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**MEETING OF THE SUPREME COURT ADVISORY COMMITTEE**

September 28, 2018

(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 28th day of September,  
2018, between the hours of 9:00 a.m. and 5:07 p.m., at the  
Texas Association of Broadcasters, 502 East 11th Street,  
Suite 200, Austin, Texas 78701.

**INDEX OF VOTES**

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

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Parental Termination Jury Charge	29375
Parental Termination Jury Charge (3 votes)	29385
Limited Scope Representation	29436
Proposed changes to Disciplinary Rules	29515
Proposed changes to Disciplinary Rules (3 votes)	29529

**Documents referenced in this session**

18-07 Jury Charge in Termination Cases Subcommittee Report (9-25-18)
18-08 Appendix C - Jury Charge in Parental Termination, Jury Charge in E.B.
18-09 HB 7 Task Force Report to Texas Supreme Court
18-10 Majority Grounds Separate Question From Best Interest (Exhibit F to report)
18-11 Minority Grounds Best Interest in Same Question (Exhibit E to report)
18-12 Proposed Amendments to Texas Rules of Civil Procedure 8 and 10 (9-26-18 redline)
18-13 Social Media Subcommittee Report (9-22-18)
18-14 Final Proposed Changes to Disciplinary Rules (9-21-18)

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1 and Justice Pemberton, what about putting procedural rules  
2 on limited scope representation into the morning? Would  
3 that be okay?

4 HONORABLE JANE BLAND: Yes. That would be  
5 okay. Chris Nickelson can't be here today, but we do have  
6 his comments, so we can proceed.

7 CHAIRMAN BABCOCK: Okay.

8 HONORABLE JANE BLAND: But if we're going to  
9 do that I'll let him know that we're going to go ahead and  
10 cover it today and he doesn't need to drive down tomorrow  
11 morning.

12 CHAIRMAN BABCOCK: Okay. All right. Let's  
13 do that then, and local rules for Saturday morning?

14 MS. CORTELL: Yes, thank you.

15 CHAIRMAN BABCOCK: The Chief Justice is  
16 going to be here later today, but right now he's on a  
17 sacred mission, I think we all would agree, or at least  
18 many of us would agree, and so he won't be here this  
19 morning; and in his place the able associate justice of  
20 the Supreme Court will give us a status report. Justice  
21 Boyd.

22 HONORABLE JEFF BOYD: Thanks, Chip. Good  
23 morning. You're all going to come up and ask Chip at the  
24 break what the sacred mission was, so I guess he left that  
25 blank intentionally. I'll leave it there. Happy to

1 report on a number of things on behalf of the Chief this  
2 morning. First, an update on Research Texas, which is the  
3 program that has been implemented to provide for  
4 electronic access of court records in the state. As you  
5 know, since last year judges and attorneys of record on a  
6 case and court clerks have had access to filed records  
7 through the Research Texas system. We asked the Judicial  
8 Committee on Information Technology to make  
9 recommendations on how to expand that next to include all  
10 licensed attorneys in Texas to have access to records in  
11 all cases except for records that are confidential by law  
12 and then also for members of the public, and they made  
13 those recommendations this summer to the Court, and we  
14 have reviewed those and approved those recommendations  
15 preliminarily and are working on the last details in an  
16 order that would approve expanding access.

17           The effect would be that people would be  
18 able to view documents online for free and then download  
19 them for a small fee, which currently is proposed to be  
20 set at 10 cents per page and up to \$6 for the entire  
21 document. The proposal includes privacy and security  
22 concerns. So, for example, as one example, members of the  
23 public would be allowed to access and view the documents  
24 and then pay to download them, but only after registering  
25 in the system. So there would be some identification

1 requirement for people who do that and then also the  
2 entire system would be set up in a way that would detect  
3 and be able to interrupt massive downloading efforts, that  
4 data mining kind of efforts, and so we've asked them to do  
5 that, and that is part of the proposal.

6           We've asked JCIT to make specific  
7 recommendations on whether the courts should -- whether  
8 the rules should require or whether the courts should  
9 order all trial court orders and judgments to be e-filed  
10 so that they will be accessible through the system. One  
11 of the gaps in the current makeup is that you can get all  
12 of the filings, but you can't get the orders. And that's  
13 because the way the feed into the Research Texas database  
14 is the fact that it's been e-filed, and so the question is  
15 do we require trial court judges or their staff or clerks  
16 to e-file all of the orders and judgments, and so we're  
17 waiting on a recommendation on that, and then we're also  
18 in conjunction with all of that are looking at proposals  
19 to amend the current e-filing and sensitive data rules,  
20 which include recommendations that this committee made  
21 last year, and so that's where we stand on Research Texas.

22           We have recently this past summer received  
23 recommendations from the Texas Judicial Council on a  
24 number of issues, and let me highlight a few of those.  
25 One, TJC has recommended that we create by rule a business

1 court for complex litigation that parties can opt into as  
2 parties, so that recommendation has come to us.  
3 Recommended that we amend the rules to improve certain  
4 case management practices, such as restricting the use of  
5 citation by publication, requiring certain diligence to  
6 notify defendants of a lawsuit digitally, permitting  
7 service of process by social media, requiring scheduling  
8 orders to include deadlines including trial dates, amend  
9 the rules to add pleading requirements such as an original  
10 petition would need to refer to a website that explains  
11 how to find a lawyer and respond to the lawsuit, requiring  
12 fact-based pleadings with statements of evidence. A  
13 recommendation to amend the canons of judicial conduct to  
14 allow judges to provide basic legal information to  
15 self-represented litigants, and a recommendation to amend  
16 the rules to create a presumption against recusal of  
17 judges based on contributions if the judge has complied  
18 with the Judicial Campaign Fairness Act contribution  
19 levels.

20                   So all of these are examples of  
21 recommendations that have come to us recently from the  
22 judicial council, and the Court is looking at them and  
23 anticipates referring some of those back to this committee  
24 to look at on behalf of the Court and make  
25 recommendations.

1           We spent some time this summer -- I want to  
2 update you -- every year the Court has in late August our  
3 big petitions conference, and we have made a habit of  
4 every other year going out of state for that petitions  
5 conference and spending a half a day or more with the  
6 Supreme Court of that state. So we've been to New Mexico,  
7 Colorado. This past year -- this past summer we were in  
8 Utah, and we spent a really good time visiting with the  
9 Utah Supreme Court and came away with some good ideas that  
10 we're looking into. A lot of court management and access  
11 to justice ideas come out of these meetings.

12           The two in particular that we're really  
13 looking at that Utah is involved in, they are rolling out  
14 a licensed paralegal practitioner program, rolling that  
15 out this fall, comparable to a nurse practitioner. The  
16 program allows paralegals who have the special license to  
17 provide services that currently paralegals are not able to  
18 provide; and Utah in particular is focused on authorizing  
19 them to provide services in debt collection areas, family  
20 law areas, and landlord-tenant areas; and so we are  
21 looking into what they are doing there. They've also  
22 rolled out a online dispute resolution program that was  
23 very interesting. For small cases \$11,000 or less,  
24 mandatory that those small claims cases are routed into an  
25 online dispute resolution program that efficiently works

1 through a dispute resolution plan before they're able to  
2 get to court, reduces expense and time to resolve these  
3 cases. So we're visiting -- continue to visit with them  
4 as they roll these out and giving thought to those.

5           The next item is the Uniform Bar Exam. We  
6 discussed this with the Utah Supreme Court as well because  
7 they have recently moved to the UBE. As the Chief  
8 reported last meeting, we created a task force to make  
9 recommendations to us on the Uniform Bar Exam; and they  
10 did recommend that we adopt the UBE with a Texas law  
11 component; and at our request the Board of Law Examiners  
12 has now proposed a time line for implementing that UBE;  
13 and under that proposed time line it would begin as early  
14 as the February 2020 bar. So we're still looking at it  
15 and will consider our next steps. Obviously we'll open it  
16 up to public comments before any change is approved, but  
17 progress is continuing on that study.

18           And then finally I will mention that we have  
19 coming up a summit on mental health in the judicial  
20 system. As the Chief mentioned last meeting, the Court  
21 and the Court of Criminal Appeals jointly created a  
22 Judicial Commission on Mental Health earlier this year.  
23 Next month the commission is joining forces with the  
24 Children's Commission to host a summit in Houston, and the  
25 goal is to be more -- through this summit to have a very

1 focused effort on developing strategies to address mental  
2 health challenges of both adults and children in the  
3 judicial system. Jackie can provide more details on the  
4 specific date and time of that, but we're excited to see  
5 this commission has hit the ground running in this  
6 important area. So those are the items I have to report  
7 on, Chip. I'll let the Chief add whatever he wants when  
8 he gets here.

9                   CHAIRMAN BABCOCK: Okay. And I think we can  
10 unanimously report to the Chief that you did a terrific  
11 job in his absence.

12                   HONORABLE JEFF BOYD: Thank you very much.

13                   CHAIRMAN BABCOCK: Thank you, Justice Boyd.  
14 A couple of scheduling things. I'll remind everybody that  
15 immediately following our session today at 5:00 o'clock,  
16 starting at 5:30 at Jackson Walker in Austin, 100  
17 Congress, there will be a cocktail reception and a team  
18 picture; and we'll try to take the picture earlier in the  
19 session so nobody looks too loopy when they're being  
20 photographed; and also upcoming, we had to move the  
21 December meeting for a lot of reasons to December 7th; and  
22 that is going to be what I have started to call our deep  
23 thoughts meeting. We'll have several members of the  
24 Legislature here, recognizing they'll be in session  
25 starting in January; and there will be a number of

1 speakers who will present some ideas on how we can make  
2 the civil justice system better in Texas, including  
3 fleshing out this very exciting and unique for us plan  
4 that has spawned of these meetings with the Utah Supreme  
5 Court and other courts and really, really exciting stuff.  
6 We still have places on the agenda, however, so if anybody  
7 here thinks there is somebody that should speak at this  
8 session, it can be a member of the committee or can be  
9 somebody from outside the committee, let me know in the  
10 next couple of weeks and we'll see if we can fit them onto  
11 the agenda.

12                   We do have somebody from the American  
13 College of Trial Lawyers who is going to travel down here  
14 at his own expense and tell us what the American College  
15 is up to in terms of proposing civil justice reform; and  
16 let's be nice to him, unlike some of the other people that  
17 we have brought in that presented ideas and we trashed  
18 them immediately, as is our style; but I think people from  
19 out of state maybe don't understand our style as well as  
20 we do, so but I warned the guy. I said, "Hey, you might  
21 present something, and it might get dumped on by certain  
22 members of our committee who are unpredictable." So in  
23 any event, that's what's coming up, and I'm excited about  
24 it.

25                   I'm hoping that Professor Dorsaneo and

1 Robert Levy are going to be able to join us by phone.  
2 That's what's going on over here. They couldn't be here  
3 in person, but we'll try to get them on the phone, but we  
4 won't wait for that, and instead --

5                   PROFESSOR HOFFMAN: Chip, is December 7  
6 planned to be a one-day meeting?

7                   CHAIRMAN BABCOCK: One day meeting on  
8 December 7th, yes. And Professor Carlson, who is the  
9 chair of the jury questions on parental termination cases,  
10 will lead the discussion on that item, which is item three  
11 on your agenda.

12                   PROFESSOR CARLSON: All right. We have  
13 three -- our subcommittee has three different agenda items  
14 during this meeting, so we are going to divide and conquer  
15 insofar as the presentation; but before I pass this off to  
16 Judge Peeples, I wanted to first thank our subcommittee  
17 and note that two members aren't listed who really were  
18 oars in the water and very helpful. Justice Tracy  
19 Christopher and Justice Bill Boyce.

20                   As you know from your reading, the  
21 Legislature asked the Supreme Court to give its input on  
22 whether broad form submission as set forth in E.B. should  
23 continue in parental termination cases, at least when it  
24 was sought by the state. The Court appointed a blue  
25 ribbon committee, which Exhibit A is their report, and

1 it's a very well done report. Two of our members of this  
2 committee served on it, Richard Orsinger and Lisa Hobbs,  
3 both of which were very gracious in sharing their thoughts  
4 with us and giving us their time. As did Carlene Dunpole  
5 brought to our attention an issue that we'll discuss, and  
6 I note that Justices Lehrmann and Guzman also served on  
7 this committee in a liaison capacity. So with that  
8 background I'm going to pass it to Judge Peeples and  
9 invite everybody on our subcommittee to jump in.

10 HONORABLE DAVID PEEPLES: I'd like for you  
11 to have before you four of our exhibits. First is the  
12 memo, seven pages, and I hope you read that, but I may  
13 refer to it a little bit, but the main three are appendix  
14 C, the actual jury charge in E.B., a Supreme Court case.  
15 This has got two exhibits here. The next is the task  
16 force's recommended jury questions. That's pages 15 and  
17 16 of the task force report, and then finally Exhibit F,  
18 which is our subcommittee's recommended form for the  
19 questions. And I think it would be helpful -- instead of  
20 having abstract discussions it would be helpful to focus  
21 on some jury questions, and I'm going to start with the  
22 actual jury charge in E.B., which mine says Appendix C,  
23 but that may be something different.

24 Let me just point out some things about --  
25 this is a broad form jury charge, 1990, right after the

1 Supreme Court had made that mandatory in Rule 277, and the  
2 Court came on very, very strong in saying you've got to  
3 submit broad form questions. You don't have any  
4 discretion not to if it's feasible. They did a second  
5 thing, too, which they approved, they didn't mandate, but  
6 they approved some disjunctive language in this charge,  
7 and I want to walk you through it. So the broad form  
8 question, it's got the two elements in a termination case  
9 that have to be proved submitted in one question. In this  
10 country we don't take children away from people just  
11 because it's in the child's best interest. We can find a  
12 better place for a lot of kids, but you don't do that.  
13 You've got to have some culpability by the parent, they've  
14 done something wrong; and in E.B. the jury found that they  
15 had either neglected or abused the child, and, of course,  
16 best interest. So some sort of culpability, a termination  
17 ground, and these are stated in the Family Code. The jury  
18 has to find that, and that provides the culpability on the  
19 parent, and the second thing the jury has to find if  
20 you're going to take children away from people is best  
21 interest.

22           So look at -- the first part of this actual  
23 question in E.B. says "For the parent-child relationship  
24 in this case to be terminated it must be proven, clear and  
25 convincing evidence, at least one of the following events

1 has occurred." At least one. One or the other or both.  
2 That's disjunctive, and the first one is a neglect ground,  
3 and the second one is an affirmative abuse ground.  
4 Speaking broadly, and if the jury -- with a disjunctive  
5 submission if the jury finds either of those or both,  
6 they've found the culpability element.

7           And then the last part of that charge says,  
8 "In addition it must also be proven," best interest. So  
9 you've got both of those submitted in one question. Now,  
10 under the old regime you would have the termination  
11 grounds in question number one and best interest in  
12 question number two. I don't think the word granulated  
13 really is appropriate for that, but it certainly is  
14 separate. This is a broad form question, both of those  
15 elements submitted in one question, one answer blank.

16           Notice also at the very end, the bottom line  
17 question is should the parent-child relationship be  
18 terminated. That asks the jury the ultimate question.  
19 The findings simply say there's been some culpability by  
20 the parents and it would be best to terminate. Should it  
21 be terminated and should that be the ruling of the court  
22 is a little bit different, but the ultimate question is  
23 submitted in that final. So that's the actual question in  
24 E.B. in 1990; and in the 28 years since then courts have  
25 gone way beyond this and submitted not just two related

1 grounds like abuse and neglect, which are very -- they're  
2 different, but they're similar; and courts have submitted  
3 disjunctively in broad form questions abuse, neglect,  
4 failure to obey a court order, was the child born addicted  
5 and so forth; and if the jury answers "yes" to any of  
6 those, not all of them, but if the jury answers "yes" to  
7 that disjunctive part of the question then they've  
8 answered that part; and the problem is that it's very  
9 possible that jurors, three could find "yes" to neglect, a  
10 different three could find abuse, a different three could  
11 find an addictive -- the mother took drugs during the  
12 birth -- the pregnancy. Another two or three could find  
13 they failed to obey a court order, and so you would have  
14 non-unanimity maybe. You wouldn't have 10 jurors voting  
15 for any of the predicate grounds, but you would have a  
16 total of 10 answering the question; and, of course, best  
17 interest is wrapped up in there.

18           So that is the problem, and there are  
19 reported cases where judges have submitted six different  
20 termination grounds in one question, linked with an "or."  
21 Six things, A, B, C, D, E, or F, and we don't know if 10  
22 answered "yes" to any one of those, but a total of 10 came  
23 up with "yes" to some or all of those, and that's how you  
24 get the "yes" answer, and that has become a problem, and  
25 that's the reason that we're here today.

1 I want to turn now to the task force's  
2 recommended questions. By the way, Richard Orsinger, as  
3 Chip mentioned, was on that, and I had a good talk with  
4 Richard and with Dean Rucker, who chaired it, and I think  
5 that most -- by the way, there wasn't a single unanimous  
6 vote on the subcommittee on anything that we did that I  
7 can recall. We reached consensus on a lot of things, but  
8 I think it's fair to say that most of the committee,  
9 subcommittee, is basically okay with what the task force  
10 recommends, but we want to tweak some things.

11 So look at the task force's recommended  
12 questions, and so they've got three different grounds.  
13 The grounds, of course, are listed in the Family Code.  
14 That's the culpability, got to have that, and so the task  
15 force says, let's break those -- just, for example, you  
16 could have different ones and a different number, but they  
17 recommend separate questions for each termination ground,  
18 and the first question there talks about allowing the  
19 kids -- placing the children or allowing them to remain in  
20 bad conditions, basically just endangered their  
21 well-being. That's the ground in question one. That was  
22 one of the grounds in E.B., and they just have that as an  
23 example, a separate question. Notice that they've got  
24 four answer blanks. You've got two parents and two  
25 children, so to terminate all four children and the two

1 parents you would have to have a "yes" to all of those,  
2 but maybe the jury would not want to terminate all of  
3 them; but they think it's okay, and we do, too, to submit  
4 four -- four questions, because they're asking about the  
5 same thing and it just makes no sense to have four  
6 identical questions for each child and each parent. So  
7 notice that they recommend that.

8           And then question two is subdivision (e).  
9 That's either engaging in abusive conduct or allowing --  
10 putting kids with someone who abuses the children. That's  
11 an abuse question, little different from neglect, and so  
12 they recommend if you've got those two in one case, and  
13 which they did in E.B., these were the two grounds  
14 submitted disjunctively in E.B. Task force recommends  
15 submitting those separately, getting separate answers.

16           And then question three is thrown in by the  
17 task force. It's just a different thing where the  
18 Department of Family and Protective Services, I think it's  
19 called, and professionals are working with this family,  
20 trying to get them to work their way back to getting their  
21 kids back, and they're just -- it's not working out, and  
22 the jury is asked in question three is that a basis for  
23 terminating, that the parents didn't work their way back  
24 to having their kids, with a different question.

25           And then they have a fourth question, which

1 is the best interest question. Okay. In other words, the  
2 jury is going to need to find at least one of grounds one  
3 through three, questions one through three, one or more;  
4 but to terminate they'll also find out -- have to find  
5 that it would be best for the child or children to do  
6 that, so that's what question four does.

7           The subcommittee -- and we may have been  
8 unanimous on this, but we were close, we think that  
9 question four ought to be predicated on a "yes" answer to  
10 one or more of questions one through three, because if the  
11 jury answers "no" to all of questions one, two, and three,  
12 best interest would be immaterial, because we don't  
13 terminate just because it would be best for children. The  
14 parents have to have done something wrong, so we think  
15 they ought to be predicated, and notice also that the task  
16 force's question four does not ask the jury the ultimate  
17 question, should parental rights be terminated. It asks  
18 would it be best, but it doesn't say should we go the  
19 extra step; and the section 161.001 of the Family Code,  
20 which lists all of these termination grounds says "the  
21 court may terminate" if these things happen; and there was  
22 concern on the subcommittee that the word "may" might  
23 embolden some judges to think, "Well, I know the jury has  
24 said all of this, but I don't think it's right, and so I'm  
25 going to exercise my discretion, may is a permissive term,

1 my discretion to not terminate"; and we think if a jury is  
2 requested the jury ought to answer the ultimate question;  
3 and so our recommended question has "should" in there.

4           So let's look at Exhibit F, and that is some  
5 sample questions that the subcommittee came up with, which  
6 are basically structured like the task force recommends,  
7 except that we have best interest predicated on a "yes"  
8 answer to one of the previous grounds, and we have the  
9 bottom line ultimate question answered by the jury. So  
10 question one, which is just an example, asks about clear  
11 and convincing evidence, of course. "Did either of the  
12 parents knowingly place the child or allow the child to  
13 remain in endangering conditions?" Got to have a "yes"  
14 answer to that.

15           And question two submits something totally  
16 different. It's an abandonment question, took the child  
17 in and said, "I'm leaving and I'm not coming back."  
18 That's different from abuse. Abandonment is kind of hard  
19 in the same time period to abuse a child that you've  
20 abandoned and you're nowhere to be found, a little  
21 inconsistent; but if the evidence raises those, just  
22 examples of two different questions, two different  
23 grounds, and if the evidence raises those and they're  
24 asked to be submitted we think they ought to be submitted  
25 separately.

1                   And then our best interest recommendation,  
2 which is question three, notice that it's predicated. If  
3 you've answered "yes" to either one or two, then you  
4 answer three. Otherwise you don't answer three, and three  
5 asks about best interest with termination being the best  
6 interest of the child, and would the parent -- should the  
7 parent-child relationship be terminated, so "should" is in  
8 there, too. So for a majority of the subcommittee the  
9 only real difference we had with the proposed questions by  
10 the task force was we think the best interest ought to be  
11 predicated and the ultimate question ought to be submitted  
12 to and answered by the jury.

13                   So I think the issues to discuss, Chip, are  
14 separate questions or stick with broad form.

15                   CHAIRMAN BABCOCK: Yep.

16                   HONORABLE DAVID PEEPLES: That's not a done  
17 deal, and there may be others, and our memo raises several  
18 questions, and at this point I want to see if there are  
19 other members of the subcommittee that want to either  
20 supplement, disagree with, modify what I have said. And  
21 Tracy Christopher has got a significant issue that she  
22 wants to bring up. So I just invite the other members of  
23 the subcommittee to speak up if they want to.

24                   CHAIRMAN BABCOCK: Justice Christopher.

25                   HONORABLE TRACY CHRISTOPHER: Well, my first

1 opinion is that we should stick with E.B., but if we don't  
2 stick with E.B. then how should we phrase the question,  
3 and so I have presented a minority question, which is  
4 Exhibit E. Well, actually it's listed as tab F, and it's  
5 Exhibit E. It says at the top "Exhibit E, minority." So  
6 the difference here is that I have asked the ultimate  
7 termination question based on one ground and best  
8 interest, and then it would be repeated every other  
9 ground. Ground, best interest, ground, best interest,  
10 ground, best interest in one question, because to me the  
11 majority opinion that has the, you know, three grounds and  
12 then if you've answered one or two there, what about best  
13 interest, can create the same sort of -- if this is a  
14 Casteel issue, which I don't think it is, could create the  
15 same sort of Casteel issue.

16           So, for example, in the -- I don't think it  
17 is a Casteel issue, but if it was a Casteel issue, having  
18 the majority submission the way it is with three grounds  
19 and then best interest, if one of those three grounds was  
20 legally incorrect, we wouldn't know whether they were --  
21 and the jury answered "yes" to that. Let's say the jury  
22 answered "yes" to all three of those grounds and then they  
23 go to the best interest, should it be terminated, we don't  
24 know if they terminated based on the legally incorrect  
25 ground, which is Casteel. Okay. And it is possible in

1 these parental termination cases that there could be a  
2 legally incorrect ground and then it would fall into  
3 Casteel, but I remind everybody that in Casteel the jury  
4 question was 11 different grounds under the DTPA and the  
5 Insurance Code, and the Supreme Court said, "Well, these  
6 four grounds are legally wrong and, therefore, the broad  
7 form was tainted."

8           The Casteel opinion did not say you have to  
9 submit all 11 grounds separately. So to me, you know,  
10 this is -- this is not a Casteel problem. We should stay  
11 with E.B., but if we don't go with E.B., then we -- and  
12 you think it is a Casteel problem, then we should go  
13 ground, best interest, ground, best interest, ground, best  
14 interest, to avoid a potential Casteel problem.

15           CHAIRMAN BABCOCK: Okay.

16           HONORABLE DAVID PEEPLES: So let me just be  
17 sure everybody knows what she's saying. She would not  
18 have one best interest question predicated on "yes" to one  
19 or more of the previous ones. She would submit best  
20 interest --

21           CHAIRMAN BABCOCK: Right.

22           HONORABLE DAVID PEEPLES: -- linked with the  
23 ground question after question. But I think -- am I right  
24 about this, Tracy? You're not for submitting any grounds  
25 disjunctively, are you?

1 HONORABLE TRACY CHRISTOPHER: No, I mean, I  
2 would stick with E.B.

3 HONORABLE DAVID PEEPLES: Yeah.

4 HONORABLE TRACY CHRISTOPHER: And I would  
5 stick with E.B., and I would let people make arguments in  
6 an adversarial system as opposed to via task force that  
7 something was wrong with submitting these four grounds  
8 disjunctively, all right, and then let the judge decide.  
9 "Okay, you're right, there could be a problem with this  
10 one, so let's pull it out as a separate question," or  
11 "You're right, let's make them all separate." I just --  
12 from my point of view we should go through the adversarial  
13 system rather than via task force on this particular  
14 question. We have a Supreme Court ruling. People can  
15 chip away from the Supreme Court ruling if they try to, or  
16 we should have a Legislature that says, "Hey, we disagree  
17 with that, here's the new rule. It should be submitted  
18 this way." So it's kind of a procedural problem with what  
19 we're doing here.

20 CHAIRMAN BABCOCK: Yeah. Professor Carlson.

21 PROFESSOR CARLSON: Yeah, there were a  
22 number of reasons I think why the majority view landed  
23 where it did. Rule 306 of the Texas Rules of Civil  
24 Procedure was amended I guess back in -- I don't know,  
25 2012. Yeah, there's the order. "To provide in a suit for

1 termination of the parent-child relationship," dot, dot,  
2 dot, dot, dot, "the judgment must state the specific  
3 grounds for termination," and so we've got a requirement  
4 that the trial judge after the jury comes back state the  
5 specific ground. So if you have -- if you can't point to  
6 the specific ground, it's difficult to comply with Rule  
7 306.

8           There's also a collateral consequence that  
9 we were made aware of. There are 21 grounds in Texas  
10 Family Code Chapter 161 to potentially support involuntary  
11 termination, and so what you see in these draft jury  
12 charge are some of those grounds just by way of example of  
13 what the form would look like. Two of the grounds, (d)  
14 and (e) -- and I won't go into what they are -- under  
15 subsection (m), if the jury finds (d) or (e) as to this  
16 child as a basis to terminate, then we are -- my  
17 understanding is subsection (m) allows that in and of  
18 itself to be a basis to terminate another child of that  
19 parent at a later time. So let's say they then have  
20 another child, and now we're going to say, "Well, you have  
21 a (d) or (e) back at this other child, so we're  
22 terminating your interest in this child."

23           So really the only time that the parent has  
24 to get appellate review on the (d) and (e) is in that  
25 first child's termination, and so we have to know is there

1 a (d) and (e) and then the appellate courts -- and a lot  
2 of appellate courts have taken this on -- do do that.  
3 Even though there's another ground found to terminate,  
4 they not only look at that ground, but they also look at  
5 the (d) and (e) one because that's your shot as a parent  
6 to getting your review. Afterwards is this collateral  
7 consequence.

8           And, of course, the full committee also  
9 considered the enhanced constitutional liberty interest of  
10 the parents. We have clear and convincing evidence  
11 requirement, and we also looked at the task force  
12 observation that appellate courts have 180 days at the  
13 court of appeals to decide these cases. We were told that  
14 in many times the parent appointed counsel files an Anders  
15 brief and the court of appeals doesn't have a whole lot to  
16 work with, and with this broad form answer you have to  
17 kind of undo everything, right, as opposed to a more  
18 focused appeal, which would make it easier on the court of  
19 appeals, and, of course, it would make it more focused for  
20 the parents.

21           Insofar as the best interest of the child --  
22 and I defer to family law experts on this -- it's my  
23 understanding that best interest of the child does not  
24 have to be tied to a specific ground, that if the jury  
25 finds some ground for termination and doesn't find others

1 or finds several grounds, the finding of best interest of  
2 the child is based on the totality of the evidence they've  
3 heard, something called the Holley factors, and it doesn't  
4 have to be tied to a specific ground, which is why I think  
5 the -- our recommendation was that it be in a separate  
6 question.

7                   But I think Justice Christopher is right  
8 that there could be a potential Casteel problem if it's an  
9 invalid ground, one of those multiple grounds submitted is  
10 invalid and you don't know whether best interest of the  
11 child is tied to that ground, but if the record as a whole  
12 supports best interest in termination and if we really do  
13 look to the entire record as a whole, then you really  
14 don't have that Casteel issue because you found other  
15 evidence. Well, this ground doesn't have any supporting  
16 evidence, but look at all of the other evidence in this  
17 case, under Holley factors best interest of the child  
18 would be met.

19                   HONORABLE TRACY CHRISTOPHER: Well, no, I'm  
20 not agreeing that -- I disagree with you on evidentiary.  
21 It has to be legally invalid before Casteel would be  
22 triggered, in my opinion, not evidentiary.

23                   PROFESSOR ELAINE CARLSON: Okay.

24                   HONORABLE TRACY CHRISTOPHER: Because it  
25 seems to me these 21 issues, 21 grounds, can be looked at

1 as speed/brake/lookout, or they can be looked at in a  
2 different way, so to me I think it would have to be  
3 legally invalid. So, for example, one of the grounds is  
4 whether there was a -- sorry, I don't have it right in  
5 front of me. Whether the parents signing away their  
6 rights was valid, and the court found that it wasn't on  
7 appeal, and so that would be a legally invalid as opposed  
8 to a factually invalid format.

9 PROFESSOR CARLSON: I would agree with you  
10 on that, but factually you wouldn't have a problem.

11 HONORABLE TRACY CHRISTOPHER: Here it is.  
12 It's (k), executed an unrevoked or irrevocable affidavit  
13 of relinquishment. But, again, so, you know, what if that  
14 evidence comes in, the affidavit of relinquishment comes  
15 in, is one of the grounds. The jury says "yes." It's  
16 considered by the jury in best interest, but on appeal the  
17 court of appeals says that affidavit was not -- did not  
18 meet the requirements of (k), so now we've got sort of the  
19 skunk in the jury box on the best interest, in my opinion.

20 CHAIRMAN BABCOCK: Judge Yelenosky.

21 HONORABLE STEPHEN YELENOSKY: I guess I've  
22 never seen (k) go to a jury. When you have a voluntary  
23 relinquishment, they come in, and it -- that's all that's  
24 presented to the court and then the termination is done.  
25 I don't know that I've ever seen the trial where (k) was

1 coupled with anything else.

2 HONORABLE TRACY CHRISTOPHER: You still have  
3 to find best interest.

4 HONORABLE STEPHEN YELENOSKY: Yeah.

5 HONORABLE TRACY CHRISTOPHER: The court  
6 still has to find best interest to terminate.

7 HONORABLE STEPHEN YELENOSKY: True, has to  
8 find best interest, but it doesn't have to -- you don't  
9 have to distinguish between (k) and anything else because  
10 it's always just (k).

11 HONORABLE TRACY CHRISTOPHER: You know, you  
12 look at some of these jury charges, and they put a whole  
13 bunch of jury charges all -- a whole bunch of grounds all  
14 in one where one would be sufficient.

15 CHAIRMAN BABCOCK: Yeah, Justice Pemberton.

16 HONORABLE BOB PEMBERTON: Quick question  
17 about the majority version of question three, Judge  
18 Peeples. Are y'all contemplating that the jury could in  
19 theory find best interest and not to terminate? Because  
20 it's stated conjunctively. Or is it intended that the  
21 latter part of that sentence, "and that the parent-child  
22 relationship should be terminated" is dependent upon the  
23 best interest ground?

24 HONORABLE DAVID PEEPLES: Well, it's hard  
25 for me to think of a realistic case where there would be a

1 ground and it would be in the best interest of a child to  
2 terminate and you wouldn't answer that the rights should  
3 be terminated.

4 HONORABLE BOB PEMBERTON: Well, I would  
5 think so, though you suggested earlier that you might have  
6 a trial judge who just up and decides that it's a  
7 discretionary matter and --

8 HONORABLE DAVID PEEPLES: He might disagree  
9 with the jury.

10 HONORABLE DAVID PEEPLES: -- it leads you to  
11 the same place. I just wonder if the intent is that if  
12 the termination follows from the best interest finding  
13 maybe a "therefore" might be --

14 CHAIRMAN BABCOCK: Justice Christopher.

15 HONORABLE TRACY CHRISTOPHER: The statute  
16 itself says, "The court may order termination of the  
17 parent-child relationship if the court finds by clear and  
18 convincing evidence one of the 21 grounds" and that it's  
19 in the child's best interest. So to me that means you've  
20 got to go the extra step and get the ultimate question,  
21 because, sure, a jury could say, "Yeah, the mom failed to  
22 obey the court order and, yeah, it would be in the child's  
23 best interest to stay with the foster child, but I don't  
24 really think that violation of the court order was strong  
25 enough to warrant termination," and they could answer

1 "no," by way of example.

2 HONORABLE DAVID PEEPLES: But in responding  
3 to Justice Pemberton, to me the important thing is if we  
4 don't have the jury deciding the ultimate question, a  
5 different decision-maker might say, "I have the right to  
6 decide that." I think it's very unlikely that the same  
7 decision-maker, judge or jury, would find the grounds to  
8 terminate and it's in the best interest but wouldn't  
9 terminate, but I think it could happen that the jury could  
10 find all of that and if the judge then has an additional  
11 discretionary question as opposed to judgment NOV, it  
12 might happen, and the thinking of most of the subcommittee  
13 was if it's a jury trial then they ought to answer the  
14 ultimate question, too, and not leave any room for a judge  
15 to think "I've got a discretionary call here." That's the  
16 thinking.

17 CHAIRMAN BABCOCK: Skip Watson.

18 MR. WATSON: I'm just on that point, I don't  
19 understand this and haven't studied it like you-all have,  
20 but the thing that jumped out at me was the "should." To  
21 me it introduces an element of jury nullification in there  
22 that I don't see in the statute, and that's -- my question  
23 is you said you're going back to the statute saying "the  
24 court may order termination," and are you assuming "the  
25 court" means the jury? I mean, I'm having a little

1 trouble here.

2 HONORABLE TRACY CHRISTOPHER: Yes.

3 HONORABLE STEPHEN YELENOSKY: Yes.

4 HONORABLE TRACY CHRISTOPHER: "The court"  
5 means the jury.

6 HONORABLE STEPHEN YELENOSKY: That's how  
7 it's tried.

8 MR. WATSON: It always does mean the jury?

9 HONORABLE DAVID PEEPLES: Well, if there's a  
10 jury trial.

11 HONORABLE TRACY CHRISTOPHER: If it's a jury  
12 trial.

13 MR. WATSON: Well, no, I get that, but I'm  
14 just trying to figure out if we haven't built in the two  
15 layers that are always there in any civil case of the jury  
16 making the fact findings and the court saying, "Based on  
17 these facts this is what I think the law requires," and  
18 I'm trying to figure out who the discretion is left with.  
19 It's left with the jury.

20 HONORABLE STEPHEN YELENOSKY: It's the jury.

21 MR. WATSON: And it's intentionally so that  
22 the jury can nullify, even if it makes the predicate  
23 finding.

24 HONORABLE STEPHEN YELENOSKY: But it's not  
25 nullification. It's a required element.

1 MR. WATSON: Well, whatever. Whatever.  
2 Whatever we call it, they can say, "Yes, we find all of  
3 this; no, it should not be terminated," correct?

4 HONORABLE STEPHEN YELENOSKY: Sure.

5 MR. WATSON: Okay. That was my question. I  
6 just wasn't sure who "the court" was in this context.

7 CHAIRMAN BABCOCK: Judge Yelenosky.

8 HONORABLE STEPHEN YELENOSKY: Well, I don't  
9 have it in front of me, but my recollection -- because in  
10 Travis County we don't have family courts, so the district  
11 court gets to do everything civil side, including family.  
12 One of the grounds of termination is that somebody is  
13 going to be in prison for a certain amount of time or  
14 expected to, correct? Isn't that one of them? And so my  
15 recollection is, although it's probably -- isn't that one?  
16 Yes.

17 HONORABLE TOM GRAY: Yeah.

18 HONORABLE TRACY CHRISTOPHER: Certain  
19 convictions is a ground for termination, but just being in  
20 prison --

21 HONORABLE STEPHEN YELENOSKY: And not  
22 expected to be out within a certain period of time.

23 HONORABLE TRACY CHRISTOPHER: I think that's  
24 considered under best interest.

25 HONORABLE STEPHEN YELENOSKY: I don't think

1 so, but I could be wrong. Isn't there a provision --

2 MR. WATSON: Well, what's your point,  
3 Stephen?

4 HONORABLE STEPHEN YELENOSKY: Well, the  
5 point is if it's separate, as I remember it to be --

6 HONORABLE TOM GRAY: Ground (q) is what  
7 you're talking about.

8 HONORABLE STEPHEN YELENOSKY: Yeah, (q). So  
9 ground (q), what I recall from the bench trial was ground  
10 (q) was presented. The mother had relinquished. The  
11 father was in prison, declined to relinquish. They tried  
12 the case on (q). Maybe they threw in something else, but  
13 mainly they were arguing (q), and you could say it meant  
14 (q) on the face of it, but I declined to terminate. I  
15 didn't think it was in the child's best interest to  
16 terminate because this guy was going to be in jail maybe  
17 just over the limited time.

18 MR. WATSON: Got it. Thanks.

19 CHAIRMAN BABCOCK: Judge Gray and then --  
20 Justice Gray.

21 HONORABLE TOM GRAY: Yes. The, I think,  
22 first question that has to be answered before we start  
23 this discussion is whether or not the 21 grounds are like  
24 manner and means in criminal cases, or are they truly  
25 separate offenses. If, as David posited the question,

1 that the problem is nine jurors this ground, nine jurors  
2 that ground, and no ground gets 10 votes and we can't tell  
3 that from the broad form submission, if that is as two out  
4 of 98 appellate judges in the state of Texas at the time  
5 determined a due process violation then we need to address  
6 that. But if literally there are 12 grounds given in the  
7 charge, and one juror -- actually you could do 10 grounds.  
8 If one juror agreed that each of those grounds had been  
9 violated, only one, as to each of the grounds, can you  
10 still terminate? Have you complied with the statute and  
11 then beyond the statute is that due process?

12           Where I understood E.B. to have been  
13 focused, subsequent cases out of the Waco court of appeals  
14 that are mentioned in the paper address it, and that is as  
15 long as at least 10 jurors believe that one of the grounds  
16 argued by the state for termination was proved by the  
17 state and that termination was in the best interest that  
18 you can violate, then we go on to this discussion of  
19 whether or not it's good to have broad form submission or  
20 what has been referred to as granulated submission, but I  
21 agree with David it's not technically in that vein, but it  
22 really complicates the process to have the individual  
23 questions.

24           If we have other problems like Rule 306 or  
25 collateral consequences, we need to focus on what the

1 problem is before we try to solve it, because obviously  
2 with the Rule 306 problem, if it's the problem that we  
3 need to identify the ground in the judgment, we fix 306.  
4 We eliminate that as a problem. We created it. Let's fix  
5 it if it's not going to help us.

6           Collateral consequences, we are of the view  
7 that trying to review (d) or (e) when it's unnecessary in  
8 an appeal, then we -- we are deciding a -- giving an  
9 advisory opinion as to what may happen in the future.  
10 This person may never have another child. This issue may  
11 never come up, and we don't need to address that in this  
12 case. Also, I would point out that it's much easier to  
13 ask these questions like this and see them in the abstract  
14 versus in a full jury charge, because one of the problems  
15 you're going to have, I would suggest, is that when you  
16 start having less than all of your jurors agree on grounds  
17 versus best interest, do you then have to have a best  
18 interest finding signed by the 10 jurors that agreed on  
19 each of the grounds; and I can just see a massive list of  
20 jurors that need to sign the finding as to different  
21 issues.

22           And then we get to where Judge Yelenosky  
23 sort of ended there on ground (k). (Q) can be the same.  
24 Those can almost be established as a matter of law  
25 uncontroverted, and the trial has really all been about

1 best interest, but there's some other grounds in there and  
2 can in effect -- I mean, you don't have to have best  
3 interest tied to a ground, but if you're starting to try  
4 to fracture this by which jurors agreed with which ground  
5 and agreed with best interest, you get to a really, really  
6 complicated charge. And so I join Judge Christopher's  
7 initial salvo that because I don't think you have to have  
8 10 jurors agree on a ground, all you need is 10 jurors to  
9 agree on one of the grounds and best interest that I think  
10 E.B. was not only rightly decided, that it is still the  
11 best way to submit these.

12 I agree that it presents some interesting  
13 questions when it gets to appeal in what we have to deal  
14 with, and in some ways I could vote to go with this for  
15 streamlining my job; but that's, I don't think, what we  
16 were asked to do; and I'm looking at what should we tell  
17 the Legislature; and my response to the Legislature is,  
18 no, we think it's just fine the way it is. If y'all  
19 disagree then y'all need to weigh in.

20 CHAIRMAN BABCOCK: Roger, then Justice  
21 Christopher.

22 MR. HUGHES: Well, two points. First, I  
23 agree with Justice Christopher, but I have some additional  
24 reasons that I think worthy of getting out of there. The  
25 first one is we keep talking about protecting the rights

1 of the parent. I saw when I read the original legislative  
2 task force someone said, you know, if we make the charge  
3 too complex the child may end up being the injured one,  
4 but an overly complex charge leads to the possibility that  
5 the jury won't really answer the questions that need to be  
6 answered and that a child is going to end up in a  
7 situation that all of the grounds are proven, the jury  
8 probably could agree on most of the grounds for  
9 termination, but because of an ordinary -- because of an  
10 overly complex charge the child is left in a dangerous and  
11 abusive situation.

12                   Now, I don't say this lightly. I was  
13 trained under the old granulated system. Gus Hodges was  
14 my guru, and some of you are old enough to remember who  
15 I'm talking about, and I remember back in the days in an  
16 automobile accident you had the question one, did the  
17 defendant fail to turn to the right or the left; two, was  
18 that negligence; three, was that a proximate cause of the  
19 accident, and the next question; and they would do that  
20 for every act or omission alleged. And if you want to do  
21 that -- and what it did, number one, it created a long,  
22 confusing charge that was easy to answer questions that  
23 conflicted with others and sending the jury back to sort  
24 of clear up all of the conflicts, which is what created  
25 all the whole law about conflicting jury answers; and

1 second, it led to the observation that I'm sure even Mike  
2 Hatchell could remember that under the old system it was  
3 impossible to do the charge right and the only question is  
4 whether you could preserve error under the Rules of Civil  
5 Procedure; and I fear that's what's going to happen if we  
6 go back to this.

7                   Now, that said, if we've got to do it then I  
8 favor the one Christopher mentioned which is F, although  
9 it's got a problem I want to mention. The other thing is  
10 I'm concerned that we're going to have a self-fulfilling  
11 prophecy that there's a due process problem here, that  
12 somehow this change will be interpreted as a signal that  
13 there is a due process problem with global submission.  
14 You know, the first thing of it is I understand we're  
15 dealing with constitutional liberties of parents and maybe  
16 children here as well, but there's a lot of cases tried in  
17 Texas where constitutional liberties are at issue. We  
18 have the Texas Citizen Participation Act, which has a  
19 laundry list of acts or omissions. We have -- and I know  
20 in section 1983 cases we have a variety of ways in which a  
21 public employee's rights can be violated under the First  
22 Amendment when they're terminated or disciplined. There's  
23 a variety of theories, and they can all argue, well, in  
24 those cases a constitutional right is involved, so you've  
25 got to granulate all of those, just like we used to before

1 global submission. It could easily become a  
2 self-fulfilling prophecy. I worry about that because I  
3 was trained under the old system, but I've come to believe  
4 that Justice Pope was right, simpler charges are better.  
5 Yeah.

6           Now, finally, while I favor if we've got to  
7 do this I like Justice Christopher's suggestion, which is  
8 Appendix F, my only concern is that by having a global --  
9 it's the last question is "If you have answered questions  
10 one, two, three, or four," which are the granulated acts  
11 that could justify termination, then should it be -- is it  
12 in the best interest of the child. This possibly can lead  
13 to Casteel problems, because -- and I say this because I  
14 really don't want to have to submit a best interest  
15 question for every act or omission. That's just going to  
16 lead to confusion and the possibility of conflicting  
17 charges, but under that one if the jury finds -- you know,  
18 answers questions one and three but not two and four, when  
19 you get to the last question, five, on best interest of  
20 the child they're all going to be lumped in there.

21           Well, let's suppose ground one doesn't hold  
22 up on appeal, so now all you've got is ground three. Now  
23 you've got a Casteel problem. That is, was there  
24 harmful error committed. How do we know which one the  
25 jury went off on? I'm not sure this is solvable, but once

1 again, if we've got to do this, and I question that, then  
2 I think Appendix F is the way to go. Thank you.

3 CHAIRMAN BABCOCK: Justice Christopher.

4 HONORABLE TRACY CHRISTOPHER: We briefly  
5 looked at the due process question, and we did not believe  
6 that it was in our -- the committee's task to come up with  
7 an advisory legal answer on this particular question, but  
8 we did look at it, and for those of you who are not  
9 familiar with criminal law we'll kind of go through it.  
10 So the indictment can say you murdered someone by hitting  
11 them with a stick or by hitting them with an object  
12 unknown. Okay. An "or," an "or" ground, or something  
13 else, or totally unknown, however you killed them, totally  
14 unknown, but those are called manner and means of  
15 committing murder, and instructing the jury in "or" is  
16 considered constitutionally permissible. It doesn't  
17 really matter whether one juror thinks it was a stick or  
18 one juror thinks it was an unknown object. If they all  
19 agree the guy murdered the person, that meets  
20 constitutional due process standards, and this is not just  
21 CCA, but also U.S. Supreme Court law on the whole idea of  
22 manner and means.

23 There are some statutes that are conduct  
24 specific. So, for example, there is a statute in Texas  
25 that says it's improper to have sexual contact -- sexual

1 contact with a child by one, two, three, four different  
2 things; and in that particular version of the statute the  
3 Court of Criminal Appeals has said you cannot submit those  
4 "or," "or," "or," because it runs into due process  
5 problems. You have to say did the defendant -- is he  
6 guilty of the crime of sexual contact by ground A, you  
7 know, yes or no, ground B, yes or no, ground C, yes or no,  
8 to meet constitutional requirements.

9           So what Judge Gray was talking about and  
10 what -- and what his court has held is that the 21 grounds  
11 in -- well, they didn't say all 21 grounds, but they said  
12 the grounds in front of them were just like manner and  
13 means, okay, so it didn't matter from a due process point  
14 of view whether you agreed with one or the other. You  
15 just agreed that termination is in the best interest. But  
16 there is a third line of cases on this due process  
17 grounds, which I don't think you addressed in your  
18 opinion, when the manner and means are so dissimilar they  
19 become separate crimes. Okay. And that is the O'Brien  
20 case, and the O'Brien case, a criminal case from the CCA,  
21 the crime is engaging in criminal activity, with a whole  
22 laundry list of potential crimes; and the court said that  
23 the crime is engaging in criminal activity, so you don't  
24 have to be unanimous on the laundry list of crimes; but  
25 within due process if your laundry list includes things

1 that are so dissimilar from a moral point of view they  
2 become separate crimes.

3 All right. So initially we look at the 21  
4 grounds in the termination, and we think, oh, yeah, those  
5 are manner and means, which is what Judge Gray has held,  
6 but then we wonder whether we fall into the O'Brien  
7 problem where the manner and means are so disparate. So  
8 E.B. dealt with abuse or neglect of a child, and those  
9 were put together. Well, those are, you know, morally  
10 equivalent items, so we don't think that created a due  
11 process problem, but is abusing and neglecting a child  
12 morally equivalent to failing to abide by a court order or  
13 abandoning your child? There's like eight different ways  
14 you can abandon your child under this laundry list, or  
15 being in jail for an unrelated offense or -- you know, at  
16 some point, and we have -- we did not come to a legal  
17 opinion. We just raised the point that at some point the  
18 21 manner and means could be considered so disparate as to  
19 constitute a separate crime for which you would need  
20 unanimity for due process reasons.

21 So -- and I kind of go back to I'd like to  
22 hear people's arguments on it, see briefing on it, read  
23 all of the case law before I came to a conclusion in a  
24 particular case. So we didn't do that. We did not come  
25 to a conclusion on this point, but so to -- in response to

1 Justice Gray's argument that we need to come to that  
2 conclusion first, I think it's a very hard conclusion to  
3 come to.

4 CHAIRMAN BABCOCK: Okay. I think Richard  
5 Munzinger had his hand up first, and then Justice Busby,  
6 and then Professor Hoffman.

7 MR. MUNZINGER: What is the subject matter  
8 that we're dealing with? Taking a child away from its  
9 natural parents in the United States of America. If it  
10 were my child or your child -- and here I am, I'm a  
11 20-year-old fellow with a two-year-old baby, and someone  
12 wants to take my child away, and I love the child. I may  
13 have made a mistake, whatever it might be, one of these 21  
14 statutory provisions. I've made a mistake, but the  
15 government is now -- the government of America, of the  
16 state of Texas, is going to take my baby from me. This  
17 country with a Constitution. This country that says  
18 you're supposed to have due process rights, and I am now  
19 going to have a verdict where three people think point  
20 number one, four people think point number two, five  
21 people think point number three. Somehow or another the  
22 total comes to 10, and I don't know which of the 10 --  
23 which of the grounds 10 people found? Well, we do that  
24 because it's efficient. We do that because it's efficient  
25 for the courts to submit jury charges. Is justice served

1 by that kind of efficiency? Are the rights of the parents  
2 served by that kind of efficiency? Are we sitting here  
3 making rules for ourselves or for the unwashed? The  
4 unwashed have the same rights I do. How could you dare  
5 take my child away from me and not have 10 jurors agree to  
6 the grounds? How could you dare do such a thing and call  
7 it America? It's amazing to me. I know what the cases  
8 say. I don't practice family law, but I've got to tell  
9 you that I raised my son by myself, and I can tell you  
10 that if someone took my son away from me it would have  
11 killed me. You just think what you're talking about here.  
12 You're talking about the government taking a child away at  
13 a time when political correctness is descending upon a  
14 society telling people what they may say publicly and  
15 privately about their private views of sexuality or  
16 anything else, and you're getting ready to empower the  
17 government to take a child away on the vote of three  
18 people. I'm amazed. I'm finished.

19 CHAIRMAN BABCOCK: Richard, do you -- are  
20 you in favor of the status quo, or do you think that it  
21 should be changed?

22 MR. MUNZINGER: I think it should be  
23 separate questions, each ground, did you do A, is it in  
24 the best interest, did you do B. That's what I think, and  
25 you need to have 10 jurors agree to the grounds that the

1 judgment is going to be based upon. This is -- as I say,  
2 it's not a contract case. It's one thing to be efficient  
3 about antitrust violations. We don't even do that in  
4 freedom of speech cases, in libel cases. I worked on the  
5 pattern jury charge committee. On libel law we worked for  
6 three years to try and figure out a way to do a Rule 277  
7 charge. We couldn't come to a decision about it, and go  
8 look at the pattern jury charge book, and you'll see that  
9 the questions are broken out. Why? Because we're dealing  
10 with constitutional rights. I think the Constitution says  
11 I have a right to raise my child. I remember reading the  
12 *Gulag Archipelago* when it first came out, and Solzhenitsyn  
13 tells the story of a Baptist who had an axe planted in his  
14 head at the gate of the prison as they all walked out, and  
15 Solzhenitsyn said his problem was -- the man's problem was  
16 he thought he had the solution to life, and he taught his  
17 children that, and so they killed him with an axe in his  
18 head and stood him up against a post in the middle of  
19 Siberian winter, and we're going to take somebody's child  
20 away on the vote of three people? Wow. I mean, I'm  
21 stunned.

22 CHAIRMAN BABCOCK: All right, Justice Busby,  
23 follow that act.

24 HONORABLE BRETT BUSBY: I was -- I think we  
25 should go with Exhibit F, the majority report, rather than

1 Exhibit E, the minority report, for a couple of reasons.  
2 One, I shared Justice Pemberton's thought about in  
3 question three of Exhibit F, why are we -- why do we have  
4 an "and" there, "and that the parent-child relationship  
5 should be terminated," but it sounds like the consensus  
6 view among those who have studied the issue is that that  
7 is in fact a separate question from best interest whether  
8 it should in fact be terminated; and if that's the case,  
9 that may be confusing to the jury because there's not a  
10 standard given for those two different things, whether  
11 it's in the best interest and whether the relationship  
12 should be terminated; but if they are separate things then  
13 they should be submitted separately with an "and"; and I  
14 think Exhibit F does that more clearly than Exhibit E does  
15 because there it treats should it be terminated as just a  
16 function of whether the predicate statutory ground has  
17 been met and whether termination is in the child's best  
18 interest and doesn't really treat "and should it be  
19 terminated" as a separate element to be met; and so I  
20 think question three submits that more clearly to the  
21 jury.

22           Also, I understand Justice Christopher's  
23 concern about if this were a Casteel problem in Exhibit E  
24 then we could -- if it was a Casteel problem to have  
25 the -- if these different predicate statutory termination

1 grounds could be a Casteel problem by submitting them all  
2 in a laundry list then maybe you want to have the  
3 termination finding accompany each predicate ground, but  
4 question four as it's currently phrased doesn't limit the  
5 jury's consideration on best interest to the predicate  
6 statutory ground that's there. So, for example, if you  
7 look at question four on Exhibit E it submits ground (d),  
8 the predicate statutory ground (d), "knowingly placed the  
9 child in conditions and surroundings that were  
10 endangering" and best interest together; but it doesn't  
11 limit the jury in deciding best interest to focusing only  
12 on whether the parent knowingly placed the child or  
13 allowed it to remain in conditions that were endangering,  
14 and so -- nor really could it because the factors are much  
15 broader than that if you look at the Holley case and  
16 others.

17           So I think -- while I understand what's  
18 trying to be done in question four, so that you don't end  
19 up with a potential Casteel problem, I don't think you can  
20 solve it that way by grouping it because you're not  
21 limiting the jury's -- the jury can go off and consider  
22 question five and ground (a), and it could turn out that  
23 that one should not have been submitted, but the jury  
24 would still be considering that ground even in question  
25 four in answering whether the termination is in the

1 child's best interest. So I think it will be simpler for  
2 the jury to understand if we separate it the way that the  
3 majority report, Exhibit F, does where you have separate  
4 findings on each termination ground and then you have --  
5 if there's a "yes" to one or more of those you have a  
6 separate question on best interest and on whether the  
7 relationship should be terminated; and as I said earlier,  
8 it makes that clear that those are two separate things  
9 that the jury has to think about.

10 CHAIRMAN BABCOCK: Professor Hoffman.

11 PROFESSOR HOFFMAN: I'll be real brief. We  
12 may be too far in the weeds for this, but I'd just like to  
13 go back to the predicate. It just seems to me very  
14 strange that we are -- that this conversation is being  
15 had, that we're being asked to look at this. As  
16 interesting as Justice Christopher's discussion of due  
17 process is, I don't know that it matters what any of us  
18 think. I mean, it seems like there's an adversarial  
19 system that we normally use for this, and until the  
20 Supreme Court tells us that there's a due process  
21 violation here it's not clear to me that we have a role  
22 here, and then it's particularly strange that HB 7 doesn't  
23 purport to overrule E.B., and so, again, I'm sort of at  
24 the beginning here, which is it seems like this is not a  
25 job for us.

1                   CHAIRMAN BABCOCK: Judge Yelenosky, and then  
2 Professor Carlson.

3                   HONORABLE STEPHEN YELENOSKY: Well, I was  
4 looking around just trying to see who are the trial judges  
5 who do family law. Judge Estevez. I'm sorry if I'm  
6 pronouncing that wrong.

7                   HONORABLE ANA ESTEVEZ: That's okay.

8                   HONORABLE STEPHEN YELENOSKY: I would say  
9 Estevez, but I know you don't pronounce it that way, so  
10 it's Estevez I think.

11                  HONORABLE ANA ESTEVEZ: That's fine.

12                  HONORABLE STEPHEN YELENOSKY: I have. Other  
13 judges? Peeples. Anyone else? Anyone else ever seen a  
14 parental rights termination case? Richard, you ever seen  
15 one? Seen one? On appeal, okay. Actually the trial, it  
16 looks like there are three people in this room who have  
17 seen a parental rights termination case, so I'd like to  
18 hear from Judge Estevez on that, and I'll just note,  
19 Richard, yes, there's a constitutional right involved, but  
20 even people on both sides of the abortion issue and the  
21 Supreme Court recognize that the state has an interest in  
22 the welfare of a child, however you define that. And I'll  
23 just add if you've been through any of these parental  
24 termination cases, which I have, as I mentioned, both  
25 bench and jury, people take this very seriously. They're

1 parents, too, most of them, and they end up crying most of  
2 the time about the decision. This isn't a willy-nilly,  
3 you know, big government thing, and the worst case -- and  
4 it's not about treating the unwashed differently. As you  
5 define those anyway, that's the people I used to  
6 represent, so I certainly don't think they are treated  
7 differently, but --

8 MR. MUNZINGER: May I respond?

9 HONORABLE STEPHEN YELENOSKY: I'm sorry. I  
10 didn't mean to criticize you. I'm just saying I wouldn't  
11 call them unwashed, but I'm just saying that group of  
12 people that I think you're referring to, low income,  
13 perhaps don't have resources, but we don't want to go --  
14 the reality of that, which I've just explained as I see  
15 it, we don't want to do -- as Justice Gray pointed out, we  
16 don't want to make this so complicated that 12 people,  
17 most of whom will be parents who take this very seriously,  
18 think that the best interest of the child is to remove  
19 this parent probably for a number of reasons, be  
20 distracted by too much complexity such that we've gone  
21 overboard with the rights of the parent without  
22 considering what that may do to children.

23 CHAIRMAN BABCOCK: Richard, go ahead and --

24 MR. MUNZINGER: I don't argue the bona fides  
25 of the people involved in the system nor that they are

1 callous to the interests of the people before them. We  
2 are discussing the format of the court's charge that will  
3 govern these proceedings, and my concern is that the  
4 format that doesn't require evidence to the appellate  
5 court that 10 persons agreed to a particular ground is a  
6 dangerous format for the reasons that I expressed. I  
7 don't have any -- I couldn't be a judge, Judge Yelenosky,  
8 because I'm not sure I could make those decisions. I  
9 think it's too difficult.

10 HONORABLE STEPHEN YELENOSKY: Well, I'll  
11 tell you, judges don't want to make them. We want jury  
12 trials on these.

13 MR. MUNZINGER: I just think that we need to  
14 be careful with the forms that we use.

15 CHAIRMAN BABCOCK: Fair enough. Professor  
16 Carlson, then Justice Bland, and --

17 PROFESSOR CARLSON: Well, as Justice  
18 Christopher said, the committee didn't really reach a  
19 conclusion; and I'm not sure that we could on the  
20 boundaries of due process; but certainly the majority of  
21 the committee felt as a matter of fairness, Richard, what  
22 you're suggesting, and in light of what's at stake that  
23 the separate submission was on a policy basis better; and  
24 of course, the state can always afford more due process  
25 than constitutionally required.

1                   CHAIRMAN BABCOCK: Fair enough. Justice  
2 Bland.

3                   HONORABLE JANE BLAND: Well, this is great  
4 work that the task force has done and that the committee  
5 has done and the minority report has done. I share  
6 Justice Christopher's concern that these charges, while  
7 great models of what a charge should look like, should not  
8 be mandated; and you know, to me, you know, the best  
9 resolution would be to take all of this work and send it  
10 to the PJC family volume, let them go through it. It will  
11 be composed of family law experts, and I guess as the task  
12 force was, and then they'll have model instructions, and  
13 then lawyers who want to make the kinds of challenges and  
14 arguments that we're hearing today can raise them, courts  
15 can rule on them; but nobody is hamstrung by, you know,  
16 what would ultimately be, you know, sort of a  
17 court-drafted mandatory jury charge that would be sort of  
18 a one-size-fits-all and might not be necessary in every  
19 case.

20                   CHAIRMAN BABCOCK: Skip, and then Richard,  
21 Richard Orsinger.

22                   MR. WATSON: I -- for what it's worth, I  
23 think we're -- you know, the train has already left the  
24 station, but I have always been concerned about E.B. for  
25 the reasons that Richard said, but assuming that we're --

1 you know, the Legislature wants to correct that and wants  
2 us to do it, for whatever reason, listening to this and  
3 not practicing in this area, I tend to favor the minority  
4 charge, Justice Christopher's charge, for the reasons  
5 articulated by Brett. To me it comes closer to solving  
6 the heartburn I get over the word "should" in there in  
7 letting the jury come in. It's a little tighter. I don't  
8 see any confusion in this. I see this as bringing clarity  
9 to this issue, and I personally think it is a good step.

10 HONORABLE BRETT BUSBY: Just to be clear, I  
11 was in favor of the other one, the majority.

12 MR. WATSON: I understand.

13 HONORABLE BRETT BUSBY: Oh, okay.

14 MR. WATSON: But I'm trying not to get in  
15 and parse it too closely, but I'm just saying that for  
16 some of the reasons you were articulating I happen to  
17 favor the minority report.

18 CHAIRMAN BABCOCK: Richard.

19 MR. ORSINGER: So, Chip, I have a changing  
20 perspective on this issue because I served on the original  
21 pattern jury charge committee that wrote the E.B.  
22 instruction, and I was troubled at the time by how broad  
23 it was and also by the role of the word "should," which  
24 Skip has pointed out presents a possibility of jury  
25 nullification; and yet on the task force I served on I

1 agreed; and one of the things that may be not be noticed  
2 but should be noticed is that the task force doesn't have  
3 "should" in its questions. It just asks whether you have  
4 a grounds for termination and termination would be in the  
5 best interest, and it just leaves it to inference that the  
6 trial judge is bound to issue a jury verdict based on two  
7 "yes" findings.

8           So that issue of "should" is a really -- I  
9 think too many years ago for me to quote for sure, but I  
10 think it was just because it was kind of simple, a simple  
11 way to get the jury to get to an answer to use the word  
12 "should." I don't know really that we have really the  
13 prerogative to say that when the statutory grounds are met  
14 that the jury can decide not to follow the law. I mean,  
15 so I don't think that -- I think you should recognize that  
16 the task force recommendation I think removes the "should"  
17 concept in the jury nullification; whereas, the E.B.  
18 charge and Justice Christopher's alternative charge has  
19 "should."

20           Secondly, another thing I would notice is  
21 that there's been criticism of some of these charges about  
22 not sufficiently distinguishing the events that affect one  
23 child and one parent and not another child, and so one of  
24 the things the task force did was to make it clear that  
25 each child and each parent is going to be submitted

1 separately, and that's a different question from whether  
2 each ground is submitted separately. I haven't heard any  
3 criticism of that, and so if anybody has any, I wish you  
4 would state it because I think that the Supreme Court  
5 probably needs to know if we have a consensus that it's  
6 just fine to say that each child and each parent should be  
7 submitted separately regardless of what we do on the  
8 grounds.

9           The third thing I wanted to say is that I  
10 grew up in the era like Roger did of the Scott and McElroy  
11 charges, and the classic poster child is an automobile  
12 negligence case where there was an allegation of improper  
13 lookout, failure to brake, failure to turn to the left,  
14 failure to turn to the right, excessive speed; and they  
15 were all submitted separately in hopes to trick the jury  
16 or get a "yes" answer, depending on your perspective; and,  
17 yeah, that's right because negligence is any failure to be  
18 reasonable under the circumstances; and so we don't have  
19 targeted categories of behavior that the Legislature has  
20 said are grounds to take children away. You just have  
21 this broad standard of what's reasonable under the  
22 circumstances, and so there's more abuse that's possible  
23 in an automobile negligence claim to break a simple  
24 question of were they negligent and did they proximately  
25 cause these damages and break it into little subparts

1 almost like a philosopher would.

2           In a contract case you could have multiple  
3 issues. You could have late delivery, inferior product,  
4 inadequate quality. You could submit all of those  
5 individually; or you could just ask the jury did defendant  
6 breach the contract, if they did what damages did it  
7 cause; and so, once again, the contract is more structured  
8 than negligence law because at least it states the duties,  
9 but the breaches could be multiple; and there's a good  
10 reason to say we're not going to let anybody parse a  
11 contract or a failure to perform into 15 different  
12 subparts and get a different jury finding on each one.

13           To me the policy is different when the  
14 Legislature has given us a specific list of behaviors or  
15 omissions that constitute the grounds to violate a  
16 fundamental right or should I say override a fundamental  
17 right that the U.S. Supreme Court says is protected by the  
18 Fourteenth Amendment. The Legislature has given us a set  
19 number of grounds, and there will be a few that apply in a  
20 particular case, and so the question is when we have  
21 legislatively defined categories and they're specified and  
22 there's a limited number and only a few apply, is there a  
23 great danger in saying in that circumstance as opposed to  
24 a breach of contract or a negligence case in that  
25 circumstance we're going to make the jury tell us whether

1 they feel like one ground was violated and another was  
2 not.

3           So then another point, my fourth point, is  
4 that E.B. was a Supreme Court case in which the Court  
5 decided that the pattern jury charge submission was not an  
6 abuse of discretion. They did not decide that it had to  
7 be that way. They decided that it was okay to do it that  
8 way; and so what the task force is doing, whether it's  
9 recognized or not, is we're taking away the discretion  
10 standard in parental termination cases and we're saying it  
11 will be submitted this way. The task force proposal is  
12 this is the way you do it, and you've got no discretion to  
13 deviate from that. So let's be aware of the fact that in  
14 E.B. we have an abuse of discretion standard about how to  
15 construct the charge, and the task force recommendation is  
16 removing that discretion and replacing it with something  
17 that we think is required, for whatever reason, due  
18 process of law, public policy, or whatever, but let's  
19 recognize that we're doing that.

20           My next point and I'm getting closer to the  
21 end is --

22           CHAIRMAN BABCOCK: While we're young.

23           MR. ORSINGER: There's no question in my  
24 mind that requiring 10 people to agree on a ground is  
25 going to make it harder to get a jury verdict. You'll

1 probably still get to jury verdicts except in very close  
2 cases because in a lot of these cases the facts are so  
3 obvious that 10 people are not going to disagree that the  
4 child was injured or whatever. So, yes, requiring 10  
5 people to agree on a ground is going to be harder to get a  
6 verdict than if three can go with ground number one and  
7 three can go with ground number two and four can go with  
8 ground number three. It's going to be hard, but on  
9 appeal, briefing, briefing it, you don't have to brief the  
10 grounds the jury rejected; and the court of appeals  
11 doesn't have to evaluate the evidence on the grounds that  
12 the jury rejected; and so overall there's practicalities  
13 to both. We're going to get a quicker verdict. We'll  
14 have fewer hung juries.

15           On the other hand, it makes every appeal  
16 harder if we have multiple grounds and we don't know which  
17 ones the jury objected to, and I personally think a little  
18 more time spent by the jury in arriving at a verdict or  
19 getting a hung jury is taking that cost against  
20 streamlining the appeal, narrowing the issues, allowing  
21 the staff attorneys who are doing an Anders appeal with no  
22 help from the appellate lawyer, it's going to make their  
23 job easier to know that we can ignore those four grounds  
24 and concentrate on these two.

25           So then I guess that brings me to my last

1 point is really philosophically what degree of certainty  
2 do we want. In an ordinary case your decision is on a  
3 preponderance of the evidence, which means it's more  
4 likely than not that something happened, and you can get  
5 there with a verdict of 10 out of 12. In a criminal case,  
6 we don't want there to be any kind of reasonable doubt.  
7 We want it to be beyond any reasonable doubt, and we want  
8 all 12 people on the jury to agree that there is no  
9 reasonable doubt and then we will convict, so those are  
10 two standards. More likely than not, 10 out of 12 agree;  
11 beyond any reasonable doubt, everybody on the jury agrees.  
12 Now, terminating parent-child relationships is somewhere  
13 in between the preponderance of the evidence and the  
14 beyond a reasonable doubt standard, and that's recognized  
15 in law because it's required that the evidence be clear  
16 and convincing. So it's more than a preponderance but  
17 less than beyond a reasonable doubt, but it's only a  
18 verdict of 10, not a unanimous verdict.

19           And so if we -- I feel like we have a policy  
20 question here. Look, we already know there has got to be  
21 a specific ground. We already know that it has to be  
22 clear and convincing evidence. What we don't know is  
23 whether 10 people have to agree on what happened. If  
24 three plus three plus four agree that something happened  
25 that was bad, then we can decide on terminating. Is that

1 what we want? Or do we want 10 people to agree on what  
2 happened? In the E.B. case, the Austin court of appeals  
3 reversed the termination on the grounds that you couldn't  
4 guarantee that 10 people agreed on what happened, and so  
5 to me that's the philosophical question or the policy  
6 question we ask, do we really want all 10 people to agree  
7 on what happened, or do we just want 10 people to agree  
8 that something happened and then let's move on to best  
9 interest. All right. That's it. Thank you.

10 CHAIRMAN BABCOCK: Thanks, Richard. Judge  
11 Estevez.

12 HONORABLE ANA ESTEVEZ: All right. Well, I  
13 want to start out -- I'm hesitating on whether to make  
14 this comment, but unfortunately I truly believe this is  
15 true in our society, but we are in a society where we  
16 treat our dogs better than we treat our children. There  
17 is no doubt that if somebody met any of these things in  
18 how they treated their dog that there would be no one in  
19 here that would think that that dog should be with that  
20 owner. I hesitate to say that, but I believe that we  
21 have -- we need to recognize and I -- Richard is  
22 talking -- when he was talking very passionately about the  
23 rights of the parents, we need to understand that this is  
24 about the parents, but it's more about the child.

25 So when we're looking at that I'm going to

1 tell you that my preference would be if you are going to  
2 go into a -- you know, fall away from the broad form  
3 submission that Exhibit F would be more appropriate. I  
4 think it would be more efficient, and I think that usually  
5 what happens is the focus is always on the best interest  
6 of the child; and just like Judge Yelenosky, I've had  
7 cases in which, yeah, they're in prison but they have a  
8 relationship with their kid. You know, the kid's on the  
9 phone. He's talking to his parent. The other parent may  
10 have taken him a few times under the court order when they  
11 got divorced to go have visitation, and so just because  
12 you make this -- make one of these lists -- make it onto  
13 one of these lists does not mean that you're going to have  
14 your parent-child relationship terminated, but I don't  
15 feel as strongly that there's a due process issue because  
16 I believe that a lot of the behaviors or the things that  
17 lead to one spot in the laundry list really would fit  
18 under another one and that at the end of the day we're  
19 looking at the child. It's not about the parent. It  
20 really isn't.

21                   It didn't say the best interest of the  
22 parent. Best interest of the child. It's about what's  
23 going to happen to them, and you're keeping them -- and  
24 philosophically or socially we're trying to have the child  
25 move on into a better, healthier life. We're not saying,

1 "Hey, this person needs another chance, they need another  
2 chance, they need another chance." Well, what happens  
3 when the kid ends up dead, which has happened, you know,  
4 because they didn't terminate and they gave them another  
5 chance. It happens a lot, you know; and that's a CPS  
6 issue that they have; but it happens a lot because people  
7 are more worried about what about the parent; and the  
8 parent had a chance, and this is their day; and I believe  
9 they should have every constitutional protection that  
10 they're entitled to; but at some point you're there for a  
11 reason; and it's because something is not going well with  
12 the child; and I'm just going to ask people to -- if you  
13 need to put your dog in this little list so that you can  
14 see it in a different perspective, I would challenge you  
15 to do that because you will not have anyone that will say  
16 that if you don't feed your dog for a year or you don't  
17 provide any type of care that you're going to get to keep  
18 your dog. If you beat your dog, there's no one here that  
19 wouldn't call someone and take that dog away. I kidnapped  
20 a cat once. It was my neighbor's cat that was abusing the  
21 cat. Okay. I think the statute of limitations has run,  
22 but I'm just saying you can't do that with a child.

23 CHAIRMAN BABCOCK: I'm going to counsel  
24 you --

25 MR. ORSINGER: You might never be on the

1 Supreme Court.

2 HONORABLE ANA ESTEVEZ: I just want you guys  
3 to think about this in what are we telling our children,  
4 what are we telling our society. Yes, they have rights.  
5 The parents have rights. We're covering all of their  
6 rights. It doesn't bother me if three of them -- you  
7 know, because the reality is most of the time or at least  
8 there's some sort of appeal that comes up from the CPS  
9 courts to me, and I have to make that decision. They  
10 didn't get 10 people. They got me, for whatever reason.  
11 That's one. And they get all of the protections of the  
12 court of appeals.

13 I think it's hard -- the hard part about  
14 this is not the constitutional rights when you see these  
15 type of cases. It's the fact that these kids are in that  
16 situation, and I mean, if the -- if the parent is there,  
17 he's done a mistake, he wants to keep the kid, the kid's  
18 not hurt because -- you know, he'll get out of jail in  
19 five years. Yeah, he's entitled to keep his child. That  
20 doesn't mean it's in their best interest, but there's a  
21 lot of situations in which it was and where it is in their  
22 best interest, and I think we're just focusing too much  
23 sometime on the parents -- on the parents' right instead  
24 of the child's, and I understand that. I just want you to  
25 realize that it's not just about the parent. This is

1 about a child. I don't know what else to say except I  
2 don't know how -- I don't know how to switch that because  
3 we are all thinking about us as parents when we're  
4 thinking. We're not thinking about if we were the kid and  
5 it was our parent doing this to us and what we would want  
6 for us, because we all are older and we all associate with  
7 the parent, with the grandparents. You need to put  
8 yourself in the shoes of the kid and see where you would  
9 be and what is constitutional right -- constitutionally  
10 right for that child, not just for the parent.

11 CHAIRMAN BABCOCK: Thank you, Judge. Judge  
12 Yelenosky.

13 HONORABLE STEPHEN YELENOSKY: Yeah, two  
14 things. Richard -- about Richard's comments. Rarely are  
15 these cases about what happened. They're about what it  
16 means. There's a police report. The child is found with  
17 somebody who is doing drugs. There's a police report.  
18 There's a video of the guy walking out of Costco with a  
19 big screen TV and the child with him. Is that something  
20 that endangers the child? Does that meet this standard?  
21 Rarely is it a factual determination. It's not like a  
22 criminal trial in that way, and if you look at these  
23 standards there are some that are concrete, I guess I  
24 would say, like the (q) or whatever, so many years in jail  
25 or whatever, but look at the other ones. I mean, most of

1 them are engaged in conduct or knowingly placed the  
2 child -- okay. I guess that's a factual issue.  
3 Voluntarily left the child. Well, there's no doubt the  
4 child was left. Was that voluntary?

5           Here's an example of a termination case:  
6 Five-year-old child in the projects, playing with other  
7 kids, gets on an air-conditioner, is electrocuted to  
8 death. That's the fact. Then the fact is the parent  
9 wasn't there. Now, we could have some question about why  
10 the parent wasn't there, but there's no real dispute about  
11 that. So you interpret -- okay, those are the facts. Now  
12 apply this, and that's the kind of case you're going to  
13 have. Now, yes, there are other cases where maybe the  
14 person is disputing anything alleged, but that's rarely  
15 true. So let's not fix the rare case and screw up the  
16 majority of the cases. Like I said, I've denied a  
17 termination before, so it's not that I think parental  
18 rights should always be terminated.

19           The second thing is people keep saying jury  
20 nullification. I just don't understand that. You're  
21 suggesting that this is like the jury finds by a  
22 preponderance of the evidence that there was liability and  
23 there were damages, but you know what, we're not going to  
24 rule for the plaintiff. That's -- that's not what this  
25 is. The best interest, first of all, the statute, as

1 Judge Christopher has pointed out, Justice Christopher,  
2 says "the court may terminate if" and then it says you  
3 have to find that it's in the best interest of the child.  
4 That's not jury nullification, so I ask it as a question,  
5 what do you mean?

6 MR. ORSINGER: See, I think that the way the  
7 Family Code is written, if you find grounds and best  
8 interest, you must terminate. That's my view.

9 HONORABLE TRACY CHRISTOPHER: It says "may."

10 MR. ORSINGER: That's where the jury  
11 nullification argument comes from.

12 HONORABLE TRACY CHRISTOPHER: It says "may,"  
13 doesn't say "must." It says "may."

14 MR. ORSINGER: Well, I know that, and I  
15 really don't know whether -- I mean, it's always been my  
16 perception that favorable findings on the jury verdicts  
17 are binding on the trial judge, and I may be wrong, and I  
18 don't know if there's a case that says I'm wrong, but if  
19 I'm not wrong then we're engaged in a debate here about  
20 whether the jury should be exercising the discretion that  
21 even though the grounds the Legislature has said if you do  
22 this and it's in the best interest, the question is do you  
23 get terminated or does a jury decide that even though you  
24 did these bad things and even though it's best for the  
25 child, you know, you can feel sorry for the parent and

1 just forget the fact that --

2 HONORABLE STEPHEN YELENOSKY: You're drawing  
3 a distinction between a jury that says I think it's in the  
4 best interest of this child to terminate the parental  
5 rights --

6 MR. ORSINGER: Right.

7 HONORABLE STEPHEN YELENOSKY: -- but we're  
8 not going to do it.

9 MR. ORSINGER: Right.

10 HONORABLE STEPHEN YELENOSKY: Now, somebody  
11 says we're not going to terminate is essentially in my  
12 mind saying it's not in the best interest of the child.

13 MR. ORSINGER: Well, but you have a jury  
14 answer that says that it is, so the problem -- the problem  
15 that I see is that I can imagine that there are reasons  
16 why someone would be against terminating even though they  
17 found "yes" and "yes," and there -- as was stated, I  
18 forget, Brett or somebody said there are no standards  
19 given to the jury about how to exercise this discretion of  
20 "should." The only standard they're given is the grounds  
21 and best interest and the *Holley V. Adams* factors and  
22 nothing for "should." So where are they? They're  
23 anywhere in the universe they want to be on whether it  
24 should or shouldn't be. I don't think that's what the  
25 Legislature wanted, but I may be wrong.

1 HONORABLE STEPHEN YELENOSKY: I don't think  
2 it's a real problem.

3 CHAIRMAN BABCOCK: Judge Yelenosky, is the  
4 clear and convincing evidentiary standard constitutionally  
5 compelled?

6 HONORABLE STEPHEN YELENOSKY: I'm sorry,  
7 what?

8 MR. ORSINGER: Yes. Yes. U.S. Supreme  
9 Court has ruled that.

10 HONORABLE STEPHEN YELENOSKY: I defer to him  
11 on that, but that makes sense.

12 CHAIRMAN BABCOCK: Isn't that to protect the  
13 parents?

14 MR. ORSINGER: Pardon me?

15 CHAIRMAN BABCOCK: Isn't that to protect the  
16 parents?

17 MR. ORSINGER: I think it is. I think that  
18 the U.S. Supreme Court, except for Justice Stevens' one  
19 concurring opinion, the U.S. Supreme Court has never  
20 really focused on the rights of the children like Judge  
21 Estevez was talking about. They're pretty much concerned  
22 about the rights of the parent and the government  
23 interfering in the family relations. That's 99 percent of  
24 what they say.

25 The only contrary that I know is in the

1 Troxel case where Justice Stevens says, "Wait a minute,  
2 wait a minute," we're talking about the fundamental right  
3 of the surviving parent to deny the deceased parent's  
4 children -- parents access to the children, and nobody has  
5 ever said anything about the children's right to see their  
6 grandparents, but so far as I know that concurring opinion  
7 is the only time in U.S. Supreme Court jurisprudence that  
8 they've ever even discussed the children's constitutional  
9 rights.

10 CHAIRMAN BABCOCK: Which is not to take away  
11 from Judge Estevez' point.

12 MR. ORSINGER: No. Her point is -- the  
13 whole -- the whole reason why we even have these task  
14 forces all the time is because the Legislature is  
15 concerned not so much about parental rights. They're  
16 concerned about delay in a situation where a jury and a  
17 judge have entered -- a jury has found and a judge has  
18 entered a judgment to terminate, and then we have a  
19 two-year process where this child is in foster care until  
20 the child can be adopted out, and so the concern for the  
21 task force is as I -- and I've been on two of them now --  
22 is, you know, how do we resolve the necessary  
23 constitutional and procedural safeguards in a way that  
24 we're sure that justice is done in a quick way so that  
25 these children can move on with the rest of their lives.

1                   CHAIRMAN BABCOCK: I heard some support, I'd  
2 like to gauge how much, for the status quo, like just  
3 let's not disturb the holding of the Supreme Court 28  
4 years ago in the E.B. case. If there's anybody in favor  
5 of that, raise your hand.

6                   How many against that? You got your hand  
7 up, Buddy?

8                   MR. LOW: Yeah.

9                   CHAIRMAN BABCOCK: So there are 11 in favor  
10 of the -- I'll say status quo, E.B., and 16 against. So  
11 the Court may want to consider that. Justice Peeples.

12                  HONORABLE DAVID PEEPLES: I've been keeping  
13 my powder dry for a long time.

14                  CHAIRMAN BABCOCK: Fire away.

15                  HONORABLE DAVID PEEPLES: I think it needs  
16 to be pointed out, first of all, that broad form and  
17 disjunctive submission are different, and we should not  
18 confuse them. Broad form deals with putting several  
19 elements in one question instead of several questions.  
20 You can have -- disjunctive just means that elements have  
21 an "or" between them, and those are just very different,  
22 and we need to keep those separate. The unfairness here  
23 is the disjunctive part, not so much the broad form part,  
24 and E.B. mandated broad form. They didn't mandate  
25 disjunctive submission. They approved it by a matter of

1 discretion, but they didn't mandate it. Very different  
2 things.

3                   Now, it was said that, you know, if we  
4 change it will be complicated and there might be  
5 inconsistent answers, and I respectfully disagree with  
6 that. If E.B. -- E.B. submitted two grounds and best  
7 interest in one question. If E.B. had been submitted with  
8 separate questions it would have been three questions.  
9 Neglect was one, abuse was another, and best interest  
10 would be the third. I respectfully say that is not  
11 complicated, and I ask anybody to show me how there could  
12 be a conflict, inconsistent answers on yes or no about  
13 abuse, yes or no about neglect, which is omission, and  
14 best interest. I mean, I'm all ears, but I don't think  
15 you can show me how there could be a conflict there. So  
16 complicated, no, and contradictory answers, I just don't  
17 see it.

18                   And then the task force comes up with three  
19 grounds, under the old regime. In E.B. those three could  
20 be submitted disjunctively in a question with best  
21 interest in the same question, so you would have one  
22 question, one broad form and disjunctive question. That's  
23 one, one versus four. I think four is not a complicated  
24 charge. I just respectfully disagree that asking about  
25 abuse and neglect and addicted baby or disobeyed a court

1 order, whatever the evidence is, asking two or three or  
2 four of those and then best interest, that is not  
3 complicated; and if the jury is really doing their work  
4 and considering them all, well, I mean, they're still  
5 doing the same mental work it seems to me, or we hope they  
6 are, but the answer -- and they should be answering in  
7 their own minds however many grounds are submitted  
8 disjunctively if they're doing their job.

9           So I just respectfully disagree that what is  
10 proposed by the task force and basically recommended by  
11 the subcommittee with some tweaks is -- runs the danger of  
12 inconsistent findings or that it's complicated. I  
13 respectfully say that's not right.

14           Best interest should not be linked to any  
15 particular ground. Abuse, neglect, the mother used drugs  
16 during the pregnancy and the baby is addicted, those are  
17 all bad parenting, but best interest -- and I've got here  
18 the pattern jury charge, it's 218.1, sets out the nine  
19 factors that were mentioned in a landmark Supreme Court  
20 case, *Holley vs. Adams*. Listen to these, and I'm going to  
21 just read them, and you will see that this is what's best  
22 on all of the evidence on common sense basis, what's best  
23 for these children, and it's not linked to any ground.  
24 The desires of the child. That's number one. The  
25 emotional and physical needs of the child now and in the

1 future, a danger to the child, parenting ability, programs  
2 available, plans for the child, the stability of the home,  
3 acts or omissions. Now, that's similar to grounds  
4 usually, and excuses for acts or omissions.

5           So the point I would make is that best  
6 interest is on the whole case, and if they answer "yes" to  
7 abuse and "no" to neglect and "no" to addicted baby or  
8 something, they've still found a ground and they're  
9 supposed to answer best interest on all of the evidence  
10 that they believe, and that's just the way the system  
11 works, and I think that's the way it ought to be. Big  
12 mistake to link best interest to a specific ground.

13           On the point that Richard Munzinger made,  
14 and let me just say that Judge Estevez is right, and I  
15 could have brought several cases where it is stated very  
16 clearly by the Supreme Court of Texas and the U.S. Supreme  
17 Court that you're balancing the rights of parents and the  
18 rights of children. I mean, it's a balancing issue, but  
19 what's being terminated is the parental rights, so that's  
20 why they talk about those, but if you've got three and  
21 three and four answering "yes" on grounds that means  
22 you've got nine answering "no" to the first one, nine  
23 answering "no" to the second one, and eight answering "no"  
24 to the third one. Now, maybe that's okay, but it's a  
25 policy question, do we want to run the system that way.

1 And so we need to take some votes, but --

2 CHAIRMAN BABCOCK: That's what I was

3 thinking.

4 HONORABLE TOM GRAY: You do realize you won  
5 the first vote, right?

6 HONORABLE DAVID PEEPLES: Not after I've  
7 spoken, but -- enough.

8 CHAIRMAN BABCOCK: Skip.

9 MR. WATSON: Well, I agree with David, but  
10 just to clarify, and I apologize, my book was mistabbed,  
11 and I was -- what was labeled as the minority report is,  
12 in fact, the task force report in my book, so I was  
13 agreeing with Brett. I agreed with Richard. I don't see  
14 why the word "should" needs to be in there, and for that  
15 reason I favor the task force report for all the reasons  
16 that were said. That's all I'm going to say.

17 CHAIRMAN BABCOCK: All right. Great. Judge  
18 Peeples, we've -- a majority of our committee has said  
19 that they don't want to stick with E.B., we want to change  
20 something, and as I read it or as I see it we've got two  
21 proposals. We've got the so-called Exhibit F proposal and  
22 then we've got the Exhibit E proposal, which Justice  
23 Christopher has authored, and she has her hand up so she  
24 may want to say something.

25 HONORABLE TRACY CHRISTOPHER: There's

1 actually three.

2 CHAIRMAN BABCOCK: Huh?

3 HONORABLE TRACY CHRISTOPHER: There's  
4 actually three proposals, because the third one is the  
5 task force report, which does not ask the ultimate  
6 question, should the rights be terminated. It's only  
7 ground plus best interest.

8 CHAIRMAN BABCOCK: And is not predicated.

9 HONORABLE TRACY CHRISTOPHER: And not  
10 predicated. So three different --

11 CHAIRMAN BABCOCK: Okay. Well, would voting  
12 on those three -- how do we want to do it? Do we want to  
13 see who gets the top two votes, or how do we want to do  
14 that, Judge Peeples?

15 HONORABLE DAVID PEEPLES: Why not vote on  
16 the general principles? I mean, we've already taken the  
17 16 to 11 vote on whether to break them into separate  
18 questions or stick with E.B. We might want to do that one  
19 again, although I like the result, but I think it ought to  
20 be stronger than that, frankly, but whether to predicate  
21 best interest is an important question. That's a time  
22 saver. It's immaterial if they haven't answered "yes" to  
23 anything. The jury time is saved. There are all kinds of  
24 reasons why it ought to be predicated, and it's not a big  
25 issue to me, but whether the ultimate question is answered

1 by the jury, we need a vote on that. And, you know,  
2 the -- another way of stating should we have separate  
3 questions is to say is it okay to submit these things  
4 disjunctively.

5 I mean, those are flip sides of the same  
6 thing, and my own view is there are a couple of kinds of  
7 cases where it ought to be okay to submit them  
8 disjunctively, but in most of the others it shouldn't  
9 happen, but in the subcommittee we just thought it needed  
10 to be kept simple and one size fits all, either separate  
11 or disjunctive. I'm for some sort of middle ground  
12 myself.

13 CHAIRMAN BABCOCK: That's going to be hard  
14 to vote on.

15 HONORABLE DAVID PEEPLES: Well, I'll tell  
16 you about it if you want.

17 CHAIRMAN BABCOCK: How many are in favor of  
18 a middle ground?

19 MR. WATSON: Chip, what exhibit is the task  
20 force report? I mean, that's where I'm confused. Mine is  
21 labeled on the paper Exhibit C, and you've not referenced  
22 an Exhibit C.

23 HONORABLE DAVID PEEPLES: That's it. Task  
24 force recommended.

25 CHAIRMAN BABCOCK: Yeah, Exhibit C is the

1 task force. Exhibit F is our -- the majority of our  
2 subcommittee, and Exhibit E is the minority of our  
3 subcommittee. Is that right, Justice Christopher?

4 HONORABLE TRACY CHRISTOPHER: And we had a  
5 couple of people that supported the task force,  
6 nonpredicated and no open-ended question.

7 HONORABLE DAVID PEEPLES: Yeah, we did.

8 HONORABLE TRACY CHRISTOPHER: I don't think  
9 they're here today, but we did have some people that  
10 supported that.

11 CHAIRMAN BABCOCK: I mean, most of the  
12 committee is here today, which is terrific. Richard, and  
13 then Justice Gray.

14 MR. ORSINGER: I would propose that we take  
15 a vote on the specific question of whether we ought to  
16 have a "should"-based question or whether we ought to do  
17 the task force where we just ask statutory grounds and  
18 best interest. To me that gets to a really core question  
19 here, and the Supreme Court ought to know what we think  
20 about that.

21 CHAIRMAN BABCOCK: Okay. Justice Gray.

22 HONORABLE TOM GRAY: Two comments, I guess.  
23 One on complexity, but I'm going to save that one because  
24 I want to talk about the conditional submission first.  
25 I'm not so much opposed to the conditional submission, but

1 I think the first question needs to be best interest if  
2 you're going to do that, because if you've got eight  
3 grounds for termination then the jury would have to go  
4 through all eight grounds to get to a conditionally  
5 submitted required element; and if you ask best interest  
6 first and they say "no," they're done.

7 CHAIRMAN BABCOCK: Yeah.

8 HONORABLE TOM GRAY: If you ask the eight  
9 grounds first then they've got to get through all eight  
10 before they get to the other question, so you have to  
11 answer "no" eight times versus -- and I don't see any  
12 reason for one versus the other being first other than at  
13 that point if you're going efficiency.

14 I did want to point out to Richard that you  
15 can be executed and not know specifically what the jury  
16 found, whether you shot him, stabbed him, hit him with a  
17 club, or we don't know, but -- and so the -- and in this  
18 case you are not terminating based on only the vote of  
19 three or four jurors. Ten must vote that it is in the  
20 best interest of the child to terminate. So you -- it's  
21 not like on the final question, and maybe the ultimate  
22 question that 10 people didn't agree. Let me get to  
23 complexity.

24 Remember that these are the simple  
25 questions. If you look on down in Family Code, section

1 161.001 that we're dealing with, after they get through  
2 ground (u), the 21 grounds, then you get to the best  
3 interest element, and then you get to another series of  
4 provisions under that about what can't be considered; and  
5 there's some, in effect, defenses and other provisions  
6 that are going to somehow have to be incorporated that I  
7 think will add to the complexity of the actual charge in  
8 individual cases that are going to make it complicated.  
9 So --

10 CHAIRMAN BABCOCK: Okay. We're going to  
11 take some votes. Judge Peeples, I'm going to let you  
12 frame some of the issues, but I'm going to frame some of  
13 them, too, and the first vote we're going to take is how  
14 many people are in favor of the task force and how many  
15 people are against the task force formulation of the jury  
16 instruction or jury issues. So everybody in favor of the  
17 task force, raise your hand.

18 MR. PERDUE: Can I ask Judge Yelenosky again  
19 to explain why he doesn't think that was an issue?

20 HONORABLE STEPHEN YELENOSKY: On the  
21 "should"?

22 MR. PERDUE: The "should" word.

23 HONORABLE STEPHEN YELENOSKY: Just a matter  
24 of human nature, I don't see somebody saying that it's in  
25 the best interest of the child to terminate but it should

1 not. So I just don't see that as a real problem. On the  
2 face of it I guess you could say it is, but --

3 CHAIRMAN BABCOCK: Everybody in favor of the  
4 task force, raise your hand.

5 Everybody against the task force, raise your  
6 hand.

7 Well, sorry for the task force, but 24 in  
8 favor -- I mean, 4 in favor and 24 against. So there you  
9 go.

10 Everybody that's in favor of the majority  
11 proposal of our subcommittee, which is Exhibit F, raise  
12 your hand.

13 Everybody against Exhibit F, raise your  
14 hand. That passes by 26 to 2.

15 Everybody in favor of the minority report,  
16 which is Exhibit E, raise your hand. That would be two  
17 people, and everybody against --

18 HONORABLE JANE BLAND: Three.

19 CHAIRMAN BABCOCK: Three, who snuck in  
20 there.

21 MR. HUGHES: That's okay. I don't count  
22 nearly as much. You can put it down for half.

23 CHAIRMAN BABCOCK: Two and a half in favor.  
24 What are you going to vote against it, too?

25 MR. HUGHES: No, no.

1 CHAIRMAN BABCOCK: Everybody against, just  
2 for formality sake. Everybody against?

3 MR. WATSON: What am I against?

4 MR. PERDUE: The Constitution.

5 CHAIRMAN BABCOCK: Two in favor, 18 against.  
6 Now, Judge Peeples, do you want to formulate some votes?

7 HONORABLE DAVID PEEPLES: Well, I think Tom  
8 Gray raised an interesting point about submitting best  
9 interest first and predicating the grounds on a "yes"  
10 answer to that. That's a very interesting proposal, and I  
11 think maybe the judge ought to have the discretion to do  
12 that.

13 CHAIRMAN BABCOCK: Yeah. Yeah, I don't  
14 know -- I don't think we need to vote on that, because  
15 Jackie and Martha are taking copious notes here and we  
16 have a transcript, and that is an intriguing idea, I  
17 think, Judge.

18 HONORABLE STEPHEN YELENOSKY: Can we speak  
19 to it if --

20 MR. ORSINGER: I would like to comment. I  
21 don't want to let that go unanswered.

22 CHAIRMAN BABCOCK: Who wants to comment on  
23 it? Judge Peeples.

24 HONORABLE DAVID PEEPLES: Well, I was going  
25 to talk about something else, too.

1                   CHAIRMAN BABCOCK:  Let's comment on that  
2 first.  Judge Yelenosky.

3                   HONORABLE STEPHEN YELENOSKY:  Well, I think  
4 the reason that the judge ought to be able to put it  
5 first, as I heard it, is it's more efficient for the jury;  
6 is that right, so they don't have to go through all of the  
7 other questions first?  The way I look at it is it's a  
8 process for the jury, and so you're asking the jury to  
9 consider the whole picture before they've talked about the  
10 individual factual claims and what they mean, and so if  
11 you're assuming the jury is going to come in there and the  
12 discussion can be just about best interest without  
13 discussing the other things, then I do -- I do think  
14 that's wrong.

15                   CHAIRMAN BABCOCK:  Richard Orsinger.

16                   MR. ORSINGER:  I would like to have the best  
17 interest submission condition for exactly the reason that  
18 Justice Gray doesn't want it, and that is I want to force  
19 the jurors to go through the discussion and the evidence  
20 on the grounds.  I can easily see after a horrible trial a  
21 jury going in and saying, "Do you guys want to stay here  
22 and discuss all this, or do you just want to vote on best  
23 interest?"

24                   "Well, let's vote on best interest."  They  
25 don't get 10 in favor of best interest so we're out of

1 here in 30 seconds. I feel like we need to force them to  
2 discuss the evidence before they consider the best  
3 interest question.

4 CHAIRMAN BABCOCK: Buddy, then Lisa.

5 MR. LOW: And not just that, if they've all  
6 agreed as to the best interest and those 12 people are  
7 going to say, "Well, if we don't find one of these, then  
8 we're not going to the best interest." I think it  
9 shouldn't be that way.

10 CHAIRMAN BABCOCK: Lisa.

11 MS. HOBBS: It's not a precise analogy, but  
12 it's kind of like asking the jury first like who wins,  
13 plaintiff or big company; and they decide, you know, big  
14 company loses and they go through -- we ask them to  
15 actually follow the law. I mean, it's not a perfect  
16 analogy, but it bothers me in that same way that you would  
17 ask a first question like that.

18 CHAIRMAN BABCOCK: Hey, Tom, do you have  
19 your hand up or just resting?

20 MR. RINEY: Just resting.

21 MR. MUNZINGER: I agree with Richard  
22 Orsinger.

23 CHAIRMAN BABCOCK: Okay. The two Richards  
24 are in agreement. I think we could probably end this  
25 right now that having happened. It's a landmark. Buddy.

1                   MR. LOW: You know, this committee passed a  
2 rule that if, you know, you instruct the jury if they  
3 don't find this then they don't go to damages. I mean,  
4 we've done that before, but I think this is something  
5 different to condition.

6                   CHAIRMAN BABCOCK: Yeah. Okay. Judge  
7 Peeples, you're hiding behind our court reporter here. I  
8 didn't know if you had your hand up or not.

9                   HONORABLE DAVID PEEPLES: Well, I think we  
10 ought to vote up or down on whether should the parental  
11 rights be terminated, whether that ought to be submitted  
12 to the jury or not; and for me, I'm not really impressed  
13 with the -- I'm not concerned about the nullification  
14 supposed problem. I do think there is -- I'd like to know  
15 what people think about if we don't have the jury answer  
16 should the rights be terminated, does the judge then have  
17 a discretionary call, not a judgment NOV call, but a  
18 discretionary call because the statute says the judge "may  
19 order termination if." And I think it's a very  
20 significant decision as to whether the judge can as a  
21 discretionary matter disagree with a jury --

22                   CHAIRMAN BABCOCK: Okay. Frame that.

23                   HONORABLE DAVID PEEPLES: -- if we think  
24 that. Richard, do you think that?

25                   MR. ORSINGER: No, I don't think that, but I

1 know that down on that end of the table there's some  
2 people that do. So it's a question and it bothers me, and  
3 that's why I proposed we take a vote on it.

4 CHAIRMAN BABCOCK: Frame the question for  
5 the vote.

6 HONORABLE DAVID PEEPLES: Should the jury be  
7 asked not only are there grounds and would it be in the  
8 best interest to terminate, but should the rights be  
9 terminated? And I would say in the same question as best  
10 interest is asked.

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

13 HONORABLE DAVID PEEPLES: Of which?

14 CHAIRMAN BABCOCK: Of what you just said.

15 HONORABLE DAVID PEEPLES: Of putting  
16 "should" in the question?

17 CHAIRMAN BABCOCK: I told you to frame the  
18 question.

19 HONORABLE DAVID PEEPLES: Putting "should"  
20 in the question.

21 HONORABLE BRETT BUSBY: We already voted on  
22 that.

23 HONORABLE TRACY CHRISTOPHER: We already  
24 voted for that.

25 HONORABLE ANA ESTEVEZ: What concerns me

1 about putting should the rights be terminated and you find  
2 this is in their best interest is that you are in effect  
3 doing exactly what we're not allowed to do, which is tell  
4 them the legal effect of their question. That's it. I  
5 think we're prohibited from doing that. I think that it's  
6 clear that our jury charge is supposed to only say what  
7 the questions are and leave out what the legal effect is  
8 of a question. It would be the same as "Do you think  
9 Rusty should win this lawsuit and be paid one million  
10 dollar in damages?"

11 MR. HARDIN: Yes.

12 HONORABLE TOM GRAY: Not nearly enough.

13 HONORABLE ANA ESTEVEZ: I think the question  
14 just has to be the question. I don't believe that  
15 "should" should be in there, and I think that's the  
16 reason, because you're giving them the legal effect and in  
17 the instructions you say, "Do not consider the legal  
18 effect of these questions."

19 CHAIRMAN BABCOCK: Yeah, Rusty, you were  
20 asking for a hundred million.

21 MR. HARDIN: I'll take it. I'll accept it.

22 HONORABLE ANA ESTEVEZ: That was the policy  
23 limits.

24 CHAIRMAN BABCOCK: You're on appeal on that.  
25 Justice Busby.

1 HONORABLE BRETT BUSBY: I do think we  
2 already voted on this because it's in Exhibit F to say  
3 "and that the parent-child relationship should be  
4 terminated," but I disagree with Judge Estevez because I  
5 don't think it's a legal question. I think it's the  
6 ultimate issue that's being asked the way that the -- and  
7 that is something that gets submitted to the jury, is the  
8 ultimate issue on should it be terminated or not. Now, I  
9 think we've got to stick with what the statute says, which  
10 is "the court may," and I'm told that in a jury trial  
11 context that means "the jury may," so I don't think we  
12 have the freedom to rewrite the statute. Whether we agree  
13 with it or not is not the question. It's is that what the  
14 Legislature said or not, and it seems to me that's what  
15 the Legislature said, and so I think Exhibit F correctly  
16 submits should it be terminated.

17 CHAIRMAN BABCOCK: Eduardo.

18 MR. RODRIGUEZ: I have two comments. One is  
19 this has really been an exciting debate and really a very,  
20 very well discussed --

21 CHAIRMAN BABCOCK: Yeah, who knew.

22 MR. RODRIGUEZ: Second thing is I think in  
23 my experience we forget that juries are really very, very  
24 serious about what they do. Very rarely do they come out  
25 with a decision without spending a lot of time and a lot

1 of serious and heart-wrenching discussion about what  
2 they're doing. So I really trust the jury to do the right  
3 thing; and even though I've lost a lot of cases thinking  
4 they've done the wrong thing, the reality is that they  
5 reached their conclusion 99 percent of the time after very  
6 serious thought and discussion about the matter; and so  
7 I've -- I think we should continue to trust juries just as  
8 we've had forever in our system.

9                   CHAIRMAN BABCOCK: Yeah, that's a great  
10 point, and that's a good point to end on right now because  
11 Dee Dee's fingers are falling off here, so we'll be back  
12 in 15 minutes at 11:20. Thanks, everybody.

13                   (Recess from 11:06 a.m. to 11:29 a.m.)

14                   CHAIRMAN BABCOCK: All right. We're back on  
15 the record, and we're going to go now to Justice Bland's  
16 item on the agenda. It's number eight, procedural rules  
17 on limited scope representation. So, Jane, take it away.

18                   HONORABLE JANE BLAND: All right. We  
19 have -- we had a meeting in July where we discussed in  
20 general the disciplinary rule that permits limited scope  
21 representation and some changes to our Rules of Civil  
22 Procedure that would -- would facilitate the use of  
23 limited scope representation by lawyers, and the two rules  
24 that the subcommittee recommended amending are Rules 8 and  
25 10. Rules 8 and 10. We brought a draft forward at the

1 July meeting. We got lots of excellent suggestions and  
2 comments, so now we're here with a revised draft to  
3 discuss with you. So I think the easiest thing to do  
4 might be for you to look at the subcommittee draft  
5 redline, because that will show you the changes from the  
6 July meeting that will hopefully address some of the good  
7 suggestions that we received at that meeting.

8           And then after we go through the revised  
9 draft, we have Chris Nickelson, who planned to be here  
10 tomorrow, but has been in trial this week and was going to  
11 get up at the crack of dawn and drive here if we discussed  
12 this tomorrow, couldn't be here today because he's in  
13 trial, but he had sent over a proposal from the family law  
14 section, and so we're going to take a look at that and see  
15 what the committee's thoughts are about that.

16           HONORABLE STEPHEN YELENOSKY: Is it in here?

17           HONORABLE JANE BLAND: Yes, the Nickelson  
18 proposal is called "Nickelson proposal," and it's just a  
19 one sentence addition to one of the rules, but before we  
20 get to it, I think it would be better to go ahead and go  
21 through the subcommittee draft that -- on all of the  
22 proposals that the subcommittee has recommended that there  
23 isn't any disagreement about.

24           So under Rule 8, Rule 8 used to be just  
25 attorney in charge, and now it's divided into two, Rule

1 8.1 and Rule 8.2. 8.1 is the old general appearance  
2 language, and we hadn't initially made changes to that  
3 section, but after the committee's discussion in July it  
4 became clear that we needed to make some changes just so  
5 that the rule would be coherent, and so it -- the new Rule  
6 8.1 basically comes out with three sections. One that  
7 has -- preserves the old rule, which is an attorney whose  
8 signature first appears on the pleadings is the party --  
9 is the attorney responsible for the suit for that party,  
10 and then there's an "unless," unless the initial pleadings  
11 designate another attorney, which is part of the existing  
12 rule, or the attorney files a notice of limited appearance  
13 under this rule.

14           So it just flags that if you file a notice  
15 of limited appearance you're under Rule 8.2, and then it  
16 notes that any change in the designation of the attorney  
17 has to be made in writing with written notice to the court  
18 and all parties, and then finally it preserves the old  
19 rule that all communications from the court or other  
20 counsel shall be sent to the attorney in charge. Then  
21 under Rule 8.2, which was the -- most of the new rule,  
22 there were a couple of issues that the committee flagged  
23 that we needed to address. One was what -- to make it  
24 clear that the rule did not forbid ghost writing, so that  
25 if you were advising a client and even helping a client

1 with drafting but had no plan to appear in court or to  
2 communicate with other -- with opposing counsel, that you  
3 did not need to file a notice of limited appearance. In  
4 other words, it was at your -- you and your client's -- it  
5 was you and your client's decision as to whether or not  
6 you would be making a court appearance and would be  
7 communicating with opposing counsel.

8           So we have added a provision that, 8.2(b),  
9 notice not required. And that is to make it clear that if  
10 the tasks to be performed do not require the attorney to  
11 appear before the court or communicate with the court or  
12 opposing parties you need not file a notice of limited  
13 appearance.

14           The second issue that the committee flagged  
15 was the issue of multiple attorneys and the concern that  
16 perhaps multiple attorneys might file -- each file notices  
17 of limited representation -- or, I'm sorry, notices of  
18 limited appearance and there would be no -- there would be  
19 multiple attorneys but no one attorney in charge. So  
20 we've added 8.2(g), which says that when multiple  
21 attorneys appear in the suit on behalf of a party, one  
22 attorney must make a general appearance and be designated  
23 as the attorney in charge, because as we heard I think  
24 from Trish McAllister and others at the last meeting the  
25 notice of limited appearance contemplates the situation

1 where a person of modest means has the ability to hire an  
2 attorney for some tasks associated with the prosecution or  
3 defense of a lawsuit, but does not have sufficient funds  
4 to hire an attorney for the entire lawsuit, and it is not  
5 intended to be a free-for-all with, you know, multiple  
6 attorneys, none of whom are designated as the attorney in  
7 charge. So we went ahead and made that change.

8           One other thing that we did was to  
9 clarify -- and this is going to come up more in Rule 10,  
10 that the -- in determining whether or not the tasks that  
11 the lawyer has designated that he's representing the  
12 client for are complete, one of the requirements of  
13 completion of those tasks will be a draft order to be  
14 submitted, and so that's now included in Rule 10. So  
15 before we get to Rule 10, though, I thought we might go  
16 through Rule 8 and see if -- you know, what the  
17 temperature of the committee is about what is hopefully  
18 the final draft that we will send up to the Supreme Court  
19 for its consideration with maybe some minor tweaking from  
20 today. And I think, Chip, that you had said that we were  
21 going to try to get this done in 30 minutes at our last  
22 meeting, so if people could keep their comments -- knowing  
23 that we have exhaustively discussed this once already, if  
24 you could keep your comments to sort of the new changes,  
25 that would be great.

1                   CHAIRMAN BABCOCK: Yeah, and I'll second  
2 that. And before recognizing Justice Gray, who I'm sure  
3 will follow that admonition, we want to get these two  
4 rules done by 12:30, so we have a little more than 30  
5 minutes but not much. Justice Gray.

6                   HONORABLE TOM GRAY: Excellent work.  
7 8.1(a)(2), I would like to see "prior to general  
8 appearance" added at the end so it reads "The attorney  
9 files a notice of limited appearance under this rule prior  
10 to a general appearance." My concern that I'm trying to  
11 address is the attorney that has already made a general  
12 appearance is having problems with their client, then they  
13 decide they want to do a limited appearance so that they  
14 can then force the trial court to let them out. That's  
15 what I'm trying to avoid.

16                   Second comment, in (e) you have "service  
17 must be made on the attorney and the party in accordance  
18 with." I would like to see (f) made parallel to that,  
19 where the judge is giving notice that the trial court must  
20 provide notice to the attorney and the party and skip out  
21 or strike out "separately provide notice to," because in  
22 both of them it implies separately provide notice if  
23 required, so just make (e) and (f) parallel in that  
24 regard.

25                   CHAIRMAN BABCOCK: Okay. Any other

1 comments?

2 HONORABLE TOM GRAY: I had one more.

3 CHAIRMAN BABCOCK: Oh, I'm sorry, Judge.

4 HONORABLE TOM GRAY: If you keep subsection  
5 (g), which I'm not a fan of, but past that, "when multiple  
6 attorneys appear in the suit on behalf of a party," I  
7 think we need to add "at the same time" because even the  
8 withdrawal provisions contemplate attorneys appearing on  
9 limited topics in succession; and so if you don't make  
10 some accommodation there then you've got a problem where  
11 two attorneys in succession, one of them is going to have  
12 to be the attorney in charge. That's all my comments.  
13 Thank you.

14 CHAIRMAN BABCOCK: Thank you. Judge  
15 Wallace.

16 HONORABLE R. H. WALLACE: I don't understand  
17 the need to have -- have multiple attorneys when one or  
18 more are entering limited appearances. I can see it if  
19 someone wants to have an attorney do certain things and  
20 then they'll do other matters pro se; but, I mean, if  
21 someone can hire two attorneys, they don't -- I don't see  
22 what it matters to me whether one of them is there just  
23 to -- as a motion -- to do motions and another one is  
24 going to try the case or whatever. That to me can be  
25 worked out between the client and the lawyers, and why do

1 I -- why does the court care? I just don't see a need for  
2 a limited representation where you have more than one  
3 attorney.

4 CHAIRMAN BABCOCK: Roger.

5 MR. HUGHES: Well, maybe I can give you a  
6 real world example, and this happens sometimes in personal  
7 injury cases where the -- the original defendant is being  
8 represented by counsel selected by his insurance company,  
9 and under the liability policy the insurance company has  
10 the right to control the case, and therefore, they select  
11 the defense counsel and direct defense counsel's activity  
12 on behalf of the defendant, but then defendant decides,  
13 "Hey, I'm really the plaintiff. I'm injured, so I'm going  
14 to hire an attorney to represent me on a counterclaim."  
15 Well, now, the insurance defense attorney can't  
16 represent -- not ethically, on the counterclaim because of  
17 the potential of interfering with settling. They're there  
18 as a conflict of interest as it comes to settlement  
19 because the plaintiff may want not to settle the case  
20 because it will interfere with settling his own injury  
21 claim; or the opponent goes, "Well, I'm not going to  
22 settle with the defendant's insurance company and the  
23 defendant and then leave myself exposed on a  
24 counterclaim."

25 So meanwhile the insurance personal counsel

1 may not want to be responsible for the defense of the suit  
2 or may believe that if he assumes charge of the case that  
3 will interfere with the insured's duty of cooperation and  
4 thereby engender a noncooperation defense by the liability  
5 insurer. So I can see the insurance defense attorney  
6 going, "Look, I'm only in this to defend the insured in  
7 this case. That's the sole scope. I can't represent him  
8 on his counterclaim, and I'm not going to undertake to do  
9 that." And I could see his personal counsel representing  
10 him only on the counterclaim going, "Well, I want to limit  
11 my representation to just the counterclaim because I don't  
12 want to be seen as interfering in the defense of the case  
13 and thereby prejudicing his rights under his liability  
14 policy."

15           So if we must have a subsection (g), I think  
16 it needs to be adjusted for situations like that, maybe  
17 allowing with the consent of the client, the multiple  
18 attorneys that there be no direct attorney in charge. You  
19 know, I could tell you in most of -- my experience in most  
20 of these cases, once the insured shows up with personal  
21 counsel, personal counsel is the only thing the  
22 plaintiff's counsel wants to talk to, but that's just a  
23 matter of practicality and not necessarily law. So that's  
24 where I could see a situation where a client may have  
25 multiple attorneys and none of them want to take -- be the

1 general -- generally responsible for the entire case. Or  
2 may have a conflict of interest.

3 CHAIRMAN BABCOCK: Professor Hoffman.

4 PROFESSOR HOFFMAN: Justice Bland, one thing  
5 about terminology that you might think about, and I don't  
6 know if the committee gave some thought to this, is the  
7 word "limited appearance" or the term "appearance" as  
8 opposed to "limited scope," is I wonder if that's not a  
9 little confusing. The 1.02 of the disciplinary rules  
10 talks in terms of scope, and then there is this subsection  
11 8.2(c) where scope and appearance are sort of both used  
12 there, and then, okay, so that's a -- sort of a comment  
13 and a question of whether or not that is confusing.

14 A related thought is we never really define  
15 what "limited scope" is in here. Can we think about doing  
16 that, or even if we don't do that, maybe a cross-reference  
17 to the disciplinary rule?

18 HONORABLE JANE BLAND: We talk about it in  
19 the comment which is following -- that follows Rule 8, and  
20 the reason for the use of the term "appearance" rather  
21 than scope is that Rule 8 uses the term "appearance," and  
22 because the scope is defined by the engagement letter  
23 between the client and the attorney, our preference was to  
24 use "appearance" because what we're really talking about  
25 is appearances in court and communications with the court

1 and opposing counsel.

2 PROFESSOR HOFFMAN: Okay. So just one quick  
3 follow-up to that. So that all makes sense and thanks for  
4 the reference on the comment. I guess there's still for  
5 me some confusion, particularly in 8.2(c) as to whether  
6 appearance and scope are used interchangeably or not.

7 CHAIRMAN BABCOCK: Frank. And then Richard  
8 Munzinger.

9 MR. GILSTRAP: One small thing and one  
10 larger thing. (d), notice not required, notice is not  
11 required if the attorney is assisting in settlement,  
12 correct?

13 HONORABLE JANE BLAND: Well, if the attorney  
14 is communicating with the court or opposing counsel, the  
15 idea would be then they would have to file a notice of  
16 limited appearance, but not otherwise.

17 MR. GILSTRAP: Well, I'm a little concerned  
18 by "communicating with opposing counsel." I mean, anyway,  
19 that strikes me --

20 HONORABLE JANE BLAND: Well, I mean, we  
21 could limit that to "appear before the court or  
22 communicate with the court." That -- this was an effort  
23 the last meeting -- you know, there was a concern that  
24 lawyers are giving advice all the time with respect to  
25 lawsuits and never plan to represent the client in

1 connection with the lawsuit in a way that's disclosed to  
2 the court or opposing counsel, and we wanted to be clear  
3 that we were not requiring that by this rule.

4 MR. GILSTRAP: Okay. Second comment, I want  
5 to echo the last comment about the use of the term  
6 "appearance." We've got -- we've already got a dichotomy  
7 between general appearance and special appearance for  
8 jurisdictional purposes in Rule 120a, and the original  
9 rule, Rule 8, didn't mention appearance. It talked about  
10 attorney in charge, and I don't see any need to come in  
11 and have two kinds of general appearance, one for  
12 jurisdictional purposes and one for attorney in charge.  
13 It seems unnecessarily confusing.

14 CHAIRMAN BABCOCK: Did we talk about that  
15 before, Jane? It seems like we did.

16 HONORABLE JANE BLAND: We didn't talk about  
17 the interplay with Rule 120a, but there is a rule ahead of  
18 Rule 8, maybe Rule 7, that if -- so you can appear by an  
19 attorney is how it works. It says you can appear by an  
20 attorney and then Rule 8 is attorney in charge. And  
21 that's why it's -- that's why it's phrased this way.

22 CHAIRMAN BABCOCK: Richard.

23 MR. MUNZINGER: The way I read the rule, the  
24 only time a lawyer would be required to file this notice  
25 would be in the circumstance where the client does not

1 have another lawyer of record. Am I correct in that?

2 HONORABLE JANE BLAND: That's right.

3 MR. MUNZINGER: So that in the insurance  
4 hypothetical that was posited if the insurance counsel  
5 were present this rule would not apply. If he had -- if  
6 he had filed an answer, the insurance defense lawyer had  
7 filed an answer and then later the defendant decides to  
8 assert a counterclaim, this rule doesn't apply.

9 HONORABLE JANE BLAND: That's right.

10 MR. MUNZINGER: Okay. It only applies in a  
11 situation where a party before the court is not  
12 represented by another lawyer.

13 HONORABLE JANE BLAND: That's right.

14 MR. MUNZINGER: Okay.

15 HONORABLE JANE BLAND: And there was concern  
16 at our last meeting that that wasn't expressed clearly  
17 enough in the rule, and that was the reason we added  
18 subsection (g).

19 MR. MUNZINGER: And then the notice must --  
20 in terms of settlement it says if you're going to  
21 communicate with the court or opposing parties in (b), so  
22 that in the circumstance Frank was talking about, if I'm  
23 going to assist you in settling the case even though I  
24 don't appear before the judge, I've got to file this  
25 notice because I'm communicating with the defense lawyer

1 or whoever it might be in attempting to settle. Do you  
2 agree with that?

3 HONORABLE JANE BLAND: I think that the way  
4 that we have it phrased, yes, but, you know, I'm open to  
5 the committee's -- we're open to the committee's thoughts  
6 about it. It was an effort to make it clear that ghost  
7 writing wasn't going to require a notice of limited  
8 appearance, and then the question is how much, you know,  
9 sort of safe harbor do we want to have for ghost writing.  
10 Do we want it to be, you know, you don't have to make an  
11 appearance at all unless you communicate with the court,  
12 or do we want to have it be that if you are representing  
13 the client in connection with communicating with opposing  
14 counsel, you should, you know, put in a limited  
15 appearance. So, I mean, that's just really a discussion  
16 point for the committee.

17 MR. MUNZINGER: Well, if you're going to  
18 communicate with me, I'm a lawyer, I represent adversely  
19 to a party who is pro se, but another lawyer has now come  
20 in saying to me "I'm helping the pro se settle this case,"  
21 and he makes a representation to me, and I rely on it. If  
22 he didn't make an appearance in the case and I've relied,  
23 I've been prejudiced by it. He clearly -- if he's going  
24 to interface with me on behalf of a client he needs to  
25 make his appearance of record in the court.

1 HONORABLE JANE BLAND: Hence our rule that  
2 says that --

3 MR. MUNZINGER: I agree with you.

4 HONORABLE JANE BLAND: -- and the states do  
5 all different kinds of -- you know, ghost writing is one  
6 of those things where states that have these rules are  
7 kind of all over the map, but our recommendation was this  
8 rule.

9 MR. MUNZINGER: I understand. You said this  
10 was a subject we could discuss, and I was discussing it.

11 HONORABLE JANE BLAND: Yes.

12 MR. MUNZINGER: I think it's critical that  
13 if a lawyer is representing somebody and making  
14 representations to another lawyer in pending litigation,  
15 in court, that that lawyer's participation needs to be a  
16 matter of record. It affects his ethical obligations, his  
17 ethical obligations to me, his compliance with the -- all  
18 of the rules that relate to interattorney dealings whether  
19 he's of record or not of record. So clearly if he's going  
20 to be communicating with me he needs to make a limited  
21 appearance. And the only other question that I have in  
22 this is of the tasks -- the notice is to talk about the  
23 tasks. At one time it said "issues," and y'all changed  
24 that, didn't you, from "issues" to "tasks"?

25 HONORABLE JANE BLAND: It used to be either

1 "issues" or "matters," and then the committee at the July  
2 meeting thought that that did not -- that left too much  
3 ambiguity, and so we ultimately came up with "tasks," and  
4 so this new report reflects the committee's decision that  
5 "tasks" was better.

6 MR. MUNZINGER: Okay. So let me give you a  
7 hypothetical case. It's a probate case in which there's a  
8 person pro se contesting a will after the letters  
9 testamentary have been issued. The case also involves an  
10 effort to set aside conduct of the independent executors,  
11 which related to a transaction involving a corporation in  
12 which the estate owns stock. Just a moment. And I'm not  
13 making it unduly complicated. So now the question comes  
14 up, was this issue -- was this corporate issue proper, was  
15 it this, that, or so forth; and the guy says, "Hell, I  
16 don't know anything about corporate law. I'm going to  
17 hire Munzinger to be my limited counsel on the corporate  
18 issues." Do I get to cross-examine? So now I've got two  
19 people cross-examining. I've got the pro se and I've got  
20 Munzinger, and can Munzinger ask any question that goes  
21 beyond the corporate issue that I've been hired for, and  
22 who objects, who rules, and what's the law on the point?

23 HONORABLE JANE BLAND: I would let you ask  
24 any question that you wanted to ask, Richard.

25 MR. MUNZINGER: Well --

1                   CHAIRMAN BABCOCK: Even though he doesn't  
2 know anything about corporate law.

3                   MR. MUNZINGER: With the language of these  
4 rules these are issues that I think are going to come up  
5 in the course of administering a rule like this. Some of  
6 these cases, my good gracious, you can get some  
7 complicated cases. I've been in cases where I was  
8 retained only to be antitrust counsel. That was all I was  
9 supposed to do, and, of course, I mean, I made an  
10 appearance of record. I didn't cross-examine anybody. We  
11 ultimately got the case settled, but I can see situations  
12 like this where you've got a pro se litigant who has got a  
13 complicated case and says, "Man, I need help, but I don't  
14 want to pay you, you son of a sea cook. I don't want to  
15 pay you a lot of money. I can do everything but this one  
16 thing," and you do that, and now the judge has got a  
17 problem because the adversary, "Do I get to ask this  
18 question, Judge?"

19                   "He didn't give notice for that, your Honor.  
20 He can't ask that question." And what does this do to the  
21 engagement agreement between counsel and client, if there  
22 is one?

23                   CHAIRMAN BABCOCK: Frank.

24                   MR. GILSTRAP: Just a point of  
25 clarification. In (g), multiple attorneys, that means two

1 or more attorneys. If I'm pro se and I hire one for a  
2 limited purpose counsel, he doesn't have to be the general  
3 counsel.

4 HONORABLE JANE BLAND: That's the idea.

5 MR. GILSTRAP: But if I hire, say, one for  
6 temporary injunction hearing and one for the settlement,  
7 then one of them has to be general purpose.

8 HONORABLE JANE BLAND: I think that was  
9 Justice Gray's tweak, that we make it clear that it's  
10 multiple at the same time.

11 MR. GILSTRAP: Okay. Okay.

12 HONORABLE JANE BLAND: Which I don't have  
13 any problem with.

14 CHAIRMAN BABCOCK: Judge Wallace.

15 HONORABLE R. H. WALLACE: I think that was  
16 the source for my confusion. Apparently multiple  
17 attorneys, subsection (g), does not anticipate multiple  
18 attorneys where some or one of them would be entering a  
19 limited appearance.

20 HONORABLE JANE BLAND: Correct.

21 HONORABLE R. H. WALLACE: Correct, got it.

22 HONORABLE JANE BLAND: Well, you could have  
23 -- you could have an attorney make a limited appearance  
24 with multiple attorneys, but you can't have all of the  
25 attorneys making a limited appearance. In other words,

1 one attorney has to make a general appearance and be  
2 responsible for the suit.

3 MR. GILSTRAP: Once you get to two  
4 attorneys.

5 HONORABLE JANE BLAND: Once you get to two  
6 attorneys.

7 HONORABLE TOM GRAY: At the same time.

8 HONORABLE JANE BLAND: At the same time.

9 CHAIRMAN BABCOCK: Roger.

10 MR. HUGHES: Well, I bring up a wrinkle  
11 about if you've got counsel making a limited appearance  
12 and his only job is to communicate -- his or her job is  
13 only to communicate something with the opposing counsel  
14 but not do anything in court, Rule 11 says if a deal is  
15 signed by the attorney of record. Well, if the limited  
16 counsel is now attorney of record, does that mean  
17 something signed by that attorney could constitute a Rule  
18 11? I say this because I'm seeing more and more cases now  
19 where Rule 11's are based on what I call thoughtless  
20 e-mails. You know, we were just discussing this in  
21 e-mail, and all of the sudden it becomes a Rule 11 filed  
22 with the court. I think a client -- the only thing I  
23 could say is if you're going to require counsel whose only  
24 job is to communicate with opposing counsel and nothing  
25 more or maybe do this across the board for all limited

1 appearances, that a Rule 11 has to be signed either by the  
2 party or their general counsel. Somebody has only filed a  
3 limited notice, can't sign a Rule 11 or their signature is  
4 not binding for the purposes of Rule 11, and I say that  
5 simply to basically protect the client and the counsel on  
6 limited representation. That's hopefully a helpful  
7 suggestion.

8 MR. MUNZINGER: Chip.

9 CHAIRMAN BABCOCK: Thank you, Roger. Yeah,  
10 Richard.

11 MR. MUNZINGER: I may be naive or  
12 inexperienced, but I don't recall ever being involved in a  
13 case where -- and I've had several pro se cases where this  
14 problem has arisen, and I'm curious. I know that it comes  
15 about because there was a committee that said we needed to  
16 have the rule, but I'm just curious how often this happens  
17 in real life, because some of the complications that just  
18 in this little limited discussion right here, there are  
19 some pretty serious complications. I just wonder whether  
20 it is worth the effort.

21 HONORABLE JANE BLAND: Well, it has been  
22 piloted in Travis County. Travis County had a local rule  
23 similar to this one, and, you know, we have not heard of  
24 any, you know, problems that a trial court couldn't handle  
25 in connection with implementing it.

1 CHAIRMAN BABCOCK: Richard Orsinger.

2 MR. ORSINGER: So I agree, Richard, that  
3 this -- there are a lot of problems with this, but because  
4 there are so many problems with this many lawyers won't do  
5 it, myself included. I won't touch this with a 10-foot  
6 pole because it's too dangerous. I can supposedly limit  
7 my duties in my employment agreement with my client, but  
8 I'm not sure I can limit my duties under the law to give  
9 them advice in areas that are slightly outside of the  
10 contracted domain. So I think the purpose behind this  
11 whole effort is to put some structure on it, some rules  
12 where you can be either compliant or noncompliant, and if  
13 you're compliant you're safe, and then that will encourage  
14 lawyers to engage in this and then that will make partial  
15 representation affordable and also more available. I  
16 think that's the whole point here, and so, yes, this is  
17 not free from trouble. This is nothing but trouble, but  
18 if we don't do something, lawyers will -- will not do it  
19 for the smart reason that if it goes bad they'll get sued,  
20 and they'll probably be liable.

21 MR. MUNZINGER: Well, this goes back to some  
22 of my arguments in the past, which whether they've been  
23 rejected or not is immaterial to me at the moment. I was  
24 very concerned about the rules relating to judges doing  
25 things for pro se litigants. The judge can tell the pro

1 se litigant to do so-and-so. We need to have them, and  
2 they can do this, that, and so forth. I go back to my  
3 argument before. The pro se litigant is not entitled to  
4 anything more than the litigant who has hired a lawyer.  
5 So in this particular rule here, if I hire Munzinger to  
6 cross-examine on antitrust issues I now have two people  
7 who are biting the apple, the pro se litigant and  
8 Munzinger. Is that fair? Is it worth -- how does that  
9 affect my rights because this guy -- this pro se litigant  
10 doesn't want to pay a lawyer? He wants to cut his money,  
11 and what am I doing to the rights of the other party? I  
12 think this is a tar baby. I think it's a mess.

13 HONORABLE JANE BLAND: Well, I'll answer  
14 that to say that we do say in the rule that the attorney  
15 is the attorney for the party for the task designated in  
16 the notice. And I understand that might not prevent  
17 somebody from asking to have a second bite at the apple;  
18 but that is the idea behind it; and we get this issue on  
19 the criminal side quite a bit, where a pro se, you know,  
20 wants to have to have hybrid representation; and I think  
21 that trial judges are well-equipped to handle those kinds  
22 of issues.

23 MR. MUNZINGER: Well, I struggle with the  
24 word "task" and the word "issues." Is cross-examining a  
25 task? It's certainly affecting me. I've gotten paid by

1 my client. "Now I've got two guys, your Honor, that are  
2 getting to cross-examine witnesses. I have got two guys  
3 cross-examining. The rule says I only get one."

4 "Well, forget that rule. We've got this new  
5 rule that helps out people that don't want to pay  
6 lawyers." Regardless of whether they're pro se litigants.  
7 Regardless of whether they're poor. This thing doesn't  
8 require that somebody come in here and say, "Hey, I can't  
9 afford a lawyer." It lets me have my cake and my pie and  
10 everything else, and it works against the party who has  
11 retained counsel. I don't -- you know, I may be preaching  
12 to the wall, but, man, this thing to me is very  
13 problematic.

14 CHAIRMAN BABCOCK: Judge Yelenosky. So  
15 we'll put you down against.

16 MR. MUNZINGER: Sir?

17 CHAIRMAN BABCOCK: I said we'll put you down  
18 against.

19 MR. MUNZINGER: Okay.

20 CHAIRMAN BABCOCK: Judge Yelenosky.

21 HONORABLE STEPHEN YELENOSKY: I think the  
22 train has left the station, and we're now down to the  
23 details because there are plenty of attorneys who want it,  
24 and so the question is how do they do it, and if it comes  
25 to where you're dealing with an attorney on the other side

1 and that attorney puts down as the task, "I'm only going  
2 to do cross-examination on this question," the judge is  
3 going to look at that notice of limited appearance and  
4 say, "Oh, yes, you are going to do more." That's  
5 ridiculous.

6 CHAIRMAN BABCOCK: Okay. Any other  
7 comments?

8 HONORABLE JANE BLAND: All right. On the  
9 comment, we added to the comment to make -- make clear  
10 that the rule only applies when there are not multiple  
11 attorneys representing the client. We'll add "at the same  
12 time." And that it's not -- it doesn't require an  
13 appearance unless the attorney appears in court, and I  
14 think we need to make it consistent. We'll add "or  
15 communicates with opposing counsel" like we have in the  
16 rule, but basically the comment is to explain that the  
17 scope, objectives, and general methods of representation  
18 are left to the engagement agreement between the attorney  
19 and the client, and the rule doesn't address that. That's  
20 going to be between the attorney and the client. The rule  
21 is simply a way of addressing an attorney who enters into  
22 this sort of agreement the way that that attorney meets  
23 the -- meets the attorney's obligations to the court and  
24 to opposing counsel in a lawsuit.

25 CHAIRMAN BABCOCK: Richard.

1 MR. MUNZINGER: I don't know if somebody  
2 else pointed this out before. If they did, I apologize.  
3 The new language in the comment, the next to last sentence  
4 says, "The rule does not require an attorney to file a  
5 limited appearance unless the attorney appears in court  
6 and no other attorney appears as the attorney in charge of  
7 the suit for that matter or that party."

8 HONORABLE JANE BLAND: And we're going to  
9 add "or communicates with opposing counsel."

10 MR. MUNZINGER: Okay. Great. Thank you  
11 very much.

12 HONORABLE JANE BLAND: Good. Yay. Richard,  
13 great. Good.

14 CHAIRMAN BABCOCK: The Bland-Munzinger  
15 detente.

16 HONORABLE JANE BLAND: Rule 10, withdrawal  
17 and substitution of the attorney. And I'm trying to move  
18 through this because there is a real substantive proposal  
19 that we need the benefit of your thoughts about. Now, in  
20 Rule 10 we wanted to make clear that if there was  
21 withdrawal by -- with substitution of counsel, it really  
22 shouldn't involve a whole lot of work on the part of the  
23 trial court. It should just be sort of like it is in  
24 other cases, but if there was withdrawal without  
25 substitution of counsel, the -- you needed to either get

1 the agreement of everybody involved or you then have to  
2 have a hearing in front of the judge for the judge to  
3 determine whether the judge is going to prevent  
4 withdrawal.

5           In addition, we wanted to make clear that  
6 the tasks that -- that the -- if the attorney that files  
7 the notice of limited appearance moves to withdraw before  
8 the conclusion of the lawsuit, the attorney has to  
9 represent that all of the tasks designated in the notice  
10 of limited appearance have been completed; and we make it  
11 express that one of the tasks is the preparation of a  
12 formal order for the trial judge; and this was to address,  
13 you know, the problem of, for example, going in and  
14 getting temporary relief and in some cases, in particular  
15 in family law cases, that order granting temporary relief  
16 can be quite complicated and take a lot of time and money  
17 to draft, and you are the prevailing party on obtaining  
18 the temporary relief and you move to withdraw, but you  
19 haven't provided an order to the trial court; and the fear  
20 was that that would shift the burden for drafting that  
21 complicated order on the losing party or the party -- or  
22 the pro se party who would not do a good job with it, and  
23 so we've made that clear.

24           And that's -- that's really the main -- oh,  
25 and we do have an out, and I think this was Justice

1 Hecht's comment at the last -- to Justice Hecht's comment  
2 at the last meeting, is that, you know, there might be a  
3 reason, illness, something, that a person wants to  
4 withdraw from a notice of limited -- you know, from  
5 limited representation who hasn't completed the task, and  
6 we need to allow for that for good cause, and so we've  
7 added that provision in 10.2(c).

8 I also think Kennon Wooten was concerned  
9 about the prospect that the opposing counsel could defeat  
10 sort of a motion to withdraw, even though opposing counsel  
11 shouldn't necessarily determine the relationship between  
12 the other side's lawyer and attorney; and so now we are  
13 simply saying that the motion has to state the -- whether  
14 there's opposition to the withdrawal and then the trial  
15 court can determine whether the tasks are complete; and if  
16 the trial court determines that the tasks are complete,  
17 then the trial court should permit the attorney to  
18 withdraw. And that's in 10.2(b).

19 CHAIRMAN BABCOCK: Justice Christopher.

20 HONORABLE TRACY CHRISTOPHER: I just have  
21 one question, and I apologize I was not at the last  
22 meeting, but Judge Yelenosky says this wasn't covered,  
23 so --

24 HONORABLE STEPHEN YELENOSKY: Of course, my  
25 memory is fallible.

1 HONORABLE TRACY CHRISTOPHER: Let's hope.  
2 Let's hope. My limited scope representation is "I will  
3 handle everything up to the pretrial for \$5,000, but I  
4 won't try the case." So when does he have to withdraw?  
5 Can he withdraw the day of trial, 30 days, 60 days?  
6 Because, you know, my understanding of a lot of fee  
7 agreements right now is "You pay me \$5,000, and I'll  
8 handle it up to pretrial, but if we're going to go to  
9 trial you need to pay me another \$5,000," and sometimes  
10 the client doesn't pay the other \$5,000. So you come in  
11 and move to withdraw because the client didn't pay you the  
12 \$5,000. Judge usually will grant the motion to withdraw,  
13 but by case law we at the appellate court have said you've  
14 got to give the pro se, you know, 60 days to find new  
15 counsel. So do we -- have we done an end run around that  
16 because of this limited scope, or are we just not going to  
17 worry about it?

18 CHAIRMAN BABCOCK: Judge Yelenosky.

19 HONORABLE STEPHEN YELENOSKY: Since you  
20 brought it to my attention, I've thought about it some,  
21 and the problem is that the pro se may be led by the  
22 attorney to believe that they will come up with the \$5,000  
23 and they'll have an attorney at trial, and lo and behold  
24 they don't, and suddenly they realize they're going to  
25 trial pro se and then they file for a continuance. So I

1 think we need to do something that adjusts their  
2 expectation in writing of the rule or what we require the  
3 attorney to tell them that basically says "Since I'm doing  
4 a limited scope that does not include trial, the judge is  
5 going to be aware of this, and if you move for a  
6 continuance, that will be taken into account," or  
7 something. I don't know the wording, but something that  
8 says to the client, "You can't go to court at the last  
9 minute and say, 'I need an attorney' when you already have  
10 a limited scope that says your attorney is not going to do  
11 it."

12 HONORABLE JANE BLAND: Well, this is really  
13 an issue any time a lawyer moves to withdraw on the eve of  
14 trial. It's not unique to limited scope representation,  
15 and --

16 HONORABLE TRACY CHRISTOPHER: I guess my  
17 question was does limited scope representation make it any  
18 different?

19 HONORABLE STEPHEN YELENOSKY: Because you  
20 have an automatic right to withdraw.

21 HONORABLE TRACY CHRISTOPHER: I've completed  
22 all of my tasks.

23 HONORABLE STEPHEN YELENOSKY: Right.  
24 General appearance, you would have to go to the court and  
25 say, "Let me out," A week before trial the judge is

1 probably going to say "no." With the limited appearance  
2 the lawyer just says, "Judge, my notice says that I wasn't  
3 going to do trials, but so you have to let me out." Other  
4 side doesn't oppose it. I guess the client could oppose  
5 it, but they might lose that. Then the problem is the  
6 client moves for continuance. Does the court of appeals  
7 require the court to give a continuance? And so I'm  
8 trying to say, no, we'll deal with that up front so that  
9 the client doesn't expect that to be an option.

10 HONORABLE JANE BLAND: Well, I would say  
11 whether the client expects the continuance to be an option  
12 or not is a matter for, you know, the engagement agreement  
13 and the advice of the attorney and to the client. Whether  
14 the court permits a continuance or not might depend in  
15 part on whether the client was aware that the lawyer was  
16 going to be withdrawing on the eve of trial and there  
17 wasn't any surprise about that; but all of those things I  
18 think are beyond the rule, which is basically sort of to  
19 put parameters around the lawyer's obligations to the  
20 client when appearing in court.

21 HONORABLE STEPHEN YELENOSKY: I yield to  
22 Justice Christopher.

23 HONORABLE TRACY CHRISTOPHER: You know, to  
24 me I would prefer to have a time frame in there on the  
25 withdrawal if that's what the limited scope representation

1 was, I'm only handling pretrial.

2 HONORABLE R. H. WALLACE: Yeah, well --

3 CHAIRMAN BABCOCK: Judge Wallace.

4 HONORABLE R. H. WALLACE: And I can see  
5 maybe some judge saying, "No, you're not going to just  
6 enter an appearance for pretrial," for the very reason  
7 then you get up to trial, he withdraws, and now we're not  
8 ready for the trial, Judge. I mean, I don't --

9 HONORABLE JANE BLAND: I think the idea is  
10 that some lawyer for some tasks is better than no lawyer  
11 for -- at all, and so obviously it's not a great idea to  
12 have a lawyer abandon the ship just before trial; but if  
13 that is the only option then, you know, it's not -- we  
14 can't by rule, you know, force lawyers to go to trial and  
15 get -- you know, that's in contravention of their  
16 engagement agreement with a client.

17 HONORABLE R. H. WALLACE: You never met some  
18 federal judges.

19 HONORABLE JANE BLAND: Well, I understand  
20 that. We can't --

21 HONORABLE STEPHEN YELENOSKY: We can do it.  
22 We just don't want to be in that position.

23 HONORABLE JANE BLAND: We can't do that as a  
24 matter of general rule. I'm not saying it doesn't ever  
25 happen. I'm just saying as a matter of general rule we

1 can't -- can't write a rule that says that.

2 CHAIRMAN BABCOCK: Yeah, I'm sorry, Judge  
3 Gray, I didn't see you over there.

4 HONORABLE TOM GRAY: No problem. Under  
5 10.1(a) and (b), this has always bothered me that it  
6 doesn't address whether or not it's the attorney in charge  
7 or one of the other attorneys that have appeared in the  
8 case that is withdrawing. This may be -- may not be the  
9 time to clean it up, but you're doing so much other good  
10 work in restructuring that horribly written rule as it  
11 currently exists to try to follow, because we've had a lot  
12 of trouble with lawyers' inability to comply with this.

13 If it included under both sections (a) and  
14 (b) a requirement to identify the attorney in charge, and  
15 then one thing that I think we're losing in the rule --  
16 and I hadn't been able to get my mind fully around it --  
17 is who must sign the two different type motions, with and  
18 without substitution of counsel. We address that in 10.2.  
19 We specifically say in 10.2(d) that the motion must be  
20 signed by the withdrawing and the substituting attorney.  
21 I think that sentence needs to be added to 10.1(b) in  
22 addition to who the identity of the attorney in charge is  
23 or will be.

24 HONORABLE JANE BLAND: Okay.

25 HONORABLE TOM GRAY: Second general comment,

1 in 10.2(a)(2), I am a little bit concerned about telling  
2 the movant what the statement must be. I think what we  
3 intend it to say is "a statement of whether the other  
4 parties oppose the motion" as opposed to simply telling  
5 them to tell us that they don't oppose it. So I would  
6 suggest that 10.2(a)(2) read "a statement of whether the  
7 other parties oppose the motion."

8 HONORABLE JANE BLAND: Well, the reason that  
9 it's stated in that way is because if those five things  
10 are met the trial court must allow.

11 HONORABLE TOM GRAY: Ah, okay. Sorry. I  
12 missed the lead-in and why it was structured that way.  
13 Thank you.

14 HONORABLE JANE BLAND: Okay.

15 CHAIRMAN BABCOCK: Justice Christopher.

16 HONORABLE TRACY CHRISTOPHER: We don't have  
17 to take a vote on it for the Supreme Court's  
18 consideration. I would add to 10.2, subsection (b),  
19 timing, "An attorney must withdraw from a limited scope  
20 representation 30 days before trial if his representation  
21 does not include trial."

22 CHAIRMAN BABCOCK: Okay. Any other  
23 comments? Justice Bland, you said there was something  
24 that you needed help from the committee on?

25 HONORABLE JANE BLAND: Yes. Okay. Yes.

1                   CHAIRMAN BABCOCK:  So let's do that in the  
2 last 15 minutes.

3                   HONORABLE JANE BLAND:  All right.  So as you  
4 all know, Chris Nickelson has been a part of our  
5 subcommittee and a really valuable resource in trying to  
6 write rules about limited scope representation and court  
7 appearances; and he gave our July draft to the family law  
8 council, family law section council of the State Bar, at  
9 their August meeting; and after I think discussion at that  
10 meeting he came back with another draft; and we've  
11 incorporated the comments in that draft with the exception  
12 of this addition that he would like to add to Rule 8, and  
13 he would like to add -- and it's at the end of Rule 8  
14 point -- probably would be --

15                   HONORABLE STEPHEN YELENOSKY:  (H).

16                   HONORABLE JANE BLAND:  (H), thank you.  
17 8.2(h) and you-all have it as a separate -- it's a short  
18 -- it looks like that, and it is that -- my printer ink  
19 died.  That "an attorney shall not limit the scope of the  
20 attorney's representation to less than all tasks necessary  
21 during a pretrial hearing for temporary relief or final  
22 trial to prosecute or defend all claims joined for hearing  
23 or trial under the Texas Family Code."  So his view is  
24 that --

25                   HONORABLE STEPHEN YELENOSKY:  Is that his

1 personal view, or is he claiming it's a committee?

2 HONORABLE JANE BLAND: Well, I think he  
3 presented this to the council, and I think he said this  
4 was their first response to our draft, and he e-mailed me  
5 this morning and said, you know, there might be room for  
6 narrowing this or discussion on it.

7 HONORABLE STEPHEN YELENOSKY: Or voting it  
8 down.

9 HONORABLE JANE BLAND: Well, I don't think  
10 he would like you to vote it down, but he understands that  
11 that might be, you know, a part of the discussion; and I  
12 can tell you that he basically says that there are other  
13 places in the Rules of Civil Procedure where we make  
14 carve-outs for the Family Code; and he says as examples  
15 Rule 693a, which dispenses with the necessity of a bond  
16 for injunction issued between spouses to a divorce case  
17 and Rule 695a which dispenses with the necessity of a bond  
18 when appointing a receiver in a divorce case. He says  
19 it's not without precedent to make exceptions to the rules  
20 for family law litigation. It does appear just from  
21 reading this rule and the way it's drafted that it would  
22 pretty much carve-out --

23 HONORABLE STEPHEN YELENOSKY: It's the whole  
24 turkey.

25 HONORABLE JANE BLAND: As Judge Yelenosky

1 probably more aptly puts it, it would carve out family law  
2 cases from this rule; and that presents a problem because  
3 I think the idea is that this rule is -- you know, one of  
4 the areas that it might be most useful is in family law  
5 cases.

6 CHAIRMAN BABCOCK: Let me just --

7 HONORABLE JANE BLAND: So I would leave it  
8 open for discussion.

9 CHAIRMAN BABCOCK: Okay. Let me interrupt  
10 for one second.

11 (Off the record)

12 CHAIRMAN BABCOCK: All right. Richard.

13 MR. ORSINGER: I would ask if, Justice  
14 Bland, would you read Chris Nickelson's letter again one  
15 more time? I'm not sure I caught it. It was quick.

16 HONORABLE JANE BLAND: Well, look, I told  
17 him about --

18 MR. ORSINGER: I mean, just read the part  
19 about family law matters can't be cut up. That was what I  
20 was not sure about.

21 HONORABLE JANE BLAND: He noted that family  
22 law -- there are other places in the Rules of Civil  
23 Procedure where we --

24 MR. ORSINGER: No, that's not --

25 HONORABLE JANE BLAND: -- except family law

1 and --

2 MR. ORSINGER: That's not my point.  
3 Basically he's saying that we can't break up and have  
4 partial representation in family law cases, right? That's  
5 what he's saying?

6 HONORABLE JANE BLAND: His view is that -- I  
7 think that's what the -- if you read the rule I think  
8 that's what the rule does, and his view is that this  
9 proposal would set -- and I'll just read you what he said,  
10 and I -- you know, I apologize because he only found out  
11 this morning that he couldn't be here. "Proposed  
12 subsection (h) would set a floor for behavior in family  
13 law cases. While an attorney may be able to contract with  
14 a client to limit the attorney's representation to very  
15 narrow issues, subsection (h) would prohibit an attorney  
16 from agreeing to represent a client at a final trial or  
17 pretrial hearing for temporary orders to only one of  
18 multiple issues that are joined for trial. In other  
19 words, the rule would set a minimum floor of behavior  
20 which attorneys who attempt to limit the scope of their  
21 representation in family law cases would have to disclose  
22 when they attempted to get informed consent from a client  
23 to limit the scope."

24 So that's the idea or the thinking behind  
25 it, and obviously, you know, I think he said this -- his

1 next opportunity to bring this to the family law council's  
2 attention for discussion is in December.

3 CHAIRMAN BABCOCK: Judge Yelenosky.

4 HONORABLE STEPHEN YELENOSKY: Well, the  
5 reason I asked who he might be speaking for is I can't  
6 keep track of all of the different family organizations  
7 there are, and maybe Richard can. So I don't know, one,  
8 if he's speaking for them and, two, what this council is;  
9 but I can tell you that the limited scope representation  
10 rule we have in Travis County, which does not have this,  
11 was urged by members of the family bar, lots of members of  
12 the family bar in Travis County. It's my understanding  
13 that some family lawyers oppose this. There's an economic  
14 interest here; and depending on, you know, what type of  
15 client you have as a family law attorney, you might oppose  
16 or support this; but that's not our problem. Our problem  
17 is to come up with something that works for clients, given  
18 the inability of many to afford counsel.

19 CHAIRMAN BABCOCK: Richard.

20 MR. ORSINGER: The family law council is the  
21 elected body that heads the family law section of the  
22 State Bar; and that's, you know, the annual vote at the  
23 annual meeting; and they are the most authoritative I  
24 would say representative of the entire bar. However, I  
25 don't understand him to be saying that this is an act, an

1 official position, of the council. I'm an ex officio  
2 member of the council. I haven't seen any votes or  
3 ballots or discussions; but beside the point, as I -- and  
4 I still don't understand, Justice Bland, what he's saying;  
5 but I think he's saying is that all of these carving rules  
6 are not going to apply in a family law case; and if that's  
7 what he's saying then I think that eliminates the utility  
8 of this in almost all instances.

9           Now, family law is very problematic, because  
10 family law includes everything that's going on between a  
11 husband and a wife and between a parent and a child, and  
12 so you could have a tort claim for physical violence. You  
13 could have fraud claims for stealing fiduciary property.  
14 You could have criminal matters, the filing of criminal  
15 complaints or defending of criminal complaints. You could  
16 have a contempt proceeding, which is quasi-criminal.

17           CHAIRMAN BABCOCK: Parental termination.

18           MR. ORSINGER: Yeah. So I guess my point is  
19 many different facets of law can present themselves in a  
20 family law case. I have a rule for myself that I will not  
21 represent a litigant in a family law case on a damage  
22 claim against their spouse. It's just in my contract, and  
23 I won't do it. I don't consider myself to be qualified to  
24 pursue tort damages or defend tort damages, and I make  
25 them go out and get another lawyer or else I don't take

1 the case. So if I can't represent someone in a divorce  
2 case without the duty to sue for damages or without the  
3 duty to defend a defamation claim or whatever may come up  
4 on the other side of the case then there's a lot of cases  
5 that I won't take, and I think that's going to be true of  
6 a lot of family lawyers because so many different issues  
7 can surface in a family law case that really require the  
8 hand of a specialist. So if we exempt family law cases  
9 from this, I'm afraid that's the main application of this  
10 rule and that we really haven't accomplished much.

11 CHAIRMAN BABCOCK: So you're against his  
12 proposal?

13 MR. ORSINGER: I don't understand Chris'  
14 proposal and I need to talk to him about it; but if I  
15 understand it, this rule would not apply in family law;  
16 and this is where it probably most needs to apply.

17 CHAIRMAN BABCOCK: Judge Yelenosky.

18 HONORABLE JANE BLAND: Could I -- before --  
19 before you wrap it up today I just want to be sure that  
20 the committee knows that Trish McAllister is here --

21 CHAIRMAN BABCOCK: Yeah. She just had her  
22 hand up.

23 HONORABLE JANE BLAND: Good. Because the  
24 Access to Justice Commission was, you know, part of the --  
25 part of the effort in drafting these rules, and I just

1 wanted her to have an opportunity to talk as well before  
2 we break today.

3 CHAIRMAN BABCOCK: Well, why doesn't she say  
4 something right now?

5 HONORABLE JANE BLAND: Okay.

6 MS. McALLISTER: I'm happy to. I think,  
7 Richard, just to clarify, what I think what he's trying to  
8 do here is they are trying to -- he's trying to basically  
9 say that if you represent -- if you're going to have a  
10 limited scope agreement and you're going to go to a  
11 hearing, in a temporary hearing or a final hearing, you  
12 have to represent that person on every issue that's going  
13 to be presented to the judge on that day at the temporary  
14 order hearing or the final hearing; and to your point, I  
15 mean, the problem with that is that it would be  
16 problematic for the way that things are done even right  
17 now, because we have lawyers who come in and will take a  
18 part. You know, "I'm going to get some information here  
19 on this tax matter" or whatever, and it's -- this is --  
20 this is the -- one of the reasons that limited scope  
21 representation -- the whole reason why we're here really  
22 talking with you guys is that -- that we don't see lawyers  
23 coming to court on a limited scope basis for a variety of  
24 reasons; and this is the whole effort here right now is to  
25 put some rules around that so people feel more comfortable

1 so that people will have the benefit of a lawyer in some  
2 aspect of that hearing; and they may not be able to afford  
3 to hire them for the whole part.

4           Maybe, you know -- maybe they've already --  
5 you know, maybe they're going to handle -- I don't know  
6 what part of the case by themselves and then the lawyer  
7 will come in and talk about the tax matter or whatever,  
8 because they hadn't filed taxes in six years or whatever;  
9 but, you know, I think that this -- if it were added it  
10 would just -- we would be back to where we are right now  
11 where it would be, you know, we see limited scope  
12 representation happening on an advise only basis or a  
13 pleading drafting situation, but that's about it.

14           CHAIRMAN BABCOCK: As Richard understands  
15 this rule as explained by Trish, is anybody in favor of  
16 it? The proposal, I'm talking about.

17           HONORABLE STEPHEN YELENOSKY: Can I be fair  
18 to him even though I oppose it so that we don't later get  
19 a response that's different? To be fair to him, the way I  
20 read this is he saying, oh, you can do limited scope  
21 representation in family cases, but you cannot define a  
22 task which subdivides any particular hearing. So you  
23 could say, "I'm only going to do the preliminary hearing,"  
24 and then you would have to cover all of the issues in it,  
25 "but I'm not going to do the final trial" or vice versa.

1 That's how I read this, so he would say it doesn't  
2 completely eliminate it, but effectively it does because,  
3 you know, you might have a temporary hearing where  
4 somebody agrees to argue the child custody issues and  
5 doesn't want to deal with, for whatever reason, temporary  
6 spousal maintenance or something. Whatever it is. So the  
7 utility would be lost, but I wanted to be fair to what  
8 he's saying so that we don't hear later that's what he  
9 meant.

10 MR. ORSINGER: But if you undertake a trial,  
11 you're in for everything that's pled. Under that rule,  
12 you're in for it all, or you're in for none of it  
13 basically, right, on the trial?

14 CHAIRMAN BABCOCK: Roger.

15 HONORABLE STEPHEN YELENOSKY: Yes, under his  
16 proposal.

17 MR. HUGHES: Well -- I'm sorry.

18 MR. ORSINGER: Go ahead.

19 MR. HUGHES: I was going to say I agree with  
20 Judge Yelenosky about how to interpret his proposal. The  
21 only thing I can say is I go back to -- before we break  
22 for lunch, I really think that before we approve any of  
23 this rule we're going to have to straighten out Rule 11  
24 about what a limited counsel can agree to, because -- and  
25 I propose that they can't sign a Rule 11 at all, because

1 it's just going to lead to problems trying to sort out  
2 what their authority was and who to deal with; and I can  
3 see a limited scope counsel signing who's said, "I'll do  
4 everything up to trial and then I'm out,"  
5 signing stipulations about evidence for trial, et cetera,  
6 et cetera, and the client screaming that I -- this  
7 exceeded their scope; and then the other counsel said,  
8 "I've been snookered. We had an agreement about how trial  
9 was going to go or what would be evidence and what  
10 wouldn't and now everything has changed."

11           So I think just to -- I know it's going to  
12 cause some pain and some problems, but letting limited  
13 scope counsel sign stipulations or Rule 11 agreements is  
14 just going to cause more problems than it's worth.

15           CHAIRMAN BABCOCK: Thank you, Roger. Under  
16 any interpretation that's been expressed for Chris' rule,  
17 whether it's the Orsinger interpretation or the Yelenosky  
18 interpretation as endorsed by others, is anybody in favor  
19 of this proposal, which is to add subparagraph (h) to the  
20 new rule? Is there anybody in favor of it? For now speak  
21 up.

22           Nobody is speaking, nobody's hands are up,  
23 so I think as far as the Court's concerned, this committee  
24 is not persuaded as to the wisdom of adding subparagraph  
25 (h) to the rule. And with that we can break for lunch,

1 and we are -- we are done with this. We'll submit this to  
2 the Court, as we will the matter we took up first thing  
3 this morning, which is the jury questions in parental  
4 termination cases. So we'll be back at about 1:30, 1:35.  
5 Thank you.

6 (Recess from 12:32 p.m. to 1:36 p.m.)

7 CHAIRMAN BABCOCK: All right. Let's get  
8 back on the record. We are now going to be led again by  
9 Professor Carlson regarding guidelines for social media  
10 use by judges.

11 PROFESSOR CARLSON: After our last meeting  
12 it became clear that we needed some more judicial input,  
13 and we were very fortunate to again have Justice Tracy  
14 Christopher and Justice Bill Boyce join our subcommittee  
15 on these important issues and share their views. Justice  
16 Christopher is going to present this topic, and I will  
17 present the lawyer voir dire question.

18 CHAIRMAN BABCOCK: All right. Justice  
19 Christopher.

20 HONORABLE TRACY CHRISTOPHER: Okay. Well,  
21 the last time we discussed this everyone was -- I don't  
22 know if we actually took a vote on it, but everyone was  
23 fine with the rule. Subsection (j), "Provisions of this  
24 code governing a judge's communication in person and on  
25 paper and by electronic methods govern a judge's

1 communications on social media." So apparently there had  
2 been some concern by the Judicial Conduct Commission that  
3 there wasn't a rule specifically referencing social media.  
4 So we adopted a rule. There was a lengthy comment done by  
5 the subcommittee that I disagreed with in many, many ways  
6 and had a lot of other judges who disagreed with it. So  
7 it was very nice of the subcommittee to let me on the  
8 committee and express my viewpoints to them.

9           So I have totally rewritten the comment, so  
10 looking at the old comment is kind of -- I mean, there's a  
11 few things that we've incorporated from the old comment  
12 into the new, but doing a redline was too difficult, so  
13 we've totally rewritten the comment. The last time,  
14 paragraph one of the comment is -- is pretty much the same  
15 thing that we had before, and there wasn't any negative  
16 comments about paragraph one. Paragraph two is new, and  
17 the purpose of this is to re-emphasize to judges that  
18 their communications will be scrutinized by others even  
19 when they're not identified as a judge. So I think, as we  
20 discussed before, sometimes judges communicate in official  
21 ways from official websites, but they also communicate on  
22 personal websites where, you know, they may or may not be  
23 identified as a judge, but we want judges to realize from  
24 this comment that even if they're not identified as a  
25 judge their comments there are still subject to the Code

1 of Judicial Conduct, and that shouldn't be a new idea  
2 because there have -- there's definitely been disciplinary  
3 actions against judges for things that happened outside of  
4 their official judicial duties, but we wanted to emphasize  
5 that in this rule, so I don't think that is controversial  
6 either.

7           So then paragraph three, just provides a  
8 little more information about social media and, you know,  
9 potential dangers of social media, and I don't think that  
10 there was anything particularly controversial about that  
11 idea. So then we get to paragraph four, and paragraph  
12 four is where more controversial ideas started to arise.  
13 For example, the original draft from the committee said,  
14 you know, if you're a friend or a follower it could be  
15 grounds for recusal, and you've got to let everybody know;  
16 and many, many judges spoke out against that and said, no,  
17 that should not be a grounds for recusal or should not  
18 require a judge to do anything different; and we've talked  
19 about the fact that I'm friends with all of you; but if  
20 one of you appeared in my court I wouldn't have to tell  
21 everybody, "Hey, I'm on the Supreme Court Advisory  
22 Committee with this lawyer and I think he's great." So I  
23 don't have to -- or terrible.

24           MR. ORSINGER: Who are you looking at when  
25 you say that?

1 HONORABLE TRACY CHRISTOPHER: We don't have  
2 to report any of that. I mean, there's a lot of judges,  
3 but, okay, so what we did is we sort of hedged it. Okay.  
4 "Simple designation as a social media connection does not  
5 in and of itself indicate the degree or intensity of a  
6 judge's relationship with a person and is not in and of  
7 itself determinative of whether a judge's impartiality  
8 might reasonably be questioned." So I don't know if you  
9 want me to stop and have comments there or just finish the  
10 whole thing.

11 CHAIRMAN BABCOCK: Why don't you finish the  
12 whole thing, Judge, and then we'll go back to it.

13 HONORABLE TRACY CHRISTOPHER: Okay. So the  
14 next sentence, which is in brackets, although the  
15 committee did approve this bracketed language is probably  
16 the most protective of judges, and it's possible that this  
17 committee or the Court will not want to be that protective  
18 of judges. So the previous draft had said that liking a  
19 post was -- was an endorsement, and this one says liking a  
20 post is not an endorsement. So it's a complete flip from  
21 what the previous committee's proposed draft was; and,  
22 again, what we've done is hedge it, right? "Liking,  
23 sharing, or commenting upon does not in and of itself  
24 indicate an endorsement." Now, depending on what you  
25 said, it could be an endorsement, right?

1                   And I'd like to tell you about a case that  
2 just came out within the past month or two. A judge --  
3 for those of you who don't do Facebook, right, Facebook  
4 advertising is very cheap, right, compared to other forms  
5 of advertising, so you will see it now as you get closer  
6 to the election time that judges and other political  
7 people are advertising on Facebook, and I don't know about  
8 advertising on Twitter because my Twitter knowledge is  
9 small, but you have an option on Facebook to share someone  
10 else's advertisement with your friends. Okay. So anybody  
11 that you have made a friend you can hit a little button  
12 that says "share," and it goes to all of your friends.

13                   All right. So this particular judge  
14 received a campaign advertisement from a sheriff in his  
15 area, and he shared it. He didn't make any other comment  
16 on it. He didn't say, "Vote for -- vote for this  
17 sheriff." He just shared this particular advertisement to  
18 his friends and the Judicial Conduct Commission  
19 disciplined him for that.

20                   PROFESSOR CARLSON: This is in Texas, right?

21                   HONORABLE TRACY CHRISTOPHER: Yeah, this was  
22 in Texas. I did not see that he appealed from the  
23 discipline. I respectfully disagree with the Judicial  
24 Conduct Commission that sharing is -- sharing this  
25 particular -- in this manner is an endorsement. I think

1 under *In Re: Hecht* you have to do more than share  
2 information to endorse somebody. So that's why I've --  
3 we've highlighted and footnoted *In Re: Hecht*. Now, you  
4 know, if you read *In Re: Hecht*, they basically say an  
5 endorsement means more than just support, but in that  
6 particular case it wasn't someone running for elective  
7 office, so, you know, that's a distinction.

8           The judge who was disciplined for sharing  
9 a -- you know, the sheriff's campaign information as best  
10 I can tell made no constitutional arguments or any sort of  
11 an argument that his sharing was not an endorsement of the  
12 sheriff. So putting this comment in then would be  
13 contrary to a decision of the Judicial Conduct Commission.  
14 So I'm being right up front about it, that that's what --  
15 and the intent of this is to negate that, you know, going  
16 forward, and I'm clear about it, and that is my intent.  
17 There's many reasons why you might share something, and  
18 it's not always because it's an endorsement.

19           CHAIRMAN BABCOCK: Could I just interrupt  
20 for one moment?

21           HONORABLE TRACY CHRISTOPHER: Yes.

22           CHAIRMAN BABCOCK: It has been reported -- I  
23 don't know if it's true or not. It's been reported that  
24 the conduct commission doesn't believe that *In Re: Hecht*  
25 is good law.

1 HONORABLE TRACY CHRISTOPHER: Well, that  
2 comes up as another very important problem --

3 CHAIRMAN BABCOCK: Which is striking to me  
4 how they get to overrule a court, but anyway.

5 HONORABLE TRACY CHRISTOPHER: That shows the  
6 problem with the way the Judicial Conduct Commission is  
7 set up and the review process of discipline by the  
8 Judicial Conduct Commission. So the Judicial Conduct  
9 Commission sanctions a judge. The judge appeals. The  
10 judge goes to trial. A three-judge panel is appointed to  
11 rule on it, and that panel makes a decision. There is no  
12 higher level of review of that panel's decision, and it's  
13 three appellate judges from various parts of the state,  
14 not the state where that judge is. Or county, not the  
15 county where that judge is.

16 So, yes, it's true, so like one panel  
17 from -- of one of these appellate panels will read all of  
18 these other cases; but you're not necessarily bound by it,  
19 even between panel opinions; and, you know, I mean, I  
20 don't know what the Judicial Conduct Commission, you know,  
21 feels about that. They might not like *In Re: Hecht*.

22 CHAIRMAN BABCOCK: I promise you they don't  
23 like *In Re: Hecht*.

24 HONORABLE TRACY CHRISTOPHER: But, you know,  
25 are they going to sanction a judge for the exact same

1 conduct that's in *In Re: Hecht*, or are they going to say,  
2 well, this -- this is different from *In Re: Hecht*. I --  
3 you know, I don't know.

4 CHAIRMAN BABCOCK: One more slight  
5 modification or friendly amendment. There is no appeal  
6 from the three-judge panel unless there is a federal  
7 constitutional question in which case there can be an  
8 appeal to the United States Supreme Court.

9 HONORABLE TRACY CHRISTOPHER: Oh, to the  
10 United States. All right.

11 MR. ORSINGER: Bypassing the Texas Supreme  
12 Court?

13 CHAIRMAN BABCOCK: Yes.

14 MR. ORSINGER: Whoa, that's interesting. So  
15 they're like the court of last resort in their  
16 administrative area?

17 CHAIRMAN BABCOCK: The special court of  
18 review, the three-judge panel, is the last court of resort  
19 in Texas.

20 MR. ORSINGER: That's amazing.

21 CHAIRMAN BABCOCK: It's the last court from  
22 which a decision may be had, which is the federal.

23 HONORABLE TRACY CHRISTOPHER: But, you know,  
24 I mean, everybody's opinions are not binding on all the  
25 panelists. I mean, it is a system that perhaps could use

1 changing --

2 CHAIRMAN BABCOCK: Well --

3 HONORABLE TRACY CHRISTOPHER: -- in terms of  
4 the binding nature of opinions and --

5 CHAIRMAN BABCOCK: I don't want to get off  
6 on this either --

7 HONORABLE TRACY CHRISTOPHER: Okay.

8 CHAIRMAN BABCOCK: -- but there's further  
9 clarification that could be made, which is that the  
10 special court of review is like the Fifth Circuit, where a  
11 panel of the Fifth Circuit can't overrule another panel,  
12 so that -- so that the various panel decisions of the  
13 special court of review, which is not like the Houston  
14 court of appeals or the Dallas court of appeals, but  
15 rather its own entity must respect the precedent of its  
16 other panels.

17 MR. HARDIN: Are you saying it should be  
18 that way or shouldn't?

19 CHAIRMAN BABCOCK: I'm saying that some  
20 people say --

21 MR. HARDIN: Oh, the very diplomatic  
22 response is that's what some people think.

23 CHAIRMAN BABCOCK: That's what some people  
24 think.

25 MR. HARDIN: Are they working as chair of

1 this committee?

2 CHAIRMAN BABCOCK: I express no opinion as  
3 chair of the committee. I will tell you a personal view  
4 that I think it's outrageous to say the conduct commission  
5 can ignore a case of a special court of review when  
6 they're a party. So anyway, sorry, don't mean to --

7 HONORABLE TRACY CHRISTOPHER: So are you  
8 saying that it's your position or the conduct's position  
9 that one --

10 CHAIRMAN BABCOCK: I'm saying my position  
11 that the conduct commission can't just willy-nilly  
12 overrule a decision in a case to which they were a party.

13 HONORABLE TRACY CHRISTOPHER: Yeah. But are  
14 you saying that one panel has to follow another panel?

15 CHAIRMAN BABCOCK: I'm saying there is an  
16 argument to be made that just like in the Fifth Circuit  
17 where one panel doesn't overrule another panel, that that  
18 argument is made with respect to the special court of  
19 review.

20 HONORABLE TRACY CHRISTOPHER: Oh, okay. All  
21 right. So there hasn't been, as far as I know, any  
22 particular Judicial Conduct Commission discipline based  
23 upon liking someone else's campaign post, for example, or  
24 even commenting upon someone else's campaign post; and a  
25 quick review of my Facebook feed shows that other judges

1 do comment or like currently other judges' campaign posts;  
2 and sometimes they'll comment upon them; and I do not know  
3 whether the Judicial Conduct Commission is going to try  
4 and say that that is also an endorsement; and I'm not  
5 aware of any judge currently being asked to respond to  
6 that issue. So --

7 CHAIRMAN BABCOCK: Although you might not  
8 know.

9 HONORABLE TRACY CHRISTOPHER: Correct.  
10 Correct. You might not know about it. And, in fact, as I  
11 was explaining to the committee, it's extremely difficult  
12 to even be aware of the decisions of the Judicial Conduct  
13 Commission, even when they do a public discipline of  
14 somebody. All right. So, for example, this discipline of  
15 the judges, it was four or five months old before I heard  
16 about it, or the judge, for passing around, you know, this  
17 campaign information. They don't send us an e-mail that  
18 says, "Hey, you know, here it is, watch out." It's not  
19 published on their website in a way that's very useful or  
20 searchable; and, you know, of course, there's secrecy  
21 involved, too; but once it's a public reprimand, you know,  
22 there ought to be a little more -- but I'm digressing.  
23 Sorry. It can lead judges into trouble, right?

24 CHAIRMAN BABCOCK: Yeah.

25 HONORABLE TRACY CHRISTOPHER: If they don't

1 have something like that. So -- so we know one judge at  
2 least has been sanctioned for endorsing another  
3 candidate's campaign post or sharing, sharing another  
4 candidate's campaign post as an endorsement. So that's  
5 why that sentence is in brackets, to show you that there  
6 could be some issue to discuss. Okay. Again, another  
7 reminder even when you're not a judge your postings can  
8 support -- could be used in support of a recusal motion or  
9 for referral to the State Commission on Judicial Conduct.  
10 Just so people start to, you know, get that in their head.

11           Then we have specific -- a specific list of  
12 things to watch out for. "Liking or sharing social media  
13 can portray approval of the content." May or may not.  
14 You know, I mean, sometimes people will like the fact that  
15 somebody's parent has died. Okay. I mean, you don't  
16 really like that. You're just acknowledging that you saw  
17 it. So there's a lot of reasons why a like, or in Twitter  
18 land it's a little heart, is not anything, but we're  
19 giving this as something for the judges to think about.

20           (B), "Posting frequently either favorably or  
21 negatively about a place of business, a person, or a  
22 product could be used in support of a recusal motion to  
23 show bias or a relationship with that business, person, or  
24 product." So a judge who we all know pretty well  
25 frequently stops at Hrusca's in his Camry of Justice, and

1 he posts about it all the time. And so I asked that  
2 particular judge, "Do you feel like you might have to  
3 recuse in a Hrusca's case," and he said "yes." All right.  
4 And John and I have discussed this. There is something --  
5 like there's a location identifier that you can attach to  
6 your Facebook page, so like if you show up at a restaurant  
7 and you want Facebook to do it -- I don't let them turn it  
8 on, but it will show up that, you know, you're at this  
9 restaurant or you're at this church or you're at this  
10 event; and someone could see if you frequented a  
11 particular, you know, business, place, or whatever, that  
12 they could use that against you; and we're not saying on  
13 any of these things that it's grounds for recusal. All  
14 right. We just want judges to be aware that there's a  
15 possibility that it could be used against you and just to  
16 be thinking about these ideas.

17           It's easier for people to see -- "it's  
18 easier for people to attempt to engage in ex parte  
19 communications with the judge. Any known attempt at an ex  
20 parte communication should be disclosed to all parties and  
21 should be discouraged." There's a case cite. The judge  
22 handled it just great when a party contacted him via  
23 social media.

24           (D), "Most social media posts can be  
25 commented upon. Judges should consider whether a

1 particular post might draw unwanted or inappropriate  
2 comments about a pending case." And we're not telling  
3 judges you can't post about a pending case, but you need  
4 to be thinking to yourself if I post about a pending case  
5 are people going to start, you know, writing a bunch of  
6 stuff about the pending case that should not be on your  
7 Twitter page or Facebook page.

8                   And then this last one, "Consider not  
9 joining a private group where lawyers comment on pending  
10 cases because this could lead to ex parte communications."  
11 A particular private lawyer group asked us to put that in  
12 because the group doesn't want to have judges in their  
13 private group, but sometimes they can't tell for sure that  
14 the person is not a judge, so, you know, that's why that's  
15 in. I don't think it's a big problem, but some people do,  
16 and so that's why we put it in, and these are closed  
17 Facebook groups, and I'm talking a lot about Facebook  
18 because it is a huge social media presence for people in  
19 the age group of judges. Okay. Not necessarily for  
20 younger people. Younger people are kind of, you know,  
21 doing away with Facebook and are moving on to other  
22 things, but judges probably between, you know, the ages of  
23 30 and 60 or a little more --

24                   HONORABLE STEPHEN YELENOSKY: Still have AOL  
25 addresses.

1 HONORABLE TRACY CHRISTOPHER: -- are, you  
2 know, familiar with Facebook, you know, judges a little  
3 bit older, maybe not so much, but anyway, I'm focusing on  
4 Facebook just because it is a common posting for judges,  
5 and it is inexpensive advertising for judges. We tried to  
6 write the rule in a way that was broad enough to sort of  
7 encompass whatever the next social media platform was. We  
8 added footnote four that explained what friending was in  
9 2018. Could be something different, you know, down the  
10 road, but -- and we talked about LinkedIn that allows you  
11 to join someone's network and have personal contacts. You  
12 could follow Twitter feed without permission and that  
13 things are constantly changing. So this -- that's our  
14 report.

15 CHAIRMAN BABCOCK: Okay. Well, we'll talk  
16 about it in a minute. We should be mindful of the fact  
17 that we are dealing with speech here, and it used to be  
18 that it was thought that judges' speech could be pretty  
19 much tailored or restricted at will until the United  
20 States Supreme Court decided the *Republican Party of*  
21 *Minnesota vs. White* case in which they held 5-4, Scalia  
22 writing the opinion, that strict scrutiny applied and that  
23 the state's asserted interest in confidence in the  
24 judiciary was not sufficient to save a canon which  
25 prohibited a candidate for judicial office from announcing

1 his position on various issues.

2           We had an identical provision in our canon,  
3 and after the Supreme Court ruled in the White case the  
4 Court appointed a task force to look at our canon. We  
5 concluded, as did a federal judge down the street, that  
6 our canon was not distinguishable at all from the canon  
7 under attack in the White case, and so the Supreme Court  
8 removed it from our canons, and one justice saying that he  
9 had grave doubts about whether or not the companion  
10 promises clause in our canons -- that is, "I promise that  
11 I'm going to do something once I get into office" -- could  
12 withstand scrutiny under the First Amendment.

13           Then the Supreme Court decided another case  
14 called *Williams-Yulee vs. The State Bar of Florida*, and  
15 that was a soliciting money case where the Court upheld  
16 the regulation of the State Bar, but said that they were  
17 clearing up any confusion that might have existed after  
18 White that with respect to judicial speech and an attempt  
19 to restrict it, a state -- and I'll read the quote, "A  
20 state may restrict the speech of a judicial candidate only  
21 if the restriction is narrowly tailored to serve a  
22 compelling interest." The classic strict scrutiny test  
23 for speech, whether it's judicial or otherwise.

24           So unlike a lot of the rules that we deal  
25 with where we debate whether it would be a good idea for

1 policy reasons or Mr. Munzinger's view, whether the great  
2 unwashed would be unfairly -- their hygiene would be in  
3 question, this is a matter to where the Constitution  
4 speaks to what we may do, and it speaks in a way that we  
5 are narrowly constrained to restrict a judge's speech.  
6 So, Judge Peeples, would you like to speak?

7 HONORABLE DAVID PEEPLES: I'd like to ask a  
8 question. I've been out of the political part of it for a  
9 long time, so I'm a little rusty, but there were ethics  
10 opinions a good many years ago that said judges cannot  
11 display bumper stickers --

12 HONORABLE TRACY CHRISTOPHER: Yes.

13 HONORABLE DAVID PEEPLES: -- or yard signs,  
14 and I think the spouse of the judge even was prohibited  
15 from doing that.

16 HONORABLE STEPHEN YELENOSKY: Right.

17 HONORABLE DAVID PEEPLES: And I know that in  
18 the early Eighties four of us in San Antonio that were  
19 identified as kind of being alike, an independent group  
20 ran newspaper ads for us that showed the four of us  
21 together, picture; and we obviously had to agree to be  
22 photographed; and somebody wrote off and got an ethics  
23 opinion on that; and my recollection is they said it  
24 shouldn't have been done, because by me being -- by being  
25 in the picture I was endorsing the other three. So my

1 question I think is do you think that the Constitution --  
2 you know, the case law has changed those rulings? And the  
3 reason I ask is the case that Judge Christopher mentioned  
4 that the guy got sanctioned a month or two ago, as I  
5 recall it looked like a -- it was a political thing.

6 HONORABLE TRACY CHRISTOPHER: It was. It  
7 was a campaign ad for the sheriff.

8 HONORABLE DAVID PEEPLES: It was something,  
9 a campaign for the sheriff, that this judge sent around  
10 and shared, so he was -- I don't know if the word  
11 endorsed, the common street usage of it, but that sounds  
12 to me like he was kind of for that guy. So thinking in  
13 terms of social media and then old-fashioned stuff like  
14 bumper stickers, yard signs, and newspaper ads, has the  
15 law changed on that, and are those ethics opinions no  
16 longer any good?

17 HONORABLE TRACY CHRISTOPHER: So -- so  
18 the -- we have them as an exhibit here, Exhibit M, are  
19 some ethics opinions; and just a reminder about these  
20 ethics opinions, these ethics opinions are the answers to  
21 questions put out by the judicial section of the State  
22 Bar, and it consists of judges and lawyers, or just  
23 judges? Do you know?

24 HONORABLE BRETT BUSBY: I think it's just  
25 judges.

1 HONORABLE TRACY CHRISTOPHER: So I pulled  
2 out the ones that dealt with endorsement for you to look  
3 at. And so, for example, it's okay to privately introduce  
4 somebody and recommend that your friends vote for the  
5 candidates. It's okay to introduce a candidate to  
6 personal friends and recommend that such friends vote for  
7 the candidate. So we have some old political endorsement  
8 ones that said, well, yeah, as long as it's your friends  
9 and it's personal you can do it. Then the opinions in '89  
10 started getting stronger, even in the absence of a no  
11 endorsement clause. So in '89 they said a judge may not  
12 endorse a candidate for public office, but they didn't  
13 really talk about what endorsement meant. A judge cannot  
14 display a bumper sticker supporting a political candidate,  
15 and a judge cannot hand out campaign material for  
16 candidates of one's own political party along with one's  
17 material and recommend to people that they vote for these  
18 candidates. That was in 1994.

19 So that's, you know, pretty strict, and then  
20 let's see, yeah. Now, question four involves the conduct  
21 of a spouse of a judge, can a spouse do that. The answer  
22 is yes, a spouse can do that, so a spouse can hand out  
23 your brochure along with some other Republican candidate's  
24 or Democrat candidate's brochure and ask that they be  
25 endorsed. So that's a summary of what was in the

1 nonbinding judicial -- I mean, the good thing about this  
2 is if you had an opinion in your favor and you got subject  
3 to a Judicial Conduct Commission complaint you could say,  
4 "I'm relying upon the advice in here" to get you out of a  
5 complaint, but that's about it as far as I know in terms  
6 of its binding nature.

7                   CHAIRMAN BABCOCK: And all of those -- all  
8 of those examples that are cited here in the attachment I  
9 think all predate the White case.

10                   HONORABLE TRACY CHRISTOPHER: Yes. They  
11 predate White. They predate Hecht.

12                   CHAIRMAN BABCOCK: And predate Hecht, which  
13 was after the White case, but before Yulee, so --

14                   HONORABLE TRACY CHRISTOPHER: Right. And in  
15 fact, David, I thought this one was a little different  
16 because it involved the money, but there is a recent  
17 discipline of a judge who attended a joint fundraiser. It  
18 was a judge and a DA, joint fundraiser held by a PAC, and  
19 the judge got disciplined for allowing the joint  
20 fundraiser with his name.

21                   HONORABLE DAVID PEEPLES: Kind of like the  
22 picture.

23                   HONORABLE TRACY CHRISTOPHER: Right. Like  
24 the picture. Even if it was an independent PAC. This one  
25 might not have been independent.

1 HONORABLE JANE BLAND: He wasn't  
2 independent.

3 HONORABLE TRACY CHRISTOPHER: Because his  
4 wife was on it, but, you know, so --

5 HONORABLE DAVID PEEPLES: Can I say this? A  
6 very important thing is fair notice. I mean, if the rules  
7 are in the ballpark, really what I want to know is tell me  
8 if I can't do it, but don't give me some vague thing where  
9 I can't understand it and I might get in trouble. So  
10 there's a strong argument, I think, of fair notice and  
11 fairness and all of that to let people know what they can  
12 and cannot do. So I think what you've done on the rewrite  
13 is very good, but, you know, just to say the Constitution  
14 or *Minnesota vs. White* says this is okay, that may not be  
15 persuasive to the conduct commission, and I might have to  
16 hire a lawyer, an expensive one, to defend me.

17 CHAIRMAN BABCOCK: And who wants to be a  
18 test case. It's not as much fun as when you're sitting  
19 around a table, so it seems to me that it's the duty of  
20 the Court in the first instance to make sure that its  
21 rules are constitutional so that people don't have to be  
22 test cases.

23 HONORABLE DAVID PEEPLES: And gives fair  
24 notice to what you can and can't do.

25 CHAIRMAN BABCOCK: And give fair notice.

1 Yeah, Judge Yelenosky.

2 HONORABLE STEPHEN YELENOSKY: I want to ask  
3 you because you're the expert on this, how far does this  
4 go? Would you be able to argue that I guess the ethical  
5 rule that says you shouldn't basically engender distrust  
6 in the judiciary or whatever? So can a district judge  
7 say, "Well, that White decision is a bunch of junk. I  
8 don't think the Supreme Court knew what they were doing"?  
9 Can I be disciplined for that?

10 CHAIRMAN BABCOCK: I wouldn't think so.

11 HONORABLE STEPHEN YELENOSKY: Because --  
12 okay, so that ethical rule is out.

13 CHAIRMAN BABCOCK: So what?

14 HONORABLE STEPHEN YELENOSKY: The ethical  
15 rule that says I can't show disapproval or engender  
16 distrust in the judiciary is out.

17 CHAIRMAN BABCOCK: Yeah. I think under  
18 White you can criticize White.

19 HONORABLE STEPHEN YELENOSKY: Right.  
20 Exactly. Exactly. And so how far does that go? So can I  
21 say -- and these are hypotheticals. I'm not elected  
22 anymore. I'm not running again. So can I say in my  
23 campaign, "Every time that Rusty comes before me I'm going  
24 to award him a hundred million dollars, no matter" --

25 MR. HARDIN: I like that much better.

1 HONORABLE STEPHEN YELENOSKY: "-- what the  
2 facts are. No matter what the facts are."

3 CHAIRMAN BABCOCK: Well, you've got one vote  
4 here, but -- but, you know, there is a promises clause.

5 HONORABLE STEPHEN YELENOSKY: Right, but you  
6 said that's in question.

7 CHAIRMAN BABCOCK: Well, I think one member  
8 of our current Texas Supreme Court thinks it's in question  
9 because even that is vague because if I -- if I go out on  
10 the campaign trail, and I say, "That Rusty Hardin is one  
11 hell of a lawyer, he's been in my court many times and  
12 he's always successful. I don't know why, but juries love  
13 him," and you know, I think -- I'm announcing my views. I  
14 think he's going to win.

15 HONORABLE STEPHEN YELENOSKY: Yeah.

16 CHAIRMAN BABCOCK: Now, improbable as that  
17 speech might be, nevertheless, it is okay. But if I say  
18 it slightly differently, and I say, "I promise you, if  
19 he's in my court, he's going to win."

20 HONORABLE STEPHEN YELENOSKY: Well, okay.  
21 Well, I'm just concerned overall, particularly with the  
22 state of things now in the rule of law. Basically it  
23 seems like it's getting to the point that if we can define  
24 what a judge can do, right, this is the authority of a  
25 judge, but you can run for that office on any basis you

1 want but perhaps the promise clause. You can say whatever  
2 you want, and so how are we defining judges other than the  
3 fact that they have this authority to make decisions?  
4 We're not really putting anything in that makes a judge  
5 distinct from any other politician.

6 HONORABLE TRACY CHRISTOPHER: Well, you're  
7 still subject to recusal.

8 HONORABLE STEPHEN YELENOSKY: Well, that  
9 doesn't -- that doesn't help with people's respect for the  
10 rule of law.

11 CHAIRMAN BABCOCK: Yeah, and Judge Estevez  
12 has got a comment, but there's one way, Judge Yelenosky,  
13 and that's to quit electing our judges.

14 HONORABLE STEPHEN YELENOSKY: Well, that's a  
15 good idea.

16 CHAIRMAN BABCOCK: Justice O'Connor said,  
17 "Hey, boys, as long as you're going to elect your judges  
18 you've got to let them talk to the electorate." That was  
19 part of her opinion.

20 HONORABLE ANA ESTEVEZ: Yeah, and it wasn't  
21 a comment. I just didn't know if you'd ever see me  
22 because I'm right next to you.

23 CHAIRMAN BABCOCK: You disrespected me.  
24 You're shaming me.

25 HONORABLE ANA ESTEVEZ: No, no, I'm sorry.

1 I apologize, but, no, mine is more probably way too  
2 specific for the committee, but I get a little concerned  
3 about where these lines are for judges as well because I  
4 could have a misconception of the law because my late  
5 husband used to tell me that if it was on his side of the  
6 yard it was okay to have a political sign and so because I  
7 said no sign, and he would sneak one in, and I would take  
8 it out at night because I was convinced I wasn't allowed  
9 to do that, and I don't know the answer to that. I guess  
10 someone else said it, but I'm concerned about fundraisers  
11 because I remember calling the commission and asking if I  
12 can go to a fundraiser and they said I can go to someone  
13 else's fundraiser, but I cannot be a host or hostess for a  
14 fundraiser. In other words, make sure you don't give that  
15 check the right amount for a hosting, or if you do make  
16 sure they take it off.

17                   And then my next question is, well, let's  
18 say I'm at a fundraiser and I check in on Facebook. Is  
19 that now an endorsement, and I was fine with being at the  
20 fundraiser and not being a host, but I can't check in? I  
21 mean, that's actually a specific question for you.  
22 Because it is campaign time, and there are people that,  
23 you know, that are not necessarily judges, but, you know,  
24 are representatives and other things that you may want  
25 to -- you know, if you're politically in you may want to

1 give them money.

2 CHAIRMAN BABCOCK: Well, you have an  
3 endorsement canon, and so, you know, you've got to worry  
4 about it unless you want to be a test case.

5 HONORABLE ANA ESTEVEZ: Well, I just call  
6 them all the time, and they say it's fine until somebody  
7 complains. That's what I've gotten.

8 CHAIRMAN BABCOCK: Frank.

9 HONORABLE ANA ESTEVEZ: I've got them on my  
10 speed dial.

11 MR. GILSTRAP: When this came up last time  
12 the thing that was just so horrifying was this idea of  
13 judges using social media to comment on pending litigation  
14 in their court while the case was going on as to show the  
15 public that they were, say, hard on crime or something.  
16 We had the boy in the box case I think, you know, where  
17 the judge walked, apparently as I understand it --

18 CHAIRMAN BABCOCK: I wouldn't put it that  
19 way, Frank.

20 MR. GILSTRAP: I know, I know.

21 CHAIRMAN BABCOCK: In a recent opinion of a  
22 special court of review.

23 MR. GILSTRAP: And I'm sure you must have  
24 done a great job because they were terrible facts, but are  
25 we just -- that's not even here. Are we talking about

1 that anymore?

2 HONORABLE TRACY CHRISTOPHER: It's in there,  
3 because we said, you know, watch out with what you're --  
4 the problem with -- everything that we do is subject to  
5 the Code of Judicial Conduct, including what's on social  
6 media. So if our social media post then violated another  
7 rule of the Code of Judicial Conduct, such as the rule  
8 saying you can't comment upon a pending case in a way to  
9 indicate your decision in the case, it's not just  
10 commenting upon a pending case. It's limited. You could  
11 still be -- you could be disciplined for that.

12 MR. GILSTRAP: Okay. But it's --

13 HONORABLE TRACY CHRISTOPHER: And that  
14 particular judge was found not to have violated that  
15 aspect of it.

16 CHAIRMAN BABCOCK: Right.

17 MR. GILSTRAP: But I mean, I mean, you know,  
18 the problem is, is it's one thing to comment on a pending  
19 litigation to another person. It's another thing to put  
20 it on Facebook, for God's sake; and so, you know,  
21 thousands of people can read it while it's going on; and,  
22 you know, it seems like we say, well, you know, we -- it's  
23 kind of here, and read the Code of Judicial Conduct and,  
24 you know, you can kind of figure out; but we're not  
25 speaking to the problem it creates.

1 HONORABLE TRACY CHRISTOPHER: Well, I think  
2 we were speaking to what the problem -- I mean, we were  
3 trying to in the rule. We were trying to.

4 CHAIRMAN BABCOCK: Justice Boyce.

5 HONORABLE BILL BOYCE: I think to your  
6 point, Frank, saying much more than "please consider the  
7 following" just leads you to an endless series of  
8 hypotheticals; and just to raise the anxiety of every  
9 judge in the room I'll give you this example. Okay.  
10 Speaking of special courts of review, I was on one this  
11 summer; and to your point, Judge Yelenosky, the charges  
12 were several, but one of the charges in terms of casting  
13 disrepute on the judiciary was based on statements that  
14 the judge wrote in a book that said, quote, "Going to  
15 court is like going to Las Vegas," close quote. That was  
16 the basis for discipline. Another basis for discipline  
17 was a statement that most -- and this is a paraphrase,  
18 most family law cases that are appealed get affirmed.  
19 Now, there was more to it, the charges, than just that,  
20 but those were charges and the --

21 MR. GILSTRAP: Was the judge disciplined for  
22 those?

23 HONORABLE BILL BOYCE: Not for those  
24 statements. The conclusion was that those were innocuous  
25 statements.

1 MR. GILSTRAP: And they're probably  
2 statements of fact.

3 HONORABLE TRACY CHRISTOPHER: But they were  
4 initially --

5 HONORABLE BILL BOYCE: That was on appeal,  
6 but the underlying -- the underlying procedure resulted in  
7 discipline based on making those statements, and so my  
8 point is this. It is -- it is hard and hazardous to get  
9 super specific about what is not permissible, which is why  
10 I like so much Judge Christopher's phrasing of things in  
11 terms of "take these things into consideration" because  
12 it's just so context-dependent that efforts to be a heck  
13 of a lot more specific about what you can and cannot do  
14 are likely to make you the test case, and nobody wants to  
15 be a test case.

16 MR. GILSTRAP: I understand. I understand.  
17 Okay.

18 CHAIRMAN BABCOCK: And I think, Frank, you  
19 know, you've practiced -- you've dabbled in this area a  
20 little bit; and you'll hear the First Amendment lawyers  
21 say, "talk about the chilling effect"; and the conduct  
22 commission is a classic example of when they take  
23 statements like what Justice Boyce talked about or some of  
24 the statements -- actually, all of the statements that  
25 Judge Slaughter used in her Facebook post and then

1 discipline somebody. Well, other judges are going to say,  
2 "Whoa, no, I'm not going to get involved in that. I don't  
3 want to have to hire a lawyer to go through a special  
4 court of review and show up before the conduct  
5 commission." And the conduct commission consists of --  
6 half of them aren't even lawyers. So you've got this sort  
7 of censure bureau that is put in place that is overseeing  
8 the speech of judges, and that to me is a problem. Judge  
9 Yelenosky.

10 HONORABLE STEPHEN YELENOSKY: I just want to  
11 respond to that. I understand that, but I mean, but your  
12 example is one in which the right result came out of the  
13 process, right, but this wasn't a violation. But my  
14 concern is you could -- I think Chip would say you could  
15 say something a lot more about engendering distrust in the  
16 judiciary than nonetheless apparently you can say with  
17 impunity.

18 CHAIRMAN BABCOCK: Sure.

19 HONORABLE STEPHEN YELENOSKY: But say it  
20 about an individual member of the Supreme Court as long as  
21 it's not factual as defamatory, you can say it, and  
22 apparently that's okay.

23 CHAIRMAN BABCOCK: It could even be  
24 defamatory if you don't do it with actual malice.

25 HONORABLE STEPHEN YELENOSKY: There you go.

1 Yeah.

2 HONORABLE DAVID PEEPLES: Can I clarify  
3 something? You said the right result came out, but only  
4 after appeal to your --

5 HONORABLE BILL BOYCE: Correct.

6 HONORABLE DAVID PEEPLES: -- tribunal,  
7 wasn't it?

8 HONORABLE BILL BOYCE: And an 18-month  
9 process.

10 HONORABLE STEPHEN YELENOSKY: Well, a lot of  
11 people lose at trial and it gets straightened out on  
12 appeal.

13 HONORABLE DAVID PEEPLES: But you're talking  
14 about a judge who's done something that sounds pretty  
15 innocuous to me paying I don't know how many hundreds of  
16 thousands of dollars in attorney's fees to get it reversed  
17 on appeal. That's just draconian.

18 HONORABLE STEPHEN YELENOSKY: I don't  
19 understand that. I mean, we have a system of appeal, and  
20 if there's a problem with the trial level then because  
21 they're not lawyers or something, maybe we fix that, but  
22 people who appear before us are paying hundreds of  
23 thousands of dollars, and if they lose they're going on  
24 appeal.

25 HONORABLE DAVID PEEPLES: I'm just saying

1 that I think I disagree with the suggestion it's okay  
2 because the result was okay in the final analysis there  
3 after the judge had fought it through to Justice Boyce's  
4 tribunal, and can you give us an idea of what kind of  
5 attorney's fees people spend, Chip?

6 CHAIRMAN BABCOCK: Yeah.

7 HONORABLE STEPHEN YELENOSKY: If you're  
8 saying that happens all the time, I understand it, and  
9 then there's a problem at the trial level, but if you're  
10 saying that there's a one off like this and it got  
11 straightened out on court of appeals, that's the system  
12 for decision-making entirely in the judicial system. If  
13 you're saying it always happens then there's a problem at  
14 the first level, and if you're saying that you have  
15 examples of where things went wrong, I can give you lots  
16 of examples where things went wrong in trial courts and  
17 people like our chair -- chairperson were hired to  
18 straighten it out.

19 CHAIRMAN BABCOCK: Well, but the point is  
20 here we're trying to write something that will not  
21 unnecessarily or unconstitutionally infringe on people's  
22 right to free speech and so that they don't have to go out  
23 and hire a lawyer who knows something about that area,  
24 and, you know, to give -- to answer Justice Peeples'  
25 question, it is public that the respondent in *In Re: Hecht*

1 paid \$330,000 and then got sued by the Ethics Commission  
2 because he didn't pay me enough and appealed that, and the  
3 result of the appeal was that he and I could enter into a  
4 arm's length agreement about attorney's fees and \$330,000  
5 for a day and a half trial sounded like it was okay.

6 HONORABLE STEPHEN YELENOSKY: Well, I don't  
7 doubt that there are problems, and maybe I'm just  
8 concerned with -- and I -- and I think we should have  
9 predictability for judges and everybody in the judicial  
10 system. I guess I'm just concerned about where this is  
11 all headed.

12 CHAIRMAN BABCOCK: Judge Estevez.

13 HONORABLE ANA ESTEVEZ: Well, I think part  
14 of the underlying problem is that you have people that are  
15 making these decisions that aren't lawyers and don't  
16 understand the law and are going more with their "Well,  
17 that doesn't sound what I want my judge to do," not what  
18 is -- you know, so it's built in the way the tribunal is  
19 working or that there's going to be a little more ability  
20 for error. Isn't that your concern of who's make these  
21 decisions?

22 CHAIRMAN BABCOCK: That is one of my  
23 concerns.

24 HONORABLE ANA ESTEVEZ: Well, I mean isn't  
25 that the basic concern, is somebody is deciding whether or

1 not you should even respond. If somebody goes, files a  
2 grievance on you or, you know, an ethics complaint and  
3 somebody reviews that and decides whether you have to  
4 respond. So all of the sudden you either respond yourself  
5 by yourself or you get a lawyer if you're smart and then  
6 you're paying your lawyer, and then it goes to the next  
7 level.

8                   CHAIRMAN BABCOCK: Well, the other concern  
9 is not only what following the tribunal, which are set by  
10 the Constitution, I mean, that's nothing you can do about  
11 that unless you amend the Constitution, but oftentimes  
12 these complaints, anonymous complaints, are used as  
13 campaign weapons. I mean, Justice Christopher just heard  
14 a case --

15                   MR. HARDIN: And I've got two.

16                   CHAIRMAN BABCOCK: -- where the complaint  
17 was anonymous, clearly written by a lawyer, probably by  
18 the opponent in the primary, and this judge lost, good  
19 judge, and he lost. Yeah, Richard.

20                   MR. ORSINGER: You know, one of the things  
21 about this debate that strikes me as ironic is that the  
22 policy behind regulating judicial speech is to create or  
23 perpetuate this image that judiciary is impartial, and we  
24 don't want a judge to let out the secret that they have a  
25 prejudice or view or a friendship or something like that.

1 So if they admit it, we're going to, you know, put them in  
2 jail or make them spend hundreds of thousands of dollars,  
3 or we can let people express themselves; and if they are  
4 biased or prejudiced, it will be evident in what they say  
5 and then the litigants that are disadvantaged by that can  
6 file a motion to recuse and get out of their court. So  
7 which is better? A society in which the judges are forced  
8 to keep all of their prejudices secret and no one knows  
9 that they're there, except we know they are, or to have  
10 them put them out there in the public and let the voters  
11 and the litigants react to now the information they have.

12           This is a great irony to me. I mean, it  
13 does seem to me like it might be a better way to run the  
14 system, even though people won't respect the judiciary for  
15 reasons that they don't deserve it, is for them to realize  
16 that these are people that are making judgments and they  
17 do have biases and prejudices and this is what they've  
18 said about their biases and prejudices, and vote for them  
19 or against them or donate to them or their opponent or  
20 file a motion to recuse. I mean, making it public and  
21 letting the public react arguably is the better policy  
22 than keeping all of it secret and letting no one know  
23 what's really going on.

24           CHAIRMAN BABCOCK: Justice Kennedy made  
25 exactly that argument.

1 MR. ORSINGER: He did? Well, I'm --

2 CHAIRMAN BABCOCK: So you're -- until a few  
3 months ago you were the pivot point of the Supreme Court.  
4 Holly.

5 MS. TAYLOR: So I'm a member of an  
6 association of appellate court staff attorneys. We had a  
7 CLE earlier this month, and one of our speakers was an  
8 individual from the commission, and their perspective  
9 seems to be -- I don't want to speak for him, but based on  
10 the presentation that all of these rules that apply to  
11 judges may apply to staff.

12 HONORABLE JANE BLAND: They absolutely do.

13 CHAIRMAN BABCOCK: Yeah. They take that  
14 position.

15 MS. TAYLOR: Yes, they do.

16 MR. ORSINGER: You better not have a yard  
17 sign.

18 MS. TAYLOR: Right. Yeah. Well, we  
19 actually had a conversation about yard signs, and what I  
20 got out of that was the spouse is okay, the judge's spouse  
21 or the staff member's spouse, but we -- so there's nothing  
22 in this -- he gave us some sample cases, which I think  
23 were from other states about staff attorneys making social  
24 media posts about ongoing matters in a court, and there --  
25 I didn't see anything in here that even mentions

1 cautioning staff or anything like that, and I don't know  
2 that we want to do that, but it's a thought that, you  
3 know, maybe mentioning that.

4 CHAIRMAN BABCOCK: Yeah. Good point, Holly.  
5 Thank you. Yeah, Rusty.

6 MR. HARDIN: I'm curious as to the judges  
7 here, I've always thought from afar that these rules in  
8 some ways protect y'all from having to get involved in  
9 politics that you don't want to be involved in and having  
10 to choose sides, and you've got --

11 HONORABLE STEPHEN YELENOSKY: Yes.

12 MR. HARDIN: -- a perfect excuse now not to  
13 do it. So if we do the great light of sunshine, as Chip  
14 is talking about, which I think makes perfect sense, but I  
15 wonder how many judges really want that sunshine in return  
16 for all of the sudden now being able to be legitimately  
17 pressured by the advocates for one party or one candidate.  
18 So I'm just curious as to really -- because right now  
19 isn't the problem really the way the commission interprets  
20 the rules and disciplines people? It's not really judges  
21 wanting to be able to say more and do more, is it? Isn't  
22 it that the way that they are interpreted now are the  
23 problem, or am I wrong?

24 CHAIRMAN BABCOCK: Well, there was testimony  
25 in the Hecht case about the history of the endorsement

1 rule, and there was testimony in lines with what you say  
2 that some people -- some judges, but you certainly  
3 wouldn't think they're speaking for all of them, five or  
4 six, lobbied for that because the very thing you say, they  
5 didn't want to be put in the position of having to choose  
6 or even having to be asked.

7 MR. HARDIN: Right.

8 CHAIRMAN BABCOCK: Because they just want to  
9 say, "I can't do it, it's unethical." Because we didn't  
10 used to have that rule, but to me, the measure is whether  
11 it's constitutional.

12 MR. HARDIN: Right.

13 CHAIRMAN BABCOCK: And if it's not  
14 constitutional, I don't care how many judges want to hide  
15 behind something, the Court has no business in  
16 promulgating it if it's not constitutional. Yeah, Justice  
17 Gray.

18 HONORABLE TOM GRAY: In direct answer to  
19 Rusty, I know that with regard to the contributions that  
20 many judges take the position that that making a  
21 contribution to any candidate is an endorsement of the  
22 candidate, and therefore, they say they can't, and I've  
23 never ascribed to that. I'll give to who I want to give  
24 to, and if it's enough that gets on a campaign report, it  
25 gets on there. What I understand that I cannot do, as

1 earlier described, is to give enough and be listed on a  
2 board like at the entry of the event or on an invitation  
3 to the event that I'm a host and actually make an  
4 endorsement. In other words, money alone is not an  
5 endorsement of the candidate for the purposes of the  
6 clause; and I've resisted, you know, any effort to make  
7 just the fact that money is contributed to a campaign or a  
8 candidate to be viewed as an endorsement, but that's kind  
9 of my view.

10           With regard to the issue under review, the  
11 actual rule as proposed, I would suggest that in item (c)  
12 in the -- I guess it's in the comment or whatever, says  
13 explanation, it says, "It is also easier for people to  
14 attempt to engage in ex parte communications." In what we  
15 did on the -- this before -- and this is really a  
16 technical kind of gnat. Only parties can engage in ex  
17 parte communications based on the definition of ex parte  
18 communication. I would suggest that that be changed, not  
19 that it matters to what we're trying to achieve in this,  
20 and I really think the objective needs to be give judges  
21 some safe harbors and let them stay in it and but y'all  
22 have scared me to death. I don't do this stuff anyway, so  
23 I'm not worried about the social media aspect of it, but I  
24 remember -- I think it was the Texas Medical Association.  
25 They do a slate card in each election cycle, and they

1 would send them out to the persons who are on the slate  
2 card suggesting that we forward them on to other people,  
3 you know, in effect as a slate obviously, and apparently  
4 now I should be concerned about that.

5 CHAIRMAN BABCOCK: Professor Hoffman.

6 PROFESSOR HOFFMAN: So a more pedestrian  
7 comment about placement. So J, is the idea is that we  
8 would add a J to Canon 4, right?

9 HONORABLE TRACY CHRISTOPHER: Right.

10 PROFESSOR HOFFMAN: So, I mean, I've looked  
11 through the canons. I guess I don't see an obvious place  
12 that it could go otherwise, although maybe 4A, which talks  
13 about extra judicial activities in general. The thing  
14 that I guess I don't like about J is it's very vague in  
15 the reference, right? "The provisions of this code  
16 governing a judge's communications also govern as to  
17 social media." But when you look at the word  
18 "communications" in the code, it's only as to ex parte, so  
19 the word doesn't even show up elsewhere. So I assume by  
20 communications they mean endorsements and lots of other --  
21 the thought is meant.

22 So anyway, my two comments I guess together  
23 are I'm not sure that the reference to "generally the  
24 stuff governing communications also applies to social  
25 media" is very helpful and then a related is maybe instead

1 it could simply stick this concept of social media is kind  
2 of covered here in maybe 4A as an alternative idea. That  
3 said, I thought, like others have said, that the comments  
4 are in fabulous shape. I thought they were very helpful.

5 CHAIRMAN BABCOCK: Any other comments?

6 Yeah, Justice Christopher.

7 HONORABLE TRACY CHRISTOPHER: Yes, it is  
8 true that a lot of judges prefer to keep the no  
9 endorsement clause in the code, even if it perhaps is  
10 unconstitutional. They would prefer to keep it in the  
11 code because it does provide cover to some judges, and  
12 Justice Hecht testified to this in the hearing, that --  
13 especially in a primary. You can imagine, you know, if  
14 there were two candidates in a primary and you were an  
15 important person in some county, not like we are in Harris  
16 County, but if you were an important judge in a small  
17 county, your endorsement of one of those two candidates  
18 could make a big difference and in a small enough county  
19 where somebody actually knows who you are, and I think the  
20 judge would prefer to say, "Oh, sorry, Code of Judicial  
21 Conduct says I can't pick between the two of you."

22 Now, you know, maybe some judge will and  
23 maybe they'll be disciplined and the case -- you know, the  
24 whole clause would get overturned, but I think judges  
25 prefer to keep it in just with this caveat that merely

1 sharing or liking someone's social media post is not an  
2 endorsement.

3 CHAIRMAN BABCOCK: Justice McClure, as you  
4 may recall, found that that was unconstitutional under the  
5 First Amendment, the endorsement clause. She was -- she  
6 concurred in the --

7 HONORABLE TRACY CHRISTOPHER: Oh, that's  
8 right. That was the concurring opinion, right, but the  
9 majority opinion did not reach it.

10 CHAIRMAN BABCOCK: No. Because we wanted to  
11 win and not have an appeal to the U.S. Supreme Court,  
12 which the conduct commission was prepared to do, so  
13 they -- so the two judges decided it on independent and  
14 adequate state grounds and didn't reach the constitutional  
15 question, and Justice McClure didn't agree with that, but  
16 said it was unconstitutional.

17 HONORABLE TRACY CHRISTOPHER: Well, I'm sure  
18 Justice Hecht was glad he didn't have to go to the U.S.  
19 Supreme Court.

20 MR. ORSINGER: That would have been another  
21 \$300,000.

22 CHAIRMAN BABCOCK: Another couple hundred  
23 thousands at least.

24 HONORABLE TRACY CHRISTOPHER: Exactly.

25 CHAIRMAN BABCOCK: Judge. Judge Wallace.

1 HONORABLE R. H. WALLACE: Well, like Rusty  
2 was saying while ago, sort of my experience is most of the  
3 public -- most of the electorate thinks that judges cannot  
4 endorse someone, and they think that we cannot comment on  
5 how we can rule on future matters and something like that,  
6 so I would move that we seal this transcript, and we're  
7 done. I'm kidding.

8 MR. ORSINGER: And shoot everyone.

9 HONORABLE R. H. WALLACE: Because I do like  
10 that.

11 CHAIRMAN BABCOCK: Rusty.

12 MR. HARDIN: I don't want to belabor, but it  
13 really to me, once you do away with it, I understand the  
14 constitutional argument. I understand what you said, and  
15 you may be right, but it really particularly in  
16 communities as Justice Christopher is talking about where  
17 the judge is not only known but a very influential person,  
18 it really injects the judiciary at two levels that would  
19 concern me just as a practitioner. One is their  
20 endorsements and their activities then become suspect in  
21 their rulings and everything else when they've actually  
22 gotten involved in politics and the public accepts that,  
23 and it does away with a lot of the respect potentially and  
24 sort of hands off the public has about judges and then the  
25 demands on judges in those communities, because now they

1 no longer can say, "I can't do this."

2 I really think it's a slippery slope to be  
3 arguing to -- it puts judges in a position that I don't  
4 think they're going to like it when it's over, and I don't  
5 think the body of -- the judicial body really gains more.  
6 I would hate to see -- even if it's challenged or someone  
7 is punished for it or something it can be raised, but take  
8 it off the books. I think it really is not a good thing.

9 CHAIRMAN BABCOCK: It wasn't on the books  
10 until recently, but anyway. Judge Yelenosky.

11 HONORABLE STEPHEN YELENOSKY: That's why  
12 Rusty is going to get a hundred million dollars every time  
13 he's before me.

14 CHAIRMAN BABCOCK: What's that?

15 HONORABLE STEPHEN YELENOSKY: I said that's  
16 why Rusty is going to get a hundred million dollars every  
17 time he's before me because I agree with that.

18 CHAIRMAN BABCOCK: You just said you're off  
19 the bench.

20 HONORABLE STEPHEN YELENOSKY: Well, I'm a  
21 visiting judge, though.

22 CHAIRMAN BABCOCK: Yeah, so remember that.

23 HONORABLE STEPHEN YELENOSKY: Where I come  
24 down after hearing Richard say, well, the people can  
25 decide is, well, if it's unconstitutional to restrict

1 judges' speech when they're elected, then elected judges  
2 should be unconstitutional because basically what you said  
3 was, well, the people can decide and if the majority likes  
4 you to be discriminatory, that's just fine.

5 CHAIRMAN BABCOCK: Frank.

6 MR. GILSTRAP: We kind of glossed over  
7 Justice Gray's comment about the distinction between  
8 people and parties in comment (c). I mean, that's an  
9 important distinction.

10 CHAIRMAN BABCOCK: Yeah.

11 MR. GILSTRAP: I mean, the social media  
12 comments from nonparties shouldn't have to be preserved.  
13 I think the Supreme Court of Texas went through a big  
14 exercise on that when they had some hot button case and  
15 they got all of this e-mail from people who weren't  
16 parties and did that have to be disclosed, and I don't  
17 think we want to put that burden on judges here.

18 CHAIRMAN BABCOCK: Yeah. So what's your  
19 proposed fix on that, Frank?

20 MR. GILSTRAP: Well, I mean, I think he -- I  
21 think Justice Gray just said in (c) change "people" to  
22 "parties."

23 CHAIRMAN BABCOCK: Yeah. Justice  
24 Christopher.

25 HONORABLE TRACY CHRISTOPHER: Well, it was

1 actually intended to be broader than parties, and perhaps  
2 the fix would be to say, "It is also easier for people to  
3 attempt to engage in communications with a judge via  
4 social media. Any known attempt at an ex parte  
5 communication should be disclosed." Because as we  
6 discussed before, when you put a post on social media, a  
7 lot of people can write comments on there that, you know,  
8 you might not -- it's not an ex parte communication. Just  
9 like if I said -- I mean, I'm obviously not trying a  
10 criminal case, but, "Oh, I'm getting ready to try a murder  
11 case," and the comment was "Hang 'em high, Judge." Well,  
12 that's not an ex parte communication because it didn't  
13 come from the parties, but, you know, it's something that  
14 the judge should be thinking about before they say, "Oh,  
15 I'm about to start a really exciting high profile murder  
16 case."

17 CHAIRMAN BABCOCK: Yeah. The comment was  
18 "Hang 'em high. Just sayin', Judge." John Browning is  
19 here --

20 HONORABLE TRACY CHRISTOPHER: Right. I can  
21 fix that first sentence just by taking out "ex parte," or  
22 we can change "people" to "parties," but it was intended  
23 to be a little broader.

24 CHAIRMAN BABCOCK: Yeah, I like your  
25 second -- I mean, the idea you just first expressed.

1 HONORABLE TRACY CHRISTOPHER: Okay.

2 CHAIRMAN BABCOCK: John Browning is here. I  
3 don't know how many people know him, but John was invited  
4 by somebody. Maybe Elaine, and he is -- he's a prolific  
5 writer, a candidate for the Dallas court of appeals, and  
6 has gotten into this social media space so deeply that  
7 somebody had the foolish notion to call him as an expert  
8 in the Slaughter case. I don't know who did that, but  
9 anyway, his views were well-received by the special court  
10 of review, and I know he's bursting here to comment. So,  
11 John, anything you want to share with us?

12 MR. BROWNING: Certainly. And thank you for  
13 that. I actually just wanted to mention that the  
14 alternative that Justice Christopher suggested is probably  
15 the better way because in the Youkers case out of the  
16 Fifth Court of Appeals it was, in fact, the father of the  
17 purported victim that reached out to the judge; and I  
18 think we can all agree that the way the judge handled it  
19 in the Youkers case was textbook and completely proper and  
20 above board and we certainly want to encourage that, so I  
21 think the broader way to take it is probably a good way to  
22 go, notwithstanding the technical distinction about what  
23 constitutes an ex parte communication. I think that level  
24 of advice would be helpful to the judiciary.

25 My larger comments are really that I think

1 the proposed rule J and the comment are excellent, for  
2 whatever it's worth from my standpoint. I give them my  
3 seal of approval. I think it's very well done. One of  
4 the -- I think one of the big concerns that I think the  
5 comments and particularly the advice for judges (a)  
6 through (e) address is taking the right tact, which is  
7 understanding that technology is going to be changing and  
8 we're not going to be able to keep up with that, and we've  
9 got to keep language that is somewhat broader than we  
10 might otherwise prefer and also be cognizant of the fact  
11 that context really is key in so many of these instances.

12           The reference that was made to the recent  
13 Judicial Conduct Commission disciplinary action of a judge  
14 who had liked a campaign advertisement, I think they were  
15 probably relying upon some very limited authority, some of  
16 which comes from out of state involving a Kansas judge who  
17 had liked another candidate within her party, a  
18 nonjudicial candidate, and she received a sanction. But  
19 as we've seen, there are a lot of gradations to what is --  
20 you know, what a like, a share, a retweet can be  
21 interpreted as. The -- you know, someone, a judge, for  
22 example, this example came up with an audience at the  
23 federal judicial center just last month. A judge who  
24 retweets an article, a book review about a book on mass  
25 incarceration, is not necessarily advocating for the views

1 expressed in that, but may be merely drawing or shedding  
2 light on that as an issue worthy of consideration, not  
3 necessarily adopting the other viewpoints. So because of  
4 the fact that there is so much room on the spectrum for  
5 this, I think the language that's been chosen is --  
6 there's a lot of wisdom in that.

7 CHAIRMAN BABCOCK: You're blushing, Justice  
8 Christopher. Yeah, Professor Hoffman.

9 PROFESSOR HOFFMAN: On this language in (c)  
10 I was looking at the way it's in Canon 2 -- sorry, Canon  
11 3A -- 3B(8) right now where we talk about ex parte  
12 communications, and I think maybe the way to make it match  
13 would be to just delete the words "for people" so it would  
14 just read "It is also easier to attempt to engage in ex  
15 parte communications with a judge via social media."  
16 That's essentially the way that it's written in sub (8)  
17 where it says, "A judge shall not initiate, permit, or  
18 consider ex parte communications," and yet it doesn't talk  
19 about who the actor is. And then the only other comment  
20 is apparently we italicize "ex parte."

21 HONORABLE TRACY CHRISTOPHER: Where's my  
22 editor?

23 CHAIRMAN BABCOCK: Okay. Well, if we have  
24 no further comments, terrific, terrific job, Justice  
25 Christopher. Thank you very much and your subcommittee

1 for that, so we will deem this guidelines for social media  
2 use by judges submitted and done; and so now we'll go to  
3 our next topic, which is new rules on lawyer access to  
4 juror social media activity; and, Professor Carlson, since  
5 you're hogging the agenda today, you can do this one, too.

6           PROFESSOR CARLSON: You'll recall at our  
7 December meeting we took votes on what we thought was  
8 appropriate behavior for lawyers in light of the  
9 prohibition in Disciplinary Rule of Professional Conduct  
10 3.06 precluding lawyers from communicating or attempting  
11 to improperly influence jurors, alternate jurors, members  
12 of the juror's family, et cetera; and I included that  
13 disciplinary rule in this report dated September 21, which  
14 is our latest promulgation of our recommendation, just a  
15 reminder to you, and I don't intend to go back over that  
16 again unless someone would like to.

17           We also discuss on page four of that memo  
18 the ABA view on lawyers' use of the internet for purposes  
19 of voir dire and otherwise, and this committee voted not  
20 to follow all of those ABA recommendations. We took three  
21 votes, and the majority vote was in favor of permitting  
22 lawyers to review the jurors' ESM without making an  
23 access report -- request, excuse me, when the juror is  
24 unaware that the website or their ESM has been reviewed by  
25 the lawyer. So lawyers can -- according to our vote, it

1 was 26 to zero that that would be appropriate behavior.  
2 So I did not revisit that in our subcommittee  
3 recommendations, other than to restate that in the  
4 beginning of the proposed comment.

5 CHAIRMAN BABCOCK: Thanks for reminding us  
6 so nobody is tempted to try to revisit it.

7 PROFESSOR CARLSON: Thank you. So over on  
8 page six of that subcommittee recommendation, we are  
9 proposing adding comment 5 to Disciplinary Rule 3.06, and  
10 the first sentence is what I just read to you that we  
11 agreed 26-0. The second vote in December was a little bit  
12 closer, but 14 people out of -- against 11 felt that it  
13 was not proper for a lawyer to conduct passive review on a  
14 juror's ESM if the juror could become aware of the  
15 identity of the lawyer or someone acting for the lawyer.  
16 And so we see then under proposed comment 5, the second  
17 sentence, after it's okay to review a juror's ESM if you  
18 don't need to make an access request and they won't know  
19 who you are; however, review by a lawyer or someone acting  
20 for the lawyer of a prospective juror's or an actual  
21 juror's ESM is improper when the lawyer knew or should  
22 have known the prospective juror or juror could become  
23 aware of the identity of the viewer.

24 Professor Hoffman, I think you had raised an  
25 issue of putting in some type of scienter requirement

1 there, and that was what our subcommittee came up with.  
2 The bracketed language is probably pretty controversial,  
3 and we did discuss this at the December meeting, with  
4 several people thinking it was appropriate to include  
5 something like "counsel should use available technology to  
6 remain anonymous when viewing or causing another to view a  
7 prospective juror or juror's social media." The reason  
8 that may be controversial is, as we see in footnote 2,  
9 Texas has not voted one way or the other whether or not  
10 lawyers are required as part of our competency to have  
11 technical competency. As you see in footnote the ABA says  
12 we should, that lawyers should not only have competence in  
13 law and skills, but should also include competence in  
14 knowing the benefits and risks associated with relevant  
15 technology, and John, I just ask you to speak to this on  
16 what's happening on a national level.

17 MR. BROWNING: Sure. On a national level 31  
18 states have adopted the ABA's comment on Rule 1.1, and  
19 that's 31 states that have explicitly adopted it. There's  
20 several -- there are several other states that have  
21 implicitly adopted it in the context of more specific  
22 narrower areas such as e-discovery use, which was the  
23 subject of a California ethics opinion that basically said  
24 you're under a duty as an attorney with regard to this  
25 area to either learn it yourself, hire someone who knows

1 it, or don't take the engagement. That's not the --  
2 that's not quite the same as explicitly adopting or  
3 ratifying this change to 1.1 as 31 states have, but, you  
4 know, it is significant in that it moves in that  
5 direction, as have certain case law rulings from other --  
6 other states.

7           Just to update you on Texas, a number of  
8 organizations, including the State Bar computer and  
9 technology section, which I'm happy to serve as  
10 chair-elect, have passed resolutions that were adopted at  
11 the State Bar annual meeting and have been presented. I  
12 believe that Texas is very close to joining that group of  
13 31 and hopefully will be the 32nd state. And just to let  
14 you know within what sort of time frame all of this is  
15 taking place, the ABA amendment was adopted in late August  
16 of 2012, and it's within that time frame that the 31  
17 states that have acted since have joined that group.

18           PROFESSOR CARLSON: Thank you. Part of the  
19 reason that we also were a little bit concerned about  
20 including this in the comment is that it really would  
21 impose, I think, a new duty; and we weren't certain if  
22 that was something that really should go in a comment or  
23 if that needs to go to the bar in looking at the Texas  
24 Disciplinary Rules.

25           MS. NEWTON: If it's -- comments go to the

1 Court, but our informal practice is that we would probably  
2 refer it to the Committee on Disciplinary Rules and  
3 Referenda for their guidance, which is what we just did  
4 with the technology proposal. If it is an amendment to  
5 the rule itself, it should go directly to the committee.

6 PROFESSOR CARLSON: Okay. So would it be  
7 helpful for us to get the committee's sense on the  
8 bracketed language and the "however" language?

9 CHAIRMAN BABCOCK: I would think so.

10 PROFESSOR CARLSON: Okay. So you want to  
11 just finish and then go back for comments?

12 CHAIRMAN BABCOCK: Uh-huh, please.

13 PROFESSOR CARLSON: Okay. And so the third  
14 vote we took in December was 24 to 2 with 24 people  
15 believing it is improper for a lawyer to request access to  
16 a prospective juror or juror's electronic social media,  
17 and so you see the second paragraph to proposed comment 5  
18 on page six of the memo, "A lawyer or someone acting for  
19 the lawyer may not request access to the prospective juror  
20 or juror's ESM," parentheses, "for example, by making a  
21 friend request," parentheses, "or comment on the  
22 prospective juror or juror's electronic social media or  
23 otherwise communicate with a prospective juror or juror,"  
24 bracketed language, "during the course of the official  
25 proceeding through ESM."

1                   CHAIRMAN BABCOCK: Comments? Frank, I  
2 thought you had your hand up. Any other comments?

3                   MR. MUNZINGER: Is that language found in  
4 some other state's canon or rule? Do you know?

5                   PROFESSOR CARLSON: I'm trying to remember,  
6 to be honest. I think we kind of looked at what the ABA  
7 language was that we voted against.

8                   MR. MUNZINGER: My only reason for asking is  
9 does it preclude the party from doing it? It says for a  
10 lawyer -- "acting for the lawyer," a party would be acting  
11 for itself or himself or herself, with or without the  
12 lawyer's advice. I know this is a rule governing lawyers'  
13 conduct. At the same time the lawyer ought to be in a  
14 position to advise his client that he shouldn't be doing  
15 that. I raise that because I had a recent analogous  
16 experience. It wasn't internet is what I'm saying. It  
17 was not a friends or what have you, but the party was  
18 doing something clearly with the lawyer's knowledge, but  
19 it was the party doing it. I don't know if this is the  
20 proper place to have that prohibition or warning, or maybe  
21 it should be a lawyer should not participate in doing such  
22 a thing or whatever it might be --

23                   CHAIRMAN BABCOCK: John, what do you think?

24                   MR. MUNZINGER: -- or what have you, but the  
25 way it's drafted it pertains to the lawyer and doesn't

1 pertain to the party.

2           MR. BROWNING: There have been a couple of  
3 ethics bodies around the country that have addressed this.  
4 New York -- I forget if it was New York City or New York  
5 County addressed this in an ethics opinion that  
6 specifically said that this was very much a danger, and I  
7 believe subsequently the New York bar commercial  
8 litigation section adopted guidelines that addressed this  
9 more specifically. Anecdotally it's come up in several  
10 cases around the country, including one case, an appellate  
11 case in Florida, where a party -- no attorney involvement.  
12 A party had reached out to a juror, and that was brought  
13 to the court's attention, and there were some question  
14 about whether the lawyer would be sanctioned until it was  
15 revealed that the lawyer had no knowledge of that, and  
16 actually it was subsequently learned that the party or the  
17 spouse of the party involved actually happened to be  
18 Facebook friends with that juror. This was something that  
19 wasn't inquired about during voir dire. And I can tell  
20 you in other states there have been instances where  
21 there's been a social media connection or relationship  
22 between a party and someone who has come up on a jury  
23 panel, and if any kind of action or communication took  
24 place there was the distinction made between it being that  
25 of the party unbeknownst to the attorney and anything that

1 was done at the instigation of the attorney.

2           So I think it's useful to have this in there  
3 because of the fact that there have been instances, and  
4 there was one that came out and I think is making its way  
5 through the appellate pipeline right now out of a Dallas  
6 County trial where a member of one side's trial team sent  
7 a LinkedIn connection request to a juror. It was  
8 accepted, and the juror's testimony after it was learned  
9 and made the subject of post-trial motions was that, of  
10 course, he accepted it. He thought that this would offer  
11 a pretty good prospect for a business relationship, not  
12 realizing that this also was improper communication. So I  
13 think it is important to address this issue, because  
14 certainly we're seeing instances where this comes up.

15           CHAIRMAN BABCOCK: Right.

16           MR. MUNZINGER: If that's the case, the  
17 language "acting for the lawyer" seems to me unduly  
18 restrictive.

19           CHAIRMAN BABCOCK: Is that addressed to John  
20 or to me or to --

21           MR. MUNZINGER: I think you would agree with  
22 me that the language "acting for the lawyer" is more  
23 restrictive than it could be.

24           MR. BROWNING: Maybe Professor Carlson would  
25 want to --

1 MR. MUNZINGER: My point being it doesn't  
2 sweep broad enough.

3 PROFESSOR CARLSON: So you would like it to  
4 be something like "or with the knowledge of the lawyer."

5 MR. MUNZINGER: Something similar to that.

6 MR. BROWNING: "At the lawyer's direction."

7 MR. MUNZINGER: With him, at his consent,  
8 I'm not smart enough to come up with the language now. I  
9 know that she is if she gives it an hour's thought or  
10 less.

11 PROFESSOR CARLSON: I'm a little slow on the  
12 uptake.

13 MR. MUNZINGER: But my only point is the  
14 language in my opinion is not -- does not sweep broadly  
15 enough.

16 PROFESSOR CARLSON: Okay.

17 CHAIRMAN BABCOCK: Okay. Lisa, and then  
18 Justice Christopher.

19 MS. HOBBS: But, John, you're not  
20 saying that -- there's not been any other ethics opinion  
21 or other state who's put an affirmative duty on the lawyer  
22 to advise their clients before trial not to make contact  
23 with the jurors.

24 MR. BROWNING: No. No.

25 CHAIRMAN BABCOCK: Justice Christopher.

1 HONORABLE TRACY CHRISTOPHER: Well, while we  
2 were discussing this in the subcommittee I think Elaine  
3 mentioned this. Should we really have it as a comment to  
4 a disciplinary proceeding, or if we're really worried  
5 about the integrity of the jury, shouldn't we put it in  
6 our Rules of Procedure? Because, I mean, you know,  
7 there's a lot of kind of squishy case law about what  
8 judges can do in connection with disciplinary code  
9 violations versus Rules of Civil Procedure violations,  
10 and, you know, if we want it to have teeth, it ought to be  
11 in the Rule of Civil Procedure versus in the --

12 CHAIRMAN BABCOCK: DR's, yeah. Jim.

13 MR. PERDUE: So the -- the conversation  
14 about the last, which is friending somebody or LinkedIn  
15 forces you to kind of go back to the technological  
16 question of the middle ground, which is looking at  
17 somebody that you either knowingly know they can know  
18 you're looking at you or you don't knowingly know they're  
19 looking at you, and one thing that Judge Christopher's  
20 rule tried to do is to write it broadly enough to  
21 recognize that technology can be different tomorrow.

22 CHAIRMAN BABCOCK: Yeah.

23 MR. PERDUE: Facebook had 50 million people  
24 hacked apparently today. They could change -- they can  
25 change the requirement tomorrow so that every single

1 person that if you passively look -- LinkedIn is weird,  
2 right, because if you subscribe to LinkedIn Premium you  
3 get to see who's looking at you; but if you're not  
4 subscribed to LinkedIn Premium, you don't get to see. I  
5 have no idea if people on my jury are LinkedIn Premium or  
6 not, and so when I go and get -- try my best to see if  
7 anybody is on LinkedIn and see, not friending them, not  
8 asking to join their network, but seeing what their  
9 profile looks, I have no idea, and that -- that could be  
10 different tomorrow as well. And, you know, we still have  
11 a jury instruction that says don't look at somebody's  
12 MySpace page. I don't know anybody that has a MySpace  
13 page, but this -- this is close to being --

14 HONORABLE TRACY CHRISTOPHER: Some of us do.

15 MR. PERDUE: -- anachronistically absent,  
16 and the problem for the lawyers or people working for  
17 lawyers or jury consultants that do this is there's no way  
18 to know whether a juror knows you're looking at it or not.  
19 I don't know after -- and I can promise you the technology  
20 about what they -- what you think they do or don't know  
21 could be different tomorrow.

22 CHAIRMAN BABCOCK: Yeah.

23 MR. BROWNING: And I think that was part of  
24 the reasoning behind having the language about  
25 technological competence, because lawyers who are in the

1 know -- and, you know, I would never take a chance on even  
2 coming close to the line -- usually will adopt or seek  
3 out, you know, through a forensics vendor or someone else  
4 assistance with doing it such that there is an anonymous  
5 follow feature, which, for example, Twitter has. When I  
6 research the folks on my panel I don't leave it up to just  
7 the chance, because as you point out, someone else could  
8 have LinkedIn Premium, too, and they could get the same  
9 notice that I get that says, "Someone has been looking at  
10 your profile." So I go through a cyber forensics vendor  
11 that makes sure that this is being done with what's  
12 loosely called an anonymous follow feature.

13 MR. PERDUE: But that would be somebody  
14 acting on your behalf.

15 MR. BROWNING: Exactly. They're my agent,  
16 and I'm acting as what I consider to be a competent -- and  
17 competent in all sense, including technologically --  
18 attorney in availing myself of that service, but not all  
19 attorneys are going to either be aware of or know enough  
20 to be aware of.

21 CHAIRMAN BABCOCK: Yeah, haven't we talked  
22 before in this committee about some case in Missouri or  
23 something that says if you don't look --

24 MR. BROWNING: Yeah.

25 MR. PERDUE: You're incompetent.

1 CHAIRMAN BABCOCK: -- you're incompetent?

2 MR. BROWNING: Yeah. The McCullough case  
3 out of the Missouri Supreme Court, yeah; and, in fact,  
4 there are a number of cases which have said in the context  
5 of lawyers' technological competence, they've pointed to  
6 that very same thing. So West Virginia with the In Re:  
7 Sluss opinion have all acknowledged that, yeah, this is  
8 going on and it's commonplace and, by the way, maybe  
9 lawyers ought to think about doing it, you know; but we're  
10 not going to talk about this in this opinion. There's  
11 been a number of cases around the country that have  
12 addressed it like that, but Missouri has been the only one  
13 that has adopted an affirmative rule requiring lawyers to  
14 do that.

15 CHAIRMAN BABCOCK: Jim, I've told this to  
16 you before, but I had a judge once say "Don't be looking  
17 at 'My Face.'" Okay. Hayes.

18 MR. FULLER: So where do pre-existing  
19 contacts fit into this? I mean, 10 years ago or whatever  
20 it was I joined LinkedIn; and for 10 years now I get these  
21 invitations to connect and so forth like that; and you  
22 know, hey, some of them look like interesting -- these  
23 business contacts we've talked about, you know. You know,  
24 I have no idea whether -- you know, and some of those  
25 people could very well end up on a jury panel in which

1 I'm -- I don't know that they're a part of my network.

2 MR. BROWNING: Or someone in your network  
3 could have reached out to them.

4 MR. FULLER: Right. So that seems -- I  
5 mean, how does this fit into that? Because I'll tell you  
6 the last thing I think about is, you know, whether or not  
7 a juror is looking at me if they're on a panel and I'm  
8 over there -- and I'm certainly not looking at them  
9 necessarily.

10 MR. BROWNING: I've actually gotten a  
11 request to connect on LinkedIn from a juror, and I should  
12 just state the obvious. It was not accepted.

13 MR. FULLER: Right. Right.

14 MR. BROWNING: Moreover, I took steps with  
15 LinkedIn -- and you can do this -- to block or withdraw  
16 any type of, you know, connection from that person.

17 MR. FULLER: So supposing a prospective  
18 juror is actually looking at you -- I don't have premium,  
19 so I don't know who they are.

20 MR. BROWNING: They do. They look at  
21 lawyers' websites.

22 MR. FULLER: So is that a -- is that --  
23 would that be affected by any of these rules? I don't  
24 know they're looking at me. They're on my panel, and yet  
25 they're probably finding out information about me. Is

1 that an attempted communication that is violative of a  
2 rule or --

3 MR. BROWNING: If it's not something that's  
4 originated by the attorney I think you're fine.

5 MR. FULLER: Okay.

6 MR. BROWNING: And if it's something that  
7 originates with a member of the panel then I think there's  
8 only one way to appropriately handle it, and it's as I  
9 just described.

10 CHAIRMAN BABCOCK: Okay. Elaine, what else?  
11 Do you want to vote -- do you want votes on things?

12 PROFESSOR CARLSON: I'd like to start with  
13 the competence bracketed language.

14 CHAIRMAN BABCOCK: Okay.

15 PROFESSOR CARLSON: And I think we already  
16 -- you know, any input you want to give me on the language  
17 in (5) up to the bracket, let me know.

18 CHAIRMAN BABCOCK: All right.

19 PROFESSOR CARLSON: Because we've kind of  
20 voted on that before up to the "knew or should have  
21 known," we haven't voted on expressly or whether lawyers  
22 need to be technologically competent.

23 CHAIRMAN BABCOCK: So the bracketed language  
24 you're speaking about is "Counsel should use available  
25 technology to remain anonymous when viewing or causing

1 another to view a prospective juror or juror's social  
2 media."

3 PROFESSOR CARLSON: Yes.

4 CHAIRMAN BABCOCK: Okay. So how does  
5 everybody feel about that? Any comments? We can vote.

6 MR. PERDUE: I think in the great tradition  
7 of this committee I would like to revisit the sentence  
8 beforehand.

9 CHAIRMAN BABCOCK: Is that --

10 MR. PERDUE: The "knew or should have  
11 known."

12 CHAIRMAN BABCOCK: Okay.

13 MR. PERDUE: I'm joking.

14 CHAIRMAN BABCOCK: But you're so sincere.  
15 That's why you're successful with juries. You can peddle  
16 that stuff and everybody goes "Oh, Jim wants us to revisit  
17 that." All right. So back to the brackets. Yeah, Skip.

18 MR. WATSON: Just question, does the  
19 brackets necessarily include the footnote requiring me to  
20 be technologically competent? That's a big deal to me.

21 PROFESSOR CARLSON: No. I just wanted to  
22 show you that that is --

23 CHAIRMAN BABCOCK: That's coming.

24 MR. WATSON: I don't want the footnote.

25 MR. DAWSON: You now have Skip's vote.

1 CHAIRMAN BABCOCK: Yeah, footnote deleted.  
2 Yeah, Lisa.

3 MS. HOBBS: Hey, John, how much do you pay  
4 someone to do that for you for a jury?

5 MR. BROWNING: Well, they are -- it's sort  
6 of an unbundled service. I use one company out of  
7 California that markets a tool called X-1 Social Discovery  
8 that that way we've got someone who, unlike me doing it,  
9 can actually be called as a witness to talk about it.

10 CHAIRMAN BABCOCK: Objection, nonresponsive.  
11 We want to know money.

12 HONORABLE ANA ESTEVEZ: Sustained.

13 MR. BROWNING: But for this anonymous follow  
14 feature and all that we're talking about, it's a very  
15 minor add-on. It's, you know, less than -- I think I paid  
16 somewhere between 500 and a thousand.

17 MS. HOBBS: I mean, I like the idea of the  
18 concept of that, and I'm glad you're doing it, but even --  
19 you say nominal to you in your practice of 500 to a  
20 thousand dollars for a panel is actually -- can be a big  
21 deal in a little case and putting that duty on every  
22 lawyer in every type of case in every jurisdiction in  
23 Texas seems -- I'm just --

24 MR. BROWNING: I think it was less than a  
25 one to three-hour consultation with a lawyer who is going

1 to represent you in front of a -- in a grievance  
2 proceeding. I think it's money well-spent.

3 MS. HOBBS: Well, I do, and I might pay for  
4 it, but I'm just not sure everybody really can for every  
5 client.

6 MR. BROWNING: And I've recommended it to  
7 solo practitioners, small firms who have, you know, what  
8 they've told me, that they use that as well.

9 MS. HOBBS: Okay.

10 CHAIRMAN BABCOCK: Justice Busby.

11 HONORABLE BRETT BUSBY: I understand Lisa's  
12 comment that that may be more money to some lawyers than  
13 others, but you don't have to look for information on  
14 these jurors using social media, and so if you don't want  
15 to spend the money then the answer is -- or you don't have  
16 the money to spend then the answer is don't go looking --

17 MS. HOBBS: Well, Missouri says I may have  
18 to look.

19 HONORABLE BRETT BUSBY: -- when you knew or  
20 should have known that they may be able to figure out who  
21 you are.

22 CHAIRMAN BABCOCK: Roger.

23 MR. HUGHES: I guess I try to look at what  
24 the primary rule here, and what we're trying to prevent is  
25 contact either by the attorney directly or at the

1 attorney's instigation with the juror. We're not trying  
2 to promote technology, and, therefore, I think what is in  
3 the bracket, whether we adopt the proposed ABA rule or  
4 not, is -- it's not the true rule. The true rule is the  
5 preceding sentence, is that you shouldn't contact -- you  
6 shouldn't contact the juror or the juror's ESM in a way  
7 that the juror -- that you know the juror is going to find  
8 out or should know; and what the real difficult part there  
9 is the "should know"; and I'm afraid we are never, never,  
10 ever going to be able to encapsulate in one sentence or a  
11 couple of sentences what a lawyer ought to know about  
12 technology.

13           I'm afraid we're just going to have to rely  
14 on the circumstances at the time to determine what a  
15 lawyer should know, but I think what makes it palatable is  
16 if you're going to do this kind of research, you ought to  
17 know something about it, and I think whether we adopt  
18 the ABA model rule or not I think people are going to look  
19 at what the prevailing standards are about what lawyers  
20 ought to know or what's available to them, what they teach  
21 in paralegal. Then we won't need this thing about whether  
22 you should use some sort of a stealth technology or not.  
23 I mean, within a year or two technology may out strip us,  
24 and we have something other than that a stealth  
25 technology, and I might also say it's entirely possible

1 that within a year or two everybody will be off Facebook  
2 because nobody will trust it, but --

3 CHAIRMAN BABCOCK: Nina.

4 MS. CORTELL: Just to give a little bit of  
5 context to the case John was mentioning, because that was  
6 our case, the LinkedIn invitation to the juror was not  
7 intended to be sent. That was the testimony of our  
8 opponent's counsel. They say the computer froze and it  
9 sent on its own, so I'm -- I think we should try to at  
10 least put -- encourage people to try to take every step  
11 they can to make sure those types of communications do not  
12 occur or, as others have said, then just don't do it.

13 CHAIRMAN BABCOCK: Justice Christopher, and  
14 then Richard.

15 HONORABLE TRACY CHRISTOPHER: Well, I was  
16 one of the people that voted against the second sentence,  
17 so I think imposing an even greater requirement on the  
18 lawyers is unnecessary. I don't think the incidental note  
19 that, oh, you know, lawyer so-and-so looked at your  
20 Facebook page or -- you know, looked at your LinkedIn page  
21 is an improper communication with a juror, nor do I think  
22 it is a harassing or vexatious investigation, which is,  
23 you know, what the rule is talking about.

24 CHAIRMAN BABCOCK: Elaine.

25 PROFESSOR CARLSON: And, yes, you're right,

1 Justice Christopher. That was our original recommendation  
2 that was rejected in December; and, Roger, the ABA view is  
3 that a lawyer who uses technology, ESM, and the juror,  
4 prospective juror, learns of their identity is not  
5 communicating, that it's the LinkedIn people who are  
6 communicating. We rejected that view.

7 CHAIRMAN BABCOCK: Yeah.

8 MR. BROWNING: And that's actually the  
9 majority view of not just the ABA but the majority of  
10 ethics opinions other than New York that looked at it.

11 PROFESSOR CARLSON: That it's okay.

12 MR. BROWNING: Yeah, that it's okay.

13 MR. MUNZINGER: Is the object here to forbid  
14 the attorney from accessing the ESM if the juror can learn  
15 it was the attorney doing it?

16 PROFESSOR CARLSON: Yes.

17 MR. MUNZINGER: It doesn't say that in stern  
18 enough language. All it says is "knew or should have  
19 known" and then the next sentence in brackets seems to say  
20 go out and check out the available technology as opposed  
21 to saying the anonymity of the inquiring lawyer must be  
22 maintained or may not -- if the object is to forbid  
23 someone from having the prospective or actual juror know  
24 that you've communicated with their site, if that's the  
25 object, I think we ought to say it point-blank. Don't.

1 And then the guy who doesn't want to spend the 500 or a  
2 thousand dollars, doesn't or takes the -- runs the risk of  
3 whatever sanction may take place or new trial perhaps or  
4 bar punitive sanction or something like that for his  
5 having violated the rule.

6                   If you're saying don't communicate with  
7 these people, I think you ought to say don't communicate  
8 with them, and if you don't know whether you're  
9 communicating with them or they can find you out, that's  
10 their problem. This is law, this is ethics. Don't do it.

11                   CHAIRMAN BABCOCK: Jim, did you have your  
12 hand up?

13                   MR. PERDUE: I did.

14                   CHAIRMAN BABCOCK: Well, you can put it down  
15 and talk.

16                   MR. PERDUE: So to second Mr. Browning's  
17 point, the ABA rule is that this second sentence reads "is  
18 not improper" and so -- and that is the majority rule  
19 across the country, so while Professor Carlson keeps  
20 saying "we," my recollection is it was pretty narrow; and  
21 we do like to be contrarians in this committee but realize  
22 that that current version is a split from the ABA and a  
23 split from the majority rule; and now we have all of this  
24 conversation about, you know, how to either narrow it or  
25 broaden it; but you're not -- so, Mr. Munzinger, you're

1 not talking about communication I think in the way you're  
2 phrasing it, because the last section, which again, is a  
3 reflection of the ABA rule and the majority rule is I  
4 can't proactively ask you to give me access to what you  
5 have out there on the internet.

6           The first sentence very clearly says if  
7 you're out there on the internet I can passively look at  
8 that; and the second sentence, which is now where we are  
9 splitting, is I can look at that if I don't know that you  
10 can know I've looked at it. That's -- I mean, right?

11           PROFESSOR CARLSON: Yeah.

12           MR. PERDUE: And the majority rule is I can  
13 look at it even if you know that I've looked at it; and to  
14 Judge Christopher's point, why is that a vexatious  
15 investigation, much less it's not a communication  
16 whatsoever, why is that a vexatious investigation of a  
17 venireperson when all me or someone on my behalf is doing  
18 is I would like to see if they have postings that express  
19 something relevant to the case at hand. And that's -- and  
20 that's the -- I think the -- this whole conversation that  
21 is very much focused on what, frankly, was I recall a  
22 pretty close vote on the split with the majority rule is  
23 because the majority rule, from my perspective, at least  
24 makes sense. It is not a vexatious investigation, and  
25 there is no communication. Proactive communication

1 through social media with a prospective juror is  
2 absolutely forbidden, should remain forbidden, and I think  
3 is very clearly captured. So that would be the only --

4 MR. MUNZINGER: Thank you very much. That  
5 was very informative.

6 MR. PERDUE: I don't know if it was, but  
7 that was my position.

8 MR. MUNZINGER: It was, and I agree with  
9 your point of view. It's analogous to the rights in the  
10 media. A newspaper reporter is free to look through an  
11 open window. He's not free to climb a tree to look  
12 through an open window, and so if your website is an open  
13 window, what the hell, why can't I look at it?

14 CHAIRMAN BABCOCK: Is the tree on public  
15 property?

16 HONORABLE ANA ESTEVEZ: Yeah, it depends  
17 where the tree is.

18 CHAIRMAN BABCOCK: Elaine.

19 PROFESSOR CARLSON: That was the unanimous  
20 recommendation.

21 MR. PERDUE: That's pitiful. I do not  
22 remember that, but I wasn't here.

23 PROFESSOR CARLSON: No, of the subcommittee,  
24 was to adopt the ABA approach, that it's okay; and the  
25 vote was, you're right, close, 14 to 11 not to adopt

1 the ABA subcommittee recommendation.

2           CHAIRMAN BABCOCK: Okay. So the -- yeah,  
3 Alistair.

4           MR. DAWSON: So I would respectfully  
5 disagree with my friend Mr. Perdue because I think that if  
6 you do a LinkedIn request -- and this came up in a trial  
7 where one of my co-counsel did a LinkedIn request or  
8 looked on LinkedIn at a juror's LinkedIn page, and the  
9 juror was notified about it. I think that is a  
10 communication with a juror. I mean, that's communication  
11 that the lawyer has looked at your page. There may be no  
12 substance in the communication, but it is a communication,  
13 and, you know, you never know how the juror is going to  
14 react to that. They could react favorably to it or  
15 unfavorably to it, but we don't want communications with  
16 jurors, so we should prohibit that kind of communications,  
17 and since the technology exists to do it anonymously we  
18 should, you know, say if you want to do this, if you want  
19 to look at LinkedIn there's technology that allows you to  
20 do it anonymously. That's what you should do so that  
21 there is no communication -- the juror doesn't know that  
22 the lawyer has looked at his or her page.

23           MR. PERDUE: But they know somebody -- I  
24 need the business card of that vendor, by the way.

25           MR. BROWNING: Yeah.

1 MR. PERDUE: But they knew somebody -- they  
2 know somebody is looking.

3 MR. DAWSON: Yeah, but they weren't  
4 associated with the -- I mean, with the lawyer or anyone  
5 in the courtroom.

6 MR. BROWNING: The language, the  
7 distinguishing language for the ABA and the majority of  
8 ethics bodies that looked at this and said that auto  
9 notification is not a communication hinged on the fact  
10 that it's not coming from the lawyer. It's coming from  
11 the platform itself in the form of an auto notification  
12 that has nothing to do with the, you know, lawyer or  
13 anyone on the lawyer's staff; and so it would not be  
14 considered -- I mean, it was also debatable whether or not  
15 a notification would be considered a communication, but in  
16 any event it's not something being generated by the  
17 attorney, and that's kind of been the view of the ABA and  
18 the majority of the ethics cases.

19 CHAIRMAN BABCOCK: Lamont.

20 MR. JEFFERSON: So we tried a case a few  
21 years ago in Houston where our side got in trouble because  
22 someone on our team went down to the central jury room and  
23 was investigating jurors without anybody's knowledge and  
24 that came to the attention of the trial judge and --

25 CHAIRMAN BABCOCK: Investigating how?

1 MR. JEFFERSON: Just observing, just  
2 observing.

3 CHAIRMAN BABCOCK: Just went down to the  
4 central jury room and looking?

5 MR. JEFFERSON: Then this whole idea of if  
6 it's available you might even have a duty to investigate  
7 potential jurors is troubling to me, and I could see a  
8 trial judge getting upset because a trial lawyer --  
9 someone on the trial lawyer's team is following jurors  
10 around or is doing something, even if it's publicly  
11 available, you can do it; but is that something that we  
12 really want to encourage is the total -- is the  
13 investigation by an advocate of, you know, anything that  
14 you can learn about. You know, and I don't know where  
15 to -- I don't know where you draw the line there; but  
16 I'm -- I think it -- number one, I think it's definitely a  
17 communication if a juror knows you're doing it; and that's  
18 something we do want to, I would think, discourage; but  
19 secondly, I think we need to think about how far can you  
20 take this. Because now when things are so automated and  
21 there's so much on the internet you have an ability to do  
22 a whole lot of investigating of jurors and potential  
23 jurors, and I mean, you know, how much do we want to  
24 really encourage that.

25 CHAIRMAN BABCOCK: Lamont, I don't know if

1 you remember, but, I don't know, probably several years  
2 ago now, but we talked about the jury shuffle; and I  
3 remember Judge, at the time, Benton was very much against  
4 it because he said lawyers were going down to the central  
5 jury room and looking at the big group of people that were  
6 going to be walking upstairs in a few hours to his  
7 courtroom and then they were shuffling, and the only thing  
8 they could have seen was the racial composition of the  
9 people front and back, and so they asked for a shuffle.

10 PROFESSOR CARLSON: Or gender.

11 CHAIRMAN BABCOCK: But the point is to yours  
12 I thought it was fairly common to go down and look at the  
13 panel.

14 MR. JEFFERSON: Well, in our case there was  
15 a consultant involved, and I don't really -- I disagreed  
16 with the fact that we got in trouble for it, and I'm not  
17 really even sure why, although there was a lot of history,  
18 as there usually is, but I'm just concerned about the  
19 ability to check so easily and deeply into, you know, the  
20 backgrounds of jurors.

21 CHAIRMAN BABCOCK: Sure.

22 MR. JEFFERSON: Even with or without their  
23 knowledge, especially --

24 CHAIRMAN BABCOCK: Can we vote on these  
25 brackets or, Roger, you want to talk first?

1 MR. HUGHES: Well, there's another thing  
2 here, which I personally cannot evaluate, and that's the  
3 public perception of being investigated by a lawyer just  
4 because you're a prospective juror. I mean, we've all  
5 learned about the CSI effect that everybody believes that  
6 there's some sort of criminal lab that can come up with  
7 all sort of technical evidence and all of that. Well, now  
8 we have a prominent TV show in which their jury consultant  
9 does extensive background research on people, which some  
10 people if they knew about it might consider intrusive, and  
11 I am a little worried about the public perception that  
12 when you get that little LinkedIn thing or the Facebook  
13 thing that says, "Lawyer Schmedlap that's going to be voir  
14 diring you tomorrow just looked at your page," people may  
15 get -- start going, "Well, what else is lawyer Schmedlap  
16 looking at? Is he getting my finances? Are my phones  
17 being tapped?" I mean, this is not something I do, and  
18 I'm not deeply involved in it.

19 CHAIRMAN BABCOCK: Yeah, you get Schmedlap  
20 to do it.

21 MR. HUGHES: Yeah. But the point of it is I  
22 don't know how the average person who is going to come and  
23 sit on our jury, the average Texan, is going to feel when  
24 they suddenly get that thing. They may not be bothered at  
25 all, but there may be a substantial number of -- probably

1 it's like this is just the tip of the iceberg. They just  
2 finally poked their nose up; and they -- who knows what  
3 else they've been looking at; and I can see jurors in the  
4 jury box going, you know, "Lawyer, I find out you just  
5 looked at my Facebook page. What else have you been  
6 looking at? Your Honor, I want you to tell him what else  
7 has he been looking at?" I can see the dialogue starting,  
8 but again, I'm not in a position to evaluate that because  
9 I don't use social media much. I don't know if ordinary  
10 people find it offensive or what they're going to think.

11 CHAIRMAN BABCOCK: Yeah. What about these  
12 brackets? The language is counsel should not -- "counsel  
13 should use available technology to remain anonymous when  
14 viewing or causing another to view a prospective juror or  
15 juror's social media." How many people think that's a  
16 good idea, raise your hand?

17 How many people think that's a bad idea?

18 MR. DAWSON: Jim, you're wrong.

19 MR. PERDUE: I know, but I'll come -- I'll  
20 bring you around eventually, Alistair.

21 CHAIRMAN BABCOCK: All right. There was 6  
22 in favor and 19 against. So --

23 HONORABLE STEPHEN YELENOSKY: Another close  
24 vote.

25 CHAIRMAN BABCOCK: Yeah, so squeeze those

1 brackets right on out of there.

2 PROFESSOR CARLSON: They're gone.

3 CHAIRMAN BABCOCK: What other vote do you  
4 want to take before our break?

5 PROFESSOR CARLSON: We didn't expressly vote  
6 on the "knew or should have known" last time.

7 CHAIRMAN BABCOCK: Okay. So we should do  
8 that.

9 PROFESSOR CARLSON: Yes. So page six, (5),  
10 the second sentence, "However, review by a lawyer or  
11 someone acting for the lawyer of a prospective juror or  
12 juror ESM is improper" -- we agreed on that in our vote  
13 last time. Here's the new part: "When the lawyer knew or  
14 should have known the prospective juror or juror could  
15 become aware." We didn't do "knew or should have known."

16 CHAIRMAN BABCOCK: Okay. Who's in favor of  
17 that?

18 MS. HOBBS: Can I have a point of  
19 clarification?

20 CHAIRMAN BABCOCK: Sure. Before we vote,  
21 point of clarification.

22 MS. HOBBS: Sorry. Okay. I think what you  
23 want us to do is take a vote on if we're going to have  
24 some kind of mental standard in this does "should or  
25 should have known" do the trick as opposed to revisiting

1 what some of us in this room might want to do, which is do  
2 we want this at all. So I guess I want the record to be  
3 clear that if I voted for the "should or should have  
4 known" as a fine standard based on our votes at the last  
5 meeting that even include this in there, I am not changing  
6 my being part of the 11 who thought this was a bad idea to  
7 begin with.

8 CHAIRMAN BABCOCK: Okay. All right.

9 MR. PERDUE: And I would say that a vote  
10 against can also reflect "or should have known" because I  
11 think if you -- if you're going to have this and you  
12 absolutely know that they're gonna know, that's one thing;  
13 but, you know, this lower standard, there's a whole lot  
14 of -- you know, there's just dangers in this.

15 CHAIRMAN BABCOCK: I'm hoping we can make  
16 this vote so that Jackie and Martha can't figure it out  
17 possibly, and they can do whatever they want to.

18 MR. PERDUE: Sometimes you win when you  
19 muddle the record so bad.

20 CHAIRMAN BABCOCK: Richard.

21 MR. ORSINGER: So the way I look at this,  
22 and this will influence my vote depending on how you  
23 phrase it, if the standard is "knew" you have to -- in  
24 order to sanction someone you have to prove their  
25 subjective thinking, what they knew, what was in their

1 mind at the time, which we know is very difficult when  
2 you're trying to put a lawyer on the witness stand and  
3 have them admit that they knew they were doing wrong. The  
4 other standard is, well, even if we can't prove that you  
5 knew it, you should have known it, because some  
6 reasonableness standard, some objective standard of what  
7 we all can agree you should have done, you didn't do it,  
8 so you were negligent. It's not a negligence standard,  
9 but it's like negligence rather than intent.

10           So in my view what we're doing is we are  
11 setting up two standards here, is that you can't do it  
12 knowingly and you also can't do it negligently. And they  
13 are different, and the proof of them is different, and  
14 knowing is a lot harder to prove, but it's a lot wronger.  
15 You're much worse if you do it knowingly than if you don't  
16 know it but you're just out of touch; and one of the  
17 things that concerns me is that I was in the front end of  
18 the computer revolution in 1968. I studied computer  
19 programming and --

20           CHAIRMAN BABCOCK: You big bragger.

21           MR. ORSINGER: -- I was right on the front  
22 edge. I am so far behind --

23           PROFESSOR HOFFMAN: He actually invented the  
24 internet.

25           MR. ORSINGER: I learned computer

1 programming in 1968; but, you know, I can't do hardly any  
2 of the stuff you're talking about today; and so not that  
3 I'm going to try to do this; but if I went out and thought  
4 I was safely checking to see if someone was a member or  
5 something like that, and then all of the sudden I should  
6 have known, because everybody that -- everybody is on  
7 Facebook, except for me.

8                   CHAIRMAN BABCOCK: The millennial knew. How  
9 come you didn't?

10                   MR. ORSINGER: Yeah. So I'm a little  
11 worried about the "should have known" standard because  
12 that invokes this whole thing about what are we expecting  
13 lawyers to know and how much do they have to keep up, and  
14 if it's a brand new service that they've just been on, to  
15 me the "should have known" is a real problem.

16                   CHAIRMAN BABCOCK: You've got to spend 500  
17 bucks with Lisa there for your little --

18                   MR. ORSINGER: All right. I'll be happy to  
19 spend \$500 on Lisa.

20                   CHAIRMAN BABCOCK: Not on Lisa, with Lisa.

21                   MR. ORSINGER: With Lisa. Dinner. For  
22 Lisa.

23                   HONORABLE BRETT BUSBY: Are we taking a vote  
24 on whether or not the standard should just be "knew" or  
25 whether it should also include "should have known," or are

1 we taking a vote on whether the sentence should end with  
2 "improper" or include the "where the lawyer knew or should  
3 have known," some standard? I don't understand what we're  
4 being asked to vote on.

5 CHAIRMAN BABCOCK: Well, my sense, my  
6 confused sense of Elaine's proposal was that we're  
7 voting -- we put a period after "improper," unless we vote  
8 in favor of this other language, but -- but I probably  
9 didn't get it right either.

10 MR. WATSON: Can we vote on the period after  
11 "improper" first?

12 CHAIRMAN BABCOCK: We can do whatever we  
13 want. But Alistair is itching to say something.  
14 Alistair.

15 MR. DAWSON: So in response to the comments  
16 about not including "should have known," and in my case  
17 where the other co-counsel or co-defense counsel did the  
18 LinkedIn request and the juror found out about it, then  
19 the lawyer got chastised a little bit by the judge; and he  
20 said, "Well, I didn't know that you could do that in  
21 LinkedIn." Well, you know, most people know that, and the  
22 judge said, "Well, if you didn't know, you shouldn't have  
23 used it." You know, if you don't know how it works, you  
24 shouldn't use it, which I think is appropriate. So I  
25 think it's important to include that so that you can't

1 have a lawyer claim ignorance as a defense, and if you  
2 don't know whether it's going to notify the juror or not  
3 then you shouldn't use that form of technology or do it  
4 anonymously.

5 CHAIRMAN BABCOCK: Good point. Elaine.

6 PROFESSOR CARLSON: So put a bracket around  
7 "the lawyer knew or should have known."

8 CHAIRMAN BABCOCK: Okay.

9 PROFESSOR CARLSON: Do you like the sentence  
10 with that or without it?

11 HONORABLE BRETT BUSBY: Thank you.

12 CHAIRMAN BABCOCK: Everybody in favor of the  
13 sentence?

14 HONORABLE DAVID PEEPLES: Can we look at  
15 that just a minute?

16 CHAIRMAN BABCOCK: Justice Christopher.

17 HONORABLE TRACY CHRISTOPHER: I just want to  
18 point out that we're talking about review by a lawyer or  
19 somebody acting by the lawyer, so I mean, to me that's  
20 even making it even more difficult to have this "should  
21 have known" standard in there.

22 PROFESSOR CARLSON: It was not my idea.  
23 That came up at the last meeting.

24 CHAIRMAN BABCOCK: Elaine is trying to bail  
25 on you now.

1 MR. ORSINGER: Yeah, fleeing a sinking ship.

2 PROFESSOR HOFFMAN: So my comment from last  
3 time that I don't fully remember, but my comment was that  
4 I didn't like the notion that there was going to be a  
5 penalty -- so, again, to Alistair's pointed story, if the  
6 lawyer doesn't do a sort of minimum due diligence before,  
7 you know, thinking about it, they just go in and do it,  
8 then, yeah, there probably should be a penalty; but it's  
9 linked to do we think that the lawyer thought about it in  
10 the right way and was careful. If you end with  
11 "improper," review of a lawyer acting is improper, period,  
12 then you're just simply barring the practice entirely.  
13 You can't do it.

14 PROFESSOR CARLSON: No, I'm not doing that.  
15 I'm bracketing that language "where the prospective juror  
16 or juror could have become aware of through a website or  
17 ESM feature of the identity" --

18 PROFESSOR HOFFMAN: So there the change is  
19 simply on the question of whether we're going to focus on  
20 what the lawyer knew or should have known versus on what  
21 sort of the standard is as to the juror.

22 CHAIRMAN BABCOCK: Yeah.

23 PROFESSOR HOFFMAN: And maybe those aren't  
24 all that different, I don't know.

25 CHAIRMAN BABCOCK: Judge Yelenosky.

1 HONORABLE DAVID PEEPLES: Elaine, does that  
2 make --

3 HONORABLE STEPHEN YELENOSKY: What about  
4 focusing on --

5 THE REPORTER: Wait a minute, wait a minute.

6 HONORABLE DAVID PEEPLES: What's the  
7 culpable mental state here if we take that out? There is  
8 none?

9 PROFESSOR CARLSON: We don't have a culpable  
10 statement.

11 HONORABLE DAVID PEEPLES: Huh?

12 PROFESSOR CARLSON: We wouldn't have one.

13 HONORABLE DAVID PEEPLES: So it's strict  
14 liability.

15 PROFESSOR CARLSON: Yeah, if the prospective  
16 juror becomes aware or could become aware.

17 HONORABLE DAVID PEEPLES: It's more  
18 stringent than "should have known".

19 MR. ORSINGER: Clearly.

20 CHAIRMAN BABCOCK: Judge Yelenosky.

21 HONORABLE STEPHEN YELENOSKY: Why not just  
22 focus on something that doesn't go to intent that just  
23 says -- and it requires them then to do their due  
24 diligence, failed to use -- or I'm not sure if it's  
25 positive or negative, but failed to use technology that

1 was available, and you have to use the technology, and  
2 your only defense was it wasn't available.

3 MR. DAWSON: We already voted against that.

4 HONORABLE STEPHEN YELENOSKY: Did we?

5 HONORABLE BRETT BUSBY: I voted for it,  
6 but --

7 MR. DAWSON: Jim Perdue voted against it.

8 HONORABLE STEPHEN YELENOSKY: Well, in the  
9 Perdue view of things, motion for rehearing.

10 CHAIRMAN BABCOCK: Story of his life.

11 MR. PERDUE: But I -- I think that the vote  
12 you're asking for, if I could frame it, would be those in  
13 favor of where the lawyer knew, or alternative, those in  
14 favor of the lawyer knew or should have known. That --  
15 that -- with where you are right now and assuming 14-11  
16 still rules the day, despite many of us in the room  
17 thinking it should be revisited, Mr. Dawson, you know, I  
18 think that at least is a vote that gives some guidance to  
19 the committee.

20 CHAIRMAN BABCOCK: Yeah, that makes some  
21 sense. What do you think, Elaine?

22 PROFESSOR CARLSON: That will work.

23 CHAIRMAN BABCOCK: All right. Lamont.

24 MR. JEFFERSON: I thought Elaine's  
25 suggestion was an elegant one to just get rid of the "knew

1 or should have known" language and just say you can't do  
2 it under circumstances where the juror knows. You take  
3 the risk that if the juror knows.

4 CHAIRMAN BABCOCK: Yeah.

5 HONORABLE STEPHEN YELENOSKY: That's what I  
6 just said.

7 CHAIRMAN BABCOCK: But that's so-called  
8 strict liability, I think.

9 MR. JEFFERSON: I don't think it's strict  
10 liability.

11 HONORABLE TRACY CHRISTOPHER: Yeah, that's  
12 even worse.

13 MR. PERDUE: That scares me.

14 MR. JEFFERSON: You don't do it unless  
15 you're sure that the juror is not going to know.

16 MR. WATSON: Thus you're not going to do it.

17 MR. JEFFERSON: Well, no, I don't think  
18 that's the case. I think those who are inclined to do it  
19 will do it, understanding that they can manage this risk  
20 by using whatever the technology is out there to know that  
21 the juror isn't going to become aware.

22 CHAIRMAN BABCOCK: Justice Busby.

23 HONORABLE BRETT BUSBY: I think it's a good  
24 point, and perhaps there could be a couple of different  
25 votes. One would be should we have the bracketed language

1 at all, "knew or should have known," and then if the  
2 majority says that we should, should the standard be  
3 "knew" or should it be "knew or should have known." In  
4 response to Jim, I will incorporate by reference the good  
5 points from the December meeting in favor of having this  
6 standard that led to the 14 to 11 vote rather than  
7 repeating them here.

8 CHAIRMAN BABCOCK: Justice Christopher.

9 HONORABLE TRACY CHRISTOPHER: Well, there  
10 are apparently services that you can hire to go do this  
11 kind of search for -- on your prospective jurors, you  
12 know. They just get the list immediately and go do it for  
13 you and get results back in an hour, so in time for you to  
14 make strikes. So where do they fall in this? You know,  
15 in terms of --

16 CHAIRMAN BABCOCK: Well, they would be the  
17 lawyer's agent.

18 MR. BROWNING: Yeah, they would be an agent  
19 of the attorney.

20 PROFESSOR CARLSON: That's why you hire  
21 these other people.

22 MR. BROWNING: Yeah.

23 MR. RODRIGUEZ: Can I be in her court, to  
24 give me an hour to pick a jury?

25 MR. BROWNING: Well, and there's another

1 reason for a third party --

2 HONORABLE TRACY CHRISTOPHER: That's on  
3 strikes.

4 MR. BROWNING: You know, they're acting at  
5 the lawyer's behest, but obviously if I were to do  
6 something myself, you know, I can't be both the lawyer and  
7 testifying about it. So if something is found I have to  
8 have someone who is going to be available to testify about  
9 the content of what was found if there's, you know,  
10 something that warrants bringing it to, you know, the  
11 court's attention.

12 CHAIRMAN BABCOCK: Professor Hoffman.

13 PROFESSOR HOFFMAN: What if we change the  
14 language as follows: "Review is only proper if you take  
15 reasonable precautions to ensure that the juror does not  
16 become aware." So, in other words, let's take the focus  
17 away from the "knew or should have known," and let's put  
18 it where it sounds like most of us are landing, which is  
19 you ought to do your best at reasonable efforts to make  
20 sure that your attempt to access their thing is not -- it  
21 doesn't violate the requirement that -- you know, that  
22 they know you're looking, and so what if that's the focus?

23 CHAIRMAN BABCOCK: Richard, sorry.

24 MR. ORSINGER: I think that what Lonny  
25 suggested is an improvement, but it doesn't change the

1 fact that what we're doing, as I see it, we're deciding  
2 three things, either mental state is irrelevant, strict  
3 liability; or we have to prove the conscious awareness of  
4 the lawyer, which is a subjective standard; or we have to  
5 prove a reasonableness, which is an objective standard. I  
6 think those are the three choices, either mental state is  
7 irrelevant, strict liability, you do it and you're  
8 punished; or you are only punished if you do it knowing  
9 that you were doing it; or you're punished if you knew and  
10 you were careless about it or negligent about it. Those  
11 are the choices we're talking about.

12 CHAIRMAN BABCOCK: Okay. Hayes.

13 MR. FULLER: I would like to have included  
14 in any vote ultimately along the lines of what Lonny is  
15 suggesting because it is dawning on me there are these  
16 services. These services purport to be able to do this  
17 anonymously, which would allow me to be in compliance with  
18 the rule. I hire that service, and lo and behold they  
19 didn't tell me the truth. Should I be punished for that  
20 when in good faith I relied upon their professional  
21 expertise to keep me in compliance?

22 HONORABLE BOB PEMBERTON: It has the benefit  
23 of building in a safe harbor.

24 MR. FULLER: Yeah.

25 MR. JEFFERSON: I think one thing that's

1 concerning me is this idea of jurors being snooped on, and  
2 I know that's what we do, right? We've got to figure out  
3 what they're like -- how they're likely to decide a case,  
4 but it might help soften the blow if we know that they  
5 know where the limits are. So and that's not to address  
6 it here, but I mean, if jurors are warned that, you know,  
7 any public information that you have is fair game for  
8 investigation, and we are deciding whether you're going to  
9 be a juror on our case.

10 CHAIRMAN BABCOCK: Okay. We're going to try  
11 a vote here. The bracketed language is "The lawyer knew  
12 or should have known." That's the bracketed language. So  
13 how many people want strict liability, which means we  
14 ditch the bracketed language? Raise your hand.

15 How many against that? Three in favor, 26  
16 against. All right. Now, how many people want solely the  
17 subjective standard; that is, lawyer knew? Raise your  
18 hand.

19 And how many people against that? 11 in  
20 favor, 16 against. How many want the subjective and the  
21 objective, "knew or should have known"?

22 How many people against that? 15 in favor,  
23 10 against. We're on a break.

24 (Recess from 3:45 p.m. to 4:03 p.m.)

25 CHAIRMAN BABCOCK: All right. We are at

1 item six on the agenda, protective order kit, protective  
2 order form, re: respondent's access to firearms, and the  
3 chair of our subcommittee is Jim Perdue, and he will take  
4 us through this I hope. Oh, no, no. Wait a minute.  
5 Before we start that Elaine has got language that she  
6 wants voted on over the last item, inspired by Professor  
7 Hoffman, seconded by Judge Peeples, and I'm sure will be  
8 adopted by acclamation, but read the language, Elaine, in  
9 a loud voice and then no discussion, but we'll vote up or  
10 down.

11 MR. ORSINGER: So a Senator Grassley.

12 CHAIRMAN BABCOCK: I mean that in the  
13 fairest possible way.

14 PROFESSOR CARLSON: So back on comment (5),  
15 the second sentence, "however," would be modified as  
16 follows. "However, review by a lawyer or someone acting  
17 for the lawyer of a prospective juror or a juror's  
18 electronic social media is proper so long as reasonable  
19 precautions are taken to ensure" -- strike "improper where  
20 the lawyer knew or should have known."

21 So let me go back over that. "Review by a  
22 lawyer or someone acting for the lawyer of a prospective  
23 juror's or a juror's ESM is proper so long as reasonable  
24 precautions are taken to ensure" -- now striking the part  
25 I just said, "the prospective juror or juror would not

1 become aware through a website or ESM feature of the  
2 identity of the viewer."

3 CHAIRMAN BABCOCK: The only person who gets  
4 to make a comment is Justice Boyd. Do you have a comment?

5 HONORABLE JEFF BOYD: I have actually a  
6 question, and that is -- and I understand completely the  
7 proposal, but how is it not inconsistent with the first  
8 sentence? What is the relationship with that and the  
9 first sentence that says it's not improper, however, it is  
10 proper?

11 PROFESSOR CARLSON: Well, you're right. The  
12 "however" is now kind of confusing. Just take out the  
13 "however." "Review by a lawyer" --

14 HONORABLE JEFF BOYD: Well, it just seems to  
15 me that first sentence says it's all okay and then you  
16 say, however, it is okay if you do A and B.

17 PROFESSOR HOFFMAN: In some ways the  
18 solution might be to simply say it's not improper provided  
19 that reasonable precautions are taken. So, in other  
20 words, that you take the what now are two sentences --

21 HONORABLE JEFF BOYD: You just put a comma  
22 after the word "juror" and then add what you're providing.

23 PROFESSOR HOFFMAN: Provided that --

24 PROFESSOR CARLSON: That would work, too.

25 MR. PERDUE: Wait, wait. The first sentence

1 is the ABA's general rule regarding looking at something  
2 that's publicly available. The second sentence is looking  
3 at something that is social media that require -- that  
4 would allow a jury to know you're looking at it, so the --  
5 there -- this is -- in the conversations at the break,  
6 this is really LinkedIn, kind of Twitter subscriptions  
7 where there's an electronic social media presence where  
8 you know that your access of it pings the person that  
9 you're looking at; whereas a publicly available profile on  
10 Facebook is just available. You just see it. So the  
11 distinction --

12 HONORABLE JEFF BOYD: So and that's just  
13 because you know that when you look at somebody's publicly  
14 available profile they're not going to know that you're  
15 looking, so you have taken the reasonable precaution to  
16 make sure that they don't know that you looked.

17 PROFESSOR HOFFMAN: I agree with that.

18 HONORABLE JEFF BOYD: So you're just -- it's  
19 just all -- we're saying the same thing, I think. It just  
20 seemed to me to be -- to leave them in as two sentences  
21 created a conflict.

22 PROFESSOR CARLSON: Let me take this back.  
23 I don't want to take any more of the committee's time, and  
24 I'll read the transcript and come back with something  
25 That --

1 CHAIRMAN BABCOCK: Yeah, and come back to  
2 Jackie and Martha.

3 PROFESSOR CARLSON: Yeah.

4 CHAIRMAN BABCOCK: Good. All right. All  
5 right, Jim, now you get to talk about guns.

6 HONORABLE JEFF BOYD: We had acclimation on  
7 that?

8 CHAIRMAN BABCOCK: Yeah. Everybody is in  
9 favor of that, aren't you, everybody?

10 MR. PERDUE: Well, I'll just begin by saying  
11 that if y'all enjoyed the discussion regarding termination  
12 of parental rights you're going to love this topic. This  
13 is a referral to our particular subcommittee regarding  
14 what are generically known as red flag laws and a specific  
15 protective order relating to an individual's access to  
16 firearms. This is not in my bailiwick, and I was blessed  
17 to hand it over to Justice Jane Bland, who took the  
18 laboring oar with some resources. We have a couple of  
19 resource witnesses here as well as we get into the  
20 conversation, and I think that they can add to it later  
21 for everybody that's here, but I'm going to let Justice  
22 Bland give you the summary of the memo to the committee.

23 HONORABLE JANE BLAND: All right. Well,  
24 Governor Abbott in May issued a school and firearm safety  
25 action plan, and one of -- one of the recommendations in

1 that plan was legislative consideration of a red flag law  
2 that would allow a family member or law enforcement to  
3 petition the court to seek removal of firearms from a  
4 person that was -- you know, was at an extreme risk to  
5 himself, extreme risk of injuries to himself or others;  
6 and I think in connection with that the Texas Supreme  
7 Court, via Justice Hecht's referral letter, has referred  
8 to our SCAC committee a request to draft forms which could  
9 be included in a protective order kit that would advise a  
10 judge about a respondent's access to firearms.

11           So at this point we don't have any  
12 legislation that would enable that sort of protective  
13 order in that way, but because it may be coming down the  
14 pike and because the Texas Supreme Court has asked us to  
15 look at it and draft forms, we thought it would be  
16 beneficial to give this committee an overview on where we  
17 are and what -- what exists under Texas law now, and then  
18 we're fortunate to have David Slayton here from the Office  
19 of Court Administration, and he has done some significant  
20 work on this issue along with Chief Justice Hecht through  
21 the National Center of State Courts, and he's going to  
22 supplement the information in your memo and could probably  
23 briefly let us know what other states are doing in  
24 connection with red flag protection laws. They're called  
25 different things in different states. They're sometimes

1 called gun violence restraining orders, sometimes called  
2 extreme risk protective orders.

3           So and one of the states that's got a law  
4 and has forms available on the internet is the state that  
5 should not be named, but we've attached some of their work  
6 for this committee to look at. In Texas right now, there  
7 are three places that authorize protective orders, and  
8 then the question becomes, you know, does a trial court  
9 right now have the authority to prohibit access to  
10 firearms, and in looking at the legislation that  
11 authorizes these protective orders, it's -- it's not  
12 completely coherent, but there are two provisions in the  
13 Family Code that talk about protective orders. There's  
14 one in the Code of Criminal Procedure. Interestingly  
15 enough -- and I confirmed this with Dave. John, who is a  
16 magistrate judge in Denton County who does all of their  
17 mental health commitment proceedings in that county, and  
18 he confirmed that the Mental Health Code does not have its  
19 own stand-alone protective order, so we're really looking  
20 at the Family Code and the Code of Criminal Procedure.

21           Right now Family Code section 5.04 allows  
22 any party to a suit to move for a protective order, any  
23 party to a suit for a divorce to move for a protective  
24 order. So if there's a filing for a divorce, a court -- a  
25 protective order court or any trial court can issue a

1 protective order. That provision of the Family Code,  
2 section 6.504, says that you can -- that the trial court  
3 can render a protective order as provided by Family Code,  
4 section 81. Family Code section 81 is another place where  
5 the Legislature has authorized protective orders. Family  
6 Code section 85.001(b) allows a trial judge to issue a  
7 protective order if the court finds that family violence  
8 has occurred and is likely to occur in the future. So the  
9 difference between 6.504 and section 81.001 is the  
10 necessary finding that must be made to issue the  
11 protective order. 6.504 allows any party to a divorce  
12 without any showing to seek a protective order, "any  
13 further showing."

14           Section 81.001 requires that the court find  
15 family violence has occurred and is likely to occur in the  
16 future. So -- and for section 81, members of the same  
17 household, those in a dating relationship, or persons  
18 seeking to protect a child from abuse may request the  
19 order. So it's not simply an order between a husband and  
20 a wife. It can be in any family situation where family  
21 violence has occurred. Then -- and this is where it gets  
22 tricky. In section 85, section 85.002, it -- it says --  
23 it lists the things that a trial court can do in  
24 connection with issuing a protective order, and it says  
25 that a trial court may prohibit the respondent or the

1 person subject to the protective order from possessing a  
2 firearm, and there's an exception if the respondent is a  
3 peace officer who is actively engaged in full-time  
4 employment as a peace officer, but overall for non-peace  
5 officer respondents a trial court may currently under the  
6 Family Code prohibit a person found to have committed  
7 family violence from possessing a firearm.

8           So the question then becomes do you have to  
9 find that the respondent has committed family violence  
10 before you include in your protective order a prohibition  
11 on possessing a firearm. I've talked to the trial judges  
12 that do this kind of work and including there is a trial  
13 judge in Harris County that her entire docket is nothing  
14 but protective orders, so she gets the criminal protective  
15 orders, the civil protective orders, and that's all that  
16 she does; and the answer to that question in the minds of  
17 trial judges is, no, that they can issue an order  
18 prohibiting the possession of a firearm in connection with  
19 any protective order that they issue under the Family  
20 Code; and you say, "Well, where do they get the  
21 authorization for that?" It looks like that section  
22 85.002 only applies when the court's found that the  
23 respondent has committed family violence.

24           Well, they get it from section 85.026 in the  
25 Family Code and Chapter 46 in the Texas Penal Code.

1 Chapter -- I mean section 85.026 in the Family Code  
2 requires that every protective order issued under the  
3 chapter contain a warning, and it's -- there are several  
4 different warnings that it requires, but one of the  
5 warnings that it requires is a warning to the respondent  
6 subject to the protective order that it is, quote,  
7 "unlawful for any person other than a peace officer,"  
8 yada, yada, yada, "who is subject to a protective order to  
9 possess a firearm or ammunition." So that's the warning  
10 that has to be put at the bottom of every protective order  
11 issued under section 85.026.

12           Where does the warning come from? The  
13 warning comes from Texas Penal Code, Chapter -- section  
14 46.04(c). Texas -- Texas Penal Code, section 46.04(c)  
15 makes it a misdemeanor offense for a person who is subject  
16 to a protective order issued under 6.504, which is the  
17 protective orders that govern just general divorces or  
18 Chapter 85 to possess a firearm after receiving notice of  
19 the order and before expiration of the order. So  
20 currently under Texas law a trial judge may issue a  
21 prohibition on the possession of firearms for respondents  
22 who are subject to protective orders and, in fact, do  
23 issue it frequently because of the fact that they want to  
24 advise the respondent of their potential criminal jeopardy  
25 if they should possess a firearm while subject to a

1 protective order. So --

2 CHAIRMAN BABCOCK: He's lurking in wait.

3 HONORABLE JANE BLAND: So there is nothing  
4 in any of these provisions that require the trial judge to  
5 issue the prohibition on possessing a firearm, and then  
6 there is also the interesting thing that the warning in  
7 section 85.026 says it's a -- it's unlawful to possess a  
8 firearm or ammunition, but the Penal Code does not mention  
9 ammunition, so I'm not sure where ammunition comes from.  
10 And although these protective orders may not potentially  
11 be enforceable by contempt if the trial judge has not  
12 ordered or prohibited the possession of a firearm, they  
13 might be prosecutable under the Texas Penal Code, and  
14 that's the reason that many trial judges include this  
15 prohibition against the possession of guns, of firearms.

16 So then just in talking with judges that do  
17 this kind of work, two things, one is in the mental health  
18 context, which is in a different part of the statutory  
19 scheme. It's in the Health & Safety Code, sections 571 to  
20 sections 574, there is no provision for a protective  
21 order, although presumably if family violence is involved  
22 a party may seek protection in connection with a mental  
23 health crisis by seeking it under section 85 of the Family  
24 Code. It also does not have a provision regarding the  
25 possession of firearms other than there is one specific

1 provision. Section 571.001(h), which allows a peace  
2 officer to seize a fire -- firearm in connection with a  
3 civil mental health commitment and then make the adequate  
4 provision for its return.

5           That, interestingly enough, is only when a  
6 peace officer intervenes and in connection with -- without  
7 a warrant for -- in a mental health crisis. So if there  
8 is a warrant, that provision doesn't apply. So the bottom  
9 line is right now we have some provisions that  
10 tangentially address the possession of firearms in  
11 connection with family violence and other sorts of  
12 protective orders, and it looks like that what the  
13 governor's office is looking at and potentially our  
14 Legislature will be looking at is a way of putting this  
15 together in some sort of comprehensive -- or maybe just  
16 tweak the individual statutes to better set out the  
17 process for, you know, what grounds must be shown before  
18 you can prohibit somebody from possessing, receiving, or  
19 purchasing a firearm, what sort of due process a person  
20 would be entitled to, how -- how can a person who has --  
21 has by court order been prohibited from possessing guns,  
22 what happens to the guns, who holds -- who holds onto the  
23 firearms and the ammunition, and then how does that person  
24 get those firearms back. And those are all questions that  
25 are beyond the scope of our committee because they're

1 legislative questions that will have to be addressed by  
2 the Legislature, and we can't really start to draft forms  
3 until we know what the Legislature would like -- like us  
4 to do.

5           I'm going to turn it over to David in a  
6 second. There -- other states have gun violence  
7 restraining orders, is what they're called in a lot of  
8 other states. We usually use the word "protective order"  
9 in Texas, and some states have forms that they've used.  
10 So should the Legislature pass a law that would address  
11 this sort of process, we have some good reference --  
12 source materials from other states to look at; but at this  
13 point, I think other than to give our committee the  
14 heads-up that this could be coming down the road and to  
15 get maybe this committee's feedback on, you know, on  
16 important points to think about in drafting forms  
17 associated with this topic, I don't think that -- you  
18 know, I think that we need some more guidance from the  
19 Legislature before we proceed.

20           One final thing, in talking with judges who  
21 do these sorts of protective orders, you know, the  
22 question then becomes -- even now, even under the Texas --  
23 the current Texas statutory scheme, what do we do when  
24 somebody is under a protective order and they possess a  
25 firearm and the protective order now says, you know, you

1 may not possess a firearm and it also says, you know, it's  
2 unlawful to do so under the Texas Penal Code.

3           Well, different counties have different  
4 approaches; and many counties ask the respondent to  
5 certify that, you know, they've handed over or, you know,  
6 become dispossessed of firearms for any firearms they own  
7 and they basically, you know, file a certificate of  
8 compliance that they don't -- they're not in current  
9 possession of any firearms. Some counties -- and Denton  
10 County being one of them, and this is one of the things  
11 that we would probably bring in the judges and lawyers  
12 that do this kind of work to educate us further when the  
13 Legislature tells us what they would like us to -- like us  
14 to look at, but some counties have a working relationship  
15 with law enforcement where law enforcement keeps the  
16 firearms until the person has either applied in the court  
17 to receive them -- return them, get them returned, or the  
18 protective order has expired. So that's sort of -- it's  
19 pretty convoluted right now in Texas, but that's kind of  
20 where we are.

21           CHAIRMAN BABCOCK: Okay. Richard, you had a  
22 question?

23           MR. MUNZINGER: I just had a question. In  
24 looking at the papers it appeared to me that the Family  
25 Code says that under the Family Code there has to have

1 been a past act of violence before the judge can enter  
2 this order, and you seem to say that yourself and then  
3 suggested to me -- and I may have misinterpreted -- that  
4 judges were ignoring that provision and entering it  
5 anyway, and it raised my question in my mind was there  
6 some case or something that does that, that allows them to  
7 do that.

8                   HONORABLE JANE BLAND: Right. They're --  
9 they're including it sometimes in their order because of  
10 the Texas Penal Code provision, which does not qualify the  
11 prohibition on possession of firearms based on a family --  
12 a family violence finding. In other words, if you look --  
13 it's in the -- I quoted it in the memo.

14                   HONORABLE STEPHEN YELENOSKY: But isn't it  
15 also required regardless? It says "shall be included."

16                   HONORABLE JANE BLAND: No, it's "may."

17                   HONORABLE STEPHEN YELENOSKY: The notice.

18                   HONORABLE JANE BLAND: Oh, the notice, okay,  
19 so --

20                   HONORABLE STEPHEN YELENOSKY: The notice.

21                   HONORABLE JANE BLAND: Okay. There's two  
22 things, but the notice stems from the Penal Code. The  
23 Penal Code says that whether you're subject to a  
24 protective order under 6.504, which is the case of  
25 divorce, which is the one case that you can get a

1 protective order without the showing of family violence,  
2 or under Chapter 85, which is the family violence case,  
3 under either one of those protective orders it's a -- a  
4 person who possesses a firearm commits an offense if they  
5 possess the firearm after receiving notice of the order.

6 MR. MUNZINGER: And my question is, is there  
7 a case so interpreting them? Is that a practice? Is  
8 there attorney general's opinion? If there are none of  
9 those things, it would seem to me that the ambiguity in  
10 the law -- there is an ambiguity in the law that the  
11 Legislature ought to be alerted to to cure --

12 HONORABLE JANE BLAND: Right.

13 MR. MUNZINGER: -- in the upcoming session.

14 HONORABLE JANE BLAND: Well, I'm hoping that  
15 we're alerting them by having this discussion this  
16 afternoon, and I'll also note that the Legislature not  
17 only passed the Penal Code provision that makes it an  
18 offense and I think the judges are basically trying to  
19 notify the respondent of their potential criminal  
20 liability in connection with possessing a firearm while  
21 being subject to a protective order, but the other place  
22 that the Legislature appears to say that it's unlawful and  
23 thus appears to authorize trial judges to forbid  
24 possession of firearms is in section 85.026, which tells  
25 a -- tells the court that in every single protective order

1 you have to list this warning.

2 HONORABLE STEPHEN YELENOSKY: Yeah.

3 HONORABLE JANE BLAND: So and the warning  
4 says that it's unlawful to possess a firearm or  
5 ammunition, and I'm not sure exactly, like I said, where  
6 "ammunition" comes from.

7 CHAIRMAN BABCOCK: Anybody else have any  
8 other comments? Richard.

9 MR. ORSINGER: Since I'm a judge I can say  
10 what I think, and --

11 CHAIRMAN BABCOCK: But you're not.

12 MR. ORSINGER: -- I don't think there's any  
13 question that Penal Code section 46.042 is  
14 unconstitutional. Basically the Family Code says that a  
15 protective order may prohibit the possession of a firearm.  
16 It is not automatic. It is not required. A judge can say  
17 nothing or a judge can permit the possession of a firearm  
18 for hunting purposes, in your home. Those are all  
19 options, but the Penal Code says no matter what the  
20 protective order says, if there's just a protective order,  
21 it's a crime for you to possess a gun. Now, how do they  
22 answer the protective order that specifically permits the  
23 use of a gun, like for hunting purposes or to keep in your  
24 home but not carry around in your car is not answered, but  
25 in the Heller -- in *D.C. vs. Heller* the majority of the

1 Supreme Court told us that this is an individual right to  
2 keep and bear arms.

3           So we've got a problem with the Penal Code  
4 that the Legislature needs to do something or some court  
5 is going to have to declare it unconstitutional, but there  
6 isn't anything we can do about that, but we need to  
7 remember in the forms that we're doing that the Family  
8 Code makes the prohibition of firearms optional. The  
9 existing forms show that. It's a check-off on the  
10 temporary -- the ex parte temporary order as well as the  
11 permanent protective order. There's a check mark, and the  
12 judge is supposed to either check it to prohibit firearms  
13 or not check it if firearms are not prohibited.

14           MR. GILSTRAP: Well, it's already checked.  
15 Isn't it automatically checked?

16           MR. ORSINGER: I don't think it's -- I don't  
17 think so. I don't think the law requires it. I think  
18 that the form suggests it.

19           HONORABLE STEPHEN YELENOSKY: If it doesn't  
20 check --

21           MR. GILSTRAP: The form requires --

22           THE REPORTER: Wait a minute.

23           HONORABLE STEPHEN YELENOSKY: -- then you  
24 have the form --

25           MR. ORSINGER: Then you have what?

1 HONORABLE STEPHEN YELENOSKY: Well, it's  
2 facially in conflict if it's not checked because you have  
3 to have the warning.

4 MR. ORSINGER: Okay. Okay. Well, look, the  
5 fact that something says a warning, if it's not supported  
6 by law it's not an accurate warning, so I mean, we've got  
7 a mess here on our hands I'm afraid.

8 HONORABLE STEPHEN YELENOSKY: Well, that's  
9 true.

10 MR. ORSINGER: Trish disagrees with me, but  
11 before -- before we leave today there is one thing we can  
12 do today.

13 CHAIRMAN BABCOCK: What can we do?

14 MR. ORSINGER: There is a proposal, we have  
15 a Rule 78a, which is the case information rule, which I've  
16 been told that the Office of Court Administration doesn't  
17 need anymore now that we have electronic filing, and some  
18 family lawyers were working on this problem independently  
19 from what Jane's subcommittee was doing, and Trish  
20 McAllister has come up with a judicial disclosure sheet,  
21 which is in the materials for the committee together with  
22 the proposed amendment to Rule 78a, which eliminates the  
23 case information sheet but requires the filing of a  
24 judicial disclosure sheet for protective orders. And so  
25 we would eliminate the rule we don't want and replace it

1 with the rule we do want, which is to require someone  
2 that's applying for a protective order to fill out this  
3 form and indicate whether the target of the protective  
4 order possesses firearms, possesses ammunition, or used  
5 the weapon in connection with family violence or a crime.  
6 So I feel like I would -- I mean, it would be very helpful  
7 if we could address that rather than just the Second  
8 Amendment issue.

9 CHAIRMAN BABCOCK: You're sure you want to  
10 call them a target?

11 MR. ORSINGER: No, that's a poor choice of  
12 words.

13 CHAIRMAN BABCOCK: Trish.

14 MS. McALLISTER: I think we're -- one of the  
15 things that's become clear to me today is that we were --  
16 we were actually asked to -- Richard -- actually, I guess  
17 it was Martha and Richard both contacted me to get in  
18 touch with the protective order task force, which is the  
19 forms task force that's the Court's task force to create  
20 this form and then subsequently allow us to, you know,  
21 look at making a rule change, but this basically all  
22 arose -- this part, the form that y'all are going to be  
23 looking at as well as the rule change all arose from a  
24 conversation that Judge Warne in Houston, family law judge  
25 in Houston, had had with Justice Guzman, and then Justice

1 Guzman subsequently talked to the Chief, and her goal was  
2 that they're trying to increase the information that is  
3 available to judges on the access of a respondent in a  
4 protective order to weapons basically to give more  
5 information to the judges in these cases because there are  
6 lots of problems that come up with these cases.

7           So the Chief then asked us to do this, and  
8 this is what we're -- what -- part of what we're here to  
9 talk about, but Jeana Lungwitz is here from the UT  
10 Domestic Violence Clinic, and she deals with these cases  
11 all day, so she may be able to answer some of the  
12 questions that were arising just a few minutes ago as  
13 well.

14           MS. LUNGWITZ: On the firearms prohibition,  
15 that's automatically checked -- I do believe -- I don't  
16 have it in front of me, but I'm pretty sure we decided in  
17 those forms to automatically check it because it's a  
18 federal law.

19           MS. McALLISTER: Right.

20           MS. LUNGWITZ: 18 U.S.C. 922(g)(8) that  
21 would make it -- that prohibits someone who is subject to  
22 the protective order, the language kind of defines what a  
23 protective order is, to ship, transport, possess, or  
24 receive firearms or ammunition while protective order is  
25 in effect. So I think what happened after that passed is

1 when I think Texas put that provision in the code about  
2 putting the warning in the order.

3 HONORABLE STEPHEN YELENOSKY: Does the  
4 definition of a protective order in federal law comport  
5 with the 65.04 protective order? Because your protective  
6 order under 65.04 I think might not have anything to do  
7 with violence.

8 MR. ORSINGER: I can answer that. That was  
9 litigated in *U.S. vs. Emerson* which was a Fifth Circuit  
10 case of some notoriety. It was a forerunner to *Heller*,  
11 and in that case there was a standard temporary order in a  
12 -- out of the form book in a divorce, and after it was  
13 signed -- and it didn't mention guns. After it was signed  
14 the husband went out and bought a Beretta pistol, and he  
15 was indicted and prosecuted and convicted by the U.S.  
16 attorney and the U.S. government, and he appealed to the  
17 Fifth Circuit. Unfortunately their case wandered off into  
18 the Second Amendment and whether individuals have a right  
19 under the Second Amendment, but part of that Emerson case  
20 was this was a standard temporary injunction that's issued  
21 in every divorce case against both spouses. Didn't  
22 mention guns or ammunition at all, but because the federal  
23 statute said that it's improper to take a gun through  
24 interstate commerce if you have an order against you for  
25 the use of physical violence, even though there was no

1 finding of violence, it wasn't a protective order. It was  
2 just a temporary order. They indicted him. So we still  
3 have a problem that that federal law is out there.

4           The Fifth Circuit has upheld it, but Heller  
5 was decided later on, which makes the Fifth Circuit  
6 decision in Emerson questionable, and so now I guess what  
7 we've got is a form in which we're following the federal  
8 statute, which doesn't require any finding of violence as  
9 the justification for how we're handling our state forms  
10 when the Family Code says barring weapons is elective with  
11 the court. It's not mandatory in every case. So we have  
12 a mess.

13           HONORABLE STEPHEN YELENOSKY: But doesn't  
14 the federal law define protective order such that it's  
15 narrower --

16           MR. ORSINGER: No.

17           HONORABLE STEPHEN YELENOSKY: -- than the  
18 standard?

19           MR. ORSINGER: I can give you the language  
20 here.

21           HONORABLE JANE BLAND: So the federal law  
22 and to the extent it covers, you know, not interstate  
23 commerce, is from the Violence Against Women Act.

24           MS. LUNGWITZ: Right.

25           HONORABLE JANE BLAND: Right? And so -- and

1 that may be where "ammunition" comes from when I heard you  
2 read it. But we have a -- we have a parallel state law,  
3 and the state law is the one that subjects you to criminal  
4 prosecution if you possess a firearm while subject to a  
5 protective order. So it's not just the federal law. It's  
6 also our state law.

7 MR. ORSINGER: So the Violence Against  
8 Women's Act justification was interstate commerce, and  
9 that's why the issue was -- there's your federal authority  
10 to legislate, but everything in -- everything that we're  
11 all talking about right now is pre-Heller, and it needs to  
12 be re-evaluated in light of the U.S. Supreme Court  
13 decision in Heller, but the problem is we've got a Penal  
14 Code that says if you have a protective order, no matter  
15 what it says, even if it specifically permits the  
16 possession of weapons, you're committing a crime if you  
17 possess a weapon. And then we have a federal law that  
18 says if you have an order against you that has to do with  
19 the use of force against a woman or child then it's a  
20 federal crime to possess a weapon, and then we have a  
21 Heller decision saying you have a constitutional right to  
22 possess you're weapon, and those different strands of our  
23 history have not been pulled together, and we don't have  
24 to pull them together today.

25 What I would suggest that we do, at least

1 try to do, is talk about the idea of whether we want to  
2 have an application form that requests the affiant to  
3 declare whether or not there is a weapon or ammunition in  
4 the home or that has been used for a crime or used by this  
5 violent person and then let's decide whether we want to  
6 get rid of the case information sheet if it's not needed  
7 anymore, and let's just borrow Rule 78a, which is now  
8 empty, and let's require a disclosure sheet for protective  
9 orders, and these were submitted and are part of the  
10 agenda today, and although it's not necessary it would be  
11 helpful if we found out whether this was okay, whether we  
12 want to go forward with this, whether we want to rewrite  
13 it or give it up.

14 CHAIRMAN BABCOCK: Roger, then Frank.

15 MR. HUGHES: I think we are getting ahead of  
16 ourselves. I would like to see what the Legislature would  
17 do, and if I may take a contrary view, the problem that  
18 brings us here today is not some abstract question over  
19 how far Heller goes. It has to do with people being  
20 killed, shot to death, or murdered because somebody  
21 wouldn't say "boo." People who knew they had guns and  
22 people who knew they were dangerous didn't have a method  
23 to bring it to the attention of authorities so something  
24 could be done.

25 Now, if I have any suggestion today, I'd say

1 whatever form we have needs to be bilingual, and it needs  
2 to be in ordinary English or whatever language the  
3 applicants speak. I'd also like to hear a history of how  
4 the forms we've got are working, because when I looked at  
5 the forms in this package, my initial reaction is the poor  
6 people that have to fill these out are going to struggle  
7 figuring out what all those terms mean. Now, as if I have  
8 any advice to the Legislature, if you're going to take  
9 away people's guns because they are flagged as perhaps  
10 violent, we need to -- my recommendation is that we  
11 have -- that the Legislature determine who is going to  
12 take possession of these weapons, and I say that because  
13 18 years ago we had my town was sued in one of the first  
14 state created danger cases because a weapon was turned  
15 into the police department for destruction, and it didn't  
16 get destroyed because the police department had -- my  
17 hometown police department had one of the laxist gun  
18 security, I don't know, in the state but it was certainly  
19 somewhat surprising to me to find out that they had no gun  
20 security. They didn't even keep track of the weapons  
21 issued to the officers, so I suggest the Legislature  
22 determine who is going to take possession of these weapons  
23 when they're seized, and I also suggest that if it's left  
24 to us we're going to have to work out a method for how  
25 they get their weapons back. I mean, if -- it bothered me

1 a little, and I say strictly from a procedural point of  
2 view, if we're going to say the person gets their gun back  
3 when the -- when the -- when the PO terminates or expires  
4 of its own terms we're going to have to have a method,  
5 because I can assure you as soon as the clock strikes  
6 midnight on that day, that guy or gal is going to be at  
7 the local police station saying, "It's expired, I want my  
8 gun back," and then what's the poor custodian supposed to  
9 do? How are they supposed to know that the order has  
10 expired? How do they know that now that the gun can give  
11 back? These are things that are going to be practically  
12 very important and going to cause a lot of things.

13                   Once again, I think the security of these  
14 weapons, because I'm sure the courts don't want to take  
15 possession of them, and we need to have -- I would just  
16 say we're going to have to have that nailed down, and also  
17 the method of return of the weapons because I was quite  
18 surprised. A lot of these weapons are extraordinarily  
19 expensive. It's not a -- a lot of these assault rifles  
20 that we're screaming about being used, they're 600, 700,  
21 thousand-dollar piece of equipment. People are going to  
22 want them back, and there's going to be fights over that,  
23 and we need to nail down a procedure for it. So having  
24 taken the contrary view, all I can say is we're getting  
25 ahead of ourselves, but I would like to hear a report

1 about how the forms we have have either worked or not  
2 worked in actual practice. Not today, not necessarily  
3 today.

4 MS. LUNGWITZ: I can -- I can speak a little  
5 bit to that.

6 MR. HUGHES: Sure.

7 MS. LUNGWITZ: So but I don't have any  
8 statistical information because I wasn't prepared for that  
9 today. We know that they do get used. Texas is unique in  
10 that prosecutors offices are given the authority to obtain  
11 protective orders on behalf of --

12 CHAIRMAN BABCOCK: Jeana, could you speak up  
13 just a little bit, please?

14 MS. LUNGWITZ: Yes, sorry about that.

15 CHAIRMAN BABCOCK: That's all right.

16 MS. LUNGWITZ: Prosecutors offices in Texas  
17 are given the authority under the Family Code to obtain  
18 protective orders; and so a lot of offices, especially  
19 larger city offices, but also some more rural offices  
20 obtain protective orders; but there are a lot of them that  
21 don't; and a lot of people can't afford private lawyers  
22 for that purpose, so that's why the kit kind of began  
23 years and years ago when we first started working on that.  
24 But we know more protective orders are granted not using  
25 the kit than are, and I think it's because prosecutors

1 have their own forms. I know in my office I have --  
2 because I was on this task force, I use a lot of the  
3 language, but it may not look exactly like these forms.

4           But that is why there was that legislative  
5 change that Richard referred to, 78a, so that that weapons  
6 -- you know, identifying what kinds of weapons the  
7 applicant knows about and where they're located can be put  
8 on that form so that law enforcement -- I think kind of  
9 the main goal of that was for law enforcement, but also  
10 judges wanted to have that information, was my  
11 understanding of what we were tasked with doing.

12           MS. McALLISTER: And just one other thing, I  
13 do know -- the last time that I looked at the statistics  
14 on how frequently the protective order kit was downloaded  
15 -- we have no way of really tracking how often it's used.  
16 There was over 40,000 times per year it is downloaded from  
17 Texas Law Help. I don't know how often it's used, but  
18 there are -- there is Texas -- the Women's Advocacy or  
19 Texas Advocacy Project now has a specific outreach program  
20 that they do around the kit; and they do walk people  
21 through, you know, filling out the form, doing all sorts  
22 of different kinds of things, safety planning around,  
23 filing a protective order, stuff like that.

24           So we do know that it's used. We know that  
25 it's successfully used. It's obviously, you know, a

1 complex packet, too, but it's better than not -- it was  
2 designed originally because there were so many counties in  
3 which people were not allowed to get a -- didn't have a  
4 way to get a protective order other than doing it  
5 themselves, which as advocates we would never really  
6 ideally want, but it's just the way the reality is.

7           But today I just do want to clarify  
8 originally we were asked to promulgate a form for the  
9 applicant to complete when they file the protective order  
10 in the kit, but then when we all got together and after  
11 talking to Judge Warne and, of course, even myself, the  
12 majority of the protective orders are not protective order  
13 kit protective orders. They're filed -- you know, many  
14 more are filed just without that form, so we asked the  
15 Chief if -- you know, if the goal was to provide judges  
16 with information about the weapons that the respondent has  
17 that the applicant is aware of, it would be best to just  
18 have a form that's not just in the protective order kit  
19 but that's available to every protective order file, which  
20 is why they -- we then made changes to Rule 78a. So those  
21 are the two things that are in the packet.

22           CHAIRMAN BABCOCK: Okay. David.

23           MR. SLAYTON: Good afternoon, everyone.  
24 David Slayton with the Office of Court Administration.  
25 Just a few things. First of all, to Justice Bland's

1 points about the statute, the Legislature is fully aware  
2 they have a mess. They had a hearing in July about this  
3 issue, and it was pointed out to them that the laws are  
4 all not clear and conflicting, and so I think that we will  
5 likely see something in this next legislative session to  
6 try to address that. The outcome of that hearing in July  
7 at the Senate was such that I don't expect that there will  
8 actually be a consolidated statute to create a red flag  
9 law. The Lieutenant Governor's description was it was  
10 dead on arrival, so but I know there are -- there is some  
11 discussion on both sides of the aisle in both houses of  
12 trying to take existing statutes and modify them to make  
13 it where it's permissive for judges to consider  
14 applications for extreme risk protection orders, which is  
15 what they're likely to be called in Texas, that are not  
16 associated with family violence or a divorce case, so it  
17 would be another mental health issue that's arisen where  
18 someone is at risk and has guns.

19           A couple of things that I think the  
20 Legislature will consider, some have been raised here  
21 today, and things that you-all will have to consider as  
22 part of this is who can file them. Several states have  
23 these now, and they differ as to whether law enforcement  
24 is the only one who can file it or if family members or  
25 friends or social workers or others can file them. So

1 that's something the Legislature will have to consider as  
2 to who has the authority and then what the burden of proof  
3 is for the judges to consider them. Most states have made  
4 that clear and convincing evidence and given the actual  
5 things judges are to consider.

6           Also, the states have looked at what is the  
7 length of the orders, so most of them provide for a  
8 temporary ex parte extreme risk protective order that is  
9 in place for 14 days, similar to our domestic violence  
10 protective orders with then a hearing for a permanent  
11 protective order which lasts for a year, but Maryland  
12 actually has created an interim order which lasts for one  
13 to two days, and I will tell you in discussions with  
14 legislators about this issue in Texas that was actually an  
15 appealing idea because they didn't want to even take  
16 someone's gun away for 14 days without giving them proper  
17 opportunity to be heard, so that's something we may see.

18           With regard to getting the guns back, in  
19 every state that has a protective order -- or, sorry,  
20 extreme risk protection order statute there is a  
21 requirement that the respondent file an application to  
22 have their gun returned, at which point the court would  
23 have to consider that, do a criminal background check to  
24 ensure that they actually do not have some other  
25 disqualifier to possessing a firearm, at which time it can

1 be responded. It's not an automatic return. It's really  
2 there has to be some order that the court can say that the  
3 order has expired, there's no disqualifiers that they've  
4 been made aware of, and then the order is done. Obviously  
5 lots of other things with regard to court-appointed  
6 counsel for the respondent, psychiatric evaluations being  
7 a requirement, and then other types of procedural  
8 protections for respondents with regards to their rights.

9           And then the last thing I would say is that  
10 every state that has allowed non-law enforcement  
11 petitioners in these types of cases have also added  
12 penalties for people filing fraudulent or harassing  
13 petitions that -- in case someone is just doing this to  
14 harass someone else, so that's something that will have to  
15 be considered as well, so and then to Justice Bland's  
16 point about surrender, one of the discussions the  
17 Legislature is having with regard to this and other states  
18 have is to -- what does a surrender look like? Is it just  
19 what we have in many of our statutes now where the judges  
20 tell them "You can't have a gun," but that's pretty much  
21 as far as it goes. Other states have given judges  
22 explicit authority to say, "You must surrender by this  
23 date and time at this location." Justice Bland mentioned  
24 the certificate that some are using as an option, and then  
25 some states have even authorized law enforcement to see --

1 go in and seize the weapon, which I will tell you in  
2 discussions about this here law enforcement was not too  
3 excited about, having to go seize a firearm from someone  
4 who might have a mental health issue, so that's that.

5           And the last thing I would add is that we  
6 looked at the data from the other states. These are  
7 rarely being used in any other state, so, for instance,  
8 Connecticut has had them since 1999. They were the first  
9 state. In 1999 they had 10 filed. In 2013, which is the  
10 last date they had, there were 184. Indiana had somewhere  
11 between 50 and 70 per year. Washington, who just enacted  
12 theirs recently, had 121, and Oregon, 34. So we don't  
13 expect there to be a significant number, but in every law  
14 that's been put in place the Legislature has required the  
15 courts to come up with forms, so we can expect if that  
16 occurs here in Texas that this will become an issue.  
17 Florida, it was really problematic because they made the  
18 law effective very quickly, and so, of course, the forms  
19 were not ready, which made it quite an issue whenever they  
20 were trying to start this process.

21           CHAIRMAN BABCOCK: Thanks, David.

22           MR. ORSINGER: Can I ask David a question?  
23 In the states that provided to turn the guns in, were they  
24 turned in to the sheriff or to the court clerk or the  
25 court reporter or --

1 MR. SLAYTON: So the most common and maybe  
2 the single way it's done is that it's either to be turned  
3 in to law enforcement or to a federal firearms -- a  
4 licensed federal firearms dealer.

5 MR. ORSINGER: Really?

6 MR. SLAYTON: And so those have been the two  
7 ways it's been done in the other states.

8 CHAIRMAN BABCOCK: Okay. Any other  
9 comments, questions? Frank.

10 MR. GILSTRAP: Well, I'm glad to hear what  
11 you're doing because it does embody due process, and we've  
12 got to have due process, because it is a federally -- it's  
13 a constitutional right now. It seems to me that the idea  
14 that we've got in the initial form that the order has a  
15 mandatory provision saying that you not possess a firearm  
16 obviously is unconstitutional. It's got to be -- it can't  
17 apply to every case where a family violence order is  
18 issued. There are some cases which you may not want to do  
19 that, but our form has a mandatory check in it.

20 Beyond that, with regard to the surrender  
21 and return of firearms, suppose you give them to the  
22 sheriff, suppose you give them to the local police  
23 department, and you come back in a year, they're gone. We  
24 don't know what happened. We have no remedy. It's  
25 negligence. They're immune from that. If they're

1 expensive guns there has got -- there might want to be  
2 some way where maybe the respondent could pay for a bonded  
3 warehouse or something like that. If the guns are worth a  
4 half million dollars, it seems to me that that at least  
5 should be feasible. That's all I have.

6 MR. SLAYTON: Can I just add one thing, too?  
7 To complicate matters even worse the discussion earlier  
8 that the reason why we had this notice language in there  
9 was because of the fact that the federal law prohibits the  
10 possession. It's worth noting that the federal law only  
11 prohibits possession of the firearm if it is actually a  
12 domestic violence against a member of the household, but  
13 Texas' protective order is allowed to be issued in dating  
14 relationships, stalking, other types of protective orders,  
15 too. So it does complicate matters a little bit with  
16 regard to when they're prohibited from possessing it.

17 CHAIRMAN BABCOCK: Jim.

18 MR. PERDUE: So for the committee, what  
19 happened is our legislative mandates subcommittee got a  
20 referral on something that has not been legislatively  
21 mandated, and so we undertook to kind of understand the  
22 issue and give the committee resources to have the  
23 discussion. It's five till 5:00, and I just want to say I  
24 desperately miss Richard Munzinger because I wish he could  
25 be here for this because it would be an important

1 addition.

2           What is conflated -- what is conflated with  
3 the issue is this 78a issue and just kind of was running  
4 unknown to us concurrently and got put in together, so  
5 the -- what this committee loves to do is talk about the  
6 Constitution when it's not necessarily at issue. It  
7 hasn't really taken effect today, but we do have something  
8 somewhat concrete to deal with that kind of may want to  
9 get on a vote before the end, which is if you're taking  
10 away the filing sheet but you have this protective order  
11 kit -- and with all due respect, I can't imagine an issue  
12 where there is a finding of family violence where you  
13 wouldn't want a judicial finding that then that person who  
14 is found to be committing family violence should not have  
15 access or possession of firearms. But be that as it may,  
16 the law says what it says on that. You ought to at least  
17 have a system where the court has notice that somebody  
18 subject to that protective order has firearms.

19           So as I understand what a separate  
20 subcommittee was working on with Trish and Richard was to  
21 bring the committee of the whole the idea of taking this  
22 notice form for the protective order kit and putting it in  
23 where we're removing the civil -- the civil filing form in  
24 78a. That is completely separate from red flag laws, so  
25 the record reflects everybody who votes in favor of that

1 is not on record saying we're taking anybody's guns. It's  
2 a completely separate and more distinct issue for the  
3 committee.

4 MR. GILSTRAP: I agree.

5 MR. ORSINGER: And if I could put a point on  
6 that, the proposal that we brought here today goes a  
7 little beyond the kit, the form kit. If we amend Rule 76a  
8 to require a judicial disclosure form for --

9 CHAIRMAN BABCOCK: 76 or 78?

10 MR. ORSINGER: 78a. Then we're not limiting  
11 the effect of this reporting form to the kit. Every  
12 single application that's filed by an attorney or by a  
13 district attorney or a county attorney or a pro se would  
14 be required to fill out the information sheet about the  
15 weapons and the ammunition, so there's been a lot of talk  
16 about the kit, and the kit is -- the TRO is in the kit,  
17 and the order is in the kit, and there's a whole big  
18 constitutional mess there, but I don't know that there's a  
19 constitutional problem with saying that if you file a  
20 protective order you've got to disclose if you have  
21 knowledge of weapons and ammunition. So to me that is  
22 something that is within our grasp, it's within our  
23 jurisdiction, and we don't have to decide on it in the  
24 next 60 seconds, but it's something that we need to look  
25 at, because the proposal that has been brought here, which

1 has no official authority behind it other than just  
2 interest from members of the Supreme Court of Texas, which  
3 is worth something, is that we ought to have an  
4 application here --

5 CHAIRMAN BABCOCK: Yeah, what do you think  
6 about that? Not much? Something.

7 MR. ORSINGER: And the thought is a perfect  
8 place to put it is Rule 78a is going away as a case  
9 information sheet, which you don't need anymore, do you?

10 MR. SLAYTON: We do not.

11 MR. ORSINGER: Okay. That's not just a  
12 rumor. It's the truth. We don't need this rule anymore  
13 for civil litigation. Why don't we just use it for the  
14 information sheet on weapons, and then we'll let the  
15 Legislature figure out, you know, what the procedures are.

16 CHAIRMAN BABCOCK: Justice Christopher --  
17 Justice Bland, what would be wrong with what Richard's  
18 proposing?

19 HONORABLE JANE BLAND: Why would I say there  
20 would be anything wrong with it?

21 CHAIRMAN BABCOCK: I don't know. You were  
22 frowning, so --

23 HONORABLE JANE BLAND: I'm frowning because  
24 it's late in the day.

25 CHAIRMAN BABCOCK: Does anybody have any --

1 HONORABLE JANE BLAND: No, no, I don't think  
2 that -- I think there are two separate issues. One was  
3 the Court asked us to draft these red flag forms, and  
4 we're going to -- we're going to monitor that, and then  
5 the second is do we want to go ahead and have a required  
6 disclosure form where anyone seeking a protective order  
7 should fill out the form and say, "To my knowledge, these  
8 are the weapons that the respondent has."

9 MS. NEWTON: Can I clarify something?

10 CHAIRMAN BABCOCK: Yeah.

11 MS. NEWTON: I think there's been a lack of  
12 communication, which probably is our fault, but we did not  
13 intend to ask you to draft forms for red flag laws. It  
14 was actually this disclosure form that we were referring  
15 over.

16 HONORABLE JANE BLAND: No, well, Justice  
17 Hecht, to quote verbatim, "Draft forms which could be  
18 included in a protective order kit that would advise a  
19 judge about a respondent's access to firearms and impose  
20 necessary limits," and then attached Governor Abbott's  
21 firearm action safety plan.

22 MS. NEWTON: Yeah, so I think he wanted to  
23 add that to give us some cover for doing it because the  
24 Governor had just said -- made this statement and then, of  
25 course, later on it was then the -- the other guy said,

1 no, we're not doing it, the Lieutenant Governor, but this  
2 all began because the judge in Houston contacted us and  
3 said, "We're already doing this, and we're already working  
4 with Trish and these other people, and will you do this,"  
5 and so then we said "yes," and, I'm sorry, it gets  
6 confusing. Sometimes there are just so many e-mail chains  
7 that it gets confusing of who we're talking to.

8                   CHAIRMAN BABCOCK: Yeah, don't apologize for  
9 that. So has everybody had an opportunity to look at this  
10 piece of paper that Richard's trying to slide in here?

11                   MR. ORSINGER: What concerns me, Chip, is  
12 that we really haven't had a debate here today about the  
13 public policy of requesting this private information be  
14 filed --

15                   CHAIRMAN BABCOCK: Right.

16                   MR. ORSINGER: -- in every application form  
17 even if the person applying for it is not concerned about  
18 weapons or whatever. I wish we had had a discussion. I  
19 mean, I'm happy to get this project on the way, and I'm  
20 sure Justice Hecht will be pleased, but there's really  
21 been no discussion about the public policy issues about  
22 requiring this in the filing of every application and is  
23 the information necessary and what happens if the  
24 information is false and should it be under oath and  
25 should there be a sanction if it's a frivolous filing or

1 you can prove that it's motivated --

2 MR. SLAYTON: Should it be under seal.

3 MR. ORSINGER: Should it be under seal. I  
4 mean, I'm afraid that -- I'm afraid that we probably  
5 have --

6 CHAIRMAN BABCOCK: Is it even in our  
7 package?

8 MR. ORSINGER: Yes, it is, but it's not part  
9 -- since it wasn't part of the official subcommittee  
10 structure it's just kind of a rogue effort to do what the  
11 Chief Justice wants.

12 CHAIRMAN BABCOCK: Well, I wouldn't say  
13 rogue, but, okay, well, is there any reason why we can't  
14 talk about it in the morning? Lisa.

15 MS. HOBBS: I don't think there's any reason  
16 why we can't talk about it in the morning, and I for one  
17 would like a drink, but can I ask, if it came through --  
18 like did this come through like the new Mental Health  
19 Commission?

20 MS. NEWTON: No. It was Judge --

21 MS. McALLISTER: Judge Warne.

22 MR. ORSINGER: Judge Warne in Houston has  
23 been working on this for a couple of years.

24 MS. McALLISTER: It was literally -- it  
25 literally was a conversation that Judge Warne had with

1 Justice Guzman, Justice Guzman had with the Chief.

2 MR. ORSINGER: Judge Warne, who is a family  
3 law district judge in Houston, has been working on this  
4 problem for several years with local lawyers and local  
5 people.

6 MS. McALLISTER: Right. But she's been  
7 working on the passport part. She's been working on the  
8 part actually that you guys were kind of looking into,  
9 which is the legislative piece on gun surrender laws. So  
10 she's been trying to work with the Harris County folks on  
11 gun surrender laws or how they're going to handle gun  
12 surrender once it's been ordered that a respondent has,  
13 you know, got to surrender their stuff, but this was  
14 separate. This was just like she's -- you know,  
15 the problem -- part of the problem that judges have is  
16 that they don't -- they don't know, you know, what's  
17 potentially out there; and so it's -- you know, there's  
18 just it's a dangerous, dangerous situation. Anyway,  
19 that's the history as I know it.

20 CHAIRMAN BABCOCK: Yeah, Justice Bland.

21 HONORABLE JANE BLAND: Chip, since this  
22 particular draft hasn't been vetted by a subcommittee of  
23 this committee, and it would seem since the proposal is to  
24 be Rule 78, which is not one of my rules --

25 MR. PERDUE: I'm going to say again there's

1 no legislative mandate behind this.

2 HONORABLE JANE BLAND: Maybe we need to  
3 refer it to the appropriate -- I mean, or we can do it  
4 because we've already done some work similar to this, but  
5 what we were looking at was the Governor's proposal and  
6 how that might look. We weren't looking at this  
7 particular form.

8 CHAIRMAN BABCOCK: Well, Richard --

9 HONORABLE JANE BLAND: And we can go back  
10 and take a look at it, but we haven't really had a  
11 subcommittee meeting and looked at it.

12 CHAIRMAN BABCOCK: Yeah. Richard is the  
13 chair of the committee that has Rule 78a in the middle of  
14 it, and you've just been named vice-chair, so --

15 HONORABLE JANE BLAND: No, I'm not.

16 CHAIRMAN BABCOCK: I'm just kidding.

17 MR. ORSINGER: Basically Justice Bland would  
18 like to not have this problem, and my subcommittee is  
19 hard-working people, and we're willing to take it on.

20 CHAIRMAN BABCOCK: And Frank is vice-chair  
21 of this. So, I'm sorry, what did you say?

22 MR. ORSINGER: I said Justice Bland --

23 HONORABLE JANE BLAND: He made it that his  
24 committee is hard working.

25 MR. ORSINGER: -- doesn't want to be

1 involved, and my subcommittee is hard working, and we're  
2 willing to take it on.

3 HONORABLE ANA ESTEVEZ: And we like guns.

4 CHAIRMAN BABCOCK: Okay. So --

5 MR. ORSINGER: But we have already taken it  
6 on, but I think we haven't examined it in sufficient  
7 detail.

8 CHAIRMAN BABCOCK: Okay. So we'll bring it  
9 back not next meeting, but the --

10 MR. ORSINGER: And I'd like to get a better  
11 understanding from David about what the other states have  
12 done because they have some protections against frivolous  
13 filing and whatnot that we didn't consider.

14 CHAIRMAN BABCOCK: Yeah.

15 MR. ORSINGER: We just considered capturing  
16 the information and not the motive or the sanction for  
17 false filing or anything like that.

18 CHAIRMAN BABCOCK: All right. So the last  
19 order of business today, we will refer the evolution of  
20 Rule 78a and the replacement of it with this proposal that  
21 you're talking about. It will be referred back to  
22 subcommittee to be reported on in the first meeting in  
23 2019.

24 MR. ORSINGER: 2019. Okay. That's next  
25 year.

1                   CHAIRMAN BABCOCK: I tell you what, they  
2 don't put anything by you, do they? All right?

3                   MR. ORSINGER: Thank you.

4                   CHAIRMAN BABCOCK: All right. Good. Thank  
5 you, everybody. We'll see you tomorrow morning at 9:00  
6 a.m. Or we'll see you tonight, right now, and the picture  
7 is at 6:00.

8                   (Recessed at 5:07 p.m. until the following  
9 day.)

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**REPORTER'S CERTIFICATION**  
MEETING OF THE  
SUPREME COURT ADVISORY COMMITTEE

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I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above meeting of the Supreme Court Advisory Committee on the 28th day of September, 2018, and the same was thereafter reduced to computer transcription by me.

I further certify that the costs for my services in the matter are \$ 1,871.00.

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Given under my hand and seal of office on this the 29th day of October, 2018.

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**D'Lois L. Jones, Texas CSR #4546**  
Certificate Expires 12/31/18  
3215 F.M. 1339  
Kingsbury, Texas 78638  
(512) 751-2618

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