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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

SEPTEMBER 13, 2019

(FRIDAY SESSION)

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Taken before *D'Lois L. Jones*, Certified
Shorthand Reporter in and for the State of Texas, reported
by machine shorthand method, on the 13th day of September,
2019, between the hours of 9:00 a.m. and 4:58 P.M., at the
Sheraton Austin at the Capital, Creekside Conference Room,
701 East 11th Street, Austin, Texas 78701.

INDEX OF VOTES

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

<u>Vote on</u>	<u>Page</u>
Citation by Publication	30,790
TRCP 244	30,827
Ex Parte Communications in Problem-solving Courts	30,894
Ex Parte Communications in Problem-solving Courts	30,909

Documents referenced in this session

19-26 Citation by Publication Report, 9-12-19
19-27 Rule-116 Service of Citation by Publication Redline v1
19-28 February 11, 2019 Report, TRCP 244
19-29 Ex Parte Communication in Problem-Solving Courts, 9-9-19
19-30 Judge Reyes' Comments - Ex Parte Communication in Specialty Courts

1 table we have Justice Bland, and the Chief will explain
2 those circumstances to those few who don't know it, and
3 the only other thing I have to say is that I heard one of
4 the best four and a half minute speeches I've ever heard
5 last Friday, and it was delivered surprisingly by none
6 other than our own Skip Watson --

7 MR. WATSON: Surprisingly.

8 CHAIRMAN BABCOCK: -- who was accepting an
9 award, and the Chief and I are making arrangements to get
10 a copy of it, and at our next meeting we're going to play
11 it so people can hear it.

12 MR. WATSON: Oh, great. I'll be absent.

13 CHAIRMAN BABCOCK: Well, maybe in body, but
14 not in terms of your words of wisdom. Really terrific,
15 terrific speech. So with that said, Chief.

16 CHIEF JUSTICE HECHT: Well, the Court was at
17 less than full strength on Wednesday for the second time
18 this year, but it only lasted about five minutes while the
19 Governor told us what a good appointment he had made in
20 Jane Bland. So Judge Brown is on his way to Galveston,
21 and he and Susannah found a home down there, and they're
22 anxious to get started, and they promise to come back
23 whenever the Court has occasions for them to do it. So we
24 welcome Jane to the Court, and we wish Judge Brown well.

25 We have made some rule changes that were

1 mandated by the Legislature to be done by September the
2 1st. We added a comment to the Code of Judicial Conduct,
3 noting that it can't be read to prohibit a joint campaign
4 activity conducted by two or more judicial candidates.
5 That was a statute passed this last session. So that was
6 done. We talked about that I think last time. The Rule
7 of Civil Procedure 91a was amended to make the award of
8 costs of attorney fees discretionary instead of mandatory
9 for cases that are commenced after September 1st. Another
10 statute.

11 Senate Bill 891 required that better notice
12 be given to court reporters regarding the filing of
13 appeals. So we changed TRAP 25.1 to require the appellant
14 to deliver a copy of the notice of appeal to court
15 reporters responsible for preparing the record and changed
16 32.1 to require appellants to include the contact
17 information of court reporters in their docketing
18 statement and then changed 13.5 to require substitute
19 court reporters, of whom there are often a number, to file
20 contact information with the Court. And then I think the
21 Office of Court Administration, David Slayton, who is here
22 today, may add the court reporter contact information into
23 the e-filing system so that it will be automatically
24 available to everybody whenever they need to see it.

25 And then the last statutorily required

1 change we made was to exempt from MDL transfer DTPA cases
2 and cases in -- brought under the Medicaid Fraud
3 Prevention Act. This was Senate Bill 827, supported by
4 the attorney general, and the Legislature directed us to
5 make that change, and we made it.

6 Some changes that we have made that were not
7 required by the Legislature: One is to approve a
8 three-year temporary license for attorney spouses of
9 active duty military who are stationed in Texas. This is
10 a national trend. A lot of other states are doing it.
11 About a third -- about two-thirds of the states have done
12 it already. And this last session the Legislature passed
13 the Senate Bill 1200, which provides for military spouse
14 temporary licensing in other occupations. We didn't think
15 the statute covered the legal profession, but we thought
16 it was a good idea anyway, and we talked about it actually
17 for some time, and so we made that change, and we will
18 start issuing temporary licenses on December the 1st when
19 that change becomes effective.

20 We finalized the rules governing the Uniform
21 Bar Exam. The first time it will be given is in February
22 of '21, and there hasn't been much discussion of that. We
23 did ask the bar for comment when we were considering it
24 and got virtually none. It's very popular with most of
25 the deans and law students, because they want to be able

1 to transfer their bar grade if they can. Some law
2 students I think are even waiting, excuse me, to start law
3 school so that they can take the UBE, or they may go ahead
4 and start and then wait to take the bar exam until they
5 can take it, just so they can transfer. There will be
6 a -- there will be the UBE and then there will be a course
7 that we will require. We haven't worked it out yet, a
8 course and a test on Texas law, peculiarities in Texas law
9 that would not be on the uniform bar exam. So we're
10 working through all of that, finalizing it, but we ordered
11 the final rules this last several weeks.

12 And then we are told that practice tests,
13 the court reporters are required to take two practice
14 tests before they can sit for the licensing exam, and the
15 report after some years of doing that is that those tests
16 are not predictive of ability to pass the exam and are
17 probably a waste of time and money, and there seemed to be
18 uniformity about that. So we changed the Judicial Branch
19 adjunct rules to eliminate the requirements that those
20 tests be taken. So those were our rules changes since we
21 last met.

22 I mention this to you, that on October 25th,
23 please mark this down, October 25th. That's a Friday or
24 Saturday?

25 MS. DAUMERIE: Friday.

1 CHIEF JUSTICE HECHT: The Texas Access to
2 Justice Foundation will have its 35th anniversary dinner
3 here in Austin, and John Grisham is their keynote speaker,
4 and he virtually volunteered to do that. He is a member
5 of the Leaders Council for the Legal Services -- National
6 Legal Services Corporation. So he really has a heartfelt
7 interest in access to justice and Legal Aid, and he's
8 given a lot of time and energy to that mission, and so
9 he'll be the keynote speaker. So, if you can, please come
10 and support the foundation, celebrate with them, and also
11 see John Grisham.

12 And, finally, time marches on. So today is
13 the 20th anniversary of Chip's service as chair of this
14 committee. It's actually 20 years and 6 days. It was
15 September the 7th. He was first appointed to the
16 committee six years earlier on August 30th, 1993, when he
17 was 20, and so we celebrate with Chip and thank him for 20
18 years service on chair of the committee.

19 (Applause)

20 CHAIRMAN BABCOCK: Thank you. And my
21 first -- my first assignment was to deal with the parental
22 notification rules. You know, just something easy, and we
23 had to get it done like in two sessions or something like
24 that, and anyway, thank you. I tell people frequently
25 that professionally there's nothing I do that I enjoy more

1 than this, and the main reason -- there are many reasons,
2 but the main is because of all of you. Really, it's just
3 an honor to serve with people that are so bright, so
4 dedicated, and work so hard for their great state that we
5 live in. So the thanks ought to go and the applause ought
6 to go from me to you, not the other way around.

7 So the next item on our agenda is comments
8 from whatever justice of the Supreme Court happens to be
9 here, which today is Justice Bland.

10 HONORABLE JANE BLAND: Well, I'm so
11 delighted to be here. It's going to take a little bit of
12 getting used to being up here instead of back there next
13 to Justice Christopher. So I am grateful that I'm getting
14 to continue to work with all of you, and other than that,
15 no comment.

16 CHIEF JUSTICE HECHT: She told me a minute
17 ago that I'm not nearly as much fun as Justice
18 Christopher. That's bound to be true.

19 CHAIRMAN BABCOCK: And of course we have
20 David Slayton with us from the Office of Court
21 Administration, and, David, thanks for joining us. The
22 first item on our agenda today is the citation rules, and
23 Richard Orsinger has passed out some additional materials,
24 and Marti asked me to tell you that there is wifi here.
25 The code is S as in Sam, C as in Charles, I as in igloo,

1 and it's free. Now you're notified. Richard.

2 MR. ORSINGER: Thank you, Chip. So citation
3 by publication has been on the radar screen, and we have
4 discussed it before. Most recently prior to today was a
5 referral from -- regarding input from some individuals who
6 made note of their concerns about the antiquated approach
7 that Texas took to citation by publication. Most
8 recently, however, the state Legislature has passed a bill
9 that has clearly put the electronic -- use of electronic
10 media for citation by publication on the front burner, not
11 just for discussion but for action; and in the 86th
12 Legislature, Senate Bill 891, which did quite a bit
13 touching on legislation, basically endorsed and funded the
14 creation of a public website for the state of Texas to be
15 used for various purposes and directed that citation by
16 publication and other activities relating to notice in
17 civil litigation would be through that portal, that
18 website portal. And just to show you how serious the
19 Legislature was, the conference committee vote when the
20 bill went back to the House of Representatives passed by
21 144 yays and two nays, the speaker not voting; and in the
22 Senate the conference bill came out with 31 yays and no
23 nays. So short of two people in the Legislature it was
24 unanimous that we're moving forward in this area plus many
25 other things that were in Senate Bill 891.

1 This is in my memo which was passed out.
2 I'm going to follow this for a while here. In paragraph 4
3 of the memo, the bill analysis said that Senate Bill 891
4 requires OCA, the Office of Court Administration, to
5 develop not later than June 1 of 2020 and maintain a
6 public information website that allows a person to easily
7 publish public information on the website or OCA to post
8 such information on the website on receipt from such a
9 person or from the person. The bill defines, quote,
10 "public information," close quote, as "citation, other
11 related public or legal notice that a person is required
12 to publish under a statute or rule, and any other
13 information that the person submits for publication on the
14 website to effectuate service of citation by publication."
15 The bill requires the website to allow the public to
16 easily access, search, and sort the public information.
17 The bill requires the Supreme Court by rule to establish
18 procedures for the submission of public information to the
19 website by a person who is required to publish the
20 information. The bill requires the Supreme Court to adopt
21 the rules necessary to implement these provisions not
22 later than June 1 of 2020.

23 So that was the bill analysis. And what we
24 have in the memo next is actual sections of the bill that
25 touch on citation by publication. This was a lengthy

1 bill. It was many pages. I have a copy of it, if anyone
2 needs to borrow it, but article 9 and article 10 touch on
3 this subject matter of citation by publication. And if
4 you look at section 9.03, there in paragraph 5 of the
5 memo, let's skip section 72.033 of the Government Code and
6 go to 72.034, public information internet website. In
7 section (a)(1) of the amended Government Code, "public
8 information" is defined to mean "citation, other related
9 public or legal notice that a person, including a party to
10 a cause of action is required to publish under a statute
11 or rule and any other information that the person submits
12 for publication on the public information internet website
13 to effectuate service of citation by publication."

14 The next section, (2), defines "public
15 information internet website," which means "The official
16 statewide internet website developed and maintained by the
17 office," by which they mean Office of Court
18 Administration, I believe. David agrees. "Under this
19 section for the purpose of providing citation by
20 publication." And then, oh, this is short. Let's go on
21 and read (b). "The office shall develop and maintain a
22 public information internet website that allows a person
23 to easily publish public information on the website or the
24 office to post information on the public internet website
25 on receipt from a person."

1 Subdivision (c), "The public information
2 internet website shall allow the public to easily access,
3 search, and sort the public information," and (d), "The
4 Supreme Court by rules shall establish procedures for the
5 submission of public information to the public information
6 internet website by a person who is required to publish
7 the information." So that's article 9 of the bill, and
8 that basically mandates the creation of a state-sponsored
9 state-regulated, monitored, provided, website to be used
10 for public notices, including citation by publication; and
11 I read it to also indicate that individuals, not just
12 persons like deputy sheriffs or deputy constables or even
13 private process servers, but individuals, I read it and we
14 can discuss, should have the right to post citations,
15 public -- publication of citation, individual posting
16 rather than through an official of the state. And if they
17 are not -- obviously there was a choice here of either
18 they directly post or they give it to OCA who posts. I
19 guess that remains to be figured out.

20 Now, let's look at article 10 of Senate Bill
21 891 and see what additional factors it creates. It was
22 too lengthy to quote I think for this memo, so I took a
23 summary that was provided by our rules attorney, Jackie.
24 Thank you very much for that. And so we move on to
25 paragraph 6 of the memo. Article 10 of Senate Bill 891

1 contains provisions that should be considered in
2 connection with citation by publication. It requires
3 citation by publication in newspapers and on the OCA's
4 website in certain cases, and it provides exceptions to
5 citation by publication in the newspapers when the person
6 seeking publication is indigent, the cost of publication
7 is greater than \$200, adjusted for inflation, or there is
8 no available newspaper in the county. And it also
9 requires the Court to adopt rules for substituted service
10 by social media. So we're talking about Facebook and
11 places like that.

12 So we're not just talking about the State
13 Bar website when we talk about this Senate Bill and about
14 what we have to do in advising the Supreme Court. We're
15 also talking about alternate service for -- through media.
16 And while we're on that discussion, our subcommittees --
17 and I'll explain in a minute. There were two
18 subcommittees working in tandem. There are proposals
19 about the possible alternative of a district judge or a
20 county court at law judge allowing alternate service by
21 e-mail or some other form of direct communication.
22 Obviously you can't mandate that across the board, but the
23 question is do you give a trial judge the option if
24 someone has only a cell phone number or only an e-mail
25 address and they need to get service, can they send a text

1 message or can they send an e-mail and achieve service in
2 that manner.

3 So there were two subcommittees that were
4 assigned this task, and one of them was the e-filing
5 subcommittee, and one of them was the Rules 16 through
6 165a subcommittee, were given different aspects of this
7 task at different times by our committee chair, our
8 esteemed committee chair, and so we worked together in
9 tandem, and that worked fairly well, not perfectly, but
10 fairly well. And so what we've come up with is a series
11 of what I would call preliminary suggestions, and I want
12 to emphasize the fact that they're suggestions because the
13 issues that we have faced in attempting to make simple
14 rule changes in this area have led to a greater
15 appreciation of the complexity of issues that are involved
16 here.

17 So given the accelerated timetable, we have
18 something here to discuss. I think it's serious.
19 However, I don't for a second think it's final, and we're
20 looking forward to the discussion here today, because
21 we're dealing with due process. We're dealing with
22 changing 75 or a hundred years of practice. We're dealing
23 with new technology that some of us understand, others of
24 us don't understand. So what I wanted to do was to, first
25 of all, call your attention to this short document here.

1 It's just one page. It's got some red, some blue on it.
2 And I thought that this was -- this was my first effort to
3 get the ball rolling on the subcommittee level, and I
4 thought that this was just a simple and elegant solution
5 to implementing Senate Bill 891, and I put it out there to
6 withering criticism, but I thought you would like to see
7 how simple it could be.

8 We just take Rule 116, service of citation
9 by publication. "The citation shall be served," scratch
10 "sheriff or constable or clerk," "by newspaper or on the
11 state public information internet website as permitted or
12 required by law." What used to be the main rule about
13 newspaper citation has now become -- there should be
14 subsection (1), sorry for that. "Citation by newspaper is
15 accomplished by having the citation published each week
16 for four consecutive weeks. The first publication is to
17 be at least 28 days." This is the old routine through
18 publication. This has now just become one alternative.

19 The paragraph (3), which probably should be
20 called paragraph (2), this is brand new. "Citation is
21 served through the state's public information website by
22 posting the citation in accordance with applicable
23 procedures so that the citation is available for review by
24 the public for not less than 28 days." And my thinking
25 was, well, if it has to be in the newspaper for 28 days,

1 let's leave it up at the website for at least 28 days, and
2 so great, we took our existing rule, we turned newspaper
3 publication into one subsection, we added a sentence
4 saying go use the state website. Everything is fine. But
5 it turns out to be more complex than that, so let's move
6 on through the memo.

7 We're going to talk about rule -- basically
8 we have Rule 106 and then pick up again in paragraph (8),
9 Rules 109 through Rules 117 were involved in this
10 discussion. Rule 106 is for substitute service, pardon
11 me, and Rules 109 through 117 are the rules that apply to
12 citation by publication. In the memo, after the rules are
13 discussed, you'll see a subparagraph or a section about
14 the Texas Family Code; and the Family Code governs a lot
15 of the litigation, a whole lot of the pro se litigation;
16 and it's got three different sections that require
17 citation by publication. One is for divorce, one is for
18 custody or children cases, and one I think is for name
19 changes, and you'll see when we get to it that a couple of
20 them are susceptible to rule changes changing the actual
21 way notice is given in the Family Code, but one is rigidly
22 committed to newspaper publication and can't be changed by
23 rule unless we invoke that provision that we never invoke
24 that we're going to use a rule to change a statute. So
25 when we get to it, we'll talk about that, but we may have

1 to -- we may need a legislative fix on that.

2 So let's talk about Rule 106, substitute
3 service. Under the traditional practice, if conventional
4 means a personal service by either an officer or by a
5 private process server or by the clerk mailing citation,
6 if that fails after reasonable effort, you can make an
7 affidavit and file a motion with the court and request an
8 alternate form of service. In my personal experience, it
9 has typically been by either leaving the citation at the
10 residence or delivering it to someone at the business that
11 answers the door when you knock. However, we're now --
12 have instructions to consider the modern media that are
13 involved, and so the subcommittee has made a couple of
14 suggestions to Rule 106 to add on, give the judge
15 additional power to select an alternate form of service
16 that's more electronically oriented.

17 So we start out with (a), method of service
18 preferred, personal delivery or mailing by certified mail,
19 done by the clerk; (b), if you fail, you can file an
20 affidavit, give the location of the usual -- defendant's
21 usual business or place of abode. Maybe we ought to
22 modernize that word. I don't know. Or other place where
23 the defendant can probably be found. And then substitute
24 service can allow you to leave a true copy of the citation
25 with the petition attached with some person over 16 or

1 older or, no, over 16, and in any other manner the
2 affidavit suggests to the court will be reasonably
3 effective to give notice.

4 The subcommittee is suggesting that we
5 insert a subparagraph (2) as an alternative as "by
6 electronic communication sent to the defendant through a
7 social media presence." Now, that social media presence,
8 which I believe -- Jackie, isn't it a statutorily-defined
9 term or no? It's not?

10 MS. DAUMERIE: I don't think it's defined,
11 but it's used in the statute.

12 MR. ORSINGER: Used, so the Legislature in
13 its wisdom has decided that this is meaningful, and so we
14 need to find a meaning for it and implement it into our
15 rule. So note that this is not -- this is set aside as
16 kind of a normal, if you will, alternative service method,
17 which is to use a social media site, privately run. So
18 we're talking about Facebook or one of these others or
19 internet location where the defendant may learn of
20 citation. So we talk about electronic communication sent
21 to the defendant through a social media presence, but let
22 me tell you I transitioned to (c). "The court may, upon
23 request, direct that service may be accomplished by
24 posting the citation at a privately run social media site
25 or other internet location where the defendant may learn

1 of the citation."

2 So we need to -- I probably explored the
3 distinction between (b)(2) and proposed (c) and then let's
4 move on to (d). "Upon motion supported by affidavit
5 stating that after diligent inquiry a party cannot be
6 served with process under (a) or (b)" -- and remember, (a)
7 is like the traditional personal service of citation by
8 publication -- pardon me, a citation mailed by a certified
9 mail, and (b) are the -- what used to be the normal forms
10 of alternate service, and we're suggesting adding
11 electronic communication through a website. Now, if those
12 are not effective, then the court can, number one,
13 authorize sending a copy of citation by e-mail or text or
14 other electronic messaging system or by posting the notice
15 of the citation on a privately maintained internet website
16 or other internet location.

17 So to recap, we are suggesting introducing
18 into Rule 106 as an alternate method of service,
19 electronic communication through a social media site. The
20 court can also do a privately run or other internet
21 location, and after diligent inquiry and an affidavit,
22 this is a separate showing, send a copy by e-mail or text
23 or by posting on a private website. Maybe there's a
24 little overlap there. Important to say that, strange as
25 it may seem, there are some situations in which, let's say

1 for example, if there's a paternity suit, the plaintiff
2 may know the telephone number and can send a text to, but
3 not have the residence address in order to deliver
4 something, or they may have an e-mail. So there are
5 situations in which we think the court should have the
6 discretion to say that under these particular
7 circumstances you've demonstrated a likelihood of the
8 information will get through by using a text, by using an
9 e-mail. So at any rate, to be discussed.

10 CHAIRMAN BABCOCK: Richard, before you go on
11 I think Steve had a question.

12 MR. ORSINGER: Oh, go ahead, Steve.

13 HONORABLE STEPHEN YELENOSKY: Why is e-mail
14 not given the same primacy as social media? You can never
15 serve me on social media, but you can serve me on e-mail.
16 Why do you have to jump through a hoop like that?

17 MR. ORSINGER: Well, I think that's a valid
18 question. I think the Legislature has mandated citation
19 by publication by the state website and then there's
20 another comment in there that would drive us to private
21 websites, but what is the Legislature's direction on
22 e-mails? We covered that here a second ago. I don't
23 recollect that there's a mandate for citation by e-mail,
24 and we can talk about that, but is that a reason to make
25 e-mail less official than a -- the state website.

1 HONORABLE STEPHEN YELENOSKY: Well, unless
2 the statute requires it, if somebody came into court and
3 said, "I have the e-mail address," they first have to, I
4 think, get them by social media; and I would think the
5 e-mail address is more likely to achieve service than
6 social media. With the caveat that I've never been on
7 social media, so I'm not sure, and if you want to serve me
8 I'll give you my e-mail address.

9 MR. ORSINGER: Well, but, okay, so here's --
10 I think this is important for us to have this discussion;
11 and I don't want to preempt the presentation for this
12 because I think we'll discuss all of these issues; but if
13 you're going to say e-mail is a default substitute for the
14 public state website, that's going to apply to people who
15 have good e-mail addresses and bad e-mail addresses and in
16 between e-mail addresses; and it may be that what you
17 ought to do is you ought to go to the court and say, "This
18 is a functioning e-mail. I got an e-mail from him
19 yesterday, and therefore, I know that it's good." Whereas
20 someone else might have an e-mail address that's six
21 months old and has had two or three bounce backs, so I
22 don't know if we want to just say, hey, you know, if you
23 send an e-mail to this site you've got service when we
24 don't have some precision that actually it's going to get
25 through.

1 HONORABLE STEPHEN YELENOSKY: Why do we have
2 more precision with social media?

3 MR. ORSINGER: Because, I mean --

4 HONORABLE STEPHEN YELENOSKY: Because the
5 Legislature deems it so?

6 MR. ORSINGER: I think that's an important
7 discussion, but let's not have it right now. And like
8 you, I don't go on Facebook. If somebody is friending me,
9 I don't know it, so --

10 CHAIRMAN BABCOCK: Roger wants to make a
11 comment, but before he does, Richard, the elder, had his
12 hand up.

13 MR. ORSINGER: You did? On technology?

14 CHAIRMAN BABCOCK: Wow, shooting daggers
15 across the table here.

16 MR. ORSINGER: I'm sure you're on Facebook.
17 I was just kidding.

18 MR. MUNZINGER: No, that's all right. I
19 don't use Facebook either.

20 CHAIRMAN BABCOCK: Richard, did you want to
21 say anything?

22 MR. MUNZINGER: No. He mentioned what I was
23 raising my hand about.

24 CHAIRMAN BABCOCK: Okay. Roger.

25 MR. HUGHES: Well, if we must, must, allow

1 service by e-mail, I think it -- I have a recommendation,
2 which comes from having researched this issue regards to
3 mailing of service of citation; and that is who is going
4 to be authorized to mail, either by snail mail or e-mail?
5 Because daily we're bombarded with spam. You know, that's
6 why we all have filters, et cetera, et cetera, and so if
7 all of the sudden I get a -- an e-mail from somebody, you
8 know, Cindy Lou Schmedlap, official process server number
9 blank authorized by the Supreme Court, says, "I've now
10 served you," I'm liable to go, "Oh, come on."

11 So I think at the very least -- and, by the
12 way, this is a question for service by mail as well, if
13 you read the statutes correctly. I think if we're going
14 to allow these form of service, we at least ought to
15 restrict it to service by a government official, that that
16 is you get an e-mail from somebody .gov that they can
17 actually look up and go, oh, yeah, that person exists, if
18 they're going to use the internet, but they're going to
19 use the internet. I don't know why they just don't do
20 public website, but, anyway, I think that's a very
21 significant issue.

22 The other is I commend to the committee a
23 subject that I don't like wrapping my brain around, and
24 that is service outside the United States and how this is
25 going to coordinate. I mean, everything in the world has

1 got e-mail addresses and cell phones, et cetera, et
2 cetera, but by God, we've got treaties about this and
3 international agreements, so I commend that to the
4 committee's study as well.

5 MR. ORSINGER: Okay. So let's move on then
6 to page eight of the memo. We'll skip the intervening
7 rules about citation by publication for trespass to try
8 title and that kind of stuff and jump on to Rule 116,
9 service of citation by publication. So context, our
10 previous discussion was substitute service that the court
11 can authorize when ordinary service is not successful.
12 Now we're talking about the rules that control citation by
13 publication, heretofore in the newspaper, henceforth in a
14 newspaper or by electronic media or the web or some
15 combination.

16 So what the subcommittee did, subcommittees
17 did, was to take the print publication portion of it and
18 make it the first section of Rule 116 and just insert a
19 title "Print publication," and where it says, "The
20 citation when issued shall be served by a sheriff or
21 constable" change that to "may." "May be served by a
22 sheriff or constable," because there is a discussion that
23 we need to have about who can -- who can serve citation on
24 the website that you saw there was several references in
25 the statute to "persons" as opposed to government

1 officials. So the suggestion is you don't need a
2 constable or a deputy sheriff or a district clerk to
3 publish the citation and return the service. We'll
4 discuss that I'm sure in a minute.

5 So then we added a new subdivision (b) as
6 the alternative to print publication and that is
7 electronic publication, and here is the proposal:
8 "Whenever the service of citation of publication is
9 required or authorized by law, and unless print
10 publication is required, service may be accomplished by
11 any person by posting citation" -- "by any person by
12 posting citation in the state's public information
13 internet website, in accordance with the rules adopted for
14 the operation of that website, for a period of 28 days."

15 And then under Rule 117 on the return,
16 instead of it being an officer executing, what we're
17 suggesting is "The return of the person or officer serving
18 such citation shall show how and when the citation was
19 published," not executed, "specifying the dates of such
20 publication, be signed by the person" -- add "who caused
21 publication to occur" -- "and shall be accompanied by" --
22 scratch "a printed copy." There's no such thing as a
23 printed copy other than if you print and scan it and make
24 it electronic, so let's skip the printing and scanning,
25 and just say "accompanied by an image of such

1 publication."

2 Now, subdivision (b) has a few important
3 concepts, which is that in some situations -- well,
4 citation is sometimes authorized and sometimes required,
5 but there are instances in which citation by newspaper is
6 required. Still. Even after Senate Bill 891. And so we
7 have to recognize that not only do we need to have a rule
8 that authorizes citation by electronic publication when
9 required or authorized, but we also need to avoid those
10 situations where it's prohibited, and it may be just
11 prohibited until the next legislative session, but it's
12 prohibited right now in some instances, and this instance
13 of citation may be accomplished by any person is an
14 important concept that individuals can post their own
15 notices and then sign their returns.

16 So that's the analysis of the rule. Behind
17 it we have the way citation by publication was with the
18 newspapers. We have not tried to undertake any suggestion
19 on how to write that because we don't know how the OCA
20 website is going to work, and I'm envisioning without any
21 clear understanding of what OCA is doing is that there's
22 going to be some kind of rules of usage that are published
23 on the internet saying this is the way you post, or maybe
24 it will be automated. All of that we'll find out about as
25 it develops. So then what I'd like to do is move on to

1 page nine, paragraph nine, and just talk briefly about the
2 Family Code.

3 CHAIRMAN BABCOCK: Richard, before you do
4 that --

5 MR. ORSINGER: Yes.

6 CHAIRMAN BABCOCK: -- I wonder if we should
7 hear from David.

8 MR. ORSINGER: Okay. That would be great.
9 Go ahead.

10 CHAIRMAN BABCOCK: Do you guys have any
11 plans, or is it too early?

12 MR. SLAYTON: It's -- good morning,
13 everyone. Good to be with you. It is a little bit early
14 in the process, but I can tell you generally what we are
15 thinking of, which is that we will have a website, public
16 portal, where depending on how the rules turn out, certain
17 individuals who are authorized to access the system will
18 be able to log into that system and upload a copy of the
19 citation, also put in the information regarding how long
20 it must be published and those type of permissions, so
21 that way it would stay up. And then once the period of
22 time has expired in which time it must be up there, we
23 will produce -- the system will automatically produce an
24 affidavit that would be made available to be filed as a
25 return of service, however the rules go that way.

1 One other thing that is something you might
2 consider, it's our intention also to allow -- and I don't
3 know whether this has to be in the rules, but to allow
4 individuals to sign up to be notified if they are ever
5 cited by publication on the system, because obviously our
6 intent is to try to make notice more effective, and so I
7 might go in and say if David Slayton ever shows up in the
8 system, please notify me so I can be aware of that.

9 That's the basics of where we're at. I
10 don't know if that answers fully the question, but I'd be
11 happy to answer any more specific questions, but that's
12 generally what we're thinking of. You know, the question
13 is are clerks going to be putting that in there directly
14 or other individuals, and I think it really depends on the
15 way the rules go as to who has the ability to upload that
16 information, but we can restrict it however we need to.

17 MR. ORSINGER: Can I ask, are there
18 financial limitations on your staffers or somebody in the
19 court system being responsible for the posting, or are you
20 building that into the budget?

21 MR. SLAYTON: We were building it in as that
22 the individual who is seeking service would enter that
23 information directly, and it would not be OCA's staff.

24 MR. ORSINGER: I see.

25 MR. SLAYTON: We were not providing any

1 staff resources at OCA to do that.

2 MR. ORSINGER: Okay.

3 MR. SLAYTON: We provided funding to develop
4 the system, but that's it.

5 MR. ORSINGER: So would it be kind of like
6 the electronic filing system, that the person is going to
7 sign on maybe a portal of some kind, and it will have the
8 citation and the petition, and they'll, quote, file it or
9 whatever, and then, bang, it's going to be up on the
10 website?

11 MR. SLAYTON: That's correct.

12 MR. ORSINGER: I see. So the individuals
13 will be doing their own publication.

14 MR. SLAYTON: Or whoever is authorized to do
15 that.

16 CHAIRMAN BABCOCK: Judge Evans.

17 HONORABLE DAVID EVANS: David, will the --
18 if this is an individual posting and after it's up will
19 you have a form that they fill out for the return that
20 will then be filed by the court with a printed name so we
21 don't have to worry about the signature, or is it going to
22 be electronic signature, or how are we going to -- I'm
23 worried about the return that the trial judge has to
24 operate off of in the courthouse.

25 MR. SLAYTON: I think we can do it however

1 we want with regard to an electronic signature or printed
2 /s/ or whatever we want to do with that, but I would
3 anticipate that the system would produce the return of
4 service.

5 HONORABLE DAVID EVANS: And go to the clerk?

6 MR. SLAYTON: Well, we could do it that way
7 or provide it back to whoever is doing the service that
8 they could then file back to the clerk.

9 MR. ORSINGER: That's the worst idea.
10 Because a lot of the pro se litigation that I see when I'm
11 just sitting in the docket and watching things happen is
12 that people don't have their returns in the file and the
13 district judge can't grant an agreed -- can't grant a
14 default because there's no -- but if we could automate
15 that return process then I think that would eliminate a
16 lot of that.

17 MR. SLAYTON: We could absolutely do that,
18 and I can tell you -- and, of course, it depends on which
19 direction you recommend and the Court goes with this. Our
20 anticipation was to try to interface as much directly with
21 the clerks on this as we could, to where, you know, right
22 now many clerks are sending those notices to -- directly
23 to the newspaper. Could the clerks be the ones who
24 actually provide that notice in the system to the website,
25 and then the returns go automatically back to them, but I

1 think it depends on if you allow -- if the rule allows
2 other individuals to access it, that might change a little
3 bit how the direction we go with that.

4 CHAIRMAN BABCOCK: Judge Evans.

5 HONORABLE DAVID EVANS: Then you're going to
6 be doing the return. OCA will be signing the return, and
7 let me point out why, because it's going to elapse by a
8 period of time. It's going to be like the Secretary of
9 State doing service. The service that will be in the file
10 will be coming from OCA. That's fine with me, but that's
11 going to cut out having to have the individual come back
12 on the website and process the return.

13 MR. SLAYTON: I would just say that the --
14 the law actually says -- I was trying to find it really
15 quickly, but if the service is made by publication there
16 is an affidavit that's made by the Office of Court
17 Administration of the Texas Judicial System or an employee
18 of the office that contains or to which is attached a copy
19 of the published citation or notice and states the date of
20 publication on the public information internet website
21 maintained by -- under the statute.

22 HONORABLE DAVID EVANS: That will work.

23 MR. SLAYTON: So OCA would produce the
24 return, by statute.

25 HONORABLE DAVID EVANS: Return. Okay.

1 CHAIRMAN BABCOCK: All right, Richard.
2 Sorry to interrupt.

3 MR. ORSINGER: Yeah. So it does seem to me
4 that it's more reliable to have the district clerk forward
5 the citation to the OCA to post than to have the
6 individual litigant; and I don't know whether that's going
7 to be a burden on the clerks that they can't handle; but
8 it's certainly more reliable because a pro se,
9 particularly a pro se litigant, may not know where to go,
10 how to go, when to go; and maybe we ought to build that
11 into the rule. It's not the anticipation that the
12 individual plaintiff will submit it to OCA, but the
13 plaintiff will notify the clerk that they desire to have
14 electronic publication, and then the clerk will send the
15 e-mail, and that could be a fairly low budget item. I
16 don't know. But at any rate, these are all important
17 points to discuss in a minute.

18 Let me just mention the Family Code. I
19 don't want to dominate the discussion, but many of the
20 cases that are --

21 CHAIRMAN BABCOCK: For a change.

22 MR. ORSINGER: Sorry. Many of the cases
23 that these rules are going to apply to are going to be
24 under the Family Code, and so I think we need to just be
25 slightly aware of the fact at what freedom we have to make

1 a difference over there. In 3.305 which is the
2 husband-wife section, it says, "If the residence of the
3 respondent, other than a respondent reported as a prisoner
4 of war or missing on public service, is unknown, citation
5 shall be published in a newspaper of general circulation
6 published in the county in which the petition was filed."

7 Now, unless we can infer in Senate Bill --
8 the Senate Bill that we -- that there's an inferential
9 override of that, it's a clear, I think, legislative
10 mandate requirement that, you know, you're going to have
11 to go to the newspaper. You can do citation
12 electronically if you want, but you're not -- you can't do
13 without it.

14 Subdivision (b) says, "published once a week
15 for two consecutive weeks." So remember the other rule,
16 rule of procedure, was 28 days or four weeks. So there's
17 a deviation there, and I don't know that that's of great
18 consequence compared to the requirement of newspaper
19 publication. So on page 11 of the memo we have section
20 102.010, the service of citation, again, but this is in
21 parent-child litigation. "Citation may be served by
22 publication as in other civil cases." "As in other civil
23 cases." So if we change the rule for other civil cases
24 we're okay on the parent-child litigation, but we are not
25 okay on the husband-wife litigation.

1 "Persons entitled to service of citation who
2 cannot be notified by personal service." So citation by
3 publication shall be published one time and then it
4 describes what the citation is supposed to say. Published
5 one time on a website is not particularly meaningful
6 because it is only published one time, but it's there 24
7 hours a day for however long we specify, 28 days. So I
8 think that that requirement is met. So I feel on
9 parent-child side, the rule change will automatically
10 implement to the parent-child litigation, not to the
11 divorces. But, of course, if there is a divorce with
12 children they have to be combined together, and that
13 creates an anomaly if we have two different independent
14 lawsuits that are really carried under one, and the Family
15 Code is kind of schizophrenic, and it's caused confusion
16 over time, but here we have one component of that lawsuit,
17 which the parent-child part you can post on the internet
18 and the other half you have to send to the newspaper. So
19 we are going to -- the Legislature needs to fix it, and we
20 need to decide if we're going to do something before that.

21 MR. SLAYTON: Richard.

22 MR. ORSINGER: Yes, sir, I'm sorry.

23 CHAIRMAN BABCOCK: Yeah, David.

24 MR. SLAYTON: One piece of good news, the
25 Senate Bill 891, the Legislature did fix it.

1 MR. ORSINGER: Oh, I'm sorry. I missed
2 that.

3 MR. SLAYTON: It's -- it's -- and
4 specifically they amended section 3.305 to specifically
5 authorize the internet website for that.

6 MR. ORSINGER: Oh, great. I'm so happy to
7 hear that.

8 MR. SLAYTON: And they amended 102.010.
9 There was no amendment in 6.409. The one caveat I would
10 say is they did not change the number of times it's to be
11 published, so the system will have to do -- you know, the
12 statute says it's published one time only or for two weeks
13 or whatever it is, that is not changed, but it does
14 specifically authorize using the public internet website
15 for those --

16 MR. ORSINGER: Okay.

17 MR. SLAYTON: -- cases.

18 MR. ORSINGER: I'm sorry I didn't copy you
19 on these preliminary e-mails, but it's good to know that
20 the Legislature saw that, but on 6.4090, which is at the
21 bottom of page 9 and top of page 10, "Citation by
22 publication in a suit for divorce or marriage may be by
23 publication as in other civil cases." So I think we may
24 be okay even though we don't have a legislative override.
25 They kind of incorporated the rule changes, so then my

1 concerns about the Family Code difficulties are resolved,
2 and so we can no longer -- we no longer need to be
3 concerned by that.

4 The one last thing I'd like to do, Chip,
5 I've never done and there's no precedent for this, but I
6 wanted to take about three minutes to read some excerpts
7 from a law review article.

8 CHAIRMAN BABCOCK: Sure.

9 MR. ORSINGER: Okay. So this is a law
10 review article by Andrew Budzinski, published in the
11 *University of Colorado Law Review*, winter of 2019. He is
12 a visiting associate professor at George Washington
13 University Law School, and I'd like to thank Elaine
14 Carlson for calling this law review article to my
15 attention, but it -- the title of it is "Reforming Service
16 of Process and Access to Justice Framework." And I
17 thought this was so significant because our discussions
18 are dominated by the due process considerations of the
19 defendant, but this article makes a point that there are
20 due process considerations for plaintiffs as well, and
21 they're covered by the Fourteenth Amendment, and so I just
22 wanted to read a few excerpts here to have that context.

23 I'm going to quote, unless otherwise noted.
24 "Over the past few decades the number of pro se litigants
25 in state civil courts has risen exponentially. Between 75

1 percent and 90 percent of litigants in family law cases,
2 landlord-tenant disputes, and small claims actions did not
3 have a lawyer in 2015. Procedural rules governing those
4 proceedings, however, often impose requirements that
5 disproportionately burden unrepresented litigants, fail to
6 optimally protect the due process rights of those parties,
7 and thereby deny them access to justice. Rules governing
8 service of process illustrate this problem by requiring
9 litigants to find a third party to hand-deliver court
10 papers to a defendant directly or to a co-resident at the
11 defendant's home. For many low income pro se litigants
12 this poses a significant barrier."

13 Moving on, "Until plaintiffs can accomplish
14 service, they are denied access to a hearing on the merits
15 of their claim and defendants are denied notice of the
16 claims brought against them. In short, burdensome service
17 of process rules bar access to justice for both parties."
18 That was from page 167.

19 Skipping ahead to page 173, "The due process
20 clause protects a plaintiff's right to a hearing on the
21 merits of her claim at a meaningful time and in a
22 meaningful manner." Moving ahead to page 173-74, "Low
23 income litigants face the most serious obstacles to
24 accessing justice in large part because of court rules
25 that assume the parties have representation or financial

1 means." Skipping ahead, on page 174, "Service rules in
2 every jurisdiction prohibit plaintiffs from serving
3 process themselves; therefore, requiring plaintiffs to
4 find a third party to do so. This creates an agency cost.
5 The collective financial, social, and logistical burdens
6 of finding a third party to accomplish service. Many low
7 income plaintiffs cannot afford a lawyer or a private
8 process server to effect service and must rely on law
9 enforcement or other third parties to serve at no cost."

10 Skipping ahead to page 179. No, I'm sorry,
11 skipping ahead to page -- I'll skip to page 188. "In the
12 mid-Twentieth Century, the Supreme Court announced a more
13 holistic standard for reviewing the adequacy of notice in
14 *Mullane vs. Central Hanover Bank & Trust Company.*" 1950
15 case. That's not quoted. "The attempt must be reasonably
16 calculated under all the circumstances to apprise
17 interested parties of the pendency of the action and
18 afford them an opportunity to present their objections."
19 And there is -- our understanding, this is the law
20 professor now, not quoting the Supreme Court. "Our
21 understanding" -- no, I take that back. This appears to
22 be part of the quote. "Our understanding of due process
23 no longer requires that the defendant receive in hand
24 service. It only requires a method of service that is the
25 equivalent of actual notice."

1 I take that back. That law professor was
2 saying after the Mullane, quote, "Our understanding of due
3 process no longer requires that the defendant receive in
4 hand service. It only requires a method of service that
5 is the equivalent of actual notice." So that was what I
6 wanted to share because it's a different perspective that
7 the focus of due process is not exclusively on the
8 defendant, but also on the plaintiff as well. So, Chip, I
9 think that's what I've got to offer.

10 CHAIRMAN BABCOCK: Just following up on
11 that, do you think he's right about that? Elaine, is this
12 guy right about what Richard just read?

13 PROFESSOR CARLSON: Well, someone who is
14 indigent and, of course, get waiver of fees --

15 CHAIRMAN BABCOCK: Could you speak up?

16 PROFESSOR CARLSON: Pardon?

17 MR. JACKSON: Louder.

18 PROFESSOR CARLSON: Someone who is indigent
19 can, of course, get waiver of fees. I assume that
20 includes the service of process fees, but I'm not --

21 HONORABLE STEPHEN YELENOSKY: It does.

22 PROFESSOR CARLSON: So but they may not know
23 that.

24 MR. ORSINGER: So the discussion may be
25 those who are between indigent and who can really afford

1 the process, and there is a gap in there based on what I
2 hear from committees I'm on, that there's a gap that falls
3 between those who are truly indigent and get free
4 everything. Sorry, I didn't mean to revert to the debate
5 last night. Those who get free services versus those who
6 can afford to pay -- who are not indigent but cannot
7 afford to litigate. So --

8 CHAIRMAN BABCOCK: Okay. Frank.

9 MR. GILSTRAP: There are really two tasks
10 before the committee, and we need to distinguish between
11 the two. The first is quite simple, and that's under 9.04
12 of 891, which says -- creates a public information website
13 so that public notices can be put -- posted on that
14 website. I think the plan is eventually to have all sorts
15 of public notices, like notice that we found your cow or
16 we're selling your house for taxes on there, but for now,
17 the only -- the only one that's been mentioned is citation
18 by publication. It's going to be the first. And it's
19 actually pretty simple. We can do that by simply amending
20 Rule 116 to say that you can publish citation by
21 publication on the public information website.

22 There are two versions of amendments to Rule
23 116 before you. They are not much different. The first
24 is on page eight and nine of the handout, and the second
25 is one with blue and white -- blue and red interlining on

1 it that was handed out with it. That's a simple task, and
2 I think we can probably resolve it today. The other task,
3 which is to establish a method of alternative citation
4 through social media, is a bottomless pit, and we can
5 spend a lot of time on it. We can have a lot of fun with
6 it, and there's a lot of things to be said about it. For
7 example, I'd like someone to walk me through how you
8 actually give notice to somebody on Facebook. Tell me
9 what the steps are. But aside from that, I think we can
10 close with 116, get that out of the way, and then have
11 this discussion. We'll probably come back to it. We've
12 got until 2020, and it's probably going to take that long.

13 CHAIRMAN BABCOCK: Roger.

14 MR. HUGHES: Well, two comments. The
15 first -- the idea about, well, we have the due process
16 obligation upon claimant to see that they at least get
17 their day in court, you know, it sounds like a zero sum
18 game here. To the extent that you accord the plaintiff
19 due process you're taking it away from the defendant, and
20 that leads to my second one. However we go about doing
21 this, this service, we're -- I think we're -- we're on
22 thin ice. It's going to start crashing unless there is a
23 method of return done by a public official.

24 And if we go back to the idea of Google, I
25 don't know how many of you have ever tried to subpoena any

1 information from Google or Facebook, but they have federal
2 laws to protect them against subpoenas for information,
3 and they get pretty ugly about it, and they get pretty
4 stout, and they pretty much tell you don't come to me
5 unless you have a subpoena issued by a federal court or a
6 state court in my home county. Otherwise they don't want
7 to listen to you. And so it's all well to say, well,
8 everybody has social media accounts, but those commercial
9 social media outfits have some pretty strong protection
10 against cooperating to turn over information, which to me
11 means if we get into fist fights over, "Yes, I was
12 served," "No, I wasn't," it's going to be really, really
13 hard to resolve. Thank you.

14 CHAIRMAN BABCOCK: Yeah, Richard.

15 MR. MUNZINGER: I think Roger makes a good
16 point about the plaintiff and being concerned with the
17 plaintiff's due process rights. There is a reason why the
18 plaintiff in the ordinary case is not allowed to serve
19 citation and has to have a third person serve citation.
20 The plaintiff has an interest, and whether you're indigent
21 or you're not indigent doesn't affect your honesty and
22 your integrity, and so I could just as soon say I served
23 you when I didn't, and I've invoked the power of the
24 state, which I think is the second of Roger's points. At
25 least it was to me.

1 How do you -- this is the state of Texas. A
2 citation is defined in the rules. The State of Texas
3 commands that you come here, otherwise you're going to
4 suffer penalties. It's the state that commands. It's the
5 state authority that renders the judgment in final form,
6 and so you can't really have individuals making these
7 postings without some kind -- it seems to me at least --
8 of official involvement and proof to the person receiving
9 the notice that there is an -- an official involvement.
10 You can -- we get messages all the time. My IT people
11 send me a message "Don't open so-and-so," and it says .gov
12 on the return address, .gov, and it's spam. There's a
13 so-and-so attached to it.

14 It's a real problem, and so if you're going
15 to have people serving by this substitute process there's
16 got to be some integrity and notice of integrity to the
17 recipient as well as to the public at large. I'm
18 finished. Thank you.

19 CHAIRMAN BABCOCK: Great. Yeah, Robert.

20 MR. LEVY: One, just to follow-up on a
21 point, I think Roger mentioned it earlier, is there is an
22 interesting question of extra-territoriality in terms of
23 some of these service methods, including service, if we're
24 going to talk about service by social media or chat or
25 something of that nature so that if you have somebody in

1 China who uses WeChat, and you send a notice to them, they
2 are in China. They don't have -- they don't necessarily
3 have any contact with Texas. Is that notice effective to
4 constitute service, because it does comply with the rule,
5 and how does that personal jurisdiction argument come into
6 play because you do have an effective service if the rule
7 provides that.

8 CHAIRMAN BABCOCK: Richard.

9 MR. ORSINGER: I think we need to grapple
10 with solutions because the Legislature requires the Court
11 to adopt rules to provide for the substituted service of
12 citation by an electronic communication sent to a
13 defendant through a social media presence; and I'm not
14 sure I understand what through a social media presence
15 means, but I think it means what we're talking about,
16 Facebook, WeChat, things like that; and so we have to go
17 ahead and complain and get it out of our system; but at
18 some point we've got to come up with some rules, some
19 recommendations. And so these concerns are not -- I mean,
20 they can't be viewed as grounds to reject the proposition.
21 They should be viewed as problems for us to fix or solve.

22 MR. LEVY: By the way, Richard, you do have
23 a Facebook page.

24 MR. ORSINGER: I do?

25 MR. LEVY: Yes. There's your Facebook.

1 MR. ORSINGER: Can I look at it at the
2 break?

3 MR. LEVY: Sure.

4 MR. HUGHES: Or at least you do now.

5 MR. MUNZINGER: You've been served.

6 CHAIRMAN BABCOCK: Frank.

7 MR. GILSTRAP: Well, let's talk about the
8 problems. First of all --

9 CHAIRMAN BABCOCK: Speak up, Frank.

10 MR. GILSTRAP: We had -- Elaine sent out
11 some cases. There was only one case in which a person
12 actually served by a social media, and it was through the
13 Facebook messenger service, and they had the lawyer do it,
14 and it was ordered by a court in California. That's a far
15 cry from posting it on your Facebook page, whatever that
16 means. But there needs to be a diligence requirement.
17 There is an attempt to -- and on page -- excuse me, yeah,
18 where is 106, Richard? Okay. I'm sorry.

19 On page four and five of the handout,
20 actually, there is (b), (c), and (d). Those are actually
21 alternative approaches. They all try to do the same
22 thing. (b) tries to do it one way in (b)(2), (c) tries to
23 do it another way, and (d) tries to do it a different way.
24 (d) does have a diligence requirement in it, and there's a
25 precedent for this, if you'll look at Rule 109, which has

1 to do with citation by publication. It has a provision in
2 it saying, "In such cases it shall be the duty of the
3 court trying the case to inquire as to the sufficiency of
4 the diligence exercised in attempting to ascertain the
5 residence," and so we show the judge, "I couldn't find the
6 residence, so therefore, that's why we used citation by
7 publication." But I think there needs to be something in
8 the rule where the court inquires as to the sufficiency of
9 the notice given by a social media.

10 Insofar -- and insofar as the problems,
11 there -- there are a great many. In the Baidoo case that
12 Elaine passed out, the court was concerned with, hey, a
13 fake Facebook page. Anybody can set up a Facebook page.
14 Now, I guess in the real -- in the world of citation
15 through traditional means you could have somebody go to
16 the defendant's house and say, "Yeah, I'm John Smith" when
17 the process server gets there and take the citation. The
18 process server fills in the return. They've been served.
19 The real John Smith knows nothing about it, but it's a
20 whole lot easier on Facebook, because you can set up a
21 Facebook page and you can say, "I've had conversation with
22 it, so, therefore, it's a good page." There's all sorts
23 of problems here. What if we post it on the website, and
24 it's -- the notice that the defendant is being sued by
25 divorce by his or her spouse? Do all the friends of the

1 people on the website of that person immediately know that
2 there's going to be a divorce?

3 HONORABLE TRACY CHRISTOPHER: Yep.

4 MR. GILSTRAP: Probably not a good outcome,
5 but you can imagine all sorts of things. I have a problem
6 with scurrilous pleadings. These pleadings are privileged
7 if they're posted on the website by government order,
8 they're privileged, and I can imagine somebody posting
9 scurrilous pleadings, and they go viral. You know, we
10 don't know what's going to happen here, but -- so that's
11 why I want someone to walk me through how we serve
12 somebody by a Facebook.

13 CHAIRMAN BABCOCK: Justice Christopher had
14 her hand up, and so she is recognized.

15 HONORABLE TRACY CHRISTOPHER: I was confused
16 about the rule because it did seem like we were
17 duplicating various methods, but I wasn't really sure what
18 the difference was between the various options, like what
19 a social media presence is versus posting on a privately
20 maintained internet website or other internet location.
21 But my suggestion is that we give the trial judge a lot of
22 discretion in trying to get this electronic notice to the
23 defendant and put rules on the default side as to whether
24 it was successful or not.

25 MR. GILSTRAP: What do you mean?

1 HONORABLE TRACY CHRISTOPHER: Meaning they
2 have to prove that this was a successful service by
3 electronic communication, and if not, they would have to
4 go to publication. So there would have to be some
5 response to it or return receipt or something before a
6 default. So that -- that would be how I would try to fix
7 the rule.

8 CHAIRMAN BABCOCK: Okay. Yeah, Judge
9 Estevez.

10 HONORABLE ANA ESTEVEZ: Just for those that
11 aren't as familiar with Facebook, you can post something
12 to their Facebook or their messenger where they're the
13 only recipient, so there is privacy that they could have
14 so that all of their friends don't have to come out and
15 tell them that. I mean, I think this is such an important
16 rule for the people that are -- you know, for this
17 generation and the next generations. I mean, this is
18 where they get their information, not in the newspaper,
19 not in the courthouse. That's not a gathering anymore.
20 We have to do this somehow, so it's imperative for people
21 to have those constitutional rights we are concerned with.
22 If you're really concerned about it, we need a -- and I do
23 this. I've done this. I mean, I believe the rules allow
24 the judge to do that under any reasonable -- any other
25 reasonable way for them to receive notice.

1 So I have people that haven't seen their
2 spouse in 14 years and they're finally getting divorced,
3 but they're Facebook friends. So I tell them they need to
4 put it on -- you know, they don't know where they live
5 because they've been drug addicts, and they're all over
6 the place, and mama doesn't know where they are, and daddy
7 doesn't know where they are, and I say, "Okay, let's do it
8 through messenger," which is a part of Facebook, and I go,
9 "and I want you to give me -- I want you to take a picture
10 when you send it, and I want to see the little picture
11 when it's been read." Because you can tell when somebody
12 has read your message, and I've had it all filed, and I've
13 gone forward. And, you know, if they come back and they
14 say they have a problem with it, well, you know what, I
15 can reverse that, too. So if they say they don't have
16 notice, you know, I think we deal on the other side. You
17 know, there was these longer periods of time where you can
18 grant new trials. I mean, obviously you're not going to
19 do that too much in a divorce because if two years go by
20 somebody is probably remarried and you have some other
21 issues, but you can take care of the other issues that
22 aren't there.

23 So I just -- I don't think that these
24 concerns can't be dealt with, and I know that we're in a
25 mixed group where some of us understand the technologies

1 and some of us don't, but I really believe all the
2 technologies are there to handle every situation we're
3 concerned about, whether it's privacy issues -- even
4 though it was all public anyway. I mean, these are all
5 public records. Anybody can go look, and the newspaper
6 always files in our court -- I mean, in our city, every
7 single person that filed for divorce, it's in there on one
8 day of the week. Everybody who ever filed bankruptcy, all
9 of those filings are there for everyone to know about, so
10 I don't know that that's a concern that we really need to
11 deal with. I mean, maybe we address it for privacy issues
12 in the rule if we feel like that's what we need to do.

13 CHAIRMAN BABCOCK: Frank.

14 MR. GILSTRAP: Well, Judge, I think, you
15 know, you are familiar with how Facebook works; and the
16 use of the private messenger service I think is, you know,
17 probably what we ought to do if we're using Facebook. I
18 don't know how other social media sites work. You know,
19 can you do that on Instagram? I don't know. And my
20 problem is a lot of judges don't know, and when you just
21 say "serve them on Facebook," you know, we don't know
22 where that winds up. There's got to be some rule -- I
23 think a rule with -- requiring the private messenger would
24 be a good one if you want to be that detailed.

25 Insofar as people can read it, the -- it's

1 public. The whole premise we're operating on is nobody
2 reads the newspapers, but everybody -- all your friends
3 read Facebook. And so -- so, you know, it's a different
4 kettle of fish. It's one thing to say it's public. It's
5 another thing to say we're going to put it out there where
6 it can be picked up on the internet and sent everywhere.
7 We probably don't want to do that, and we probably like --
8 really not like the friends, the people on Facebook, to
9 know that there's been a divorce filed. It seems to me
10 that would be a terrible result of a rule that we would
11 pass.

12 CHAIRMAN BABCOCK: Sharena.

13 MS. GILLILAND: Yes, sir, thank you. I
14 think what Mr. Slayton was saying with respect to the
15 public website for citation by publication, I don't think
16 it would be overly burdensome for clerks to interface with
17 the court. I think the question clerks would have, are
18 they supposed to charge their service fee in addition to
19 anything that OCA charges that might be related to that
20 website. I think that would be the only question.

21 With respect to e-mail and social media, I
22 think most clerks' offices have a no social media during
23 work hours or on work computers. I think it would be of
24 concern to have a deputy clerk using Facebook to message
25 somebody to say, "You've been served." Likewise with

1 e-mail. If we could utilize the e-filing portal to e-mail
2 service, that might be something to think through, but I
3 think direct e-mail from a deputy clerk to a litigant sets
4 up a situation where the employee may find themselves
5 becoming pen pals because a person might respond, "Well,
6 what am I suppose to do? How am I supposed to do this?"
7 And then you're in that quandary of is this giving legal
8 advice or am I just telling them the process to get an
9 answer filed, and all of that would be taking place in
10 e-mail rather than necessarily just in the return.

11 CHAIRMAN BABCOCK: Richard.

12 MR. ORSINGER: Several things, Chip. First
13 of all, I wanted to put into the record that Frank cited
14 the Baidoo case that Elaine had provided to members of the
15 subcommittee.

16 CHAIRMAN BABCOCK: Right.

17 MR. ORSINGER: And I wanted to put the cite
18 in. It's a state court of New York. Even though it's
19 called the Supreme Court of New York, in New York that
20 means it's the trial level. Baidoo, B-a-i-d-o-o, versus
21 Blood-Dzraku, B-l-o-o-d, hyphen, D-z-r-a-k-u; and the cite
22 is 48 Misc. 3d 309 or 5 NYS 3d 709, decided in 2015; and
23 in this particular case this trial judge wrote this
24 opinion saying there's no precedent for service by
25 Facebook, but notice to the defendant is not a question of

1 precedence, it's a question of constitutional law; and
2 based on the circumstances that he put in his opinion,
3 I'll quote, "Under the circumstance presented here,
4 service by Facebook, albeit novel and nontraditional, is
5 the form of service that most comports with the
6 constitutional standards of due process. Not only is it
7 reasonably calculated to provide defendant with notice
8 that he is being sued for divorce, but every indication is
9 that it will achieve what should be the goal of every
10 method of service, actually delivering the summons to
11 him."

12 So that's -- anyone that wants to see the
13 case can find it there. With regard to the privacy
14 concerns, if we post the citation together with the
15 petition on the state website, I assume and I hope that we
16 would have -- the state of Texas would have an arrangement
17 with Google and some of the other portals that do search
18 for internet searches so that if someone puts their own
19 name in there they'll see the state website. When we were
20 evaluating this concern about a year ago, I got from David
21 some recommendations on some states that had gone this
22 route, and I went and looked to see what their postings
23 looked like when there was a citation by publication.

24 It was only about four or five states, and I
25 got the names of some of the plaintiffs and defendants and

1 then I stuck them in Google to see if they showed up in
2 the Google search, and they didn't, which convinced me
3 that the Google organization is not crawling those State
4 Bar -- those state websites, and why I mentioned to David,
5 I don't know whether it's protocol or not, but to try to
6 make an arrangement with a private service like one of
7 these search services saying, "Would you please be sure
8 that you're crawling our site so that our plaintiffs and
9 defendants names' are showing up?" I don't know if that's
10 ethical. I don't know if that's legal, but as a practical
11 matter it seems like you would want the search software
12 that someone sticks in on the internet to look for their
13 own name or their spouse's name or whatever, and it's
14 going to show up in public that they've been cited by
15 publication.

16 If they are going to be on the internet and
17 if they are going to show up in a Google search, there's
18 no less privacy in Facebook than there is in a posting at
19 the state website. They're both going to be for anyone
20 who inquires, you can click a link and you can go read it.
21 One of the safeguards, I think to follow up on what
22 Justice Christopher said, is on the attorney ad litem
23 side. In the family law environment, there will be an
24 attorney ad litem in a parent-child case, and I believe
25 it's also in a divorce case, and there's this tension

1 right now about whether the attorney ad litem has to
2 defend the case on the merits, and the current
3 recommendations in some of the task forces has been that
4 the ad litem's role be restricted from defending the
5 defendant, absent defendant, on the merits to just
6 evaluating the legitimacy of effort to give the defendant
7 notice, so that if we do implement the idea that an
8 attorney ad litem who is appointed for the defendant, the
9 job is not to defend the case on the merits, the job is to
10 see if notice -- if reasonable efforts were made, that
11 could be part of the safeguard.

12 And then let me mention also in Bexar County
13 and maybe also in Travis County, they have attorneys,
14 staff attorneys, who assist pro se litigants to be sure
15 that their files are ready to present to the judge to sign
16 the judgment, and not only do they look at the judgment to
17 be sure that it's proper, but they also check the file to
18 be sure that service has been effected and returned
19 properly because they don't want the judge signing a
20 judgment if there's no proof of service.

21 Now, I know that all counties cannot afford
22 to have staff attorneys helping with the pro ses, but I
23 do -- I will say that at least in some areas of the state
24 we are getting -- we are assisting these pro ses on
25 getting the returns on file. Now, having said that, I can

1 see the OCA website is going to automatically return a
2 sworn return directly to the clerk. Great, problem
3 solved. No further discussion. These private websites
4 and service by e-mail or text, is where the problem is
5 going to be, because if you rely on the plaintiff to sign
6 the affidavit, they may lie. So does that mean that if
7 we're going to have service by e-mail or service by
8 Facebook that it needs to be done by a private process
9 server or by a clerk or by a deputy sheriff or a constable
10 so that we have some bona fides built into the system.
11 Thank you.

12 CHAIRMAN BABCOCK: Yeah. Professor Carlson.

13 PROFESSOR CARLSON: Yeah, there are two of
14 the rules that I looked at in other jurisdictions were
15 Maine Rule of Procedure 4 and Alaska Rule of Procedure 4,
16 both of which were very extensive on when service through
17 electronic means would be permissible, and Alaska does
18 have the same kind of set up we're proposing with the
19 state -- I mean, the web page, and then they have separate
20 for e-mail and social platforms. In both of them you need
21 court approval like you would for any alternative service,
22 and the rules were really beefed up on the diligent
23 inquiry side.

24 Of course, the prerequisite to using service
25 by some electronic method is that you have in good faith

1 bona fide tried to serve the defendant in person or via
2 the mail. And so they make it very clear that the court
3 has an obligation to make findings, and the litigant who
4 is seeking this type of service has to show the court what
5 they've done insofar as looking at publicly available
6 records online as well as private, talking to family
7 members or fellow employees or things of that nature, and
8 so the way they -- it looks to me like they've safeguarded
9 the process, at least to some extent, is really on the
10 front end on the diligence and then requiring the court
11 approval. And then the return gets done by -- if it's
12 electronic means, by the attorney by affidavit.

13 So now we've got -- hopefully you're not
14 going to have a lot of attorneys lying to the court, but
15 maybe pro ses don't feel the same strength, I don't know.
16 But I thought those were two really good models that we
17 could look at for safeguards, because that's what we're
18 really talking about here, right, what are the safeguards
19 for using service by electronic means.

20 CHAIRMAN BABCOCK: Yeah, Harvey.

21 HONORABLE HARVEY BROWN: I want to turn to
22 Justice Christopher's comment. It seems to me that we
23 need the safeguards when we get to the situation with
24 somebody is looking for a default judgment, but for a lot
25 of people, they get a Facebook posting, they're going to

1 know immediately, they're going to respond. I would not
2 be one of those people. For me you would need to have a
3 lot of safeguards in place to make sure I knew and saw it,
4 et cetera, but for, you know, maybe half the people a
5 quick little order that says you can do it by Facebook
6 would work. So if that's true, and I don't know that's
7 true, but it seems reasonable to me, then you really just
8 need to worry about the safeguards for the people who
9 don't respond. So I think the idea of going and looking
10 at it in default process is probably a good idea.

11 CHAIRMAN BABCOCK: Justice Christopher.

12 HONORABLE TRACY CHRISTOPHER: So -- so my
13 proposal would be to eliminate (c) and (d) and instead
14 have (b)(2) that says "through social media in a manner
15 that the affidavit or other evidence before the court
16 shows will be reasonably effective to give the defendant
17 notice of the suit," which is exactly what Judge Estevez
18 was saying that she's already done it once because they've
19 convinced her that under the residual number (3) she had
20 the power to do it anyway, and I think other judges have
21 done that across the state.

22 So we make a very simple change to the rule
23 by including number (2), through social media, and use the
24 language from what is currently number (2) that would now
25 be number (3), and so through social media and then in any

1 other manner, with that same language. And so that would
2 incorporate the idea that your affidavit has to show that,
3 you know, this is why I think Facebook is going to be
4 effective. This is why I think e-mail is going to be
5 effective. This is why I think a tweet will work the
6 best, and give the judge the power to do it.

7 CHAIRMAN BABCOCK: Great. What do you think
8 about that, Richard?

9 MR. ORSINGER: I'm going to ask -- during
10 the break I'll copy her language down.

11 CHAIRMAN BABCOCK: Okay.

12 MR. ORSINGER: That seems fine. I think
13 there's overlap between (c) and (d), and you know what
14 they say is that a camel was a horse designed by a
15 committee, so we have said it maybe in different ways, and
16 Justice Christopher prefers (b)(2), rewritten.

17 CHAIRMAN BABCOCK: Yeah. Okay. Frank.

18 MR. GILSTRAP: There's already a number of
19 safeguards in the rules involving publication that we
20 might want to consider using here. One is the diligence
21 requirement that I talked about earlier. The second is
22 the requirement of an ad litem, which Richard talked
23 about. There's also a provision giving an extended time
24 to file a motion for new trial. I think in Rule 329. We
25 might want to do some of these things because it seems to

1 me citation by publication is like citation by social
2 media. The people may not get it. We don't really have
3 any assurance that they really got it.

4 Also, the rule, I think we had one of the
5 provisions we were going to give them 28 days, which would
6 be absolute minimum time if you're served by hand. Maybe
7 give them more than 28 days. Maybe there's a few things
8 we can do that will give these people a little bit more
9 slack when they're served by social media.

10 CHAIRMAN BABCOCK: Great. All right. Yeah,
11 Professor Hoffman.

12 PROFESSOR HOFFMAN: A couple of maybe just
13 questions as much as things. So, David, I'll start with a
14 question for you, is are we thinking --

15 CHAIRMAN BABCOCK: Speak up.

16 PROFESSOR HOFFMAN: Sorry. Are we thinking
17 of charging for using the portal?

18 MR. SLAYTON: The answer to that is, no, we
19 are not planning on charging.

20 HONORABLE ANA ESTEVEZ: But the clerk will?

21 MR. SLAYTON: The clerk would still -- OCA
22 will not charge. I should be clear. OCA will not charge
23 for use of the system. I believe the clerk under -- and
24 we need to look a little closer at this, but I believe the
25 clerk would still be able to charge for the issuance of

1 the citation just as they are today, which is fairly
2 minimum, but there will be no charge for the publication
3 on the website. Right now when you publish in the
4 newspaper there -- part of the reason for this was the
5 exorbitant cost of publishing in newspapers right now, and
6 so you see the 200-dollar barrier. That was put in by the
7 Legislature on purpose, so but there will be no charge for
8 us to do it.

9 PROFESSOR HOFFMAN: So just a couple of
10 maybe follow-up thoughts from that. So one is -- one of
11 the things is that is remarkable that this legislation was
12 enacted is that section 72.034, which I think is the main
13 authorizing section, is allowing service by publication to
14 now be done by this website in lieu of the newspaper,
15 versus there are a few specific places in the statute
16 where it's "and," but those are -- those are just -- like
17 there's an estate case, and I think there's one of the
18 family law provisions is "and," but the main default in
19 72.034, if I'm reading it right, is -- this is an option
20 you don't have to do it in the newspaper.

21 That opens up, of course, the possibility,
22 right, of so now those exorbitant costs that you were
23 talking about that newspapers have been thriving on for
24 some period of time now is not going to be there anymore.
25 That's a good development, but it also opens up an

1 opportunity, and I know that, you know, Trish McAllister
2 and the Texas Access to Legal Justice has talked about the
3 possibility of considering whether if we would charge a
4 significantly more nominal fee than the newspapers have
5 charged and whether that money could go to fund access to
6 justice issues. So I just throw all of this out as we're
7 sort of working through this issue to recall -- to sort of
8 keep this in mind, that 72.034 looks like it's instead of
9 a newspaper, so if there aren't any fees for the newspaper
10 anymore in the run of the mine case, in most cases, that
11 raises questions of if anyone is going to charge, and if
12 they are, where is that money going to go.

13 The other thought I have, which is just
14 different but maybe sort of equally provocative to think
15 about is you were talking, David, about the idea of maybe
16 doing an opt-in for being alerted, which I must say I
17 thought was a very, very good idea. I mean, the -- what's
18 valuable, right, about having one central internet
19 repository is people will sort of know to go there. On
20 the other hand, we have that already with unclaimed
21 property, and nobody ever goes there. I mean, maybe some
22 people do every now and then. They troll, but by and
23 large that money just sits there and eventually escheats
24 to the state, as I understand it.

25 What about the possibility of thinking about

1 some automatic opt-in that happens when you get your
2 driver's license, for instance, that you have to give an
3 e-mail address, for instance, or a Facebook page or
4 something. I don't know, but some way to communicate with
5 you, and you're automatically notified in the event that
6 your name shows up on this website. Again, if the goal
7 here is to actually do a better job of notifying people
8 when they've been sued through this fairly crummy means of
9 service, right, the service by alternative publication,
10 requiring opt-in to get that notification is not likely to
11 improve significantly. Even though, having said that,
12 it's not a criticism of the idea. I just sort of was
13 building on that further. Anyway, those are my two
14 thoughts.

15 CHAIRMAN BABCOCK: Thank you. Anybody else
16 have any thoughts? Professor Carlson.

17 PROFESSOR CARLSON: Richard, can I ask you
18 to repeat when service by publication is required? Did
19 you say there were some instances --

20 MR. ORSINGER: I think it says 28 days. I
21 can't remember whether it was continuous.

22 PROFESSOR CARLSON: No, not the time frame,
23 but do you ever have to do service by publication?

24 MR. ORSINGER: Oh, under the new statute?

25 PROFESSOR CARLSON: Yeah.

1 MR. ORSINGER: You're asking when is
2 newspaper citation required?

3 PROFESSOR CARLSON: Yes.

4 MR. ORSINGER: Okay. So you guys are better
5 at understanding that statute than I am.

6 PROFESSOR HOFFMAN: So, Elaine -- Elaine, I
7 was looking at this. I've got the bill open, and it looks
8 like if you have a case raised under section 9.160(a) of
9 the Business Organizations Code, so the attorney general
10 is somewhere involved in that, it says the attorney
11 general will publish notice on the web -- on the new
12 public website and in a newspaper. So that's one example.
13 A second example is in section 11.301 of the Business
14 Organizations Code. Again, the attorney general shall do
15 it on the website and in a newspaper. And there was one
16 more I saw. Oh, yeah, in section 1051.054 of the Estates
17 Code, again, it says publish it on the website and in the
18 newspaper. But the general 72.034, which is I think the
19 general provision in the bill, so everything else, it
20 looks like it's either-or. But not either-or. It's
21 they're adding the public information website as the
22 option.

23 PROFESSOR CARLSON: Thank you.

24 CHAIRMAN BABCOCK: So it's "and" not "or."

25 PROFESSOR HOFFMAN: Again, it's only "and"

1 in those very, very narrow provisions. I think -- I think
2 if I'm reading this right under section 72.034, it's not
3 "and." It's you can just put it up on the website. That
4 was the part that I was sort of startled by, I must say,
5 that the newspapers didn't succeed in stopping that.

6 CHAIRMAN BABCOCK: Uh-huh. Yeah, that is
7 surprising. Steve.

8 HONORABLE STEPHEN YELENOSKY: To the end of
9 culling out those who will respond and then doing on the
10 back end the default judgment, is it helpful to think that
11 the federal system waiver of citation, you don't have any
12 proof that they got service, but if they don't respond
13 then they're responsible for paying for service, as you
14 know. I don't know that that part of it makes sense, but
15 clearly the federal system allows for service the easiest
16 way. People will respond to it or they won't, but a lot
17 of them will. As you were suggesting, I think from the
18 social media, and if they do, no problem. If they don't,
19 then you have to have some proof and whether it's at that
20 point or at the default point. I mean, the federal system
21 would make you then go to service, but the first shot at
22 it is, hey, why don't you respond.

23 CHAIRMAN BABCOCK: Yeah. Any other --
24 Elaine, is that you?

25 PROFESSOR CARLSON: Yeah.

1 CHAIRMAN BABCOCK: Professor Carlson.

2 PROFESSOR CARLSON: One thing I want to
3 mention is that the main rule was modified I think last
4 year because apparently a problem arose about people
5 serving incompetents or minors. We made it clear that you
6 could not do that and provided alternatives.

7 CHAIRMAN BABCOCK: Frank.

8 MR. GILSTRAP: Two more problems. First of
9 all, along with what Roger was talking about, for the
10 private process server to go online -- or to go online and
11 serve via Facebook, he's going to have to be a member of
12 Facebook and is going to have to sign the agreement. I
13 don't know where that leads, but I don't know if the state
14 of Texas, an office of the state of Texas, can make that
15 agreement, but I believe to serve on Facebook, you've got
16 to be a member. I guess that's -- oh, there's one other
17 thing.

18 Unfortunately they call it the public
19 information website, and the state of Texas already has a
20 public information website in connection with the Public
21 Information Act. It's not called the public information
22 website, but that's what it is, and there are two
23 different statutes, two different websites, and people who
24 use this may have to be alerted that we're not talking
25 about the public information website under the Public

1 Information Act, which I think is called
2 myopenrecords.gov.

3 CHAIRMAN BABCOCK: Good point. Yeah.
4 Richard.

5 MR. ORSINGER: So when we take the next step
6 to get down to the specifics, when we're talking about
7 service of citation through private social media or
8 websites and what are the parameters for how it will be
9 posted, whether it's going to be -- what the judge
10 described with the image and the buttons and the green
11 button and the red button or how detailed we're going to
12 get, and the kinds of proof we would require to show a
13 return of service, so to speak.

14 CHAIRMAN BABCOCK: Yeah.

15 MR. ORSINGER: I'm afraid the technology
16 will move too quickly for us to bake that into a rule of
17 procedure, which are slow to change and hard to change,
18 and so I'm wondering if maybe if we're going to specify
19 criteria for posting on Facebook or whatever, maybe we
20 should do it through a Court administrative order that can
21 be more readily modified, and we can put it in -- ask West
22 Publishing to put it in the comments of "please see"
23 whatever, and we do that with the jury charges. We have
24 an informal method of constructing the instructions that
25 go in the jury charge. It's not -- it's a subpart of the

1 rule, but it's not the rule itself. It's issued by the
2 Court incident to the rules, more flexible.

3 If we try to put too many specific criteria
4 into the rule I'm afraid technology will out move the rule
5 too quickly, so I would suggest we consider one of the
6 Court's other alternatives for promulgating rules so that
7 they can be more readily modified.

8 CHAIRMAN BABCOCK: How do people feel about
9 that?

10 HONORABLE ANA ESTEVEZ: I think that's
11 smart.

12 CHAIRMAN BABCOCK: Judge.

13 HONORABLE ANA ESTEVEZ: I think that's
14 smart. I mean, I think that our problem right now is
15 technology. This doesn't work anymore because of that
16 same problem, and here we are, and how long is it going to
17 take us to get where we need to be, and then the minute
18 we're there it's obsolete. So, you know, with the
19 language that Justice Christopher said and then the
20 asterisk with "This is what you need to do now," and it
21 can change as we go, I think we have a solution that we
22 don't have to spend two years trying to resolve. I think
23 we can -- it's more workable. I think it's smart.

24 MR. ORSINGER: Thank you. I accept that
25 compliment.

1 CHAIRMAN BABCOCK: Don't suck up to him.

2 MR. ORSINGER: I don't get that many.

3 CHAIRMAN BABCOCK: He doesn't need it. Any
4 other reactions to what Richard said or his suggestion?
5 Okay. Any other comments? Richard, what do you want to
6 do next?

7 MR. ORSINGER: So, Chip, we need to -- we
8 need to have a sense of where to go. I'll take Justice
9 Christopher's language. We'll redo the rule changes.
10 They're very narrow. In fact, it's kind of shocking to me
11 how little change there is to implement this enormous
12 change in approach and then bring it back to the committee
13 for discussion again. I don't see a mandate to go any
14 broader than that really.

15 CHAIRMAN BABCOCK: Yeah. Do we want to talk
16 about some of the language proposals? Like in 116(a), you
17 say -- you change "the citation when issued shall be
18 served by the sheriff." You've changed that to "may be
19 served."

20 MR. ORSINGER: I think we should talk about
21 it today, because we can revise it and have a closer to
22 final product next time.

23 CHAIRMAN BABCOCK: That's what I was
24 thinking. Yeah, Judge.

25 HONORABLE ANA ESTEVEZ: I just have kind of

1 an overall philosophical question. I would prefer that
2 the process server try to serve them in person, then try
3 to -- you know, when they give me the affidavit and they
4 prove this is where they lived, and I actually had the
5 best affidavit ever last week that talked about Kudo the
6 dog that really does chew everyone out. I should have
7 brought it. It's so good, but I would prefer that they
8 have to go through those two hoops. You know, somebody
9 lives at the house, but they won't go to the house, and so
10 we affix it to the door, or you give it to someone over 16
11 then before you go to Facebook.

12 Now, that's just a preference. I don't know
13 that one is more effective than the other, and I think
14 that this rule makes it equal, and so they wouldn't have
15 to do that, so the process server would go in person, and
16 he would go twice and then he would say, "I found a
17 Facebook page. I want to do this on Facebook," and it
18 should be okay. And I like Facebook for when there's
19 absolutely no other way to do it, because I think it's
20 better than publication, but I don't think it's as good as
21 the other options we have right now.

22 CHAIRMAN BABCOCK: Yeah. Steve.

23 HONORABLE STEPHEN YELENOSKY: We've been
24 speaking about service of process, which of course, is the
25 most important here, but is it appropriate at this point

1 to address the public notice requirements of the rules?
2 Because there are some that are specific, and if they
3 aren't amended, I wonder if people will understand that
4 they are essentially amended by statute. For example, 76a
5 has a very specific notice requirement; and if you read
6 that, you'd have to know the statute and you'd have to
7 know that it was intended to apply to 76a.

8 So my question is, do we need to do
9 something with 76a? And I'll give you an example of
10 what's happened in the past. There's a statute that says
11 you can use an unsworn declaration and that it can be used
12 in any context where there's an affidavit. Attorneys do
13 not know that they can use that for a motion for summary
14 judgment. They'll come in and say, "Well, I couldn't get
15 this signed by a notary yet, Judge, but I'll get it," and
16 my question is "Well, why didn't you have your client do
17 an unsworn declaration?" So the point is a change in the
18 statute without a change in the rule, like in 76a, to me
19 is going to be a little problematic if we care about
20 public notice of the rules.

21 CHAIRMAN BABCOCK: Okay. Richard.

22 MR. MUNZINGER: Unlike Richard, I do not
23 have a face page that I'm aware of. He apparently wasn't
24 aware of his own, so I know nothing about Facebook or
25 social media. I just am curious whether or not if you

1 could not arrange the requirement that you serve through
2 social media by merely giving notice that the citation has
3 been posted on the state's public information website. It
4 reduces -- it seems to me it would reduce the cost. I
5 have been told that I -- if I were to get on the website I
6 could control those people who have access to my location.
7 So someone might say I'm trying to send something to you,
8 Richard Munzinger, on Facebook, I don't necessarily have
9 to receive it. I can refuse to open it or accept it. I
10 don't know if that's the case or not. But if it is, a
11 simple notice, "Your name has appeared on a government
12 website."

13 MR. GILSTRAP: And "if you need help call
14 so-and-so."

15 MR. MUNZINGER: Well, no.

16 MR. GILSTRAP: That's what it's going to be.

17 MR. ORSINGER: You'll get a thousand
18 e-mails. Yeah, you will get a thousand e-mails from
19 lawyers.

20 MR. MUNZINGER: Again, though, the point is
21 the person has been given notice that his name is on the
22 website. If I'm trying to avoid you, I may want to see
23 why I'm on the website. The minute that I go to the
24 website I've been served. I don't know whether that has
25 any attraction or any -- it certainly would satisfy due

1 process. The problem comes in proving that you've given
2 these people notice anyway. Facebook isn't going to say,
3 yes, you -- here's proof that you did something with
4 Facebook. I don't think they're going to incur the
5 expense of doing anything like that. I doubt that the
6 public website is going to send a response saying you did
7 A or B. I don't know that. I don't know what the public
8 website does. But anyway, I ask the question.

9 CHAIRMAN BABCOCK: Okay. Good question.
10 Yeah, Holly.

11 MS. TAYLOR: Just real quick, related to
12 some discussion earlier. I was just glancing at Facebook
13 and looking at the Travis County clerk's Facebook page,
14 which is a very helpful Facebook page, which links out to
15 other Facebook pages; for example, the Travis County tax
16 office and other governmental organizations which have
17 Facebook pages, and there's also some nice notifications
18 which are posted on the Travis County clerk's Facebook
19 page, such as notice about some new laws that took effect
20 and having to do with assumed names and things like that,
21 so it looks like there may already be a framework that
22 could be utilized.

23 CHAIRMAN BABCOCK: So they could link to OCA
24 or something?

25 MS. TAYLOR: Right. Yeah.

1 CHAIRMAN BABCOCK: Yeah. Richard.

2 MR. ORSINGER: Chip, Justice Christopher
3 shared her language with me, and I'd like to read it and
4 then make one observation. Remember, we're on Rule 106,
5 alternate service, that requires an affidavit showing that
6 service was attempted at the residence or business, not
7 successful. Subdivision (2), Justice Christopher's
8 proposed language is you could effect service "through
9 social media or electronic communication in a manner that
10 the affidavit or other evidence before the court shows
11 will be reasonably effective to give the defendant notice
12 of the suit." So that includes both Facebook, that
13 includes e-mails, texts, maybe a Twitter. I don't see how
14 you could do it in 128 characters.

15 MS. HOBBS: There's DM's.

16 MR. ORSINGER: What?

17 MS. HOBBS: No, there's DM's. There's
18 direct messages.

19 MR. ORSINGER: "Other evidence before the
20 court," means that there can be or maybe even is expected
21 to be evidence presented, testimony, sworn testimony or
22 documents, copies of things, maybe recent e-mails or text
23 messages showing that the link is alive. So, anyway, I
24 think that that's become the tentative proposal out of
25 this meeting on this part. Now then, Chip, did you want

1 to -- there were some other changes that occurred that are
2 maybe not as centrally focused that you wanted to mention.

3 CHAIRMAN BABCOCK: Yeah. I think we should
4 talk about them. Frank, did you disagree with that?

5 MR. GILSTRAP: What's that?

6 MR. ORSINGER: So the one you mentioned was
7 on page eight.

8 CHAIRMAN BABCOCK: Right.

9 MR. ORSINGER: Print publication, the
10 citation when issued, it used to say "shall be served by
11 the sheriff or constable or clerk of the court," and the
12 proposal was to change "shall" to "may," thereby
13 permitting individuals to accomplish the service by
14 publication. If you say "citation when issued shall be
15 served by the sheriff or constable or clerk," to me that
16 means a nonsheriff, nonconstable, and nonclerk cannot
17 serve it. But we don't want or do we want to have only
18 clerks -- and maybe that's right. Maybe if only the clerk
19 can send it to OCA and gets it back from OCA and the
20 litigants are out of the process, maybe that's the best,
21 and we should still say "shall" rather than "may."

22 CHAIRMAN BABCOCK: Yeah.

23 MR. GILSTRAP: Well, there is a provision of
24 the rules that says that whenever the sheriff, constable,
25 or clerk can serve a private process server can serve. I

1 mean, I think that's -- but the question is do we want the
2 litigants doing it?

3 MR. ORSINGER: That is the question.

4 MR. GILSTRAP: First of all, I think private
5 process servers will be able to do it. What about other
6 third parties, or do we want that? Do we want litigants?
7 Do we want attorneys? At some point, you know, I'm a
8 little concerned about letting litigants do it themselves.

9 CHAIRMAN BABCOCK: Yeah, Roger.

10 MR. HUGHES: Well, and that was the concern
11 that I raised earlier is going to do that, and I think
12 there's a -- the problem with -- it's distinct for serving
13 the state's website and then serving through a social
14 media. Already we allow mail service, personal service on
15 the Secretary of State and the Secretary of Transportation
16 when we do substitute service under the Civil Practice and
17 Remedies Code, so I'm not too troubled that how it got to
18 the OCA -- I mean, how it gets to the state's website.
19 The point is the return has to be by the public website
20 and not by a private process server, which was -- usually
21 for substitute service under the Civil Practice and
22 Remedies Code, you get a certificate from the Secretary of
23 State or from the Secretary of Transportation. "We got it
24 on this date, and this is what we did to serve it on the
25 actual defendant."

1 I think it's a real problem if you start
2 allowing that by -- you know, service on social media by
3 nonpublic officials, whether it's the sheriff or the
4 constable or the clerk of the court. When you start
5 allowing third parties, private process servers or third
6 parties, what you get is the risk of it goes in spam. Or,
7 worse, "I don't know this person, I'm not touching this
8 e-mail." Delete. And so on and so forth. I think it's
9 very important then that if the system is going to work,
10 it's not just the discretion we give the judge, but the
11 factual foundation that it's been -- that their faith has
12 been justified; and when you have a court official saying
13 I send it to this person's Facebook account and this is
14 how I verified that they got it and that they read it,
15 that's one thing. That's much more secure I think than
16 just, you know, turning it over to a process server,
17 because the idea is to get notice to them.

18 It's not enough to send them an e-mail that
19 they're not likely to read, because I don't think that's
20 due process. I think it has to be in a form that will
21 attract their attention. I mean, even when we do mail
22 service, service by mail, you have to show the person
23 signed for the letter, even when the process server -- and
24 that's a question, is whether we can allow process servers
25 to serve by mail. They still have to have a return

1 receipt signed by the defendant, and so that gives you
2 some measure of security that when they mailed it this
3 person actually got it.

4 Well, what have we got when they send it by
5 e-mail or serve it by Facebook? Well, we're allowed -- I
6 think we're just running into problems when we -- when we
7 allow returns or returns of service by nonpublic officials
8 if we're going to allow social media service.

9 CHAIRMAN BABCOCK: So are you a "shall" or a
10 "may" kind of guy?

11 MR. HUGHES: Well, there's a lot of
12 "shall's" and -- and throughout the statute. I tend to --
13 my personal feeling is if you're committed to the idea
14 that nonhand-to-hand service should be judged by the
15 likelihood the person will actually get notice, then I
16 think there has to be some measure -- like I said, there
17 has to be some measure that the person is likely to accept
18 it.

19 So if you just send it in a -- we don't --
20 when we have service by mail we have something to show
21 that they got it, independent of the third party --
22 independent of the person who sends it. So my thinking
23 is, is if we're going to do social media, it has to be
24 sent or delivered by a public official so that we have a
25 return by a public official and not by a private person.

1 Certainly not by an attorney or litigant, and I'll say
2 this: I can't say this is true at everybody's office, but
3 if you say that attorneys can do service of -- they can do
4 the service of process and all the mailing, the attorney
5 is not going to do it. They're going to hand it to their
6 secretary or their legal assistant, and then when it's all
7 over with, the attorney is going to get an affidavit to
8 sign saying it was done.

9 I -- and then the other thing of it is, is
10 that if there's any question about it, if you're the
11 attorney, to whom do you owe the duty? Candor to the
12 court or fidelity to the client? I don't think that's a
13 good idea to put it in that situation.

14 CHAIRMAN BABCOCK: Throw your assistant to
15 the wolves. Lisa.

16 MS. HOBBS: I'm just trying to bring it all
17 together, and I'm sorry I missed the first hour or so. I
18 might be missing things, but I think we're talking about
19 alternatives to publication.

20 MR. ORSINGER: Yes.

21 MS. HOBBS: Okay.

22 MR. ORSINGER: And alternatives to in person
23 service as well.

24 MS. HOBBS: No, no, no, right, but like we
25 have this range of things where we have in person service,

1 publication service, and now we're thinking about
2 alternative to publication that might be better than just
3 putting into the newspaper that none of us subscribe to
4 anymore because we all get our news on Twitter or
5 whatever, right? And so while I appreciate what you're
6 saying, I feel like the comparison is not to is this
7 alternative better than in person service that we all
8 agree, like under 103 standards that should be the way we
9 go, but I think if the alternative is we're going to do it
10 by putting a notice in a newspaper, that's the comparison.
11 So it's easy to go back to what's the ideal service, but I
12 don't think that's what we're being asked to -- to
13 evaluate, right?

14 I think we're being evaluated by if we do
15 the social media service in comparison to publication that
16 in newspapers that maybe nobody reads, but somebody
17 correct me if I'm wrong, because that's where I kind of
18 got up on what my dear friend Roger was saying here was we
19 got to -- we have to keep comparing to the publication.
20 Am I wrong?

21 MR. HUGHES: Well, yes, I think my point is
22 this: I don't think we're searching for a new way to make
23 ourselves feel good about a method of service that we know
24 is not going to work. So the -- the person is going to
25 get their judgment. We just want them to have their

1 judgment, and we don't want to worry too much about
2 whether the person is really going to get notice this way.
3 I think to satisfy due process you really have to ask the
4 question is the person likely to get real notice through
5 this, and if so, how are we going -- and then the flip
6 side is how are we going to prove it, because you know the
7 writs -- pardon me, the restricted appeals are going to
8 flow in, the bills of review are going to flow in, and
9 then what are we going to do?

10 MS. HOBBS: But correct me if I'm wrong.
11 We're talking about the difference between what everybody
12 agrees through established law is that notice by
13 publication can serve due process concerns. And we're
14 saying do we up the ante and do notice by some other means
15 that we think -- I agree with you. There's risks.
16 There's they may not do it. I don't read my blah, blah,
17 blah, but I also don't read the newspaper for -- so I feel
18 like you keep comparing the notice to what we all want,
19 which is actual, like where we are actually serving
20 somebody; but I feel like if I move the ball forward and
21 be like, okay, we can't serve them for whatever reason
22 through traditional means, and so it's publication versus
23 these other things, why are you comparing it back here
24 when we should be comparing it right here.

25 CHAIRMAN BABCOCK: Judge Estevez, and then

1 Judge Wallace, and then Buddy, and then Richard.

2 HONORABLE ANA ESTEVEZ: Well, somebody
3 brought it up, and I think it was Judge Yelenosky, but
4 there's two separate issues here. One of them is giving
5 people notice of that lawsuit, and so when you serve them
6 on Facebook and they answer, there's no due process
7 problem.

8 CHAIRMAN BABCOCK: Right.

9 HONORABLE ANA ESTEVEZ: Because they got
10 notice. So I think it's important and maybe what we need
11 to look at is once we finish our Facebook rule do we need
12 a more stringent default rule for a Facebook, or, you
13 know, if there is a publication by a social media, this is
14 what you need to show in order to get a default, but I
15 think that -- I actually think it's going to be more
16 effective. You know, the process server that gets on
17 there, if you get on -- you can stalk someone on Facebook
18 and see when they're on Facebook. Their little light
19 turns green. It says the last time they've been on
20 Facebook. So you can sit there and, just like any other
21 return, say it showed that this person was on Facebook
22 from this time to this time on this date, and I got on
23 Facebook and sent them a message, and they didn't respond.

24 I mean, there's -- and it doesn't just have
25 to be Facebook, but I'm saying it's already been stated.

1 I think this is -- when you divide the two issues, this is
2 another way to give people true notice. So you are giving
3 them more options to have all of their constitutional
4 rights fulfilled. You are not taking something away by
5 giving them another tool.

6 CHAIRMAN BABCOCK: Yeah. Judge Wallace.

7 HONORABLE R. H. WALLACE: Well, I'm just
8 thinking about the technology of how this would work, and
9 I don't understand the technology, but to ensure -- let's
10 say you're going to send somebody an e-mail and you're
11 going to as part of that e-mail have a link they're going
12 to click on or something they're going to click to open.
13 A lot of people, as pointed out before, are not going to
14 do that. I probably wouldn't, because you never know when
15 you're going to be downloading something bad.

16 There is some kind of technology that can
17 tell if people read stuff. You know, if you go up and
18 sign up for some type of website or whatever, and you have
19 got to agree to the terms and conditions and you scroll
20 way down and if you don't click that you read them, they
21 won't let you on there.

22 CHAIRMAN BABCOCK: Right.

23 HONORABLE R. H. WALLACE: So there's some
24 kind of technology. Now, that doesn't mean you read it,
25 but you click, but anyway, and maybe that's something the

1 technology could be to at least ensure that they opened
2 that attachment.

3 CHAIRMAN BABCOCK: Okay. Buddy, and then
4 Richard before our morning break.

5 MR. LOW: Chip, maybe I misunderstood your
6 question to Roger, but I thought your question was to the
7 point of in Rule 116, whether the publication must be
8 published by the clerk, the sheriff, and so forth.

9 CHAIRMAN BABCOCK: Must be served, right.

10 MR. LOW: With the "may" or "shall." I
11 thought that was your question.

12 CHAIRMAN BABCOCK: That was my question. I
13 was going to object as nonresponsive, but I didn't.

14 MR. LOW: Well, I haven't heard that
15 answered. That's a simple thing that I think we should be
16 able to answer, but I haven't heard any of the responses
17 that answers that.

18 CHAIRMAN BABCOCK: Richard, and then we'll
19 take a break.

20 MR. ORSINGER: Okay. So just so everyone
21 will be on the same page, in Senate Bill 891, article 10
22 amends section 17.033 of the Government Code, and let me
23 just read it so we all have it in our head.

24 "Substituted service through social media
25 presence. (a), if substituted service of citation is

1 authorized under the Texas Rules of Civil Procedure, the
2 court in accordance with the rules adopted by the Supreme
3 Court under subsection (b) may prescribe as a method of
4 service" -- and that says "may prescribe" -- "an
5 electronic communication sent to the defendant through a
6 social media presence."

7 "(b), the Supreme Court shall adopt rules to
8 provide for the substituted service of citation by an
9 electronic communication sent to a defendant through a
10 social media presence." So we can't really debate whether
11 we should. We need to be debating how we're going to do
12 it.

13 CHAIRMAN BABCOCK: But does that answer the
14 "shall" versus "may" question?

15 HONORABLE ANA ESTEVEZ: It says "shall."

16 MR. ORSINGER: Well, let me finish this
17 thought and then we'll see. So I'm sitting here asking
18 myself --

19 CHAIRMAN BABCOCK: I'll give you a little
20 more rope, counsel.

21 MR. ORSINGER: Why would I -- I'm sitting
22 here asking myself why would I bother with e-mail and all
23 of this other affidavit and hearings and everything else
24 when I can just cite -- you know, publish by citation on
25 the website, and I don't have to have any of this. And

1 the difference is -- the difference between posting
2 citation on the website and sending citation by e-mail is
3 if you post on a website it's citation by publication with
4 all of these safeguards, including extended motion for new
5 trial dates, appointment of an ad litem in some cases.
6 There's lots and lots of safeguards for the person who may
7 not get notice.

8 If I do e-mail service, even if it bounces
9 or even if I know that they've left the e-mail address
10 behind, I don't get those safeguards because I have a
11 default judgment that's not by citation by publication.
12 So to me what the debate we ought to be having is how many
13 of the accepted procedural protections for citation by
14 publication should we be applying to citation through
15 social media? And maybe they should be the same.

16 HONORABLE DAVID EVANS: All. It's never
17 been my belief that any newspaper has ever been read by a
18 defendant.

19 HONORABLE ANA ESTEVEZ: Amen.

20 HONORABLE DAVID EVANS: I just I've never
21 thought of that when I signed the judgment. I thought the
22 protection was is that they were going to go out and
23 enforce the judgment, and the defendant was going to
24 realize that suddenly they had a judgment against them,
25 and they're going to come to court on the extended time

1 limits and ask it to be set aside. So all of this stuff
2 about e-mail addresses, social media, you don't know
3 whether they're searching it; and quite frankly, it's just
4 a bunch of conclusory affidavits that the Supreme Court is
5 going to say is no evidence that they were using the site,
6 because the lawyer is going to have this form that says,
7 "I've checked and they're using their e-mail" or "I know
8 they're using their e-mail"; and it's not going to be --
9 or I'm going to read a 20-page affidavit that says, "Here
10 are all of the e-mails I got."

11 That's before I sign the service. I have
12 two of these motions in my briefcase. This is already
13 happening. They're already asking for that kind of
14 service.

15 CHAIRMAN BABCOCK: Yep.

16 HONORABLE DAVID EVANS: All in credit
17 collection.

18 CHAIRMAN BABCOCK: Okay. On that
19 informative and uplifting note let's take our morning
20 break.

21 MR. ORSINGER: We still didn't answer your
22 question. Sorry.

23 CHAIRMAN BABCOCK: No, no, of course not.

24 (Recess from 11:01 a.m. to 11:29 a.m.)

25 MR. ORSINGER: Okay. Over the break we had

1 several topics discussed. We have an agenda item -- we're
2 at a hotel, people want to socialize.

3 CHAIRMAN BABCOCK: I know. Hey, Lisa. All
4 right. We're back on the record, and Richard is going to
5 answer the question between "shall" and "may."

6 MR. ORSINGER: Ah, you want to get to that.
7 Well, I wanted to cover one thing first.

8 CHAIRMAN BABCOCK: All right, sure. Please.

9 MR. ORSINGER: So one of the topics we
10 discussed, or Roger and I were discussing, is what is the
11 implication of these international treaties on service.
12 There's the Hague Convention, and maybe some individual
13 treaties, and so we were having an interesting debate, I
14 guess, about whether any of that applies. If you're
15 hiring somebody to physically serve someone in a foreign
16 country, if you're using their mail service to serve them,
17 I can understand why it would implicate their governmental
18 concerns; but if some resident of another country has a
19 Facebook account, which is headquartered in California,
20 and you're sending an e-mail to a place in California to
21 communicate with someone who has a link in California,
22 does that implicate these international treaties and
23 conferences? So Roger wants us to look at that, and I'll
24 try to look at it, but I'm afraid it's just going to be
25 the same kind of misty view that we have here, is how do

1 you take a treaty that's written when you're thinking that
2 someone is going to physically go up to a door in Mexico
3 and translate that to an e-mail.

4 Secondly, Elaine said that we have later on
5 on the docket discussion about the attorney ad litem
6 appointment, and at our May meeting we discussed changing
7 the role of the ad litem from defending the case on the
8 merits to verifying the validity of the service or the
9 claimed service. If it's citation by publication on the
10 state website, there's no validity problem, but if it's an
11 e-mail or a text I was told over the lunch hour that
12 e-mails are out and that everybody is doing instant
13 messages and text --

14 CHAIRMAN BABCOCK: Richard, we haven't had
15 lunch yet.

16 MR. ORSINGER: Oh, that was the morning
17 break. So I remember instant messages back in the
18 Eighties. I think AOL had IM, but I think this is a
19 different thing, and I don't know what it is, which is why
20 we shouldn't put it in a rule, but --

21 MR. WATSON: Richard will explain it to you.

22 MR. ORSINGER: Okay. Richard knows. So
23 bottom line is an argument could be made that anything
24 that relies on the reliability of the plaintiff to verify
25 service in a way that's going to be very challenging,

1 because there's no way to prove that an e-mail was opened.
2 There's no way to prove that a Facebook post was read, is
3 that perhaps we ought to use the same safeguards for that
4 that we do for citation by publication, but limit the role
5 of the ad litem, is not to try the case, but just to
6 verify whether service was effected. And an example could
7 be, well, I took the e-mail address from the plaintiff,
8 and I tried it, and it indicated that it was not
9 functional, all the e-mails bounced back, so I don't think
10 that was effective.

11 That's possible, or we could ask the clerk
12 to do that if the clerk is going to be serving by e-mail,
13 and then the question is if it is an ad litem, who pays
14 for the ad litem if it's an indigent litigant who is the
15 plaintiff. So at any rate, I think there seems to be some
16 support for the idea that we should treat alternative
17 service through social media like citation for
18 publication. Citation by electronic publication with
19 those procedural safeguards.

20 Now, on the issue of "may" versus "shall,"
21 the question is, we apparently have no -- as a technical
22 point, we don't have to be concerned about citation by
23 publication getting to the OCA or the return getting from
24 the OCA to the clerk. That looks to me like that's a
25 really easy technological solution. The more difficult

1 problem is who effects service by e-mail, who effects
2 service by posting it on a social website, and that "may"
3 versus "shall" is implicated, Chip, the one you want to
4 talk about, because if it's "shall be a government
5 official," then the individual litigant is not going to be
6 responsible for posting or sending the e-mail. It's going
7 to be either a clerk, or it's going to be a deputy sheriff
8 or a deputy constable or a private process server. If you
9 say "may," then that allows the litigants to make the
10 service themselves; and if they do make the service
11 themselves, you have to rely on them for the return; and
12 if you're relying on them for the return, they may not
13 have a lawyer. They may not understand the consequences
14 of what they're doing. They may inadvertently or
15 intentionally lie under oath, so that decision about
16 whether to change "shall" to "may" is a really important
17 one; and if we stick with "shall" then we're dealing with
18 people who are either peace officers or they're officers
19 of the court or the clerk of the court, and so you're
20 going to get some assurance --

21 CHAIRMAN BABCOCK: Some governmental
22 official, but the subcommittee must obviously have thought
23 that that was not a good idea.

24 MR. ORSINGER: No. No, it wasn't that
25 serious. It was in reading the statute it appears that

1 the Legislature wanted these litigants to be able to post
2 their own notices, at least for the website, because they
3 specifically said you've got to have rules that allow
4 people, the public, to come to the website and either post
5 the information or give it to the person who is going to
6 be --

7 CHAIRMAN BABCOCK: Where in the statute are
8 you talking about?

9 MR. ORSINGER: All right. Let's -- I have
10 to go back and look and see.

11 CHAIRMAN BABCOCK: I'm sure you're right. I
12 just didn't -- I didn't get that from it, but like I said,
13 I'm sure you're right.

14 MR. ORSINGER: I'm usually right, but I may
15 be wrong here. Some of you who know the statute better
16 than I do, I welcome your comment.

17 HONORABLE TOM GRAY: Well, Chip, it just
18 emanates from the words and phrases used in the document,
19 and it suggests.

20 MR. MUNZINGER: 9.03(d).

21 MR. ORSINGER: 9.03.

22 CHAIRMAN BABCOCK: Well, I'm a textualist,
23 so let's see if we can find some text.

24 HONORABLE TOM GRAY: Yeah, right.

25 MR. ORSINGER: Okay. So Richard says on

1 9.03(d) on page three, "The Supreme Court by rule shall
2 establish procedures for the submission of public
3 information to the public information internet website by
4 a person who is required to publish the information."

5 MR. MUNZINGER: I think it's also (b), as in
6 boy.

7 MR. ORSINGER: Oh, I'm sorry.

8 MR. MUNZINGER: "The office shall develop
9 and maintain a public information internet website that
10 allows a person to easily publish."

11 MR. ORSINGER: So I don't think there was
12 any more thought, Chip, going into "may" versus "shall"
13 than that it seemed to be an inference from the statute
14 that they wanted the litigants to be able to post or to
15 publish through this medium. And so if you -- if you
16 accept that the individual is going to be able to post
17 through the medium, then you get over here to the statute
18 you can't say that it's only limited to a clerk or a
19 deputy sheriff or constable, because that rules out a
20 person.

21 So -- but at any rate, on print publication,
22 we -- that's not where the "may" and "shall" should be, is
23 it? "Citation when issued shall be served by" --
24 there's -- if we're going to leave print publication the
25 same way, then we don't -- we don't change "shall" to

1 "may" because this requires the sheriff to go to the
2 newspaper. Okay. And maybe we shouldn't. I mean, why
3 should we? How difficult as it is to get something
4 published in the newspaper, and it's not who got it
5 published, but the fact that it was published is what
6 counts. What counts is that it showed up in the newspaper
7 and not who carried it over there or e-mailed it over
8 there.

9 MR. GILSTRAP: Richard, how are we --

10 MR. ORSINGER: Do you disagree with that?

11 HONORABLE DAVID EVANS: A neutral has to be
12 in charge of service of process.

13 MR. ORSINGER: But if it's published in the
14 newspaper for 28 straight days what does it matter who
15 took it over there?

16 HONORABLE DAVID EVANS: Well, because I have
17 to rely on the affidavit of an interested party that it
18 was done.

19 MR. ORSINGER: Well, I haven't done a
20 citation by publication in a long time, but I used to get
21 a clip of the newspaper and attach it to some --

22 HONORABLE DAVID EVANS: I would trust you,
23 Richard. There's others in the room I might --

24 MR. ORSINGER: Oh, you mean like a fake
25 newspaper article. I hadn't thought about that.

1 HONORABLE DAVID EVANS: You've got all kinds
2 of credit collector people running around. You've got
3 foreclosures doing this. You've got all kinds of stuff.
4 A neutral has to be involved in service of process.
5 That's my --

6 CHAIRMAN BABCOCK: Chief Justice Hecht.

7 CHIEF JUSTICE HECHT: And I don't think --
8 you ought to at least consider that the Legislature may
9 not have meant that much by the word "person." You know,
10 part of the deal is they are trying to set policy and then
11 looking for us to carry it out, and if it's better policy
12 for a neutral to do it, we shouldn't think, oh, well, they
13 said "person." I mean, I think that's reading too much
14 into it.

15 HONORABLE DAVID EVANS: The allocation of
16 costs for indigent people can be handled by the courts and
17 the -- so the cost can be handled in that fashion.

18 CHAIRMAN BABCOCK: Frank.

19 MR. GILSTRAP: Why don't we start with Rule
20 103, who may serve? I mean, it says you've got to be a
21 sheriff, constable, or officer of the court or you've got
22 to be authorized by written order, which I think includes
23 private process servers.

24 CHAIRMAN BABCOCK: Right.

25 MR. ORSINGER: Or a plaintiff.

1 MR. GILSTRAP: Does 103 allow a plaintiff to
2 serve?

3 MR. ORSINGER: I don't know. Didn't you say
4 any person authorized by the court? Is there a
5 disqualifier for parties?

6 MR. GILSTRAP: Yes, there is. It says, "But
7 no person who is a party to or interested in the outcome
8 of a suit may serve any process in that suit," and "unless
9 otherwise authorized by written court order, only a
10 sheriff or constable may serve a citation and action" --
11 oh, and then it talks about forcible entry. So you have
12 to -- you'd have to I guess maybe look at amending Rule
13 103 or the provision that allows -- I can't call it now
14 that allows private process servers to serve.

15 MS. HOBBS: 103.

16 MR. WATSON: We could just say "the persons
17 described in 103" and go.

18 CHAIRMAN BABCOCK: Well, haven't we decided
19 that 116(a), that maybe putting "may" in there was not the
20 appropriate thing to do?

21 MR. ORSINGER: Yes, we have, I think. You
22 made your point finally.

23 CHAIRMAN BABCOCK: What's a couple of hours
24 among friends? Some kind of leader after 20 years, huh?
25 So we'll leave it "shall," but then the next issue becomes

1 subsection (b). Is that --

2 MR. ORSINGER: "By any person" raises the
3 same question.

4 CHAIRMAN BABCOCK: Right. Yeah. That's the
5 point.

6 MR. ORSINGER: Right. So if we're going to
7 restrict this to a clerk or deputy sheriff, deputy
8 constable, or some nonparty designated by the court order
9 then we better just refer back to Rule 113 like Frank
10 says.

11 MR. WATSON: Correct.

12 MS. HOBBS: You mean 103?

13 MR. WATSON: 103.

14 MR. GILSTRAP: 103. But, of course, we
15 don't refer back to rules.

16 MR. WATSON: Yes.

17 CHAIRMAN BABCOCK: That would solve it,
18 wouldn't it, Richard?

19 MR. WATSON: Yeah.

20 MS. HOBBS: It could.

21 HONORABLE ANA ESTEVEZ: I think it should
22 just be (b). I think we will have so many less issues if
23 you -- I mean, if you have a clerk do it the way the clerk
24 does it now.

25 CHAIRMAN BABCOCK: Yeah. Yeah.

1 MR. ORSINGER: You don't even want it to be
2 anyone but the clerk?

3 HONORABLE ANA ESTEVEZ: No. Not for the
4 service on the -- I only want the clerk to be the one that
5 can do it on the internet.

6 MR. ORSINGER: You mean on the state
7 website?

8 HONORABLE ANA ESTEVEZ: On the state
9 website.

10 CHAIRMAN BABCOCK: You want to modify 103.

11 HONORABLE ANA ESTEVEZ: Because then I can
12 get everything from them as the district judge, and I
13 don't have to go look at a service processor that maybe
14 didn't do it or didn't have it. I will have the whole
15 thing in my wonderful electronic filing system that the
16 Texas Supreme Court has.

17 CHAIRMAN BABCOCK: Sharena and Nancy, what
18 do you think about that?

19 MS. GILLILAND: We agree.

20 CHAIRMAN BABCOCK: The record reflects
21 they're nodding their heads in an affirmative manner.

22 So you would not --

23 HONORABLE DAVID EVANS: Ask OCA what they
24 think, too.

25 HONORABLE ANA ESTEVEZ: So just like that

1 certified mail, that they're the only ones that can do
2 that. Make them the only ones that could do this.

3 CHAIRMAN BABCOCK: So you would not permit a
4 private process server to do this, do this service?

5 HONORABLE ANA ESTEVEZ: No. No, because if
6 any changes happen, the OCA can immediately let them know
7 if they're down and everybody knows. I mean, I think the
8 communication, the chances of something going wrong,
9 everything is eliminated by just having the clerk do it.

10 CHAIRMAN BABCOCK: Okay.

11 HONORABLE ANA ESTEVEZ: Then they can get
12 the returns right away. It goes straight into their file.
13 Everything is already connected. It would make it easy.

14 CHAIRMAN BABCOCK: Skip.

15 MR. WATSON: Let's agree on that. That
16 makes sense.

17 CHAIRMAN BABCOCK: Skip says it makes sense,
18 let's agree on that. Does anybody --

19 MS. HOBBS: So as far as publication on the
20 OCA website, putting aside --

21 CHAIRMAN BABCOCK: Yeah.

22 MS. HOBBS: -- service on the e-mail?

23 MR. ORSINGER: Yeah.

24 MS. HOBBS: Okay.

25 CHAIRMAN BABCOCK: Does anybody disagree

1 with that? Justice Gray dissenting.

2 MR. WATSON: The great dissenter.

3 HONORABLE TOM GRAY: Would you like to know
4 why?

5 CHAIRMAN BABCOCK: Yeah.

6 HONORABLE TOM GRAY: Most people don't care.

7 HONORABLE ANA ESTEVEZ: I know it's a
8 separation of powers issue.

9 CHAIRMAN BABCOCK: State your reasons.

10 HONORABLE TOM GRAY: Well, David has already
11 said that they're doing the return and the return goes
12 into the clerk's record, and that's all the trial judge
13 needs, is the return. So why does it matter who posted
14 what to the site if the return comes from OCA and goes
15 straight into the record? Why should we limit ourselves
16 in such a way?

17 HONORABLE DAVID EVANS: Well, let's ask OCA
18 because I think they're concerned -- they're not staffed
19 to take in anything more than the clerks. They're going
20 to have a problem training people. Am I correct, David?

21 MR. SLAYTON: I certainly have concerns from
22 a practical perspective of if we open it up and allow
23 anyone to do it that, you know, we're going to get phone
24 calls, "Well, how do I do this," or people messing up or
25 they get halfway through. I worry a little bit about

1 that, the practical implementation of it. Obviously when
2 we're dealing with clerks then it's we train the clerks
3 how to do it. We work with them if there are issues.
4 It's a lot more straightforward, because we're not talking
5 about just a freeform website that anyone can go use
6 either because people are going to need log-ins and
7 passwords, so then we've got to deal with that issue. So
8 just from a practical perspective it is -- it will be more
9 difficult if anyone is allowed to do it versus a limited
10 group of people.

11 MR. GILSTRAP: But what about private
12 process servers? Those are -- I mean, they are trained,
13 and they are licensed.

14 MS. HOBBS: Oh, my God.

15 MR. SLAYTON: I mean, from my perspective if
16 that's the direction that this group and the Court want to
17 go we could make that work. The only question I guess I
18 have is are we adding in a -- I mean, adding in a cost or
19 adding in another party that's not necessary because the
20 clerks are going to be issuing the citation anyway.

21 MR. ORSINGER: Right.

22 MR. SLAYTON: Couldn't we just have them
23 just do it right whenever they do that --

24 MR. ORSINGER: Sure.

25 MR. SLAYTON: -- versus giving it to a

1 private process server.

2 CHAIRMAN BABCOCK: Just push a button.

3 HONORABLE TOM GRAY: I withdraw my dissent
4 because I see Nathan shaking his head yes, so I'm done.

5 CHAIRMAN BABCOCK: Yeah, Richard. Now we're
6 getting somewhere.

7 MR. MUNZINGER: When OCR says they return
8 the service, do they return a copy of the citation, or is
9 it simply an e-mail sentence that says "citation was
10 served in accordance with X"? The way the sheriff does it
11 today the citation is actually removed, and you can look
12 and see what was served. If you leave that to me as an
13 individual to prepare what was served, what assurance does
14 the court have that the citation met the requirement of
15 law regarding the issue? The return of the OCR is simply
16 saying we published something -- I don't think they're
17 going to return the citation that was filed.

18 MR. SLAYTON: I think the intent would be
19 that we would prepare a return of service just like a
20 private process server does or the sheriff does or
21 whatever that would be returned back. It wouldn't just be
22 an e-mail. There would be an actual document that would
23 be the return of service using the language that's
24 required by whatever rule it is with the return of
25 service. We would provide that in e-file back to the

1 clerk.

2 HONORABLE ANA ESTEVEZ: Now, I just want to
3 tell him, just so he knows, you know, when a citation is
4 actually drafted when the clerk makes one, it's in my file
5 before it's even served. So when they do the return I
6 always have the citation. I have the citation as a
7 separate document and then I get a return citation, the
8 way the e-filing system works. So the -- I would be able
9 to see every citation, even before they're served in any
10 way, in any type of capacity.

11 MR. MUNZINGER: But will that be the case
12 when you allow any person to go directly to the website?
13 That's the concern that everybody has.

14 HONORABLE ANA ESTEVEZ: Well, I don't want
15 them to go to the website.

16 MR. MUNZINGER: Say again.

17 HONORABLE ANA ESTEVEZ: I don't want any
18 person to go to the website. I want the clerk to do it.

19 MR. MUNZINGER: Whether you and I want it or
20 not, I don't know whether I want it, my point is simply
21 that somehow or another a court needs to assure itself
22 that if the state of Texas says that I lost Blackacre as a
23 result of a judgment of a court that the judgment of the
24 court met due process requirements. We have constitutions
25 and rights, and you can't -- we have to be careful with

1 them, and I don't trust everybody that litigates with me.
2 None of us do. We've all learned through life that people
3 lie for money. And other reasons. So why would I let an
4 individual post to a statewide website on the assurance
5 that the statewide website is going to send me back the
6 citation that I got if it's not the state's citation.
7 You've got to be certain that it's the state's citation
8 that was served. I don't know how you do that, and if you
9 don't, I don't know how you're letting the state of Texas
10 say that we're taking Blackacre away from you or your
11 child.

12 CHAIRMAN BABCOCK: Because somebody has got
13 to work Blackacre. Frank.

14 MR. GILSTRAP: Well, when we serve the
15 Secretary of State they don't return the return of
16 citation. They give a certificate. I think it's called
17 like a Whitney certificate or something like that. That
18 may be specific to the statute, but it seems to me that
19 might be a way to do it without actually having the OCA,
20 you know, fill out the return.

21 MR. ORSINGER: So we don't need to worry
22 about the legitimacy of the process if it's between the
23 court clerk that prepares the citation and the OCA that
24 posts it. There can't be anything but the real citation
25 posted at the website. So we don't need the citation sent

1 back by OCA if the clerk is the one that's submitting it.
2 If the litigant is submitting it, God knows what it would
3 say.

4 MR. MUNZINGER: That's the point.

5 MR. ORSINGER: I know, so I think there's
6 nobody in the room but Justice Gray --

7 HONORABLE TOM GRAY: I withdrew mine.

8 CHAIRMAN BABCOCK: He withdrew it.

9 HONORABLE TOM GRAY: I may be foolish, but
10 I'm not stupid.

11 MR. ORSINGER: I think everybody has agreed
12 the best idea is for the clerk to electronically deliver
13 the citation directly to OCA and OCA to post it and then
14 directly deliver the return to the clerk, and there are no
15 outsiders, and it's not possible to screw it up.

16 HONORABLE TOM GRAY: Now, wait a minute. I
17 do disagree with that.

18 CHAIRMAN BABCOCK: Yeah, what he said. You
19 think you can write that into this subpart (b)?

20 MR. ORSINGER: No, but I'll read it in the
21 transcript. I'll read it in the transcript.

22 MR. GILSTRAP: But, I mean, in the real
23 world the Secretary of State is served all the time by
24 private process servers, and they send back a simple
25 certificate. You don't necessarily have to tie yourself

1 to that particular model to have something that nobody
2 questions.

3 MR. ORSINGER: What we really need to be
4 debating is not citation by publication through the state
5 website. It's these alternative services --

6 MS. HOBBS: Yes. Yes.

7 MR. ORSINGER: -- through e-mails, texts,
8 instant messages, and social media sites. That's where
9 the quality or integrity of the citation is of concern,
10 and that's where the return is most doubtful.

11 MR. GILSTRAP: I agree, but this
12 conversation I thought had been about serving the -- about
13 OCA and the state website.

14 CHAIRMAN BABCOCK: We're trying to limit it
15 to that.

16 MR. ORSINGER: Since everyone has agreed to
17 that now, everyone has agreed to that now, I think we
18 should talk about the other.

19 CHAIRMAN BABCOCK: Judge Estevez.

20 HONORABLE ANA ESTEVEZ: Well, he's just so
21 concerned about the process servers, and I just wanted to
22 state on behalf of them I don't think they're going to be
23 concerned about losing this opportunity since they would
24 have already been hired and they already would have failed
25 and so they would have already been paid for trying to

1 serve that citation, and there wasn't going to be a fee;
2 or if it is, it's just a minimal fee, which they would
3 have to pay as well, so it's going to end up being a wash.
4 They won't lose any work.

5 CHAIRMAN BABCOCK: Very good.

6 MR. ORSINGER: So it seems to me like we
7 have some lingering concerns, and we're about to run out
8 of time I think, but --

9 CHAIRMAN BABCOCK: No, we're --

10 MR. ORSINGER: The quality of the citation
11 that's delivered by e-mail or instant message is
12 questionable because who are we relying on to make that
13 delivery, and then when the return comes back how do we
14 verify that there's validity to it? Because this
15 alternate method through e-mail or whatever means there's
16 no ad litem. It means there's no extended motion for new
17 trial.

18 HONORABLE ANA ESTEVEZ: I think you still
19 get an ad litem after that.

20 MR. ORSINGER: On substituted service?

21 HONORABLE ANA ESTEVEZ: Well, at least on
22 the OCA. Right?

23 MR. ORSINGER: No, we're not talking about
24 the OCA site.

25 HONORABLE ANA ESTEVEZ: Okay. But the OCA

1 you still get the ad litem.

2 MR. ORSINGER: It's a citation by
3 publication, so you get all of the protections of citation
4 by publication, but the substitute service is not citation
5 by publication, and you don't get all of those safeguards,
6 and so we have to build a safeguard somehow into the
7 process or else -- or else we're not going to have the
8 verification.

9 CHAIRMAN BABCOCK: Okay. But, Richard,
10 let's -- I think we've got consensus on one issue, but is
11 there anything else under this new proposed language of
12 116(b) that is found on page nine of your memo, is
13 there -- are there any other issues with the language
14 here, recognizing that you're going to amend it to say who
15 can accomplish -- the person that can accomplish the
16 posting?

17 MR. ORSINGER: So we can --

18 CHAIRMAN BABCOCK: Are there any other
19 issues besides that?

20 MR. ORSINGER: Okay.

21 MR. GILSTRAP: Yeah, how many days. I mean,
22 I mean, if 28 days is the minimum, do we want to give them
23 more time?

24 HONORABLE ANA ESTEVEZ: Isn't that just
25 based on the four weeks that they're normally published in

1 a newspaper?

2 CHAIRMAN BABCOCK: I'm sure it is.

3 HONORABLE ANA ESTEVEZ: So it's consistent.
4 So why make it more, or why make it less? Just stays
5 consistent. If we're going to increase the other way.

6 CHAIRMAN BABCOCK: Justice Gray.

7 HONORABLE TOM GRAY: I don't see why you
8 would pull a citation once it was posted on the web page.
9 I mean, until they're answered.

10 HONORABLE ANA ESTEVEZ: It's just for
11 default purposes, I think, right?

12 MR. GILSTRAP: It's when you take a default
13 judgment.

14 HONORABLE TOM GRAY: That has to do with the
15 return and when you can take a default judgment. It
16 doesn't have anything to do about the person still needs
17 notice that maybe they got sued. The -- leaving it out on
18 the web page serves a purpose. The only reason there was
19 28 days in the statute was because it costs money to put
20 it in the newspaper, and so they put an end on it. And
21 you're not -- you don't need that trade-off in the
22 electronic posting.

23 CHAIRMAN BABCOCK: Yeah, but if they leave
24 it up, so 20 years from now you can see that there was
25 service by publication.

1 HONORABLE ANA ESTEVEZ: But I never -- I
2 never gave them a default until they could prove it had
3 been published for at least 28 days and then --

4 HONORABLE TOM GRAY: That doesn't affect the
5 return that David is going to provide once it's --

6 HONORABLE ANA ESTEVEZ: Okay.

7 HONORABLE TOM GRAY: -- been posted. It
8 just stays up there. It's nothing more than it's
9 published in the newspaper, and it's in that newspaper
10 forever, the one that's actually printed. But you only
11 have to do that for 28 days in the newspaper world. What
12 is the point of putting a deadline to pull it down
13 electronically?

14 HONORABLE ANA ESTEVEZ: Well, I don't know
15 that you need to do a pull down, but I think you do need
16 to tell them a time/date so that we know when we can go
17 forward. I mean, what if I say it's been there 30 days
18 and I think that's long enough, but another judge thinks,
19 no, I'm going to do 60 days before I'll grant a default,
20 and I think it's long enough. I mean, I know you're
21 saying that's on the return, but at the same time the
22 return is based on -- they had to prove it was printed 28
23 -- or it was actually in the newspaper 28 days before I
24 even care about the return, because I wouldn't have had
25 service.

1 CHAIRMAN BABCOCK: Justice Christopher.

2 HONORABLE ANA ESTEVEZ: Service was 28 days.

3 HONORABLE TRACY CHRISTOPHER: I think we
4 could just let OCA say like here's the current notices,
5 here are, you know, old notices; and they could stay up
6 there forever, just like they do in any newspaper search,
7 and that would cover it.

8 CHAIRMAN BABCOCK: Yeah. David, what do you
9 think?

10 MR. SLAYTON: I think we could have an
11 archive. I guess the question would become at what point
12 would we -- I mean, at some point it becomes larger and
13 larger and larger. Do we want to keep them really
14 forever, or is there going to be some period of time under
15 which we're going to roll them off of even the archive? I
16 mean, we can do anything. I mean, it's just a matter of
17 space, but I don't know why having 20 years' worth out
18 there is necessary or even helpful, but maybe it is.

19 CHAIRMAN BABCOCK: Judge.

20 HONORABLE ANA ESTEVEZ: Is there a way for
21 you to connect -- if the clerk is the only one doing it,
22 once a default is given, for you to take it off and then
23 they stay posted until someone actively does something or
24 it's dismissed for want of prosecution or something?

25 MR. SLAYTON: Not currently. There is no --

1 there's no -- unless the clerk were to go back in and note
2 that the default -- and that would just be a little --
3 another step in the process. There's no connection right
4 now that we would be able to do that. Maybe in the
5 future, but not right now.

6 MR. ORSINGER: It seems to me there may be
7 an issue once it's posted on the website. It may be a
8 government record and may be governed by the archival
9 statutes rather than some rule that we recommend, in which
10 event it would be a government record that has to be
11 destroyed according to the timetable.

12 CHAIRMAN BABCOCK: Lisa.

13 MS. HOBBS: I totally agree with Richard
14 that there might be other statutes that would play into
15 when OCA could delete something, but I also don't
16 understand why when we're creating a subsection (b) we
17 couldn't just point out the same timetables that are in by
18 publication into the electronic publication, and so then
19 we have a minimum standard, notwithstanding what OCA needs
20 to do with regard to now it's a public record and things
21 like that. So they would at least know that they're
22 complying with -- because we're concerned about due
23 process. David is going to be concerned about archival
24 and other retention issues, but all our rule needs to do
25 is like what is due process requiring, and I just think

1 maybe you just transport that 28 days into the electronic
2 publication, and you solve this problem.

3 CHAIRMAN BABCOCK: Yeah. Because this new
4 language here that was drafted anticipates that OCA is
5 going to adopt rules for operation of that website.
6 Right? It says that.

7 MR. ORSINGER: Well, but you know what, now
8 after this discussion we've realized the rules are not
9 about posting. The rules are about accessing. They're
10 not -- individuals are not going to be posting. At least
11 not citations.

12 CHAIRMAN BABCOCK: Right. That's true.

13 MR. ORSINGER: Later on there may be notices
14 for, you know, RFPs for construction projects or who
15 knows, but for the time being the rules --

16 CHAIRMAN BABCOCK: But somebody is going to
17 be posting.

18 MR. ORSINGER: It's just the clerks.

19 CHAIRMAN BABCOCK: Yeah. The clerks are
20 going to be posting, and don't they have to do it in
21 accordance with the rules that OCA adopts?

22 MR. ORSINGER: I don't think that -- I don't
23 think the Rules of Procedure would govern that. David.

24 CHAIRMAN BABCOCK: No.

25 MS. HOBBS: But OCA is going to be posting,

1 right? You're not going to give a clerk a password and
2 then they just post it, right? There's going to be some
3 review on your thing so it is an OCA posting much like the
4 Austin American-Statesman editor decides like I'm going to
5 publish this notice, right?

6 MR. SLAYTON: I think our intention actually
7 is to give clerks log-ins and passwords --

8 MS. HOBBS: And to post?

9 MR. SLAYTON: -- and allow them to post the
10 citation publication.

11 MS. HOBBS: Oh, okay.

12 MR. ORSINGER: And that spreads the load of
13 all of those counties around the state rather than in one
14 office in Austin.

15 MR. SLAYTON: Right.

16 CHAIRMAN BABCOCK: And Lisa is not happy
17 about that, but Judge.

18 HONORABLE ANA ESTEVEZ: I was just going to
19 try to articulate my point I made earlier that I failed to
20 articulate. My understanding of posting by publication,
21 the 28-day requirement, was that if you don't post for the
22 full 28 days, you didn't give notice.

23 CHAIRMAN BABCOCK: Right.

24 HONORABLE ANA ESTEVEZ: At all. So we need
25 to have -- it's not a default issue. There isn't notice

1 until a certain period of time has come, has gone by. So
2 I believe you need 28 days just to be consistent with the
3 rest of the statutes or the other requirements or some
4 other time period that you can change across the board in
5 order for the constitutional due process notice to be
6 fulfilled. It's not the fact that it posted. He can put
7 it on for 15 minutes and say he posted it and took it
8 down.

9 CHAIRMAN BABCOCK: Yeah.

10 HONORABLE ANA ESTEVEZ: It was a period of
11 time that would reasonably give anybody that would be
12 looking the chance to find it or any of their friends to
13 look everyday because they're so, you know, just kind of
14 nosey and call them up and say, "Hey, I see you've been
15 sued 15 times by 15 people."

16 CHAIRMAN BABCOCK: Yeah. So you would
17 suggest that in this language here in this rule that maybe
18 we should add "for a period of not less than 28 days"?

19 HONORABLE ANA ESTEVEZ: That would be --

20 MS. HOBBS: Yeah.

21 HONORABLE ANA ESTEVEZ: That would be smart.

22 CHAIRMAN BABCOCK: Well, he's the smart guy.

23 MR. ORSINGER: Now, wait a minute. You
24 already used that one. That would be clever.

25 HONORABLE ANA ESTEVEZ: There you go.

1 CHAIRMAN BABCOCK: Clever. Yeah. Lisa, and
2 then Frank.

3 MS. HOBBS: Just out of curiosity, would
4 there not be a way for you to just -- like clerks submit
5 and then you have some kind of toggle where you then say,
6 like, okay, this is now posted and I -- I, OCA, controls
7 how long it is posted so it's not just -- and then you
8 also know when you can take it down, right?

9 MR. SLAYTON: Sure.

10 MS. HOBBS: And whether you preserve it for
11 open records reasons or whatever, but I just -- I do feel
12 like there -- if you can -- if it's not crazy hard for you
13 to do, that there should be some staff member who is
14 looking at what's posted and accepting it and then knowing
15 when it can be taken down, whether it's taken down on that
16 precise day or not; but that OCA, like a publisher of a
17 newspaper says, "Okay, we'll run this for four days.
18 Thank you for your money." You know, I think OCA needs to
19 have a role in this, and it just can't be like -- I don't
20 know what you're imagining without OCA having a process
21 into it, but it can't just be like clerk posts, and they
22 can say two weeks, and that's not complying with the law.
23 Like I feel like y'all are going to have to some initial
24 review of what's posting and then, you know, how you take
25 it down is up to you guys, but that it has to -- that you

1 know it's on the website for four weeks.

2 MR. SLAYTON: That makes sense.

3 CHAIRMAN BABCOCK: Yeah, Frank. I'm sorry,
4 David.

5 MR. SLAYTON: I just said that makes sense.

6 CHAIRMAN BABCOCK: Yeah, Frank.

7 MR. GILSTRAP: The question has to start
8 with when does the defendant get notice. It's a default
9 judgment issue. Under Rule 99 for normal citation the
10 citation says you have been served. You have until Monday
11 next after 28 days -- after 20 days, whatever it is, to
12 file an answer, and then you can take the default
13 judgment. The citation by publication, I don't find a
14 provision like that. It says it should be up for 28 days,
15 but where is the rule that says when the defendant is
16 deemed to have notice and when does his period of time
17 start to run?

18 HONORABLE DAVID EVANS: You appoint the ad
19 litem.

20 MR. GILSTRAP: What's that?

21 HONORABLE DAVID EVANS: You don't do
22 anything. You appoint the attorney ad litem.

23 MR. GILSTRAP: Okay. Okay.

24 HONORABLE DAVID EVANS: You don't take a
25 default until the ad litem -- the ad litem makes the

1 appearance on behalf of the defendant.

2 MR. GILSTRAP: So we're going to have to
3 have -- either we're going to have a different rule or
4 we're going to have to have an ad litem because we don't
5 have a provision right now that says that -- that would
6 simply allow the court to take a default judgment after
7 it's been posted for 28 days or 50 days or however many
8 days. There's no provision there saying when you can do
9 that.

10 HONORABLE ANA ESTEVEZ: It's all -- these
11 should all be ad litem, unless it's a family law case,
12 and you can dispose of them under that one provision if
13 there's no children or anything.

14 MR. GILSTRAP: We're going to have ad litem
15 in every case.

16 HONORABLE ANA ESTEVEZ: Huh? There's an ad
17 litem in every case.

18 MR. ORSINGER: Every civil case except
19 certain family law cases.

20 HONORABLE ANA ESTEVEZ: Right.

21 MR. GILSTRAP: So that's -- we're kind of
22 all settled on that?

23 MR. ORSINGER: Except we haven't settled on
24 the role of the ad litem, but that will come up later.

25 MR. GILSTRAP: I understand. Okay. But

1 that's a far cry from this goal of, you know, we put it on
2 the internet and then they get notice and we take default
3 judgment. It's another huge step in there.

4 MR. ORSINGER: The problem is we've solved
5 the easy problem; and we really haven't, in my opinion,
6 undertaken to solve the difficult problem, which is who
7 has the authority to serve by alternate service and who
8 has the authority to make the return.

9 CHAIRMAN BABCOCK: Yeah.

10 MR. ORSINGER: And we're obviously not going
11 to get that between now and lunch, but in my opinion,
12 we've solved this problem, and we ought to consider
13 talking about the --

14 CHAIRMAN BABCOCK: Yeah, I'm an optimist by
15 nature, so let's keep going.

16 MR. ORSINGER: Oh, good. Okay.

17 CHAIRMAN BABCOCK: And Rule 117 -- is there
18 anything further on (b), Rule 116(b)? Anybody got any
19 other issues on that? Hearing none, then let's go to 117,
20 and you're going to have to revise 117 in accordance with
21 the revisions to (d) and (a) in 116, correct?

22 MR. ORSINGER: So, Chip, it seems to me it
23 should say "the return of the clerk or officer." There's
24 not going to be any person but a clerk or an officer or I
25 guess -- let's see. Do private process servers do returns

1 on newspaper citation? Do you know?

2 HONORABLE ANA ESTEVEZ: I've never had one,
3 but I don't know.

4 MR. ORSINGER: Does anyone know?

5 MS. GILLILAND: I think they do.

6 MR. ORSINGER: They do? So we have to allow
7 for newspaper publication to be effected by a private
8 process server, so maybe we do need to say "person"
9 because they're just persons. "A return of the person or
10 officer." Can we call a clerk an officer, or should we
11 say clerk separately from officer? We'll put it in
12 provisionally. "Person, clerk, or officer" and instead of
13 "executing" we'll say "publishing." That's an okay
14 change? "Said citation shall show how and when the
15 citation was published, specifying the dates of such
16 publication" or maybe we ought to put a parentheses around
17 "dates." I don't know if you can do that in a rule, but
18 if you --

19 MR. GILSTRAP: And what's a printed copy of
20 the citation of publication? What's the printed
21 publication? Are we actually posting the citation itself
22 on the website?

23 MR. ORSINGER: Yes, I think so.

24 MR. SLAYTON: Yes.

25 MR. GILSTRAP: Okay.

1 HONORABLE ANA ESTEVEZ: With the petition.

2 MR. ORSINGER: And the petition I guess --

3 HONORABLE ANA ESTEVEZ: Yes.

4 MR. ORSINGER: -- will be attached with a
5 link, or will it just be part of one file?

6 MR. SLAYTON: I think it would be a PDF, one
7 file.

8 MR. ORSINGER: Both of them in one file.

9 MR. SLAYTON: Right.

10 MR. GILSTRAP: And the petition has got to
11 be attached to the citation.

12 HONORABLE ANA ESTEVEZ: And so do all those
13 discovery requests.

14 MR. GILSTRAP: What's that?

15 MR. ORSINGER: Discovery requests she said
16 that are served with the petition, they have to be part of
17 it, too. So to stay on the point here, "signed by the
18 person who caused publication to occur." That's not good
19 because it's just a computer that caused the publication.

20 MS. HOBBS: That's what I was telling David.
21 It needs to be a person.

22 MR. ORSINGER: Well, you know, the newspaper
23 is not a person. Well, now, are we talking about the
24 medium that published it, or are we talking about the
25 person that caused it to be published, like the clerk?

1 HONORABLE ANA ESTEVEZ: Well, it could be an
2 electronic signature by the clerk, or by the OCA. Right?
3 So it's still good.

4 MR. ORSINGER: So do we want to say
5 "agency"? "Signed by the agency which caused publication
6 to occur"?

7 MR. MUNZINGER: "By the publisher."

8 MR. ORSINGER: Because it needs to cover
9 newspapers as well. "Signed by the publisher." "Signed
10 by the publisher and shall be" --

11 CHAIRMAN BABCOCK: Wait a minute. Do you
12 get the newspaper to sign something now?

13 MR. ORSINGER: I don't know.

14 MS. HOBBS: And that's what I -- I was just
15 wondering, like, what is the return on --

16 MR. SLAYTON: They file an affidavit.

17 CHAIRMAN BABCOCK: The newspaper does?

18 MR. SLAYTON: The newspaper files an
19 affidavit, which actually has attached to it a copy of the
20 actual publication.

21 CHAIRMAN BABCOCK: There you go.

22 MR. GILSTRAP: That's one of the things you
23 pay for.

24 MR. ORSINGER: So I don't think we need "who
25 caused publication to occur" because we're going to say

1 "by the publisher."

2 CHAIRMAN BABCOCK: Okay.

3 MR. ORSINGER: And "shall be copied by an
4 image" instead of a printed copy. The thought there is
5 there's no point in printing it -- well, it's all being
6 delivered electronically, so a printed copy is nothing but
7 a scan, so why even have a printed copy? Let's just call
8 it an image there.

9 CHAIRMAN BABCOCK: All right. Any other
10 comments on 117?

11 Okay.

12 HONORABLE ANA ESTEVEZ: I'm just going to
13 state on the record, back on 116 real quick, that in those
14 family law cases -- because I do get those, my pro se ones
15 where they don't have any property and they do have to
16 publish or give the citation by publication, I do give
17 defaults in those cases. So we still do need the default
18 rule. There's not always an ad litem because those
19 exceptions do come up quite a bit in the --

20 CHAIRMAN BABCOCK: Okay. So you're saying
21 that we need --

22 HONORABLE ANA ESTEVEZ: No, I just -- when I
23 was talking about the 28 days, and we talked about --

24 CHAIRMAN BABCOCK: Yeah.

25 HONORABLE ANA ESTEVEZ: -- whether or not

1 you need them because there's an ad litem in all cases,
2 and that's not true. In limited family law cases in which
3 they show that they have no property and no kids they do
4 not need an ad litem.

5 MR. ORSINGER: But you don't need anything
6 more than the 28-day notice?

7 HONORABLE ANA ESTEVEZ: No, but I need it.

8 MR. ORSINGER: Yeah. Well, it's going to be
9 there.

10 HONORABLE ANA ESTEVEZ: Okay.

11 MR. ORSINGER: No problem.

12 HONORABLE ANA ESTEVEZ: I want to make sure
13 I keep it.

14 CHAIRMAN BABCOCK: Now, you want to talk
15 about 106?

16 MR. GILSTRAP: Are we talking about a
17 situation where you don't need an ad litem?

18 MR. ORSINGER: Yes.

19 HONORABLE ANA ESTEVEZ: I'm talking about
20 the situation that I do have limited defaults, and I do
21 need to know when that can occur.

22 MR. GILSTRAP: Yes.

23 MR. ORSINGER: She just needs to know the
24 timing by which the default can be granted, and we've all
25 agreed on 28 days.

1 HONORABLE ANA ESTEVEZ: Well, 28 days plus
2 20. I always count that last day of publication as the
3 day they got served.

4 MR. GILSTRAP: I thought --

5 HONORABLE ANA ESTEVEZ: And then I gave them
6 the 20 days after that, plus the, you know, Monday at
7 10:00 a.m.

8 MR. ORSINGER: Sure.

9 HONORABLE ANA ESTEVEZ: So I do all of that.

10 MR. GILSTRAP: Okay. But it's not in the
11 rule. I mean, where is the situation where we don't have
12 an ad litem?

13 HONORABLE ANA ESTEVEZ: It's in the Family
14 Code.

15 MR. GILSTRAP: Okay.

16 HONORABLE ANA ESTEVEZ: And it's under a
17 specific section in which you have people that have no
18 money and are not going to fight over a kid. You can do
19 publication without an ad litem.

20 MR. GILSTRAP: And does it have a provision
21 saying when you can default them?

22 HONORABLE ANA ESTEVEZ: No.

23 MR. GILSTRAP: That's kind of --

24 HONORABLE ANA ESTEVEZ: But I know I can
25 default them after they've been noticed --

1 MR. GILSTRAP: I'm just saying --

2 HONORABLE ANA ESTEVEZ: -- and it's been 20
3 days and it's been a Monday and after 10:00.

4 MR. ORSINGER: So we need to fix the date.
5 We know the minimum period of time in which to publish it,
6 but we don't have the date on which service is effected.

7 MR. GILSTRAP: That's right.

8 MR. ORSINGER: So maybe we should say the
9 service is effected on the 29th day or the 28th day, and
10 once we do that then we have until the Monday following
11 the --

12 HONORABLE ANA ESTEVEZ: You need to
13 understand, these are the people that are the poorest
14 people that need the most access to justice, because I
15 have no -- I have absolutely no attorney.

16 MR. GILSTRAP: But remember, we're dealing
17 here when you're trying to set these aside with the rule
18 of strict scrutiny, and if you didn't dot the T you set it
19 aside, and if there's no provision in there saying that
20 you can default them, you can't.

21 HONORABLE ANA ESTEVEZ: I can default them.
22 I can default anyone that has -- the citation says, "You
23 have been sued." It's -- there's no reason for me not to
24 be able default.

25 MR. GILSTRAP: There's a reason because

1 there's no rule that permits it.

2 MR. ORSINGER: No, you can always take a
3 default judgment if answer day has come and gone and the
4 defendant didn't file an answer. We don't need a rule to
5 say that. We already have it.

6 MR. GILSTRAP: But for publication we don't
7 have a provision saying what the answer date is.

8 MR. ORSINGER: That's my point. Maybe we
9 ought to say that the service will be effected on 28th day
10 or the 29th day.

11 MR. HARDIN: Judge Wallace and I are trying
12 to go figure out how this is going to read. This last --
13 this last colloquy.

14 MR. ORSINGER: My -- my suggestion is why
15 don't we just say for a period of 28 days, period, and
16 then let's just say, "Service shall be effected on the
17 28th day."

18 CHAIRMAN BABCOCK: How does it work now if
19 you serve by newspaper publication? That's got the 28
20 days.

21 HONORABLE ANA ESTEVEZ: Well, you get an ad
22 litem. But if you're in that limited family law case --

23 CHAIRMAN BABCOCK: Right.

24 HONORABLE ANA ESTEVEZ: -- that you don't
25 get an ad litem, then you would say that it would -- I

1 mean, these are alternative service provisions.

2 CHAIRMAN BABCOCK: Right.

3 HONORABLE ANA ESTEVEZ: So that means we are
4 saying it is constitutionally the same thing. We have
5 given notice at this point.

6 CHAIRMAN BABCOCK: Yeah.

7 HONORABLE ANA ESTEVEZ: So if the
8 requirement -- if the requirement was they had to publish
9 for 28 days then on day 29, if they have completed that we
10 say they have been served.

11 CHAIRMAN BABCOCK: Yeah. Service --

12 HONORABLE ANA ESTEVEZ: So if nobody filed
13 an answer before that or within the other 20 days, so if
14 you were going on day 29 and counted 20 days and then went
15 to the next Monday, there shouldn't be any reason why
16 under the rules you were unable to do this because you're
17 assuming -- and if you can't assume then all of this is
18 unconstitutional and we shouldn't be giving anybody
19 anything if they were served by publication. So if we're
20 being consistent with this is actually constitutional due
21 process, then at the end of 29 plus 20 plus 10:00 o'clock
22 you should be okay. I think she's got something, but
23 nobody can see her.

24 MS. McALLISTER: I just wanted to say
25 there's already a time requirement, though. Like on the

1 citation for publication you have to have them published
2 for a certain number of days.

3 HONORABLE ANA ESTEVEZ: That's what I'm
4 talking about.

5 MR. ORSINGER: But it doesn't say when
6 service is effective. It says you don't have service if
7 it's less than 28 days' notice, but is it the 29th day,
8 the 28th day, the 30th day? When is the day of service?
9 No one cares because normally you have an ad litem and
10 you're weeks or months into the process, but in these few
11 cases there is no ad litem. You need to know when service
12 occurred so you know when answer date was so you can grant
13 a default.

14 HONORABLE ANA ESTEVEZ: Yeah. And, I mean,
15 it's there are no children, there is no property. All I'm
16 doing is keeping these people from moving on with their
17 lives, so --

18 MR. GILSTRAP: Except you don't have any
19 lawful authority to do it.

20 HONORABLE ANA ESTEVEZ: I do have lawful
21 authority. All of the other rules.

22 CHAIRMAN BABCOCK: Richard.

23 MR. ORSINGER: Yes, sir.

24 MR. MUNZINGER: Rule 99 --

25 CHAIRMAN BABCOCK: Different Richard.

1 MR. MUNZINGER: Rule 99(b)(10), "The
2 citation shall contain the time within which these rules
3 require the defendant to file a written answer with the
4 clerk that issued citation." Skipping (11), and (12),
5 "The citation shall direct the defendant to file a written
6 answer to the plaintiff's petition on or before 10:00 a.m.
7 on the Monday next following the expiration of 20 days
8 after the date of service thereof." It seems to me, and I
9 haven't studied it all that long and hard, but if the
10 citation contains a time to answer that, in essence it's
11 telling you when you were served.

12 MR. LOW: Right.

13 MR. GILSTRAP: Well, that's the provision
14 we've been hunting for.

15 MR. ORSINGER: But, see, the problem --

16 MR. MUNZINGER: The citation itself has to
17 have these 12 requirements. There are 12 requirements of
18 the citation, and one -- the two that I read pertain to
19 the subject we're discussing.

20 MR. ORSINGER: So that suggests that we
21 should write into the citation that the answer day is a
22 Monday following the 20th day after the 28th day after it
23 was published.

24 MR. GILSTRAP: How do you know -- how is the
25 reader going to know -- is the website going to say it was

1 published on this day?

2 HONORABLE ANA ESTEVEZ: Yeah, it will have
3 the day it was posted. The posted date will be on there.

4 MR. MUNZINGER: Citation is --

5 (Simultaneous cross-talk)

6 THE REPORTER: Wait a minute.

7 MR. ORSINGER: It sure will. So I think we
8 ought to -- it seems to me, decide when service is
9 effected so that we know what to put -- you could say
10 service is deemed effective on the 28th day or on the 29th
11 day, and if you do that then they know how to type the
12 citation. It's going to say the Monday following the 48th
13 day after the citation was first published on the website.

14 CHAIRMAN BABCOCK: David.

15 MR. SLAYTON: I just want to be clear, and
16 the clerks can correct me if I'm wrong here, but the
17 citations just say that language. They don't have a date
18 or a time on there. They just say "the Monday following"
19 or "10:00 o'clock, the Monday following the expiration of
20 20 days after the date of service." That's what the
21 citations say. So the litigant is having to calculate
22 that themselves, so it's not like there's a date stuck in
23 there. So I do think it's important for there to be some
24 indication of when is the date of service so that the
25 party can determine when their answer is due.

1 MR. MUNZINGER: Well, if I'm a litigant I'm
2 going to attack any citation that does not comply with
3 Rule 99 on its face, and because that's the definition of
4 citation as it exists, unless it's modified by this rule.
5 I'm not arguing with anybody. I'm just saying that it
6 needs to -- it needs to say in there. There's no reason
7 why you can't put in the rule, "The citation shall state
8 that the answer is due not less than 20 days after the
9 28th day of publication" or whatever you want, and then
10 it's done.

11 CHAIRMAN BABCOCK: Richard, the younger.

12 MR. ORSINGER: I would like to suggest that
13 we add on to subdivision (b) of Rule 116, "Service is
14 deemed to have occurred on the 28th day after the citation
15 is first published."

16 "Service is deemed to have occurred on the
17 28th day after the citation is first published." So that
18 works for either a newspaper or the website.

19 CHAIRMAN BABCOCK: Uh-huh. Anybody got any
20 problems with that?

21 MR. ORSINGER: That gives you a date of
22 service, and you can start your calculations accordingly.

23 CHAIRMAN BABCOCK: Justice Gray.

24 MR. MUNZINGER: But if you read Rule 99
25 don't you have to say the date?

1 MR. ORSINGER: No. No, no. It's up to the
2 defendant to calculate what's a Monday following the 20th
3 day after service, and if the 20th day is a Monday then
4 you've got to add seven days, but it's all -- it's all
5 vague, or it's all stated in the abstract rather than a
6 calendar date.

7 MR. RODRIGUEZ: I second the motion.

8 MS. HOBBS: Should it be the 29th day
9 instead of the 28th?

10 MR. ORSINGER: I don't know. Let's discuss
11 that.

12 CHAIRMAN BABCOCK: But not too long.

13 MS. HOBBS: Okay. I would vote for 29th.

14 CHAIRMAN BABCOCK: Justice Gray.

15 HONORABLE TOM GRAY: I'm still struggling
16 with the --

17 HONORABLE DAVID EVANS: Or the first Monday.

18 HONORABLE TOM GRAY: -- purpose and
19 specifically with Judge Estevez' opportunity to grant a
20 default when service has been accomplished by publication,
21 either in the traditional method or in the new electronic
22 method. Because as I look at Rule 244, it says if service
23 is done by publication you have to do an ad litem, and
24 then I look over at 107.014 of the Family Code, and it
25 doesn't limit 244 as far as the appointment. It limits

1 them as far as the scope of their responsibilities, and so
2 I am confused about --

3 HONORABLE ANA ESTEVEZ: Will you read that?
4 Because I don't believe that that's -- there's either
5 another --

6 HONORABLE TOM GRAY: There may be another
7 provision.

8 HONORABLE ANA ESTEVEZ: Okay. There must be
9 another provision. There is one that says specifically if
10 there is no property and no children the court can
11 dispense with appointing ad litem.

12 HONORABLE TOM GRAY: Even if they're --

13 HONORABLE ANA ESTEVEZ: Under a publication.

14 HONORABLE TOM GRAY: Okay.

15 HONORABLE ANA ESTEVEZ: But can you find it,
16 Richard?

17 MR. ORSINGER: I'll try. I'll try.

18 HONORABLE ANA ESTEVEZ: You're the smart
19 guy.

20 MR. ORSINGER: I'll try. I'm using my cell
21 phone.

22 MR. GILSTRAP: We also have to look at Rule
23 329, which gives you six months after any citation by
24 publication to file a motion for new trial. Are we going
25 to put that -- is this going to apply as well when it's

1 published on the web?

2 MR. ORSINGER: Sure. I mean, in my opinion
3 this is doing nothing but substituting a website for a
4 newspaper page. So everything else is the same, in my
5 view.

6 CHAIRMAN BABCOCK: So, Richard, you're going
7 to come back with a new draft.

8 MR. ORSINGER: I am.

9 CHAIRMAN BABCOCK: Of 116 and 117.

10 MR. ORSINGER: And I know that we're coming
11 to a close here, but the truth is --

12 CHAIRMAN BABCOCK: Yeah, we are closed.

13 MR. ORSINGER: We are closed. Okay.

14 CHAIRMAN BABCOCK: But we're going to go to
15 106.

16 MR. ORSINGER: Good, because that's where we
17 need some help here. But the question basically is we've
18 been told by the Legislature that we've got to arrange for
19 electronic -- service by electronic communication, so the
20 question is, what goes along with that? Does the 329(b)
21 extended motion for new trial go along with that? Does an
22 ad litem go along with that? Does nothing go along with
23 that? Who is going to verify the citation that gets
24 served? Who is going to verify the truth of the return?
25 Those are difficult issues.

1 MR. GILSTRAP: And the fact that they apply
2 to citation by publication doesn't automatically mean that
3 it's going to apply to this provision. We're going to
4 have to apply them.

5 MR. ORSINGER: In my view we don't have any
6 accuracy concerns with citation by publication
7 electronically, because we're dealing with the clerk and
8 we're dealing with the Office of Court Administration.
9 Where you get into trouble is when a litigant is in court
10 saying, "I want to send a text" or an IM, whatever that
11 is, or an e-mail or a posting on Facebook; and we don't
12 know whether the true citation is going to get out. And
13 then when it comes to doing the return, what are they
14 going to say, "I posted it"? Was it read? How do we know
15 they read it? Those are the issues.

16 CHAIRMAN BABCOCK: Justice Christopher.

17 HONORABLE TRACY CHRISTOPHER: Current Rule
18 107 says, (f), "When citation is executed by an
19 alternative method as authorized by Rule 106, proof of
20 service shall be made in the manner ordered by the court."
21 So the court is going to look at the particular type of
22 service, electronic service that's being requested, and
23 figure out the best way to authorize service and what the
24 return of service would look like. If we try to
25 micromanage it, it will be difficult, because there's so

1 many different types of social media posting and
2 electronic posting and et cetera.

3 So I'm sure Judge Estevez when she
4 authorized that Facebook told them exactly what she wanted
5 to show proof of service, and that's what I anticipate a
6 trial judge would do, and our current rule allows that,
7 and it specifically says in 107, "The return shall be made
8 in the manner authorized by the court."

9 CHAIRMAN BABCOCK: Yeah, Lisa.

10 MS. HOBBS: Okay. So I spent more time as a
11 rules attorney worrying about 106 and 103 than I care
12 to -- I'm having PTSD right now is what I'm saying, but
13 I'm -- interesting that you brought that up, Judge
14 Christopher, because I thought 106 was the traditional
15 method of service, but it does say --

16 HONORABLE TRACY CHRISTOPHER: No, 106
17 includes the substitute.

18 MS. HOBBS: Yeah, I know.

19 HONORABLE TRACY CHRISTOPHER: It includes
20 (b) that we're talking about.

21 MS. HOBBS: So 106(a) I guess is the
22 traditional.

23 MR. ORSINGER: Yes.

24 MS. HOBBS: Okay. And then (f) says --

25 HONORABLE TRACY CHRISTOPHER: By 106.

1 MS. HOBBS: I know, but do you see what I'm
2 saying? Like I may not have been a good rules attorney.
3 I might have needed shaming. I feel like there's an idea
4 of 106 as the traditional method, and the nontraditional
5 method under 106 as well, and I think we just need to
6 amend 107 to be clear of what the traditional methods are
7 and what the nontraditional methods are, and we should fix
8 that now that I'm 10 years removed from rules attorney or
9 more. 15.

10 CHAIRMAN BABCOCK: Judge Estevez.

11 HONORABLE ANA ESTEVEZ: Okay. I just want
12 to have this on the record so nobody spends extra time on
13 it. So, thank you, Mr. Slayton, for finding the cite. So
14 Texas Family Code, section 6.409, citation by publication,
15 part (a) says, "Citation in a suit for dissolution of a
16 marriage may be by publication as in other civil cases
17 except that notice shall be published only one time"; and
18 then on section (e) it states, "If the petitioner or the
19 petitioner's attorney of record makes an oath that no
20 child presently under 18 years of age was born or adopted
21 by the spouses and that no appreciable amount of property
22 was accumulated by the spouses during the marriage, the
23 court may dispense with the appointment of an attorney ad
24 litem. In a case in which citation was by publication a
25 statement of the evidence approved and signed by the judge

1 shall be filed with the papers of the suit as a part of
2 the record."

3 So that's the statute, and people use it.
4 And they ask us. So -- oh, it was actually in here
5 anyway. It was on page 10. After all of that, page 10
6 and 11, so -- so there it is.

7 CHAIRMAN BABCOCK: All right.

8 MR. ORSINGER: So Justice Christopher is
9 saying don't do anything about the return because the
10 trial judge is going to need to tailor that to the
11 specific form of service authorized.

12 CHAIRMAN BABCOCK: Let me ask Justice
13 Christopher a question with your permission, Richard. On
14 this proposed language of 106(b)(2), which says after
15 affidavits, et cetera, et cetera, "the court may authorize
16 service," (b)(2), "by electronic communication sent to the
17 defendant through a social media presence." Is that
18 language okay or not?

19 HONORABLE TRACY CHRISTOPHER: No. That was
20 my alternative language that I gave and has been read into
21 the record. My alternative language was "through social
22 media or electronic communication in a manner that the
23 affidavit or other evidence before the court shows will be
24 reasonably effective to give the defendant notice of the
25 suit."

1 CHAIRMAN BABCOCK: Okay.

2 HONORABLE TRACY CHRISTOPHER: So I
3 anticipate we'll have evidence that "I regularly
4 communicate with him by text. I know it's him, but I
5 don't have a physical location, and I want to serve him
6 through the text." And then the judge will say, "Okay.
7 You are authorized to serve him by the text, and the
8 return of service has to include this information."

9 CHAIRMAN BABCOCK: Got it. Richard.

10 MR. MUNZINGER: The introductory portion of
11 (b) refers to the place where the defendant is or was, and
12 an e-mail address is not a place where a person is. "Upon
13 motion supported by affidavit stating the location of the
14 defendant's usual place of business or usual place of
15 abode or other place where the defendant can properly be
16 found and stating specifically the facts showing that
17 service has been attempted under" so-and-so and so-and-so,
18 "at the location named in such affidavit but has not been
19 successful, the court may authorize service." So you're
20 showing that the person was there, but it says "at
21 location." I think the way you have right now, number
22 (3), you wouldn't have to have a subdivision (2) if you
23 added what is now (2) at the end of (3), "or in any other
24 manner." It says that "the affidavit or other evidence
25 before the court will be reasonably effective to give the

1 defendant notice of suit including by electronic
2 communication sent to the defendant through a social media
3 presence."

4 The problem becomes defining who are the
5 social medias and what, if any, requirements there are
6 going to be that the person will be found at that social
7 media. If we want to do that as distinct to leave it up
8 to the trial court, as the judge says, which is probably
9 the correct answer in my opinion.

10 CHAIRMAN BABCOCK: Got it. Robert.

11 MR. LEVY: One thing that I think Judge
12 Christopher's language resolves is that the reference to
13 social media presence I think is too vague to provide
14 guidance, because social media could be many different
15 things, in many different contexts, and as it's worded in
16 the proposal, I think it's going to create more confusion
17 and problems. If you post something on Instagram, is that
18 social media? Is an e-mail social media? Probably not.
19 But I think with the broader language it should address
20 that.

21 CHAIRMAN BABCOCK: Yeah, Judge Christopher's
22 language says "social media or electronic communication,"
23 so your -- those are two distinct concepts. Social media
24 is one and electronic communication is e-mail, right?

25 HONORABLE TRACY CHRISTOPHER: Yes. Or fax.

1 MR. ORSINGER: Or IM, that I was told.
2 Instant message.

3 HONORABLE TRACY CHRISTOPHER: Whatever the
4 next iteration is that we'll get to.

5 CHAIRMAN BABCOCK: Yeah. Could be IM.
6 Could be an e-mail. Could be something else.

7 MR. ORSINGER: Could be a text.

8 CHAIRMAN BABCOCK: Could be a text.

9 MR. LEVY: The problem with social media is
10 Pinterest is social media. That's not necessarily a
11 communication tool, and so -- Twitter is, but there are
12 other -- other methods that don't really involve
13 communication, but there are ways to -- you know, a news
14 site could be social media, but it's not necessarily a
15 reliable means to communicate with somebody. So I think
16 giving the judge the next step of making that
17 determination of whether it's going to be effective should
18 provide guidance. Although it does put a lot more work on
19 the judge to solve these issues.

20 CHAIRMAN BABCOCK: Yeah. Judge Estevez.

21 HONORABLE ANA ESTEVEZ: You guys will have
22 to correct me if I'm wrong, but the way I read this change
23 in amendment was that we were basically given a tool
24 specifically that I believe we already had, but I think it
25 will help people, since none of you get to serve process,

1 to kind of have an idea of what we do now. So the process
2 server tells us why he couldn't serve the person in
3 person. Like he went here, he went there, he couldn't
4 find him here, and then he tells us what he did to figure
5 out a way to find them. So then he would tell me in this
6 affidavit, "I have found a Facebook page and I find that
7 he has been on here" blah, blah, blah. "I talked to his
8 dad and his dad confirmed this is his Facebook page" or
9 something specific to that, and then he asks me
10 specifically to authorize a specific way to give him that
11 notice.

12 So I have never gotten a request for a
13 substitute -- this alternative service where they say,
14 "Please let me put it in front of any door where I find
15 him." He tells me specifically where he's found him and
16 why he can't get in that door and why if I tell him it's
17 okay to put them on that door he will get it, and that's
18 really what's going to happen here. So when you're
19 concerned that this is too broad, broad is good. But the
20 affidavit I'm going to get is very specific. It's going
21 to tell me specifically why I know that this specific
22 Facebook page is his, whether or not he activates it
23 constantly or not, because I'll ask, I mean, they -- you
24 know, or I'll just read it on the affidavit.

25 I mean, you can read those affidavits, and I

1 have sent so many affidavits back going "Read the rule."
2 It says specific times and locations you went. You know,
3 where they say, "I went three times and I didn't find
4 him." Well, that doesn't mean anything, and this has to
5 show, that affidavit by specific facts has to show that
6 this is reasonably going to get to them. So it's not just
7 I'm going to Twitter it out. They're going to have to
8 show me he has a Twitter account. This is how I know it's
9 his account, just like his home, and I appreciate the
10 concerns, but I think you -- I don't know that everybody
11 realizes how much we really have to look at it and
12 determine whether or not notice was actually given. And
13 most of the time we don't even -- we don't really look at
14 it like -- I mean, I look at it, and I grant it, and I go,
15 yeah, that's good. But if I'm looking at it on a default
16 and something looked strange, I won't sign the default;
17 and I'll tell them, you know, "You need to do something
18 else." If for some reason somebody sat -- you know,
19 because I look through it, and I'll tell you that
20 sometimes you get visiting judges that get in your queue
21 and they get kind of excited and sign more things than you
22 would want them to, but --

23 CHAIRMAN BABCOCK: They get excited.
24 Justice Christopher, on your language, "through social
25 media or electronic communication," is "social media" and

1 "electronic" both modifiers of "communication"? So it's
2 "social media communication" or "electronic
3 communication"?

4 HONORABLE TRACY CHRISTOPHER: I don't think
5 so, but I'm not a hundred percent. I'd have to think
6 about it.

7 MR. ORSINGER: Can I comment?

8 HONORABLE TRACY CHRISTOPHER: I mean, I
9 think of social media as one thing as in Facebook is
10 social media. I mean, you also electronically communicate
11 through Facebook, so they're kind of both, but I wanted to
12 make it broad enough to encompass electronic
13 communications that we don't necessarily think of as
14 social media, like e-mail or a text.

15 CHAIRMAN BABCOCK: Okay. Richard, you had
16 some thoughts, but your head is exploding.

17 MR. ORSINGER: I think we need to be careful
18 about calling a posting a communication. I mean, in the
19 sense anything that you post anywhere is a communication,
20 but some of these media sites have a particular world in
21 which you are designed to communicate with each other, and
22 so I think that putting "social media communication" is
23 limiting, perhaps more so than we should.

24 CHAIRMAN BABCOCK: Okay. Well, that's to me
25 an issue that maybe we ought to think about some.

1 MR. ORSINGER: I agree. And I am one of the
2 least qualified people here to discuss the distinction
3 between communicating and posting on Facebook.

4 CHAIRMAN BABCOCK: No, we have others that
5 are less qualified than you.

6 MR. ORSINGER: At least I have a Facebook
7 page, right?

8 CHAIRMAN BABCOCK: It's a low bar, but, all
9 right, subpart (c). Kennon, did you have something to
10 say?

11 MS. WOOTEN: Just very quickly, I think that
12 when we're choosing phrases to describe electronic
13 communications we should think about the phrases that are
14 used already in the rules. By way of example, in 21a we
15 talk about electronic service versus e-mail service. So
16 we're using a lot of different terms, and it could get
17 pretty confusing instead of trying to figure out what is
18 or is not electronic communication, and now we're adding
19 onto that social media, which in common sense terms is
20 electronic communication. I just think we need to be
21 mindful of all of the different terms we use and be
22 consistent across the board to avoid confusion.

23 CHAIRMAN BABCOCK: Justice Christopher.

24 HONORABLE TRACY CHRISTOPHER: I think that's
25 a good idea, and I think I was just trying to use the

1 statutory language, which I thought included both of those
2 terms, so that was my proposal.

3 CHAIRMAN BABCOCK: So you're saying if
4 you -- out of your proposed language if you took "social
5 media" out, you wouldn't be really removing anything?

6 HONORABLE TRACY CHRISTOPHER: No, I think
7 you need both in.

8 MR. ORSINGER: Yeah.

9 CHAIRMAN BABCOCK: Okay.

10 HONORABLE TRACY CHRISTOPHER: I do.

11 CHAIRMAN BABCOCK: Okay. Well, let's move
12 on to (c), proposed language, Richard.

13 MR. ORSINGER: So (c) is an alternative to
14 (b)(2). It's really overlapping, and (d) is overlapping,
15 but --

16 CHAIRMAN BABCOCK: My question is do we need
17 these?

18 MR. ORSINGER: No. Justice Christopher's
19 suggestion was let's go with (b)(2); and I think (b)(2) is
20 fine if it's expanded out as she did, in which event we
21 wouldn't need (c); and the only thing about (d) that we
22 need to discuss, Frank mentioned a couple of times but
23 he's left the room, is the word "diligent" is used there,
24 and he felt like that was important.

25 CHAIRMAN BABCOCK: Okay. Roger.

1 MR. HUGHES: Well, I looked at the
2 subsection (b)(2) and (d) and became a little concerned
3 about just using the rather vague and amorphous term
4 "social media presence," and I'm thinking that in essence
5 what we're really doing when we do this kind of service is
6 we're making that media outlet, whatever you want to call
7 it, an agent for service of process. We give it to them,
8 and effectively we have given it to the defendant.
9 There -- it's kind of like because you're on Facebook, you
10 just made Facebook your agent for service. Because you're
11 on Pinterest you just -- I'm thinking if we're about to
12 step out into this brave new world, I appreciate giving
13 judges discretion, but I also want to give some
14 protection, and I think we should at least restrict it to
15 commercial social media outlets and because -- that are
16 open to the public.

17 Because there are a lot of private bulletin
18 board systems that exist where if you know the right
19 password and the right e-mail address you could get into
20 the circle, and I don't want -- and I'm not sure we're
21 ready yet to say if you could justify it, then I know your
22 husband belongs to a private bulletin board system open to
23 only 50 of his closest friends and he goes by the handle
24 Snark Master, so you can serve it by posting on that -- on
25 that bulletin board service using this e-mail to the name

1 Snark Master. I mean, I don't think -- I don't think we
2 want even continence that that might be permissible.

3 CHAIRMAN BABCOCK: You sound like you have
4 some experience with Snark Master.

5 MR. HUGHES: No. I'll talk to you later
6 about this, but -- but when in (d)(2) he says "posting on
7 a privately maintained internet website," that could open
8 up the world, and there are -- we already read in the
9 newspaper about the dark web and, you know, secret e-mail
10 servers where, you know, only this interest cell group
11 have access to it and know about it. I don't think we
12 want to go there, and I don't want -- I don't think -- I
13 think we want to protect a judge who wants to honestly
14 exercise his or her discretion. We need to have some
15 fence posts and not just say the field is wide open, use
16 your judgment, and I think at the very least we ought to
17 limit it to commercial social medias that are available
18 and open to the public, even if they have closed web
19 pages, still you can get on Facebook.

20 CHAIRMAN BABCOCK: Yeah. Justice
21 Christopher, what do you think? Roger wants to tighten it
22 up in the judge's discretion in some ways.

23 HONORABLE TRACY CHRISTOPHER: Well, I -- my
24 proposal is to eliminate (c) and (d).

25 CHAIRMAN BABCOCK: Right.

1 HONORABLE TRACY CHRISTOPHER: I just don't
2 think we can write a rule that would stand up for more
3 than a couple of years if we tried to define the social
4 media outlet, and so, you know, I'm just sticking with
5 let's leave "social media," because that's what the
6 Legislature called it, and give the judge the discretion
7 to say yay or nay.

8 CHAIRMAN BABCOCK: Okay. Any other
9 comments? Judge Peeples.

10 HONORABLE DAVID PEEPLES: If somebody comes
11 in and I have time to talk to them about this and I ask
12 the lawyer who wants publication, "Do you have a cell
13 phone number for this spouse?"

14 "Yeah, we got that."

15 "Got e-mail?"

16 "Yeah, got that."

17 "Do you have an address?"

18 "Yeah, I think it's old, but we've got it."

19 Can't I say let's do all three?

20 MR. ORSINGER: Sure.

21 HONORABLE TRACY CHRISTOPHER: Yes.

22 HONORABLE DAVID PEEPLES: Obviously I can.
23 We should encourage judges to do that and have exactly
24 that conversation. I'm just looking, I guess, if you
25 really read through it you can know, you know, I've got to

1 do this first, (a), and if that doesn't work I can ask for
2 (b), and as a catch-all provision "any other manner" and
3 so forth. And I think where I want to come out is making
4 people use the traditional ways when they can, but having
5 the discretion, if all else fails, then say, okay, let's
6 be creative here and making them tell me what information
7 do you have.

8 If it's a tax case, they don't have a
9 relationship with the person, but they've got documents.
10 If it's a family law case, they may not have documents,
11 but they certainly have relationships. "How long did you
12 live with this guy? Well, how long have you been gone?"
13 Well, so-and-so.

14 "Do you know the name of his mother, his
15 brother? What information do you have?" And maybe
16 authorize a bunch of things, maybe some social media, and
17 maybe somebody over 16 at the brother's house. I don't
18 know. But the more you do, if you really want to find the
19 person, the more you do, the more likely that one of them
20 will get the job done; and I don't know if you can make
21 judges have that conversation, especially if they're busy;
22 and as Judge Estevez said, you've got the affidavit there,
23 and it's very easy just to yeah, yeah, yeah, sign it, but
24 I will just stop after this.

25 Incentives are important, and most of the

1 time the person filing the case, family law, especially,
2 it's easier to win that case if the other side doesn't
3 show up, and that's -- if I can get it there, you know, go
4 through the motions enough but they don't come in, the
5 judge is going to give me all the property in my
6 possession, the possession order I want, et cetera. And I
7 think we need to not -- not dangle that temptation before
8 people in the rules that we draft.

9 And, by the way, when we finish this I think
10 we get to Rule 244, which is still in this area. It's the
11 ad litem rule that badly needs to be changed because it
12 was last changed in 1941, but what we've been doing is the
13 judge just sits there and says I'm going to appoint
14 somebody to do all of my work, and the next subcommittee's
15 report is going to advocate changing that, but our
16 discussion has laid a lot of responsibility on the ad
17 litem, but I don't think that's a very good back, you
18 know, stop for this.

19 CHAIRMAN BABCOCK: Okay. Robert.

20 MR. LEVY: Seconding Roger's point about the
21 private websites, I realize that there's another problem
22 with this that let's say you have an internal company
23 website that the defendant works for that company. You go
24 to the court and ask the judge, "Well, order that company
25 to post citation on that private website," because the

1 rule seems to -- the proposed rule authorizes that, and
2 that I don't think is intended, but the question is
3 whether this rule might encourage parties to ask for that,
4 and I think that the reference to private website also is,
5 again, very vague and something that could be
6 misinterpreted and misapplied.

7 CHAIRMAN BABCOCK: Okay. Harvey. Is that
8 your hand? Yeah.

9 HONORABLE HARVEY BROWN: I wonder if (b)(2)
10 should be taken out of (b) and made its own separate part.
11 In other words, (c). A lot of that because of David's
12 comment about kind of a hierarchy, and the way it's
13 written now, as pointed out earlier, they seem kind of
14 equal, and I think that maybe trying through the personal,
15 putting it at the door should be a first necessary step.
16 And secondly, not only does that encourage to do the
17 traditional way, but all of that introductory language in
18 (b) about their house and where they live and all that
19 stuff is disconnected completely from the social media
20 attempt of service. So I think that might be better to
21 make that a separate section (c).

22 CHAIRMAN BABCOCK: Okay. Frank, and then
23 Professor Carlson.

24 MR. GILSTRAP: Justice Christopher's
25 approach is to say let's let conscientious judges look at

1 the facts and craft a way to do this using social media,
2 and having heard from these judges, I'm really impressed
3 at what conscientious judges can do, and I like that
4 approach, but there's a problem in that all justices --
5 all judges aren't conscientious. If we just have a vague
6 rule like that, I don't know what we're going to get. We
7 certainly don't need to jettison the idea of safeguards.
8 There have been a number proposed that come from the law
9 of citation by publication, such as ad litem, such as a
10 provision in Rule 109 that imposes a duty on the judge to
11 exercise diligence, and so we can't -- we can't forget
12 those if we take this custom crafted approach that Justice
13 Christopher wants.

14 With regard to the question of what is
15 social media, there is a problem here. When you're trying
16 to bust a default judgment you look at the rule of strict
17 scrutiny, and you come across an opinion by Justice James
18 Baker before he went on the Supreme Court that says part
19 of strict scrutiny is we strictly construe the rules for
20 citation against the plaintiff. So if we have a vague
21 definition of social media, I don't know where that goes.
22 I mean, if we have a -- if that's going to be strictly
23 construed against the plaintiff we need it to be more
24 specific.

25 CHAIRMAN BABCOCK: Professor Carlson.

1 PROFESSOR CARLSON: I want to respond to
2 Harvey. A lot of the -- not a lot. The places that are
3 allowing service through social media platform, their law
4 is developing this concept of a virtual abode. And that's
5 really what you were talking about, Justice Christopher,
6 that you're looking to see is this really an abode, are
7 they really using the site. And I also agree with what
8 Frank just said. I think it would be good to have more
9 definition, but as Richard pointed out, that might best be
10 served by a separate order as referred to in the rules
11 like 226a so that it can be fluid to change when
12 technology changes.

13 HONORABLE TRACY CHRISTOPHER: Since it took
14 us like four years to change 226a, I'm not in favor of
15 that.

16 PROFESSOR CARLSON: You're going to be the
17 one doing that.

18 CHAIRMAN BABCOCK: Judge Estevez, and then
19 Kennon.

20 HONORABLE ANA ESTEVEZ: Well, I wanted to
21 respond to Justice Harvey's statements as well. I
22 absolutely agree with him. I think I said something
23 similar to that, but never as articulate.

24 CHAIRMAN BABCOCK: Boy, you're just full of
25 compliments today, aren't you?

1 HONORABLE ANA ESTEVEZ: You know, I'm around
2 all of these wonderful people, and I'm just really
3 enjoying my day, so thank you for letting me be here, but
4 I do think it's important that they do -- and Mr. Levy
5 said it as well. You don't want them just to be posting
6 it; and, you know, you're hoping the judges read it; but,
7 you know, people that are really avoiding service, I would
8 like them to have to go through (1), (b)(1), first before
9 they go to the Facebook; and I think that we would be
10 creating this inner -- this new little level of service of
11 process knowing that they had exhaust that first before we
12 hit that specific one.

13 And we could still keep that "reasonably
14 effective to give the defendant notice of the suit," but
15 the (3) would go back to (2), because there could be
16 something that's more than just a Facebook or electronic
17 that would be an in person or, you know, that doesn't fall
18 under (b)(1) that could be more than Facebook. And then
19 once they've exhausted (b)(1) and what's now (b)(3), then
20 they go to (c). I think that's fair. I mean, I think
21 that takes care of those traditional notions of due
22 process better.

23 CHAIRMAN BABCOCK: Justice Christopher.

24 HONORABLE TRACY CHRISTOPHER: So I have to
25 tell you a funny story about MySpace, which, you know, is

1 in 226a; and of course, as soon as we put MySpace into
2 226a no one uses MySpace anymore. All of the trial judges
3 are saying to me, do I still have to say MySpace? I said,
4 "No, you don't." I said, "You see this direction that
5 says you can change it as you need to? Change it."

6 CHAIRMAN BABCOCK: I've said this -- I've
7 told this story before, but I had a federal judge who was
8 not very -- not into social media, warn the jury about the
9 social media site "my face." Kennon.

10 MS. WOOTEN: I want to piggyback on what
11 Professor Carlson said about putting the standards
12 elsewhere other than in the rule text and suggest that an
13 approach comparable to the JCIT technology standards may
14 work well, because I think when you start to put specific
15 examples in rules, like MySpace, they get outdated
16 quickly, and the rule-making process is just too slow to
17 keep up with technology and its developments, but this
18 approach with the JCIT standards is more efficient. And I
19 think David could probably address how frequently these
20 standards have been amended, but I do know they've been
21 amended several times; whereas, the rule underlying the
22 standards has remained constant.

23 CHAIRMAN BABCOCK: Yeah, Harvey.

24 HONORABLE HARVEY BROWN: I want to go back
25 to Professor Carlson, too, about her point about virtual

1 abode. To me that's all the more reason to have a
2 separate subsection (c), because then you could have
3 language similar to the intro to current (b), only you
4 would say something like "upon motion supported by
5 affidavit, stating the location of the defendant's e-mail
6 address, web page, Facebook page," and give some
7 information about that, rather than trying to make (b)
8 work with subpart (2). It just seems like to me that
9 could give the judge some valuable information about how
10 they use that social media presence and make that part of
11 the rule.

12 CHAIRMAN BABCOCK: Buddy.

13 MR. LOW: Chip, I think that Justice Peeples
14 raised a good point. Could that be taken care of by a
15 comment? In other words, these are the rules, but
16 suggesting that the court use such other, you know, that
17 he's talking about, that's not a minimum requirement, but
18 suggesting that the judges use that. Could -- would a
19 comment be possible?

20 CHAIRMAN BABCOCK: Sure. Always possible.
21 I think we ought to try to get a sense, Richard, of on
22 (b), subpart (b)(1), (2), (3), if the committee feels more
23 comfortable with the language that you have in there or
24 with Justice Christopher's substitute language, because I
25 hear that there's some sentiment that maybe we shouldn't

1 give all of that discretion to the trial judges because
2 they're not as conscientious as the people -- the trial
3 judges in this room, but -- but on the other hand, there's
4 some people probably feel differently. What do you think
5 about a vote? Because I'm hungry, and I always like to
6 have a vote before I eat.

7 MR. ORSINGER: You know, yes, I completely
8 agree. I would also say, though, that the term "social
9 media presence" is a statutory term, and so we have to
10 decide if we want to use that because the Legislature --

11 CHAIRMAN BABCOCK: Well, it's not a
12 statutory term. It's a term that's used in the statute.

13 MR. ORSINGER: There we go, and so do we
14 want to do something to change that so it's more
15 meaningful or more limited, or do we just want to use it?
16 I think that's a factor.

17 CHAIRMAN BABCOCK: Yeah, that's another
18 argument.

19 MR. GILSTRAP: That's a second question,
20 though. That's not the question you're posing.

21 CHAIRMAN BABCOCK: No. That's not the
22 question I'm posing. So everybody -- I'm going to read
23 Justice Christopher's language, and we'll vote. People
24 that like that and then I'll read the -- well, I'll read
25 them both. So Justice Christopher's language is "through

1 social media or electronic communication in a manner that
2 the affidavit or other evidence before the court shows
3 will be reasonably effective to give the defendant notice
4 of the suit." That's her language.

5 The other language you have before you is
6 "by electronic communication sent to the defendant through
7 a social media presence." So everybody who likes Justice
8 Christopher's language, raise your hand.

9 Okay, everybody that prefers the other
10 language? A landslide. Unanimously, 29 to nothing. And
11 I propose we eat.

12 (Recess from 12:53 p.m. to 1:55 p.m.)

13 CHAIRMAN BABCOCK: We're back on the record,
14 and in a second Professor Carlson in a loud voice, which
15 is not her nature, is going to lead us in the discussion
16 about Texas Rule of Civil Procedure 244, but in the
17 meantime, I was extremely remiss at the outset of our
18 meeting for not recognizing the Chief, who received a
19 lifetime achievement award from the judicial section of
20 the State Bar of Texas just last week. I got one of those
21 a couple of years ago, and I had mixed emotions about it,
22 because it felt like, oh, are they telling me I ought to
23 quit. So, Chief, you now have the opportunity to make a
24 response.

25 CHIEF JUSTICE HECHT: I told them when they

1 gave it to me, I pointed out to them they gave it to Chief
2 Justice Pope and Chief Justice Cornelius, who are both
3 deceased, and all of the other judges that have gotten it
4 are either retired or senior, and I wasn't going to quit
5 yet, so but I think they were kind of nudging me that way.

6 CHAIRMAN BABCOCK: No, I doubt that, and
7 what a great honor.

8 CHIEF JUSTICE HECHT: Thank you.

9 (Applause)

10 CHAIRMAN BABCOCK: So now to more mundane
11 things. Rule 244.

12 PROFESSOR CARLSON: Thanks for the set up.

13 CHAIRMAN BABCOCK: Professor Carlson. Not
14 that this was mundane.

15 PROFESSOR CARLSON: If you thought that this
16 morning was interesting, you are in for a big treat.

17 MR. ORSINGER: We have microphones that are
18 hot over here. You want me to get one?

19 CHAIRMAN BABCOCK: Yeah.

20 PROFESSOR CARLSON: Our subcommittee on Rule
21 244 was asked to review the State Bar of Texas committee
22 on rules proposal dealing with the propriety of appointing
23 an attorney ad litem under Rule 244 where the defendant is
24 served by publication, and to look at the role of the
25 attorney ad litem and whether it should be limited, and I

1 want to say we had really a very good committee. Thank
2 you very much, Tom Riney, Judge Peeples, Alistair Dawson,
3 Kennon Wooten, Kent Sullivan, and Bobby Meadows.

4 So you should have in your materials a memo
5 from us, February 10th, 2019, and we laid out the
6 background for this. In fact, we discussed this pretty
7 extensively at our May meeting, but there were some
8 members of the committee that wanted to wait to see how
9 the service rules might be changed to see if our
10 modifications were in line. So the State Bar proposal is
11 on page three of that handout, and our subcommittee
12 proposal is on pages seven and eight of that handout dated
13 February.

14 We -- well, let me give you a little bit of
15 background. We went beyond in some ways than the State
16 Bar rules committee in our proposal. We proposed to merge
17 Rule 109 that deals with service by publication in Rule
18 244, which also deals with service by publication in one
19 rule. And so we started to look at the rules in its
20 totality, and we started with Rule 106(b), which Richard
21 set forth today, and we're all familiar that that motion
22 requires court approval on an affidavit for substitute
23 service when attempts have been made to serve the
24 defendant in the usual means, in person or via the mail.
25 And we looked at Rule 109, which allows for service of

1 citation, and it does not require court motion, and that
2 was troublesome to our committee, and so we are
3 recommending a number of things, including that we
4 mirrored the Rule 106(b) approach to substitute service in
5 Rule 109. That is, that we require court approval before
6 we go forward.

7 By way of background, the complaint that
8 triggered the State Bar proposal was brought by a
9 plaintiff who had tried to obtain service by publication,
10 and ultimately the tax -- it was cumbersome and the tax --
11 excuse me, the costs of that were taxed back against the
12 plaintiff, which the rules allow; and so the plaintiff was
13 very upset that the role of the ad litem was overly broad
14 and that the ad litem fee was correspondingly large; and
15 it kind of took up the winnings; and so the State Bar
16 committee suggests that the role of attorney ad litem
17 should be limited to assisting the court in attempting to
18 locate the defendant and not representing the absent
19 defendant who has been served by publication.

20 The U.S. Supreme Court looked at a couple of
21 cases -- we looked at a couple of U.S. Supreme Court cases
22 and a Texas Supreme Court case, all of which dealt with
23 the issue of the constitutionality of service by
24 publication. The Texas case, *In Re: ER*, was a parental
25 termination case, and it was authored by Chief Justice

1 Wallace back -- I think I have the cite here somewhere, I
2 think in about 2010, I think. I'm wagging the date on
3 that. And the short of that was Justice Wallace was
4 looking at the propriety of the service through the
5 newspaper, and so under the circumstances there was
6 insufficient diligence used in attempting to locate the
7 parent whose rights were proposed to be terminated and
8 held that the service was ineffective and the family law
9 provision that limits the time a parent can go back and
10 contest the validity of the termination order was not
11 triggered because the service was defective.

12 In other words, the parent could go forward,
13 the service simply wasn't effective to limit that parent's
14 right to seek redress. We also looked at the line of
15 cases where they're not that the defendant can't be found,
16 but maybe they're unknown defendants, unknown heirs or
17 unknown creditors of an entity; and the U.S. Supreme Court
18 case in Mennonite Board of Missions, which I think I
19 discussed in this memo, also looked at the diligence
20 that's required to support service by publication and held
21 that it was not sufficient effort under those
22 circumstances because they just basically asked the
23 private process server to try and serve. They then took
24 that return back and said, okay, now we're ready to do
25 service by publication.

1 In both of those cases, and the reason I
2 bring them up, there was a large discussion by the court
3 about the effort that is need to be made by a plaintiff
4 when they're seeking service by publication, because it is
5 so circumstance drawn, and the need to look at both public
6 and private information that might be available before
7 resorting to service by publication. Texas, as you know,
8 under our current Rule 244 has some enhanced protection
9 for defendants served by publication in that the court has
10 the authority to appoint the attorney ad litem, and the ad
11 litem has the right to get reasonable compensation; and as
12 you know under Rule 329, the defendant served by
13 publication has two years instead of 30 days to seek to
14 set aside that judgment that may be entered against them;
15 and it's not a true default judgment because they do have
16 an attorney in the case.

17 The Texas case law was a little bit
18 inconsistent on what the role of the attorney ad litem is
19 under Rule 244; but most of the cases say, including the
20 Texas Supreme Court, that the role of the attorney ad
21 litem is to represent the absent defendant, even perhaps
22 through the appeal of that case; and the discussion in our
23 subcommittee is it's really -- it's not realistic to
24 expect an attorney who cannot locate their client to be
25 able to adequately defend them; and there is an element of

1 unfairness to the plaintiff who has to pick up the cost of
2 service on the -- has to pick up the cost of the ad litem,
3 excuse me, the defendant's lawyer, before they can get the
4 judgment against the defendant because that usually is not
5 the case, of course. So Texas has enhanced procedural
6 protection in that regard beyond probably what due process
7 would require.

8 The State Bar committee felt that the role
9 of the attorney ad litem should be limited to assisting
10 the court in locating the absent defendant, and our
11 committee agreed. So I'd like to, Chip, if it's all right
12 with you, go through the rule paragraph by paragraph and
13 just kind of get feedback in light of our discussion this
14 morning.

15 CHAIRMAN BABCOCK: Yeah, I think that would
16 be great. I think you meant to say Chief Justice
17 Jefferson, not Chief Justice Wallace.

18 PROFESSOR CARLSON: I did say that. The
19 years have not been kind, have they?

20 CHAIRMAN BABCOCK: Just for the sake of the
21 record.

22 PROFESSOR CARLSON: Thank you. Okay. So on
23 page seven of that report, first paragraph, our committee
24 felt -- subcommittee felt a plaintiff should first attempt
25 to obtain service of citation on a defendant pursuant to

1 Rule 106 by either in-hand service or via the mail, by
2 qualified process servers. As to a nonresident, the same
3 attempts should be made. That obviously is going to have
4 to be broadened, in-hand or via the mail, by what other
5 means the Texas Supreme Court in light of this committee's
6 recommendation might make. If personal service of process
7 is unsuccessful, the plaintiff must use due efforts to
8 obtain information of where the defendant resides or
9 location where the defendant can probably be found before
10 moving for substituted service. That's pretty consistent
11 with what we have now, right.

12 If substituted service is unsuccessful, and
13 the bracketed language our subcommittee was split on, or
14 if substituted service is not possible as the whereabouts
15 of the defendant is unknown, after diligent efforts have
16 been made, the plaintiff can move for constructive service
17 under this rule. That motion must be supported by a
18 detailed affidavit by an affiant with personal knowledge
19 of describing with particularity the actions the plaintiff
20 took in attempting to locate the defendant and the results
21 of those earlier service attempts.

22 That's different. The rule doesn't
23 expressly say that now, and then the next sentence is new.
24 "An oral hearing on the motion must be conducted by the
25 court and a record made." So it's not going to be just

1 mere issuance by the clerk on the affidavit of the
2 plaintiff's counsel. We're going to involve the court,
3 and we can have the court do some checks and balances, and
4 I think they're doing it now, but the rule doesn't
5 expressly require that. "It is the court's duty to
6 inquire into the sufficiency of the diligence exercised by
7 the plaintiff in attempting to ascertain the defendant's
8 residence or whereabouts." So I don't think any of those
9 three paragraphs, but I may be wrong, are controversial.

10 CHAIRMAN BABCOCK: Just one comment.

11 PROFESSOR CARLSON: Yes.

12 CHAIRMAN BABCOCK: When you say "affidavit"
13 in the third paragraph, fourth line, you know, you can do
14 it by declaration. That's given, but I've worried
15 sometimes when I see a rule or a statute that says
16 "affidavit," whether or not, you know, there's some sort
17 of mandate that I do affidavit, so I wonder if we could
18 just put "or declaration."

19 PROFESSOR CARLSON: Yeah. Is it called the
20 unsworn declaration? Isn't that the name?

21 HONORABLE STEPHEN YELENOSKY: Yes.

22 MS. GREER: But it's sworn, so I've never
23 understood that.

24 MS. HOBBS: I've never understood that
25 either.

1 MR. ORSINGER: Could we just call it a sworn
2 statement? Even though it's not in front of a notary I
3 think it's a sworn statement.

4 CHAIRMAN BABCOCK: Yeah, but you want to use
5 the term of art, whatever the statute says.

6 PROFESSOR CARLSON: Yes. Okay.

7 CHAIRMAN BABCOCK: Sorry, but other than
8 that, yeah, Justice Christopher.

9 HONORABLE TRACY CHRISTOPHER: I don't think
10 an oral hearing should be required. I think that -- I'm
11 sorry, I don't think an oral hearing should be required if
12 all we're looking at is an affidavit. It seems like you
13 can do that by submission.

14 MR. JACKSON: Someone might be trying to
15 phone in.

16 MR. RINEY: They're trying to phone in.
17 It's ringing.

18 (Off the record)

19 CHAIRMAN BABCOCK: Okay. Justice
20 Christopher says no oral hearing. Yeah.

21 HONORABLE TRACY CHRISTOPHER: Well, and, I
22 mean, are we expecting the plaintiff to actually make this
23 affidavit, or are we expecting some process server to make
24 some sort of an affidavit, and who is it that the trial
25 court is going to take evidence from? Because the way

1 it's written it's like you're going to take evidence from
2 the plaintiff at this oral hearing. So, anyway, the way
3 it's written I have problems with.

4 PROFESSOR CARLSON: Well, if the affidavit
5 has to be based on personal knowledge, you might have to
6 have a couple of people do affidavits.

7 HONORABLE TRACY CHRISTOPHER: Yeah, because
8 it says with personal knowledge of the actions that the
9 plaintiff took. I mean, usually it's not the plaintiff.
10 It's the lawyer.

11 PROFESSOR CARLSON: I see what you're
12 saying.

13 HONORABLE TRACY CHRISTOPHER: It's the
14 process server. It's, you know, somebody else, and then
15 do they all have to come in for an oral hearing? I just
16 think that's unnecessary.

17 PROFESSOR CARLSON: If we took off "the
18 plaintiff took," so it's "the actions in attempting to
19 locate the defendant," that would solve part of your
20 problem but not all, I think.

21 CHAIRMAN BABCOCK: Judge Peeples.

22 HONORABLE DAVID PEEPLES: I agree that that
23 sentence is imperfect; but on the other side of it,
24 especially in family law cases where there are
25 relationships, and the person suing, which is -- you know,

1 could be either spouse, knows the other person. I mean,
2 they have a relationship. Unless it was a one night
3 stand, which does happen, they know each other, and they
4 may know the defendant's family, they may have contact
5 information; and I want the law to do something to force
6 the petitioner in that situation to really divulge what
7 they know about this person, because a lot of times there
8 will be general language in the affidavit. "I made
9 diligent efforts. I've tried this." If they know they've
10 got -- that somebody has got to go before a judge and have
11 a discussion on the record, and the judge knows that, I
12 think that in those situations where they have information
13 we will get the information more often and there will be
14 fewer default judgments and more justice done.

15 CHAIRMAN BABCOCK: Okay. Anybody else have
16 a comment about that?

17 CHAIRMAN BABCOCK: Justice Christopher.

18 HONORABLE TRACY CHRISTOPHER: What about
19 unknown heirs? I mean, do we have to go through this
20 whole elaborate rigamarole for unknown heirs? I mean,
21 those are not just -- you know, I mean, they're unknown.

22 CHAIRMAN BABCOCK: By definition.

23 HONORABLE TRACY CHRISTOPHER: I mean, that
24 is where -- I didn't do family law court, so most of my
25 citation by publication I saw in the -- like the unknown

1 heir situation, or, you know, a defendant who just left
2 town, so the plaintiff generally in the cases that I dealt
3 with had no knowledge of the defendant. I could see in
4 the family law cases, you know, you might have a reason to
5 require an oral hearing, but I just think it's overkill to
6 require the oral hearing in all cases.

7 CHAIRMAN BABCOCK: Judge Peeples.

8 HONORABLE DAVID PEEPLES: And I agree with
9 what she just said, and that's one reason that when all is
10 said and done I think we need to end up with a unified set
11 of rules on this instead of sort of patchwork. It is
12 certainly true that the family law situation is polar
13 opposite from the unknown heirs situation, where you're
14 just trying to quiet title or something like that, and
15 there needs to be a way in that situation to do it by
16 publication or whatever and get a judgment that will help
17 title be clear so property transactions can proceed. And
18 so to have one size fits all in this situation I think is
19 very much a problem, because the amount of information
20 that the petitioner or the plaintiff has differs from case
21 to case.

22 CHAIRMAN BABCOCK: Sure.

23 HONORABLE DAVID PEEPLES: And it seems to me
24 this is an opportunity for us to do something to try to
25 fine tune it to --

1 CHAIRMAN BABCOCK: But you like the oral
2 hearing aspect.

3 HONORABLE DAVID PEEPLES: Pardon? Well --

4 CHAIRMAN BABCOCK: Or don't you?

5 HONORABLE DAVID PEEPLES: Well, I think what
6 I want, Chip, is for judges to have to take a more active
7 role instead of just where I do sign, is this all true,
8 yeah, here you go, have a five second process, which I
9 think happens a lot. I really do, but I think if judges
10 were expected to do it and lawyers and litigants knew that
11 they were going to have to eyeball the judge and maybe a
12 record be made, you wouldn't have these -- the case that
13 Elaine mentioned that Chief Justice Jefferson wrote was
14 just outrageous because in that case a default judgment
15 was entered, and I think it was termination of parental
16 rights, and they had been dealing with this defendant in
17 person. I mean, he would come to court. They had
18 addresses and names and all of that kind of stuff and just
19 default judgment, publication. And so that kind of thing
20 does happen, and I don't have language for a set of rules
21 to do the job, but I think the job should be tackled by us
22 instead of trying to hurry through it and come up with
23 a --

24 CHAIRMAN BABCOCK: Yeah.

25 HONORABLE DAVID PEEPLES: -- patchwork

1 solution.

2 CHAIRMAN BABCOCK: Justice Christopher.

3 HONORABLE TRACY CHRISTOPHER: Well, and
4 another large volume of cases where you have service by
5 publication are tax cases.

6 HONORABLE DAVID PEEPLES: Yes.

7 HONORABLE TRACY CHRISTOPHER: And, I mean,
8 you can make the judge or the tax master or whatever, you
9 know, have this oral hearing, but I just don't see that
10 anything is to be gained by it other than putting added
11 expense and time into the system for those kind of cases.

12 CHAIRMAN BABCOCK: Judge Peeples is winding
13 up for a response.

14 HONORABLE DAVID PEEPLES: Well, there's a
15 detailed set of rules that deal with the tax cases, and it
16 goes on for about five pages that are tax cases only. Am
17 I right about that?

18 HONORABLE DAVID EVANS: That's right.

19 HONORABLE DAVID PEEPLES: As I said this
20 morning, tax cases and family law cases are almost polar
21 opposite because the tax collector almost never knows the
22 person, the defendant, but they've got records; and the
23 records may be out of date, people may have moved, but
24 they've got paper; and in family law, you've -- by
25 definition you've got relationships. You know people.

1 You know siblings or in-laws, and you used to have phone
2 numbers and so forth, and there may not be a lot of
3 records. But there are a lot of tax cases, and there are
4 a lot of family law cases, and I think the rules have to
5 be different for both of them, and it seems like it's 117
6 through something, it goes on for pages what you've got
7 to --

8 MR. GILSTRAP: 117(a).

9 CHAIRMAN BABCOCK: Judge Wallace, while
10 Judge Peeples --

11 HONORABLE DAVID PEEPLES: Well, in this book
12 right here is about four pages in this book right here for
13 tax cases only, and very detailed.

14 CHAIRMAN BABCOCK: Yeah. Judge Wallace.

15 HONORABLE R. H. WALLACE: Well, the
16 provision, the suggestion that an oral hearing must be
17 conducted, most of the ones that we see just in civil
18 courts, civil cases, is they've been out to the address,
19 they've talked to the neighbor. They live there. They
20 talked to the wife. The wife says he's out of town, he'll
21 call. He doesn't. I mean, it's that type of thing. I
22 mean, I don't see -- and only known maybe with better
23 contacts -- the need for a hearing; and it may help ease
24 Judge Christopher's pain and mind if it was "the court may
25 conduct a hearing" or something of that nature. But then

1 I don't know how you would -- how you would articulate
2 when you could or when you should and when you shouldn't,
3 but a lot of the ones -- I'd say most of the ones we see
4 just in civil cases, it's pretty obvious that the guy is
5 just not cooperating or dodging service, and it would be
6 a -- it would be a big consumption of the court's time to
7 have a hearing on every one of those.

8 CHAIRMAN BABCOCK: Judge Estevez.

9 HONORABLE ANA ESTEVEZ: I have the same
10 concerns regarding a hearing and also a record being made.
11 I don't know what you would be reviewing on the record, if
12 you just decide that it was improper to have this type of
13 citation, because once you have the ad litem, the ad
14 litem's job -- and I think we've had these discussions
15 before. The ad litem's job, one of them, if not all of
16 their job, will be or is to -- they actually are supposed
17 to look for the defendant. So if it is someone that was
18 easily ascertained or easily found, then you would think
19 that the ad litem would find them, assuming the ad litem
20 does his or her job.

21 So I don't know why you would need a formal
22 hearing. People will come and talk to you to get these
23 motions done. The affidavit, if it's not sufficient, then
24 you can tell them it's insufficient, and they can draft
25 another one or come and talk to you to try to get it, but

1 I think it's just wasting court resources because nothing
2 is going to be done with that hearing. I mean, are they
3 going to reverse it because of what was said there? I
4 mean, they were going to reverse it anyway. They didn't
5 get notice.

6 HONORABLE R. H. WALLACE: Right, yeah.

7 HONORABLE ANA ESTEVEZ: Right? If you did a
8 default. I mean, the issue is once they get notice,
9 there's no other issue if they've responded, so it's only
10 a default appeal, and at that point if they didn't -- even
11 if they had the citation and everything else went through,
12 I don't know why you wouldn't be able to set it aside.

13 CHAIRMAN BABCOCK: Richard.

14 MR. ORSINGER: I notice in the next
15 paragraph, which I don't think Elaine has written -- read
16 out loud yet, it appears that under this proposal, if the
17 court conducts an oral hearing and is satisfied that
18 diligent efforts has been made, then the court is not
19 required to appoint an attorney ad litem. So if there is
20 going to be an option discretionary with the court to
21 appoint an ad litem or not, would we want the court
22 waiving the ad litem without forcing a diligent inquiry
23 into the service?

24 Right now we have the safety net. There is
25 an ad litem in every case except a few categories of

1 family law cases. So in the context of this proposal, if
2 I understand it, Elaine, you're saying that the court is
3 going to conduct an oral hearing, and if the court is not
4 satisfied with diligent efforts, they can either order
5 additional efforts or appoint an ad litem, but if they are
6 satisfied with diligent efforts, they can waive the ad
7 litem appointment?

8 PROFESSOR CARLSON: They can approve the
9 service by publication, but you're still going to have the
10 ad litem.

11 MR. ORSINGER: Oh, well, then I'm misreading
12 this, because it appears to me to say the court may order
13 either additional efforts or appoint an ad litem. I
14 didn't see that as a requirement. So I may have missed
15 that, but maybe that's not a bad suggestion, even though I
16 stumbled onto it by accident, is that if the judge is
17 satisfied that the efforts are diligent do we really need
18 to appoint an ad litem to make yet another inquiry into
19 diligence or make another effort for diligence?

20 CHAIRMAN BABCOCK: Judge Wallace.

21 HONORABLE R. H. WALLACE: I just want to
22 withdraw my previous stupid comment. I was reading that
23 -- this is what occurs after substituted service has been
24 unsuccessful. I was reading it that before you could
25 authorize substitute service under Rule 106(b) you had to

1 have a hearing, and that's not what it says, so --

2 HONORABLE ANA ESTEVEZ: Maybe I'm misreading
3 it. Did I misread it, too?

4 HONORABLE R. H. WALLACE: Yeah. I think.

5 MR. ORSINGER: Must not be clearly written.

6 CHAIRMAN BABCOCK: Okay. So we've been
7 discussing the three noncontroversial paragraphs. Why
8 don't we start some controversy by talking about the next
9 one?

10 PROFESSOR CARLSON: Before we move on I'd
11 just like to ask a question of our trial judges. Current
12 Rule 244 says, "When service has been made by publication,
13 the judgment shall be rendered in other cases but in
14 every" -- well, "...but in every case a statement of the
15 evidence approved and signed by the judge shall be filed
16 with the papers of the cause." Is that basically the ad
17 litem who is doing that and the judge signs off on it?

18 CHAIRMAN BABCOCK: Judge Evans.

19 HONORABLE DAVID EVANS: Here's what you do.
20 If they've done it right, they have a statement of
21 evidence. The ad litem reads over the statement of
22 evidence. I agree with you that rarely is the ad litem
23 going to change the outcome on this kind of case for the
24 defense, but I had one look at it and say limitations ran
25 on the case, wouldn't approve the statement of evidence,

1 and I wouldn't approve the statement of evidence. I'm
2 troubled that you'd -- maybe you can give the trial judge
3 the discretion on how much the ad litem does, but there
4 are apparent defenses on the face; and if that defendant
5 waits two years to execute the judgment, it's hard. It's
6 good, and you can't get it set aside.

7 So I question that, and that particularly --
8 a lot of it is in tax work and other areas and
9 foreclosures, and then I may be reading this wrong,
10 because I get confused because R. H. has never admitted to
11 being dumb before, or a dumb statement, but if you're
12 saying we have to interview the defense lawyer, the
13 lawyer, over service for due diligence at the bench before
14 we appoint an ad litem, there's not enough time in the
15 day. If that's what I read this rule to require.

16 PROFESSOR CARLSON: You're reading it
17 correctly.

18 HONORABLE DAVID EVANS: Huh?

19 PROFESSOR CARLSON: You're reading it
20 correctly.

21 HONORABLE DAVID EVANS: That is -- what
22 happens is you appoint the ad litem. They contact the
23 plaintiff's lawyer. They look for the information on due
24 diligence. They act like an advocate. Then they come to
25 a judge, and they argue about whether there's been due

1 diligence. Otherwise, I don't think anybody would come to
2 me for a due diligence hearing. They'll go down to R. H.
3 He's nicer. And I wouldn't have enough time to do it. I
4 would have to start on Wednesday morning in my kind of
5 docket with all of the credit card cases and tax cases,
6 I'd have to start on Wednesday morning and run them 15
7 minutes a shot.

8 PROFESSOR CARLSON: I think the impetus for
9 this might have been from Judge Peeples' experiences with
10 the family law cases, so currently you're making -- you
11 approve service by publication based on the affidavit
12 proof?

13 HONORABLE STEPHEN YELENOSKY: Based on --

14 PROFESSOR CARLSON: On affidavit proof, or
15 is it just a clerk? If the clerk is satisfied with the
16 affidavit, they approve the citation and then it goes back
17 to you, and you appoint an ad litem?

18 HONORABLE TRACY CHRISTOPHER: Well, we had a
19 rule in Harris County that the judges had to do service by
20 publication. So we would get the affidavit and approve
21 service by publication, even though the rule does allow
22 the clerk to do it, but I'm not sure what it is in other
23 counties.

24 HONORABLE ANA ESTEVEZ: We did it the same
25 way. So I read the affidavit, and I approve -- I sign the

1 order to have substitute publication.

2 HONORABLE STEPHEN YELENOSKY: We did it.

3 Judges did it.

4 CHAIRMAN BABCOCK: Judge Peeples.

5 HONORABLE DAVID PEEPLES: Under existing law
6 and practice, Rule 106, there's a motion, an affidavit for
7 alternative service. A judge has to sign that. How many
8 times a week do you do that?

9 HONORABLE DAVID EVANS: I would -- I think
10 yesterday I probably signed a half dozen out of a stack of
11 20, and you have to read the affidavit. You have to look
12 at the service, but, you know, the affidavit can be
13 conclusionary. We've used due diligence to obtain that
14 service. It goes when you get to substitute service, if
15 you're talking about leaving the papers at the doorway,
16 you have a pretty good -- you have a pretty good idea from
17 reading the process server's affidavit if they've really
18 been out to the place of abode or they know where they're
19 going to find them. What you turn to is the process
20 server's affidavit on the prior attempts, and what you
21 don't allow, because there's some cases out there, one
22 attempt is not enough. You've got to make two, sometimes
23 three attempts. You've got to show that you've really
24 tried to locate them. I mean, I just went through this
25 with the people out at North Carolina, the debt

1 collectors.

2 HONORABLE DAVID PEEPLES: What we've got
3 right now, Rule 244, the judge -- for publication the
4 judge doesn't even get involved until after there's been a
5 citation by publication. The clerk, you go into the
6 clerk, and the clerk shall issue. That's what 109 says,
7 and 244 says after it's all done then the judge gets into
8 the action and we have this ad litem.

9 HONORABLE DAVID EVANS: Yes.

10 HONORABLE DAVID PEEPLES: And that clearly
11 needs to be changed.

12 HONORABLE DAVID EVANS: But here's the
13 difference.

14 HONORABLE DAVID PEEPLES: Pardon?

15 HONORABLE DAVID EVANS: On the publication,
16 David, on the publication, David, the ad litem finds an
17 answer, so it ceases to be a default without an answer.
18 That's where the statement of evidence comes in. You
19 don't have the allegations admitted as a matter of law.
20 And so, yes, it seems to me, I also agree with you it
21 seems backwards that you would then inspect service at the
22 actual evidentiary hearing instead of before the
23 publication, but it doesn't work -- it doesn't work badly
24 because publication is done and then you come in, and the
25 first thing you go through is was service -- did they

1 attempt to find this person, could you find them. And
2 they say, "Well, I found junior, and I found this guy."
3 If they don't find them then you go to the statement of
4 evidence and the defenses.

5 HONORABLE DAVID PEEPLES: Well, the State
6 Bar committee recommended and we think and I think we
7 voted last time --

8 HONORABLE DAVID EVANS: Uh-huh.

9 HONORABLE DAVID PEEPLES: -- that for the ad
10 litem to defend the case after there's been publication,
11 we need to change that, and then maybe talk about the ad
12 litem checking out the diligence of it. I'm thinking,
13 just myself, that we make the judge do something, at least
14 read the affidavit before authorizing alternative service,
15 why not have the judge do the same thing before there's
16 citation by publication? Why should publication be easier
17 to do than the person over 16?

18 CHAIRMAN BABCOCK: Justice Christopher.

19 HONORABLE TRACY CHRISTOPHER: I don't have
20 any objection to requiring a motion and an affidavit to
21 support your service by publication and for a judge to
22 rule on it. My objection was to the oral hearing required
23 and the taking of evidence at that point. I agree with
24 you, and that was the practice in Harris County. We
25 didn't let the clerks issue it. The judges had to do an

1 order. Of course, that was many years ago, but I think
2 we've kept that same, you know, process going, but I do
3 agree with you that the way the rule is written it doesn't
4 require that.

5 CHAIRMAN BABCOCK: Richard.

6 MR. ORSINGER: And in the context of what
7 Judge Peeples was saying, one of the reasons to consider a
8 distinction between the way you handle citation and
9 substitute service is that citation has the procedural
10 safeguard of an ad litem and substitute service does not;
11 and in some worlds, in some worlds, citation by
12 publication is preferable to alternate service, which
13 allows you to take a default with no ad litem. And, in
14 fact, I think Frank and I were talking at lunch about the
15 possibility that we ought to go with personal service as
16 certified mail as the first alternative, publication as
17 the second alternative, and substitute service as the
18 third alternative, because that substitute service, unless
19 we change it here or the Supreme Court changes the rule,
20 you just get a flat default judgment. There's no
21 defendant. There's no ad litem. There's no nothing.

22 So there is a distinction at least today
23 under the rules because there are constitutional
24 procedural safeguards for publication that you don't have
25 for substitute service. See what I'm saying? So

1 there's -- unless we make them the same -- and I advocated
2 that earlier, that if you're going to have service by
3 Facebook or whatever, you know, maybe we ought to give
4 them the same due process that we do somebody that gets
5 cited by publication.

6 CHAIRMAN BABCOCK: Justice Christopher.

7 HONORABLE TRACY CHRISTOPHER: Well, I would
8 think that that would be unnecessary. I mean, the vast
9 majority of current substituted service motions are "I've
10 gone to the house. I've knocked. I see them in there.
11 They won't open the door. Can I please leave the citation
12 on their door?"

13 "Yes." Or "I go to the property. It's
14 gated, and they won't let me in. Can I please leave it on
15 the gate?"

16 "Yes." Now, you know, maybe -- we surely
17 don't want to require an ad litem appointment in -- after
18 those sort of substituted service -- substituted service.
19 Now, you know, to me I'm hopeful that I have the same
20 sense of security -- that the trial judge would have the
21 same sense of security with respect to the e-mail
22 communications or the text or whatever that they would get
23 from -- from posting it to the door. So to me having an
24 ad litem would be overkill.

25 CHAIRMAN BABCOCK: Roger.

1 MR. HUGHES: Well, a slightly different
2 perspective for those of us from the South Texas area. We
3 also have a different issue besides the two that have been
4 cited by Judge Christopher, and that is they're in Mexico
5 now. They've gone to visit their cousin or their aunt or
6 somebody, and it may require some sensitivity to figure
7 out just how true that is and whether this is just a day
8 trip or not.

9 The other thing is -- and it's largely
10 historical. One of the problems in the earliest Twentieth
11 Century was the number of -- was the amount of land held
12 by Mexican nationals in Cameron County, and the South
13 Texas area that got, shall we say, seized and sold under
14 tax judgments, and the Mexican owner would come back after
15 a year and suddenly find out my property now belongs to
16 Mr. Smith, who bought it at a tax sale that I didn't know
17 anything about. Now, we've cured some of that loopholes,
18 but that same sort of feeling still exists about using the
19 substitute service in publication, and so while I am --
20 I'm sympathetic that maybe we -- that we don't need oral
21 hearings, I think something has to be done to justify it
22 because there is, as I say, in some parts of the state a
23 historical background that is somewhat hostile to it.
24 Thank you.

25 CHAIRMAN BABCOCK: Yeah, Judge.

1 HONORABLE R. H. WALLACE: And I'm starting
2 to -- or I think I understand where there may be
3 differences in how a judge in a family court matter where
4 somebody is just really trying to get a tactical
5 advantage, as you described earlier, Judge Peeples, as in
6 a civil case. If it's a car wreck, the plaintiff wants to
7 find that person and have them served because they want
8 the insurance company in there defending them. They don't
9 want a default judgment against somebody who has no money,
10 you know, so they'll usually -- and same way credit cards,
11 bank debts, whatever. They're going to eventually have to
12 find those people to collect their money, and so there's
13 probably -- there may be some different motivations and
14 issues involved, but I agree with what Judge
15 Christopher -- most of the time you can look at those
16 things and say this guy is just avoiding service, this
17 person is just avoiding service, and I don't ever recall
18 having a motion to set aside a default judgment in my
19 court because they -- you know, "Hey, I didn't get this
20 pinned on my door, I never got served." But in a civil
21 case, if they're looking for money, sooner or later
22 they're going to have to find the person.

23 HONORABLE DAVID PEEPLES: But if you can't
24 find them to serve them and then you come in and you do it
25 by publication, and then you come in later on and say, "We

1 found them, I want to collect my default judgment,"
2 there's something wrong there. Can't find him to serve
3 him, but I can find him to collect from him later. That
4 doesn't make sense. And that's why it's very rare for
5 that to happen, but in these status cases like family law,
6 it's just very different, and there's tax rules. I think,
7 Chip, what I'm for is a hierarchy that you work your way
8 through, and I don't mean some, you know, detailed thing,
9 but there -- in person is the gold standard. Okay.

10 CHAIRMAN BABCOCK: Right.

11 HONORABLE DAVID PEEPLES: And then certified
12 mail, it seems to me, you know, you hear of people who
13 won't claim that. Talk about not being there, they won't
14 claim it, but ordinary mail, there's case law that says
15 there's a presumption that they got it if you -- if you
16 have testimony that it was correctly addressed, return
17 address was correct, the postage, and it was put in a
18 proper mail receiver, that is enough evidence that the
19 judge can find this person got it -- and it didn't come
20 back. That gets you there. And we ought to use that more
21 often, but as I said, it's hard to have one -- one size
22 fits all, but we need to have sizes that fit situations
23 that happen, and I'm just attracted to the idea of in
24 person, mail, maybe, and if we got a location, over 16 or
25 post it on the door; and at some point the judge needs to

1 have the discretion to use electronic means and, of
2 course, newspaper, we all think that's ridiculous. I
3 think we agree on that.

4 But, again, in some of these cases, the
5 petitioner, especially family law, really would like it
6 best if the person doesn't show up, because they're going
7 to win that case and get everything they want from a
8 compliant judge who is saying, "What do you want and I'll
9 give it to you and move on to the rest of my 50 cases,"
10 and I think we need to do what we can to minimize that
11 scenario.

12 CHAIRMAN BABCOCK: Well, are you arguing for
13 a remand to the subcommittee so you can do better?

14 HONORABLE DAVID PEEPLES: Well, in all
15 honesty, I think this is an opportunity for this committee
16 and the Court to take a look at the whole citation set of
17 rules. There are a bunch of them. And, as I said, the
18 tax thing, you talk about hard reading, golly, the
19 paragraphs go on and on forever without a -- you know,
20 hitting the enter button. I don't know who does that.

21 CHAIRMAN BABCOCK: Tax lawyers.

22 HONORABLE DAVID PEEPLES: But I think we
23 need to take a unified look at it that would be
24 user-friendly for lawyers and judges and pro se people.

25 HONORABLE DAVID EVANS: It would be -- I

1 would just ask, it's rare in a publication when you have
2 an ad litem to find out that -- that there was information
3 in the plaintiff's file that they could have served them
4 personally. Generally that oath is made by a lawyer to
5 the district clerk and has it issued, and so there's a
6 certain penalty that would attach to that if it's not
7 true. I don't -- I don't mind having an affidavit coming
8 to me first and sign off on it instead of having the
9 clerk. Basically the clerk is approving the oath
10 statement, not the judge, on publication. That's the only
11 difference that I see at this point.

12 The beauty of the ad litem is that, at least
13 in a lot of courts, the plaintiff is made to turn over
14 their file and their information about what they have on
15 the defendant and then the plaintiff does a new search --
16 I mean, the ad litem does a new search, and they'll turn
17 up a few people. It depends on the type of case; and some
18 of them you will just have them waive their answer, but
19 others you'll get a good service, and you'll get somebody
20 in court; and as I said, an ad litem, just limiting them
21 to service issues, if there's an apparent defense on the
22 face of the case, I'm concerned that that would just be a
23 trap. You can revive that judgment out to 10 years.

24 MR. LOW: Chip.

25 CHAIRMAN BABCOCK: Buddy.

1 MR. LOW: That raises a point I was thinking
2 about. What -- you appoint an ad litem and he only looks
3 at service. What if the petition on its face, limitations
4 has expired? What if a grandparent is suing for the death
5 of their grandchildren, doesn't have a cause of action? I
6 mean, if you just limit it to that, there's something
7 wrong with that.

8 HONORABLE DAVID EVANS: Well, I'm not
9 allowed to assert the affirmative defense.

10 MR. LOW: Right.

11 HONORABLE DAVID EVANS: So, and so I have to
12 sign off on the statement of evidence that says there's a
13 judgment if there's nobody that raises it for me.

14 CHAIRMAN BABCOCK: Tom.

15 MR. LOW: No cause of action is stated like
16 12(b)(6), and we have a similar statute. The judge
17 doesn't look at that.

18 CHAIRMAN BABCOCK: Tom.

19 MR. RINEY: I think there's real problems
20 with the lawyer presuming to know what a client would want
21 him to do, him or her to do. I mean, many times in my
22 career I've thought there was a great affirmative defense
23 or there was a great position to take, and a client for
24 various reasons did not want me to take that position, and
25 so we're asking a lawyer to -- you put that lawyer in that

1 position where they're making those choices, I understand
2 it may be obvious and so forth, but I just don't think
3 that we ought to put that on a guardian ad litem to defend
4 the case. I mean, you know, you've already given a couple
5 of examples, limitations. Maybe it doesn't state a cause
6 of action. You can go on and on, and that was really the
7 genesis of the proposed change to this rule is, as I
8 recall, it was a lady that owned some property and she was
9 trying to get clear title.

10 PROFESSOR CARLSON: Right.

11 MR. RINEY: Yeah, and she ends up, the
12 lawyer very aggressively defended the case, thousands of
13 dollars of fees, as I recall. She's the one on her own
14 who brought it to the State Bar rules committee. She's
15 been fighting this for several years, and, I mean, there's
16 a lot to support her position that she shouldn't have to
17 be stuck with the cost in order to clear the title to her
18 property by someone that she can't find. So I was very
19 much in favor of limiting the duties of the guardian ad
20 litem to investigation of diligence regarding the service.

21 PROFESSOR CARLSON: Yeah, the attorney ad
22 litem.

23 MR. RINEY: Yes.

24 HONORABLE DAVID EVANS: The fees should have
25 never been approved as reasonable.

1 MR. ORSINGER: So it occurs to me that one
2 option is to give the district judge the ability to
3 appoint an ad litem on a discretionary basis if he feels
4 like there's a matter of law defense or something of that
5 nature, but let me -- let me add to the concern. I'm not
6 changing my prior views, but I wanted to share this, that
7 under the Texas Family Code, if you have an interstate
8 jurisdiction issue involving a child, Texas has very
9 limited circumstances in which they can go forward. If
10 the child has been living here for six months it's the
11 home state, and if it's not the home state then you have
12 to meet a lot of other exceptions. The failure to meet
13 those exceptions is interpreted by the court as a lack of
14 subject matter jurisdiction, which subjects the judgment
15 to collateral attack.

16 So let's say that we have a default on a
17 nonresident parent on another child living in another
18 state. I think the judge has the inherent power to refuse
19 to sign that judgment because there's an indication in the
20 record that they don't have subject matter jurisdiction.

21 Let me change the subject slightly. Let's
22 say that the parents are absent and we have a relative,
23 like a grandparent or someone else, or even foster
24 parents. We have very complicated, lengthy statutes about
25 what standing is required to initiate or intervene in a

1 suit affecting the parent-child relationship. Standing in
2 Texas under T.A.B. -- and the famous T.A.B. case is
3 considered to address subject matter jurisdiction, and if
4 the plaintiff doesn't have standing then the court has no
5 jurisdiction.

6 So I can envision, for example, the
7 grandparents coming in to get custody of a grandchild and
8 doing citation by publication on the parents, and there's
9 a question -- there's a fundamental question before we
10 ever get to the question of notice of to the parents is do
11 the grandparents have standing to even seek custody. If
12 there's nobody there to answer that question or to raise
13 that defense, I guess the court has to take it on itself
14 because it does go to subject matter jurisdiction, but I
15 can see now that there are a number of instances where a
16 district judge should be free to refuse to authorize a
17 citation by publication for someone that they're not sure
18 even has standing to bring the lawsuit or whatever. And
19 so perhaps we ought to write a clause in here that the
20 appointment of an ad litem is discretionary. Or maybe
21 it's already written somewhere, but I'm not aware of that,
22 but perhaps that should be a safety valve where the judge
23 can see there's a defense on the face of the record or
24 there's lack of jurisdiction or whatever.

25 CHAIRMAN BABCOCK: Justice Gray.

1 HONORABLE TOM GRAY: I went back to the
2 assignment, which is more narrow than what the committee
3 has done, which is kind of like what our committee will do
4 in a little while, but my comments go to the foolishness,
5 not stupid that I made earlier today. In the memo they
6 talk about the fact that the role of the ad litem has been
7 to assert and protect the interest of the unlocated
8 defendant, and that's been the law since Texas was no
9 longer a nation, and so we go back to the mid-1800's, and
10 my point is when the Legislature has wanted to limit the
11 scope of the ad litem, they have done that by statute. We
12 talked about it this morning in the Family Code. 107.014.
13 And I don't think that we by rule should step into it.
14 Leave it the way it is. Leave it where the ad litem
15 protects the interest of the defendant; and, you know, I
16 understand Tom Riney's point, but there are some things
17 that they just need to be defended; and if the -- you
18 know, I always wonder -- and they explained some of this
19 last time when we talked about this -- why somebody would
20 be wanting to sue someone they can't find, and that
21 usually involves some type of race, like the property of
22 an estate, of that nature. Sometimes insurance proceeds
23 would be there, but, you know, they come up in so many
24 different situations that I really think that when the
25 Legislature sees an abuse that they want to correct, give

1 the trial judge the opportunity to proceed without an ad
2 litem, they have done that, and that we should leave that
3 to the Legislature. So --

4 CHAIRMAN BABCOCK: Okay. So, Elaine, where
5 are we going from here?

6 PROFESSOR CARLSON: Well, it would be
7 helpful to get a vote at this point on whether a majority
8 of the full committee would like to eliminate the oral
9 hearing requirement that the trial judges have --

10 CHAIRMAN BABCOCK: Okay. This will be the
11 second vote based on a Justice Christopher recommendation.

12 HONORABLE TRACY CHRISTOPHER: I am thinking
13 I'm going to lose this one, though.

14 CHAIRMAN BABCOCK: Yeah, it did pretty well
15 last time.

16 HONORABLE TRACY CHRISTOPHER: I'm trying to
17 rally the troops.

18 CHAIRMAN BABCOCK: Everybody that thinks we
19 should eliminate the hearing requirement, raise your
20 hand.

21 HONORABLE TRACY CHRISTOPHER: Oral hearing
22 requirement.

23 CHAIRMAN BABCOCK: Oral hearing requirement.

24 HONORABLE DAVID EVANS: Not proof
25 requirement, oral form of it.

1 CHAIRMAN BABCOCK: Everybody that thinks we
2 should retain the oral hearing requirement, raise your
3 hand.

4 Well, not as decisive as before, Justice
5 Christopher, but nevertheless, 19 in favor of eliminating
6 the oral requirement, hearing requirement, and eight in
7 favor of retention. So that's a sizable victory, although
8 not unanimous. The Chair not voting. All right. Elaine,
9 now what?

10 PROFESSOR CARLSON: Okay. We're on the
11 fourth paragraph.

12 MR. RODRIGUEZ: Can I make a comment about
13 that?

14 CHAIRMAN BABCOCK: Yeah.

15 MR. RODRIGUEZ: It seemed like most of the
16 people -- it seemed like a lot of the judges voted in
17 favor and other lawyers voted against.

18 CHAIRMAN BABCOCK: We couldn't note the
19 demographics of the vote. All right. Go ahead, Elaine,
20 paragraph four.

21 PROFESSOR CARLSON: Uh-huh. On page seven
22 of the report, and I think we're going to have a
23 difference of opinion here from what has been said.

24 CHAIRMAN BABCOCK: Don't suggest anything.

25 PROFESSOR CARLSON: Yeah. "If the trial

1 court is not satisfied sufficient diligent efforts have
2 been made, the court can either order the plaintiff to
3 make additional efforts to locate the defendant or appoint
4 an attorney ad litem to assist the court in attempting to
5 locate the residence." Well, if we're not going to have
6 the oral hearing then it doesn't seem like that is going
7 to work well, and it sounds like the trial judges want to
8 proceed to appoint the ad litem at that -- once they
9 approve the service by publication.

10 CHAIRMAN BABCOCK: Okay.

11 PROFESSOR CARLSON: That's the two models
12 that we were suggesting, is, one, the judge could tell the
13 plaintiff, "Go back and use more diligence," or the court
14 could simply deny it, deny service by publication, or
15 grant it and go right to the ad litem.

16 CHAIRMAN BABCOCK: Harvey.

17 HONORABLE HARVEY BROWN: So I voted for
18 eliminating the oral hearing, but I would be in favor of
19 something like this, because the judge still may want to
20 call them in after reading the paper and think an oral
21 hearing here would be helpful. So this goes back to
22 giving the judge discretion. I think the judge should
23 have the discretion to have the hearing if he or she
24 thinks it would be helpful.

25 CHAIRMAN BABCOCK: Okay.

1 HONORABLE HARVEY BROWN: It says "may."

2 PROFESSOR CARLSON: Yeah.

3 CHAIRMAN BABCOCK: Richard.

4 MR. ORSINGER: I have to go back and do a
5 little more thinking before I know that this is
6 applicable, but in the family environment, in the Family
7 Code of Texas as well as around the country, there is a
8 distinction drawn between an attorney ad litem and what we
9 now in family law call an amicus attorney or amicus
10 attorney; and the ad litem ethically historically have an
11 obligation to advocate the views of their clients; and
12 that part of the history goes back for decades at least,
13 if not centuries; and so to use the word "ad litem" to
14 describe the attorney who has no duties to the client to
15 advocate the client's view, in family law we've created a
16 new category called amicus attorney; and I find that
17 courts are appointing amicus attorneys in greater
18 frequency than the ad litem, because the ad litem are
19 required to advocate the views of the children if they're
20 mature enough to have views; and judges really want to
21 have an independent lawyer evaluating the witnesses,
22 taking some depositions, and presenting evidence.

23 I don't know whether that would gain
24 traction at large, but if anyone is concerned for that,
25 maybe we should use the word "amicus attorney" here and

1 define it in a way that we did in family law so that we
2 get around all of these ethical obligations and historical
3 requirements that the attorney ad litem advocate the views
4 of the client. If we're taking that power away, maybe we
5 shouldn't be calling him an ad litem anymore.

6 CHAIRMAN BABCOCK: Okay. Roger, and then
7 Judge Evans.

8 MR. HUGHES: Well, I don't think calling
9 them "amicus" or "ad litem" is going to make a difference.
10 What will make a difference is have the rule define the
11 scope of their retention or their job, because if you call
12 them an ad litem attorney and leave it, well, you're back
13 to the same problem. Did they represent the person or
14 not? And if you call them an amicus attorney, you still
15 have the question of, well, what's the scope of their --
16 of their retention? I mean, if you were an attorney, say,
17 okay, you've now been appointed an amicus. The first
18 question is going to be what am I supposed to do? So I
19 think rather than struggle with the name we ought to
20 struggle with the scope of employment type of section that
21 defines what they do and what they don't do. And while it
22 does trouble me that an attorney might spot a dead bang
23 loser problem with the petition such as jurisdictional
24 limitations, as cold as an ice cube, I think that's just
25 something we're going to have to put up with, because you

1 know, what may be a perfectly obvious defense to me, might
2 not be so to some other attorney, and all of the sudden
3 we're back with, well, now you've got duties to your
4 client and if they can't get the judgment overturned you
5 need to call your malpractice carrier.

6 CHAIRMAN BABCOCK: Judge Evans.

7 HONORABLE DAVID EVANS: Well, the -- under
8 this model we would have the affidavit, the oath, come to
9 the judge instead of the clerk before we would issue
10 publication and the judge would review the affidavit.
11 What would be the trigger for the judge and what basis
12 would a judge doubt an affidavit and allow the judge to
13 appoint an ad litem? Would it be I think that lawyer is a
14 tricky lawyer? That was facetious, but the affidavit will
15 have what my old partner used to call an affidavit face.
16 It will be credible on the face of it. It is the ad litem
17 that goes and asks the plaintiff, "Give me your
18 information you were looking for. Tell me what you did to
19 find this defendant. Show me what you have in the way of
20 a last known address."

21 This is a credit card company that has got a
22 Social Security number and has access to every credit
23 agency and they say, "We can't find them." So you get the
24 ad litem and you say, "Go find out what you have," and the
25 next thing you know you're turning up people or you're

1 turning up -- in property cases you're turning up the
2 sisters, the brothers, the cousins, and everybody else. I
3 appreciate that this one person got overcharged on an ad
4 litem fee. I appreciate that. But the key to that was,
5 is you don't reappoint somebody that churns a file and you
6 don't award churned fees.

7 And under what circumstance wouldn't I
8 appoint an ad litem over an affidavit? If I was concerned
9 about the defendant. Or do I call Richard in and start to
10 interrogate him and then Richard lectures me for another
11 half hour. It's a dangerous proposition right there. I
12 wouldn't do it, Richard.

13 CHAIRMAN BABCOCK: Hypothetically speaking
14 of course.

15 HONORABLE DAVID EVANS: Hypothetically. You
16 know, what's my basis? Let me see your file, Mr. Lawyer.
17 Let me get into your work product. Show me what you have.
18 From the bench he's standing down there, she is standing
19 down there. That's pretty harsh.

20 CHAIRMAN BABCOCK: Buddy, then Tom.

21 MR. LOW: But Richard raises a good point.
22 Because of tradition and what we know, if you name
23 somebody a certain thing, that assumes certain duties.

24 CHAIRMAN BABCOCK: Yeah.

25 MR. LOW: And we've got to name them

1 something, even though we can outline, and we just need to
2 be careful what we name them and know that that definition
3 applies and not just an ordinary traditional definition.

4 CHAIRMAN BABCOCK: Yeah. Tom.

5 MR. RINEY: Well, I've never served as an
6 attorney ad litem, amicus attorney, or whatever, and I
7 don't intend to, but if someone came to me and said, "I'm
8 about to be appointed what do I do" -- Judge Evans, all
9 due respect, I'm telling them not to churn the file, but,
10 you know, I can't even count the number of times somebody
11 brought me a lawsuit to defend that had a limitations
12 defense, quote, on the face. I pled for summary judgment
13 and lost because there are all kinds of exceptions to
14 limitations; and if I have been given an appointment and
15 my duty is to, well, let's find out ways to defend this
16 case then I've got to consider discovery, I've got to
17 consider fraudulent concealment, I've got to consider
18 whether the statute has tolled because my client may have
19 been out of state for that period of time. There's
20 federal statutes that may toll, and you go on and on and
21 on. So how can you say if it's just a simple defense that
22 you could raise, well, there aren't any, and so you run
23 that risk of, I think, having an attorney have undue
24 burdens imposed on him or her.

25 But let's talk about the way this rule is

1 set up, because I think it is designed to eliminate a lot
2 of those situations, because the purpose of having a lot
3 of this in here is to let the plaintiff who seeks to have
4 this type of service get a judgment. They're going to --
5 they know they're going to be second-guessed to a degree;
6 and, in fact, I think Judge Peeples had some good examples
7 that he's used today during our discussions on this as a
8 subcommittee; and that is when you start asking someone
9 some questions about, well, have you done this, have you
10 done that, have you done that, the answer is oftentimes
11 "no." You can find people today if you know how to do it.
12 That's -- if I were a judge, that's what I'd look for in
13 the ad litem, someone who has the ability to do that
14 investigation and you can find the people.

15 So hopefully the idea would be if there's
16 that backstop, putting the duties on that ad litem, and I
17 think a fairly limited expense, probably the quality of
18 the affidavit for this -- or after this service by
19 publication or whatever we choose to apply to it is going
20 to be a little better work before it gets to the trial
21 judge in the first instance.

22 CHAIRMAN BABCOCK: Judge Peeples.

23 HONORABLE DAVID PEEPLES: I've been doing
24 some big picture thinking. I want to --

25 CHAIRMAN BABCOCK: Oh, I love it when you do

1 big picture thinking.

2 HONORABLE DAVID PEEPLES: I'm dividing it
3 into physical location service and virtual abode service.
4 Okay. And I think what the rules have that we've got
5 before us are some physical location ways of doing this.
6 In person, mail. It might be certified, might be regular.
7 Service with a person over 16 at a location, we know about
8 that one. Posting at an address. Landlord-tenant, hey,
9 that's about all they do. That's all they have. They
10 know where the apartment is and so forth, and I think we
11 need some guidance maybe from the Court as to whether we
12 want a one size fits all system or whether we want to have
13 some fine-tuning based upon the kind of case it is.

14 But the kinds of service and the kind of
15 information we have about people of when we're going to
16 allow that kind of service, I think we've been talking
17 about some safeguards, and Richard mentioned safety net, I
18 think, and some of those happen before, and some of them
19 happen after. Before, if I am the judge doing this and
20 somebody comes in, I'm probably going to have a one-minute
21 discussion with them at the bench, maybe two minutes. We
22 do that all the time. What have you done? Have you tried
23 this, tried that? But the before safeguard, and then
24 afterwards we've talked about ad litem coming in, ad litem
25 going to defend the case or check into diligence of

1 service, and we've also -- we've already got extended time
2 periods, and I just hope that eventually our state will
3 lead the way in having some unified look at all of this
4 that makes distinctions and that tries to get good front
5 end information about where -- how to get in touch with
6 someone. Not find the location necessarily, but how to
7 get in touch with someone. That's it.

8 CHAIRMAN BABCOCK: Okay. Richard.

9 MR. ORSINGER: So it seems to me like that
10 we have two discussions going on at the same time. The
11 U.S. Supreme Court has said that the Fourteenth Amendment
12 requires the State of Texas to meet constitutional
13 standards of giving the defendant notice, but in civil
14 matters the Constitution does not require the state to
15 provide a defense. There's a difference between being
16 given notice and the state providing you a lawyer to give
17 you a defense.

18 HONORABLE TOM GRAY: Carve out the
19 termination cases.

20 MR. ORSINGER: Right. I was just going to
21 say the Supreme Court of Texas has said there is a right
22 to counsel in termination cases. I've never read a
23 termination case that was based on publication and the
24 appointment of a lawyer in an absence of the parent, but I
25 assume the Constitution is the same whether you're

1 personally served or not. So in termination cases we have
2 an obligation to provide a defense to someone who has been
3 cited by publication, but to my knowledge that's the only
4 civil litigation where the state has a constitutional
5 obligation to provide a defense.

6 So then the question becomes, well, the
7 Constitution requires that we give notice, but it doesn't
8 require that we provide a defense. So then we have to
9 make a decision as a matter of policy, does the State of
10 Texas, the Supreme Court, the State of Texas, want to
11 require the State of Texas to provide a defense to
12 somebody who has been served by alternate service or by
13 citation. And that policy decision really should be made
14 by the Legislature unless it's a constitutional question
15 and then it ought to be made by the Court.

16 HONORABLE DAVID EVANS: I think but the
17 state is not providing the defense in the civil case. The
18 plaintiff is by paying the cost. That's the difference.
19 That's where it comes down.

20 HONORABLE TOM GRAY: In a termination case
21 the plaintiff doesn't pay the costs.

22 HONORABLE DAVID EVANS: That's true.
23 Termination is different, but in a publication on a normal
24 civil case, it's a cost that's taxed against the party
25 who -- that brought the lawsuit. That's what happens in

1 tax cases, except it comes out of the excess proceeds, and
2 that's where it is. It's not the state -- it's not the
3 county paying for it, and it's not the State of Texas
4 paying for it. It's the litigant that's brought the case.
5 That's part of the cost that goes with the publication.

6 CHAIRMAN BABCOCK: Richard Munzinger.

7 MR. MUNZINGER: The origins of the duty of
8 the guardian ad litem to provide a defense, did that
9 originate with the Legislature or with the courts? If it
10 originated with the courts, the courts, it would seem to
11 me, would have the power to set it aside or not yield or
12 be required to defer to the Legislature. I don't see a
13 reason, A, that there should be such a defense provided by
14 the plaintiff in the case who is going to be paying the
15 costs, and I also have a problem with -- with the fallback
16 rule that the guardian ad litem is appointed to double
17 check on the plaintiff. The plaintiff has to be concerned
18 about the validity of the plaintiff's judgment. And why
19 are we putting -- telling -- if I'm appointed guardian ad
20 litem and he's the plaintiff's lawyer, I'm in essence
21 saying I ought to go to his file and say, "Show me what
22 you did," and he's going to have to give me his file or
23 I'm going to have to go back to the court and say he won't
24 give me his file.

25 Why should I have to contact someone or go

1 to a service that he has already gone to and spent money
2 on and couldn't find the person? You know, you can spend
3 a lot of money on the internet, and I go to these trial
4 seminars and I hear these guys say, "I can find anybody."
5 Right, you can't hide from me. I can get your boat
6 license. I can get your gun license, this license, that
7 license. A lot of that depends on having access to the
8 Social Security number, I've learned, but that could be
9 available in family cases, but again, the long and short
10 of it is, there's a heck of a lot of money being spent
11 here. Why are you spending it twice?

12 If the plaintiff did in good faith make
13 these efforts, why have a guardian ad litem do it again?
14 That doesn't make sense. To me at least it doesn't make
15 sense, especially since the plaintiff is going to have to
16 pay the guardian ad litem. And so a trial court can say
17 maybe a fallback rule is to make the due diligence efforts
18 part of a finding of the court or a part of the judgment
19 or something else that there is a record in court under
20 oath that the person did, in fact, go to the ABC service
21 on the internet and look for this person. They may or
22 they may not have, but, man, you're making litigation
23 extremely expensive, and you're doing it on the back of
24 the plaintiff, and they may or may not have money.

25 I mean, the companies theoretically have the

1 money to do it. Most litigants don't. Most people don't
2 have the money to do these kinds of things. They're not
3 inexpensive, and I don't know why we have to have a
4 guardian ad litem if other states do not have a guardian
5 ad litem. Why do we have to have a guardian ad litem?
6 The rule is give notice to the defendant and make a
7 reasonable effort to find them, and, judge, satisfies
8 -- I'm sure David Peeples and David Evans, any of these
9 trial judges in here, can satisfy themselves if -- if they
10 have the time, did you or didn't you make a good faith
11 effort to find this fellow.

12 Part of the problem is time, and David and I
13 were speaking out in the hall. Not every judge in this
14 room -- it wasn't David and I. It was somebody else. Not
15 every judge in the state is a judge like the judges in
16 this room. In fact, most are not. And that is a real
17 problem that we have to face in our judicial system. Not
18 all the judges in the state care that much about what
19 they're doing. It's a real problem, and perhaps one way
20 of solving that problem is to put into the judgment the
21 reasonable efforts to find the absent defendant were the
22 following. The guy spent \$275 on the ABC internet
23 service, which in turn looked at gun registrations, boat
24 registrations, car registrations, this, that, and so
25 forth, which did or did not include -- I'm not saying put

1 this in the rule, except in general terms, but which did
2 or did not include the use of the Social Security number
3 if it was known. And all of these recitations are made,
4 they now become a judicial finding, and it is required so
5 that good trial judges are going to do these things.

6 If you work around our state, you find that
7 not all judges are that interested, and they don't care,
8 and many of them are so overworked it's mind-boggling.
9 It's mind-boggling. Give a state district judge a motion
10 for summary judgment in a complex case, and you think that
11 he or she really has the time in some jurisdictions to sit
12 there and spend the 30 or 40 hours necessary to -- without
13 a law clerk, a licensed attorney law clerk, to digest all
14 the facts and the law, and look, they do their best to get
15 it done. I'm in the middle of a capital murder trial and
16 I've got this guy's summary judgment sitting on my desk
17 for nine months, and I'm in a capital murder trial. Am I
18 going to read his motion for summary judgment or am I
19 going to try my capital murder trial? I'm going to try my
20 capital murder trial, and when I finish that I've got
21 whatever else.

22 Don't add guardian ad litem. Just say make
23 the findings and make these judges force these people to
24 come and show it on your way, because the plaintiff is
25 going to pay for it one way or the other. If I'm

1 appointed guardian ad litem I don't want to do a lot of
2 work if I'm not going to get paid. Who is going to pay
3 me, in Smith versus Brown? Who is going to pay me? Does
4 Mr. Smith have the money to pay me? Good God, I'm going
5 to spend two days, three days looking for somebody and
6 that's what it might take? That's 24 hours. At today's
7 hourly rates that's a fair sum. Even in El Paso that's a
8 fair sum. You know, people paying a thousand dollars an
9 hour in some of these cities, \$800 an hour, \$400 an hour,
10 \$500 an hour. That's a hell of a lot of money over two or
11 three days. Who's going to pay that? It's a real
12 problem.

13 CHAIRMAN BABCOCK: I think Justice
14 Christopher had her hand up, and then Steve, and then
15 Richard.

16 HONORABLE TRACY CHRISTOPHER: Well, I am
17 arguing in favor of not making a change. The only change
18 I would make if we had to make a change would be to say
19 that the ad litem's role does not include appeal. Because
20 I do think that the ad litem can provide necessary work to
21 try and find someone that the plaintiff doesn't, and why
22 is that? Well, in some cases the plaintiff does not have
23 the incentive to find someone. All right. Only --
24 because if they want a clear title to a piece of property
25 and the other person is gone, it's to their incentive to

1 never find this other person, right? So that's why you
2 need the ad litem to make sure that someone with the
3 proper incentive tries to find the defendant.

4 So to me that's why you have to have the
5 person representing the defendant served by citation. But
6 I'm perfectly happy with saying the role ends at trial,
7 and I'm perfectly happy with trying to craft some language
8 about, you know, what sort of defenses can be asserted,
9 you know, based just on the face of the pleadings. I
10 mean, an ad litem should not be taking depositions. You
11 know, an ad litem appointed after service by publication
12 should not be taking depositions.

13 HONORABLE DAVID EVANS: Or sending
14 interrogatories. It isn't necessary.

15 HONORABLE TRACY CHRISTOPHER: So, I mean, I
16 think -- and I don't know what happened to this woman
17 who's complaining that she had to pay too much. I don't
18 know if that's what happened, but I certainly think we can
19 limit the role of the ad litem without throwing the ad
20 litem out. I think the ad litem still provides a very
21 important part of the process.

22 CHAIRMAN BABCOCK: Stephen.

23 HONORABLE STEPHEN YELENOSKY: Yeah. I
24 second that, and even if the lawyer doesn't have an
25 incentive to not find the person, there's the appearance

1 issue. You know, well, did you really try to reach me?
2 Well, yeah, because the plaintiff's attorney said that he
3 or she did. And if, in fact, there are busy judges who
4 aren't really able to look at that carefully, I mean,
5 requiring a checklist just means that the plaintiff's
6 attorney is going to give them a checklist and ask them to
7 sign it. What works, though, is an ad litem who can do
8 all -- look at all of that and then tell the judge from a
9 neutral position, "This is what I did, and this is what I
10 found."

11 One thing I don't know the answer to is if
12 the plaintiff has done some of that search through certain
13 agencies or whatever, what prevents the plaintiff's
14 attorney from just giving that to the ad litem, so and if
15 the ad litem deems it reliable, then ad litem can rely on
16 it. So it doesn't seem to me that there's a problem with
17 having an ad litem do the work.

18 CHAIRMAN BABCOCK: Kennon.

19 MS. WOOTEN: When the State Bar Court Rules
20 Committee discussed this particular rule, the focus was
21 really about whether the ad litem should be, quote,
22 defending the suit on behalf of the defendant, and I think
23 right now we're having a conversation not solely about
24 whether there should be a defense provided but also
25 whether there should be meaningful efforts to serve, find,

1 et cetera, and those are in my mind two separate
2 questions, because nobody ever proposed doing away with
3 the role of the ad litem to make meaningful efforts to
4 find a missing party.

5 HONORABLE STEPHEN YELENOSKY: Except today.

6 MS. WOOTEN: Except today, right. The
7 subcommittee didn't and the State Bar rules committee
8 didn't, and the question in my mind is what do you have to
9 do to defend a suit, and if you're an attorney trying to
10 do everything you're obligated under the rules to do, who
11 do you owe the duty to if the client is not there? And so
12 we would just struggle with the idea that you have to
13 fully defend the suit, and if somebody reads that and
14 takes the responsibility seriously, they're going to rack
15 up some legal fees pretty quickly.

16 HONORABLE DAVID EVANS: They shouldn't. In
17 16 years of a hundred percent civil docket, not a single
18 criminal or family law case, and I confess my ignorance.
19 I've never had an attorney ad litem take a deposition,
20 send a set of interrogatories, send a request for
21 production, and I guess the same thing is true in Houston
22 and in Austin. I've never had an abusive fee, and the one
23 time it got close, I made it clear that I didn't consider
24 the services necessary for the defense of the defendant.
25 We're not hiring Tom and you to defend these cases.

1 They're looking at -- they're looking at debt obligations
2 and title obligations that are clear on their face, and
3 they're making a reasonable defense and response to it.
4 David, did you ever see an abuse on an attorney ad litem?
5 I just hadn't seen it.

6 MS. WOOTEN: I just think before we say it's
7 a solution in search of a problem we should remember that
8 the whole reason that we're here talking about it is
9 because a person in the court system complained about it
10 being a problem.

11 HONORABLE DAVID EVANS: That's right.

12 MS. WOOTEN: And so maybe she's the only
13 person who's ever encountered this issue --

14 HONORABLE DAVID EVANS: I doubt it.

15 MS. WOOTEN: I doubt it, too, and so I don't
16 know how extensive the issue is, but I guess I come back
17 to the question of whether it makes sense to have the
18 attorney ad litem defending the suit under the text of the
19 rule. And maybe they're not defending the suit in
20 practice, but the rule on its face requires them to defend
21 the suit, and so I think the question is whether that
22 should be required of the attorney ad litem. If the
23 reality is that the attorney ad litem is rarely actually
24 defending the suit, then maybe the rule shouldn't require
25 it.

1 HONORABLE DAVID EVANS: No, I make a
2 distinction. They're doing the necessary services to
3 defend it. This is not where you go out and you're
4 automatically going to send a request for disclosure and a
5 set of interrogatories. This is not pitched civil
6 litigation. This is somebody who looks at the type of
7 obligation that is in question. Tax, some credit cards,
8 some property title cases. They're looking at mortgages.
9 They're looking at death records, and they're making a
10 decision as to whether there's a viable defense to raise.
11 Every once in a while, you would have somebody right after
12 the wheels came into place, when you had to rotate these
13 wheels, you would have somebody come in and act like they
14 were going to chat away the fee and they were going to
15 make a living off of being an ad litem.

16 We still have lawyers who try cases without
17 doing discovery, because they take an instrument of what
18 the case is worth, and they decide these facts are not
19 disputed, I don't have to do that. And as trial judge you
20 have to decide whether services are necessary and then
21 whether the fee was reasonable.

22 CHAIRMAN BABCOCK: Hey, guys, we're going to
23 have to suspend this discussion for a little bit because
24 we've got to open up this line that Kennon so graciously
25 closed for us a minute ago, and we've got an army of IT

1 guys over here to do that, and then we're going to at 3:30
2 because we have some people calling in, we're going to
3 take up ex parte communications in problem-solving courts,
4 and we'll do that as long as we have to, and then we'll
5 come back to this exciting topic as soon as we're done
6 with that. So we're going to be in recess until about
7 3:30. Okay.

8 (Recess from 3:17 p.m. to 3:31 p.m.)

9 CHAIRMAN BABCOCK: All right. Let's go back
10 on the record, and we've got Judges Chitty, Reyes, and
11 Byrne on the phone. Welcome to you, Judges, and I have
12 one announcement for before we get started, and that is I
13 hold in my left hand here parking passes for anybody that
14 wants discount parking passes. So it's not the free ride.
15 It's just a discount, right? Okay. So Marti will have
16 these, and if you want one, you can have it from her.
17 There she goes. Okay. Nina, what -- are you ready to
18 roll?

19 MS. CORTELL: We are ready and again want to
20 thank very much Judges Byrne, Chitty, and Reyes both for
21 their help in the work of the subcommittee and also for
22 participating in today's meeting. I want to also thank
23 our hard-working subcommittee, which has been very
24 diligent in this regard, and the subcommittee includes
25 -- we've drafted Andrew Van Osselaer from my firm to help,

1 and also sometimes we fail to list Holly from -- the rules
2 attorney from the Court of Criminal Appeals. Holly, we so
3 appreciate your help as well, and we're not going to let
4 you off the subcommittee. You have a permanent
5 appointment.

6 MS. TAYLOR: Thanks.

7 MS. CORTELL: Anyway, if you would turn to
8 Tab B of your materials, what we are providing for
9 discussion today at the request of Chief Justice Hecht is
10 a proposed comment to the Code of Judicial Conduct, which
11 would authorize certain types of communications in the
12 problem-solving courts or specialty courts, as we call
13 them, because of the different nature of those
14 proceedings, and we did discuss this at the May meeting.
15 We took two votes in May. We may be revisiting one of
16 those, but so the first question for the committee in May
17 was whether to have a comment or not. The vote was 22 in
18 favor and 3 against. We also voted on whether to include
19 a recusal provision, a mandatory recusal provision in the
20 event that the judge was privy to such communications.
21 The vote there was a little closer. 13 for mandatory
22 recusal, 6 for discretionary.

23 The subcommittee, following the May meeting,
24 has continued to consider how to draft a comment and
25 specifically also how to handle recusal. The comment that

1 you have before you at Tab B has two mandatory recusal
2 options and one discretionary recusal option, because even
3 though we had that vote in May the subcommittee wanted to
4 reconsider the wisdom of that and wanted to come back to
5 the bigger group with some different options for you to
6 consider.

7 I also want to flag that in the document
8 we've given you, the proposed comment, there is one
9 particular discussion item included, and that is we said
10 that the judge could consider ex parte or privileged
11 communications, a question as to whether include
12 privilege, whether that could give rise to waiver and what
13 are the implications of that. We included it because of
14 some discussion at the May meeting, but I wanted to bring
15 that to your particular attention.

16 Finally, and thank you, Judge Reyes. We
17 have some specific written comments that came in I believe
18 yesterday that you should have in your materials, some
19 written comments from Judge Reyes on the current comment,
20 and let me say that one of the questions he raised we did
21 talk about at the subcommittee level, and that's the
22 applicability of our recusal Rule 18b in the criminal
23 context, and I believe that Holly and Justice Newell were
24 comfortable that 18b does apply, so we don't have to worry
25 about that. So it's okay for the canon to refer to 18b in

1 both the civil and criminal context.

2 I think with that I'll open it up, and maybe
3 if it's all right with the Chair that I first defer to our
4 visiting judges participating by phone with their
5 comments, and then again, to our judges, we very much
6 appreciate your participation, and specifically I want the
7 larger committee to know that Judge Chitty is the chair of
8 the Texas Association of Specialty Court Judges, but all
9 three have looked at the comment and have very valuable
10 input for us. So, Judges, if you don't mind, we'll turn
11 it over to you first.

12 HONORABLE MICHAEL CHITTY: Judge Reyes,
13 would you like to begin?

14 HONORABLE RUBEN REYES: This is Judge Reyes,
15 and let me say that the comments that I forwarded were
16 following a conversation that Judge Chitty and I had. He
17 is the president of the state association, and I thought
18 it was important to have his insight and input. As a
19 result of that, we have in written form the feedback, and
20 I would just say I think the written comments are pretty
21 succinct, as much as can be. I think the big issues are,
22 as I understood, is there a need for a comment? I would
23 say yes. I know the vote was 22 for and 3 against, but --
24 but this is a big issue that is on the horizon, and I'll
25 tell you why. I also sit on the Commission for Judicial

1 Conduct. We have been wanting the canons to be updated to
2 properly reflect what judges are doing today, and the lack
3 of a comment for the judges who preside over specialty
4 courts is -- is missing. I mean, it really is.

5 Having said that, I think the other big
6 issue is the recusal. You have my comment as to why
7 perhaps a mandatory recusal should not be put into the
8 canons, so I really don't have anything to add to that. I
9 would defer to any questions that you may have with regard
10 to the -- the comment about privileged communication,
11 there is a lot of communication by the inherent nature of
12 the way these programs are run. It is -- it is ex parte
13 communication, it is privileged communication, and I think
14 that including that is important because otherwise it
15 hinders the communication that happens not only between
16 the participant and the judge, but quite frankly, the
17 participant and maybe the probation officer or maybe if
18 it's a family drug court, the children's protective
19 services officer, supervising officer. It just happens.
20 So I think that needs to be included.

21 Now, having said that, I would tell you that
22 that's the point -- and I view the word "proceeding," I
23 really struggle with the written comments that you
24 received on that because I wanted to make sure that we
25 recognized the possibility of what I call intermediate

1 sanction hearings. In the program if somebody is
2 noncompliant, they are sanctioned, and that sanction can
3 be anything from a verbal admonition to actually a brief
4 jail sentence. These programs are effective and have been
5 successful because the swiftness of the imposition of a
6 sentence, the sanction, the certainty that a sanction is
7 going to be imposed, which nurtures the accountability
8 afforded to the participant. We know treatment without
9 accountability is not as successful as treatment with
10 accountability. That has been the nature of the drug
11 court model. It is the standard.

12 So one thing that I think needs to be made
13 clear is that a recusal would not apply to an intermediate
14 sanction hearing. Now, I will tell you this: In our
15 state of Texas there are some judges who simply as a
16 matter of practice do have another judge preside over an
17 intermediate sanction hearing. In fact, I'm in the middle
18 of one right now, and I just took a recess to be on the
19 call. Our DWI court judge has imposed a sanction. The
20 participant disagrees with the sanction or disagrees as
21 the basis for the sanction, and under federal law, he is
22 entitled to the full gamut of due process protection. We
23 simply have an understanding here that we will not sit on
24 that type of hearing if the participant is in our court.
25 We have the luxury of having another judge hear it.

1 Some judges in Texas do not do that. They
2 believe that they can sit on that hearing and make a
3 decision as well. This is no different to an analogy that
4 I made in my comments about we have jurors that sometimes
5 consider evidence for one purpose, but not another. If we
6 have that expectation of lay jurors, it would seem that we
7 would be able to have that expectation of a trained judge
8 to do that. So that is a very credible issue.

9 The other thing I would tell you is this:
10 While we do not have a Texas case on point, we do have
11 cases from other states that are also split on how that is
12 done. Some other states allow the judge to sit and
13 preside over the intermediate sanction hearing. Other
14 states do not favor that. So this is an unsettled area,
15 which, again, is important as to why Texas needs to speak
16 on it, because there is uncertainty, to provide for
17 guidance to judges to see whether they're in compliance or
18 not. At some point I'm certain there will be an appellate
19 decision from Texas, but we just do not have that as of
20 yet. All the more reason to have this committee provide
21 as much guidance as possible in the way of comments to the
22 canons and as such.

23 Beyond the intermediate sanction hearing,
24 there is then the possibility, if somebody is going to be
25 terminated from the program then you have perhaps an

1 application to revoke probation, or if it's a deferred
2 adjudication probation, then a motion to proceed with the
3 adjudication of guilt, or whether they are in the program
4 or out of the program, you actually also have the ability
5 of a judge to preside over a family law case, and the
6 conduct, the participation, successful completion of
7 somebody in a specialty court could be part of the
8 evidence that is presented. So it's not a black and white
9 issue, and it creates a easier problem if you have
10 multiple judges in the jurisdiction. So it probably is
11 not an issue for the large urban areas, but you get into
12 small or rural areas, and it could be a problem. Do you
13 have -- in a county where you have only one district
14 judge, who is going to hear the other issues, the other
15 cases? Who is going to hear an intermediate sanction?

16 If it's a felony, it has to be by another
17 district judge. So you would have to have a visiting
18 judge come in. The regional presiding judge could assign
19 the district judge to hear a misdemeanor matter. That can
20 be done, but it can't be done the other way. So there's a
21 real problematic logistical need for clarification and
22 guidance.

23 MS. CORTELL: Judge Reyes, this is Nina. I
24 take it that you would urge the committee to consider a
25 discretionary rule rather than mandatory?

1 HONORABLE RUBEN REYES: Absolutely, and I
2 had a suggested revision that pretty much adopted the
3 original current proposal, and I added and reworded just
4 that last sentence that said a party may object, and if
5 they do then let the standing law rule on the issue.

6 MS. CORTELL: Right. So something to the
7 larger committee here, we're looking at some version of
8 the discretionary recusal option. Thank you, and I've got
9 your other language suggestions noted, and we can go over
10 that with the full committee as well.

11 HONORABLE RUBEN REYES: Yes, ma'am.

12 MS. CORTELL: Well, thank you so much. Do
13 the other judges, Chitty or Byrne --

14 HONORABLE MICHAEL CHITTY: Yes, this is Mike
15 Chitty. I wanted to just add onto what Judge Reyes has
16 said. I concur in general with everything he has just
17 said. With respect to mandatory recusal, if the committee
18 is considering adding a mandatory recusal provision to the
19 comment, I would suggest that it only apply to a
20 proceeding or a adjudicatory hearing involving the merits
21 of the participant's case. That way the presiding judge
22 in a specialty court who had presided over the sanctions
23 hearings and, if necessary, the termination hearing to
24 terminate the participation of the defendant in that
25 particular program. But the judge would be recused from

1 sitting on the MTR hearing, for example, or any hearing on
2 the merits of the defendant's case. I think it's
3 important that the specialty court judge does have the
4 authority to conduct those intermediate sanction hearings
5 and the termination from the program hearing.

6 I have talked to one of my board members
7 from San Antonio, Peter Sakai, who presides over a family
8 drug court, and Judge Sakai largely agrees with my
9 position on that. He indicated he would prefer language
10 in the comment talking about expulsion or withdrawal from
11 the program rather than the conclusion of the
12 participant's participation in the program, and I think
13 that grows out of his specific drug court program being a
14 family drug court not involving criminal activity
15 necessarily. Most of the drug courts deal with parties
16 caught up in the criminal justice system, and the drug
17 court programs or dismissal court programs allow an
18 alternative for treatment and disposition rather than jail
19 time or penitentiary time. So I think if you are
20 considering maybe a small modification to your comment,
21 look at the word "conclusion" and use some terminology
22 that would indicate discharge from the program without
23 successful completion of the program, whether it be
24 expulsion, termination, or whatever.

25 I would also suggest -- I agree with Judge

1 Reyes about this. I think in any matter dealing with a
2 court case involving a participant or a former participant
3 in a drug court or a specialty court program, that the
4 existing Rule 18b would cover whether or not the judge
5 should recuse himself or herself in connection with any
6 subsequent legal action. The concern -- and I believe
7 most judges follow this practice. They will do the
8 intermediate sanction hearings, but when it comes to an
9 adjudication of the merits of the case of the participant,
10 they will recuse themselves. I know that is my practice,
11 and I think it's a good practice. I've been doing my
12 court now for 10 years, and we have had that procedure
13 work very well in my program, and I know a lot of judges
14 across the state do that.

15 MS. CORTELL: Thank you so much. All duly
16 noted, and I'm sure we'll be following up with the
17 committee, but before we get there, Judge Byrne, did you
18 want to add any comments?

19 HONORABLE DARLENE BYRNE: I first want to
20 say that it was hard to hear Judge Chitty's responses
21 because I'm getting an echo throughout the telephone
22 communication. So I apologize that I can't endorse
23 everything he said, because I just couldn't hear it. And
24 I hear myself echoing as well.

25 MS. CORTELL: My apologies.

1 HONORABLE DARLENE BYRNE: So with that
2 technological concern, I would come to this committee with
3 a great deal of endorsement of the concerns that Judge
4 Reyes raised. Secondly, I come to this committee as a
5 judge presiding over several specialty courts such as
6 family treatment drug courts and dually involved crossover
7 youth cases. In that vein a lot of my concern is the best
8 practice of presiding over these cases as a one judge, one
9 family model, meaning that if I presided over a specialty
10 court case involving a family five years ago and a new
11 child is brought and a new case is brought related to that
12 child, whether they're in a specialty court or not, we
13 would in our jurisdiction send that case back to the same
14 judge. So the mandatory recusal is of concern for me in
15 the one judge, one family best practice recommendation in
16 civil family court matters.

17 Additionally, I would tender to the
18 committee that in our family treatment drug court we --
19 prior to a client becoming a part of the specialty court,
20 is provided with legal counsel, an opportunity to observe
21 a specialty court, and a contract for entering into the
22 specialty court. It advises them of the nature of the
23 proceedings and the high likelihood of ex parte and
24 privileged communications occurring during the life of
25 this specialty court involvement. They sign that contract

1 in open court beside their legal counsel and then they
2 enter the specialty court. So that in our jurisdiction
3 gives us great comfort that the client is aware of the
4 nature of a specialty court and how it functions in a
5 coagulative fashion. I apologize for my speaking method
6 because otherwise I'm getting an echo and I can't even
7 think straight with it.

8 MS. CORTELL: Well, we fully understand and
9 again appreciate it so much. I think at this point, if
10 it's appropriate, we'll open it up to the full committee.
11 There is some language issues that have been flagged by
12 Judge Reyes in the written comments, and I can address
13 those, but I think at this point it makes more sense to
14 open it to the committee as a whole. I would suggest in
15 light of the additional input as well, the additional
16 consideration of the subcommittee, that we look again at
17 the issue of mandatory recusal versus discretionary and
18 otherwise open it up generally to people's questions and
19 concerns.

20 CHAIRMAN BABCOCK: Great. Who -- who has a
21 comment about this? I noted that Judge Reyes suggested
22 that we omit from our proposed language the phrase
23 "insofar as the judge reasonably believes such
24 communication" and just basically makes the statement that
25 the communications are necessary to fulfill the specialty

1 court's function. How does everybody feel about that? In
2 other words, take the reasonable subjective state of the
3 specialty court judge out of it and just make the
4 statement that, yeah, of course, ex parte communications
5 are necessary. Justice Gray.

6 HONORABLE TOM GRAY: Since I was the one
7 that argued for the insertion of that language I will
8 attempt to defend it, and it is absolutely the subjective
9 standard that I wanted in there because I want the judge
10 and his conduct to be determined based from his -- his or
11 her perspective and not have a after-the-fact evaluation
12 by some other committee to come in -- and specifically the
13 judicial conduct committee. I don't want their
14 determination of what is necessary in his program. I want
15 the judge that is in the program that is making that
16 communication and allowing that communication to be the
17 one in the first instance who makes that determination,
18 and that is the standard that is being evaluated later to
19 determine if he violated the canons, and so obviously I am
20 strongly in favor of having that subjective factor as part
21 of this modification of the rule.

22 CHAIRMAN BABCOCK: Yeah, I personally
23 thought that your language was more friendly to the court,
24 to the judge, than having -- than taking that out and just
25 saying it is necessary and have the Judicial Conduct

1 Commission say, "No, it isn't."

2 HONORABLE TOM GRAY: Right.

3 CHAIRMAN BABCOCK: So having the subjective
4 standard, as long as it's reasonable, is more protective
5 of the judges than would be if we left it out. That was
6 my thought anyway. Anybody else have thoughts about this?
7 Buddy.

8 MR. LOW: Chip, I have one thought. It says
9 for the court to initiate, permit, or consider. Well, you
10 might consider something. To me it should be a judge
11 participating in ex parte. That's what we're talking
12 about. I mean, just considering something, I have
13 considered a lot of things, you know, but it's the judge
14 himself participating in ex parte that disqualifies him or
15 may disqualify him.

16 CHAIRMAN BABCOCK: Who would the ex parte be
17 with if it wasn't with the judge?

18 MR. LOW: Well, and I'm talking about with
19 the ex -- when the judge is participating in it with one
20 of the parties or a lawyer.

21 CHAIRMAN BABCOCK: Right.

22 MR. LOW: That's what they're talking about
23 when serving as a statutory judge.

24 CHAIRMAN BABCOCK: But there might be a
25 suggestion that even though he is participating in it he

1 should -- he or she should ignore -- should not consider
2 what they've learned from the communication, but rather
3 should ignore it.

4 MR. LOW: Well, the way we talk about it
5 now, if you engage with me, somebody might have an ex
6 parte communication with a judge and he says, "Go to
7 hell." You're not supposed to have it, regardless whether
8 it affects or not.

9 CHAIRMAN BABCOCK: Yeah. Got it.

10 HONORABLE TOM GRAY: I believe that is the
11 language that is in the current rule about ex parte
12 communications, is where that language comes from.

13 CHAIRMAN BABCOCK: Okay.

14 MR. LOW: Okay.

15 CHAIRMAN BABCOCK: He's not conceding. He's
16 just acknowledging that --

17 MR. LOW: No, you're right.

18 CHAIRMAN BABCOCK: Anybody else?

19 HONORABLE TOM GRAY: Are we talking about
20 the whole rule or just the phrase?

21 CHAIRMAN BABCOCK: No, I think we should
22 talk about the whole rule.

23 HONORABLE TOM GRAY: Okay. I took the
24 opportunity this week to go down and visit with the -- one
25 of the specialty court judges in McLennan County. It is a

1 drug court, drug and alcohol court, and we both had some
2 misconceptions, one, about what we were doing with the
3 rule, and then what they did as a specialty court and how
4 they handled it. He is very concerned about the addition
5 of the privileged communications being permitted, as I
6 was, and I will say that first. I led him to that
7 question to see if he was concerned about it, and --

8 CHAIRMAN BABCOCK: You're concerned about
9 this, aren't you?

10 HONORABLE TOM GRAY: Now, I didn't quite do
11 it that way, but I said -- he, in fact -- the first thing
12 he focused on was the ex parte, because he said, "I don't
13 even allow that," and so he does not feel that he violates
14 the current rules regarding ex parte communications in the
15 way that they conduct their court. So he said, "I could
16 see how maybe there's an argument." He said, "but I don't
17 want this change because I don't want people to think that
18 I need to be considering ex parte or privileged
19 communication. I don't want that put into the equation of
20 what I'm doing as a specialty court judge." And I
21 thought, okay, that was a point of view that I hadn't
22 really thought about.

23 CHAIRMAN BABCOCK: Sure.

24 HONORABLE TOM GRAY: That was kind of
25 different, but he said what I absolutely do not want to

1 ever have happen is me to be called as a witness in a
2 subsequent criminal trial once the participant has failed
3 the system and I've discharged them from the program, and
4 I'm called in to ask if there were communications
5 regarding what would otherwise be attorney-client
6 privilege, to determine whether or not there had been a
7 waiver of the attorney-client privilege and possibly an
8 admission or confession or something of that nature, and
9 so I really want the big committee to focus upon even if
10 we do the ex parte communication, because that can be
11 consented to and waived, more easily, but this privilege,
12 you know, once it's out of the -- once you've waived your
13 attorney-client privilege, or there's some other
14 privileges that are very much involved and explicitly
15 waived in the documents and the contract to get into one
16 of these programs, and specifically, the counselor
17 privilege and the physician privilege. Psychiatric
18 privilege as well, so that they can talk about the mental
19 challenges that these participants face of how to get over
20 the, "Okay, I was in the environment, and, you know, my
21 best friend was using marijuana, and so, you know, he
22 offered me a hit, and so I didn't know quite what to
23 say" -- you know, and that pressure of the environment
24 then becomes a psychological evaluation, and they deal
25 with that in the staffings, and they teach the

1 participants how to avoid those. They don't want the
2 confession, I guess you would say, or the statements that
3 they would make to their attorney or that they did make to
4 their attorney to ever come into one of these staffings,
5 is what the judge that I was talking to was concerned
6 about that aspect of it.

7 CHAIRMAN BABCOCK: That's understandable,
8 but if the judge, a specialty judge, is sitting there and
9 one of the participants comes into him and just blurts
10 out, you know, something his lawyer has told him, you
11 don't -- by taking this out of this exemption from the
12 canon, does that mean that if the judge hears that
13 privileged communication he has violated the canon?

14 HONORABLE TOM GRAY: He didn't "initiate,
15 permit, or consider."

16 CHAIRMAN BABCOCK: Well --

17 HONORABLE TOM GRAY: In the context that you
18 describe.

19 CHAIRMAN BABCOCK: He permitted it in the
20 sense that the guy came in his office and he was sitting
21 there listening to it.

22 HONORABLE TOM GRAY: And I will have to say
23 that that was one thing that this particular judge was
24 very specific in. He said when he sees a participant
25 coming outside the program he immediately stops and --

1 because invariably he said they'll wonder by in the
2 courthouse and say, "I've got a question for you." And
3 he's got to decide what he has to do with that, and he
4 said most of the time it is directed -- I redirect them
5 immediately to the probation officer and let them ask that
6 probation officer the question, and he said that empowers
7 the probation officer, and that way all the communications
8 then are filtered through someone else.

9 CHAIRMAN BABCOCK: Okay, but that -- it
10 sounds like your judge is not typical of what other
11 judge -- what's happening with other judges.

12 HONORABLE TOM GRAY: Remember that one of
13 the original judges that Andrew interviewed said that --
14 the same thing that the judge that I'm talking to said,
15 that he didn't see the need for this type modification.
16 Isn't that right, Andrew? Wasn't there one of the four or
17 five you talked to?

18 MR. VAN OESSELAER: There was one judge that
19 said this is not an issue, and "I don't permit ex parte
20 communication in my court."

21 HONORABLE TOM GRAY: Yeah. So it's not only
22 that judge, but there are some percentage I would say that
23 don't allow this, don't get into this.

24 CHAIRMAN BABCOCK: Okay. Of the small
25 percentage of judges that Andrew interviewed, 75 percent

1 say that they do it and 25 percent say no.

2 HONORABLE TOM GRAY: 25 percent say it's not
3 a problem, and we have to decide whether or not it -- we
4 need to make the -- and I no longer oppose the ex parte
5 part of it, but I am still very concerned about anything
6 that would purport to validate a privileged communication,
7 because that really gets into a much broader evidentiary
8 problem of waiver of the attorney-client communications
9 and privilege and where does that go.

10 CHAIRMAN BABCOCK: Yeah. I get that, but
11 from the judge's perspective, you know, he hadn't done
12 anything wrong. He hasn't violated the canons if somebody
13 comes up and blurts out a privileged -- I mean, he can
14 say, "Whoa, whoa, whoa, don't tell me what your lawyer
15 said. Don't tell me what your doctor said" or "your
16 priest said." He can say, "Whoa, whoa, stop." But I
17 wouldn't think that he could get -- he or she could get in
18 trouble if someone just comes in and blurts it out if
19 there's going to be a permitted ex parte communication.

20 HONORABLE TOM GRAY: I'm not sure we
21 disagree on where we are then.

22 CHAIRMAN BABCOCK: Okay. I wasn't arguing.
23 I was observing.

24 HONORABLE TOM GRAY: Yeah, okay.

25 CHAIRMAN BABCOCK: I saw that Judge Reyes

1 argued in favor of keeping privilege in the comment and
2 not excluding it, and I don't know, Judge, do you want to
3 -- Judge Reyes, do you want to expand upon your reasoning?

4 HONORABLE RUBEN REYES: Yes. I would say
5 this: The model for drug court redefines the role of a
6 judge. The judge is an integral part of the participants'
7 success in the program. These programs take on the
8 personality of their respective judge. We know from the
9 science and the studies done on these programs that the
10 relationship with the judge is the most important
11 relationship that these participants cite as the success
12 in their program. It is because they have somebody in a
13 position of authority saying, "I believe in you. You can
14 do this. Tell me what's going on. What do you need to
15 succeed in this program?" We in essence become a
16 cheerleader of these people.

17 We also know that, based on the studies,
18 incentives work much better than sanctions for the success
19 of the participant. That means the praise from the judge
20 coming from the interaction between a participant and a
21 judge is critical. I make it a habit to know what is
22 going on in a participant's life, and that sometimes by
23 the nature of the conversation I'm having with them may
24 cause ex parte communication to happen or privileged
25 communication to happen. It is an inherent critical part

1 of the program. In fact, we know from other appellate
2 cases in other states where this has gone up, that has
3 actually been the reason that the appellate court ruled in
4 favor of these programs, because they recognize that this
5 is a different animal. The judge is an integral part of
6 the treatment and the success of the participant. We may
7 call them specialty courts in Texas, but they are called
8 therapeutic courts, treatment courts, in other
9 jurisdictions. And that's not by accident.

10 CHAIRMAN BABCOCK: Proffer Hoffman. Thank
11 you, Judge.

12 PROFESSOR HOFFMAN: But the question is only
13 what -- the only point that Justice Gray is raising is --
14 is whether we should include in the comments an express
15 sentence that says it's not a violation to consider
16 privileged communications or just to leave that out. He's
17 not -- Tom can speak for himself, but he's not arguing
18 that it is a violation. He's just asking whether the
19 comment should flag the word "privilege" or not.

20 CHAIRMAN BABCOCK: Yeah, but somebody is
21 going to say, whoa, you know, you guys considered that and
22 then you took it out.

23 PROFESSOR HOFFMAN: Well, let's not forget
24 that, again, this is a comment to the canon, and the canon
25 says nothing at all about privileged communications. The

1 canon is principally about ex parte communications, and so
2 it's -- it's really quite a zinger to just throw in
3 privileged into the comment when it's not even in the
4 canon itself.

5 CHAIRMAN BABCOCK: Well, it -- I would argue
6 that it's included in the canon. I mean, if you're having
7 an ex parte communication, it doesn't matter whether it's
8 of privileged information or other nonprivileged
9 information about that. It's still a violation. Bill.

10 HONORABLE BILL BOYCE: So I think one of the
11 areas that can't really be disputed is that there are
12 many, many variations of how individual judges run
13 individual programs, and because of that a broader safe
14 area is potentially the better way to go because nothing
15 in this draft says you've got to consider privileged
16 communications if you don't believe that's appropriate for
17 the way you run your program or you have to do this or you
18 have to do that or you have to do the other thing. And in
19 light of that, I don't think including a reference to
20 privilege or some other specific kind of handling makes
21 anybody do anything that they're not comfortable with in
22 terms of serving as a judge running one of these programs,
23 but it does provide what I understood to be the point of
24 having this discussion in the comment, which is to -- to
25 provide an area of maneuverability in which all of the

1 varied ways that these court programs run may run.

2 CHAIRMAN BABCOCK: Yeah. Somebody has got
3 an arm up. Richard.

4 MR. MUNZINGER: I may have missed something.
5 What is the privilege? What is the source of the
6 privilege?

7 CHAIRMAN BABCOCK: It's the participant in
8 the program who is represented by counsel or goes to a
9 doctor or is confessing to his priest, and he comes in to
10 the chambers of the judge and says, you know, "I confessed
11 to my priest that I did such-and-such," or "My lawyer told
12 me that he if I keep doing this I'm going to be in big
13 trouble." I mean, some privileged communication.

14 MR. MUNZINGER: The judge is hearing
15 privileged information from the person's attorney.

16 MR. ORSINGER: No.

17 CHAIRMAN BABCOCK: No, no, no.

18 MR. MUNZINGER: From the person himself.

19 CHAIRMAN BABCOCK: Who owns the privilege.

20 MR. LEVY: He doesn't understand.

21 MR. MUNZINGER: He owns the privilege to do
22 what? Who is he speaking to? He's speaking to the judge,
23 not his lawyer.

24 CHAIRMAN BABCOCK: Right.

25 MR. LEVY: He doesn't understand the

1 privilege.

2 CHAIRMAN BABCOCK: He doesn't understand
3 he's waiving it maybe.

4 MR. MUNZINGER: That's my point, is we're
5 calling it a privileged communication, and when you use
6 that in the rule I'm trying to say where does that
7 privilege come from? It's not a privilege for me to speak
8 to a judge. I don't -- to my knowledge. I'm not a
9 criminal lawyer. I'm not even a smart lawyer. I don't
10 think I have a privilege to speak to a judge.

11 MR. LEVY: Disclosing a privilege.

12 CHAIRMAN BABCOCK: No, it's disclosing a
13 privileged communication.

14 MR. MUNZINGER: I'm disclosing my conduct.

15 PROFESSOR HOFFMAN: Richard, what if you
16 tell your doctor that you did something that broke the
17 law, and then you're in front of the judge, and you tell
18 the judge what you told your doctor.

19 MR. MUNZINGER: Well, I tell the judge I
20 broke the law. I may not -- I may not say to him, "I told
21 my doctor I broke the law." I may say to the judge, "I
22 smoked six joints." I have now made a communication, a
23 confession, so to speak, that I broke your rules, but I've
24 made it to the judge only and not in the context of the
25 disclosure of a privileged communication, but we are using

1 the words "privileged communication" in the rule and that
2 troubles me because I don't see that it's a privileged
3 communication.

4 CHAIRMAN BABCOCK: Judge Newell.

5 HONORABLE DAVID NEWELL: Whoa, okay.

6 CHAIRMAN BABCOCK: You raised your hand,
7 didn't you?

8 HONORABLE DAVID NEWELL: I did. I did. I
9 just didn't know it was going to be so fast. I was going
10 to wind up for this. No, the thing I was going to say is
11 the one thing that I'm hearing and I hope that this is --
12 I think this is the same thing that Justice Boyce was kind
13 of alluding to, is what I'm hearing in this discussion is
14 we're talking about how to make this work, like sort of
15 the process for making this work, but really what we are
16 tasked with doing is just trying to address the ethics of
17 the way this is done, and so what -- instead of focusing
18 on the scope of the ethical canon, we are starting to go,
19 well, here's this ethical canon and then we go, well, we
20 want to make sure that the judge does X or Y, which is
21 more of a procedural thing instead of just trying to say,
22 look, it's okay if you engage in this communication.
23 You're not going to run afoul of the canons.

24 But then we start to want to put procedural
25 requirements in a comment to the rule to try and allow --

1 or to try and say you will do this or you won't do this,
2 and I think it kind of also ties into what Lonny was
3 saying, is we need to keep -- I think it's important to
4 keep in perspective that we're just talking about a
5 comment to the canon itself to just talk about this
6 ethical -- these ethical responsibilities instead of
7 trying to figure out a way for a procedures to cover every
8 variation.

9 CHAIRMAN BABCOCK: What you're saying,
10 Judge, what I take you're saying is we want to have safe
11 harbor --

12 HONORABLE DAVID NEWELL: That's right.

13 CHAIRMAN BABCOCK: -- and we don't want to
14 have the rules of the harbor master.

15 HONORABLE DAVID NEWELL: That's right.
16 That's a very good way of putting it.

17 CHAIRMAN BABCOCK: I was sitting here while
18 you were talking thinking of all of those things. Holly.

19 MS. TAYLOR: I just want to -- so I was just
20 looking back at Professor Shannon's article, which was one
21 of the things that we originally looked at when we started
22 this journey with ex parte communications in specialty
23 courts.

24 CHAIRMAN BABCOCK: This is never a journey
25 here.

1 MS. TAYLOR: Okay, sorry. But it's about
2 the journey. Anyway, I thought that one of the main
3 concerns wasn't necessarily ex parte communications
4 between the specialty court judge and the defendant or as
5 the term they use in specialty courts I think is
6 "participant." I thought that it wasn't as much that
7 concern, although I do understand that that can happen,
8 but I thought it had more to do with the judge's role as
9 the team leader in the treatment team, for example, in a
10 drug court context, where the judge is meeting with these
11 other professionals and the participant, the defendant, is
12 not there, and I think frequently also the participant's
13 attorney is not there, although I think they often will
14 have -- or sometimes will have a defense attorney there,
15 but it may not be an attorney that represents that
16 particular participant.

17 So the ex parte nature of the
18 communications, the prosecutor may be in there. Also,
19 there may be mental health professionals or people who
20 have mental health professional information about the
21 participant are there. So they're considering ex parte
22 communications between the judge and those folks in those
23 staffings that occur. So that was kind of my -- what I
24 thought the concern was. And, in fact, there are
25 programmatic best practices which drug courts in Texas, I

1 think, after August 31, 2019 -- Mr. Slayton is shaking his
2 head yes. They are required to follow these programmatic
3 best practices, and those programmatic best practices
4 specifically discuss this treatment team and this list of
5 professionals who will be in these staffings and this
6 whole process, and I read through them, and it's thick
7 stuff, and I didn't understand all of it because I don't
8 have a lot of experience in this area, but it seems pretty
9 clear to me that they are contemplating this type of ex
10 parte communications, and there may be some privileged
11 communications that are occurring as part of that process
12 as well.

13 And I would also note that Senate Bill 891
14 that we were talking about earlier today, additionally
15 tasks the Office of Court Administration, OCA, with making
16 sure that these programmatic best practices is followed.
17 Is that right, Mr. Slayton?

18 MR. SLAYTON: That is correct.

19 CHAIRMAN BABCOCK: But all of those things
20 you've just described would be covered by the safe harbor,
21 would they not?

22 MS. TAYLOR: I think so.

23 MS. CORTELL: And I think that's an
24 important point, if I may. I mean, because we're not
25 talking about just the participant providing that

1 information, but these other persons involved in the
2 program may be conveying privileged information.

3 CHAIRMAN BABCOCK: Professor Hoffman, and
4 then Richard.

5 PROFESSOR HOFFMAN: Just a small little
6 point of levity, I just thought might be nice. On behalf
7 of law professors everywhere and recalling Chief Justice
8 Roberts' derision of the lack of utility of law review
9 articles I might note that in today alone we've cited two
10 different articles that we've relied on heavily.

11 CHAIRMAN BABCOCK: A new first for our
12 committee. Richard, then Rusty.

13 MR. MUNZINGER: My only point again is I
14 share all of the ambition and the hope and the -- to get
15 all of these things privileged and within the safe harbor.
16 The problem is to use words that will accomplish the
17 purpose with the precision necessary for the protection of
18 the participating judges and criminal defendants, and if
19 you use the word "privileged communication" you've
20 described something that has a meaning known in law. My
21 communications to my lawyer are privileged, my
22 communications to my clergyman are privileged, but my
23 communications to a judge are not privileged. Maybe it
24 needs to say "a communication made of the auspices of the
25 program" or some other defined -- that's my only point.

1 I'm not arguing against it. I'm arguing for it and saying
2 be precise in what we use for the protection of the people
3 involved.

4 CHAIRMAN BABCOCK: Yeah. As usual you've
5 spotted -- you've spotted an issue that probably requires
6 some language fixing. Yeah, Rusty.

7 MR. HARDIN: I'm not sure -- I go along with
8 the idea that we're not really talking most of the time
9 about privilege here. We're really talking about whether
10 or not in effect it's a compelled admission to the judge,
11 and so it's just like would it ever be used as evidence,
12 but somebody who is in a program like this is not really
13 freely speaking in terms of whether it's compelled. So
14 it's not an attorney-client privilege. I mean, it might
15 be. It might be attorney-client privilege if the lawyer
16 by himself talks to the judge, says, "This is the problem
17 he's going through." His family is supportive or not
18 supportive. He's got all of these issues. He might be
19 basing some of that he's saying on privileged
20 communications he's gotten from his client, but that can
21 all be controlled in other areas. As I understand this,
22 this is simply to give judges some protection if they're
23 performing a different judicial duty as we've talked about
24 it.

25 HONORABLE DAVID NEWELL: That's exactly

1 right.

2 MR. HARDIN: They're now part of a treatment
3 program that everybody has talked about, and I don't think
4 we need to address anything about whether it's a compelled
5 statement or whether it can be used or not. I think it
6 will get cloaked ultimately with the confidentiality that
7 the mediation process does. We all know when a judge is
8 called, you know, he's not going to be testifying -- or
9 the mediator, and so I think a judge's concern that
10 somebody voiced as to whether he could be called to be
11 asked, I think that can be taken care of in other forms,
12 but this particular amendment I think is just simply
13 directed to give the judges some protection. I don't
14 think you need to mess with it beyond this.

15 HONORABLE DAVID NEWELL: Yeah.

16 PROFESSOR HOFFMAN: I agree.

17 CHAIRMAN BABCOCK: What if we took out "or
18 privileged" and inserted the word between "consider" and
19 "ex parte," "any"? Put the word "any."

20 MR. HARDIN: I must be looking at the
21 wrong --

22 MR. ORSINGER: Where are you?

23 CHAIRMAN BABCOCK: I'm in the comment, the
24 comment that the subcommittee is proposing.

25 HONORABLE TOM GRAY: Page two of the

1 materials.

2 CHAIRMAN BABCOCK: Page two of the
3 materials.

4 MS. CORTELL: It's at Tab B. So the
5 suggestion is you would delete "or privileged," between
6 "consider" and "ex parte" you would add "any," and
7 "consider any ex parte communication," singular or plural.

8 CHAIRMAN BABCOCK: "It's not a violation to
9 consider any ex parte communications." That would
10 necessarily sweep up privileged, however defined.
11 Richard, would that solve your problem?

12 MR. MUNZINGER: I think so.

13 CHAIRMAN BABCOCK: Holly, do you think that
14 would solve it?

15 MS. TAYLOR: I think so.

16 MR. HARDIN: Say it one more time.

17 CHAIRMAN BABCOCK: Huh?

18 MR. HARDIN: Say it one more time.

19 CHAIRMAN BABCOCK: "I think so." That's
20 what she said.

21 MR. ORSINGER: Which page of Tab B?

22 CHAIRMAN BABCOCK: We would say it is not a
23 violation --

24 MR. HARDIN: Justice Hecht, did he really
25 get the award? Go ahead.

1 CHAIRMAN BABCOCK: "It is not a violation of
2 this canon for a judge when serving on a statutory
3 specialty court to initiate, permit, or consider" -- I
4 propose adding the word "any ex parte" -- strike "or
5 privileged" -- "communications insofar as the judge
6 reasonably believes."

7 MS. CORTELL: Would you go singular on
8 "communication" or plural?

9 CHAIRMAN BABCOCK: Plural. Buddy.

10 MR. LOW: Chip, the way it's written, that's
11 the way to consider ex parte communications or privileged
12 communications. It has two kind of communications, any ex
13 parte and privileged. So that -- that includes it all.

14 CHAIRMAN BABCOCK: Right.

15 MR. LOW: They didn't say ex parte
16 privileged communications. They say ex parte or
17 privileged.

18 CHAIRMAN BABCOCK: Yeah, but Richard makes
19 the point that that's confusing because the participant
20 and the judge are not engaged in what we think of as a
21 privileged communication.

22 MR. LOW: Well, the whole thing is confusing
23 to me, so I will agree with you on that.

24 CHAIRMAN BABCOCK: Nina, what do you think
25 about that proposed --

1 MS. CORTELL: I'm fine with that. It's
2 still broad. It could encompass privileged,
3 nonprivileged.

4 CHAIRMAN BABCOCK: Right.

5 MS. CORTELL: This was just, as originally I
6 think you noted, intended to cast a broader protective net
7 for the judges, but I'm fine with that.

8 CHAIRMAN BABCOCK: Yeah, I wouldn't want
9 anyone, including the conduct commission to read this
10 transcript and say, "Oh, privilege was in there but they
11 took it out," thinking that our recommendation to the
12 Court was that we were trying to exclude something.

13 MS. CORTELL: Right.

14 CHAIRMAN BABCOCK: We're not trying to
15 exclude anything. We're trying to sweep as broadly as we
16 can.

17 MS. CORTELL: I think that would be a fair
18 read, and let me also say to answer Buddy's point, and I
19 think Justice Gray pointed this out, the language
20 "initiate, permit, or consider" comes out of the canon
21 itself, Canon 3B(8), so we're trying to counter that
22 prohibition that's in the canon and say that does not
23 apply here.

24 CHAIRMAN BABCOCK: Yeah. Great. Okay.
25 Other comments before we get to mandatory versus

1 discretionary?

2 MR. LOW: Chip, to guard against us having
3 to take that out would you put --

4 HONORABLE RUBEN REYES: This is Judge Reyes.
5 I'm going to have to excuse myself and get back to the
6 hearing that I have. The lawyers are waiting on me. So
7 thank you for allowing me to participate, and I'm going to
8 hang up.

9 MS. CORTELL: Thank you, Judge. We have
10 your written comments, which we will continue to consider
11 in your absence, and thank you again so much for your
12 continued help throughout the process. We appreciate it.

13 HONORABLE RUBEN REYES: Yes, ma'am. Thank
14 y'all. Bye-bye.

15 CHAIRMAN BABCOCK: Buddy, you probably ought
16 to repeat what you were saying.

17 MR. LOW: It might not be worth repeating,
18 but it showed we took out "privileged." Would we want a
19 comment to have it includes dealing with communications
20 that are privileged?

21 CHAIRMAN BABCOCK: Yeah, we took that out,
22 but we put in the word "any." And so --

23 MR. LOW: Okay, well --

24 CHAIRMAN BABCOCK: -- that's intended to
25 give the judges --

1 MR. LOW: I know what it does. "Any" means
2 everything.

3 CHAIRMAN BABCOCK: Any means every.

4 MR. LOW: Yeah.

5 MS. CORTELL: I want to make sure I have a
6 sense of the full committee about keeping in the
7 subjective standard --

8 CHAIRMAN BABCOCK: Yeah.

9 MS. CORTELL: -- that Justice Gray has
10 provided. The judge reasonably believes as noted that was
11 intended again to provide greater protection for our
12 judges, so I assume everyone agrees with it, but I don't
13 see any disagreement.

14 MR. ORSINGER: I want to comment that the
15 use of the word "reasonably" is an objective standard by
16 definition. The subjective standard is what the judge
17 thinks and the objective standard is what the judge
18 thought reasonable. So --

19 CHAIRMAN BABCOCK: "Believes" it subjective.
20 "Reasonably" --

21 MR. ORSINGER: "Reasonably believes" turns a
22 subjective test into an objective test.

23 CHAIRMAN BABCOCK: It does?

24 MR. ORSINGER: Because you're asking whether
25 a reasonable judge in the same or similar circumstances

1 would believe that. That is by in its essence an
2 objective test, so if what you want to do is make this
3 subjective, the last thing you want to do is drop the word
4 "reasonable" in there.

5 HONORABLE TOM GRAY: Well, I actually I
6 think proposed it without the word in there. I'm not
7 sure. I don't remember precisely, but I would be good
8 with the word "reasonably" --

9 MR. ORSINGER: The problem I have --

10 HONORABLE TOM GRAY: -- coming out.

11 MR. ORSINGER: The problem I have with the
12 very subjective standard for judges is the same problem we
13 have with the recusal rule. If it's a subjective
14 standard, you're trying to reconstruct the judge's
15 thoughts about whether they have a bias or prejudice that
16 would cause them to recuse, and it's very difficult and
17 very personal to attack a judge on the basis of their own
18 views. You have to call in friends, lawyers they've had
19 conversations with. It's a horrible process.

20 The other standard for recusal is an
21 objective standard of whether -- oh, I forget the exact
22 language now, but it's how it looks to an outsider that
23 might reasonably question the court's impartiality.
24 That's an objective standard, and that's something that
25 you could make your case based on what the circumstances

1 look like, not what the judge actually thought or calling
2 in their friends to testify. So in this situation I think
3 we shouldn't be pursuing what the judge actually thought.
4 Should we?

5 HONORABLE TOM GRAY: Yes.

6 MR. ORSINGER: Or should we?

7 HONORABLE TOM GRAY: We should.

8 MR. ORSINGER: Okay. So how are we going to
9 pursue that? Can I depose the judge? Can I take his
10 deposition?

11 HONORABLE TOM GRAY: Where it occurs is in
12 the front of a 15-member Judicial Conduct Commission.

13 MR. HARDIN: Yeah, where would you be doing
14 it?

15 MR. ORSINGER: I don't know.

16 MR. HARDIN: Where would you be doing it
17 other than -- I can't imagine how the judge would ever be
18 questioned about it other than the Judicial Conduct
19 Commission.

20 MR. ORSINGER: Well, you're not allowed to
21 do discovery on a Judicial Conduct Commission --

22 MR. HARDIN: Well, you are.

23 HONORABLE ANA ESTEVEZ: You get to file an
24 affidavit, so I guess the judge can file a response to it.

25 MR. ORSINGER: So the Judicial Conduct

1 Commission is going to be trying to decide what was in the
2 judge's mind.

3 MR. HARDIN: They do it, unfortunately, very
4 frequently.

5 MR. ORSINGER: Okay.

6 MR. HARDIN: Seriously.

7 MR. ORSINGER: If the goal is to have a
8 subjective standard then I go back to my original point,
9 is we don't want the word "reasonably" in there.

10 CHAIRMAN BABCOCK: You want the word
11 "reasonably" taken out.

12 HONORABLE ANA ESTEVEZ: I agree.

13 MR. HARDIN: I was going to say the same
14 thing. I mean --

15 CHAIRMAN BABCOCK: Great minds.

16 MR. HARDIN: Well, the other thing -- he's
17 brilliant, right?

18 HONORABLE ANA ESTEVEZ: Smart.

19 MR. HARDIN: Smart.

20 MR. ORSINGER: I get two gold stars today.

21 MR. HARDIN: I would take it further and
22 just say insofar as the judge believes the communications
23 are necessary. Because that's really what we're after.
24 If he believes it, there's nothing to contradict it.
25 There's nothing that's going to be able in a conduct

1 commission or anywhere else, nobody is going to be able to
2 say he didn't believe it if he says he did. He says you
3 can't prove that. So if you say as long as he or she
4 believes it is necessary, that would take care of it.

5 CHAIRMAN BABCOCK: Yeah. You're good with
6 that, Justice Gray?

7 HONORABLE TOM GRAY: Absolutely.
8 Absolutely.

9 CHAIRMAN BABCOCK: Nina, you good with that?
10 We can ask everybody, but what do you think?

11 MS. CORTELL: I prefer "reasonably" in,
12 but --

13 MR. HARDIN: I think he's right about
14 reasonably.

15 MR. ORSINGER: All of the sudden you're
16 going to have a committee of 13 people deciding what's
17 reasonable and not what that judge thought at the time
18 he's --

19 MR. HARDIN: That's my fear, Nina.

20 CHAIRMAN BABCOCK: Yeah. Chief Justice
21 Hecht.

22 CHIEF JUSTICE HECHT: There's one
23 intermediate step I think which the Court has used in
24 official immunity, which is that no reasonable officer
25 could have believed different than what that officer

1 believed. In other words, you don't look to see if the
2 officer's belief was reasonable. You look to see if
3 there's no way it could have been reasonable. I'm not
4 advocating that.

5 MR. ORSINGER: It's kind of like a no
6 evidence review.

7 CHIEF JUSTICE HECHT: I think the subjective
8 myself is probably better, but --

9 CHAIRMAN BABCOCK: Yeah. Well, that's where
10 I come out, but anybody else want to weigh in on this? Do
11 we need to vote on this? Judge Evans.

12 HONORABLE DAVID EVANS: If you have -- end
13 the sentence at "communications" then they can consider
14 them. If there's mandatory recusal, the defendant has the
15 right to move the judge out if he doesn't like what the
16 judge has heard in the pretrial. Now, I'm not -- that's a
17 hook right there. It's easy to enforce this from an
18 enforcement standpoint if it ends with the word
19 "communications" and you strike "insofar." Because that's
20 it, you can consider it.

21 CHAIRMAN BABCOCK: "Communications," period.

22 HONORABLE DAVID EVANS: I mean, that's a
23 simple way to read it. Otherwise I think you have to go
24 to something like the Chief has where --

25 CHAIRMAN BABCOCK: So you would put a period

1 after "communications," and you would pick it back up "if
2 such communications occur then" --

3 HONORABLE DAVID EVANS: And then you have to
4 pick up whether you're going to mandatory.

5 CHAIRMAN BABCOCK: Yeah.

6 HONORABLE DAVID EVANS: If the participant
7 in the program -- and I'm not advocating the mandatory
8 recusal. I'm just saying the first sentence will protect
9 the judge. Mandatory recusal will protect the defendant,
10 the participant in the program. So and (a) is much more
11 preferable to my mind as somebody who has to replace the
12 judge to the (b) option. But if you're looking for some
13 bright line protect the specialty court judge, bright line
14 protect -- say the specialty -- one of the problems I
15 have, what's going to happen in this team building, the
16 judge has to at some point get tough --

17 CHAIRMAN BABCOCK: Yeah.

18 HONORABLE DAVID EVANS: -- with the
19 defendant, probably. I mean, unless the defendant is a
20 model person. And at that point counsel and everybody
21 else will begin to feel like maybe this judge can't be
22 fair. Now, if that's what -- I read the vote. The vote
23 seemed to be in favor of mandatory recusal.

24 MS. CORTELL: Why don't we stay on the first
25 sentence, would be my recommendation, then move on to

1 recusal.

2 HONORABLE DAVID EVANS: Yeah. Yeah. Okay.

3 CHAIRMAN BABCOCK: Good. Can Richard speak
4 or not? I know it's always a risk, isn't it?

5 MS. CORTELL: Yes.

6 MR. ORSINGER: Okay. So I really have
7 strong sympathies for the judges who are operating in this
8 environment that's completely estranged from any of the
9 legal training that we've ever had, making judgment calls.
10 Peoples lives may hang in the balance. Certainly their
11 freedom hangs in the balance. I don't think a judge ought
12 to be saying, wait a minute, if I listen to this, am I
13 going to be removed from the bench or publicly admonished.
14 I just think there should be zero risk, and if there's
15 zero risk for the judge then the judges are free to be
16 creative if they need to be, and then later on if we're
17 worried that they heard too much, if the defendant
18 implicated himself in a crime that would lead to the
19 revocation, let's protect the defendant through the
20 recusal process.

21 It just seems strange to me that we might
22 have a judge putting his or her bench at risk here in this
23 area where it's very difficult to ascertain what the
24 standards are. Maybe you'll clarify it, but it doesn't
25 sound like the standards are that simple, and so why don't

1 we protect the judges with allowing any communications,
2 and let's protect the defendant by recusing the judge that
3 heard the admission of guilt.

4 CHAIRMAN BABCOCK: Okay. Nina.

5 MS. CORTELL: So do you want to have the
6 committee entertain a vote as to whether to put a period
7 after "communications"?

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

10 MR. MUNZINGER: Could you restate it again?

11 CHAIRMAN BABCOCK: Yeah. We're going to
12 vote on whether or not you put a period after
13 "communications."

14 MS. CORTELL: And you would then delete what
15 we currently have here.

16 CHAIRMAN BABCOCK: Right.

17 MS. CORTELL: "Insofar as the judge
18 reasonably believes such communications are necessary to
19 fulfill the specialty court's functions and the specialty
20 court's procedures contemplate such communications." In
21 other words, that was a bit of a cabining of the ex parte
22 communication permission being granted here. If you put a
23 period after "communications" you're saying that the judge
24 in the specialty court context, that's all we're
25 requiring, can consider any ex parte communications.

1 CHAIRMAN BABCOCK: Right. Period after
2 "communications." Everybody in favor of that, raise your
3 hand.

4 MR. MUNZINGER: But we're not choosing any
5 of the alternatives yet.

6 CHAIRMAN BABCOCK: No.

7 MS. CORTELL: We're not to recusal yet.

8 CHAIRMAN BABCOCK: All right. Opposed?
9 Tracy, too bad you didn't propose this one. Well, maybe
10 somebody raised their hand late. 20 to 1.

11 MR. ORSINGER: No, there were three.

12 CHAIRMAN BABCOCK: Three?

13 MR. ORSINGER: Yeah, the two down there at
14 the end that are kind of hiding behind Eduardo.

15 CHAIRMAN BABCOCK: Oh, okay. 20 to 3.

16 MR. ORSINGER: Or, no, four. Eduardo's now
17 gone with them.

18 MR. RODRIGUEZ: Should I stand up?

19 MR. ORSINGER: I think the polls have
20 closed. Chip, the polls have closed. Let's quit
21 counting.

22 CHAIRMAN BABCOCK: Okay. 20 to 3, 4, or 5,
23 but anyway, they got slaughtered. The Chair not voting.
24 Okay. Let's talk about mandatory versus discretionary
25 recusal. Buddy.

1 MR. LOW: I have a question. What have you
2 accomplished if you get that and then you're out of it?
3 What have you accomplished?

4 CHAIRMAN BABCOCK: Well, you've accomplished
5 not getting called before the --

6 MR. LOW: I know, but in the case, for the
7 good of the case.

8 CHAIRMAN BABCOCK: For the good of the case?

9 MR. LOW: The party you're trying to protect
10 or keep him from hurting himself or whatever. If -- I
11 mean, what have you accomplished by getting that? The
12 information is to help the case move along and so forth,
13 but you're automatically out, who --

14 CHAIRMAN BABCOCK: Yeah, that's an argument
15 in favor of discretionary recusal.

16 MR. LOW: Yeah.

17 CHAIRMAN BABCOCK: Okay.

18 MR. LOW: How'd you guess that?

19 CHAIRMAN BABCOCK: Buddy's in favor of
20 discretionary recusal. We got that vote pegged now.
21 Richard.

22 MR. ORSINGER: I'm going to make a
23 suggestion here. I hope it makes sense to you, but when I
24 heard all the privileges being discussed I never heard
25 anything about the Fifth Amendment, and it seems to me

1 like the most likely privilege that's going to be waived
2 is that this poor guy or gal is going to admit that they
3 committed a crime, which will be the grounds for revoking
4 the probation. So to me the real issue here is not
5 whether somebody revealed an attorney-client privilege but
6 whether they admitted wrongdoing, and a proposal could be
7 that if the information the judge received ex parte is
8 privileged there's a mandatory recusal, and if the
9 information that the judge received ex parte is not
10 privileged then it's discretionary, because it's really
11 not outcome determinative that really -- the judge didn't
12 hear anything that it was not allowed to hear.

13 CHAIRMAN BABCOCK: Rusty.

14 MR. HARDIN: In most situations I'm familiar
15 with, Richard, it's a precondition to get into this
16 program that you're willing to admit it.

17 MS. TAYLOR: Yes.

18 MR. HARDIN: So that's taken care of.

19 MR. ORSINGER: So it's expected that the
20 judge who is adjudicating your probation will have heard
21 all of this privileged information?

22 MR. HARDIN: Well, the large jurisdictions
23 that's not an issue, but it is for the smaller ones
24 because there's only one judge there. I agree that's an
25 issue, but if you get to the larger jurisdictions, that

1 judge doesn't preside over a trial or a hearing later. If
2 he goes into drug court and drug court doesn't solve the
3 problem, he goes back into the regular system and another
4 judge hears it.

5 MR. ORSINGER: Okay.

6 MR. HARDIN: So that's in the larger ones.
7 I take it from Judge Evans that's the same thing up in
8 Tarrant County, but I don't know the answer there, except
9 that what you've done -- that privilege, it has to -- let
10 me back up. I don't see how anybody can meaningfully
11 participate in these programs without conceding they have
12 a problem. I mean, the system is not compelling them to
13 be in them. They're in them to try to help them and treat
14 them. So I think that pretty much you're going to give up
15 a Fifth Amendment right when you go into them to begin
16 with.

17 CHAIRMAN BABCOCK: Judge Newell.

18 HONORABLE DAVID NEWELL: I was just going to
19 say that part of -- this is getting back to the thing I
20 was trying to say earlier, which is when we're talking
21 about mandatory recusal in certain circumstances or
22 discretionary in other circumstances and we're trying to
23 put that into a comment on the rule, we're getting away
24 from just focusing on this is this one exception to the --
25 this is an exception to the canon that prohibits ex parte

1 communication, but the recusal thing is completely
2 separate, and it can be handled as a procedural thing, not
3 as a comment to the rule. All you really need to do in
4 the comment is say you can make these ex parte
5 communications, but those things, if you engage in them,
6 that might still -- you're not protected from a potential
7 recusal in some other circumstance, but all you need to do
8 is sort of direct to that may be something that could get
9 you recused, and if we want to worry about trying to limit
10 when recusal is mandatory, that belongs somewhere else.
11 Like that's how it's done.

12 You know, that's a how the thing is supposed
13 to work, but sort of the example, sort of the down and
14 dirty example that I keep thinking of is when I look at
15 this, say I'm the guy that wants to -- that thinks the
16 judge should be recused in the subsequent proceeding.
17 What am I going to cite to? Like how -- that's sort of
18 weird to cite to a comment to the rule. It's like a brand
19 new procedural rule instead of citing to a Rule of Civil
20 Procedure or something. I'm having to go, well, here's
21 the comment that says you were supposed to mandatorily --
22 mandatory to do that, appendix (c), canon whatever. You
23 see what I'm saying?

24 CHAIRMAN BABCOCK: Yeah. Good point. Yeah,
25 Rusty.

1 MR. HARDIN: Can I ask from the judges here
2 or anybody still on the phone, what do the smaller
3 jurisdictions do if it -- if the person flunks the program
4 or so, is that -- does that judge then preside -- is the
5 practice that judge then presides over what to do with
6 them?

7 CHAIRMAN BABCOCK: Judge Estevez.

8 HONORABLE ANA ESTEVEZ: Can I say two
9 comments?

10 CHAIRMAN BABCOCK: Two comments.

11 HONORABLE ANA ESTEVEZ: Okay. Because I
12 wanted to comment on the word "recusal." I'd like -- I
13 know I said it the last time we brought this up. I don't
14 believe we should use the word "recusal." I think we need
15 to use the word "transfer" because if we do recusal then
16 it has to go up to our regional, and then it has to come
17 back down, but what we do is our drug -- our drug court
18 judge also presides over criminal cases, and he's never
19 felt comfortable being the person to determine what will
20 happen, so he's always transferred the cases back to
21 wherever they originated. Because I may have a drug court
22 case, so I send it to him and then if my person flunks, he
23 sends it back to me, and if one of his people, it
24 originated with him, then he'll ask for one of us to take
25 it. He'll just say, "Hey, can you take this case" and

1 we'll say, "Sure, we can hear it." And I want to --

2 MR. HARDIN: That's what happens in Houston.

3 HONORABLE ANA ESTEVEZ: Without saying
4 anything too bad about how important I believe this is, my
5 assistant DA at one point was very angry because he had so
6 much pressure from whoever was participating in that drug
7 court to not do what he would normally do on our normal
8 cases because they felt like every time they messed up in
9 drug court that should be like another -- an extension of
10 their community service, so they were angry if we didn't
11 do what the person refused to do that got them flunked
12 out, because they don't always just flunk out. They might
13 have a recommendation they're going to go to SAFP, and
14 they say, "No, I don't want to go to SAFP," and if they
15 don't agree to it, they get kicked out of the program.

16 Well, if they come back and they really want
17 to do -- you know, serve a sentence and they don't want to
18 go to SAFP, and we give them a sentence and it ends up
19 being less time than whatever they would have had -- which
20 is a rehabilitation. It's an in-house rehabilitation, so
21 I'm sorry, I'm using words that I just assume everybody in
22 here knows, but it's a minimum six months program. You
23 know, so it's day for day for six months, and you're
24 getting rehabilitation, and that might be where you are
25 because of your mistakes throughout, you know, the first

1 time you did drugs they stuck you in jail, the first time
2 you did this, you know, another weekend and then at some
3 point they kick you out.

4 So that shows the conflict. There's
5 obviously a conflict. If they get mad and they are
6 yelling at my district attorney, who -- or assistant
7 district attorney who has nothing to do with the case and
8 putting that type of pressure on, well, they shouldn't
9 feel like they can just get out of the program and get an
10 easier one. Well, he should be able to decide or they
11 should have an open motion with me, and it should be open
12 and fair, without me having all of those preconceived --

13 CHAIRMAN BABCOCK: Stuff.

14 HONORABLE ANA ESTEVEZ: Stuff.

15 MR. ORSINGER: What do you do if you're the
16 only judge in town?

17 HONORABLE ANA ESTEVEZ: Well, I think you
18 could put in here, "if available." I don't know what you
19 do if you're the only judge in town, because I don't think
20 they have a drug court, frankly. I don't think there is
21 one court that has a -- I think there's like a minimum
22 amount of courts you have to have before you can have drug
23 courts, so I don't think it's actually an issue in the
24 state of Texas, but I could be wrong.

25 HONORABLE DAVID EVANS: The only place we

1 find them, that I have them in 18 counties -- David,
2 please don't correct me in public -- is in Denton in
3 Tarrant County, because it's large enough to have a
4 treatment program, and that judge will handle the
5 treatment and then the case will go back to the
6 originating court. That's how our system --

7 MR. HARDIN: Same for Harris.

8 HONORABLE DAVID EVANS: -- works all the way
9 around. I'm not familiar with this problem that Judge
10 Reyes is addressing, so I can't really speak to that, but
11 that -- that's a different issue.

12 CHAIRMAN BABCOCK: Skip Watson.

13 HONORABLE DAVID EVANS: We have a different
14 judge. We don't hear the ex parte.

15 CHAIRMAN BABCOCK: Skip.

16 MR. WATSON: For those of us who weren't on
17 the committee and who are not familiar with this, why
18 wouldn't a judge recuse every time the person comes back
19 before him?

20 HONORABLE ANA ESTEVEZ: Transfer.

21 MR. ORSINGER: Transfer.

22 MR. WATSON: Well, whatever. Pick your
23 word. Why wouldn't it be automatic with every judge if
24 they have known something that could prejudice the
25 determination that came in, you know, under confidence or

1 whatever. I don't understand what --

2 CHAIRMAN BABCOCK: Well, because they're in
3 a small county. They're going to have to get a visiting
4 judge, and they've only -- they've heard like one sentence
5 that -- or two sentences. There's some minimal ex parte
6 going on. So they say, "I don't need to transfer this."

7 MR. HARDIN: But that judge has -- this guy
8 has just rejected what that judge thought he ought to do,
9 and now he's going to sentence him. It's a horrible,
10 horrible deal. It should always be -- it should always be
11 a transfer. Most judges in the smaller counties ride a
12 district of two or three counties, don't they, so that
13 there's another judge in it. I mean, do we really have
14 that many circumstances of where drug courts would be
15 where there's only one judge?

16 CHAIRMAN BABCOCK: Yeah, I don't know. I
17 was just being the devil's advocate. Nina, is that --

18 HONORABLE DAVID EVANS: I would only speak
19 to one issue on recusal. I understand the comment about
20 not putting in a canon, but it may be -- maybe I think of
21 it as a standard of conduct for the judge who's heard an
22 ex parte communication, that you will recuse yourself
23 unless you have --

24 CHAIRMAN BABCOCK: Transfer.

25 HONORABLE DAVID EVANS: And that gives him a

1 bright line to -- as conduct to go under in that matter.
2 And I think that you get the protection of hearing it, and
3 then you get the protection of trying it, if you have to,
4 if you have written consent. And I think if you feel bad
5 about the judge, you're not going to give written consent.
6 That protects the judge all the way through for the
7 conduct.

8 CHAIRMAN BABCOCK: Holly.

9 MS. TAYLOR: Well, I was just going to say
10 it must be an issue because Judge Reyes in his memo said
11 "what if there's not another judge in the county or
12 jurisdiction; e.g., district judge for a felony case.
13 Visiting judge would need to be appointed." So he's
14 identifying this as an issue.

15 MR. WATSON: That's correct.

16 MR. ORSINGER: Why don't we ask David? He's
17 head of the whole court system.

18 MR. SLAYTON: I don't know if I would
19 describe it that way.

20 CHAIRMAN BABCOCK: I think what he meant to
21 say was emperor.

22 MR. ORSINGER: Administrator.

23 CHIEF JUSTICE HECHT: I think with what's
24 coming, you should be the head.

25 MR. SLAYTON: I don't know, there may be

1 situations where it exists today -- I think it would be
2 rare -- where there's a single judge in a county that has
3 a specialty court, but I think it is absolutely possible
4 that that could be an issue. There's new funding coming
5 to all the counties starting January 1st that will allow
6 them to start specialty courts in the rural areas, and
7 there's a big push by the Texas Association of Specialty
8 Courts just a few weeks ago to say can we get these in all
9 counties in the state. So we may have situations where
10 there's a single judge doing that, and I don't know the
11 practice in all of those counties. My guess is that in
12 some counties the judge may be hearing the disposition of
13 the underlying case on the merits, and anyway, I think
14 that you-all have expressed your concerns about it, which
15 I think I would share as well.

16 CHAIRMAN BABCOCK: Yeah. Good. Justice
17 Christopher, Justice Gray. Nina, you had your hand up
18 about 15 minutes ago.

19 MS. CORTELL: Why don't we wait, and I'll
20 come back around.

21 CHAIRMAN BABCOCK: Okay. Justice
22 Christopher.

23 HONORABLE TRACY CHRISTOPHER: Well, we
24 already have a comment to Canon 5 talking about recusal.
25 So it's not -- it would not be unheard of to add another

1 comment discussing the recusal.

2 CHAIRMAN BABCOCK: Transfer.

3 HONORABLE TRACY CHRISTOPHER: But I would
4 put it more in the language -- I would -- if we're going
5 to include it, I would want it to be discretionary, and I
6 would include it -- I would make it more like the comment
7 to Canon 5. If y'all remember, if you have your book
8 here, weirdly the comment to Canon 5 is not here, but you
9 can find it online, and I'll read it. "A statement made
10 during a campaign for judicial office, whether or not
11 prohibited by this canon, may cause a judge's impartiality
12 to be reasonably questioned in the context of a particular
13 case and may result in recusal." So to me I would -- I
14 would make similar wording on, you know, "receipt of ex
15 parte communications while working on a specialty court
16 may cause a judge's impartiality to be reasonably
17 questioned in a different proceeding and may result in
18 recusal."

19 CHAIRMAN BABCOCK: Okay. Justice Gray.

20 HONORABLE TOM GRAY: I was going to talk
21 about the case load in the small counties. You have to
22 remember that you've got to have this program going on in
23 the small county and then you have to have someone that
24 failed the program, and so the frequency with -- and this
25 was from the judge that I talked to about this. He said,

1 "I can't see that as a real problem because" -- I think B.
2 B. Schraub was his -- is his administrative judge; and he
3 said they're going to just appoint somebody in a situation
4 like that, a visiting judge, on those one or two cases
5 where somebody flunks out of the program; and so that
6 should not be a problem to recuse or transfer it to
7 another judge; and that's how I would change the
8 discretionary recusal, is to make it where they should
9 consider whether transfer or recusal is proper under 18b.
10 So --

11 CHAIRMAN BABCOCK: Okay. Well, let's have a
12 vote on this. Oh, Nina, you wanted to say something.

13 MS. CORTELL: I did want to refer you to the
14 option B under mandatory recusal, which Andrew wrote,
15 knowing that we should not use the word "recuse." He must
16 have been clairvoyant there, and if we went with something
17 like that on the mandatory side, if we were to entertain
18 that then we would also want to incorporate Judge Chitty's
19 concept that we're really not talking about any case, but
20 kind of the final hearing on the merits, which is language
21 that we worked real hard to embrace but ended up having
22 some trouble, and that's why we went to sort of a temporal
23 trigger in the current comment. But I just wanted to
24 mention that B might be close to a template for a
25 mandatory suggestion.

1 CHAIRMAN BABCOCK: Yeah. I think that's a
2 great point. Why don't we have two votes? One is
3 mandatory versus discretionary, and then on mandatory, if
4 it's going to be mandatory, A or B. How about that?

5 MS. CORTELL: That works, with the caveat,
6 as I said, we'll tailor it to some of the language that
7 Judge Chitty gave us today.

8 CHAIRMAN BABCOCK: Right. Right. So
9 everybody in favor of mandatory, raise your hand.

10 Everybody for discretionary? So 17 for
11 discretionary, 10 for mandatory, the Chair not voting, but
12 if the Court wants to go mandatory, how many are in favor
13 of option A?

14 HONORABLE DAVID EVANS: Well, let me just
15 point out, if you have discretionary, the counsel only has
16 one choice but to file a motion for recusal, and all of
17 the privileged information then and all of that private
18 information that went on in the treatment, then starts to
19 flow in into the recusal hearing, and all of the exchanges
20 between the judge and the person in the program starts to
21 flow in. Because they'll say that the judge has made
22 statements during treatment that would indicate a bias and
23 prejudice. They would go to 18b(a) is where they would
24 go.

25 CHAIRMAN BABCOCK: Yeah.

1 HONORABLE DAVID EVANS: And we would end up
2 trying all of that private material. That's why I don't
3 think it works.

4 CHAIRMAN BABCOCK: I'll construe that
5 comment as a motion for rehearing.

6 HONORABLE DAVID EVANS: Well, I was
7 disappointed there wasn't any argument, but I said so much
8 unnecessarily earlier today I thought I would be quiet.

9 CHAIRMAN BABCOCK: Yeah, Judge Peeples.

10 HONORABLE DAVID EVANS: I think there's a
11 real problem with -- I'm sorry, David.

12 HONORABLE DAVID PEEPLES: Judges already
13 have the right to recuse -- the discretion to recuse.

14 CHAIRMAN BABCOCK: Right.

15 HONORABLE DAVID PEEPLES: It happens all the
16 time.

17 CHAIRMAN BABCOCK: Yeah.

18 HONORABLE DAVID PEEPLES: So this vote I
19 think is meaningless because we've already got it. The
20 question is, is the burden on the judge to get consent or
21 is the burden on the other side to urge "I don't consent"?
22 That's the real question, and mandatory to me in this
23 context means if someone asserts it, there's no hearing.
24 You've just got to recuse. That's what we ought to be
25 talking about.

1 HONORABLE DAVID EVANS: And I think you're
2 right. The model in the rule, that was brilliantly
3 drafted, is that all recusal grounds are mandatory unless
4 you get consent. That's how 18b is set up.

5 HONORABLE DAVID PEEPLES: But it's got to be
6 urged, doesn't it? Otherwise it's like disqualification.

7 HONORABLE DAVID EVANS: The only one that's
8 different here, David, is I think is this is not a ground
9 being disclosed by the judge. This is a known fact to all
10 the parties, and so there's a timing issue as which point
11 you would have to -- and I think you're probably right to
12 place the burden on the movant, but that then moves over
13 to the procedural rules. If the judge has to recuse
14 without written consent, I think he has to initiate
15 getting a consent.

16 CHAIRMAN BABCOCK: Yeah, Steve.

17 HONORABLE STEPHEN YELENOSKY: I guess maybe
18 I'm understanding it differently. I thought mandatory
19 meant -- I thought the situation was that the judges in
20 the specialty courts did not want to be bound to recuse if
21 the situation arose that they were going to be deciding
22 another matter, with or without that being urged by an
23 individual, and then discretionary is where the judge can
24 decide whether or not to recuse, because saying the
25 individual has to urge it is kind of meaningless in this

1 context. I don't see that that plays any role in it.

2 CHAIRMAN BABCOCK: Okay. We only have this
3 room for three more minutes. There's going to be a
4 wedding here at 6:00. Actually, we have a bunch of people
5 here that could preside, you being one of them.

6 HONORABLE DAVID PEEPLES: Why not say if
7 there's been ex parte communication, the judge must
8 transfer the case unless the parties consent to the judge
9 hearing the case.

10 CHAIRMAN BABCOCK: That's a good suggestion.
11 We don't even need to vote on that it's so good.

12 MR. ORSINGER: So before we close out,
13 Justice Newell or Judge Newell said that maybe this
14 doesn't belong here in Canon 5, maybe it belongs somewhere
15 else, and I think somebody ought to consider that.
16 Because this looks like an odd place to stick a recusal
17 ground.

18 CHAIRMAN BABCOCK: You know the good news is
19 we're coming back tomorrow. Nina, thanks.

20 MS. CORTELL: Thank you.

21 CHAIRMAN BABCOCK: Great work on this.
22 Judge Chitty and Judge Byrne, if you're still on the
23 phone, thank you again for your help.

24 (Recessed until following day)

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REPORTER'S CERTIFICATION
MEETING OF THE
SUPREME COURT ADVISORY COMMITTEE

* * * * *

I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above meeting of the Supreme Court Advisory Committee on the 13th 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 \$ 2,020.00.

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

/s/D'Lois L. Jones
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