedly. My bad." So
24 disciplinary charges were brought against Judge Johnson.

25 And then we have another case in Galveston

1 involving Judge Neves of the 10th Judicial District Court.
2 Following a series of high profile shootings and attack on
3 law enforcement personnel nationwide, this judge went on
4 Facebook with a declaration that he planned to ban plea
5 bargains in cases involving assaults and threats to police
6 officers. And he posted, "I may be only one person, one
7 judge, but I will do what I can to stop the disrespect and
8 aggressive behavior against our police officers," and he
9 followed that up with subsequent posts along the same
10 lines, saying that an officer would have to agree to a
11 plea deal before Judge Neves would even consider it and
12 the defendant would have to write a heartfelt apology to
13 the officer and read it in court. That post was shared
14 more than 11,000 times according to this research piece.

15 The Criminal Defense Lawyers Association
16 called this "shocking" and "a breach of impartiality" and,
17 again, sought the commission to proclaim this to be
18 improper, which they did. They said, "Judge Neves may
19 very well have given a reasonable observer cause to
20 question his impartiality, and his Facebook posts signaled
21 an intent to accord different weight to the testimony and
22 members of the law enforcement." So that's what we have
23 in Texas so far that we've found. I mean, I'm sure
24 there's others that we don't have an opinion on.

25 So not much going on insofar as hard, black

1 letter law, and so in August Judge Peeples presented to
2 you our initial proposal, and you'll recall that in that
3 initial proposal there was a proposed ban on a judge
4 making statements about impending or pending cases on
5 social media, period. It was a blanket sort of no-can-do.
6 And then we have lots of very good input from this
7 committee, and our subcommittee has reconvened several
8 times since then, and several of our folks are here. So
9 feel free, Tom, David, Bobby, to chime in any time you
10 want. And we kind of rethought that position because in
11 the back of our mind we're thinking about *Minnesota vs.*
12 *White* and what does that mean in terms of placing
13 restrictions on judge's free speech, particularly a
14 blanket restriction.

15 As you recall -- and, Chip, you're going to
16 have to help me out on this because I'm just a novice, but
17 when you were prohibiting -- the government is prohibiting
18 speech or bridging the freedom of speech, particularly
19 content-based speech, according to *Minnesota vs. White* and
20 other cases, to pass constitutional muster, any
21 restriction on the speech must be necessitated by a
22 compelling state interest, and there must be narrowly
23 tailored the restriction to meet that compelling state
24 interest.

25 So it's a very tough standard, I think, to

1 meet to put a restriction on a judge's right to free
2 speech. So when we look at the second page you'll notice
3 in the first paragraph we added a sentence to that
4 paragraph, "Social media has become a powerful
5 communication device." The last sentence of that says,
6 "The provisions of this code that govern a judge's use of
7 social media, along with the following guidelines, are
8 intended to strike a constitutionally permissible balance
9 between judges' First Amendment rights and a State
10 interest in safeguarding both a right to a fair trial" --
11 which was held to be a compelling state interest in a
12 slightly different context in the footnote to a Nevada
13 case -- "and the State's interest in safeguarding both the
14 right to a fair trial and public confidence in the
15 integrity and impartiality of the judiciary." Those were
16 found to be compelling state interest in footnote 4 by the
17 United States Supreme Court in the *Williams-Yulee vs.*
18 *Florida Bar* case. And, again, it was a different context
19 because the Florida case dealt with a prohibition of
20 judges personally I think soliciting funds, campaign
21 funds, and we don't have that restriction, that same
22 restriction, but they did uphold it saying that that was a
23 compelling state interest to safeguard the right to a fair
24 trial and public confidence in the integrity and
25 impartiality of the judiciary.

1 We also looked back through the transcript
2 and saw a couple of things. People were saying we want it
3 really general or very, very specific, and can you give us
4 some safe harbors for judges; and what we gathered looking
5 through the transcript is that it would be helpful if we
6 had something in our provision that addressed things like
7 what is a judge's obligation to consider privacy settings
8 when using social media? What's the obligation of the
9 judge who uses social media to monitor it? Is a judge
10 when a judge likes something, shares something, endorsing
11 it? Is that a proper endorsement or an emoji, friendly
12 faces? If a judge is friends with a judge -- if a judge
13 is friends with a lawyer who is appearing in his court, is
14 that a basis automatically for recusal? Is that
15 prohibited? It is in Florida, but in most places it's
16 not. Under what circumstances does a judge have an
17 obligation to disclose to counsel, "Hey, I'm a Facebook
18 friend" or "I'm a social media follower of counsel or a
19 party or someone involved in a case," and, of course, what
20 is a judge's ethical constraints on using social media to
21 research things about the case, facts about the case or
22 about the parties in the case?

23 So those were the issues we kind of saw as
24 wanting some more specificity, and so we did our best to
25 meet that. So I think if you go over to -- a lot of this

1 is we took the same language we were using before for the
2 post part and then tried to interject more specific
3 provisions. So if you look at the last paragraph on page
4 two.

5 CHAIRMAN BABCOCK: Note muttering in the
6 corner.

7 MS. GREER: Sorry. Trying to get on the
8 same page.

9 PROFESSOR CARLSON: So you'll notice
10 everything is in 14-point font because I had eye surgery
11 last week, so I decided we all need a little bigger font.
12 So we looked at that last paragraph, "Social media differs
13 from traditional in-person and written communications. A
14 statement, photograph, video, or other contact can be
15 disseminated to large audiences quickly and easily on
16 social media, sometimes without the consent or knowledge
17 of the person who posted the content or any person
18 mentioned or depicted in that content. Postings can also
19 invite response and discussion over which the original
20 poster may have little or no control. Seemingly private
21 remarks can quickly be taken out of context and broadcast
22 in much wider circles than the original poster intended.
23 Content on social media can lie dormant and then be
24 recirculated long after the original posting."

25 That we had in our last version, and I think

1 it's important to repeat it because that's what makes
2 social media different and potentially dangerous, and we
3 think it's important that that be in the comment so judges
4 who might dabble in social media but really don't
5 understand the implications of what they're doing in terms
6 of others being able to access or recirculate or take
7 pictures of or whatever. You need to be aware of that,
8 because I even think there's a good argument for saying
9 that social media -- restrictions on judicial speech on
10 social media really could be considered different from
11 regular speech because of those very rare factors, but I
12 have not found anything that supports that.

13 CHAIRMAN BABCOCK: And I doubt you will.

14 PROFESSOR CARLSON: It certainly crosses my
15 mind, though, that there is that -- particularly the third
16 party aspect of it, but I digress. So the next sentence
17 is a new sentence. "A judge using social media should be
18 familiar with privacy settings and mindful of the extent
19 public access is allowed." We didn't want to say a judge
20 can only have private settings because it's a powerful
21 tool. You know, it's an inexpensive powerful means of
22 reaching a lot of people, and in a state with fully
23 elected judiciary, that's an important thing, right? But
24 we did want judges to be thinking about that, like, okay,
25 if we're going to have public settings, what does that

1 mean?

2 And then we say in the next sentence "If
3 public access is unrestricted," which the judge is free to
4 do, "a judge should use reasonable efforts to monitor
5 their social media." So if you're going to have it open
6 to everybody, you should be upon monitoring it. "In all
7 cases the judge should take appropriate corrective action
8 if others communicate improperly on the judge's social
9 media." That's probably pretty controversial. We cited
10 the Youkers case for that, because that was sort of a --
11 the Dallas court of appeals gave Judge Youkers an A on how
12 he handled the inappropriate posting by, one, documenting
13 it, and, two, making available to the parties, and they
14 didn't say you have to make it available to do that. So I
15 guess I would stop there unless you want me to go through
16 it and then take up concerns.

17 CHAIRMAN BABCOCK: No, I think we can stop
18 there, and I would -- I would add a comment, which I may
19 have said before, so if I have, indulge me and let me
20 repeat myself. As you pointed out, Elaine, any
21 restriction on the judge's speech will be subjected to
22 strict scrutiny by a court applying the First Amendment,
23 and we and the Court are not writing on a blank canvas,
24 because we elect judges in Texas; and because we elect
25 judges in Texas, judges raise money for their election or

1 re-election; and most of the campaign funds that judges
2 raise come from lawyers and lawyers who appear before the
3 judges. And there are a number of studies that suggest
4 that that undermines confidence in the judiciary and the
5 impartiality of judicial decision-making. Improperly so,
6 but that's what a lot of people out in the community,
7 including sophisticated people. I'm sure all of you have
8 had clients, you know, from New York and Minnesota and
9 California; and they said, "Oh, you know, we need to get a
10 politically connected judge."

11 Some of my clients told this story publicly,
12 so I could repeat it. I've been chair of this committee
13 for a number of years, and you remember when the
14 Democratic Senators hightailed it out of Texas to New
15 Mexico to avoid a quorum on a vote that they disagreed
16 with, and the Governor filed a mandamus in the Supreme
17 Court to make them come back; and the Democratic Senators,
18 who should have known better, but they hired me to
19 represent them in the Supreme Court. So I worked on a
20 brief over the weekend, and that night I was talking to
21 them on the phone from their little motel room in New
22 Mexico, and they said, you know, "Mr. Babcock, we just are
23 so grateful that a Republican lawyer like you would
24 represent us in this," and I said, "Well, boys, I hate to
25 tell you this, but I'm a Democrat, and I think everybody

1 on the Court knows that." There was this stunned silence,
2 but they thought that they hired a Republican who had a
3 seat as chair of this committee that, of course, the
4 Republicans would only appoint a Republican.

5 CHIEF JUSTICE HECHT: We didn't know.

6 CHAIRMAN BABCOCK: Huh?

7 CHIEF JUSTICE HECHT: We didn't know.

8 (Laughter)

9 CHAIRMAN BABCOCK: That's not true. You've
10 known that forever.

11 PROFESSOR CARLSON: Keep your friends close
12 and your enemies closer.

13 HONORABLE DAVID PEEPLES: Let the record
14 show laughter.

15 CHAIRMAN BABCOCK: But that's just an
16 example of public confidence in -- you know, because of
17 this elected system we have. Now, that translates into
18 the White case where Justice O'Connor made a point of
19 saying, "Look, boys, if you're going to elect your judges,
20 you can't stop them from talking to the electorate. It
21 might be different if you had a different system, but not
22 when you elect your judges." I say all of that because
23 when we -- when we seek to justify restrictions based on
24 confidence of the citizenry in the judicial process, we
25 are starting from behind, because there is already a lack

1 of confidence because of the way we elect judges, and
2 judges use social media so they can get elected. You
3 rarely see a federal judge -- you know, maybe a handful,
4 like three or four -- using social media, but in Texas
5 almost all of the judges or a high percentage of them use
6 social media, and it's to communicate with the voters
7 for -- rightly or wrongly.

8 And in Judge Slaughter's case and in many
9 others when the Judicial Conduct Commission comes after
10 them, you hear about the chilling effect on free speech.
11 You know, Judge Slaughter did what any one of us would,
12 she took her Facebook page down. I don't know if she's
13 ever put it back up again, but by doing that the
14 commission chilled her speech, and as we ultimately found
15 out from the court, that was an improper approach to it.
16 So I offer those comments because this is an area that I
17 practice in a little bit and know something about and not
18 for any other purpose.

19 PROFESSOR CARLSON: Okay.

20 CHAIRMAN BABCOCK: Judge.

21 HONORABLE R. H. WALLACE: It seems to me
22 that with the First Amendment considerations that
23 depending upon the nature of a post the anti-SLAPP statute
24 could come into play --

25 CHAIRMAN BABCOCK: Absolutely.

1 HONORABLE R. H. WALLACE: -- as well. Say,
2 you know, whatever, because I think they would apply to
3 those type proceedings.

4 CHAIRMAN BABCOCK: No question they would.

5 HONORABLE R. H. WALLACE: I don't know if
6 anyone has asserted that as a defense yet, but --

7 CHAIRMAN BABCOCK: I don't -- that's a great
8 point. I had never thought of that, so --

9 HONORABLE STEPHEN YELENOSKY: Well, it
10 wouldn't apply to the commission. It's unethical.

11 CHAIRMAN BABCOCK: If the commission filed
12 an action in court, maybe it would. That's a little trick
13 I've never thought of, but, yeah, Judge Peeples.

14 HONORABLE DAVID PEEPLES: Chip, will the
15 committee at some point get the benefit of your expertise
16 on how far the law can go to confine a judge's ability to
17 talk about a pending or impending case. The 3B(10) right
18 now says you can't do that if it indicates a probable
19 decision. And I'm paraphrasing.

20 CHAIRMAN BABCOCK: Right.

21 HONORABLE DAVID PEEPLES: And I don't know
22 if you're prepared to talk about that now, but we stayed
23 away from changing the content of that because -- I think
24 the reason was we just felt that we didn't have the
25 expertise that the task force that you chaired, you know,

1 years ago did; and so, I mean, it seems to me that the
2 compelling interests are stated in the footnotes, and
3 there are quotations from Supreme Court cases, and I can't
4 believe that the Court would hold there's not a compelling
5 interest in the integrity of the judiciary and appearance
6 of fairness and so forth; but whether it's narrowly
7 tailored it seems to me would be the more probable
8 inquiry; and I'd just like to know -- I think a lot of
9 people would like to know what you think about where this
10 could go because we are not writing on a clean slate.
11 We're confined by some law on this.

12 CHAIRMAN BABCOCK: Yeah, and the clean
13 slate -- you're right, but we're also -- we have a canvas
14 that's got a lot of painting on it --

15 HONORABLE DAVID PEEPLES: Yes.

16 CHAIRMAN BABCOCK: -- because of the way we
17 elect our judges, and we have a more robust election
18 process than a lot of other states. A lot of states elect
19 their judges, but in our state, I mean, Supreme Court
20 justices raise millions of dollars, mostly from attorneys
21 that have cases in this system. So that undermine -- I
22 think that if you read the opinions, the various opinions
23 in White, that -- that gives us less room as a state to
24 say, oh, we're -- our compelling interest is confidence of
25 the electorate.

1 HONORABLE DAVID PEEPLES: Can I push back on
2 that?

3 CHAIRMAN BABCOCK: Certainly.

4 HONORABLE DAVID PEEPLES: To raise money and
5 politic is one thing, but to comment about cases that I'm
6 either trying or going to try is a different thing. I'm
7 not trying to raise money by doing that.

8 CHAIRMAN BABCOCK: Yeah.

9 HONORABLE DAVID PEEPLES: I may be trying to
10 get my name out there so I've got the better name ID, and
11 people can think "Oh, wow, he tries big cases," and that's
12 politically helpful I guess, but, you know, the need to
13 campaign it seems to me is not qualified and limited by
14 the restrictions on comments about pending cases. That's
15 the main problem that we had with this area.

16 CHAIRMAN BABCOCK: Yeah. Well, a couple of
17 things about that. One, of course, where you draw the
18 line in the Slaughter case makes a great example of that
19 where at least the three-judge panel didn't think she had
20 even come close to the line. In fact, I said I want to
21 brief the -- you know, this is before we had the trial. I
22 said, "I want to brief the constitutional issues," and
23 they said, "Oh, no, no, no, don't worry about that," which
24 was a signal.

25 One other point, the other thing about the

1 White case, you know, was a provision that said you
2 couldn't announce your views on a topic, and announcing
3 your views on a topic might reasonably be thought to
4 signal to how you're going to decide a case, and they said
5 that was unconstitutional, and then our committee
6 appointed by the Supreme Court with the Chief as the
7 liaison and person who participated considered whether the
8 promises clause was also unconstitutional, and I don't
9 know if you want to talk about your concurring opinion on
10 the promises clause or not.

11 CHIEF JUSTICE HECHT: Well, it's -- I think
12 it's complicated because, as I wrote, because the -- you
13 know, for one thing, there are shades and phases. So we
14 say, you know, don't talk about a pending or impending
15 case. Well, we get asked all the time "What's your docket
16 look like this year?" People ask me all the time because
17 they don't know what else to say, I think, "Well, do you
18 have any important cases coming up?" Well, if I say,
19 "Well, we've got Smith vs. Jones, pretty important," have
20 I said that the other 60 cases are unimportant? You know,
21 is that some sort of comment on the -- it's just the
22 routine comments.

23 And you also have to take into account I
24 think the opportunity for recusal, so if there's a
25 question in a particular case then it should be fully

1 remedied by recusal. Just get a different judge. There's
2 a bigger problem than that, which is the public trust and
3 confidence. If a judge says enough things enough times
4 then you get to thinking, well, that's what judges do, and
5 so then it reflects poorly on the judiciary as opposed to
6 one judge who makes a mistake and gets too close to the
7 line on a particular case, and you just -- you just
8 recuse.

9 CHAIRMAN BABCOCK: Yeah. So at the end of
10 the day it looks like the U.S. Supreme Court has perhaps
11 taken a half step back. They decided this Yulee case
12 after the White case, and Justice Scalia was the most
13 ardent of the advocates of judicial speech, and he's been
14 replaced, and there's no -- nobody knows what his
15 replacement will say. So, you know, whether the promises
16 clause goes down is in doubt. If it does, it will be at a
17 very -- by very close vote, I would think, but anyway,
18 enough of that. Yeah, Marcy.

19 MS. GREER: I had a question about the
20 Slaughter case because the comments that the judge made
21 were all fine with me except for one that concerned me a
22 little bit, and I'm wondering how the court dealt with
23 that, which was the comment that the defendant was, quote,
24 "very challenging" because that seemed to me to be a
25 comment about the individual she was sentencing, and that

1 to me seems to cross the line, and maybe I'm missing
2 something.

3 CHAIRMAN BABCOCK: Well, the facts were that
4 this -- this particular defendant during the sentencing
5 spit in her face.

6 MS. GREER: Oh.

7 CHAIRMAN BABCOCK: Which, I might have said
8 something stronger than he was challenging, but it -- you
9 know, she had already sentenced him by the time he spit in
10 her face and apologized, by the way, which she accepted on
11 the record, but I'm not sure I would have been that
12 gracious either, but anyway, that was the facts behind
13 that, and anybody in the courtroom would have seen and
14 agreed. I mean, there would have been no disagreement
15 that this defendant was a challenging defendant.

16 MS. GREER: Well, just because that word
17 seems to be more of a judgment word, and I'm wondering if
18 we're trying to figure out where that line is.

19 CHAIRMAN BABCOCK: Yeah, but you can't --
20 when you're regulating the speech, the government can't
21 start drawing lines like that because then you chill
22 legitimate speech when you do that, in my opinion. Frank.

23 MR. GILSTRAP: Going back to the Slaughter
24 case, all I know is what I've heard about it here, and my
25 impression is that you were prepared to defend the judge's

1 actions under the First Amendment, but that you weren't
2 asked to do that.

3 CHAIRMAN BABCOCK: Right.

4 MR. GILSTRAP: But you would be prepared to
5 say that -- that those actions are permitted, and that to
6 me, that's just horrifying. Let me give you an example.
7 We all saw the O. J. Simpson case redone on TV. If you
8 didn't see it, it was just superb, and imagine Judge Ito
9 at the close of every day comes out and has a press
10 conference. Same thing. I mean, you know, why isn't that
11 covered? And obviously in a -- you can imagine what that
12 would be like in some type of really high profile public
13 case. It would be crazy. Maybe it's protected by the
14 First Amendment, but if it is, good Lord.

15 CHAIRMAN BABCOCK: Well, I think the O. J.
16 case was -- had enough circus-like atmosphere without a
17 press conference from the judge, but that certainly would
18 have added to it.

19 MR. GILSTRAP: Well, certainly it would
20 have. I guess the question is, you know, would -- in this
21 hypothetical situation would Judge Ito's press conference
22 be something that he could be disciplined for or, hey,
23 it's perfectly permitted by the First Amendment because --
24 and I'll change the case -- he's running for election.

25 CHAIRMAN BABCOCK: Yeah. Yeah, Judge

1 Yelenosky.

2 HONORABLE STEPHEN YELENOSKY: Yeah, I don't
3 want to really speak to the law, but the point you made
4 about a press conference is something I wanted to address.
5 I mean, for a long time we've had television, right, and
6 we haven't had much discussion about, I guess, television
7 until White perhaps, but if you imagine everything that's
8 said on social media as an interview or a press conference
9 on television, you as a judge might be a little more
10 circumspect about it. I guess if judges were told that,
11 those of us who grew up in the TV era, that you're not
12 writing an e-mail. You're not just talking to the person
13 next to you. I imagine -- this is a guess. Justice
14 Hecht, if asked in an interview, "Do you have any
15 important cases" he might answer that question. I doubt
16 Judge Slaughter would have said everything she said in a
17 TV interview.

18 I don't know, but that's the way I look at
19 it. It's like going on television, and that doesn't speak
20 to the legal issues, but like you, Elaine, I tend to think
21 there's a difference when you're talking about judicial
22 speech and particularly about cases, and Chip is great on
23 the law, but he's also an advocate for a particular
24 position, and so it's not been decided definitely, has it?
25 Right?

1 PROFESSOR CARLSON: No.

2 CHAIRMAN BABCOCK: No, no question. The
3 issue that Elaine spotted, which is a great issue, and I
4 don't think there is any cases, and I know how I would
5 predict it would come out, and that is whether the method
6 of distribution justifies greater regulation in speech,
7 and, you know, when television came along, you know, we
8 had the fairness doctrine. I mean, there was -- there
9 was --

10 HONORABLE STEPHEN YELENOSKY: Monopoly.

11 CHAIRMAN BABCOCK: In the Red Lion case in
12 the United States Supreme Court, they said "yes" because
13 of the scarcity of the bandwidth and everything, that did
14 justify a greater -- now, that was -- the Red Lion case
15 was because there was less opportunity for speech. The
16 bandwidth for TV stations at the time was very narrow. Of
17 course, now it's much broader than that, so that was a
18 justification on the restriction of speech. The question
19 now is whether or not the fact that if she had said it in
20 a press conference and what I did in my brief was took two
21 and a half pages to construct a speech to the Rotary Club
22 exclusively from the things she said on her Facebook page
23 and underline the stuff the commission was mad about; and
24 if you looked at it that way, it's a speech that any judge
25 would give to the Rotary Club, saying everything, you

1 know, she said. You know, "I had a challenging defendant.
2 He spit on me," and et cetera, et cetera. So will the
3 courts impose greater restrictions on speech because the
4 internet is so widely -- allows such wide distribution? I
5 don't think so. I don't think that's the way the Supreme
6 Court is going, but that's a legitimate question.

7 HONORABLE STEPHEN YELENOSKY: But law aside,
8 I think it says something to judges to think about it in
9 those terms because I think I would be more circumspect
10 about an interview as opposed to even speaking to a Rotary
11 Club. Maybe the law is the same, but if we're trying to
12 signal to judges to be cautious, I think it would be
13 helpful for those of us who grew up in the TV era to think
14 about it in those terms, because law aside, I think of
15 speaking to a Rotary Club, yes, the same rules apply, but
16 there's much greater danger if I went on TV. I would have
17 to be very, very careful because I don't know my audience,
18 for one thing.

19 CHAIRMAN BABCOCK: Right.

20 HONORABLE STEPHEN YELENOSKY: It's a bigger
21 audience. If I'm at a Rotary Club, you know, there's a
22 personal interaction. They can see what you're -- they
23 can read the nonverbal communications, which perhaps would
24 be I'm not judging this person. It's just a fact that he
25 spit on me. Whereas, when it's communicated without a

1 person-to-person that might be considered a condemnation,
2 so I think it's helpful to think about law aside that
3 you're speaking to an unknown very large audience as you
4 would be on TV.

5 CHAIRMAN BABCOCK: Yeah, Roger.

6 MR. HUGHES: Well, I think you're right that
7 the question about whether technology is more than just
8 magnification. It actually changes the nature of the
9 speech. I'm not there yet. I mean, frankly, some of the
10 things people have described judges saying in public
11 media, whatever, those are the sort of things I've heard
12 judges say in court to my face.

13 CHAIRMAN BABCOCK: Yeah, but you're the
14 exception, Roger.

15 MR. HUGHES: Yes, sir. And so it seems to
16 me a little difficult to say, well, if it's in open court
17 and the judge comments on the strength or weaknesses in
18 your arguments or perhaps tips his or her hand about
19 where -- what the likely ruling is going to be, but "Maybe
20 you guys want to go out in the hall and discuss resolving
21 this thing before I rule," you know, if they can say it in
22 open court where any reporter can write it down --

23 CHAIRMAN BABCOCK: It can be tweeted.

24 MR. HUGHES: Yeah, why not. How is that --
25 how does that suddenly become recusal material because it

1 got tweeted or put on a social media page instead of it
2 being that was told to you right there in open court? The
3 one thing I -- one thing I'd go back to, and I'm not sure
4 we can address this at all, it's the problem of people
5 leaving comments on the judge's social media site,
6 because, you know, I don't live in that generation, and so
7 I don't understand the import of some of these
8 communications, but it sure seems to me that the birds of
9 a feather flock together argument seems to paint the
10 person who sponsors the website. You sponsor -- I mean, a
11 social media page, and some quote, "friend," unquote,
12 decides to leave a comment on your web page about a ruling
13 in a case. All of the sudden that comment by that person
14 somehow becomes endorsed by the judge.

15 CHAIRMAN BABCOCK: Yeah.

16 MR. HUGHES: I'm not sure that's true, but I
17 know many people, especially people who work for media,
18 who seem to think that's exactly what it means, that if
19 you left this comment on the website, your social media
20 page, you've effectively endorsed the person. I mean, the
21 judge may totally disagree, but it may be of some value to
22 point out ways that the judge is either not responsible
23 for these kind of comments or can remove them without
24 being perceived as endorsing them. Because I can see -- I
25 mean, people leave all sorts of strange comments. If we

1 go far enough down the road then just leaving a comment on
2 the judge's website is going to be like the Wikipedia
3 opinion where people who want to influence whether the
4 judge could sit on that particular case start leaving you
5 might call fringe comments on the judge's web page.

6 CHAIRMAN BABCOCK: Judge Slaughter had a
7 disclaimer on her Facebook page that said, you know, the
8 comments don't reflect my opinion and disregard them, and
9 then when somebody put an incendiary comment on she told
10 them to take it off or maybe she took it off, but it
11 disappeared. Yeah, Justice Gray.

12 HONORABLE TOM GRAY: You may remember that
13 we had a subcommittee look at -- specifically my comments
14 are directed to the last two sentences that were added to
15 this draft. But the other subcommittee looked at what is
16 the judge's obligation to take corrective action, and
17 you've cited a case, the Youkers case, Youkers maybe, but
18 the -- my concern is that was a very troubling methodology
19 on how we fix things and the burdens, and while that
20 particular procedure used by that particular judge in that
21 particular circumstance may have been viewed with favor
22 both by this subcommittee and the commission, I think we
23 all realized that that litany -- excuse me, litany of
24 procedure could not be applied to every social media
25 comment, and so the burden of doing that would kill the

1 ability.

2 I mean, from -- I don't do this, so it
3 doesn't impact me as a judge on any of this. So, you
4 know, to me elections and recusals can fix anything, and I
5 understand the perceived need to restrain members of the
6 judiciary from public comment and debate, but I think
7 there's other ways to get to it, but given that, I'm very
8 concerned with this particular draft about referencing the
9 case as being the -- by default, the appropriate
10 corrective action that the judge is supposed to take, and
11 the commission's ability to use that as a -- as a judge
12 that failed to take that corrective action in their
13 zealous protection of their territory.

14 CHAIRMAN BABCOCK: Justice Christopher.

15 HONORABLE TRACY CHRISTOPHER: I agree with
16 Justice Gray. I think the last two sentences of that
17 paragraph at the top of page three should not be in the
18 draft. I -- to say, yes, you should be mindful about a --
19 to the extent public access is allowed could be used as a
20 reason to discipline you if you do allow public access.
21 So I think that's bad, and I want to talk about these
22 reasonable efforts in terms of corrective action.

23 Okay. So in Facebook if someone just writes
24 something -- let's give this Youkers example guy. All
25 right. And someone could say, "My son is on trial, and

1 he's a good guy, and the judge ought to give him
2 probation." Right? Post it. That judge may never see
3 that. Okay. May never see that, because it didn't have
4 his name linked in it somehow that it would pop up on that
5 judge's Facebook page. Okay. Because, you know,
6 Facebook, you don't see everything that people post to
7 you. I don't know if people are aware.

8 HONORABLE STEPHEN YELENOSKY: No, explain
9 it, because a lot of us aren't on Facebook. For good
10 reason.

11 HONORABLE TRACY CHRISTOPHER: So I'm friends
12 with 500 people roughly, and -- which is small. Some
13 judges are friends with 2,000 people or 5,000 people, and
14 on any given day all of those people may have posted
15 something. All right. But Facebook chooses through some
16 sort of algorithm to only show in my Facebook feed certain
17 of the posts. They -- after you've liked a few things or
18 even if you pause on something, okay, like if you're
19 scrolling, scrolling, scrolling, and you pause, they will
20 know that that interested you, okay. So if you've liked
21 something or you've paused on something, they will then
22 the next day you turn on your Facebook feed there will be
23 more things connected with what you liked or paused on.
24 So as a result, you know, certain things will come up on
25 your Facebook feed and certain things won't. Now, in the

1 Youkers case I don't know how this exactly happened, but
2 for example, there is also a way for you to say, "I'm in
3 trial in Judge Tracy Christopher's court." And, you know,
4 "I want her to give my son leniency." Well, that might
5 make my Facebook page because -- feed because it has my
6 name in it. It might, it might not.

7 PROFESSOR ALBRIGHT: And she might click to
8 you.

9 HONORABLE TRACY CHRISTOPHER: And I look at
10 my Facebook maybe once a day. When I'm busy, maybe once a
11 week, and your feed is constantly refreshed, right? So
12 that comment even with my name in it could be buried way
13 down at the bottom of my Facebook feed, and, you know, if
14 we put in that I have to monitor it and I have to use
15 reasonable efforts, that strikes me as requiring me then
16 to check it every hour because that is how fast your
17 Facebook feed moves and gets replaced. Now, if I post
18 something I -- and people comment on my post, that's
19 something that I can review and look at. All right. So
20 that's a little different thing than this case where
21 someone puts some -- something into the Facebook that
22 might mention me or might mention a case in my court.

23 So those are two very different things, but
24 even in connection with something that I post -- so, for
25 example, during my last campaign I did Facebook

1 advertising, okay, which is different from my Facebook
2 page. All right. And I have a personal page, and I have
3 a campaign page and then I have -- you do Facebook
4 advertising. Okay. And when you do Facebook advertising,
5 it goes to everybody. It doesn't go just to your friends.
6 And, you know, allegedly my campaign consultant says,
7 "Well, I'm going to target," you know, blah, blah, blah,
8 blah, "through your Facebook feed." Again, this is all
9 part of this Facebook algorithm thing that -- so that they
10 try to find -- well, first of all, they would target
11 people just in my 10 counties, and then they would try to
12 target people, not Republicans, so if -- and they know if
13 you're a Republican or a Democrat pretty much by what
14 you're liking.

15 CHAIRMAN BABCOCK: Yeah, Supreme Court
16 doesn't know, but --

17 HONORABLE STEPHEN YELENOSKY: You're not on
18 Facebook.

19 HONORABLE TRACY CHRISTOPHER: By what you're
20 liking. So this particular advertisement allegedly was
21 trying to go to Democrats, and it did actually because I
22 could tell by all of my Democratic friends that were
23 liking it that it appeared to be going more to Democrats
24 than to Republicans, so that was kind of an interesting
25 exercise. But so one person made kind of a nasty comment,

1 it wasn't terrible, but it was kind of a nasty comment;
2 and I was like, oh, my God, somebody is saying something
3 bad about me. I was like, oh, oh, what am I going to do;
4 and this goes to something else in this draft that I also
5 disagree with, right. So the -- I'm talking to the
6 campaign guy, what do I do, what do I do with this nasty
7 comment; and they're like, well, there are two things you
8 can do with this nasty comment. You can remove it, or you
9 can hide it. Okay. And if you remove it, the person who
10 posted it, if they come back and check it again they will
11 see that it's removed, and it might make them mad and they
12 post some more. If you hide it then it still looks to
13 them as if it's there, but it doesn't show up for the rest
14 of the people looking at the ad.

15 CHAIRMAN BABCOCK: Gee.

16 HONORABLE TRACY CHRISTOPHER: I'm like, "Oh,
17 well, let's hide it." And I said, you know, you know, how
18 do I -- what are we going to do about future comments, and
19 then they're like, well, we can monitor your Facebook page
20 at a cost of a thousand dollars a day or something similar
21 to that, or you can do it yourself. We'll tell you how to
22 hide the comments, right.

23 HONORABLE STEPHEN YELENOSKY: Doesn't it
24 violate their First Amendment right?

25 HONORABLE TRACY CHRISTOPHER: The hiding,

1 the hiding of the comments? I don't know. So the idea,
2 first of all, that, you know, I have to have a campaign
3 committee or, you know, somebody else operating my website
4 is just unrealistic in terms of expense. So, I mean, you
5 know, lower court judges don't raise millions of dollars.
6 Okay. We don't, and especially intermediate appellate
7 court judges. We raise less than trial judges, because,
8 you know, trial judges are more important than
9 intermediate appellate court because they have your case
10 in their hands right away. So it's -- you know, to say
11 that I'm under some obligation to have some third party
12 monitoring this at a huge cost is to me also wrong.

13 So, yes, if someone sends me something
14 directly targeted to me that I see then I should take
15 corrective action. Okay. I should take corrective
16 action, and I should do a screenshot of it. I should, you
17 know, tell everybody "Don't do that again," but there's a
18 high probability that I won't see something unless it's
19 really, really targeted to me, which in -- on Facebook
20 world means a note that goes directly from Joe Blow to
21 Tracy Christopher. And, you know, that probably won't get
22 lost in my Facebook feed, but it could if it's old enough;
23 and so, yes, if I see it, I should do something about it;
24 but to impose a duty of reasonable efforts to monitor
25 would eviscerate your ability to use Facebook.

1 CHAIRMAN BABCOCK: Pete.

2 MR. SCHENKKAN: Tracy --

3 CHAIRMAN BABCOCK: Pete, the right-winger,
4 sorry.

5 MR. KELLY: I want to go next.

6 MR. SCHENKKAN: You have given me a lot of
7 reasons to vindicate my decision to stay off Facebook, but
8 I have a question about -- I understand your choice
9 personally, and I certainly understand your need
10 campaignwise. It's obviously far and away more cost
11 effective than it is to go on television.

12 HONORABLE TRACY CHRISTOPHER: Right, which
13 you can't. I mean, you just can't have the money for
14 that.

15 MR. SCHENKKAN: But I wonder is it possible
16 for -- at least as to your personal, for one to tell
17 Facebook -- and I don't mean the company obviously -- to
18 use some aspect of the system to screen out from you posts
19 that have certain content, thus, you know --

20 HONORABLE TRACY CHRISTOPHER: Probably. But
21 you --

22 MR. SCHENKKAN: And how hard is that?

23 HONORABLE TRACY CHRISTOPHER: But you have
24 to know what it is before you say, "Don't show me this
25 again."

1 MR. SCHENKKAN: I guess that's then the
2 question. Can you preemptively do some kind of screen
3 that at least improves the odds that posts that relate to
4 what you're doing in your court job won't show up to you?
5 Is that just not possible?

6 HONORABLE TRACY CHRISTOPHER: I don't think
7 it's possible.

8 CHAIRMAN BABCOCK: Peter, the left-winger,
9 and then Judge Wallace.

10 MR. KELLY: I don't want to comment on
11 Justice Christopher's devastatingly effective Facebook
12 campaign, but there is a problem that a friend of mine who
13 was running for a district court in Houston -- and when
14 you're a candidate and you have a campaign page you're
15 promiscuous in your friendship. Anybody who wants to like
16 your page, you like back, you let them be your friend, and
17 so you meet someone at a campaign event, and it was a
18 right-wing -- and someone started posting on his time
19 line, and it was a pro-Israeli, right-wing Israeli group,
20 and he didn't know what to do about it.

21 Can I remove this? Well, if I remove it and
22 I'm elected, well, then I would be recused for being
23 anti-semitic. Could this be construed as an anti-semitic
24 act and then later come back and haunt me if I'm actually
25 elected? So the actual act of removing a post can be

1 construed as a communicative act or a comment on potential
2 litigants in -- if someone posts a Black Lives Matter
3 something on your feed and you take that off consciously,
4 does that mean you are passing judgment on Black Lives
5 Matter or a pro-Israeli group? So the actual act of
6 editing your feed can be -- has implications. So putting
7 a duty to edit your feed will create more problems.

8 CHAIRMAN BABCOCK: Yeah. And apparently he
9 didn't know about hiding it.

10 MR. KELLY: Did not know about hiding it,
11 but even that's an act, right, by, you know, saying you
12 don't want to be associated with Jewish groups then it
13 could be construed, and that could later come back to
14 haunt you.

15 CHAIRMAN BABCOCK: Okay. Judge Wallace, and
16 then Roger.

17 HONORABLE R. H. WALLACE: There's a
18 difference between Facebook and a website, too. I mean,
19 Facebook you're -- all of these problems. You can create
20 a website and it not be interactive. Nobody can put
21 anything on it. Nobody can post anything. All you do is
22 just put on it what you want to put on it. Now, there's
23 probably not as accessible and not that many people can
24 find it, but I know in my last campaign I had a
25 noninteractive website. We put on it whatever we wanted,

1 but nobody else could post anything, but Facebook I doubt
2 that you could do that.

3 HONORABLE TRACY CHRISTOPHER: Well, I mean,
4 you can prevent people from posting directly to your page.
5 Okay. You have a -- you can do a privacy setting that
6 prevents people from posting directly to your page, but so
7 then if they want to send you a post, it goes into
8 messenger, you know, so if they post something to you, you
9 know, and they've limited it to certain people and you
10 don't allow them to post it on the page then it posts to
11 Facebook messenger, which is a more direct post, which I
12 hardly ever look at. Again, you know, it's the sort of
13 how much of an effort -- you would literally have to be on
14 it all day long to make sure something inappropriate
15 wasn't being posted.

16 CHAIRMAN BABCOCK: Yeah, by the way,
17 yesterday John Browning I thought said that if you look at
18 somebody's Twitter feed that the -- that person knows
19 you're looking at it.

20 PROFESSOR CARLSON: He did say that.

21 CHAIRMAN BABCOCK: My millenium daughter
22 last night told me that that is not right.

23 PROFESSOR CARLSON: Justice Boyd.

24 HONORABLE JEFF BOYD: Which, by the way, it
25 occurs to me all of this great work is going to be

1 outdated a year from now because now it's -- you know,
2 it's Facebook. When I run in 2020 Facebook may not even
3 be relevant.

4 CHAIRMAN BABCOCK: Passe'.

5 HONORABLE JEFF BOYD: Yeah. It's all, you
6 know, Instagram, Twitter still. Snapchat --

7 CHAIRMAN BABCOCK: Snapchat.

8 HONORABLE JEFF BOYD: -- is really bigger,
9 and all of those create --

10 MR. PERDUE: For your demographic.

11 HONORABLE JEFF BOYD: Yeah. I've got three
12 millennial. So each of those creates its own unique user
13 interaction problems.

14 PROFESSOR CARLSON: Yes.

15 HONORABLE JEFF BOYD: You know, Snapchat
16 disappears. Once you look at it, it's gone. So --

17 CHAIRMAN BABCOCK: Spoliation.

18 HONORABLE JEFF BOYD: Yeah.

19 MR. GILSTRAP: What are those problems?
20 Because, you know, my impression of Twitter is that it's a
21 one-way deal, you know, and so that -- that's like a press
22 release. That should -- the problem we're dealing with
23 here is interaction.

24 HONORABLE JEFF BOYD: Well, but Twitter, if
25 I tweet out something, and it can be a link or a picture

1 or just words, I can tweet out anything.

2 HONORABLE STEPHEN YELENOSKY: Or video. A
3 video.

4 HONORABLE JEFF BOYD: Anybody that wants to
5 see what I tweet can choose to follow me and so if I tweet
6 something that's going to come up on their feed when they
7 open Twitter they'll see what the people they're following
8 have tweeted. They'll see that I've tweeted something
9 about, you know, the Court has conference next week.

10 CHAIRMAN BABCOCK: In important cases.

11 HONORABLE JEFF BOYD: No, all I say is, you
12 know, "working hard for conference next week," and then
13 they can comment on my tweet or they can retweet it or
14 reply to it or retweet it with comments and say, "Well,
15 you better do the right thing in the Jones case."

16 CHAIRMAN BABCOCK: Right.

17 MR. GILSTRAP: They can --

18 HONORABLE JEFF BOYD: Now, I can control
19 whether they do that.

20 MR. GILSTRAP: They can change it and make a
21 comment and relay it onto other people.

22 CHAIRMAN BABCOCK: But I think what Browning
23 was talking about was if you're a follower then you can
24 interact, but if you're just looking at it, you're not.

25 MR. GILSTRAP: Yeah. What we're talking

1 about, from what I'm hearing, is stuff that comes back to
2 the judge's Facebook page, which strikes me as, you know,
3 the judge is not in control of that whereas --

4 CHAIRMAN BABCOCK: Same thing as what he's
5 talking about.

6 MR. GILSTRAP: -- the tweet it seems like
7 the judge is largely in control. Am I wrong?

8 HONORABLE JEFF BOYD: Well, like Justice
9 Christopher said, there's really two kinds of pages.
10 There's the Facebook page that, you know, everybody
11 started creating 10 years ago.

12 PROFESSOR CARLSON: Public.

13 HONORABLE JEFF BOYD: Where it's just Jeff
14 Boyd, and it's got my family, and it's my personal page,
15 and I can set the privacy setting so that anyone wants to
16 be my friend sends me an invite and I accept it, or I can
17 send them an invite, and if we agree to be friends then
18 everything I post on mine they see when they get on their
19 feed, and anything they post on theirs I see when I get on
20 my feed, but then you can have -- and I don't even know
21 what they call it. Like your campaign page.

22 CHAIRMAN BABCOCK: Public Facebook page.

23 HONORABLE JEFF BOYD: It's an organizational
24 page. So, you know, the Domain Shopping Center can have a
25 Facebook page or a church can have a Facebook page, and

1 you don't have friends for that. You have followers or
2 likes. So they can't post anything on that. They can
3 comment on what I post, but there is no feed. When I get
4 on my campaign page there's no feed. It's just anyone who
5 has liked it can see what I post, but I'm not looking at
6 what they've posted unless it's a comment. So there's two
7 different ways that works. But and each one of these --
8 Instagram is completely different than that. Each one of
9 them is going to be different.

10 PROFESSOR CARLSON: And that's why we were
11 trying to write things very generally --

12 HONORABLE JEFF BOYD: Yeah.

13 PROFESSOR CARLSON: -- because we started
14 looking at all the different platforms.

15 CHAIRMAN BABCOCK: Roger had his hand up and
16 then Justice Busby.

17 MR. HUGHES: Well, I think this discussion
18 is very useful, but it still gets -- and I'm sensitive to
19 the comment that maybe an open-ended, you know, duty or an
20 obligation to use reasonable efforts sort of leaves a
21 judge hanging out there, what does that mean, what's
22 reasonable. My only suggestion is perhaps the rule ought
23 to endorse a -- some sort of simple, bright line
24 prophylactic that if the judge posts a disclaimer on their
25 website that I'm not responsible for some fringe group's

1 posting to my site or somebody -- you know, some internet
2 troll leaving outrageous comments. I do not -- I don't
3 endorse that.

4 I also think -- and maybe I'm not
5 sufficiently clear about First Amendment privileges, but I
6 think if it's the judge's Facebook page, the judge ought
7 to be able to say, "I'm removing this comment," and that's
8 enough said and that that is not the judge's comment or an
9 expression of belief because at that point you get into
10 what I was talking about earlier. You know, the judge --
11 the judge has respectably remained silent, just removed a
12 comment from his or her own web or Facebook page. It's
13 the rest of the world that's deciding what that action
14 means, and I'm not sure that if we're going to, so to
15 speak, imprison the judge in that way to say your audience
16 will determine what your action means and their
17 determination will become a basis for sanction. I think
18 that essentially tells the judge, well, then you take your
19 life in your hands when you have one of these, because you
20 really won't be able to halt the trolls and the flammers
21 from posting whatever they like, and whatever they say
22 will be pasted on you, and there will be nothing you can
23 do about it. I just can't -- and especially when some of
24 those people are doing it as a litigation strategy.

25 CHAIRMAN BABCOCK: Right. Justice Busby,

1 and then Skip.

2 HONORABLE BRETT BUSBY: I had a couple of
3 observations and suggestions, but are we going to go
4 paragraph by paragraph at some point or --

5 CHAIRMAN BABCOCK: I think probably so.

6 HONORABLE BRETT BUSBY: Okay. Well, I'm
7 happy to save them then for when we go seriatim rather
8 than -- because they're not overarching comments. They're
9 specific.

10 CHAIRMAN BABCOCK: Skip, then Justice
11 Christopher.

12 MR. WATSON: Elaine, I'm just curious about
13 the comment in the paragraph that we've been discussing
14 that the judge should be familiar with privacy settings.
15 Okay. I'm not sure what that's saying, and I'm not sure
16 if it's an admonition to limit the people that can see the
17 page or if it's an admonition to open it up. If I'm
18 before a judge, I would like to be able to see, you know,
19 have access, to his feed or his wall or whatever it is, to
20 see not only that someone has posted and he has left up a
21 comment so-and-so and such-and-such trial should burn in
22 hell, but I also want to see if he gave it a thumbs up,
23 you know.

24 And it's almost like saying, no, hide what
25 your feelings really are and that you're -- and hide your

1 communication, which to me that is a communication ex
2 parte -- from the world. And on the other hand, it could
3 mean that, whatever you call it, where, you know, the
4 thing I use is when my wife tells me, you know, you need
5 to be friends with this person, and I start getting 600
6 recipes a day. Well, there is a way to go in and rather
7 than unfriend that person just say, "I don't want to see
8 what she posts anymore," you know, as long as I live, I
9 don't want to see another post from that person.

10 PROFESSOR CARLSON: There is a way to do it.
11 I have to ask my son-in-law.

12 MR. WATSON: And that may be what you're
13 talking about, but I can see some of these generalizations
14 kind of going both ways and not really giving me any
15 guidance or giving a judge guidance, and I'm not being
16 critical in saying that. It's just that in trying to
17 avoid a bright line that would -- might cause, you know,
18 consternation on one side or another, I'm not sure I'm
19 being helped, and, in fact, my feeble brain is getting
20 confused.

21 CHAIRMAN BABCOCK: Justice Christopher.

22 HONORABLE TRACY CHRISTOPHER: Judge
23 Slaughter has not been deterred from posting on Facebook.

24 CHAIRMAN BABCOCK: Ah, there we go.

25 HONORABLE TRACY CHRISTOPHER: And I want to

1 give you an example of something she posted. She posted
2 Wednesday -- and some of the comments she received to her
3 post for people to think about as to whether the judge has
4 some duty with respect to those comments. Okay. "So
5 today I learned that my opponent suggested to others that
6 I am not tough enough on criminals. One only has to look
7 at the publicly available judgments where I decided the
8 punishment to find that suggestion is false. I'm known as
9 a fair judge. I ensure both sides get a fair trial and
10 constitutional rights are protected." So far good. "I
11 always consider all of the facts and the full range of
12 punishment and treat each case individually, but I'm known
13 as one of the toughest judges around when it comes to
14 punishing violent and repeat offenders. In fact, I can
15 only think of one time in the first few years where a
16 defendant voluntarily came to me instead of going to the
17 jury for punishment, and in that case, *State V. Saenz*, the
18 defendant pleaded guilty to two counts of aggravated
19 robbery and came to me for a punishment hearing. After
20 considering all of the evidence presented at the
21 punishment hearing I sentenced the defendant to 40 years
22 in prison on one count and 30 years on the second count.
23 The opinion affirming my decision is attached," and then
24 she links to a court of appeals opinion, and I haven't
25 seen whether Judge Jane -- Judge Bland or me are on that

1 particular affirming.

2 So she's gotten a lot of comments. Most of
3 them are "You're great," "You've got our vote," you know,
4 everything --

5 CHAIRMAN BABCOCK: Democracy in action.

6 HONORABLE TRACY CHRISTOPHER: Right. Okay,
7 but then one person says, "Yet criminals call your
8 courtroom the Slaughter house." Somebody responds to
9 that, "What? That is awesome." Someone else says, "That
10 is a little extreme for a campaign slogan, though." Then
11 the judge agrees. Okay, so I'm not sure -- I think she's
12 agreeing to it's a little extreme for a campaign slogan,
13 and then the person posts again "Fair trial doesn't equal
14 lenient sentence." Okay. So if we go back to our
15 original post, "Yet criminals call your courtroom the
16 slaughter house," would I be -- would Judge Slaughter be
17 under an obligation to remove that from her website?
18 Would that be an inappropriate post that needs to be
19 removed or hidden or something?

20 CHAIRMAN BABCOCK: Well, it depends on who
21 is on the Judicial Conduct Commission, I would guess.

22 HONORABLE TRACY CHRISTOPHER: I'm giving you
23 a real life, real world, happened Wednesday during a
24 campaign season. She's running for the Court of Criminal
25 Appeals.

1 CHAIRMAN BABCOCK: So, Jim, what do you
2 think?

3 MR. PERDUE: It's her name. I see it on a
4 bumper sticker. I think that's a fantastic campaign tag.
5 It's her name.

6 CHAIRMAN BABCOCK: "Tough on crime, come to
7 the slaughter house."

8 MR. PERDUE: Judge Slaughter.

9 MR. KELLY: It's Texas, after all.

10 CHAIRMAN BABCOCK: Anybody think that that's
11 inappropriate, what Judge Christopher just read?

12 HONORABLE TRACY CHRISTOPHER: That she would
13 have some obligation to take that --

14 CHAIRMAN BABCOCK: To take it down.

15 HONORABLE TRACY CHRISTOPHER: -- to take
16 that comment down.

17 HONORABLE JEFF BOYD: Or at least some
18 obligation not to respond and say "agreed."

19 MS. HOBBS: Right.

20 HONORABLE TRACY CHRISTOPHER: Right. Well,
21 I think she was agreeing to it's not a good campaign
22 slogan. In looking at it, I think that's what she was
23 agreeing to.

24 HONORABLE JEFF BOYD: I think you're right,
25 but even then she's interacting with the commenter.

1 HONORABLE TRACY CHRISTOPHER: She is.

2 HONORABLE JEFF BOYD: And that adds some
3 personal -- not endorsement, but --

4 PROFESSOR CARLSON: Could be perceived.

5 HONORABLE JEFF BOYD: -- acceptance, not
6 agreement, but accepting that people are saying things and
7 wanting to interact with them on those kinds of things.

8 CHAIRMAN BABCOCK: Eduardo.

9 MR. RODRIGUEZ: Well, I mean, I think it's
10 demeaning the courts for her to -- if she were to like
11 that comment, and apparently she doesn't like it and
12 thinks -- did something to take it off, but were she to
13 like that comment, it would be to me demeaning to the
14 court because she would be --

15 HONORABLE TRACY CHRISTOPHER: She did like
16 the comment. I have double-checked. "Yet criminal calls
17 your courtroom the slaughter house," she did the thumbs up
18 to the comment.

19 CHAIRMAN BABCOCK: There you go.

20 HONORABLE TRACY CHRISTOPHER: According to
21 my review of the Facebook page.

22 CHAIRMAN BABCOCK: Chief Justice Hecht.

23 CHIEF JUSTICE HECHT: But you're out
24 campaigning and somebody asks you -- you're in this group
25 and somebody says, you know, "So-and-so said the other day

1 you're soft on crime. What's your response to that?" And
2 the judge would say, "Well, somebody else said my
3 courtroom is known as the slaughter house, so I guess that
4 tells you something." And so is that a -- I mean, is that
5 a bad thing to say when all you've done is recite the
6 facts?

7 CHAIRMAN BABCOCK: Well, and whether it's in
8 good taste or bad taste, can the government tell you not
9 to say it?

10 CHIEF JUSTICE HECHT: Right. Which is why
11 the particular problem here is so acute, is becoming
12 acute, is because there is such a wide variety of opinion.
13 When things like that happen there is a substantial group
14 who would say for that reason you shouldn't -- judges
15 shouldn't be in social media, top, side, or bottom. You
16 just shouldn't be there under any set of circumstances.
17 Well, my wife wants to check on the grandkids. Well,
18 that's too bad. You just can't do it.

19 And then there's a whole group of people on
20 the other side who are sort of let the good times roll. I
21 mean, this is just the -- this is today. This is what
22 happens today, and judges who are -- have to run for
23 office, and almost all of us hate it, and we all see the
24 problems with it, and we don't like the problems, but the
25 people want us to do this, and there's nothing we -- so

1 there's nothing we can do about that. But we -- what we
2 don't want to do is step over the line. We don't want to
3 do something that we're going to bring discredit to the
4 judiciary or certainly get accused of bringing discredit
5 to the judiciary. And when the judge is trying to decide
6 among the options what to do, it's the very real advice
7 coming back from ethics and disciplinarians who are
8 looking at this is what should you do, you should stay off
9 of social media; and if you don't, you run risk of the
10 consequences. Or there's probably no problem, and that's
11 just -- it seems to me that's a very difficult position to
12 put the judiciary in, which is already in a bad position,
13 not to mention, as you say, the constitutionality of it.

14 CHAIRMAN BABCOCK: So when you're saying the
15 ethicists, they're saying stay off altogether and then
16 another group saying, you know, do whatever you want.

17 CHIEF JUSTICE HECHT: Right.

18 CHAIRMAN BABCOCK: And there's no middle
19 ground.

20 CHIEF JUSTICE HECHT: Well, you just don't
21 know on any given day where you're going to fall. You
22 know, Justice Guzman and I have interviewed candidates for
23 the conduct commission for years. She's the liaison, and
24 that's what the candidates tell you. They'll -- a
25 candidate will come in and say -- we'll say, "What's your

1 view of social media?" They say, "Judges should stay out
2 of it, and if they don't, they deserve whatever they get,"
3 and then others will say, "Oh, I don't think that's a big
4 deal. I think judges just have to do what they have to
5 do." Well, one of those two people is going to be sitting
6 on the conduct commission and --

7 HONORABLE JEFF BOYD: You don't know which
8 one.

9 CHIEF JUSTICE HECHT: And you don't know
10 which one, and is going to be voting on basically your
11 career, and so it's a very difficult situation. But we've
12 been here before, because Chief Justice Greenhill used to
13 tell me about running for office against Sarah T. Hughes,
14 and I said, "What did you do back in those days?" He
15 said, "I got in my blue Ford, and I drove around the state
16 with Martha, and we would drive up to the shopping mall or
17 somewhere, and we would get out and say, 'I'm Joe
18 Greenhill.' Of course nobody cared and then we would get
19 in the car and drive someplace else." And I said, "Well,
20 did you make speeches or talk about what you were going to
21 do if you got elected?"

22 "No, no, no, we never did that."

23 "Well, did Judge Hughes do that?"

24 "No, she didn't do that." Well, that was in
25 1958 or '56, and a lot has changed since then.

1 CHAIRMAN BABCOCK: For sure.

2 CHIEF JUSTICE HECHT: But he took a dim view
3 of the use of television in the Supreme Court races in the
4 early Eighties, was the first time it was used. So, I
5 mean, as these things evolve, you get this disparity of
6 views between a generation who is accustomed to it and
7 this is just what -- this is the way we communicate and a
8 generation who says, "Oh, my goodness, what's the world
9 coming to."

10 CHAIRMAN BABCOCK: Yep. Pete, you had your
11 hand up, and then Frank, and then Judge Wallace.

12 MR. SCHENKKAN: Is there a different
13 standard for incumbent judges in the campaign setting and
14 other candidates --

15 HONORABLE STEPHEN YELENOSKY: No.

16 MR. SCHENKKAN: -- and could there be?

17 CHIEF JUSTICE HECHT: Not supposed to be.

18 MR. SCHENKKAN: And if there can't be,
19 doesn't that answer the question? The answer to the
20 question of what the judge can properly do is whatever the
21 First Amendment allows the candidate to do, the other
22 nonincumbent candidate. Doesn't that have to be -- play
23 into it?

24 MR. KELLY: Candidates are bound by the same
25 code.

1 MR. SCHENKKAN: Well, that was my original
2 question.

3 CHAIRMAN BABCOCK: Yeah.

4 MR. SCHENKKAN: And so what does that mean
5 as to the candidates? I mean, are they -- no one is
6 enforcing that unless they win, I assume.

7 HONORABLE STEPHEN YELENOSKY: No. They're
8 subject to it.

9 MR. SCHENKKAN: During the campaign or after
10 it's over?

11 HONORABLE BRETT BUSBY: During.

12 MR. SCHENKKAN: Well, how effective is that?

13 CHAIRMAN BABCOCK: The White case, Pete,
14 arose during a campaign.

15 MR. SCHENKKAN: Uh-huh.

16 CHAIRMAN BABCOCK: And I believe White was a
17 nonincumbent, right? He was running for the office.

18 CHIEF JUSTICE HECHT: He was running.

19 CHAIRMAN BABCOCK: He was running for the
20 office, but he was not the incumbent. Frank.

21 MR. GILSTRAP: With regard to the slaughter
22 house posting that Judge Christopher talked about, you
23 know, I don't have much heartburn over that in response to
24 Eduardo's comments. It is demeaning. Yes, it is
25 demeaning, but I guess that's the price we pay for elected

1 judges, but transpose those over just a little bit to
2 there's a big criminal case coming in the judge's court,
3 and there's postings about whether she's going to -- she's
4 going to be the slaughter house like she always is. I
5 mean, at that point it's completely different, and we've
6 got -- I mean, there's got to be some -- some way to
7 prevent comments on pending cases. I mean, that's --

8 CHAIRMAN BABCOCK: Well, we have a
9 prohibition now.

10 HONORABLE JEFF BOYD: Her public web page,
11 not social media, just the public web page, says, "When it
12 comes to punishment Judge Slaughter's philosophy as a
13 trial judge is that a defendant who is a violent or repeat
14 offender does not deserve multiple chances before serving
15 prison time." Is that as bad, or is that fine?

16 MR. GILSTRAP: You know, I don't have a
17 problem if it's not a specific case, but as I understood
18 the facts of the case were that she was commenting on the
19 events that were occurring day by day in this particular
20 trial, and she -- there was no consequence to her other
21 than the consequence of having to go before the Judicial
22 Conduct Commission. Am I correct?

23 CHAIRMAN BABCOCK: Yes.

24 MR. GILSTRAP: Well, that's -- that's the
25 problem to me. The other stuff abstract, who is this

1 judge, what does she do, what's her attitude on crime,
2 fair game. The question is what is her attitude toward
3 this defendant, which is -- that's the problem to me.

4 CHAIRMAN BABCOCK: Okay. Yeah, Judge
5 Wallace.

6 HONORABLE R. H. WALLACE: Yeah, this goes
7 back to what Judge Peeples said, too, I think. In my mind
8 I think of kind of two different purposes for maybe a
9 Facebook or website. One is for campaign purposes, where
10 -- I was just looking at one of my colleagues in Tarrant
11 County that has a Facebook that's very active. She's
12 always posting pictures, you know, "Here I am with
13 so-and-so, and we're having a great time listening to a
14 speaker," that kind of stuff and every -- a lot of people
15 do that, and a lot of political consultants advise that
16 you need to do that. Other political consultants, like
17 mine, said you don't want to do that, that's not your
18 audience. I don't know. Anyway, that kind of stuff, I
19 don't see where that approaches any ethical boundaries,
20 you know, asking people to support them, donate to them or
21 whatever.

22 To me it's different when you cross over to
23 a Facebook page or a website where you're commenting on
24 cases that are in your court; but even at that, taking
25 what some of the people have said in here, what if you got

1 a criminal judge, criminal court judge --

2 CHAIRMAN BABCOCK: Thanks for the
3 clarification.

4 HONORABLE R. H. WALLACE: -- who posts on
5 his website, his or her website or Facebook, "Had
6 such-and-such case today, child molester, jury found
7 guilty and was sentenced to 50 years in prison. Horrible
8 case, he thoroughly deserved the punishment," and maybe he
9 said that very thing in open court. He gets his court
10 reporter to type it up and attaches it as a -- "Here's
11 what I said in open court" and puts it on his Facebook
12 page. Has he done anything wrong? I mean, I'm not
13 suggesting I'd do it, but I'm thinking this is really
14 interesting.

15 CHAIRMAN BABCOCK: I think that would be a
16 difficult case to bring against him.

17 HONORABLE R. H. WALLACE: Because that could
18 be -- in some areas that could be just as strong a
19 political statement as anybody could make.

20 CHAIRMAN BABCOCK: Sure. Judge Yelenosky.

21 HONORABLE STEPHEN YELENOSKY: I think Lonny
22 was before me.

23 CHAIRMAN BABCOCK: Oh, sorry, Professor
24 Hoffman. My peripheral vision isn't what it used to be.

25 PROFESSOR HOFFMAN: So my comment is this:

1 I think that this conversation has convinced me -- and
2 especially from what Justice Boyd was saying -- that we're
3 never going to catch up. Like if we were to write a rule,
4 it's going to be outplayed by that, so I think we might do
5 better by thinking about general principles, and there may
6 be others, but for me there are sort of two that jump out.
7 One of them is communications that a judge makes and then
8 communications that a judge receives, and thinking about
9 maybe setting up a canon that speaks to those two --
10 again, there may be others, but that seems like it covers
11 a lot of other ground.

12 And sort of thinking about this a little bit
13 like a restatement sometimes does, where you have the
14 broad principle and then you have -- you sort of play that
15 out with examples. Now, interestingly, that's not how the
16 Code of Judicial Conduct is currently set up. We actually
17 have -- in fact, this would look totally different than
18 what is in the code right now. There are very, very few
19 comments generally in the code, but this might be an
20 example where putting in the principles and then having
21 some examples that sort of set boundaries of, you know,
22 what should be out of limits and what should be within
23 limits might be a useful way for us to approach this.

24 CHAIRMAN BABCOCK: Okay. Judge Yelenosky.

25 HONORABLE STEPHEN YELENOSKY: Justice

1 Wallace mentioned putting the transcript of what the judge
2 said in court. I hadn't thought about that, but in cases
3 where a reporter would be interested enough to ask and ask
4 my staff "Can I talk to the judge" the answer would always
5 be "Whatever the judge had to say about that case he said
6 in court." And I don't know why we can't have a bright
7 line that requires that on a pending or impending case.
8 And I think Roger said, well, you say it in court, but
9 that's different. Whatever I say in court, if somebody
10 thinks it's unethical or it's grounds for recusal I've
11 said it, number one, with both parties in front of me; and
12 so they're not finding out that I said it to somebody else
13 after the fact; and, number two, if they think that what I
14 said indicates that I prejudged the case, fine, I might
15 very well say something like "Well, I've heard your
16 argument, but I don't think you're going to win on that
17 point." They think that's unethical, fine, they can bring
18 me back before the committee because I have prejudged the
19 case, but, you know, it isn't like that. It isn't the
20 judge comes in the courtroom and says, "I'm going to rule
21 against you. I haven't read anything yet, but I just
22 don't like you, and I'm going to rule against you".

23 CHAIRMAN BABCOCK: Has that ever happened?

24 HONORABLE STEPHEN YELENOSKY: Yeah, not me,
25 but if that did happen, that would be an ethical

1 complaint, but the courtroom confines it. The parties are
2 there. There's a record of everything that's said, and
3 it's not just an isolated comment that goes to everybody
4 about a pending or impending case, and so those are real
5 different to me. And like Justice Wallace, why can't we
6 have a bright line about pending or impending cases?

7 CHAIRMAN BABCOCK: Justice Gray.

8 HONORABLE TOM GRAY: You asked the question
9 if it had ever happened, and I will share to say that it
10 has. It was a little bit different in that after the
11 movant made his argument the court said, "I'm going to
12 grant that. Did you want to put on any evidence in
13 contravention of it," and so it was --

14 CHAIRMAN BABCOCK: Okay.

15 MR. WATSON: How did they receive the
16 comment?

17 CHAIRMAN BABCOCK: Well, this is a pretty
18 good breaking point for our morning break. When we come
19 back let's just try to go through these things paragraph
20 by paragraph, and I'm sad to say that that may take up the
21 rest of the morning. Is that going to mess up anything on
22 our timing? Do we have any items that we're not getting
23 to that --

24 PROFESSOR CARLSON: Cyberbullying.

25 CHAIRMAN BABCOCK: Cyberbullying is not a

1 time sensitive issue, I don't think. So let's take a
2 break for 15 minutes.

3 (Recess from 10:34 a.m. to 10:48 a.m.)

4 CHAIRMAN BABCOCK: Okay. We're back on the
5 record, Elaine, and why don't we start at the beginning
6 and you -- the only amendment to the canons, as I
7 understand it, from this is that you would say that you
8 would add a "Judicial use of social media" that says, "The
9 provisions of this code that govern -- govern a judge's
10 communications in person, on paper, and by electronic
11 methods also govern a judge's use of social media." Isn't
12 that redundant? Don't the canons cover use of social
13 media now?

14 PROFESSOR CARLSON: Yes. They do. And
15 there was a fairly active debate on the subcommittee on
16 whether or not we needed to do anything but add comments,
17 which was the approach I think we took in the first draft.

18 CHAIRMAN BABCOCK: Which was what?

19 PROFESSOR CARLSON: That was the approach we
20 took in the first draft that was looked at in August, but
21 some members of the subcommittee felt that there should be
22 a separate canon discussing social media because not
23 all -- not all publishers publish the comments along with
24 the code. So even within our subcommittee some of us had
25 different --

1 CHAIRMAN BABCOCK: Okay.

2 PROFESSOR CARLSON: -- publishers on the
3 Code on Judicial Conduct, and some of us had the comments
4 and some of us didn't from our publishers. So that was
5 really the idea that we need to give a strong heads-up to
6 the judiciary that there are --

7 CHAIRMAN BABCOCK: Social media counts.

8 PROFESSOR CARLSON: Uh-huh. And that was
9 really the only reason.

10 CHAIRMAN BABCOCK: Yeah. Doesn't 3A(10) say
11 all communications or something like that?

12 PROFESSOR CARLSON: Yeah, it is definitely
13 covered.

14 CHAIRMAN BABCOCK: Public comment about a
15 pending or impending proceeding.

16 PROFESSOR CARLSON: You in 3B(10)?

17 CHAIRMAN BABCOCK: I'm in 3B(10) and (4)
18 talks about extra-judicial activities.

19 PROFESSOR CARLSON: Right.

20 CHAIRMAN BABCOCK: So that -- but then it
21 talks about speaking and writing, et cetera. Okay.

22 PROFESSOR CARLSON: And, Judge Peeples, I
23 don't know if you agree with that.

24 CHAIRMAN BABCOCK: What are the thoughts
25 about this additional language that is proposed to be

1 added to -- as a new subsection (J)? Anybody have any
2 comments on that? Justice Gray.

3 HONORABLE TOM GRAY: If it's going to be
4 done, I'd prefer the subsection (J) under Canon 4 as
5 opposed to -- and without any comment at all, just add
6 subsection (J) as drafted, but the clear problem is that
7 it is also addressing communications; and you have Canon
8 3; and that's why I like it under 4 because that tends to
9 be the extra-judicial activities as opposed to mixing it
10 up with ex parte communications. That runs into all of
11 those problems that we had when we tried to define what a
12 judge should do in the event of an ex parte social media
13 contact or communication.

14 CHAIRMAN BABCOCK: Okay. Is 3A(10) ex parte
15 or is that --

16 HONORABLE TOM GRAY: No.

17 CHAIRMAN BABCOCK: 3B(10), I'm sorry.

18 HONORABLE TOM GRAY: 3B(8) is the ex parte.

19 CHAIRMAN BABCOCK: Right.

20 HONORABLE TOM GRAY: But it's ex parte
21 communications, and that is actually what the case that is
22 footnoted in footnote 5 in the new comment, that was an ex
23 parte communication, not an extra-judicial activity.

24 CHAIRMAN BABCOCK: I think that 3B(10) is
25 also in play. It was in the Slaughter case. "A judge

1 shall abstain from public comment about a pending or
2 impending proceeding which may come before the judge's
3 court in a manner which suggests to a reasonable person
4 the judge's probable decision on any particular case." So
5 I think that's in play, too.

6 HONORABLE TOM GRAY: Absolutely.

7 CHAIRMAN BABCOCK: I would think. Okay.
8 Other comments about proposed subsection (J)? Anybody
9 else?

10 HONORABLE TRACY CHRISTOPHER: Without the
11 comment, just (J) itself?

12 CHAIRMAN BABCOCK: Yeah. Just (J) itself.
13 Yeah, I guess. We'll get to the comments in a minute I
14 guess. Does everybody think we need (J)? Anybody think
15 we don't need (J)?

16 HONORABLE DAVID PEEPLES: If you don't have
17 a (J) where does the comment go?

18 CHAIRMAN BABCOCK: Yeah.

19 HONORABLE DAVID PEEPLES: Generally to the
20 code?

21 CHAIRMAN BABCOCK: Maybe generally to the
22 code or just generally after Canon 4. As somebody pointed
23 out, there are very few comments in the code.

24 HONORABLE DAVID PEEPLES: Yeah.

25 CHAIRMAN BABCOCK: Yeah, Eduardo.

1 MR. RODRIGUEZ: Well, I think by having this
2 canon it sort of points out to the court or to the judges
3 that we're including social media, even though it may be
4 in the other parts of the code. I just think that it
5 helps to -- to bring it forward to the attention of the
6 court where it might not be as clear if we didn't have
7 that -- if we didn't have this wording.

8 CHAIRMAN BABCOCK: What is social media?

9 MR. RODRIGUEZ: What is social media? To me
10 social media is all of the things we've been talking about
11 here today.

12 CHAIRMAN BABCOCK: There's a definition.
13 Judge Peeples.

14 HONORABLE DAVID PEEPLES: As we get into
15 these comments I just want to say that what the
16 subcommittee is looking for, now, there's a lot of talk in
17 here about how social media are just more potent and so
18 forth and different and be careful. Okay. But also and
19 this is something that we're all very interested in, is
20 giving guidance to judges. If judges have a new duty to
21 do something, monitor, privacy settings, and correct and
22 that kind of thing, that's -- we need to talk about that,
23 because you can be sanctioned for violating a duty. And a
24 second thing that judges are interested in, and
25 justifiably so, is safe harbors. If you have a disclaimer

1 on something, are you home free? You know, does that
2 protect you?

3 CHAIRMAN BABCOCK: Yeah.

4 HONORABLE DAVID PEEPLES: So I think that
5 those are legitimate and important things that judges need
6 to know about simply so they can go about their business,
7 but because fair notice and guidance is an important tenet
8 of our law.

9 CHAIRMAN BABCOCK: Yeah.

10 HONORABLE DAVID PEEPLES: So that's what we
11 need to be talking about.

12 CHAIRMAN BABCOCK: Is it the sense of the
13 subcommittee right now, Judge, or, Elaine, or anybody else
14 on the subcommittee, that -- that this is explaining
15 duties that already exist under the canons or creating new
16 duties?

17 HONORABLE DAVID PEEPLES: Well, I think
18 there's language in the comment that would create new
19 duties. A like is an endorsement, you've got to monitor
20 it and set your privacy settings and so forth. You might
21 be taken before the conduct commission for not doing that,
22 and that's not in the code right now.

23 CHAIRMAN BABCOCK: Yeah.

24 HONORABLE DAVID PEEPLES: But just for
25 example.

1 CHAIRMAN BABCOCK: Okay. Anything else
2 about the language in (J)? Elaine.

3 PROFESSOR CARLSON: On the next page we do
4 have footnote 1. We had a definition of social media that
5 we borrowed from the Federales, I think.

6 CHAIRMAN BABCOCK: Very good.

7 HONORABLE TOM GRAY: There is one thing you
8 could do, Chip, that would -- might be a different
9 approach, because I'm not sure -- I agree with your
10 comment that it's redundant of existing, but if there was
11 a place to put it so that everybody understands that
12 communications can be in play in both Canon 3 and 4, is
13 simply take out -- and it wouldn't fit under the (J)
14 anymore, but "The provisions of this code govern," take
15 out the word "that" so that you are in effect defining
16 "communications" to include "paper, electronic methods,
17 and use of social media." You'd have to tinker a little
18 bit with the language, but --

19 CHAIRMAN BABCOCK: Yeah. Yeah, and
20 following up on Judge Peeples' comments about creating new
21 duties, can you do that by a comment, or wouldn't you have
22 to put it in a canon? Elaine.

23 PROFESSOR CARLSON: Well, the comments are
24 just admonitory. They're not meant to be, I don't think,
25 the basis for disciplinary proceedings. But --

1 CHAIRMAN BABCOCK: But if the commission is
2 looking for guidance, they'll take the comments as
3 guidance and use that to discipline.

4 PROFESSOR CARLSON: I think that's in all
5 likelihood true.

6 CHAIRMAN BABCOCK: Okay. Justice
7 Christopher.

8 HONORABLE TRACY CHRISTOPHER: I mean, social
9 media is in all sorts of the canons, and I think it's kind
10 of interesting that we say we're talking about a judge's
11 communications. So, for example -- and this is something
12 I totally disagree with later on about liking means
13 endorsing, but, you know, a judge shall not lend -- the
14 judge shall not convey or permit others to convey the
15 impression that they are in a special position to
16 influence the judge. Okay. So if I have liked someone or
17 if I have accepted them as my friend, okay, I'm not
18 communicating, I don't think, with either of those things;
19 but, you know, that canon, too, could also come into play
20 there, too. So it seems to me that all of those things
21 come into play without the need to have subsection (J) and
22 having it there under extra-curricular activities is a
23 little odd.

24 CHAIRMAN BABCOCK: Okay. Frank.

25 MR. GILSTRAP: You say that there are few

1 comments. My copy at the back of the rule book doesn't
2 seem to have any.

3 CHAIRMAN BABCOCK: Yeah, well, that would be
4 a few, a very few.

5 MR. GILSTRAP: So what we're doing is for
6 the first time in the middle of -- at the end of Canon 4
7 just dumping an enormous comment here, which is, you know,
8 obviously different from anything that's been done before.

9 CHAIRMAN BABCOCK: A big, old, fat, pregnant
10 comment.

11 MS. HOBBS: There are comments. That's
12 wrong. Your copy just doesn't have the comment reprinted.

13 MR. GILSTRAP: Okay.

14 MS. HOBBS: But the Court has other comments
15 to various codes.

16 MR. GILSTRAP: Sounds like --

17 MS. HOBBS: One I know we did was in White,
18 right after White.

19 MR. GILSTRAP: -- a ridiculous practice,
20 posting the law high on a pillar where no one could read
21 it.

22 CHAIRMAN BABCOCK: That sounds like a former
23 rules attorney.

24 CHIEF JUSTICE HECHT: But --

25 CHAIRMAN BABCOCK: Justice Hecht.

1 CHIEF JUSTICE HECHT: But the Court has
2 recently used a comment to try to explain the application
3 of a ethical rule when it didn't seem to warrant an entire
4 amendment effort. So that was with the attorney rule
5 about -- what was it, Martha? Oh, whether law students --

6 MS. NEWTON: Oh, right.

7 CHIEF JUSTICE HECHT: -- should be
8 treated -- law students who serve as summer clerks should
9 be subject to the same conflicts rules in the firms that
10 they work for as would apply if they were lawyers, if they
11 were licensed lawyers, and the professional ethics
12 committee said "yes," and we issued a comment saying "no."
13 But the rule, as I recall, the Texas rule and the ABA rule
14 are the same or largely the same, and this was just a case
15 where the professional ethics committee interpreted the
16 rule differently than the ABA has, and so it seemed that
17 that was an easy way to avoid the problem without going
18 through a full blown revision process, and so that worked
19 pretty well, and we might -- we might continue to use that
20 tool if it's appropriate. So, I mean, one of the things
21 the committee should consider is whether that's a way to
22 address some of these issues, not by having a
23 self-standing rule, which as Justice Boyd points out, is
24 probably going to be out of date.

25 CHAIRMAN BABCOCK: Obsolete.

1 CHIEF JUSTICE HECHT: Yeah, in a year or
2 two, or a comment that can apply to a certain set of
3 circumstances, and then if those go away we can take the
4 comment out.

5 HONORABLE DAVID PEEPLES: And, Chip, also
6 the intended audience here is a finite group of judges,
7 not the whole bar --

8 CHAIRMAN BABCOCK: Yeah.

9 HONORABLE DAVID PEEPLES: -- and the conduct
10 commission, and it's easy to distribute and get things to
11 them, it seems to me.

12 CHAIRMAN BABCOCK: Yeah, good point. Good
13 point. The -- but I think the underlying concern remains
14 as to whether or not you're going to create new duties
15 with a comment and whether that's fair notice to the
16 judges, because as Elaine says, this is just all kind of
17 advice. The spirit is we're giving advice, and you can do
18 this or you cannot do this. You should maybe, but if the
19 conduct commission takes these comments as, hey, if you
20 don't do this, we're going to come after you, that could
21 raise some issues.

22 PROFESSOR CARLSON: That's a problem.

23 CHAIRMAN BABCOCK: Yeah.

24 CHIEF JUSTICE HECHT: But the other side is
25 true, too. It might take what are thought to be duties

1 already latent in the black letter rule away.

2 CHAIRMAN BABCOCK: And say they're not.

3 CHIEF JUSTICE HECHT: And say they're not.

4 That's what we did in the lawyer rule. We just said --
5 the professional ethics committee said law firms have
6 this -- they have to treat these summer clerks this way,
7 and we said, "no," and I assume that a law firm would not
8 be -- or a lawyer would not be criticized, or it wouldn't
9 come up in a case that they had not treated summer clerks
10 the way that the committee said they should be treated
11 because we have --

12 CHAIRMAN BABCOCK: Walked that back.

13 CHIEF JUSTICE HECHT: We walked that back.

14 CHAIRMAN BABCOCK: Got it. Great. Okay.
15 Why don't we talk about the first paragraph? There have
16 been people that have discussed it. Elaine, any
17 particular comments you want to make about it or Judge
18 Peeples?

19 PROFESSOR CARLSON: You're talking about the
20 first paragraph under the comment?

21 CHAIRMAN BABCOCK: Yes.

22 PROFESSOR CARLSON: No, other than as I
23 pointed out earlier, we added that sentence that we're
24 trying to strike a constitutionally permissible balance
25 between the First Amendment and state interest.

1 CHAIRMAN BABCOCK: Right. Okay. Any other
2 comments? Yeah, Peter, and then Lisa.

3 MR. KELLY: The first line, I think "social
4 media have become a powerful communication device."

5 CHAIRMAN BABCOCK: Thank you. Lisa.

6 MS. HOBBS: Professor Carlson, what's the
7 intent of the footnotes here? Is that for our reference
8 point, or do you anticipate that the comment that the
9 Court promulgates would also include footnotes?

10 PROFESSOR CARLSON: You know, we didn't
11 really discuss that. I think footnote 5 we were kind of
12 hoping would be included just because that gives judges a
13 case that they can look at, but now I hear that maybe they
14 don't want that.

15 HONORABLE DAVID PEEPLES: A lot of it is
16 just explanation for this committee, just sort of
17 background, but the statement of what have been held to be
18 compelling governmental interests I think is informative.

19 CHAIRMAN BABCOCK: Okay. Any other comments
20 about the first paragraph? Second paragraph? Referencing
21 back to the new Canon 4J.

22 MR. KELLY: Just a general stylistic
23 comment.

24 CHAIRMAN BABCOCK: Yeah, Peter.

25 MR. KELLY: On paragraphs one and two,

1 paragraph one is phrased in terms of judges, but then has
2 one reference to "a judge." Then paragraph two is phrased
3 pretty much in terms of a judge, but then has one
4 reference to "judges," and just stylistically they might
5 be harmonized.

6 PROFESSOR CARLSON: Okay. Thank you.

7 HONORABLE DAVID PEEPLES: Good.

8 CHAIRMAN BABCOCK: Any other comments about
9 the second paragraph?

10 MS. HOBBS: Well, I have a --

11 CHAIRMAN BABCOCK: Yeah, Lisa.

12 MS. HOBBS: That last line of paragraph two,
13 "Judges should be cautious when posting or communicating
14 on social media and should understand that their
15 communications will likely be scrutinized by others," I
16 mean, that's true of all judicial conduct, right? I mean,
17 you're an elected official. You put a robe on. There's
18 certain people at least who will hold you to a higher
19 standard because you wear a robe, and so this seems to be
20 taking the position as between Justice Hecht's some people
21 say fair game, go do it, and some people say this is --
22 that's -- this is tilting this towards the idea that
23 perhaps you as a judge should not be on social media. And
24 that's not exactly what it's saying, but it definitely
25 feels like it's tipping the scale one way or the other in

1 a way that I would disagree with, I guess.

2 CHAIRMAN BABCOCK: And you're going to have
3 a problem with narrowly tailored and vagueness on a
4 sentence like this I would think. If the commission took
5 the view that this is -- this says what's in the canon,
6 it's latent in the canon and brings an action against a
7 judge on this basis, I think the judge would have a --
8 it's not narrowly tailored, and it's vague.

9 HONORABLE DAVID PEEPLES: If you're
10 sanctioned for not being cautious, I would agree that's
11 just as vague as can be.

12 CHAIRMAN BABCOCK: Yeah.

13 HONORABLE DAVID PEEPLES: But, I mean, just
14 for myself, I think it's good for people to be told that
15 when you're putting it out on the internet it can go
16 everywhere very quickly; therefore, you shouldn't just do
17 it in the snap of a finger. You know --

18 CHAIRMAN BABCOCK: Just friendly advice.

19 HONORABLE DAVID PEEPLES: Think about it.

20 MS. HOBBS: Well, your next line, though,
21 your next paragraph, does kind of say why this is a
22 different form of communication than others, and that --
23 and we can debate whether we want all of that in there or
24 not, too, but that is a different -- giving them kind of
25 why this is different is not necessarily saying it's good

1 or it's bad; whereas, that last line of paragraph two
2 seems to be taking a stand that I disagree with about
3 whether judges should be on social media. So --

4 CHAIRMAN BABCOCK: Any other comments about
5 this second paragraph? Yeah, Justice Gray.

6 HONORABLE TOM GRAY: I just note that it
7 does reference the concept of ex parte communications,
8 which, again, is a Canon 3 issue, not a Canon 4, although
9 as you observed and others -- I think Tracy observed --
10 it's interwoven throughout the canons, is the concept of
11 communications, but it is Canon 3 specifically. And that
12 just concerns me, again, because of the specific
13 procedures were discussed at length in here about what to
14 do with ex parte communications on social media and how do
15 we accommodate that in the context of a canon
16 modification, and I'm not sure where that stands with the
17 Supreme Court in adoption or rejection of what was
18 recommended or voted upon, but that concerns me.

19 CHAIRMAN BABCOCK: Great. Okay. Any other
20 comments about the second paragraph? Okay. Let's go to
21 the third paragraph. "Social media differs from
22 traditional in-person and written communications."

23 MR. KELLY: Should be "differ."

24 CHAIRMAN BABCOCK: Our grammatacist. Is
25 that a word, grammatacist? Okay. I think we've already

1 talked some, Justice Christopher.

2 HONORABLE TRACY CHRISTOPHER: Right. The
3 last two sentences of that paragraph I object to for the
4 reasons stated.

5 HONORABLE TOM GRAY: Same.

6 MR. GILSTRAP: Doesn't that boil down to
7 whether this is a prohibition or just a comment that's not
8 going to change the canons?

9 CHAIRMAN BABCOCK: Well, I suppose whether
10 it's a prohibition or a suggestion people could feel one
11 way about a prohibition, another way about a suggestion,
12 and then other people could think it should be neither a
13 suggestion nor a prohibition.

14 MR. GILSTRAP: Yeah, but in terms of whether
15 or not we leave this in here. I mean, I'm certainly moved
16 by the idea that the Judicial Conduct Commission could
17 come in and say, "Well, you violated the last three
18 sentences, and we're going to discipline you"; and that
19 would disturb me; but at the same time, I wouldn't mind
20 leaving it in as just a suggestion or an admonition to the
21 judges, "This is how you should conduct your business if
22 you can."

23 CHAIRMAN BABCOCK: Uh-huh. Okay. Any other
24 comments about this? Okay. Let's go to the next
25 paragraph, which is a big one.

1 PROFESSOR CARLSON: The friends.

2 CHAIRMAN BABCOCK: This is the friend, the
3 friend paragraph.

4 PROFESSOR CARLSON: In John's book it's
5 called -- his chapter is "Friends With No Benefits.
6 Judges' Legal Ethics in Social Media."

7 CHAIRMAN BABCOCK: Justice Busby.

8 HONORABLE BRETT BUSBY: I suggest removing
9 the last sentence of the paragraph because it doesn't
10 relate to friends, which is the topic of the paragraph,
11 and I think it's been adequately covered by other material
12 in the comment.

13 PROFESSOR CARLSON: I have no problem with
14 that. Judge Peeples, how do you feel about that?

15 HONORABLE DAVID PEEPLES: Well, I need to
16 take a look at it. I think it's good to tell judges you
17 can get recused. A very plausible recusal motion can be
18 filed if you aren't careful, and now, if someone, you
19 know, says a lot of things in impending cases or whatever
20 and gets recused, that takes care of the unfairness of
21 that judge, but it doesn't take care of the damage to the
22 judiciary that can collectively happen and so forth, but I
23 mean, I don't remember how any of the sentences got in
24 here, frankly, but we did want to caution people that you
25 could be dealing with recusal if you're irresponsible

1 here.

2 HONORABLE BRETT BUSBY: And I think you do
3 that in other places in much more specific ways, and I
4 think along the lines of some of the other comments that
5 have been made just saying "Careless statements may be a
6 basis for referral to the State Commission on Judicial
7 Conduct" is incredibly vague, and so I think that the
8 specifics that are in other parts of the comment are much
9 more helpful than somebody saying, "Oh, well this is a
10 careless statement, whatever that means, and so it needs
11 to be referred to the commission." I don't think that's
12 narrowly tailored.

13 CHAIRMAN BABCOCK: Justice Christopher.

14 HONORABLE TRACY CHRISTOPHER: Okay. Unless
15 I'm wrong, I don't see anything in 18B that says being a
16 friend of a judge is a ground for recusal.

17 CHAIRMAN BABCOCK: You don't see anything in
18 what?

19 HONORABLE TRACY CHRISTOPHER: In 18B. A
20 friend. Okay. I don't see anything in 18B that says if
21 you're a friend of a judge that is a recusal basis.
22 That's what this whole paragraph says is possible, and I
23 just think it's completely wrong, and just the idea
24 that -- well, for example, the idea that I have to
25 disclose that I'm a friend. Okay. If any of these people

1 in the Supreme Court Advisory appeared in front of me,
2 "Oh, you know, I've been on a committee with them for
3 years. We're really good friends." No. No. I am under
4 no obligation to make that disclosure. And the fact that
5 I am a friend on social media of someone I am under no
6 obligation to make that disclosure, and I object heartily
7 to creating such an obligation. It's not in the rules.
8 It's not a grounds for disqualification; and it should not
9 elevate social media friendship, which is much more minor
10 than being in the Supreme Court Advisory Committee for
11 years and meeting with you-all; and none of you would sit
12 here and say, "Oh, you've got to disclose that."

13 CHAIRMAN BABCOCK: I have a judicial
14 precedent on this. When Judge Benton was on the district
15 bench in Harris County, I had a case in front of him that
16 was about to go to trial, and Lloyd Kelly, the plaintiff's
17 lawyer, moved to recuse Judge Benton on the basis that he
18 and I both served on the Supreme Court Advisory Committee.

19 HONORABLE TRACY CHRISTOPHER: Yeah, and I'm
20 sure that was summarily denied.

21 CHAIRMAN BABCOCK: By Judge Benton, and then
22 Judge Davidson was appointed and held a hearing within, I
23 think, 15 minutes and denied it. Lisa, and then Judge
24 Peeples.

25 MS. HOBBS: Well, I had raised my hand

1 before Judge Christopher spoke for that same reason, that
2 I don't see how being friends with a judge -- whether
3 social media friends or true friends that you, you know,
4 go to dinner with on occasion, I just don't think that we
5 want the Supreme Court to suggest in a comment that that
6 would be grounds for recusal, and I definitely think that
7 this suggests that it would be, and the idea that how
8 often you communicate with somebody is also an indication
9 of the depth of your friendship that might create bias in
10 you is also wrong.

11 I can talk to somebody every single day of
12 my life and have no warmth in my heart for them in some
13 way that makes me feel like I can't be impartial if they
14 were beside me, and I could have one girls weekend with
15 somebody once a year, and that's the only time we talk,
16 and that girlfriend can be so dear to me that I could feel
17 like I could not be impartial, and so this idea is just a
18 weird concept to me that we're asking the Supreme Court to
19 put into a comment, and I don't think it really comports
20 with reality and what makes people bias and not bias.

21 CHAIRMAN BABCOCK: Judge Peeples, and then
22 Eduardo.

23 HONORABLE DAVID PEEPLES: No question that a
24 Facebook friend is different from a real friend. No
25 question. But do you think you have a duty to tell if a

1 case comes before you for trial and you're friends with a
2 party? Do you need to tell the other side that?

3 HONORABLE TRACY CHRISTOPHER: Depends.

4 HONORABLE DAVID PEEPLES: Depends on how --

5 HONORABLE TRACY CHRISTOPHER: Depends on
6 what the friendship is.

7 HONORABLE DAVID PEEPLES: Yeah. Yeah.

8 HONORABLE TRACY CHRISTOPHER: And, you know,
9 it also depends on whether -- what county you live in. I
10 mean, you know, let's face it, judges in small counties,
11 they know everybody.

12 HONORABLE DAVID PEEPLES: They know
13 everybody.

14 HONORABLE TRACY CHRISTOPHER: They're
15 friends with everybody. In a big city where it's easy for
16 me to say, you know, "I know that party a little too well,
17 I'm going to recuse," okay. But that's a judicial call.

18 CHAIRMAN BABCOCK: Eduardo.

19 MR. RODRIGUEZ: Well, yeah, but in a small
20 county you can be friends with everybody, but going to
21 dinner with them three or four times a week is very
22 different than just being friends because both of you are
23 in the Rotary Club; and so, I mean, you've got to look at
24 what kind of friendship we're talking about and what kind
25 of relationship we're talking about and determine whether

1 or not a judge should be -- should be recused.

2 CHAIRMAN BABCOCK: Yeah.

3 MR. RODRIGUEZ: So I think there's a
4 difference.

5 CHAIRMAN BABCOCK: Yeah. Peter, and then
6 Elaine.

7 MR. KELLY: I think this is a little bit
8 more innocuous than everybody is construing it because it
9 just says "may be a factor that can be considered." So
10 it's not saying it's automatic recusal if you're a friend
11 on Facebook, but also you have to bear in mind that on
12 Facebook you have all of these different subgroups and
13 sub-boards. Some of them are interest groups. You know,
14 there is a Texas lawyer group that talks about lawyer --
15 or about judges. You know, there's plaintiff lawyer
16 groups, appellate lawyer groups, and there are advocacy
17 groups. You know, anti-property tax, or you know. So
18 some of those social media relations could lead to
19 something that would lead to -- could lead to a recusal.

20 If you're a member of an interest group that
21 says, you know, they don't believe in inverse
22 condemnation, and you have an inverse condemnation case
23 come up to you, so it simply says that a social media
24 group can be a factor that should be considered. Also, it
25 should be "create," not "creates," and in the very first

1 line.

2 And I just wanted to echo something Justice
3 Christopher said earlier because we're now doing the
4 paragraph by paragraph. She suggested the last two
5 sentences of paragraph two come out, and I think I just
6 want to echo that in that I agree with it as well, now
7 that we're going paragraph by paragraph.

8 CHAIRMAN BABCOCK: Yeah. Okay. Great,
9 thanks, Peter. Elaine.

10 PROFESSOR CARLSON: Florida prohibits judges
11 from having friends on Facebook. We thought that was
12 ridiculous, our subcommittee, and we could end this
13 paragraph in line eight after the word "or lawyer,"
14 period, and just leave out any discussion of the recusal
15 and frequency and all of that.

16 CHAIRMAN BABCOCK: After which line, Elaine?

17 PROFESSOR CARLSON: Eight lines down
18 beginning with "or lawyer."

19 CHAIRMAN BABCOCK: Okay.

20 PROFESSOR CARLSON: If you think it's
21 inappropriate or not necessary to talk about recusal or
22 it's going to put you at risk ethically as judges and you
23 feel strongly about that, we were just trying -- I think
24 we thought it was more beneficial to just remind people
25 you could be setting yourself up for recusal. It's all

1 context-driven, of course.

2 HONORABLE TRACY CHRISTOPHER: But I don't
3 think you can be recused for being a friend.

4 PROFESSOR CARLSON: Well, I don't think
5 that's what --

6 HONORABLE TRACY CHRISTOPHER: Unless it's
7 perhaps a single judge dating the district attorney. You
8 know, okay, that's a recusal.

9 PROFESSOR CARLSON: We didn't think -- I'm
10 sorry, Dee Dee. We did not think that's what this
11 paragraph said. We thought it said that's a factor and
12 you look at the relationship and depth of relationship and
13 does that lead to a lack of -- a perception of a lack of
14 impartiality.

15 HONORABLE TRACY CHRISTOPHER: Well, are we
16 going to put that somewhere else in a comment, if you go
17 to dinner with a lawyer that might be considered, you
18 know, lack of impartiality? If you are on a committee
19 with a bunch of lawyers, you know, that can be considered,
20 and, I mean --

21 CHAIRMAN BABCOCK: A drink at the Four
22 Seasons.

23 HONORABLE TRACY CHRISTOPHER: This social
24 media is no different than those sort of interactions, in
25 my opinion, that judges have on a daily basis.

1 PROFESSOR CARLSON: I understand.

2 HONORABLE DAVID PEEPLES: Big difference
3 between parties, witnesses, and lawyers to me. And you're
4 right about the small town. I mean, the small town judge
5 has to try cases with -- where they know jurors and
6 witnesses and parties, and they sentence people they know.
7 It's very different from the big cities.

8 CHAIRMAN BABCOCK: Any other comments about
9 this paragraph? Okay. Let's go to the next one. "Posts
10 can be liked in an instant on social media without pause
11 for reflection or thought."

12 PROFESSOR CARLSON: I would say the next
13 sentence is very controversial, and what we're trying to
14 do was provide bright lines and see if you liked them or
15 don't. No pun intended.

16 CHAIRMAN BABCOCK: "Liking a post is
17 tantamount to" --

18 PROFESSOR CARLSON: -- "to an endorsement."

19 CHAIRMAN BABCOCK: "To an endorsement," and
20 there's bracketed language of "any communication contained
21 within the posting."

22 PROFESSOR CARLSON: Those are reflecting
23 differences within the subcommittee.

24 CHAIRMAN BABCOCK: Yeah. Okay. Lisa.

25 MS. HOBBS: Okay. So Judge Boyd, I follow

1 him on Twitter.

2 CHAIRMAN BABCOCK: Really.

3 MS. GREER: Uh-oh.

4 HONORABLE JEFF BOYD: She likes everything I
5 tweet.

6 MS. HOBBS: I do like everything he tweets.

7 CHAIRMAN BABCOCK: Suck up.

8 MS. HOBBS: But he may have -- he may be
9 kind of linking an article that I wouldn't necessarily
10 agree with, but he says something really funny about it,
11 and so I'm liking it not because I am endorsing the
12 article that he's posted that I may completely disagree
13 with, but I may just like it because it was a really funny
14 comment about the article. So I don't think liking
15 something is always an endorsement of something, and I
16 hate that the Supreme Court would say that it is. This is
17 just -- I hate this comment.

18 HONORABLE DAVID PEEPLES: If Judge Slaughter
19 likes the statement that she's got the slaughter house
20 court --

21 MS. HOBBS: Uh-huh.

22 HONORABLE DAVID PEEPLES: -- has she not
23 endorsed the idea of slaughter house?

24 MS. HOBBS: I think that is the case that I
25 felt like. When you were reading that comment, Judge

1 Christopher, I felt like she had endorsed that statement
2 about her -- how she runs her courtroom by liking it, but
3 it's not in every case an endorsement, and that's why
4 context matters. That's why writing a rule that says it's
5 always an endorsement is not good policy in my opinion,
6 because sometimes, yes, from context it may look like
7 you're -- a like is an endorsement, and sometimes it could
8 not at all be that.

9 HONORABLE STEPHEN YELENOSKY: But you can't
10 tell the difference.

11 CHAIRMAN BABCOCK: Justice Christopher.

12 HONORABLE TRACY CHRISTOPHER: I would just
13 like to say that there are other judges who have left who
14 said, "Tracy, fight it, fight it, fight it." Okay. So I
15 feel like I'm doing all of the talking and doing all of
16 the disagreement on it, but I am not the only one who
17 feels very strongly about these points. And I --

18 MR. RODRIGUEZ: However you see it being
19 liked on social media.

20 HONORABLE TRACY CHRISTOPHER: I am not even
21 a big social media user at all. I am not a person who
22 posts daily, you know. "Oh, just went to hear Justice
23 Hecht speak at XYZ club," big picture of me and Justice
24 Hecht. Or "Oh, I just filed for re-election." Here's my
25 name, me filing for re-election. I mean, I don't do that,

1 but to me, first of all, endorsement under the code has a
2 very specific meaning.

3 CHAIRMAN BABCOCK: Yeah.

4 HONORABLE TRACY CHRISTOPHER: And we know
5 from the *In Re: Hecht* case that my -- for example, Brett
6 Busby, I don't know -- not Brett. Randy Wilson. It was
7 the funniest picture. Randy Wilson signed up again for
8 another term, and so he's in front of the board signing
9 his name. He posted it on Facebook, and so I liked it,
10 right? And then I told him it looked like a hostage video
11 photo, but in person, not on Facebook. I did not say that
12 on Facebook. I said that in person. But, okay, my liking
13 Randy Wilson signing up again for another four years is
14 not an endorsement of Randy Wilson under the code, which
15 has very specific meaning and can get you separately into
16 very significant trouble.

17 You know, so liking a post can equal an
18 approval of the post. It can equal support for the post.
19 It can equal "I thought it was funny" of the post. I
20 mean, now you have the option of saying "ha-ha," you know,
21 instead of liking a post if, you know, you think something
22 is funny, or you know, if somebody's mother dies you can
23 put a little sad emoji instead of liking the fact that
24 someone's mother died, but at least that way you can react
25 to it. So very important that we don't put "endorsement"

1 in here. Yes, I think a judge should have some concept
2 that if I'm going to like something, people are going to
3 think I approve of it in some way, shape, or form.

4 CHAIRMAN BABCOCK: Judge Yelenosky.

5 HONORABLE STEPHEN YELENOSKY: Yeah, I mean,
6 earlier it was said, well, judges shouldn't be responsible
7 for how people interpret what they do, and that's true,
8 but we also have an obligation not to create a perception
9 of impropriety. And so we can't always know that, but if
10 you like something where there is something offensive on
11 it or indicates it may create an appearance of impropriety
12 then you ought to withhold the like if you're a judge.
13 That's something you lose, because you should know that
14 creates the appearance of impropriety. I don't know that
15 that's likely when people are liking Randy Wilson saying
16 something, but it could be something really inflammatory,
17 and I don't think you can say, "Well, I didn't mean that,"
18 because judges are required to worry about appearance,
19 too.

20 MS. HOBBS: Well, and I totally agree with
21 that, but this is a rule that says it is an endorsement.

22 HONORABLE STEPHEN YELENOSKY: I don't care
23 if it's endorsement or not.

24 MS. HOBBS: Right.

25 HONORABLE STEPHEN YELENOSKY: But it's

1 something somehow we shouldn't do.

2 MS. HOBBS: Well, and I wouldn't even be
3 bothered by the sentence as much if it said something
4 along what Judge Christopher is talking about. Liking a
5 post is -- you know, not using the word "endorsement," and
6 I might -- but what I would say is "Liking a post could be
7 perceived" or "might be perceived as" --

8 HONORABLE TRACY CHRISTOPHER: Right.

9 MS. HOBBS: -- "endorsement" or whatever
10 your new language is.

11 HONORABLE TRACY CHRISTOPHER: Approval.

12 MS. HOBBS: Approval. Because that's not
13 saying it is or it isn't. It's just saying it could be
14 perceived that way, and that's a fairer statement than
15 what is currently in the draft right now.

16 CHAIRMAN BABCOCK: Okay.

17 HONORABLE DAVID PEEPLES: I'm fine with --
18 "endorsement" is a bad word. I'll grant that. How do you
19 tell judges jurors could be looking at this and when a
20 juror sees the judge liked something they're going to
21 think, "Golly, this person that I respect is telling me
22 something about the case," and it's so easy to do it so
23 quickly. Does not -- is it not good to tell people "Be
24 careful before you hit the like button and move on to the
25 next post because it can be misinterpreted"? Is that

1 not --

2 CHAIRMAN BABCOCK: Justice Christopher.

3 HONORABLE TRACY CHRISTOPHER: I think that
4 that should be in there, you know, to tell a judge "Think
5 about it. Think about it before you like something, and
6 pay attention to it." As a practical matter, it would be
7 extremely difficult for a juror to find out that I liked
8 something.

9 HONORABLE DAVID PEEPLES: Okay. You were
10 just able to find out what Michelle Slaughter did.

11 HONORABLE TRACY CHRISTOPHER: Correct.
12 Because she and I are friends. We're Facebook friends.

13 HONORABLE DAVID PEEPLES: Oh, okay.

14 HONORABLE TRACY CHRISTOPHER: So that means
15 I can look at things she's posted and people's comments to
16 her posts and whether she liked something.

17 JUSTICE BOYD: Well, but she and I are not
18 friends and I can do the same.

19 HONORABLE TRACY CHRISTOPHER: Well, she must
20 have an open --

21 HONORABLE JEFF BOYD: Yeah, she doesn't have
22 privacy settings.

23 HONORABLE TRACY CHRISTOPHER: Right.

24 HONORABLE JEFF BOYD: So I can go to her
25 page and see whatever she's ever posted.

1 HONORABLE TRACY CHRISTOPHER: Right. If I
2 post something, I know who liked my post, but I'm pretty
3 sure it would be extremely difficult -- unless you knew
4 what you were looking for. Like I think you could
5 probably go to Randy Wilson's page if you were a friend of
6 Randy Wilson and, you know, have his picture there, and it
7 will say "125 people liked this," and you can click on
8 that little like button and find out who the 125 people
9 were that liked it, but pretty hard just sort of in the
10 general course of business that a juror would find out
11 that I liked Randy Wilson's post.

12 CHAIRMAN BABCOCK: Justice Busby, and then
13 Judge Yelenosky.

14 HONORABLE BRETT BUSBY: I agree with Justice
15 Christopher. I think we should not say that liking is an
16 endorsement, and I know that some of the other judges who
17 aren't here definitely share that view as well. I don't
18 have a problem with saying, you know, "Think before you
19 like," but I don't think we should have a bright line rule
20 on this.

21 CHAIRMAN BABCOCK: Judge Yelenosky.

22 HONORABLE STEPHEN YELENOSKY: Well, I think
23 we were in agreement until Tracy's comment I disagree
24 with, because that's dependent on a question that at least
25 I'm not qualified to answer, which is how likely it is

1 that somebody can find a like, and it depends on your
2 privacy settings, and it depends on technology as it
3 changes. So I think we have to assume that it can be
4 found in deciding what to say about it. I don't think we
5 can say this is okay because nobody is going to find it or
6 it's unlikely they're going to find it because we don't --
7 I don't know that. Do we really know that?

8 HONORABLE TRACY CHRISTOPHER: No. No, we
9 don't. And I'm not saying that we shouldn't have the rule
10 because of that, but I was responding to Judge Peeples
11 saying, you know, the jurors would be able to see this,
12 and right now the likelihood is slim.

13 HONORABLE STEPHEN YELENOSKY: Well, that's
14 just Judge Peeples and me who don't know anything about
15 Facebook.

16 HONORABLE TRACY CHRISTOPHER: Right.

17 HONORABLE DAVID PEEPLES: Well, I know that
18 we've dealt in this room with jurors and how we instruct
19 them, you know, don't use your -- some people take up cell
20 phones of jurors, and we know that they're curious, and I
21 think it's very likely that some jurors are going to try
22 to find out about this judge who is trying their case.
23 And they can do it during a break, or they can do it when
24 they get home, and let me ask this. Would you-all -- and
25 listen, I'm open on this. I want to come up with

1 something that works. I'm not fighting for any word or
2 anything else, but suppose some judge, you know, there's
3 something said, and the judge says, "I agree with that."
4 Not just like, but "I agree." is that --

5 CHAIRMAN BABCOCK: Or thumbs up. Thumbs up.

6 HONORABLE DAVID PEEPLES: I mean, has the
7 judge accepted or agreed with, adopted, not endorsed, that
8 statement or whatever it is? It seems to me that he or
9 she has. And I don't know, I guess, you know, there are
10 two or three things that stand out to me as being involved
11 here. One, the fairness in the case, and but another one
12 is the decorum, integrity, dignity of the judicial system,
13 and just to have instant, what seems to me, agreements
14 with things is so easy to do without thinking about it,
15 and people see that, and sometimes that has consequences.

16 CHAIRMAN BABCOCK: Peter, then Lisa.

17 HONORABLE DAVID PEEPLES: And how should we
18 do it?

19 MR. KELLY: Touching on what Justice Boyd
20 mentioned earlier about how these platforms are changing
21 so much. I have two teenage daughters. "Who are you
22 texting?"

23 "I'm not texting."

24 "Well, who are you messaging?"

25 "I'm not messaging. I'm on Instagram."

1 Whatever. So whether something -- you know, we're talking
2 about Facebook so much and Facebook privacy controls, but
3 someone could be on Instagram or Snapchat or Pinterest or
4 something else. So saying, you know, we know pretty well
5 what liked means, but I don't think we should talk about
6 it in terms of -- have it as a term because it doesn't
7 apply across platforms. So I would say something to the
8 effect of "The acknowledgement of a post can be taken as
9 approval or even endorsement of the content of the post"
10 and just have that as a warning. Just raise it very
11 general like that, that acknowledgement of a -- whether
12 it's by like or sharing or pinning on Pinterest, whatever,
13 can be construed and just have that as -- have that be the
14 advisory to the judges.

15 CHAIRMAN BABCOCK: Lisa.

16 MS. HOBBS: Well, I just -- because there's
17 such a vast difference of knowledge in this room about how
18 these various platforms work, and as one of the younger
19 members of the advisory committee I feel --

20 CHAIRMAN BABCOCK: The most knowledgeable.

21 MS. HOBBS: No, not most knowledgeable, but
22 it's definitely a part of my life on an hour by hour basis
23 really. I am on social media all the time among tons of
24 platforms, but the idea that a juror is going to see
25 something that a judge likes or shares and what you seem

1 to be concerned about is that it's going to reflect on
2 that particular case, and that seems even more unlikely --
3 I mean, Judge Christopher talked about how it was unlikely
4 that they would even see it, it would be so hard to find,
5 but the idea that what the judge liked also was about that
6 case, which I would -- I don't think judges should be
7 communicating in any way on any platform in any way about
8 a case that's pending in them. I feel strongly about
9 that, but so it just seems like it would be unlikely that
10 it's going to actually reach a juror about that particular
11 case.

12 HONORABLE DAVID PEEPLES: If I'm a juror and
13 I see that Judge Slaughter -- and I'm in her court on the
14 jury -- likes the slaughter house concept, I might think,
15 you know what, this judge here, I respect her, wants me to
16 hammer the heck out of this guy. She wasn't talking about
17 this case, but her attitude is slaughter house she likes,
18 hang 'em high or whatever.

19 MS. HOBBS: Well, Judge Boyd got her
20 website, and she puts it on her website so, I mean, you
21 could do any nominal amount of research on a particular
22 judge that's an elected official that campaigns that tells
23 the public what their position is on being tough on crime
24 or not, and that's -- you know, it's out there. Jurors
25 can do that kind of research.

1 HONORABLE DAVID PEEPLES: Another quick
2 question, and I realize I'm talking a lot. The reason
3 that we want to give judges some latitude to be in social
4 media, if I were still running I would be doing it, okay,
5 but I'm not still running, but many judges are, is that we
6 want them to be able to use this potent technique, device,
7 but do you need to like things like that? And Peter was
8 right, the concept of like may be too limited, but
9 acknowledge the statement. Do you need to do that to
10 campaign? I mean, is that a good thing, and is it needed
11 for people that are forced to be out there running?

12 MS. HOBBS: I mean, I think if you can ask
13 any one of the judges in this room who does it and
14 probably looking around the room they probably all do,
15 it's about hits. It's about constant communication with
16 your base. So you're looking for ways to communicate with
17 the people to get your name out there. So Justice Boyd
18 reads an interesting article about use of the comma, the
19 serial comma, and he wants to retweet it. That's
20 something people may like. That's something -- so it's
21 really not -- it's not that you're -- it's -- for social
22 media to be effective you have to be very active on it so
23 you're getting constant hits, constant communications with
24 your people, and so that's why people retweet, share, like
25 things. It's because then they're getting their name out

1 there more with every time.

2 CHAIRMAN BABCOCK: To me it's not such a bad
3 thing. I mean, we talk all the time about, particularly
4 in big counties like Dallas and Harris, you know, the
5 voters, they don't know these judges. They don't know who
6 they're voting for, and but if you have an active social
7 media program, maybe they do, maybe they start to know
8 something about the people that they're voting for.

9 MS. HOBBS: Right.

10 CHAIRMAN BABCOCK: And if we're going to
11 have elections, it's better that the citizens know who
12 they're voting for than just saying "Oh, he's an R or he's
13 a D," and so that's my basis for voting.

14 HONORABLE TOM GRAY: To repeat something
15 that Mr. Perdue said earlier, probably not my target voter
16 base, my target demographic.

17 CHAIRMAN BABCOCK: People that are on social
18 media?

19 HONORABLE TOM GRAY: Well, I mean, from my
20 18 counties, Central Texas, the percentage that notes my
21 absence on social media, I mean, this is so unique to each
22 individual person of what they need to do, feel like they
23 need to do, want to do, the method by which they want to
24 meet their voters, I just think we ought to stay out of
25 it, but that's -- you know, not stay out of this media,

1 but I just don't think there's a need for a rule in this
2 area, and, you know, you know, I never have understood if
3 it's no holds barred as in wrestling or no hole barred as
4 in something else. It just doesn't make any sense to me,
5 but I just don't think there ought to be any limitations
6 on it.

7 CHAIRMAN BABCOCK: Okay.

8 HONORABLE DAVID PEEPLES: Can I ask?

9 CHAIRMAN BABCOCK: Yeah, Judge.

10 HONORABLE DAVID PEEPLES: Tom, if we don't
11 do that, how do people get any guidance? Aren't judges
12 entitled to some guidance on this?

13 HONORABLE TOM GRAY: Yeah, it's called the
14 voter box and recusal.

15 HONORABLE DAVID PEEPLES: The Judicial
16 Conduct Commission, I mean, are judges not entitled to --
17 you know, whether you like the rules or not to hear, you
18 know, you can -- you can get sanctioned for doing A, B, or
19 C. Now, if you do so-and-so, you're safe. Is that not a
20 good thing for people, something to be desired and sought?

21 HONORABLE TOM GRAY: I don't think the
22 existing canons are written such that there is anything
23 that is a safe harbor. I mean, what one person may read
24 those canons, it's like the Bible. You read it on any
25 given day, and it may mean one thing to you, and it

1 impacts you in one way or another. Same event, or read it
2 on another day and you see it in a different context. I
3 just -- I don't think that we can give in a comment
4 sufficient guidance to a judge, particularly a candidate,
5 that may or may not realize that they're even bound by
6 these canons until they're elected, that is going to
7 impact the way they conduct their social media presence.
8 As said at the top of the hour, I think the fact that
9 these type of communications are a special form of
10 communication doesn't change the way that a judge should
11 or should not communicate, and I'm just concerned that
12 this gives the Judicial Conduct Commission too much
13 control over what they decide to prosecute as a violation
14 as opposed to leaving that within the judge's control, and
15 I say that by just the default provision, let the judge
16 decide where the risk is under the existing canons.

17 HONORABLE JEFF BOYD: Chip, it occurs to me
18 -- Lisa's comment made me think this, and not to defend
19 myself and everybody else in here, but I wonder how
20 different this conversation would be if we had a whole
21 bunch of really smart 25 to 35-year-old lawyers sitting in
22 here.

23 HONORABLE STEPHEN YELENOSKY: They wouldn't
24 be talking. They would be texting.

25 HONORABLE JEFF BOYD: I'm thinking if we got

1 our, you know, the last --

2 MS. HOBBS: Law clerks.

3 HONORABLE JEFF BOYD: -- three years of our
4 law clerks to sit around this table and have this
5 conversation.

6 CHAIRMAN BABCOCK: Completely different.

7 HONORABLE JEFF BOYD: And I'm not saying
8 they would come up with the right answer compared to a
9 wrong one. I just think it would be completely different,
10 which I think we ought to be considering. Maybe we need a
11 sub subcommittee.

12 CHAIRMAN BABCOCK: Yeah.

13 HONORABLE TOM GRAY: But it's not just
14 the -- in this part of this rule it's not just the lawyer
15 student that we're addressing here. We are addressing or
16 attempting to address the public and their perception of
17 the judicial branch.

18 HONORABLE JEFF BOYD: Right, but, you know,
19 a half or more of that public is 25 to 40 years old.

20 HONORABLE TOM GRAY: And what I'm suggesting
21 is --

22 HONORABLE JEFF BOYD: What would their
23 perception be of what we're trying to do for them?

24 HONORABLE TOM GRAY: What I'm suggesting to
25 you in response is, yes, do your subcommittee but include

1 on your sub subcommittee --

2 HONORABLE JEFF BOYD: Nonlawyers.

3 HONORABLE TOM GRAY: -- nonlawyers. My
4 grandson. I'll nominate him. You know, he's 10.

5 CHAIRMAN BABCOCK: You're going to nominate
6 him as chair I hope.

7 HONORABLE JEFF BOYD: And he's probably more
8 adept at all of the social media even than the 25 to 35.

9 CHAIRMAN BABCOCK: That was my point, make
10 him the chair.

11 HONORABLE JEFF BOYD: Yeah. Yeah.

12 CHAIRMAN BABCOCK: All right. Let's go to
13 the next paragraph. "Judges shall also take care that
14 their use of social media satisfies this code's
15 prohibition of inappropriate political activity." Justice
16 Busby.

17 HONORABLE BRETT BUSBY: I suggest that we
18 delete the second and third sentences because I don't see
19 any difference between having a political post on your
20 personal page versus a political post on a separate public
21 social -- you know, if we're talking about Facebook, you
22 know, your personal page versus your sort of
23 organizational page, as Justice Boyd was describing it. I
24 think -- you know, some of your friends may also go over
25 and like your political page, but I want my friends to see

1 that I'm running for office, and if they're inclined to
2 support me to go to my website and make a contribution,
3 and I don't see why having -- putting that on my personal
4 page is any more or less inappropriate -- I mean, I think
5 it's appropriate in both places in that it's not narrowly
6 tailored to say that you can only post it on one page and
7 not the other.

8 MS. HOBBS: Chip, it's also very
9 Facebook-specific. I mean, your Twitter account is your
10 Twitter account. It's not like you have a -- I guess you
11 could. I guess you could do --

12 HONORABLE BRETT BUSBY: Two Twitter
13 accounts.

14 MS. HOBBS: Yeah. But most people don't.
15 This seems like a very Facebook-specific comment, and not
16 a social media broad comment.

17 CHAIRMAN BABCOCK: Okay. Elaine.

18 PROFESSOR CARLSON: Yeah, we had kind of a
19 split on the subcommittee on this. A lot of states do
20 have this as their best practices, but --

21 HONORABLE BRETT BUSBY: What's their
22 rationale?

23 PROFESSOR CARLSON: I think they have more
24 Draconian restrictions on judicial activity in general
25 running for re-election than we do. So we're open to --

1 and let me just back up and say we did draft Kennon to be
2 on our committee, hoping that would bring -- it has
3 brought a lot of -- I'll call it tech savvy, youthful
4 perspective, and our subcommittee has no pride of
5 authorship. We're trying to write what will work and what
6 reflects reality, so all comments are very much
7 appreciated. Anyone who would like to volunteer to be on
8 the subcommittee, we would welcome that.

9 CHAIRMAN BABCOCK: Well, and your vice-chair
10 is thinking about drafting somebody.

11 HONORABLE DAVID PEEPLES: I've already done
12 it.

13 CHAIRMAN BABCOCK: With the permission of
14 the chair, the liaisons. Justice Christopher.

15 HONORABLE TRACY CHRISTOPHER: I think I made
16 this comment before, but it pertains to this paragraph in
17 particular. Yeah, it would be great if we all had the
18 money to delegate, you know, taking care of our website to
19 a campaign committee; and, in fact, I know that's the way
20 it is in some states, right? Judges are not allowed to
21 raise money themselves. They have to have a separate
22 committee that raises money for them. The judges are not
23 allowed to be involved in that, but we don't have that
24 prohibition, and it's expensive to have a social media
25 person doing your social media. I think most judges, you

1 know, you might pay to help get it set up, but after that
2 you pretty much maintain it.

3 HONORABLE TOM GRAY: I committed to that
4 same position to announce for Ana yesterday when she said
5 she wasn't going to be here. She's got the same objection
6 to it, as do I, that it just doesn't work to have a
7 separate campaign committee to do that.

8 CHAIRMAN BABCOCK: Professor Albright.

9 PROFESSOR ALBRIGHT: I like the idea of
10 calling attention to particular pitfalls, like if you're
11 concerned that some judges or candidates may not
12 understand what liking means or understanding that they
13 need to look at their security settings, you can say
14 something like "Social media has some other things --
15 things you need to be concerned about that you might
16 not -- that you are not concerned about with other
17 communications such as," but it seems like the same
18 concepts apply to communications in social media that do
19 on any other kind of communications. You shouldn't do
20 anything inappropriate or, you know, whatever the rule
21 says about communications, but I don't think social media
22 is so different as to the concept of communication. It's
23 still communication. It's just easier, and it's -- you
24 can reach a whole lot more people, and you need to be
25 aware of that, and maybe you can point out some of those

1 differences without all of the commentary about if you do
2 this, that's wrong, because I think what we're finding is
3 usually it's a judgment call. I mean, I do think if you
4 talk about a pending case, that's wrong.

5 CHAIRMAN BABCOCK: Okay. Any other -- yeah,
6 Justice Christopher.

7 HONORABLE TRACY CHRISTOPHER: Well, I have
8 one quick comment about comments, and we were surprised to
9 find that there is a comment to the Code of Judicial
10 Conduct, and I -- but it is not in our Texas Rules of
11 Court paperback book that everyone looks at for the rules.
12 The comments are in there for the disciplinary procedure
13 rules, but that comment -- there's only one, and it's a
14 comment to Canon 5, and it's not in this book. I don't
15 know why it's not in this book, and it probably should be.

16 CHAIRMAN BABCOCK: Martha knows.

17 MS. NEWTON: Well, I do know, because we are
18 in touch with them. We really don't have any control over
19 what West or Lexis or any of the other publishers publish,
20 and we find mistakes in their books all the time, and we
21 do communicate with them from time to time if we see
22 something that's wrong or something that's missing, but
23 it's -- it's just impossible to kind of monitor their
24 publication of all the rules every year. A few years ago
25 we saw that they had -- they had published in the Texas

1 Rules of Civil Procedure some old comments that the Court
2 didn't write, and we never really figured out where they
3 came from, and so we advised them and told them to take
4 them out, and they did. So we do communicate with them
5 from time to time, but we just don't have any control over
6 what they publish and what they don't.

7 CHAIRMAN BABCOCK: Judge Yelenosky.

8 HONORABLE STEPHEN YELENOSKY: Do these -- in
9 here somewhere does it at least -- if it's going to work
10 as you're suggesting, does it at least tell us whether or
11 not putting something up is a public comment or not?
12 Because that triggers different requirements, right?
13 You're not supposed to comment publicly about, and so I
14 would want to know I guess whether when I put something on
15 Facebook with some privacy settings does that necessarily
16 make it nonpublic? I mean, is there some way to guide
17 people on that question, because --

18 PROFESSOR ALBRIGHT: My view is anything you
19 put on social media is public no matter how locked down
20 you are.

21 HONORABLE STEPHEN YELENOSKY: But that's a
22 question we would need to answer.

23 PROFESSOR ALBRIGHT: Yeah, because I think
24 that's a good idea.

25 CHAIRMAN BABCOCK: Elaine.

1 PROFESSOR CARLSON: So, Judge Christopher,
2 could I ask you a question? Let's say Judge Busby posts
3 on his personal Facebook page "Filed today to run for
4 re-election," and you put like. Is that okay?

5 HONORABLE TRACY CHRISTOPHER: Well, I did it
6 for Judge Wilson, and then Judge Busby and I were talking
7 about it, and in light of this comment when you say it's
8 an endorsement I'm like, oh, my God, well, I'm not
9 supposed to be endorsing other political candidates, so
10 that's why I was immediately like, oh, my gosh, that is
11 not an endorsement. That was just like, you know, no. I
12 did not make a violation.

13 PROFESSOR CARLSON: In several states it's
14 improper.

15 HONORABLE TRACY CHRISTOPHER: So, I mean, I
16 think when you read *In Re: Hecht* endorsement is a -- as
17 used in the Code of Judicial Conduct has specific meaning,
18 and hitting a like button that someone filed for
19 re-election is, in my opinion, not it.

20 PROFESSOR CARLSON: In some states it has
21 been held to be improper.

22 HONORABLE TRACY CHRISTOPHER: Well, but I
23 mean, read *In Re: Hecht*. It just couldn't be under that
24 case.

25 MS. GREER: I think as a practical --

1 CHAIRMAN BABCOCK: Marcy.

2 MS. GREER: Sorry. I think as a practical
3 matter it's not an endorsement. You're just saying "Good
4 for you," which is not saying, "I think you're the best
5 candidate." I mean, to me there are different -- there
6 are so many different ways like can be interpreted. I
7 mean, I always struggle with clicking like on someone's
8 news that they're sharing about bad news because I can't
9 get the emojis to work and that they'll take it that I'm
10 liking this terrible thing that happened to them, and
11 there's some different ways to interpret it. You're just
12 saying, you know, "amen," or I mean, not even "amen."
13 You're just saying, "Okay, good job."

14 CHAIRMAN BABCOCK: "Atta boy."

15 MS. GREER: "Atta boy."

16 PROFESSOR ALBRIGHT: "Thinking of you."

17 HONORABLE TRACY CHRISTOPHER: "Thinking of
18 you."

19 CHAIRMAN BABCOCK: Let's talk about the last
20 paragraph.

21 HONORABLE TRACY CHRISTOPHER: Now, I will
22 say I will never like a Democrat's post that they've filed
23 for election, even if I think, "okay," and "good for you."

24 HONORABLE STEPHEN YELENOSKY: Well, that's a
25 good point.

1 HONORABLE TRACY CHRISTOPHER: I don't. You
2 know, I'm being honest. I don't.

3 CHAIRMAN BABCOCK: So just move to Austin,
4 and you'll change your mind.

5 HONORABLE TRACY CHRISTOPHER: No, I
6 wouldn't. Because that would not be good for me
7 politically.

8 CHAIRMAN BABCOCK: Okay. Let's talk about
9 the last paragraph. Frank.

10 MR. GILSTRAP: The first sentence really
11 needs to be rewritten. I count 50 words. I would start
12 by taking the phrase "in using social media" and moving it
13 to the first, and then after the first mention of Canon 3B
14 I would start a second sentence there, but I don't know
15 what that clause there says. It says the judge should
16 avoid using social media to obtain information about --
17 about a case before the judge. Is that what we're talking
18 about?

19 PROFESSOR CARLSON: Yeah.

20 MR. GILSTRAP: How does that work?

21 PROFESSOR CARLSON: You go on the internet
22 and you say, "Well, I want to find out some more about
23 this subject."

24 MR. GILSTRAP: Some more about the case
25 before me?

1 PROFESSOR CARLSON: Right.

2 MR. GILSTRAP: And that's not -- it's not
3 okay for a juror obviously, but it's not okay for a judge
4 either?

5 PROFESSOR CARLSON: I think there are
6 limits.

7 MR. GILSTRAP: Okay. Well, anyway, I would
8 still put a second sentence, because it's --

9 HONORABLE STEPHEN YELENOSKY: It's evidence
10 that doesn't come through the court.

11 MR. GILSTRAP: What's that?

12 HONORABLE STEPHEN YELENOSKY: It's evidence
13 that doesn't come through the court. The parties have no
14 chance to object.

15 MR. GILSTRAP: Okay, but, I mean, I'm not
16 acting as the fact-finder. I'm presiding over a criminal
17 trial.

18 HONORABLE STEPHEN YELENOSKY: It may be
19 different, but why? Why bother with the difference?

20 MR. GILSTRAP: Well --

21 CHAIRMAN BABCOCK: Well, 3B(8) says a lot of
22 things that don't violate it.

23 PROFESSOR CARLSON: Right.

24 CHAIRMAN BABCOCK: Has anybody thought about
25 the interaction between this paragraph and the safe harbor

1 provisions of 3B(8)?

2 PROFESSOR CARLSON: We referenced 3B(8),
3 saying, "Be careful, because generally you're not supposed
4 to be doing this," but you're right. There are a number
5 of exceptions.

6 CHAIRMAN BABCOCK: And you say "avoid using
7 social media to obtain information regarding a proceeding
8 in violation of Canon 8," so I guess you pick up the
9 exceptions that way.

10 PROFESSOR CARLSON: Uh-huh. Yeah.

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

13 HONORABLE TRACY CHRISTOPHER: I'm really --
14 I don't understand what that is for and why it would be
15 here. Okay. This comment has all been talking about
16 something that you do, something that somebody responds to
17 your post, something that you're liking, and now -- now
18 we're talking about 8, which to me if we wanted to talk
19 about judges' abilities to use the internet to do research
20 about their cases or parties or companies, that cannot be
21 covered in one sentence like this. I mean, it just can't
22 be.

23 Periodically like the Texas Center will have
24 a whole half-day devoted to pros and cons of, you know,
25 what it is that you can look at on the internet in terms

1 of doing research that's not in the briefs and, you know,
2 the right way to do it and how to do it and, you know,
3 should you do it. Judges on the Supreme Court have --
4 Judge Posner, for example, he says -- not Supreme Court,
5 but in the federal system. He says of course you have to
6 look at the internet because you can't write something in
7 your opinion that's just wrong, and Judge Brister had that
8 same opinion also. If the only thing in front of the
9 record is that the, you know, moon is made of green
10 cheese, you can't put that in your opinion that the moon
11 is made of green cheese.

12 HONORABLE STEPHEN YELENOSKY: But you don't
13 get that from the internet. I mean, that's judicial --
14 you can make a judicial -- what is it called, judicial --

15 CHAIRMAN BABCOCK: Judicial notice.

16 HONORABLE STEPHEN YELENOSKY: Judicial
17 notice of that.

18 HONORABLE TRACY CHRISTOPHER: No. No.
19 Let's give an example of -- and this was a case that I
20 worked on where we were talking about blood and blood
21 plasma and the difference between the two, and the expert
22 in trial was saying absolutely the wrong thing, right?
23 But defense lawyer was like "Well, isn't it true you're
24 saying just the wrong thing?"

25 "No." And but didn't have the medical

1 articles available to prove that the expert was saying the
2 wrong thing, the difference between blood and blood
3 plasma. So it comes up on appeal. Can I rumble around
4 researching the difference between blood and blood plasma?
5 No. I'm not supposed to be able to do that. Can I look
6 at case law that talks about blood and blood plasma, even
7 if no lawyer in the case has cited it to me? And the
8 answer to that, of course, is yes. Can I then look at a
9 medical article that was embedded in the Court of Criminal
10 Appeals opinion about the difference between blood and
11 blood plasma? And the answer to that is yes. So, I mean,
12 there's a lot of -- and that is all using social media. I
13 am using the internet to do that.

14 HONORABLE STEPHEN YELENOSKY: But why is it
15 wrong to say -- you're an appellate judge, so I may not
16 understand this, but why is it wrong to say, "In this case
17 there was nothing to contradict what the expert said on
18 this point"? You're not saying they're the same thing,
19 but there was nothing to contradict it rather than saying,
20 "Well, I know that's wrong, and therefore, I should find
21 out that it's wrong." I mean, don't you work with the
22 record and the record -- part of the record can have
23 things that are not -- not factually correct.

24 HONORABLE TRACY CHRISTOPHER: That is the
25 debate. Okay. That is the huge debate. All right. In

1 appellate circles, okay. That -- and like I said, it's
2 not something that can be dealt with in one kind of
3 obscure sentence in a comment. That's all my point is.

4 CHAIRMAN BABCOCK: Yeah. Well, and I think
5 as we come to a close here at noon, it's very appropriate
6 that we end with blood since we've been dealing with the
7 slaughter house for most of the morning.

8 HONORABLE TRACY CHRISTOPHER: I am not
9 liking that comment. And we're all laughing.

10 (Laughter)

11 CHAIRMAN BABCOCK: Yeah, show laughter, Dee
12 Dee. Marcy and Frank had two closing comments. Keep it
13 clean, guys. Marcy first.

14 MS. GREER: I was just going to elaborate on
15 your point. Here's an even more innocuous way that it
16 comes up. Say a brief references a CLIA standard.

17 CHAIRMAN BABCOCK: A what?

18 MS. GREER: A CLIA standard. This is a new
19 -- it has to do with certifying a lab, for example. So
20 you look on the internet. You go to Google, search out
21 CLIA, and it's going to pull up acronyms. It's going to
22 give you Facebook references. It's going to give you all
23 kinds of stuff. Can you not look at that? I mean, it's
24 all out there, and it's all integrated, and I think the
25 lines are very hard to cross. So I agree with Justice

1 Christopher's point about not putting something in a
2 comment that could create a liability or recusal for doing
3 something like that because that happens on a daily basis.

4 CHAIRMAN BABCOCK: Yeah. Frank.

5 MR. GILSTRAP: Information about a
6 proceeding is much broader than the appellate record or
7 the evidence. What about -- I'm trying a criminal case,
8 I'm the judge, and I go online to see if this juror is
9 posting something about the case. That would be proper,
10 and that's covered. That's prohibited there.

11 PROFESSOR CARLSON: Sounds like the sense is
12 we don't need to broach that topic, and just leave 3B(8)
13 to 3B(8).

14 CHAIRMAN BABCOCK: I'm getting that sense.

15 PROFESSOR CARLSON: I am, too.

16 CHAIRMAN BABCOCK: Well, I don't know about
17 you guys, but I think this has been a fabulous
18 conversation, and we'll -- Jim doesn't think so, but
19 anyway, we'll continue it next time with I suspect all the
20 same faces that are sitting here at the table now, but
21 this is the end of three years. It seems hardly possible
22 that we've started our term three years ago, but
23 apparently so, and it's been an honor to preside over you
24 cats, and I mean that. I tell people all the time it's
25 the most professionally rewarding thing that I do in my

1 practice, and thanks for letting me be part of it, and
2 thanks for your participation. It's just wonderful. It
3 is great.

4 CHIEF JUSTICE HECHT: The Supreme Court
5 extends its gratitude to Chip and to all of you.

6 CHAIRMAN BABCOCK: So we're adjourned.

7 (Adjourned)

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

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

* * * * *

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 2nd 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 \$ 843.00.

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

#DJ-450