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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

SEPTEMBER 14, 2019

(SATURDAY SESSION)

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Taken before *D'Lois L. Jones*, Certified Shorthand Reporter in and for the State of Texas, reported by machine shorthand method, on the 14th day of September, 2019, between the hours of 9:01 a.m. and 11:58 a.m., at the Sheraton Austin at the Capital, Creekside Conference Room, 701 East 11th Street, Austin, Texas 78701.

INDEX OF VOTES

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

Documents referenced in this session

19-31 Email from Judge Benton - Eviction Kit Forms

19-32 SB478 Eviction Kit Forms and Instructions

19-33 Memo - Appeals in Parental Termination Cases, 9-5-19

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

MR. JACKSON: Over there.

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

MS. CORTELL: That is correct.

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

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

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

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

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

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

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

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

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

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

CHAIRMAN BABCOCK: Great. Nina.

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

MR. WATSON: You're talking about B?

MS. CORTELL: Really A or B.

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

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

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

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

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

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

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

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

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

MS. CORTELL: Right.

CHAIRMAN BABCOCK: Yeah.

MS. CORTELL: Right.

CHAIRMAN BABCOCK: Okay. Yeah, Richard.

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

CHAIRMAN BABCOCK: Skip Watson.

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

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

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

MR. WATSON: Thank you, Judge.

CHAIRMAN BABCOCK: Yeah, Robert.

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

CHAIRMAN BABCOCK: Yep. Nina.

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

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

CHAIRMAN BABCOCK: Oh, of course.

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

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

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

CHAIRMAN BABCOCK: Justice Christopher.

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

CHAIRMAN BABCOCK: Stephen, and then Skip.

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

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

CHAIRMAN BABCOCK: Right. Skip.

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

HONORABLE TRACY CHRISTOPHER: Right.

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

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

CHAIRMAN BABCOCK: Holly.

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

HONORABLE DAVID EVANS: Grayson has three district courts.

CHAIRMAN BABCOCK: Right.

HONORABLE DAVID EVANS: And two county courts at law.

MS. TAYLOR: Okay.

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

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

HONORABLE DAVID EVANS: Fredericksburg. Yeah.

CHAIRMAN BABCOCK: Levi.

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

CHAIRMAN BABCOCK: Justice Gray.

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

CHAIRMAN BABCOCK: Yeah.

HONORABLE TOM GRAY: In the near future.

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

HONORABLE TOM GRAY: Yeah.

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

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

CHAIRMAN BABCOCK: Yeah.

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

CHAIRMAN BABCOCK: Judge Estevez.

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

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

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

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

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

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

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

CHAIRMAN BABCOCK: Yeah.

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

CHAIRMAN BABCOCK: Yeah. Justice Christopher.

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

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

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

HONORABLE ANA ESTEVEZ: Mine is Judge Moore.

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

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

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

CHAIRMAN BABCOCK: Steve.

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

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

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

CHAIRMAN BABCOCK: Judge Evans.

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

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

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

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

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

HONORABLE DAVID EVANS: Right.

HONORABLE TRACY CHRISTOPHER: I mean, if

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

CHAIRMAN BABCOCK: Steve, and then Nina.

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

CHAIRMAN BABCOCK: Nina.

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

CHAIRMAN BABCOCK: You guys getting all of this?

MS. DAUMERIE: Yes.

MS. CORTELL: I will be helping.

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

MR. WATSON: Please.

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

HONORABLE STEPHEN YELENOSKY: Can you reread it, Chip?

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

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

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

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

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

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

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

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

CHAIRMAN BABCOCK: Okay.

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

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

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

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

CHAIRMAN BABCOCK: Justice Christopher.

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

CHAIRMAN BABCOCK: Judge Evans.

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

CHAIRMAN BABCOCK: Elaine, can you hear the judge?

PROFESSOR CARLSON: Yes, I can.

HONORABLE DAVID EVANS: Senator Zaffirini

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

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

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

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

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

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

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

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

Okay. Anybody -- Justice Gray.

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

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

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

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

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

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

HONORABLE TRACY CHRISTOPHER: No.

CHAIRMAN BABCOCK: No.

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

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

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

CHAIRMAN BABCOCK: Professor Hoffman.

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

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

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

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

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

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

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

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

CHAIRMAN BABCOCK: Judge Estevez.

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

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

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

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

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

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

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

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

litem, and that solves a lot of problems.

CHAIRMAN BABCOCK: Thanks, Tom. Judge.

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

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

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

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

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

CHAIRMAN BABCOCK: Sure.

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

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

HONORABLE DAVID EVANS: Yes.

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

CHAIRMAN BABCOCK: Great. Sharena.

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

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

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

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

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

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

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

CHAIRMAN BABCOCK: Professor Hoffman.

PROFESSOR HOFFMAN: Okay. I am just totally

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

HONORABLE DAVID EVANS: That's right.

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

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

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

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

PROFESSOR HOFFMAN: Yeah.

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

PROFESSOR HOFFMAN: Uh-huh.

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

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

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

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

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

CHAIRMAN BABCOCK: What's skip tracing?

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

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

CHAIRMAN BABCOCK: Kennon.

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

HONORABLE ANA ESTEVEZ: Can you say that again?

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

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

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

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

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

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

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

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

MS. WOOTEN: Yes.

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

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

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

MS. WOOTEN: Right.

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

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

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

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

MS. WOOTEN: Right.

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

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

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

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

MR. LEVY: Not a residence.

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

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

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

CHAIRMAN BABCOCK: Judge Wallace.

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

MS. WOOTEN: I agree.

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

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

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

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

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

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

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

CHAIRMAN BABCOCK: So if we leave half an

hour that would be sufficient?

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

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

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

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

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

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

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

report back that there are known heirs.

HONORABLE ANA ESTEVEZ: Very often.

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

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

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

CHAIRMAN BABCOCK: What about --

MR. RINEY: In live I should say.

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

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

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

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

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

PROFESSOR CARLSON: I don't know.

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

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

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

CHAIRMAN BABCOCK: The old Supreme Court case.

PROFESSOR HOFFMAN: 1957 or '58.

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

PROFESSOR HOFFMAN: But no one reads that case anymore.

CHAIRMAN BABCOCK: I knew that.

MR. WATSON: No one but Chip.

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

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

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

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

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

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

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

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

CHAIRMAN BABCOCK: Judge Wallace.

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

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

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

HONORABLE R. H. WALLACE: Okay.

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

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

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

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

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

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

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

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

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

HONORABLE R. H. WALLACE: Who?

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

CHAIRMAN BABCOCK: Nina.

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

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

CHAIRMAN BABCOCK: Skip.

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

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

HONORABLE DAVID EVANS: Yes.

HONORABLE TRACY CHRISTOPHER: Yes.

CHAIRMAN BABCOCK: It does.

HONORABLE DAVID EVANS: Yes.

CHAIRMAN BABCOCK: And only lawyers are on

the wheel, right?

HONORABLE STEPHEN YELENOSKY: Yes.

HONORABLE DAVID EVANS: Yes.

CHAIRMAN BABCOCK: Kennon.

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

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

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

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

MS. WOOTEN: It should.

HONORABLE DAVID EVANS: And the judge.

CHAIRMAN BABCOCK: Justice Christopher.

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

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

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

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

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

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

CHAIRMAN BABCOCK: Robert, and then Kennon.

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

CHAIRMAN BABCOCK: Kennon.

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

The second thing that I know we've done in

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

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

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

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

HONORABLE ANA ESTEVEZ: Let's sing.

MR. WATSON: No, but he is.

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

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

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

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

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

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

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

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

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

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

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

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

PROFESSOR HOFFMAN: I share that.

CHAIRMAN BABCOCK: Oh, you were raising your

hand because you share it.

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

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

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

CHAIRMAN BABCOCK: Frank.

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

CHAIRMAN BABCOCK: Okay. Yeah, Judge Evans.

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

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

CHAIRMAN BABCOCK: Okay. Yeah, Justice Christopher.

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

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

CHAIRMAN BABCOCK: Okay. Elaine.

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

CHAIRMAN BABCOCK: Use the mike, Elaine.

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

HONORABLE DAVID EVANS: Can I leave?

CHAIRMAN BABCOCK: Say that again.

HONORABLE DAVID EVANS: Can I leave?

CHAIRMAN BABCOCK: No.

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

CHAIRMAN BABCOCK: Levi.

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

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

CHAIRMAN BABCOCK: Judge Evans.

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

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

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

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

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

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

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

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

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

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

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

HONORABLE DAVID EVANS: Regrettably.

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

PROFESSOR CARLSON: Please.

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

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

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

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

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

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

MS. WOOTEN: No. No.

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

You want to fight again.

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

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

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

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

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

HONORABLE LEVI BENTON: So --

CHAIRMAN BABCOCK: No?

HONORABLE LEVI BENTON: Yes.

CHAIRMAN BABCOCK: Yes, okay.

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

CHAIRMAN BABCOCK: Right.

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

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

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

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

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

MS. DAUMERIE: There's no --

HONORABLE LEVI BENTON: It's --

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

HONORABLE LEVI BENTON: Right.

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

HONORABLE LEVI BENTON: Speak into the mike, Chip.

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

you'll report to us?

HONORABLE LEVI BENTON: That's right.

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

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

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

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

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

HONORABLE LEVI BENTON: Okay.

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

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

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

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

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

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

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

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

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

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

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

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

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

CHAIRMAN BABCOCK: Yeah, Judge.

HONORABLE STEPHEN YELENOSKY: Stephen, Judge, whatever.

CHAIRMAN BABCOCK: Yeah. Stephen, Judge, whatever.

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

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

MS. McALLISTER: Yeah.

HONORABLE STEPHEN YELENOSKY: So it only

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

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

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

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

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

HONORABLE LEVI BENTON: Trish, may I invite

you?

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

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

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

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

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

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

CHAIRMAN BABCOCK: Yeah. And "default" --

HONORABLE STEPHEN YELENOSKY: Default is --

CHAIRMAN BABCOCK: It's up in the air whether we change that to "vacate."

HONORABLE STEPHEN YELENOSKY: No, "default" is to change, Trish has it, but "fail to pay rent" or -- the "vacate" goes to whether it should say "vacate," "leave the home" or something else. But the "default" was should it say something more than "fails to pay rent," and, Trish, you can pick up on that.

HONORABLE LEVI BENTON: Well, you can default in ways other than paying rent.

HONORABLE STEPHEN YELENOSKY: Yeah, which is why I suggested "fails to pay rent or fails to comply with the lease."

HONORABLE LEVI BENTON: I'm okay with that.

CHAIRMAN BABCOCK: Okay. So those are the three changes. Justice Gray.

HONORABLE TOM GRAY: I hesitate to even say this, but you've got a document titled "Lease termination after Foreclosure Notice." Is that going to have "lease termination/cancellation"?

MS. McALLISTER: No. So here -- no, probably not on that one. Let me just also be real clear. On this packet has every single form you would possibly need if you were either a landlord or a tenant including

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

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

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

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

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

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

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

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

HONORABLE TOM GRAY: Your titles as well.

MS. McALLISTER: Yeah.

CHAIRMAN BABCOCK: Yeah, Frank.

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

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

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

MS. McALLISTER: Yes. Yeah.

HONORABLE TOM GRAY: -- that proposed this.

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

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

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

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

CHAIRMAN BABCOCK: Okay.

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

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

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

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

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

MS. WOOTEN: No mas.

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

CHAIRMAN BABCOCK: Judge Yelenosky.

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

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

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

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

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

CHAIRMAN BABCOCK: Okay.

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

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

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

MS. McALLISTER: Sounds great.

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

MS. McALLISTER: Perfect. Thank you.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

HONORABLE BILL BOYCE: Yes.

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

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

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

CHAIRMAN BABCOCK: Yeah, great.

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

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

MS. BARON: I was waving bye.

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

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

HONORABLE TOM GRAY: It's your own fault.

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

CHIEF JUSTICE HECHT: I don't know how much

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

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

CHAIRMAN BABCOCK: Robert.

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

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

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

CHAIRMAN BABCOCK: Yeah, Steve.

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

CHAIRMAN BABCOCK: No.

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

CHAIRMAN BABCOCK: Kennon, and then Judge Wallace.

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

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

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

HONORABLE TOM GRAY: No.

MS. WOOTEN: Right?

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

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

Then one small, small nit in the first

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

CHAIRMAN BABCOCK: Judge Wallace, and then Hayes.

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

CHAIRMAN BABCOCK: No, that's too simple.

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

CHAIRMAN BABCOCK: Yeah.

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

CHAIRMAN BABCOCK: Hayes.

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

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

MS. WOOTEN: Uh-huh.

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

HONORABLE STEPHEN YELENOSKY: Right. That's --

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

CHAIRMAN BABCOCK: Justice Christopher, and then Judge Yelenosky.

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

MS. WOOTEN: Uh-huh.

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

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

HONORABLE TRACY CHRISTOPHER: Well --

MS. BARON: No. You don't.

HONORABLE STEPHEN YELENOSKY: Not under the

current rules.

CHAIRMAN BABCOCK: Steve.

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

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

CHAIRMAN BABCOCK: Justice Gray.

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

In a criminal arena we have a form that has

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

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

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

CHAIRMAN BABCOCK: Frank. Thanks, Judge.

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

MS. WOOTEN: Yeah.

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

CHAIRMAN BABCOCK: Okay. Commissioner.

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

CHAIRMAN BABCOCK: Kennon.

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

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

CHAIRMAN BABCOCK: Okay. Robert.

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

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

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

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

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

(Adjourned)

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REPORTER'S CERTIFICATION
MEETING OF THE
SUPREME COURT ADVISORY COMMITTEE

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

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

Charged to: The State Bar of Texas.

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

/s/D'Lois L. Jones
D'Lois L. Jones, Texas CSR #4546
Certificate Expires 04/30/21
P.O. Box 72
Staples, Texas 78670
(512)751-2618

#DJ-514