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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

October 27, 2017

(FRIDAY SESSION)

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 Taken before *D'Lois L. Jones*, Certified
Shorthand Reporter in and for the State of Texas, reported
by machine shorthand method, on the 27th day of October,
2017, between the hours of 9:00 a.m. and 4:33 p.m., at the
Texas Association of Broadcasters, 502 East 11th Street,
Suite 200, Austin, Texas 78701.

INDEX OF VOTES

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

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Documents referenced in this session

17-22 HB 45 Proposed Rule 308b Rev. 10.24.17

17-23 Texas 2017 HB45-Enrolled Version

17-24 Cal Dive Offshore Contractors Inc vs. Bryant

17-25 Castrejon vs. State

17-26 Attorney General Ken Paxton-Opinion No. KP-0094

17-27 October 24, 2017 Memo, Revisions to Canon 3.B(8)

17-28 October 23, 2017 Report on TRCP 99

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2 CHAIRMAN BABCOCK: All right, welcome,
3 everybody. We have some startling news. There is -- that
4 should get your attention, except not Lisa, who is back
5 there hugging people. We have some startling news.
6 There's been a coup at the Court. Chief Justice Hecht has
7 been deposed and Martha Newton has now taken over as our
8 new chief, and she's going to give the report from the
9 Court this morning. Hey, guys, guys. Come on, let's go.

10 HONORABLE TRACY CHRISTOPHER: You missed
11 Chip's joke.

12 MS. NEWTON: Well, the Chief is sorry he
13 can't be here. He's in Lexington, Kentucky, at a pretrial
14 justice reform summit. So he is off doing important work
15 elsewhere. Justice Boyd also had a conflict and is sorry
16 he couldn't be here either. Since the last meeting, as
17 you know, a few weeks after our meeting there was
18 Hurricane Harvey, and the Court issued a number of
19 emergency administrative orders to kind of help courts
20 deal with that disaster. There is a provision in Chapter
21 22 of the Government Code that allows the Court by order
22 to modify or suspend any court procedure in a time of
23 disaster notwithstanding any other statute. So the Court
24 and the Court of Criminal Appeals issued a joint order
25 directing all courts in the state to consider

1 disaster-caused delays as good cause for modifying or
2 suspending deadlines or just filing deadlines.

3 The Court issued an order extending the
4 statute of limitations -- or pausing, I would say, the
5 statute of limitations in civil actions if a filer can
6 show that disaster caused the filing delay. There was an
7 order suspending the dismissal deadline in a Family Code
8 statute for CPS cases. 263.401 of the Family Code
9 requires the trial court to commence a trial on the merits
10 in a child protection case within a certain amount of time
11 or the case is dismissed, so the Court issued an order to
12 help those cases.

13 There was an order authorizing out-of-state
14 lawyers to practice in Texas temporarily. This is
15 something -- immediately after the hurricane the Chief
16 received a number of calls from chief justices all over
17 the country, and the Access to Justice also received a lot
18 of inquiries from out of state wondering how lawyers can
19 help Texans in the disaster-affected areas, so the Court,
20 as it has in other disasters in the past, issued an order
21 permitting out-of-state lawyers to practice Texas law
22 temporarily to help disaster victims. Most of these are
23 actually doing it online. There is a website,
24 texaslawhelp.org where out of state lawyers from -- or any
25 lawyers really, but from their home computer or work

1 computer can log on and answer questions that people pose
2 to them, and so that's been, you know, about how to, you
3 know, apply for FEMA or that kind of thing. So it's been
4 really a big help.

5 The Court issued an order suspending
6 deadlines for interpreters, process servers, and guardians
7 to renew their licenses if the licenses were set to expire
8 in the first few months after the hurricane. There was an
9 order extending the deadline for payment of State Bar
10 membership dues, and then orders directed to certain
11 counties, Aransas and Refugio County, to permit them to
12 conduct court proceedings in a neighboring county if they
13 could not access their own facilities to conduct court
14 proceedings there, but the order stated that jury trials
15 could not be conducted in the neighboring county unless
16 the parties consented. So that was a very busy time for
17 us on the administrative side of the Court's work in the
18 first few weeks after the storm.

19 There hasn't been a lot of other rules
20 projects since or a lot of rules orders since our last
21 meeting. We are expecting in November to finally issue an
22 order addressing the qualifications for officers and
23 directors of the State bar. So this is something that
24 this committee considered about a year ago, whether the
25 current rule disqualifying a lawyer from serving as a

1 State Bar officer or director if the lawyer has had a
2 previous disciplinary suspension, whether that rule should
3 be changed in any way. And the committee discussed it,
4 and my recollection is that the committee was largely in
5 favor of some kind of change, but there wasn't really a
6 consensus on what the new rule should be. And the
7 committee recommended that the Court refer the matter back
8 to the State Bar, which the Court did; and they finally
9 have recommended a rule change, which is that for director
10 candidates an administrative suspension will no longer be
11 a disqualifier. A disciplinary suspension will no longer
12 be a disqualifier if the lawyer is reinstated at least 10
13 years before being sworn in as director, but disbarment
14 will still continue to be a disqualifier. And then for
15 officer candidates any disciplinary suspension or
16 disbarment would still be a disqualifier. Administrative
17 suspensions would not be. So administrative suspension is
18 if you forget to pay your dues on time or maybe you're
19 late on your CE, and from what I understand in talking to
20 the bar a lot of people are suspended and they don't even
21 know it just because they're a little late, and so I can't
22 speak for the Court, but the Court has -- is aware of the
23 bar's recommendations and is generally in favor of a
24 change, so we expect to do that at our November
25 conference.

1 And then that is really it on the rules
2 front. There is one other announcement, which some of you
3 know, but there's been some staffing changes in the
4 Chief's chambers. I have moved into the position of the
5 Chief's chamber staff attorney. I am going to continue to
6 do a lot of rules work and administrative work, but we are
7 looking for a new rules attorney who will share the load
8 with me, so if anybody knows of a good candidate, please
9 send them our way.

10 CHAIRMAN BABCOCK: Great. Thanks, Martha.
11 I've been told that Martha is going to continue to work
12 on --

13 MS. NEWTON: Yes.

14 CHAIRMAN BABCOCK: -- rules that she likes.

15 MR. SCHENKKAN: Might that be a short list?

16 CHAIRMAN BABCOCK: That might be a short
17 list. The new rules attorney will get only rules that
18 Martha doesn't like to work on.

19 MS. NEWTON: That is basically it, yeah.

20 CHAIRMAN BABCOCK: And this is all part of
21 her edging closer to the Chief Justice's slot, and she's
22 told me that she does want to be referred to as "your
23 Honor" from now on.

24 MS. NEWTON: No.

25 CHAIRMAN BABCOCK: That's how we'll address

1 Martha from now on. Okay. The first item on our agenda
2 is rules on enforcement of a foreign judgment or
3 arbitration award in family law cases, and Jim Perdue is
4 the chair of our subcommittee studying that. Take it
5 away.

6 MR. PERDUE: All right. So this is one that
7 Martha loves, so we had a lot of -- we didn't have --
8 actually I'm going to turn this over to Richard Orsinger.
9 Basically what you have by way of background is a bill,
10 HB45, that was passed in the last session. It has a
11 mandate that the Supreme Court is going to issue a rule
12 consistent with outlines in the bill itself. This
13 committee may want to talk about policy underlying the
14 statute, but the statute was passed, and our charge was to
15 come up with a rule embodying the mandate of the statute,
16 which is to create a rule of procedure dealing with
17 foreign law judgments or arbitration awards in family law
18 cases. The subcommittee was more than happy to turn that
19 project over to Richard Orsinger since he was our family
20 law specialist of the subcommittee, but we also have
21 special guests here.

22 Karl Hays was involved in the session and
23 the bill and then the drafting that came up for the rule
24 that Orsinger worked over, as well as Paul Leopold, who is
25 also here as a guest. So there's some legislative

1 background to this and then the heavy lifting was turned
2 over to the family law specialists, and Justice Busby also
3 did some very good drafting comments as the thing got
4 whittled down, and I think the principals of the
5 rule-making process have come now to you with a final
6 product that Orsinger can explain in better detail than
7 me.

8 CHAIRMAN BABCOCK: Great. Thanks, Jim.
9 Richard.

10 MR. ORSINGER: Okay. Before we get finished
11 with the introductions I also wanted to point out Steve
12 Bresnen and Amy Bresnen, who were intimately involved in
13 the legislative process and who -- Steve in particular has
14 been shepherding all of the revised versions of the bill,
15 and they're both -- of the proposal that we're going to
16 consider today, and they're both here in the room, and I
17 want to thank all of the family lawyers for their hard
18 work in helping to get this done because it would have
19 been probably difficult, if not impossible, without their
20 help.

21 So the materials that were sent out to you
22 with the agenda, together with one corrected later e-mail,
23 include Rule of Evidence 203 on determining foreign law,
24 Rule of Evidence 1009 on translating a foreign language
25 document, House Bill 45, which Jim talked to you about,

1 which is the focus of what we're doing today. Behind that
2 is the bill analysis for the House bill that was done back
3 at the legislative stage. Sometimes I find these bill
4 analyses helpful to give you the context. The bill itself
5 refers to comity, the concept of comity, c-o-m-i-t-y, and
6 the public policy's exception to comity, and there's an
7 Attorney General opinion from Ken Paxton, KP-0094, dated
8 June 15, 2016, which contains an extended discussion of
9 comity and the context of enforcing foreign family law
10 related decrees and also arbitration awards. And the
11 statute makes reference to this analysis, so it's been
12 included so you at least have a context of what the
13 Legislature had in mind when they were enacting this bill.

14 Then our subcommittee initially -- well, let
15 me say that House Bill 45 is a very interesting animal,
16 and part of it is substantive law, part of it is a
17 statement of public policy, and part of it is a direction
18 to the Supreme Court to implement Rules of Evidence and
19 procedure that will allow the policy in Rule 45 to be --
20 to be applied. And that's a difficult problem, and we've
21 faced it before when we've had a family law issue we've
22 been mandated by the Legislature to fix, and it might
23 require four or five different rules to be altered, but
24 it's been our collective wisdom in the past that that's
25 not smart to spread those changes in four or five places

1 where people may never find them, especially in the Rules
2 of Appellate Procedure, and I think we took that as a
3 given in the present situation that considering the
4 possibility of amending Rule 203 and amending Rule 1009 in
5 the Rules of Evidence and then also creating a procedural
6 rule and what do we do with all of the policy statements.
7 I think our initial effort was to take a cut at putting it
8 all in Rule 203 in rule of evidence determining foreign
9 law. That was not very successful.

10 At that point the family lawyers got -- came
11 forward, and having, I guess, the advantage of seeing that
12 effort, decided to take a suggestion that Professor
13 Carlson gave about amending Rule 308b of the rules -- 308a
14 of the Rules of Procedure. Let me explain. Rule 308 of
15 the Rules of Procedure says the court has to enforce its
16 decrees. Rule 308a is a very old rule of procedure that
17 if it's brought to the attention of the court that a court
18 order regarding possession of children or child support is
19 being violated, the court has the authority to appoint an
20 attorney to represent a litigant who can then bring the
21 lawsuit to enforce the child support or the visitation,
22 and the court can award attorney's fees to the appointed
23 attorney. It's a very old rule. It predates a lot of
24 statutory changes that now authorize the awarding of fees.

25 So Rule 308a is not used anymore, but it did

1 address the enforcement of family law decrees, which may
2 be what prompted Professor Carlson to make the suggestion.
3 She can tell us, but the family lawyers thought it might
4 be a smart idea to create a new Rule 308b and to stick
5 what we need to stick into that rule of procedure even if
6 it affected Rules of Evidence, and so that's the
7 conceptual framework that we have to look at today, is we
8 have a new Rule of Procedure 308b that carries the full
9 load of the direction the Supreme Court received from the
10 Legislature, even though it affects what would otherwise
11 be the operation of two Rules of Evidence, and so I think
12 that the most useful way for us to get started here today
13 is let's start with the Rules of Evidence and then move
14 into House Bill 45 and the proposal on 308b.

15 So I'd like to talk first about Rule 203,
16 determining foreign law. That's Rule of Evidence 203.
17 It's supposed to govern situations in which a party raises
18 an issue about foreign law in a lawsuit; and it's an
19 evidentiary rule, not a procedural rule, even though it
20 has procedural overtones to it; and it's in the chapter on
21 judicial notice, even though it's more in the nature of an
22 evidentiary presentation, a presentation and a
23 counter-presentation. So Rule 203 is sort of an odd duck
24 to begin with, so let's look at it. 203(a) says a party
25 who intends to raise an issue about a foreign country's

1 law must, number one, give reasonable notice in a pleading
2 or writing; number two, at least 30 days before trial
3 supply all parties with copies of written materials or
4 sources that the party intends to use to prove the foreign
5 law. Okay. So we have a notice requirement, but it's
6 only reasonable notice. It's not so many days before a
7 hearing, not so many days before a trial. It's not so
8 many days after the pleading is filed or with the
9 pleading. It's reasonable notice, but at least 30 days
10 before trial you have to provide the written materials
11 that you're going to rely on and sources. I don't know
12 what sources would be other than written materials.

13 So we do have a timetable there about the
14 presentation of written materials to support your request
15 that the court consider foreign law, but we have a
16 reasonable notice requirement that the issue will be part
17 of the lawsuit to begin with. Now then, subdivision (b)
18 relates to translations. It says if the materials or
19 sources were originally written in other than English, a
20 language other than English, the party intending to rely
21 on them must at least 30 days before trial supply all
22 parties both a copy of the foreign language text and the
23 English translation. So, once again, we have a
24 requirement 30 days before trial to provide written
25 materials, but they could be in a foreign language; and if

1 there's going to be a translation offered, which doesn't
2 appear to be required, then you have to give that 30 days
3 before trial; but we have another rule already for Rule of
4 Evidence 1009 about written translations, so we're going
5 to have to I guess correlate 203 to 1009; and there's a
6 deadline there 30 days before trial, so that is where we
7 are with the rules -- bringing the issue of foreign law
8 before the court as a matter of judicial notice.

9 Now then, subdivision (c) of Rule 203 says
10 the court can consider any information, not stuff
11 submitted by the parties. So the court is free to do its
12 own research, and that -- there are no requirements
13 regarding -- the court has to give parties reasonable
14 notice and an opportunity to comment on additional
15 materials. So if the court does do independent research,
16 it has to give notice and an opportunity to comment, but
17 again, no timetables there, and no indication about
18 the circumstance where it's done before a trial or a
19 hearing or during a trial or hearing or after a trial or
20 hearing.

21 Now, in connection with the materials sent
22 out, we included a copy of a case called *Cal Dive Offshore*
23 *Contractors vs. Bryant*, 14th Court of Appeals decided in
24 2015, authored by none other than our Honorable Justice
25 Brett Busby, and it involved Rule 203, and in terms of the

1 overall description of the operation of the rule, this
2 case is very representative of many cases that discuss
3 Rule 203. I will turn to page six of the materials that
4 you were sent. I'm going to quote. "Rule 203 is
5 described as a hybrid rule because the presentation of
6 foreign law to the court resembles the presentment of
7 evidence, but the meaning of the foreign law and its
8 application to the facts are decided and reviewed as
9 question of law."

10 So let me point out that "reviewed by
11 questions of law" means de novo by the appellate court or
12 the reviewing court. So there's no discretion in how to
13 interpret or misinterpret a foreign law, but it's not
14 really like judicial notice, which is usually a fact
15 question that absolves the normal requirement of proof.
16 So that's one concept to remember, that although it is a
17 judicial notice -- it's in the judicial notice section of
18 the rules, it really involves a presentation of evidence
19 and counter-evidence, and really, just the real point of
20 it is it's a question of law reviewable de novo on appeal.

21 Justice Busby points out that, yes, the
22 court can consider any materials, including briefs,
23 treatises, affidavits, and but on page seven,
24 interestingly -- and I'm hoping that we can discuss this
25 this morning. In this particular case one of the

1 litigants wanted to invoke the law of the United Kingdom,
2 and they gave notice in compliance with Rule 203,
3 reasonable notice, but the other side came in on less than
4 30 days before trial and presented contrary arguments and
5 offered different law that they said supplanted the law
6 that had already been submitted. Raising that issue about
7 different laws applies was done within 30 days of trial,
8 even though Rule 203 says at least 30 days before trial
9 all -- "supply all parties a copy of any written
10 materials."

11 So this opinion on page seven says, "Because
12 Bryant was the party seeking to apply English law to his
13 claims and had timely raised the issue with the trial
14 court, we conclude Cal Dive did not waive its challenge to
15 the application of English law by filing responsive
16 argument and English legal materials less than 30 days
17 before trial." So that's an important concept because the
18 foreign law was introduced by one litigant, but in
19 response different foreign law was introduced by another
20 litigant, but the 30-day before trial requirement was only
21 applied to the person who initially invoked the United
22 Kingdom law not responsive. So I think we need to keep
23 that in mind when we look at the operation of our proposed
24 Rule 308b as to whether the requirement does, as written
25 or should apply to both sides or just to the one who

1 initially raises the issue of the foreign law. I'd like
2 to move on then to Rule of Evidence 1009, which has to do
3 with the translations of foreign language documents.

4 Now, right off the bat I think you need to
5 keep clear in your mind that this is written translations.
6 And it has been interpreted by courts of appeals that this
7 rule on written translations does not apply to live
8 translations of witnesses on the witness stand. So
9 whatever we want to talk about and think about, let's
10 remember that so far anyway this rule has been interpreted
11 as applying only to written translations that are filed in
12 advance of trial, and it doesn't affect the calling of
13 witnesses to testify unless somebody is testifying in
14 contradiction to a written translation.

15 So let's look then at Rule 1009. "A
16 translation of a foreign language document." And I think
17 we probably need to satisfy ourselves today whether that
18 includes laws and courts' opinions and published material
19 of commentators. Presumably it does. I think most people
20 assume it does. "A translation of a foreign language
21 document is admissible if at least 45 days before trial,"
22 -- so here we have a timetable for a written translation
23 of 45 days before trial -- "serves on all parties the
24 translation of underlying foreign language document and a
25 qualified translator's affidavit or unsworn declaration

1 that sets forth the qualifications and certifies that the
2 translation is accurate." So if you're going to bring in
3 a foreign language document, whether it's a contract in a
4 contract case or presumably the statute or some sort of
5 commentary of foreign law, if you're -- you can invoke
6 this procedure by submitting a written translation from a
7 qualified translator supported by affidavit or unsworn
8 declaration and then you trigger an obligation on the
9 opposing party.

10 Rule 1009(b), "When objecting to a
11 translation's accuracy, a party should specifically
12 indicate its inaccuracies and offer an accurate
13 translation. A party must serve the objection on all
14 parties at least 15 days before trial." So that's 30 days
15 after the deadline for the initial submission to the
16 foreign translation, and but only 15 days before trial.
17 So both of these dates are pretty close to trial when you
18 consider that a lot of these cases will go many months or
19 even over a year.

20 So let's keep those deadlines in mind, and
21 let's realize that a litigant who doesn't submit a written
22 translation will not be triggering this if they just call
23 an expert witness to testify without invoking this
24 procedure, but if there is a written translation that's
25 submitted 45 days before trial, it triggers the objection

1 obligation 15 days before trial.

2 Subdivision (c) says what happens if someone
3 has triggered the rule and you didn't respond in time.
4 "If the underlying foreign language document is otherwise
5 admissible, the court must admit and may not allow a party
6 to attack the accuracy of the translation submitted under
7 (a), unless the party has submitted a conflicting
8 translation under (a) or objected to the translation under
9 (b)." So "submitted a conflicting translation under (a)"
10 is a little bit of a puzzle to me anyway, because under
11 (a) you have to do it 45 days before trial, but if you
12 don't even know the other side is going to do it on the
13 45th day before trial it's kind of hard to do it in
14 reaction since both of you are under the same deadline to
15 act simultaneously. But if you file an objection within
16 the following 30 days, which would be 15 days before
17 trial, then you're free to contest it, but apparently not
18 by something in writing. You may be able to call an
19 expert witness to testify live in the trial, but you can't
20 contest their written submission with your written
21 submission unless you've done that 45 days before trial.
22 That's as I interpret it. And we've got a room full of
23 procedure experts here, so I may be corrected.

24 Subdivision (d) says if there are
25 conflicting translations under (a) or an objection under

1 (b) the court has to determine if there is a genuine
2 issue, and if there is then the fact-finder has to resolve
3 it. So in the worst case scenario a jury is reading
4 written translations by two opposing experts of the
5 language, foreign language, that's completely alien to
6 anything that the jury knows, and the jury is going to
7 figure out which translator is correct.

8 Subdivision (c) says qualified translators
9 can testify except for (c), meaning that you're cut off
10 from attacking because you didn't object to someone who
11 had filed a written translation 45 days before trial. If
12 you're not cut off then it says, "This rule does not
13 preclude a party from offering the testimony of a
14 qualified translator to translate the foreign language
15 document." So unless they invoke the written translation
16 provisions and you fail to submit your own or object
17 within 15 days you're free to call an expert to testify.
18 (f) says the court for good cause can alter the time
19 limits and the court can appoint a translator.

20 So behind this case set out in your
21 materials was a case -- behind this rule was a case
22 *Castrejon vs. State*, 428 S.W.2d 179. And this case that's
23 submitted for your consideration because it shows some of
24 the complexities surrounding the use of translations in
25 trial. This was a criminal prosecution in Houston. A

1 female police officer, who was not fluent in Spanish, but
2 could speak some Spanish and could understand and make
3 herself understood -- I don't know if this was a part of a
4 sting, but she was out on the street, and the man pulled
5 her over, and there was ensuing discussion about sexual
6 services for pay, and he was arrested and prosecuted, and
7 the prosecutor did not -- pardon me. The gentleman -- the
8 conversation between the male and the female police
9 officer was recorded, but the police officer was called to
10 testify, and she testified based on her memory of what the
11 conversation was, including the English and the Spanish
12 words, and particularly the Spanish was used to describe
13 the sexual activities that actually made the conversation
14 illegal. And so we had a police officer that admitted she
15 wasn't fluent in Spanish testifying to the Spanish and
16 English part of the conversation, and then the state
17 offered the recording without a translation. It was just
18 the English and the Spanish on the tape, added on top of
19 the police officer's testimony, who is not fluent in
20 Spanish, about what the English and Spanish part of the
21 conversation meant. The judge let it into evidence, and
22 it went up on appeal, and the court split two to one with
23 Justice Massengale dissenting -- or I should say
24 concurring, but with a vigorous disagreement with some of
25 the analysis; and the majority said Rule 1009 of the Rules

1 of Evidence was not implicated because there was no
2 written translation. They just had a police officer
3 testifying about a language she wasn't fluent in, and they
4 had a tape recording that was partly in English and partly
5 in a foreign language, and it was up to the jury to figure
6 it out, and so Rule 1009 was not implicated.

7 So I think you have to realize that in the
8 context of the way things are done, maybe Rule 1009 has
9 some more limited application than you might ordinarily
10 think. As an aside, I don't know whether anyone should be
11 concerned about the fact, but there are not that many
12 jurors in Texas that speak Hindi or a very, very foreign
13 language, but there's quite a few jurors that speak
14 Spanish; and so if you're going to allow tape recordings
15 or translations into evidence without expert testimony,
16 there's going to be some people on the jury that can read
17 it in Spanish; and there are going to be some that can't.
18 And having tried cases with juries that are partly Spanish
19 speaking and partly not, I find that the English speaking
20 jurors will rely on the Spanish speaking jurors to
21 translate the Spanish documents; and so we've got a jury
22 process going on here where jurors who have not been
23 vetted for their understanding of Spanish or their ability
24 to interpret contracts or anything else are going to be
25 our translators if we don't provide them translations that

1 are official. So at any rate, that's not our topic today,
2 so --

3 CHAIRMAN BABCOCK: But it is interesting.

4 MR. ORSINGER: So and we're very strict
5 about requiring people to testify in English like it's
6 really important that the jury hears it in English, and
7 yet we can put all kinds of foreign language in there for
8 the jury to figure out. So let's move on to House Bill
9 45. Now, House Bill 45 possibly -- I can't read the minds
10 of any of the legislators, much less all of them, but
11 there has been a concern as a result of things around
12 America that law in foreign countries is being imported
13 here to the United States, and so the courts are being
14 required to apply the law of foreign countries and not the
15 law of America, and some of these foreign countries the
16 law is quite different, and so while this may -- and Steve
17 may be able to comment on this more because he really was
18 involved from the start I think in the way this came up,
19 where it went, and where it ended up, but it's very
20 different I think in operation from perhaps what the
21 original intention was.

22 The original intention might have been to
23 have a bill that prohibited the application of a
24 particular foreign law, but instead we wind up with a more
25 generically stated bill that says, look, we live in

1 America, we believe in due process of law. We have
2 certain fundamental rights that are protected by the Bill
3 of Rights in the United States Constitution as well as the
4 Texas Constitution. No foreign judgment is required to be
5 enforced in Texas. If it was from a sister state or a
6 jurisdiction in the United States Full Faith and Credit
7 would attend, and we would have no discretion. We would
8 have to apply it, but if it's a foreign country, there's
9 no Full Faith and Credit. There's just comity,
10 c-o-m-i-t-y, which is an election on our part out of
11 respect for the foreign sovereign to apply their law to
12 litigants in our courts.

13 There is a well-known exception for -- since
14 the beginning of time that you don't have to apply or
15 enforce a decree or a contract or any right under foreign
16 law under the Doctrine of Comity if it violates our public
17 policy, and just for a little context and not to create
18 controversy the Legislature used that exception as an
19 effort to try to announce that the public policy in Texas
20 was against the recognition of same-sex marriage and they
21 used the -- tried to use the public policy exception to
22 Full Faith and Credit, and that was announced as our
23 policy, but it was, of course, preempted by the United
24 States Supreme Court, but a similar concept here that the
25 Legislature is announcing our public policy and

1 telegraphing to our trial judges and our appellate judges
2 that in deciding whether to apply foreign law or foreign
3 decree, a foreign arbitration award, that you have to
4 recognize we have certain public policy requirements, and
5 if they are not met then you cannot enforce that decree or
6 you cannot apply that law.

7 Now, the arbitration part of this is
8 important because in some cultures it is typical for the
9 spouses to enter into an agreement when they marry, and
10 they are not necessarily a premarital agreement like we
11 have in Texas that what do you do in divorce. Sometimes
12 they involve a dowry or the opposite of a dowry, a
13 marriage price, but sometimes they also agree that any
14 disputes in the family or a divorce will be resolved under
15 a selected law or by a selected court that applies that
16 law, which is not an official court in the country where
17 you end up. So you'll find sometimes that you'll get an
18 arbitration award out of a court that's -- that we would
19 not necessarily recognize as an official government
20 entity.

21 But at any rate, be that as it may we've got
22 all of these things coming in, and so this House Bill 45
23 is about the family law component of somebody coming to
24 Texas and trying to enforce a decree that relates to a
25 husband and wife divorce or the parent-child relationship

1 of minor children, and they're attempting to bring in the
2 foreign decree or arbitration award under foreign law to
3 be enforced through the arbitration mechanisms, and
4 therefore it becomes a decree here in Texas.

5 So if you look at House Bill 45 and start
6 with section 1, you find broad statements of consideration
7 about our Family Code proceedings involving the marriage
8 relationship or a parent-child relationship, that those
9 litigants are protected against violation of
10 constitutional rights and public policy. Of course, two
11 people that are from a foreign country that are litigating
12 in a foreign country are not under the 14th Amendment or
13 the 5th Amendment of the Texas Constitution, so they get
14 some adjudication under whatever brand of law they have
15 there and then they bring it here to the United States,
16 and so the Legislature is saying we recognize that once
17 they come here we're being asked to put our legal system
18 behind whatever their legal system did or whatever their
19 arbitration process was, and it's not -- we do not believe
20 that we should do that unless fundamental tenets of the
21 U.S. Constitution, the Texas Constitution, federal law,
22 treaties, state law, have been met. And not every
23 component. The fundamental components.

24 So you drop down to section 1, subparagraph
25 (5), and I think you get to the essence of the policy

1 behind House Bill 45. "The Family Code should not be
2 applied to enforce a judgment or arbitrator's award
3 affecting a marriage relationship or parent-child
4 relationship based on foreign law if the foreign law
5 applied to render the judgment or award does not, (A),
6 grant constitutional rights guaranteed by the United
7 States Constitution and the Texas Constitution; (B),
8 consider the best interest of the child; (C), consider
9 whether domestic violence or child abuse has occurred and
10 is likely to continue in the future; or (D), consider
11 whether the foreign judgment or arbitrator's award
12 affecting the parent-child relationship may place the
13 child in substantial risk of harm."

14 Now then, even though that's the essence of
15 the policy, that's in House Bill 45, but it wasn't made
16 part of the Family Code, and so it's not going to be
17 noticed by very many people, which perhaps was by design.
18 But this public policy right here is going to be in the
19 session laws, and unless the publishing industry does
20 something about it I don't know if this will be
21 forgotten or not, but it's certainly on the table for us
22 here today.

23 Subdivision (6) of section 1 says, "The
24 rules of procedure and evidence adopted by the Supreme
25 Court and judicial education required by the Supreme Court

1 can ensure the full implementation and uniform application
2 by the courts of the state of the well-established body of
3 law described by subdivision (1)." And so then we drop
4 over here to section 2 of the bill, which is an amendment
5 to the Government Code, and it defines "comity," which is
6 "Recognition by a court of one jurisdiction of the laws
7 and judicial decisions of a court of another
8 jurisdiction." Defines foreign judgment to mean, "A
9 judgment of a court, tribunal, or administrative
10 adjudicator or jurisdiction outside of the United States
11 and territories." And, by the way, we have some cultures
12 that have tribal courts here in the United States. I see
13 now probably is not triggered here.

14 And subdivision (3), "'Foreign law' means a
15 law, rule, or code outside the states and territories of
16 the United States." Subdivision (b) directs the Supreme
17 Court to "adopt rules of evidence and procedure to
18 implement limitations on the granting of comity to a
19 foreign judgment or arbitration award involving marriage
20 relationship or parent-child relationship to protect
21 against violation of constitutional rights and public
22 policy." And then the Legislature gives us specifics.
23 And as an aside, let me say that this is much better for
24 the Legislature to give us specifics about what the rules
25 should say than it is for the Legislature to write the

1 rule. Some of us have been around back in the day when
2 the Legislature used to write rules and made it very
3 difficult on us to make all the rest of the rules fit with
4 the legislative drafting. Buddy remembers what I'm
5 talking about. Sometimes a very difficult process, but
6 the Legislature thankfully is basically setting out
7 policy, sometimes specifics, and letting us do the
8 details.

9 So the instruction to the Supreme Court,
10 which then became instruction to the subcommittee, the
11 rules that we adopt or the Supreme Court adopts we
12 recommend must "require any party who intends to seek
13 enforcement of a judgment or arbitration award based on
14 foreign law involving a marriage or parent-child to
15 provide timely notice to the court and each other party,
16 including by providing information required by Rule 203 of
17 the Rules of Evidence and describing the court's authority
18 to enforce or decide to enforce the judgment or award."
19 So we have a timely notice there. Just remember.

20 Item (2), "require any party who intends to
21 oppose to provide timely notice to the court and party and
22 include with the notice an explanation of the basis for
23 opposition, including stating whether the judgment or
24 award violates constitutional rights or public policy."

25 Item (3), the rule has to "require a hearing

1 on the record after notice to the parties to determine
2 whether the award or decree violates constitutional rights
3 of public policy." So that's a requirement we would put
4 on the courts. No. (4), "to facilitate appellate review,
5 require written findings of fact and conclusions of law in
6 a written order" regarding this issue of violation of
7 public policy. So again, that implicates our Rules of
8 Appellate Procedure because we're now folding what would
9 normally be Rule 296 rules, if it was -- if the ruling was
10 in a final judgment, and now it has to be in the order,
11 but if it's done pretrial then it has to be in the
12 pretrial order.

13 No. (5), "require that the court's
14 determination be made promptly," no time given; and (6),
15 provide the court can issue ancillary orders to preserve
16 comity while all of the litigation is going on. And then
17 (d), the Supreme Court has to adopt rules that -- any
18 other rules necessary or advisable to accomplish the
19 purpose of this section, and then the caveat or an
20 exception that it doesn't apply when the International
21 Child Abduction Remedies Act, which is the American
22 counterpart for The Hague International Convention on
23 Child Abduction, so that has its own set of standards and
24 rules and it preempts anyway, and so this rule does not
25 apply in those situations. We have to decide what to do

1 about that, specific exception, and of course, if this
2 violates federal or state law then the rule that's adopted
3 would have to be subordinate.

4 And then the last part of the Government
5 Code that was adopted here is that there has to be
6 judicial education on this point. So what we've done, Ken
7 Paxton's -- I'll let you read the AG opinion. It's vivid
8 in its description of public policy and how it's sometimes
9 violated by different countries around the country. So
10 having said all of that, we get down to the subcommittee
11 proposal, which is basically the family law section
12 proposal, with a lot of dialogue back and forth; and
13 you'll see that some of these issues or uncertainties that
14 we've discussed we attempt to grapple with them here; but
15 especially with the timing these are more in the nature of
16 suggestions than they are conclusions.

17 So let's start out. The very first part of
18 Rule 308b is the exceptions that were mentioned last in
19 House Bill 45. And, by the way, I mentioned before that
20 this is all a rule of procedure, 308b. It's a new rule.
21 It never existed before. It's got evidentiary components
22 into it. It's got procedural components in it, but it
23 also has to reflect the policies and procedures that are
24 directed out of the statute. So we have this Rule 308b.
25 It's titled "Determining the enforceability of judgments

1 or arbitration awards based on foreign law in certain
2 suits under the Family Code."

3 Subdivision (a) says this -- "Except as
4 provided by subsection (b), this rule applies to the
5 enforcement of judgment or arbitration award based on
6 foreign law in a suit under the Family Code involving the
7 marriage relationship and parent-child
8 relationship." That's very similar, if not identical, to
9 what House Bill 45 said. And its applicability, Rules
10 203(c) and (d) apply to an action to which this rule
11 applies, which also is an echoing of what was in House
12 Bill 45.

13 So let's talk about the exceptions.
14 Question, should exceptions be set first, could exceptions
15 be set last, or should they not be mentioned at all? All
16 of which were discussed and could be mentioned today.
17 Subdivision (1), it doesn't apply where The Hague
18 Convention or the federal statutes for The Hague
19 Convention control. House Bill 45 says that. That's
20 smart. We don't want to write a rule here where someone
21 is going to argue it preempts international treaties and
22 federal statute.

23 Subdivision (2). "Rules 203(a) and (b) do
24 not apply to an action to which this rule applies." That
25 was a decision by the subcommittee that we were going to

1 have difficulty reconciling the way that Rule 203(a)
2 applies or operates in the abstract when you start
3 interacting with all of the other deadlines that we have
4 here, and so -- pardon me, I said that backwards. Rule
5 203 -- yes, 203(c) and (d) above apply, and 203(a) and (b)
6 do not apply. That's correct. And so this 203(a) has to
7 do with if you intend to raise an issue about foreign law
8 you have to give reasonable notice in writing and at least
9 30 days before trial you have to give the written
10 materials. We're -- we're supplanting that part of that
11 rule with a new procedure that's consistent with House
12 Bill 45, so be aware of that. Subdivision (3), "In the
13 event of a conflict between this rule and federal rule or
14 state law, the federal or state law prevails." That's out
15 of House Bill 45.

16 So now we get down to the notice
17 requirements. "A party who intends to seek enforcement of
18 a judgment or arbitration award must," (1), "provide
19 written notice to the court and to each other party in the
20 party's original pleading." Now, if you're going to raise
21 foreign law under Rule 203, you just have to give
22 reasonable notice by a pleading or other writing and then
23 at least 30 days before trial file the written materials.
24 This is a requirement that the party that's coming into a
25 Texas court to enforce a judgment under foreign law or an

1 arbitration award say that's what you're doing in your
2 initial pleading, and so the deadline is zero. It's at
3 point zero. It's not so many days after or so many days
4 before trial. It's when you file. And you have to
5 describe the basis for the court's authority to enforce or
6 decide to enforce the judgment or award, and then no later
7 than 60 days after the original petition serve written
8 materials or sources the party intends to use to prove the
9 foreign law if the materials or sources were originally
10 written in English or have been published in English prior
11 to the date the petition was filed.

12 So here is a requirement that within 60 days
13 after filing you serve on every other party written
14 materials you intend to use if the materials were written
15 in English, but if they were not written in English we
16 have to ask that question and answer it separately.

17 Subdivision (d), "A party who intends to
18 oppose enforcement must provide written notice to the
19 court and other party of the objections within 30 days of
20 receiving the notice required in subsection (c)." So the
21 notice required in subsection (c) is going to be the
22 original pleading and, therefore, providing notice to the
23 court of objection within 30 days of the notice in (c) I
24 think would be 30 days after the initial pleading is
25 served. I guess served. Not filed, but served. And

1 explain the basis for the objection.

2 So now we have the issue joined by the
3 proponent in the original pleading and the opponent 30
4 days after written notice. I think we should say
5 "receives written notice," but at any rate, the theory
6 here is that the proponent notes at the outset that
7 they're enforcing a judgment from a foreign country or an
8 arbitration award. Perhaps the defending litigant won't
9 know that or won't know whether they want to raise this
10 challenge in their initial pleading, so this gives them 30
11 days. Perhaps that's not enough. Perhaps it is, and but
12 both sides have to explain their rationale.

13 So then let's move onto the translation,
14 subdivision (e). "Except as provided in subsection (2) or
15 (3)" -- so put a little bookmark there. We're going to
16 limit this -- "a translation from language other than
17 English of a judgment or arbitration award to which the
18 rule apply, and any material, documents, or sources not
19 written in English is subject to Rule 1009." Rule 1009 is
20 written translations of foreign documents. So now
21 basically we're telling everybody that's reading this rule
22 that you need to look at rule of evidence 1009, and you
23 need to comply with it. Subdivision (2), which is an
24 exception to subdivision (1). "A translation described at
25 1009(a) that is offered by a party seeking to enforce a

1 judgment to which this rule applies must be served upon
2 each other party no later than 60 days after the party's
3 original petition is filed."

4 Well, in my view that leaves the 1009
5 procedure in place, but it changes the 1009 timetable from
6 45 days before trial to giving notice -- pardon me, of
7 serving written translations supported by affidavit or
8 unsworn certificate to 60 days after the party's original
9 petition is filed. This is basically a timing change in
10 the way that Rule 1009 works.

11 Section (3) is another exception. If a
12 party contests the accuracy of another party's
13 translation, the party must serve an objection and
14 conflicting translation on each opposing party no later
15 than 30 days after the party receives the translation in
16 (2). So the deadline for counter-translations in writing
17 instead of counting back from any kind of trial date or
18 anything else is 30 days after you receive the proponent's
19 translation. So now we have Rule 1009 applying to
20 procedures under this rule, except for those timetables.

21 No. (4), on a party's motion and for good
22 cause the court can alter the time limits hearing. That's
23 subdivision (f). No. (1), "The court must, after timely
24 notice, conduct a hearing at least 30 days before trial."
25 That is proposed by the subcommittee. It's not mandated

1 by House Bill 45. To determine whether the foreign law
2 judgment or arbitration award can be enforced.
3 Subdivision (2), "The court must make the determination no
4 more than 10 days after the hearing." You'll recall that
5 House Bill 45 didn't give a specific time dates. It just
6 said "promptly."

7 Subdivision (g), order, "Within 15 days of
8 the hearing." Again, that's a deadline provided by the
9 subcommittee. "Within 15 days of the hearing the court
10 must issue a written order. The order must include
11 findings of fact and conclusions of law. The court can
12 issue orders necessary to preserve comity or freedom to
13 contract while protecting violations of constitutional
14 rights." Those provisions are right out of House Bill 45.

15 Subdivision (h), hearings on temporary
16 orders. So let me point out that in civil litigation
17 there are two critical case determinative events. One is,
18 in Texas litigation anyway, there is summary judgment and
19 then there's trial, but in family law we have temporary
20 orders for families that are breaking up where there are
21 no rules and people are sometimes not acting at their
22 best, and so you can have a hearing on three days' notice
23 or perhaps even less. Typically it's 7 to 10 days'
24 notice, and you have a hearing where you get in and you
25 resolve who is going to live in the house, who is going to

1 drive the cars, what's going to happen to the paycheck,
2 who's going to pay the bills, where are the kids going to
3 live, what is the visitation going to be, and what is the
4 child support going to be.

5 That's a temporary hearing, and it can be
6 done on an emergency basis. It can be done within a
7 matter of days of when the lawsuit is filed, so none of
8 these timetables will work if someone files a divorce
9 involving a foreign decree or arbitration award and wants
10 it enforced, or the party who doesn't particularly like
11 the outcome initiates a divorce or custody proceeding in
12 Texas and the responding party wants to raise the foreign
13 law or the foreign arbitration award in defense, bring it
14 into the Texas courts. So those timetables that are
15 outlined will not work for temporary hearing.

16 At one point the family law committee had
17 drafted a set of separate timetables for temporary orders,
18 but I think we decided collectively that they are just too
19 fluid. We don't know whether you're going to have three
20 days' notice of a temporary hearing or whether it's going
21 to be reset for two weeks or whether there's not going to
22 be one at all, and so we just thought it would be better
23 if the trial judge set the timetables for a temporary
24 hearing and we leave the fixed timetables in place for the
25 hearing on the enforceability of the foreign judgment or

1 trial.

2 So the definitions that are used, "Comity
3 means the recognition by a court of one jurisdiction of
4 the laws and judicial decisions of another jurisdiction."

5 "Foreign law means a law, rule, or code of a
6 jurisdiction outside of the states and the United States."
7 That's echoing House Bill 45, but there are certain
8 cultures that live in the United States that -- that
9 operate under their own legal system that's not part of
10 our law, and perhaps that should be written slightly
11 differently. Maybe we can't because of House Bill 45.

12 So then the subcommittee is proposing two
13 changes here, one to Rule 203 and one to 1009, and that is
14 to add a subdivision onto the end of each rule saying if
15 you have a case under the Family Code involving
16 husband-wife or parent-child and a foreign decree or a
17 foreign arbitration award, please see Rule 308b. It
18 doesn't purport to change anything other than to just give
19 them a pointer to go look at the rule of procedure because
20 many of the things in those two rules are altered for
21 those kinds of proceedings, so that's I guess my overview.
22 Perhaps I went on too long. I apologize. And so, Chip, I
23 don't know whether we want to ask some of the other people
24 involved in the process if they want to comment.

25 CHAIRMAN BABCOCK: We may well want to do

1 that. I just want to note for the record that you're
2 obviously trying to take over Lonny's professorship at the
3 University of Houston.

4 MR. ORSINGER: Look, this is a difficult
5 situation giving a lecture to procedure specialists on
6 procedure, so I tried to do the best I could, but I'm just
7 a practicing lawyer.

8 CHAIRMAN BABCOCK: It was very well done,
9 Richard.

10 MR. ORSINGER: Thank you.

11 CHAIRMAN BABCOCK: So who do you think could
12 add to our dialogue here?

13 MR. ORSINGER: Somebody on the family law
14 side may have something to disagree with or add to what I
15 said.

16 CHAIRMAN BABCOCK: Steve, you got --

17 MR. BRESNEN: I think you did an outstanding
18 job in laying out the background in all of this. This all
19 started out as an anti-Sharia law deal in Oklahoma
20 and evolved to the approach that you see now. We, the
21 family law section, the Family Law Foundation, believed
22 that we had ample substantive law, but the courts of the
23 state might not be fully apprised of the best way to go
24 about this. There was a case in Houston in the First
25 Court of Appeals, *Ashfaq vs. Ashfaq*, that laid out a

1 pretty reasonable procedure for doing this. That gave us
2 the idea to address this from a procedural point of view
3 and not muck up the pre-existing substantive law, which
4 seemed to be in good order. I would defer to Karl, if he
5 wanted to, or Paul Leopold. They were members of the
6 four-member committee for the family law bar that worked
7 on this in addition to Brian Webb in Dallas and Bill
8 Morris in Houston. Karl, do you or Paul have anything you
9 want to add to what Richard had to say?

10 MR. HAYS: I will be much briefer than
11 Richard, but Richard did comment about the fact that he
12 thought that part of the reason why the statute was
13 drafted the way it was was because it was by design, and
14 that was the case. For I think the last probably four or
15 five legislative sessions there had been a move afoot to
16 try and ban the application of any foreign law in -- first
17 of all, it was in any case, and then the oil and gas
18 people got up in arms about that, so they went back and
19 said, well, we're just going to do it in family law cases
20 because there was this belief that Islamic law had taken
21 over, in particular in Texas, and that there was a need to
22 protect the citizenry from that. And, in fact, there are
23 13 or 14 states that have adopted this model statute,
24 which is the American -- American Law for American Courts
25 statute, that basically says that no foreign law will be

1 enforced in -- in that state if it conflicts at all with
2 any of the constitutional rights guaranteed by either the
3 state or the federal Constitution.

4 And the problem we saw with that in family
5 law cases is that it threw the baby out with the bath
6 water because, for example, in a majority of countries in
7 family law cases there is not a right to trial by jury.
8 We have a right to trial by jury in Texas, so if someone
9 came with an English custody decree or an English divorce
10 decree and was going to try and enforce it in Texas, if we
11 had adopted the statute that says across the board the
12 court doesn't look at the issue of comity, they simply
13 look at whether all the constitutional rights a Texas
14 citizen had were preserved in the foreign country, then
15 that order would not be enforceable in the state of Texas
16 because the individual in England didn't get a -- the
17 opportunity for a jury trial. And so we -- we came up
18 with -- and actually, I think it was Steve and Amy came up
19 with this process, and we tried then to make sure that we
20 did the least harm possible while satisfying the desires
21 of the legislators to be able to go back to their
22 constituents and say that they had worked on this
23 particular issue.

24 Richard, I will raise one issue that while I
25 was listening to you I was trying to figure out that you

1 might want to put some thought around. We have not looked
2 at the application of 152.305 and may need to put some
3 sort of an exception built into this, because that is --
4 152.305 is the registration procedure for a foreign
5 custody determination that has the deadlines involved and
6 says that if you meet those requirements then the order is
7 not subject to being challenged on the basis of due
8 process, and so that's -- that is a -- is something that
9 we need to look at because we haven't excepted this rule
10 of -- we haven't done anything to address that. So we
11 will be creating, I think, a conflict with that particular
12 statute. So that's all I have to say.

13 MR. BRESNEN: Paul, do you have anything you
14 want to add?

15 MR. LEOPOLD: I just noticed one thing,
16 Richard, while you were talking, that under subdivision
17 (d) for the objections for the response -- for the
18 objection, does that have to come after that 60 days when
19 the materials are presented? Is that part of the notice,
20 or is just (c)(1) part of the notice that they have to
21 reply to in the 30 days? And then under (e) for
22 translations, (e)(1), do we want it to have -- be a
23 translation just of the judgment or arbitration award or
24 any written materials under 1009?

25 MR. ORSINGER: Important questions, because

1 I guess in my mind I was -- I was assuming that these
2 timetables applied to whatever supplementary materials you
3 had to prove up the law of the foreign country, so we
4 would have a judgment written in a foreign language or we
5 would have an arbitration award in a foreign language, but
6 then I assumed we would also have the Quran or whatever
7 the governing law is together with some interpretation,
8 because you can't interpret the Quran without interpreting
9 some of the last --

10 MR. MUNZINGER: Mr. Chairman, could you
11 remind the participants that you're speaking to everyone
12 in the room and not just the two of you six feet apart?

13 MR. ORSINGER: Good point.

14 MR. MUNZINGER: Yes, sir.

15 MR. ORSINGER: So I had envisioned that the
16 timetables in this rule would apply to all of the
17 supplementary materials to explain the law and the
18 interpretation of the law, not just the judgment and the
19 arbitration award. And if that's true, is this written
20 for that purpose, or do you think it's more limited than
21 that?

22 MR. BRESNEN: Let me explain I think where
23 the cross-reference got messed up. When Justice Busby
24 rightly pointed out that in a prior draft we spoke to
25 translations but we didn't speak to what if you had it in

1 English version, and so when I put the 60-day provision in
2 (c)(2) there I should have made the reference in (d), the
3 (d)(1), that should be subsection (c)(1). It was
4 anticipated that the original notice that you got had the
5 provision of the translated materials that would come 60
6 days later. So the cross-reference in (d)(1) should be to
7 subsection (c)(1). I think that's where the error
8 occurred. While I'm at it, let me just say that Justice
9 Busby made a -- I don't know if Justice Busby is here
10 because I don't know him.

11 MR. ORSINGER: There he is.

12 MR. BRESNEN: He made some really great
13 suggestions, and I appreciate all of the attention that he
14 paid and to Jim Perdue for allowing us to participate and
15 y'all working with us. We really appreciate it. I could
16 answer that cross-reference, the 152.305. I'll have to
17 leave that to the practitioners.

18 MR. GILSTRAP: Why don't we go through the
19 rule before we jump into the minutia of some of the
20 specific section because, you know, I've got a thought on
21 (c)(2), but maybe we need to talk about some of the other
22 sections first.

23 CHAIRMAN BABCOCK: Yeah. Justice Busby.

24 HONORABLE BRETT BUSBY: Well, I wanted to
25 thank the members of the family law working group. We've

1 had some good exchanges, and I think this continues to
2 improve. There was a version of the -- of the rule with
3 some of my comments in it that was circulated earlier, and
4 I'll say that I think all of those have been incorporated
5 in one way or the other into the current draft, so if you
6 still have a version that has my comments on it, you don't
7 need to look at that one any longer. One of the issues
8 that we had been talking about and I'd be particularly
9 interested in people's comments on is the interaction
10 between this rule and Rules 203 and 1009, because I think
11 we all -- any of us that have dealt with Rules 203 and
12 1009 know that they don't work particularly well together,
13 you know, not least because one has a 30-day deadline and
14 the other one has a 45-day deadline, and so it's kind of a
15 trap for the unwary practitioner when you have a foreign
16 law issue involving a translation.

17 And we largely tried to -- at least my
18 suggestion was that we do want to look at Rules 203 and
19 1009 and the problems with those and try to revise those
20 and try to make them work better together, but perhaps
21 this was not the time to do that when we're under the gun
22 from a deadline that the Legislature has set for us to
23 pass a rule on this subject. And so I think we have
24 largely tried to stay away from fixing broader problems
25 with Rules 203 and 1009, but in the course of that we do

1 have some cross-references, and in a way we've sort of
2 created a third rule that's not really exactly either 203
3 or 1009 that applies in family law cases, and so, you
4 know, that's one way to go. There may be other approaches
5 as well, and I'd be interested in comments from the group
6 on that issue.

7 On the timing issue that was just brought up
8 about 30 days after receiving the notice in -- where it
9 says in (d)(1), "within 30 days of receiving the notice
10 required by subsection (c)," I would say I think that
11 should actually be the notice required by subsection
12 (c)(2) because you're not going to be -- you're not going
13 to know what the -- what it is that you're objecting to
14 until you have the sources that the other side is relying
15 on. So it seems to me that that notice needs to come
16 later, and then in response to the point about 152.305, I
17 don't think -- well, if there is a conflict, I think we
18 resolve it in (3) by saying if there's a conflict state
19 law prevails. Now, maybe we don't want that to be the
20 answer, and if so, we would need to change that.

21 CHAIRMAN BABCOCK: Okay. I think Frank
22 makes a good point, especially since the Chief and Justice
23 Boyd are not here. Why don't we go through the rule
24 section by section and discuss it that way and then maybe
25 it will be easier to follow for people that are not here,

1 even though the substitute chief is here, so she's the
2 important one.

3 Judge Estevez, you've thrown me off here.
4 How come you're not over there?

5 HONORABLE ANA ESTEVEZ: Because there wasn't
6 a seat. I was late. My flight -- they changed the flight
7 schedule so I can't get here.

8 CHAIRMAN BABCOCK: Okay. All right. You're
9 excused to sit on the right then.

10 HONORABLE ANA ESTEVEZ: But it's coming back
11 in another month. I'll be on time next time, but can I
12 say something or ask a question? I was concerned about
13 the --

14 CHAIRMAN BABCOCK: It's a free speech kind
15 of committee, so --

16 HONORABLE ANA ESTEVEZ: I'm sorry?

17 CHAIRMAN BABCOCK: It's a free speech
18 committee. You can say whatever you want.

19 HONORABLE ANA ESTEVEZ: Well, you mentioned
20 the temporary orders and how the timetables would work,
21 and I'm just really concerned about that because I would
22 think that if we're talking about a family law case and
23 we're talking about people with attorneys and this
24 actually applies, I mean, then there's a really high
25 probability that we're going to have temporary orders. I

1 mean, I think over half of -- the majority of cases with
2 the lawyers have temporary orders if they have to deal
3 with children, and so is it just the timetables -- I mean,
4 are we still allowed to consider the law that someone is
5 going to say is going to be proven up?

6 CHAIRMAN BABCOCK: Buddy.

7 MR. LOW: Yeah, let me make a comment on the
8 question of 30 days to 45. This was considered by this
9 committee, and we got input from the Court of Criminal
10 Appeals and everything, and we decided to change both 203
11 and 1009 or change so they would both be 45 days. That's
12 been voted on by this full committee, and it was approved,
13 but I make that comment. It doesn't mean we can't do
14 whatever anybody wants to do, but that's been done once.

15 CHAIRMAN BABCOCK: Okay. Let's look at
16 subsection (a), the proposed 308b. Subsection (a) being
17 applicability. Does anybody have any comments about
18 subsection (a), either subsection (a)(1) or (a)(2)? Yeah.
19 Justice Boyce, and then Robert.

20 HONORABLE BILL BOYCE: One observation about
21 the interplay between (a)(2) and (b)(2). I wonder whether
22 the content of (b)(2) more smoothly would fit under -- as
23 a second sentence of subsection (a)(2) because you're kind
24 of directing traffic about which parts of Rule 203 are
25 going to be applicable here, which ones are not going to

1 be applicable. It's a little bit awkward to start out
2 with applicability of Rule 308b, and subsection (1) says,
3 "Except as provided by subsection (b) this rule applies as
4 follows," and we go to (b), exceptions, (b)(1) is an
5 exception to Rule 308b and then (b)(2) is an exception to
6 a different rule. It's just a little bit confusing, and I
7 think it probably could be addressed with putting all of
8 the traffic direction under subsection (a)(1). Rules
9 203(c) and (d) apply, Rules 203(a) and (b) do not.

10 CHAIRMAN BABCOCK: Yeah. Good comment.
11 Robert.

12 MR. LEVY: Does Richard want to respond?

13 MR. ORSINGER: Let me say I like that
14 suggestion, but I'm wondering if we couldn't just
15 eliminate the subdivision (b) and just say "Applicability"
16 and just have (a)(1), (2), (3), and (4). We don't
17 necessarily need to distinguish between where it does
18 apply and where we have exceptions. Just put it all under
19 "applicability" and combine the two as Justice Boyce said.

20 CHAIRMAN BABCOCK: I think that was pretty
21 much Justice Boyce's idea.

22 MR. ORSINGER: Well, he wanted to move
23 (b)(2) and add it to (a)(2), and I want to get rid of (b)
24 altogether and just make it all (a).

25 CHAIRMAN BABCOCK: Okay. Robert.

1 MR. LEVY: I'm just pointing this out. We
2 talked about it on some of our subcommittee calls.
3 This -- I think the statute as well as the proposed rule
4 limits itself to suits brought under the Family Code
5 involving the enforceability of judgments or arbitration
6 awards. There could be circumstances, I would think, that
7 there would be an arbitration award that might involve
8 issues relating to the parent-family relationship that are
9 not brought in a family court, and I think that we
10 should at least consider that possibility, but I think
11 that the statute limits us to what we're doing, but, you
12 know, I'm curious from the family practitioners'
13 perspective what do you do if somebody tries to enforce an
14 arbitration award in a district court case that's not a
15 family court?

16 MR. BRESNEN: Let's ask somebody who
17 actually practices.

18 MR. LEOPOLD: Richard, in one of our phone
19 calls we discussed that, and I think it was the conclusion
20 that if someone does bring a civil case that would fall
21 under this it would be the responsibility of the opposing
22 party to come up and say, "This needs to go to family
23 court. This is brought under 308b."

24 MR. LEVY: Well, would that -- would this
25 statute or this rule still apply? Because the action

1 itself wasn't brought -- it doesn't explicitly bring
2 itself under the Family Code.

3 MR. BRESNEN: Are you going to have a
4 parent-child case that's not governed by the Family Code?

5 MR. ORSINGER: No, but you sure could have a
6 property case that's -- a post-divorce property case could
7 be -- like a monetary judgment could be filed under the
8 Uniform Foreign Judgment --

9 CHAIRMAN BABCOCK: Right.

10 MR. ORSINGER: -- I think, and my experience
11 in Houston and Dallas where we have differentiating
12 courts, family law and civil, is that if the civil law
13 judge gets a whiff that it's a family law case that's been
14 filed in his or her court they'll transfer it over to the
15 family law judge, all of whom are sharing the same
16 courtroom right now because of the flood I understand, but
17 I don't -- I think that it's entirely possible that
18 someone could plead their way out of this statute by
19 attempting to treat this judgment as something other than
20 a divorce decree.

21 CHAIRMAN BABCOCK: Justice Christopher.

22 HONORABLE TRACY CHRISTOPHER: I have a
23 question in (a) whether we would want to add in the words
24 "recognition for enforcement of a judgment or arbitration
25 award," because sometimes if someone, for example, says

1 "I'm suing for divorce," and the answer is "We were
2 already divorced 10 years ago in Mexico," I'm not seeking
3 to enforce the Mexican divorce decree. I'm just using
4 that as a defense to your action for divorce, so to me
5 those are two different words.

6 MR. ORSINGER: Really.

7 CHAIRMAN BABCOCK: Roger.

8 MR. HUGHES: Yes, I think that's good
9 because the word -- the definition of comity under the
10 statute includes recognition, but putting it in a rule
11 would certainly save a busy trial judge from having to
12 open a second book to figure it out.

13 CHAIRMAN BABCOCK: All right. Any other
14 comments on subsection (a)?

15 MS. GREER: Just one other point.

16 CHAIRMAN BABCOCK: Yeah, Marcy.

17 MS. GREER: I'm sorry. One other point on
18 the word "recognition" is that under the UNCITRAL, the
19 Convention on Recognition of Foreign Arbitral Awards, they
20 use "recognition" as well, so I think it's important that
21 we add that because we're talking about arbitration as a
22 possibility.

23 CHAIRMAN BABCOCK: Okay. Thank you.

24 MR. BRESNEN: By the way, the Ashfaq case
25 was a question of recognition of a Pakistani divorce.

1 CHAIRMAN BABCOCK: Somebody had their hand
2 up. Was it Justice Gray? Yeah.

3 HONORABLE TOM GRAY: I would just comment,
4 first, I love the fact that it starts off with
5 applicability and tries to explain that. One of the rules
6 we get to later in the day I think -- it's the last one
7 we're going to discuss -- the applicability section is
8 like (f) or (g) of the rule. I like for it to be at the
9 beginning.

10 To address Richard's comment on the
11 potential loss of the policy of the statute in its
12 interpretation by a court later, I was wondering if like
13 in some of our rules, although it tends to be at the
14 beginning of the rules, we could have a section in here
15 either (a) or now that we apparently aren't going to have
16 a (b) maybe it would be the new (b) section that would
17 bring over that subsection (5) from the statute, items
18 (a), (b), (c), and (d) as to the policy of what this rule
19 is doing.

20 Because to further what Justice Busby was
21 saying, this really -- this rule really conflates what I
22 always viewed as two very distinct concepts of foreign
23 law; that is, the object of the trial court, and in
24 particular if you're submitting something to a jury,
25 that's going to be what is the law that is submitted to

1 the jury, and that law may be a foreign law. It can
2 actually be a foreign law of another state, or it can be a
3 foreign law of another nationality, but then there's
4 interpretation of documents under that law that may or may
5 not -- one, the document may be entirely in English, but
6 it may be foreign law may be applied to it, but more --
7 probably more likely is that it is a document in a foreign
8 language that it has evidentiary value that is being
9 translated, and that's very different than what is the law
10 of a foreign jurisdiction that the jury is going to be
11 charged on.

12 And so this rule definitely seems to
13 conflate those two, and those are obviously under 203 and
14 1009 under our current rules. So with the policy brought
15 over into it maybe that helps guide us, but also it seems
16 to be some -- I don't know, I guess I would argue for -- I
17 was interested to see what Richard's justification for not
18 amending 203 and 1009 to simply accommodate the statute
19 was, and he addressed that, and so I'll leave that where
20 it is, but that concerns me in the fact that what we're
21 doing here.

22 CHAIRMAN BABCOCK: Okay. Anything else on
23 (a), on subsection (a)? Okay. Let's move on to (b).
24 Richard, I may be wrong about this, but the statute
25 references the International Child Abduction Remedies Act,

1 22 U.S.C., Section 9001, and in (b)(1), exceptions, we
2 reference the same thing, but we seem to broaden it to the
3 Hague Convention on International Child Abduction,
4 including the statute.

5 MR. ORSINGER: Yeah. The -- I think that
6 the reason for that is to be helpful.

7 CHAIRMAN BABCOCK: Well, we're always trying
8 to be helpful.

9 MR. ORSINGER: Right. So there's an
10 international convention that was adopted in The Hague --
11 in the Netherlands for intercountry custody flight
12 litigation, where someone leaves the traditional home and
13 goes to another country and initiates a custody
14 proceeding; and it was very, very problematic; and it
15 still is today for Japan and some other countries that
16 have never adopted it; but the United States has ascribed
17 to that convention, which gives it treaty status, and then
18 we've adopted federal statutes that give federal district
19 courts the jurisdiction to vindicate your rights under the
20 treaty. So as a result of that you have some instances in
21 which federal district courts are litigating custody-like
22 issues. They don't litigate best interest, but they
23 litigate the habitual home of the child and whatnot, so
24 the International Child Abduction Remedies Act is the
25 implementation of our treaty obligations under the Hague

1 Convention. Does everybody agree with what I just said?

2 MR. HAYS: Yeah.

3 MR. ORSINGER: So the question is are we
4 just going to refer them to the federal statute, or are we
5 going to tell them the federal statute in the context of
6 the Hague Convention?

7 CHAIRMAN BABCOCK: Is the federal statute
8 more narrow than the convention?

9 MR. ORSINGER: Well, it's tailored to
10 federal district court jurisdiction and procedure.

11 MR. HAYS: Yeah. It is actually the
12 implementation statute, and so, no, they don't conflict.
13 It just is like Richard was saying. It's just a
14 procedural part of implementing the actual treaty itself.

15 MR. BRESNEN: I might say one other thing,
16 Mr. Chairman. Mr. Webb, Brian Webb, was particularly
17 concerned about mentioning the Hague, because when they --
18 when they go into court, they tend to say, "Your Honor,
19 this is a Hague case", and the court may not be
20 immediately aware of the citation here, but the jargon in
21 the courts is the -- it's a Hague case, and so he thought
22 it would be particularly helpful, and we agreed with him,
23 to get the label out front out there without modifying
24 House Bill 45.

25 CHAIRMAN BABCOCK: Okay. The only thing

1 that struck me was that you -- when you say, "The Hague
2 Convention including the International Child Abduction
3 Remedies Act" that suggests something more.

4 MR. ORSINGER: Okay. So you can bring a --
5 you can bring a Hague case in Texas courts under Texas
6 procedure invoking the convention. Would y'all agree with
7 that?

8 MR. HAYS: Correct.

9 HONORABLE BRETT BUSBY: Is it
10 self-executing?

11 MR. ORSINGER: In what sense do you mean?

12 HONORABLE BRETT BUSBY: Well, I mean, if you
13 look at the restatement on foreign relations law and all
14 of that you have to decide is the convention
15 self-executing and if it is -- or does it require
16 implementing legislation, and so we may not be being
17 technically correct if we say "brought under the Hague
18 Convention" because it may not be that you can sue under
19 the Hague Convention. You may have to sue -- if it's not
20 self-executing you have to sue under the statute that
21 implements the Hague Convention.

22 MR. ORSINGER: Well, the -- I haven't read
23 the Hague Convention real recently, but I believe that it
24 requires the contracting states to establish agencies
25 through which the government will enforce this

1 adjudication of the habitual residence of the child.
2 That's not what happens if you file a Hague case in Texas
3 courts. In Texas courts you file a proceeding for habeas
4 corpus or whatever to get possession of a child on the
5 grounds that it was taken from the habitual residence, so
6 you're not under a federal statute. You are certainly not
7 under U.S.C. 9001 because you're not in a federal district
8 court, but you are under the Hague Convention because
9 there are certain standards in the Hague Convention, but
10 the portion of the Hague Convention that requires that you
11 create a government agency is not what's being invoked.
12 It's the standards for how you rule on the dispute. Did
13 that clarify your point at all?

14 CHAIRMAN BABCOCK: Pete Schenkkan has got
15 the answer to all of that.

16 MR. SCHENKKAN: No, I don't. I have a
17 question that might lead to at least clarifying in my mind
18 what this discussion is about. Would it -- would it be
19 correct to change "including to" as "implemented under"?

20 MR. ORSINGER: No, because --

21 MR. SCHENKKAN: And that's really my point.
22 If not, what do we need to do to make it comply with the
23 statute we're trying to implement without screwing
24 anything else up?

25 MR. ORSINGER: Okay. So "implement" and

1 "under," in my opinion, this federal statute means you're
2 in a federal district court invoking federal jurisdiction,
3 but your rights under the Hague Convention could be
4 vindicated in a state court proceeding, too, so I think it
5 can't be just limited to a federal court proceeding.

6 MR. SCHENKKAN: In a state court proceeding
7 that is not subject to the standards of the federal
8 statute?

9 MR. ORSINGER: No. In my opinion, they're
10 subject to the standards of the treaty but not the
11 statute. What does anyone else think?

12 MR. BRESNEN: I think Karl --

13 MR. ORSINGER: Karl, what do you think?

14 MR. HAYS: Well, what I believe, though,
15 Richard, that ICARA, which is the federal statute,
16 actually creates concurrent jurisdiction. There's part of
17 the statute that says there's concurrent jurisdiction, and
18 I believe that statute would --

19 MR. ORSINGER: So if you file a lawsuit in
20 state court, are you under 22 U.S.C. 9001, or are you
21 under the Texas Family Code and you're invoking the Hague
22 Convention?

23 MR. HAYS: I believe the latter.

24 HONORABLE BRETT BUSBY: Or under the Hague
25 Convention.

1 MR. HAYS: Yeah, you're under the Hague
2 Convention.

3 HONORABLE BRETT BUSBY: Only if it's
4 self-executing.

5 CHAIRMAN BABCOCK: Peter, did you have
6 something?

7 MR. KELLY: What I find troublesome is it
8 seems to -- the rule seems to combine two distinct
9 concepts. One is proceeding in the Texas court where you
10 have to determine what foreign law is, you know, a
11 contract. You know, you have to determine what Australian
12 law is so the Texas court can render judgment, and the
13 second concept is domestication of a foreign judgment,
14 which is governed by the Uniform Enforcement to Foreign
15 Judgment Act.

16 MR. ORSINGER: Only if it's a money
17 judgment.

18 MR. KELLY: But why do we have to have a
19 completely separate procedure for Family Code that is
20 different from -- that departs from Uniform Enforcement of
21 Foreign Judgment? But the rule seems to combine -- it
22 goes back and forth. Even in section (a) it says, "This
23 rule applies to enforcement of a judgment or arbitration
24 award," which makes it sounds like it's domestication.
25 Then it goes "based on foreign law in a suit brought under

1 the Family Code." So that makes it sound like it's going
2 toward the Texas judgment, bringing foreign law into a
3 Texas judgment, and it might help to break that out in two
4 different subsections. So one is application of foreign
5 law, and one is domestication of a foreign family law
6 judgment.

7 MR. ORSINGER: What do you gain by doing
8 that?

9 MR. KELLY: You make it a lot more clearer
10 because it goes back to what are you giving notice of?
11 Are you giving notice of -- to someone of a Rule 203
12 proceeding what foreign law you're asking the Texas court
13 to apply, or, you know, a foreign statute, as opposed to a
14 foreign judgment, which has been adjudicated by a foreign
15 court. And, you know, according to the attorney general's
16 letter if they follow due process doesn't -- you can trust
17 the morals of the populous of the state of Texas then it's
18 not going to be enforced. That's two different things.
19 One is an Australian statute, another one is an Australian
20 judgment.

21 MR. BRESNEN: This is directly out of the
22 House Bill 45.

23 MR. ORSINGER: But we're assuming -- in this
24 scenario we're assuming we have either a judgment or an
25 arbitral award, so they're enforcing something that's a

1 judgment or judgment-like, but we're attacking it on the
2 basis of the surrounding law --

3 MR. LEVY: Right.

4 MR. ORSINGER: -- under which the judgment
5 or arbitral award was arrived at. So in sort of an odd
6 way it's a fusion of the two concepts in that somebody is
7 trying to get recognition of a judgment that was rendered
8 by a court that didn't offer due process of law or in
9 which women have no fundamental rights or whatever the
10 complaint is.

11 MR. LEVY: I think you need to understand
12 that foreign law to address the comity issue so that if
13 you don't plead it in the right way or follow that
14 provision, if you bifurcate then you could have a
15 recognition of a foreign judgment without the ability to
16 prove up the foreign law that supports or defeats its
17 application under those comity principles.

18 CHAIRMAN BABCOCK: Richard Munzinger.

19 MR. MUNZINGER: I address this to the
20 practitioners in the family law. Is it possible that you
21 could have a case where a judgment of a foreign court is
22 offered as a defense to this International Child Abduction
23 Remedies Act relief, whether it's brought in state or
24 federal court, because if I'm the defendant and I say, "I
25 took my son to Germany because I have a German court's

1 judgment giving me custody of my son, and I didn't kidnap
2 him," and I then file whatever it is under section --
3 subsection (a). Is it possible for the two to overlap,
4 and if so, does the rule apply to that situation? It
5 doesn't appear to be so on its face.

6 MR. ORSINGER: Yeah, I would say that
7 because the House Bill 45 said that the House Bill 45
8 initiative doesn't apply to Hague cases, our rule doesn't
9 apply to Hague cases, and that if someone brought a
10 custody case here in Texas and someone else has a custody
11 adjudication out of Germany and your opposition to that is
12 that Germany was not the habitual residence of the child
13 so the Texas court is not bound by the Germany custody
14 adjudication, that's all operating over there in the Hague
15 world, and it doesn't have anything to do with this rule.
16 I think that's what the Legislature said, and so we have
17 to live with it.

18 CHAIRMAN BABCOCK: Well, Richard, if the --
19 if, quote, Hague cases are broader than the federal
20 statute then the Legislature didn't say that explicitly,
21 did it?

22 MR. HAYS: Yeah, if I may add, Richard,
23 152.302 of UCCJEA is -- that's the actual implementation
24 statute in Texas for the Hague Convention. It's under
25 this subchapter, "A court of this state may enforce an

1 order for the return of a child made under the Hague
2 Convention on the civil aspects of international child
3 abduction as if it were a child custody
4 determination." So that is what allows the -- a Texas
5 court to enforce the Hague Convention.

6 MR. ORSINGER: So the question is -- I think
7 that Richard Munzinger raised is we just throw Rule 308b
8 out if someone mentions the word "Hague." And that's kind
9 of what he's saying, right, is that all of this stuff
10 we're working on today will have no application even if
11 the Hague country is one that automatically awards custody
12 to the father because he has property rights in the
13 children, but I don't know that we have the freedom to do
14 differently because House Bill 45 --

15 MR. HAYS: Right.

16 MR. ORSINGER: -- says that the scope of the
17 statute does not include that, I believe. Somebody help
18 me out here.

19 CHAIRMAN BABCOCK: Well, it's section
20 22.0041(2)(e).

21 MR. GILSTRAP: The Court could adopt a
22 broader rule. It doesn't have to go to the -- it doesn't
23 have to have legislative authority --

24 CHAIRMAN BABCOCK: That's right.

25 MR. GILSTRAP: -- if it feels there's an

1 overlap.

2 CHAIRMAN BABCOCK: I think that's right.

3 MR. ORSINGER: It doesn't mention the Hague
4 in House Bill 45. It just says --

5 MR. HAYS: It says ICARA.

6 MR. HUGHES: It's Abduction Remedies Act.

7 MR. ORSINGER: Yes, the federal statute.
8 What section are you at, Roger?

9 MR. BRESNEN: Well, it also says, though, if
10 there's a conflict with state or federal law. So your --
11 in some sense you have a savings by one of the other
12 exceptions in the rule as drafted, but your idea about
13 making it more explicit with respect to these cases, the
14 primary concern here is that -- is that you can move
15 expeditiously to retrieve a kid under these things, and we
16 wanted to make sure that nobody read these deadlines to
17 give them more options and more time to string it out and
18 not go get the kid before he was secreted somewhere beyond
19 the ability to get them.

20 CHAIRMAN BABCOCK: Yeah, that makes sense.
21 Richard.

22 MR. MUNZINGER: Well, as I read these rules,
23 this rule that we're talking about, its -- I don't know
24 that it's a principle purpose, but certainly an effective
25 rule is to address how you get evidence of foreign law

1 before the forum. I don't know because I don't practice
2 in this area whether the Hague Conventioin statute has
3 comparable provisions or not. But I do see it is possible
4 if I were the defendant that I would want to prove that I
5 have the custody of my son based upon a judgment of the
6 foreign court where I lived or live or whatever, and this
7 is a procedural rule in part at least that seems to
8 address how I prove my judgment, how I prove my right to
9 my son, et cetera. I'm not trying to frustrate the Hague.
10 I'm saying to the judge, I say, "Judge, I'm just trying to
11 prove my judgment, and I want to do that," or do I have to
12 do that? And that's my question to you-all because it
13 does seem to me that there is a fact scenario where these
14 two may overlap.

15 MR. ORSINGER: So, Chip, I would say that to
16 consider whether we should broaden it out as Richard
17 Munzinger's suggestion, we need to look closely as
18 subdivision (e) in the last page of House Bill 45 because
19 it says, "A rule adopted under this section does not apply
20 to an action brought under the International Child
21 Abduction Remedies Act, 22 U.S.C. Section 9001, et seq."

22 CHAIRMAN BABCOCK: Right. That's what I've
23 been talking about.

24 MR. ORSINGER: So if we're in a family court
25 proceeding in Texas under the Texas Family Code, are we --

1 is it brought under the International Child Abduction
2 Remedies Act or not, because if a state court action is
3 under the federal statute, even though it's in state
4 court, then House Bill 45 says the rule can't apply to it.
5 If the state court proceeding is under the -- is under the
6 Hague Convention but not under the federal statute then
7 we're free to write it in if we want to.

8 CHAIRMAN BABCOCK: Okay. I think that -- I
9 think you've articulated what the issue is. Now, the next
10 question is why would -- the Court is going to want to
11 know why we are going to broaden something that is not in
12 the statute. I think they have -- the Court has the
13 authority to do it, but why would they do it? What's the
14 justification for going beyond what the statute says?
15 Does that make any sense?

16 MR. MUNZINGER: Chip?

17 CHAIRMAN BABCOCK: Yeah. Richard first, and
18 then Karl.

19 MR. MUNZINGER: I'm the defendant in a suit
20 brought in an action authorized by the Hague Convention.
21 I file a counterclaim, or as my defense I'm going to file
22 it as a counterclaim an action to enforce the German
23 court's judgment under section so-and-so of the Family
24 Code. The two seem on their face to overlap. I'm
25 offering in evidence a judgment giving me custody of my

1 son, and I want to take advantage of these procedural
2 devices and these evidentiary devices to do so, and that's
3 what prompts my question. Again, I'm not -- I don't
4 practice in this area, but I do seem -- it seems to me
5 that they can conflict, that they do overlap, and it's
6 something someone needs to think about.

7 CHAIRMAN BABCOCK: Karl, Justice Busby has
8 had his hand up for a long time.

9 MR. HAYS: No problem. I will defer.

10 CHAIRMAN BABCOCK: We'll defer to him and
11 then to you.

12 HONORABLE BRETT BUSBY: I don't think we can
13 answer this question today. I think it needs more
14 research. I mean, I'm reading Second Circuit cases and
15 other cases around the country about --

16 CHAIRMAN BABCOCK: Oh, my goodness.

17 HONORABLE BRETT BUSBY: You know, because
18 there's nothing in Texas on whether the Hague Convention
19 is self-executing, but it sounds like that you can
20 actually bring a suit in state court under ICARA, under
21 the federal statute, and it may be that you can also bring
22 it under the state statute that Karl pointed out, which
23 would be covered by what's now (b)(3), and we would -- so
24 I -- I share your concern, Chip, about including the Hague
25 Convention in here, because I'm not sure it's correct to

1 say that any action is brought under the Hague Convention.
2 It sounds like it's brought either under ICARA or under
3 the state statute.

4 CHAIRMAN BABCOCK: Karl.

5 MR. HAYS: I'll let Richard go first.

6 CHAIRMAN BABCOCK: Always dangerous.

7 MR. ORSINGER: You know, Richard Munzinger
8 is concerned about the timetables, but these standards
9 that are behind House Bill 45 about "I'm not going to
10 recognize your German decree because you don't give due
11 process or you didn't give due process or you don't
12 recognize fundamental rights," that's not a defense to a
13 Hague Convention claim. So we have both timetables in
14 this proposed rule, but we also have implicit standards of
15 public policy that allows you to refuse to recognize a
16 foreign decree based on public policy and due process.
17 The international convention does not permit that kind of
18 analysis, I believe. Am I not right, Karl?

19 MR. HAYS: That's right.

20 MR. ORSINGER: So the procedural part of
21 what you're saying may be very attractive, but all of the
22 sudden the substantive law that's folded into this is in
23 collision with the federal law, so I don't know, Steve, if
24 that was on people's minds when they ruled out the federal
25 statute or whether they should have just ruled out Hague

1 generally or whether they meant just federal court
2 proceedings.

3 MR. BRESNEN: I think the combination of
4 that provision and the catch-all exception where it
5 conflicts with state law is what walls off these kinds of
6 cases from these time limits. Karl, is that a fair
7 statement?

8 MR. HAYS: Well, yeah, the intent behind
9 this was that it apply whenever a Hague case came into
10 court, whether it was in Federal court under ICARA or
11 whether it was brought under state law because this rule
12 only applies in state court, and so we mentioned the
13 federal statute because we were trying to find the
14 identifier for the Hague Convention, and that's why we did
15 it. It probably may have been better to have put into the
16 statute the Hague Convention or section 152.305 or
17 whatever section that was that I just cited.

18 CHAIRMAN BABCOCK: Yeah.

19 MR. HAYS: But the intent was not to have
20 this apply when you were in state court on a Hague case.

21 CHAIRMAN BABCOCK: Okay. Well, following
22 Justice Busby's suggestion, we've got one more meeting
23 before our deadline, so I think -- I'm just guessing, but
24 it's an educated guess, that the Court is probably going
25 to want some discussion about why we would broaden what

1 the Legislature has said. Whether they intended to
2 broaden it or not, I mean, why should the Court do that.
3 There's probably perfectly good reasons, and I think the
4 Court has authority to do it, but because we're not
5 limiting the statute and we're not going against the
6 statute, but why would they do that? They need to know
7 that. Buddy.

8 MR. LOW: Chip, could I expand Richard's
9 point about --

10 CHAIRMAN BABCOCK: Which Richard?

11 MR. LOW: What if you have a judgment for
12 custody in Pakistan and one in Israel, a conflict? Is
13 that the kind of thing that's contemplated here?

14 MR. ORSINGER: Sure, it would be included in
15 that because somebody would be advancing Pakistani law,
16 and the other would be advancing Israeli law, and they
17 would each need to mention it in their initial pleading,
18 and they would each have deadlines to object to the other
19 party's application.

20 MR. LOW: But do our rules as we've written
21 them take care of that situation like that, the time
22 limits and everything?

23 MR. ORSINGER: I think so. Now, the party
24 advancing Pakistani law has a deadline to put in their
25 initial pleading. The party opposing Pakistani law has a

1 deadline to respond, but it just so happens that the party
2 that's responding is going to be advancing a different
3 country's law. Did you say Israel? Or whatever you said,
4 and they'll have a duty with their first pleading to raise
5 the law they like, and then the other side will have a
6 responsive deadline. So in that sense we have two
7 timetables running simultaneously on the both parties.

8 MR. LOW: So we'll solve something. We
9 can't -- where there's conflict between Louisiana and
10 Texas like my Hartfield case, we can't go to federal court
11 now.

12 MR. ORSINGER: Huh-uh.

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

15 HONORABLE TRACY CHRISTOPHER: I think by
16 expanding an exclusion in (b)(1) we are actually going
17 contrary to the law. So to the extent that that is an
18 expansion of an exclusion, it is contrary to the law.

19 CHAIRMAN BABCOCK: Yeah, I think that's a
20 point well-taken. We may be frustrating the will of the
21 Legislature if you expand an exclusion.

22 HONORABLE TRACY CHRISTOPHER: Right.

23 CHAIRMAN BABCOCK: Whereas the other
24 argument would be the Court is perfectly free to exclude
25 whatever it wants in its rules.

1 HONORABLE TRACY CHRISTOPHER: Right.

2 MR. SCHENKKAN: But this is why we need more
3 research because if we have to countermand the Texas
4 Legislature because of a treaty to which the United States
5 is a party I think we get to do that.

6 CHAIRMAN BABCOCK: Yeah. That's why we need
7 more research. Yeah, Robert. Sorry I skipped you.

8 MR. LEVY: No, that's all right. So,
9 Richard, in answering Buddy's question the thought came
10 up, if the party that's advancing Pakistani law fails to
11 meet that 60-day deadline, what happens? They just lose,
12 and is it -- is it dispositive? Is it res judicata? I'm
13 concerned about the provision in (e)(2) that you have to
14 do it within 60 days or you lose, it sounds like.

15 CHAIRMAN BABCOCK: Justice Busby, and then
16 Frank.

17 HONORABLE BRETT BUSBY: It does appear that
18 from preliminary research that ICARA -- I'm sorry, that
19 the Hague Convention is self-executing in some respects,
20 but then the Legislature -- ICARA was proposed in order to
21 smoothly integrate it with the federal and state legal
22 systems that we have, and so it's ICARA that the federal
23 statute -- that creates the private right of action to
24 enforce rights recognized under the Hague Convention, and
25 it does it in both federal and state court. So from what

1 I've seen so far I can't see that you would -- that you
2 would actually bring the action under the Hague
3 Convention.

4 CHAIRMAN BABCOCK: Frank, did you have your
5 hand up? And then Judge Christopher.

6 MR. GILSTRAP: Well, I thought we had moved
7 on into (c). If we haven't I don't have any comments, but
8 when we get to (c) I'll have a comment.

9 CHAIRMAN BABCOCK: We're still in (b)(1), so
10 Justice Christopher, did you have anything?

11 HONORABLE TRACY CHRISTOPHER: Well, no, mine
12 was on (c) also.

13 CHAIRMAN BABCOCK: Okay. I can't face (c)
14 without the morning break, so let's take a 15-minute
15 break.

16 (Recess from 10:43 a.m. to 11:00 a.m.)

17 CHAIRMAN BABCOCK: I should have mentioned
18 this at the outset, but I was too intent on digging
19 Martha, but on a sad note, Carl Hamilton has resigned from
20 our committee, and it's because his wife is very, very
21 ill, and he feels he has to be at home and take care of
22 her. I told him that hopefully she will get better, and
23 if she did, if she does, I hope he will come back to us
24 because he has been on this committee for a long, long
25 time, sits right over there to my left, and has been of

1 great service to us and the state and the Court, very wise
2 and got a great sense of humor and very thoughtful in his
3 approach to our projects, so we will miss Carl. Hopefully
4 he'll come back, but I want to share that with you because
5 I told him I would, and he wanted me to tell you all that
6 he will miss you guys very, very much.

7 HONORABLE TOM GRAY: Do we have an emeritus
8 status with the committee, because he would certainly be
9 entitled to it if we had that, somebody that stayed on the
10 e-mail list and was invited to future committee meetings,
11 because --

12 CHAIRMAN BABCOCK: We could torture you
13 forever kind of status?

14 HONORABLE TOM GRAY: Yeah.

15 CHAIRMAN BABCOCK: He certainly would
16 qualify.

17 MR. ORSINGER: It's like the Mafia, you
18 can't retire.

19 CHAIRMAN BABCOCK: Speak to the whole
20 committee here, Richard. You had your hand up.

21 MR. ORSINGER: Yes. Okay. So we had
22 fruitful discussion during the break I wanted to share
23 with everyone.

24 CHAIRMAN BABCOCK: Okay.

25 MR. ORSINGER: First of all, remember that

1 Rule 203, Rule of Evidence, is about foreign law,
2 recognizing foreign law and Rule of Evidence 1009 is about
3 translating documents. 203 says, "The court is not
4 limited to admissible evidence in interpreting the foreign
5 law." So it doesn't have to be an affidavit, doesn't have
6 to be sworn testimony, doesn't have to be submitted by a
7 party.

8 So it looks like Rule 1009, which has to do
9 with the admissibility of written translations,
10 admissibility meaning into evidence, if you think about
11 it, if you have a fight that's come up like this you're
12 going to have either a foreign language decree or a
13 foreign language agreement that has an arbitration
14 provision in it and maybe a foreign language arbitral
15 award; and those are not law. And so those are going to
16 have to be proven evidentially; and if you're going to do
17 it through written translations you have to do it in
18 writing. You have to do it in compliance with Rule 1009,
19 Rule of Evidence. In the attack on the law not giving
20 fundamental rights or due process, it is not an
21 evidentiary -- it is not required to be evidentiary; and,
22 therefore, Rule 1009 really doesn't make any difference in
23 terms of proving what the foreign law is.

24 So thinking about it in one of these
25 proceedings, probably the fact questions are going to be

1 what the divorce decree says or the custody decree or the
2 arbitration agreement as well as the arbitral award if
3 it's in writing is evidentiary. If you are not allowed to
4 call witnesses, if you are not allowed to speak to the
5 court, that would be evidentiary; but if you're trying to
6 argue that there's no due process of law or that a certain
7 class of litigants is not afforded fundamental rights then
8 that would be nonevidentiary. So Rule 203 and Rule 1009
9 apply partially and to different components of what we're
10 doing.

11 Apart from that, Robert Levy said what
12 happens if you don't -- what happens if you miss these
13 deadlines? We don't say if you miss these deadlines, but
14 it does say -- it is written from the standpoint that a
15 party "must," so if somebody's lawyer doesn't file the
16 right thing within 30 days then I guess they've forfeited
17 all of their due process concerns. Or have they? And we
18 do have a -- you can extend the deadline for good cause,
19 but if it's just missed, have you just forfeited all of
20 your human rights or what? We don't address that in this
21 rule. I don't know whether we should or shouldn't, but we
22 should at least be aware that we're setting up a bunch of
23 rules, and we're not telling anybody what the consequence
24 is for violating the rule.

25 CHAIRMAN BABCOCK: Okay. All right. Roger.

1 MR. HUGHES: Well, I think it might be
2 important at this juncture to note where we're sort of
3 kind of going further than what the statute requires,
4 because HB 45, when it says that the -- it describes the
5 rules that are adopted; and it says, "For the party who
6 seeks enforcement, the rule has to provide for timely
7 notice to the other party, providing the information
8 required by Rule 203, and describing the authority to
9 enforce the judgment." Well, technically all they have to
10 do is plead the basis for the law. All of this stuff
11 about the materials they have to provide, we're kind of
12 injecting that in.

13 Now, I think that's a good idea. I think we
14 ought to set down deadlines for when they have to provide
15 translations and supporting materials, and, you know,
16 professors' affidavits and the like, and the same thing
17 goes for the opponent. They require -- it says that "The
18 party who intends to impose enforcement" -- this is what
19 the statute -- "provide timely notice to the court to
20 include an explanation of the party's basis for
21 opposition, including stating whether the party asserts
22 the judgment or award violates constitutional rights or
23 public policy." I mean, technically all we could do is
24 say all you have to do is plead your basis, et cetera.
25 All of this stuff about what materials you have to

1 provide, et cetera, we're kind of putting that in, and I
2 think it's good. I mean, I think if the court is going to
3 do its job to make a very difficult and important
4 decision, there ought to be rules of the road about when
5 these materials get provided.

6 CHAIRMAN BABCOCK: Okay.

7 MR. HUGHES: But that's what we are doing
8 because the statute just says all you've got to do is give
9 notice to the other side and tell them why. The rest
10 we're putting in there and -- but I think that's good. I
11 think we ought to.

12 CHAIRMAN BABCOCK: Okay. Justice
13 Christopher.

14 HONORABLE TRACY CHRISTOPHER: With respect
15 to the notice, again, I would encourage that we put
16 "recognition" there in addition to "enforcement." There's
17 a difference between (1)(a) that talks about a pleading
18 and (2) which talks about a petition, and as we talked
19 about sometimes it will be in an answer that you're going
20 to raise the foreign law, so there's a little bit of a
21 problem there. To me I am concerned about these time
22 limits. It's very difficult to get your ducks in a row in
23 60 days, hire an expert, because often it's a question of
24 an expert testifying, you know, "This is a copy of this
25 document, this is what it means, and this is the law," and

1 sometimes everyone will agree that a particular law
2 applies to the particular document, but they disagree on
3 what the law of that foreign country is, and to me this
4 60-day time limit is very difficult to meet in that kind
5 of a complicated case.

6 So my suggestion is you have to give notice
7 that you intend to rely upon the Mexican judgment, either
8 in your petition or in your answer, and that the court
9 should promptly hold a hearing to determine, you know,
10 what the issue is between the parties, is it -- are we
11 confused about the translation, are we confused about the
12 law, and set a schedule for exchanging this information,
13 and then hold the hearing. I'm very reluctant to have
14 these sort of deadlines in that kind of a case, because
15 it's difficult. I mean, if you're the plaintiff you can
16 get a lot of that work done before you file your petition,
17 but if you're responding, you're in a much tighter time
18 frame to try and get all of the information that you need.

19 CHAIRMAN BABCOCK: Yep. Frank.

20 MR. GILSTRAP: Now that we're into (c) on
21 notice, first of all, (1)(A) and (2) use the term -- talk
22 about "serving on each other party." I know that's in the
23 statute. It's terribly clumsy.

24 CHAIRMAN BABCOCK: Hang on. You said
25 (1)(A). You mean (a)(1)?

1 MR. GILSTRAP: (1)(A) says --

2 MR. ORSINGER: (c)(1)(A).

3 CHAIRMAN BABCOCK: (c)(1)(A).

4 MR. GILSTRAP: (c)(1)(A) and (c)(2) both
5 talk about serving on "each other party." (C)(2) says
6 "served on all parties." That's what the rules generally
7 use. That's better. I think we ought to use that. Now,
8 it talks about in (1)(A), the original pleading, and then
9 down in (2) -- in (2), it talks about the original
10 petition. Are those the same thing, or does (2) mean 60
11 days after the start of the lawsuit?

12 MR. BRESNEN: It should be pleading.

13 MR. GILSTRAP: Okay. Okay. If it means --
14 okay. So (2) should say "original pleading." Now, I have
15 a problem with that because, you know, divorce, like any
16 other litigation, can morph into areas that aren't
17 expected. It may start out as an uncontested divorce or a
18 quarrel over property and then it explodes into some type
19 of domestic relations war over children, and, you know,
20 well, I want to prove up foreign law on the custody issue,
21 and, well, too late. It's you didn't put it in your
22 original petition, but that wasn't at issue in the
23 original petition. Obviously a trap there.

24 Now, I simply don't really understand what
25 (b)(2) is talking about. It says "used to prove foreign

1 law." Does that mean proving what the foreign law is or
2 whether the foreign law is applicable? If it's the latter
3 then Justice Busby's opinion in the court of appeals is
4 one of the things that's in English that needs to be
5 included. It seems to me there is a drastic difference
6 between, say, law of an English-speaking country where the
7 material might be quite voluminous and the law of an
8 non-English-speaking country where the English material
9 may be very narrow. Is this about prior translations of
10 the applicable law, or are we talking about larger
11 material about how the foreign law works? I can't really
12 tell from this.

13 CHAIRMAN BABCOCK: You said -- hang on. You
14 said -- you said (b)(2). You mean (c)(2)?

15 MR. GILSTRAP: No, I meant (2), not (b)(2).

16 CHAIRMAN BABCOCK: (c)(2), right?

17 MR. GILSTRAP: (c)(2), yes, I'm sorry.
18 (c)(2). All of those comments were about (c), notice.

19 CHAIRMAN BABCOCK: And specifically
20 subsection (2).

21 MR. GILSTRAP: Subsection (2), yes.

22 CHAIRMAN BABCOCK: (c)(2). Yes.

23 MR. BRESNEN: The phrase used, "to prove
24 foreign law" is taken out of Rule 203, so whatever it
25 means there it would mean it here. I was trying to

1 accommodate here Justice Busby's comment earlier, which
2 was correct, that we had left out what happens if it's in
3 English, so I just parroted the language in 203.

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

6 HONORABLE ANA ESTEVEZ: Just to continue
7 with something that Frank just made me think of, also, if
8 you file your original answer and then you realized, oh, I
9 have this foreign law I can use, or foreign judgment, then
10 I guess you could just then file an original
11 counter-petition and you can start with your new 60 days?
12 Is that right?

13 MR. BRESNEN: If it's an original pleading
14 it would seem to be right under --

15 MR. GILSTRAP: Why does it have to be
16 original?

17 HONORABLE ANA ESTEVEZ: Well, you have the
18 word "original." I mean, if it's supplemental and it goes
19 back to your original, aren't you part of your original
20 anyway, so what if you just supplemented because a
21 supplement is -- as long as you don't amend your pleading
22 and you just supplement it, it's still part of the
23 original petition, right? So I'm just asking.

24 MR. BRESNEN: No, it's a good question. The
25 reason we tied everything back to the original pleading

1 was because everything in 203 and 1009 talked about so
2 many days before trial, and I think the group's conclusion
3 was, was that we needed to tie back from the start of the
4 lawsuit, but the questions you're raising are perfectly
5 good questions. There is a catch-all in here that says
6 the court can alter the time limits for good cause shown.
7 So if that's broad enough to accommodate that then --

8 CHAIRMAN BABCOCK: Okay. Yeah, Richard
9 Munzinger.

10 MR. MUNZINGER: I just want to join in
11 Frank's comment. I think Frank's comment is right on. To
12 use the words "original pleading" is not a time limit.
13 It's a designation of a particular pleading and is a trap
14 for the unwary where the issue does arise later, and I
15 think it's a matter of concern.

16 CHAIRMAN BABCOCK: Yeah. Justice Brown.

17 HONORABLE HARVEY BROWN: I'm a little
18 concerned by whether (c) should cover more than just
19 notice. Maybe we should require a motion. If it's just
20 something that's filed in the original petition and the
21 answer, it may never be called to the attention of the
22 court, and it seems like we need this to be moving forward
23 where somehow the court is notified about it. Otherwise,
24 I don't see any way that this forces the court to take
25 action and doesn't kind of trigger a number of things to

1 happen, particularly the hearing. I mean, the court needs
2 to know about it in time to set it for the hearing that's
3 required later.

4 CHAIRMAN BABCOCK: Justice Gray.

5 HONORABLE TOM GRAY: I wanted to join
6 Justice Christopher's concerns about 60 days being
7 problematic to get, you know, the various ducks in a row;
8 but always in an effort to avoid progress, I wanted to go
9 back to (b)(3) and address the question of whether or not
10 the rules we write are laws, because it seems to me we've
11 created inherent conflict because I always thought they
12 were, and I say "we write." We don't write. We
13 recommend, and somebody -- Martha signs off on them.

14 CHAIRMAN BABCOCK: Martha.

15 HONORABLE TOM GRAY: And that is the final
16 authority over there. So it would seem to me that the
17 rule, any federal or state law would actually be statutes
18 or Constitution as opposed to law, since rules inherently
19 are, so anyway.

20 CHAIRMAN BABCOCK: Roger, then Carl.

21 MR. HUGHES: Going back to this exception
22 about under (c)(2), first, I'm not sure the notice should
23 be keyed to when the petition is filed, because if you are
24 the petitioner -- the original petitioner, you may have to
25 effect service abroad, and having seen this sometimes --

1 I've got one case now where there's still two years later
2 they haven't accomplished service in Mexico, and so
3 that -- it may be better to key it to the date of service
4 on the respondent than on the date of filing.

5 The second one is to eliminate the problem
6 about original petition, what are we talking about. It
7 might be better to say instead of "the party's original
8 petition" to put "the party's first pleading seeking
9 enforcement." That's just a thought. That might clear it
10 up, and so, you know, a party might amend themselves into
11 it when they didn't the first time, and it would also
12 eliminate the problem of when the respondent files a
13 counter-petition seeking enforcement.

14 CHAIRMAN BABCOCK: Good point. Karl.

15 MR. HAYS: I wanted to -- Justice
16 Christopher, on your point, so what you see as better a
17 solution for this would be that once the issue has been
18 joined that there's like a pretrial hearing before the
19 court, and at that point the court has the opportunity to
20 set the individual deadlines?

21 HONORABLE TRACY CHRISTOPHER: Yes. Because
22 sometimes it's not really a matter of translation. It's a
23 matter of what does this mean under the particular law of
24 the state. Other times the issue is going to be it's not
25 the translation but did I get due process in the foreign

1 country, and that requires other experts, other experts
2 that don't just talk about what the law is in the country,
3 but other experts that talk about many things in
4 connection with a foreign country, that, you know, might
5 go into your determination, so --

6 MR. HAYS: Well, and that would also solve
7 the issue of bringing the notice up that was mentioned a
8 second ago to where there's a motion would be I guess
9 filed with the court for the pretrial hearing --

10 HONORABLE TRACY CHRISTOPHER: Right.

11 MR. HAYS: -- and that would then let the
12 court know that that issue was going to be something that
13 needed to be decided.

14 HONORABLE TRACY CHRISTOPHER: I just think
15 that, you know, we're running into, you know,
16 constitutional concerns with these tight deadlines.

17 CHAIRMAN BABCOCK: Professor Hoffman.

18 PROFESSOR HOFFMAN: So I just want to kind
19 of echo that and say I think much of what we have here in
20 notice are really pleading requirements that you're
21 imposing; and if that's what they are, we ought to call
22 them that and then there ought to be a separate procedure
23 by which the party triggers the sequence that leads to a
24 hearing. You ask the court by way of motion for whatever
25 it is that you want, and then that in turn creates the

1 hearing process that Tracy was talking about.

2 CHAIRMAN BABCOCK: Okay. Anybody else have
3 any comments? On (c), notice. Kennon.

4 MS. WOOTEN: Just one comment, and that is
5 Rule 5 of the Texas Rules of Civil Procedure does give the
6 judge a mechanism I think to enlarge the time, so if
7 there's concern about potentially not meeting the
8 statutory goal of prompt decision-making by virtue of
9 incorporating a procedure for an additional hearing, an
10 alternative is either to let Rule 5 do some of the legwork
11 or do what some of the other rules do and expressly say
12 "unless otherwise ordered" or something along those lines
13 to give the parties some awareness that they can seek
14 another order from the court.

15 CHAIRMAN BABCOCK: Okay. Good. Anything
16 else on (c), notice? All right. Let's move to (d),
17 objections. I know we've already had some comments about
18 (d), but any thoughts about subsection (d)? Yeah, Pete.

19 MR. SCHENKKAN: In (d)(2), the "explain the
20 basis for the party's opposition and whether the judgment
21 or arbitration award violates constitutional rights or
22 public policy." I would ask if it wouldn't be best to
23 insert after the word "whether," "whether the party
24 asserts that the judgment or arbitration award violates"
25 and so forth. That's what the statute says, and I would

1 think that at this stage in the objections, the task is to
2 find out if they do assert it. If you don't put that,
3 it's sort of ambiguous as to whether you're saying explain
4 how it -- what it violates, and I don't know whether you
5 want to require that at that point or whether the briefing
6 on this can be later.

7 CHAIRMAN BABCOCK: Great. Richard.

8 MR. ORSINGER: As a guide to drafting, if
9 we're going to do an alternative such as Justice
10 Christopher and others have suggested that this be a
11 deadline to plead your case but not a deadline to put up
12 all of the proof, what would the deadlines to plead be?
13 If you're not gathering your expert witness testimony and
14 filing and everything, all you're doing is advising the
15 other side and the court that you're going to seek
16 enforcement or oppose enforcement? You didn't comment on
17 the 60-day period, Justice Christopher. Is that too quick
18 to plead if all we're doing is pleading?

19 HONORABLE TRACY CHRISTOPHER: No, I think
20 that's fine for pleading.

21 MR. ORSINGER: Okay.

22 HONORABLE TRACY CHRISTOPHER: With the idea
23 that, you know, you can in good faith assert that you
24 think it did violate constitutional rights, you know,
25 without having to have your expert ready to go on that

1 point.

2 MR. ORSINGER: And then rather than have a
3 deadline relative to the hearing to produce your proof
4 you're suggesting that the court would set the deadline,
5 so that means if someone files a motion, you have a
6 hearing on setting deadlines for proof and then after that
7 expires then you have your hearing on the issue itself.

8 HONORABLE TRACY CHRISTOPHER: Yes.

9 MR. ORSINGER: So that's two hearings.

10 HONORABLE TRACY CHRISTOPHER: Yes.

11 MR. ORSINGER: Okay.

12 CHAIRMAN BABCOCK: Okay. Anybody else?
13 Yeah, sorry, Lisa. I can't see you unless I lean over, or
14 you do.

15 MS. HOBBS: On (d)(1) the use of the word
16 "receiving" isn't typical for rules. I think that we
17 typically use service instead of receipt.

18 CHAIRMAN BABCOCK: Yeah. Okay, anything
19 else? All right. Let's go to (e), translations.

20 MR. ORSINGER: So, Chip, before we get into
21 the specifics I just wanted to reiterate what I said
22 before. It seems to me that the proof of the foreign law
23 is not going to require translations in compliance with
24 1009 because the court is not limited to admissible
25 evidence on considering the foreign law, but on

1 translating the judgment or the arbitration agreement or
2 the arbitration award or having someone testify that this
3 party was not allowed to call witnesses or not allowed to
4 testify. That is evidentiary. So I think we need to keep
5 in mind that the translations part here, if we're invoking
6 1009, we're only talking about translations of the decree,
7 the agreement. We're not talking about translations of
8 the foreign law. Apparently you don't have to use 1009 to
9 translate the foreign law. You can use 203. You can just
10 throw it in.

11 MR. GILSTRAP: I have a problem with that.

12 CHAIRMAN BABCOCK: Frank.

13 MR. GILSTRAP: Well, Rule 1009 talks about
14 translation of, quote, "foreign language documents," and
15 you know, the question is does that mean the decree or is
16 that something broader? (e)(1) in this rule talks about
17 the judgment or award to which this rule applies is
18 governed by Rule 1009, so I guess it's a foreign language
19 document. It might be nice to say that in part (1), but
20 then you get down into (e), (e)(3), it says, "If you
21 contest the accuracy of the party's translation of a
22 foreign language document," which seems to me implicitly
23 broader than the judgment or arbitration award, and that
24 certainly needs to be clarified. And maybe there needs to
25 be some reference in (e)(1) saying that the judgment

1 arbitration award is a foreign language document under
2 Rule 1009.

3 MR. ORSINGER: Well, I don't think that
4 helps because Rule 1009 is a rule for what makes
5 translations admissible, and as far as the termination of
6 foreign law is concerned it's not an evidence issue, and
7 there's no admissibility involved. So perhaps it's unwise
8 for us to say that the judgments and the arbitration
9 contract are governed by 1009. Maybe we ought to be
10 careful, because do we, one, have a separate rule for the
11 judgment or the arbitration decree from translations of
12 foreign law, or should we just have one set of rules that
13 if you're given something in a foreign language you've got
14 the following duties and the following timetables?

15 MR. GILSTRAP: Well, I don't know which
16 portion you choose, but when you use "foreign language
17 document" in (3) it seems to me that that's broadening the
18 scope of subsection (e).

19 MR. ORSINGER: I agree with that, but I have
20 an even more fundamental problem, which is does 1009 even
21 apply to -- or what does it apply to? Does it apply just
22 to the judgment in the arbitration award, or does it apply
23 to documents attempting to prove what the foreign law is
24 translated into English?

25 MR. GILSTRAP: Well, if it's a problem then

1 now's the time to fix it.

2 CHAIRMAN BABCOCK: Richard Munzinger.

3 MR. MUNZINGER: Again, I don't practice in
4 this area, but if I were attacking a judgment or an
5 arbitration award, I doubt that I would limit myself to
6 the attack of the language or the words used in the
7 arbitration or the judgment itself. I would be looking at
8 the underlying law that led to the adoption of the
9 judgment, so that, for example, country A enforces a
10 certain rule that says women have no rights in respect to
11 men in these categories, and my client is a woman, and I
12 need to prove that in country A women don't have the same
13 rights as men. That's not the arbitration award. It's
14 not the judgment. It's the underlying constitution or
15 document or statute or code or whatever it is of that
16 country, and so am I going to prove that through an
17 expert? That becomes hearsay. "Professor X, what does
18 the constitution of country X say about men and women?"

19 "Well, it says" -- that's hearsay. "Well,
20 but I brought with me a translation." I mean, all of that
21 stuff it seems to me you've got to anticipate and be sure
22 that the other side has a chance to look at the underlying
23 documents, and they need to be identified. Now, again, I
24 don't do this for a living. I've never done it, by God's
25 good graces, but it does seem to me that that's the way it

1 might work out, and I don't know if these rules -- and
2 some of these comments address that.

3 MR. BRESNEN: In the Ashfaq case the
4 Pakistani law was proved up by an expert, by dueling
5 experts.

6 MR. MUNZINGER: Proven up by what?

7 MR. BRESNEN: Experts, by expert testimony.

8 MR. MUNZINGER: And again, that raises the
9 question. If part of the object here is to give notice to
10 the adversary that you're going to prove the Pakistani
11 Constitution and you're going to do it through an expert,
12 are you going to let the expert just testify to what it
13 says? That seems to me to be hearsay. And so "Well, but,
14 Judge, I brought it with me," but you didn't give me 60
15 days notice of it or whatever the time limit is, and you
16 didn't give me a chance to contest the translation of it.
17 I don't accept his translation. He's a hired gun. You
18 know, I don't -- these are problems it seems to me that
19 come up to the -- I don't do this, but good lord, I can
20 see where a fellow might be a one man law shop and doesn't
21 have all of the translators and all of the sophistication,
22 but he does have a client who's about to lose his or her
23 baby because of the law of Pakistan or some other place,
24 and this law is designed to protect that client. And
25 we're adopting rules that are going to be used by lawyers

1 of all sorts of backgrounds, all sorts of logistical
2 abilities and inabilities, and so if my expert comes in
3 and he's going to be permitted to say what the law is and
4 translate the document from the witness stand, you just
5 blew this rule right out of the saddle because you haven't
6 given me notice of what it says.

7 CHAIRMAN BABCOCK: Judge Christopher.

8 HONORABLE TRACY CHRISTOPHER: I understand
9 your concerns. I think that usually how we deal with
10 foreign law is -- and I've seen it more from a contractual
11 point of view rather than a decree, but sometimes it's a
12 decree. We get a translation of that document, and it
13 says what it says, and then if there's a question as to
14 what the document says or what it means under that
15 particular country's laws then we do have dueling experts.
16 No one translates the entire body of Pakistani law or
17 Mexican law that might apply to this particular area. We
18 have the dueling experts. So to me 1009 only needs to
19 apply to the actual judgment or arbitration award, and
20 then with respect to the other it's generally expert
21 testimony about what a foreign law is. That's the way
22 it's been done. Now, whether we want to continue that
23 process or not, I don't know, but that's generally how
24 it's done.

25 CHAIRMAN BABCOCK: Okay. Richard, then

1 Roger.

2 MR. ORSINGER: Okay. So following up on
3 Justice Christopher, if we say in (e)(1) that the other
4 materials, documents, or sources that the party intends to
5 rely on have to fulfill the standards of 1009, we've
6 changed the scope of 1009. 1009 is for pretrial
7 translations, written translations, of documents. They
8 are not expert witnesses. That's what the *Castrejon vs.*
9 *State* case said that was in the materials. So experts can
10 get up and testify without meeting any of those
11 requirements, but the problem is 1009 is written
12 translations of documents that you have a pretrial
13 procedure to determine whether there's a dispute or not,
14 but Rule 203 on determining foreign law is not relied on
15 evidence or documents or witnesses. You can read magazine
16 articles. You can read books. You can read statutes that
17 are translated. So I think we have to be careful here
18 because the way this is written, as I interpret it, we
19 have forced into Rule 1009 evidentiary pretrial
20 translations what previously was discretionary with the
21 trial court of what to consider to prove the law of a
22 foreign country, and I think we have to be careful that we
23 don't make the situation worse between 203 and 1009
24 because this does.

25 CHAIRMAN BABCOCK: Roger, and then Frank.

1 MR. HUGHES: Well, I'm beginning to see the
2 wisdom in Justice Christopher's remarks, because what
3 we've got here is an interplay of three different
4 evidentiary issues. First, you're going to have a
5 translation in many cases of the underlying document, the
6 arbitral award, the judgment. Second, you may or may not
7 have to prove up to translate the relevant enactments,
8 laws, decisions from the foreign countries. That's both a
9 translation problem, and then that traipses over another
10 one, is the expert witness problem, is that you're
11 probably going to need some sort of expert law witness on
12 the foreign nation about how to interpret it and apply it,
13 and I'm beginning to think trying to have one
14 all-encompassing rule to schedule the deadline for when do
15 you designate your experts and nobody gets surprised at
16 the hearing that, you know, professor so-and-so shows up,
17 and they've never been designated, and their affidavit
18 hasn't been provided, and the same way for documents.
19 That just might be better to be thrashed out within a
20 period of time after the challenge has raised.

21 But as written, subsection (e) certainly
22 lays out a timetable for the person who wants enforcement,
23 but it seems to me the real dispute is going to be
24 controlled by the person who is a -- who wants to contest.
25 They're the one that's going to say, okay, these are the

1 issues. This is why this judgment, that arbitral award is
2 not going to enforce for reasons A, B, and C, and that's
3 where the fight's going to be; and as written, subsection
4 (e) doesn't set out a deadline. I mean, I can see the
5 petitioner claiming I've been bushwhacked because I didn't
6 know that was the grounds for your contesting enforcement.

7 Maybe it would be better to have a pretrial
8 hearing to thrash out all of this immediately or shortly
9 after the parties contest.

10 CHAIRMAN BABCOCK: Okay. Professor Hoffman,
11 did you have --

12 PROFESSOR HOFFMAN: So regardless of what
13 (e) applies to, one question I have is why are we putting
14 these deadlines in here? Was your thought that this is
15 commanded by the statute? Like where it says, for
16 example, like in that part (5) there where it says
17 "require the court's determinations must be made
18 promptly."

19 MR. ORSINGER: Yes. So we've got (c)(1) in
20 the House bill, timely notice, timely notice for the
21 proponent, timely notice for the opponent, so --

22 PROFESSOR HOFFMAN: So notices, that's the
23 party's obligation, but what's driving the deadlines that
24 you've drafted here in (e)? Is that the language just
25 below there in subpart (5) of the bill where it says

1 "require the court's determinations under (3) or (4) be
2 made promptly"?

3 MR. ORSINGER: Well, the truth is this
4 doesn't require the court to have a hearing within any
5 period of time, so in a sense this proposed rule doesn't
6 even address the promptly having a hearing question.

7 PROFESSOR HOFFMAN: So just one follow-up
8 then.

9 CHAIRMAN BABCOCK: Yeah.

10 PROFESSOR HOFFMAN: I guess what -- and
11 maybe it's just, again, I don't think I'm staking out a
12 position as much as I am just trying to get information
13 here, is what's driving the reason for putting in stricter
14 deadlines in this proposed (e) than exist in 1009 today,
15 which are not strict at all, right? They're just 45 days
16 before trial.

17 MR. ORSINGER: Right. The 1009 deadlines,
18 number one, don't apply to the foreign law. They only
19 apply to the judgment, the arbitration award, or testimony
20 that "I was not allowed to call a witness" or "I was not
21 allowed to testify because I'm a woman" or whatever. So
22 that doesn't fix it. Number two, the 1009 deadlines are
23 so close to the end of the case, 45 days before trial and
24 15 days before trial, that it doesn't -- it's not timely
25 or prompt or anything. So we felt like it was smarter and

1 more -- more legitimate implementation of the policy in
2 House Bill 45 to operate from the filing, from the start
3 of the lawsuit than from the end of the lawsuit.

4 PROFESSOR HOFFMAN: But notice -- I'm sorry.
5 Is it okay, Chip --

6 CHAIRMAN BABCOCK: Yeah, go have a dialogue.
7 Talk amongst yourselves.

8 MR. ORSINGER: Be sure Richard can hear.

9 PROFESSOR HOFFMAN: I will make sure.

10 MR. ORSINGER: Or he'll call you down.

11 PROFESSOR HOFFMAN: But what's peculiar
12 about all of this is -- and, again, this sort of goes back
13 to Tracy's point in distinguishing between the
14 conversation we had before between pleading requirements
15 and notice and when all of these things get set in motion.
16 You don't have the hearing in the rule if you jump ahead
17 to (f) until -- you could wait 30 days before trial. So
18 all -- there's all of these deadlines for everything to
19 happen very, very fast, but then the court doesn't have to
20 have a hearing until 30 days before trial; and so if the
21 goal is to move quickly, it seems like the starting point
22 should be let's impose a motion deadline on the parties
23 and then encourage the court, like we do in Rule 91a, to
24 hold a hearing expeditiously.

25 MR. ORSINGER: I agree. It makes perfect

1 sense.

2 MR. PERDUE: And, Lonny, so that -- I mean,
3 the stakeholders, which are the people who actually do
4 this and were involved in both the bill and in the
5 drafting, the language in the bill is prompt, right? And
6 everybody seemed to agree and the subcommittee -- of which
7 there are members who don't practice family law -- agreed
8 that it made sense to put in a time line and put in a
9 deadline rather than just have "promptly," and I will
10 defer because Orsinger I think was the -- the point is if
11 you have one of these, you know you do. So if you've got
12 an arbitration family award or you've got a dowry contract
13 thing, you know you have it, and you need to get it out
14 there in the case from the get-go to tee it up.

15 Now, so then it becomes a question of the
16 judicial concept of handling it, because Justice
17 Christopher is coming up with this essentially different
18 concept than what we were doing, which is that the Rules
19 of Evidence are tied to trial, and we wanted a rule of
20 procedure that was tied to process and getting it
21 essentially before the court and teed up. But, I mean,
22 that then becomes a question, do you want to have a
23 mandate to a family judge that they have to have a
24 pretrial hearing on this? You can go that route. That
25 just wasn't the route that we did. We chose it as a

1 procedural vehicle that was tied, but Richard was the one
2 that came up with the concept I think, which is you've got
3 to do it with the petition because you know you have it,
4 and you've got to get this issue challenged in the case
5 from the get-go as early as you can.

6 And again, remember going back to the key
7 policy here behind the bill is generally they don't want
8 these things honored. I mean, that's what's -- that's
9 what's behind all of this. So, you know, but you can't
10 just throw out the world of law, and we have good law in
11 the concept of comity, so the idea was integrate that
12 into -- and then create a process specific to this around
13 it. But I'm hearing -- I mean, Justice Christopher has
14 got a brilliant idea. It's just it's a different concept,
15 and it's one that forces judicial resources to deal with
16 it as opposed to the parties, but that's a stakeholder
17 question.

18 CHAIRMAN BABCOCK: Richard Munzinger.

19 MR. MUNZINGER: The issue of having separate
20 rules applying in proving some of these things, the
21 Legislature has declared that it's a matter of public
22 policy of the state that this is a sui generis problem.
23 This is its own problem. It applies in cases where your
24 -- of constitutional rights and public policy. It isn't
25 an ordinary contract case. The Legislature says so, and

1 humanity says so. I've lost my child to Pakistan,
2 whatever it might be. I'm burdened by some tribal rule of
3 Pakistan or something, and I'm now an American citizen,
4 and I have the rights of an American citizen.

5 These are -- this is pretty serious stuff,
6 and it deserves -- I'm concerned about me -- I don't have
7 a lot of logistical stuff. I'm a one-man shop, and a guy
8 comes in here, and he's got an expert who sits down and
9 starts telling me what Pakistani law, and I haven't had a
10 chance to look at the Pakistani constitution or Pakistani
11 procedural code that has led to this situation, but gets
12 it in through an expert who can say, "I know all about
13 it," and he gets around the hearsay rule. That doesn't
14 seem to me to be within the spirit of the law to guarantee
15 due process to people who are before the court in this sui
16 generis proceeding.

17 CHAIRMAN BABCOCK: Richard, could I ask you
18 a question along those lines?

19 MR. MUNZINGER: Sure.

20 CHAIRMAN BABCOCK: And then we'll get
21 Professor Carlson and Justice Christopher. If you've got
22 an expert and the other side has an expert, you're going
23 to want to know what the other expert is relying upon,
24 right?

25 MR. MUNZINGER: Sure.

1 CHAIRMAN BABCOCK: And you're going to want
2 his documents?

3 MR. MUNZINGER: Absolutely.

4 CHAIRMAN BABCOCK: And aren't you going to
5 insist that they be in -- at least eligible for evidence?
6 I mean, to be put in evidence so you can cross-examine
7 him?

8 MR. MUNZINGER: I should, but can my client
9 pay for all of that?

10 CHAIRMAN BABCOCK: Well, put that aside for
11 a minute.

12 MR. MUNZINGER: But that's part of the
13 problem here. Some of these people come to court -- most
14 of us deal with people who have the money to buy
15 translations. You have the money -- we're dealing with
16 contract cases. This isn't a contract case.

17 CHAIRMAN BABCOCK: But my question is, let's
18 say you do discovery on the other side's expert, and they
19 do it on yours, and you get these documents that are in
20 Pakistani or whatever language, and they're eligible for
21 evidence. Does our proposed (e)(1) or (e)(2) apply? In
22 other words, does that document have to be provided within
23 60 days of the original petition, or can it be 45 days
24 before trial?

25 MR. MUNZINGER: I'm not sure that it's

1 answered by the text of the rule. That's part of the
2 thing we're talking about having pretrial hearings and
3 what have you.

4 CHAIRMAN BABCOCK: Yeah.

5 MR. MUNZINGER: I don't know.

6 CHAIRMAN BABCOCK: Professor Carlson.

7 PROFESSOR CARLSON: Mine isn't really an (e)
8 problem.

9 CHAIRMAN BABCOCK: It's not an (e) problem?
10 Well, get out of here then. Judge Christopher has got a
11 brilliant solution, and she does have an (e) --

12 HONORABLE TRACY CHRISTOPHER: Well, I just
13 wanted to say that sometimes in these cases we are not
14 dealing with citizens of the United States. So, you know,
15 so there's a different reason why you might recognize
16 another foreign country's law if you're not dealing with a
17 U.S. citizen.

18 MR. MUNZINGER: But if --

19 HONORABLE TRACY CHRISTOPHER: And that's why
20 we have the idea that we're going to look at principles of
21 comity and, you know, constitutional rights. I mean,
22 sometimes two Mexican citizens will come to Texas for a
23 divorce.

24 MR. MUNZINGER: Well, but doesn't the
25 Constitution apply to them equally to the rest of us?

1 HONORABLE TRACY CHRISTOPHER: Well, does it?

2 MR. MUNZINGER: It should. I just read
3 where the --

4 CHAIRMAN BABCOCK: All right.

5 HONORABLE TRACY CHRISTOPHER: There are a
6 lot of people that don't think so.

7 MR. ORSINGER: Including some Supreme Court
8 justices.

9 HONORABLE TRACY CHRISTOPHER: I'm just
10 saying, what if they're here illegally? Can you look into
11 that?

12 CHAIRMAN BABCOCK: Professor Carlson is
13 going to join the (e) street band.

14 PROFESSOR CARLSON: I didn't know it was --
15 that was not exactly (e)-esque so I'm going to take my
16 liberty. It's not clear to me when I look at (a) that
17 this doesn't apply to a Texas judgment, applying foreign
18 law. Is it intended to apply only to foreign judgments?
19 And, two, what if the foreign judgment is on appeal? Do
20 you want to say something in (a) about it has to be a
21 final judgment? If the case is on appeal in Pakistan, are
22 we going to be using this?

23 And three, if the -- and this is a -- I
24 can't tell from this either, and I was no help in the
25 drafting, and I'm on the subcommittee, so shame on me.

1 But if there's no answer filed in response to this
2 petition to enforce a judgment, is there an affirmative
3 duty on the party seeking the enforcement or recognition
4 to go ahead and prove up the foreign law anyway and a
5 corresponding obligation on the court not to enforce the
6 judgment if it violates policy or due process, public
7 policy of Texas or there was not due process?

8 CHAIRMAN BABCOCK: Frank had his hand up and
9 then some people over here.

10 MR. GILSTRAP: I want to approach that
11 problem kind of from a different direction, but, again,
12 going back to (e)(3) talks about foreign language
13 documents, which is a phrase lifted from 1009, but then we
14 go to (e)(1), and it says -- refers to any "materials,
15 documents, or sources." Well, on its face that's got to
16 be broader than documents, otherwise those words would not
17 be used, and how broad is it? Could it apply to expert
18 testimony? And before we kind of write that off, I've had
19 this conversation with Richard Orsinger. In Latin America
20 and most civil law countries the way that you prove the
21 law is you bring in an expert. They don't read the cases.
22 They have a jurist who comes in and says what the law is.
23 That's the method, and so it seems to me that that might
24 be the method that we have to use to prove foreign law
25 here. So do we get discovery of expert's testimony under

1 this or not? It needs to say so.

2 CHAIRMAN BABCOCK: Richard, you had your
3 hand up, but now it's down, and I don't know why. Go
4 ahead, answer that question.

5 MR. ORSINGER: Okay. So I have to say that
6 I completely feel like Justice Christopher's proposal is
7 smarter than the rigid deadlines, especially because I
8 don't know what the consequences are for missing the
9 deadlines; and if the consequence is that you forfeit all
10 of your rights as a human being because you miss something
11 by one day, I have a problem. So at any rate, I have two
12 questions or I think questions that we need to decide.
13 The first one is should the court be limited to admissible
14 evidence in determining foreign law, or can the court
15 consider anything that's allowed in 203, such as any
16 material or source, the words you spoke of are out of 203?
17 So are we limiting the court to admissible evidence? Are
18 we giving them the freedom to consider any material or
19 source? If we make that decision, that will change the
20 wording of this rule.

21 Secondly, should the timetable for proof for
22 law and proof of facts be the same? Because right now
23 they're different, depending on whether you're under 203
24 or 1009 or whichever one of our deadlines you're under,
25 and so if it -- if the deadlines are going to be

1 different, if the evidentiary deadline, is it governed by
2 the rules of discovery, or is it governed by Rule 1009 for
3 admissibility of written transcripts, or is it governed by
4 203, which is just giving notice to the court that you're
5 going to -- and the other side of what materials to look
6 at? So I feel like we probably should have a sense of
7 that because -- or maybe the question goes away. If we
8 use Judge Christopher's proposal, and there are no
9 deadlines other than maybe just to plead, then the trial
10 court can figure out whether expert witnesses have a
11 different deadline from the regular discovery rules, are
12 they covered by rules of disclosure 120 days before trial,
13 if you're seeking affirmative relief, you know, whatever.
14 90 days I guess in a civil matter.

15 CHAIRMAN BABCOCK: Before we get to Roger,
16 Justice Christopher, could you restate your idea, your
17 thought, that Richard has now endorsed apparently?

18 HONORABLE TRACY CHRISTOPHER: Well, my
19 thought is you have a pleading requirement. Now, whether
20 it has to be in the original, there might be some reasons
21 why you should be able to plead it later because you
22 didn't realize that this aspect of the case required the
23 foreign law, so I'd like to see some sort of an exception
24 to original, either original petition or original answer.
25 Then I would -- I would require a mandatory pretrial

1 conference. Every time I've done a case involving foreign
2 law it's complicated; and, yes, that is more resources on
3 the trial judge; but, you know, having the pretrial
4 conference where you will discuss getting a translation,
5 you know, experts if necessary on what the law is, and the
6 timing for it, I think is important; and, yes, there's
7 always discovery in these cases. I mean, not only do --
8 have I seen them in connection with, you know, a contract,
9 but you also see it like in the -- the forum non
10 conveniens where people are trying to say, you know,
11 "Don't send me to Nigeria because their" -- and I'm just
12 making this up -- "because their, you know, judicial
13 system is corrupt." All right. And so we have dueling
14 experts on whether the Nigerian judicial system is
15 corrupt. So sometimes you get that kind of evidence in
16 connection with due process and comity and, you know,
17 those sort of considerations.

18 CHAIRMAN BABCOCK: Thank you. Roger.
19 Sorry.

20 MR. HUGHES: Well, in further support of
21 Justice Christopher's proposal, there is a quirk in the
22 statute, which I noticed as I was rereading it again. The
23 statute requires us to develop a rule, one, for the party
24 who seeks enforcement about setting deadlines, not just to
25 state their grounds, but also to provide the information

1 required by 203. The claw is to provide the information
2 by 203 is not in the next subsection about rules for the
3 party opposing enforcement, which creates a little quirk,
4 is that since the Legislature wants 203 -- the materials
5 being provided under Rule 203 to apply to the party
6 seeking enforcement, I'm not sure how much of 203 we can
7 exempt because under the rule as it's proposed we ignore
8 203(a). Well, 203(a) is the one that says what a party
9 seeking to enforce foreign law is supposed to provide. So
10 now by tossing out 203(a) we don't have a -- we don't have
11 a rule about what the party seeking to enforce a foreign
12 divorce decree or whatever is supposed to be -- to
13 provide.

14 So I'm thinking that if we decide to go back
15 and retool and have a mandatory pretrial conference to set
16 out deadlines, we're going to have to rethink how much of
17 Rule 203 we're tossing out. And maybe all we're tossing
18 out is the deadlines and not the rest of the rule about
19 what the party is to -- who is seeking enforcement is
20 supposed to provide; but I think there needs to be some
21 parity because I think even though the statute doesn't
22 require the party to provide materials on -- about the
23 foreign law that they want brought to the court's
24 attention, I think common sense and parity requires that
25 they do that because, as I said, I think the real fight is

1 going to be over the opposition; and they are going to
2 have maybe like the Cal Dive problem that Justice Busby
3 had where the parties wanting to oppose enforcement is
4 wanting to bring forward laws, decisions, et cetera, from
5 the foreign nation that the party seeking enforcement
6 hasn't brought up yet; and that may be where the real fire
7 fight is.

8 CHAIRMAN BABCOCK: Anybody else? Richard.

9 MR. ORSINGER: We can get with the drafting
10 team, but it seems to me that what we could do is set up a
11 pretrial conference and then direct that the trial judge
12 will set an appropriate timetable without regards to the
13 rules of discovery and 203 and 1009.

14 MR. HAYS: Right.

15 MR. ORSINGER: Because what we really want
16 to do is we want to eliminate all of the crazy different
17 timetables, but we don't want to change the principles of
18 the court can decide foreign law based on anything, but
19 you have evidentiary standards about corruption or
20 whatever you're going to do. So that would be a nice way
21 to circumvent a lot of this complexity, is to just say
22 make your own time lines. You're not constrained by the
23 rules of discovery or the rules of evidence. Just make
24 your own time lines. That would make it so much simpler.

25 CHAIRMAN BABCOCK: Justice Gray.

1 HONORABLE TOM GRAY: I do note that the
2 statute requires a hearing on the record, and so they
3 recognize the need for the kind of hearing that Justice
4 Christopher talks about and then maybe next session we
5 could use that requirement of additional judicial time to
6 ask for some more judges to be funded.

7 CHAIRMAN BABCOCK: At higher pay.

8 HONORABLE TOM GRAY: I don't care about the
9 pay. I'll take them at the pay they're at now, but, yes,
10 we need more judges.

11 MR. PERDUE: I can assure you there's no
12 fiscal note on this bill.

13 HONORABLE TOM GRAY: There should have been.

14 CHAIRMAN BABCOCK: Nina.

15 MS. CORTELL: I think this is a good
16 resolution, but -- and I know everybody has already noted
17 this, but it does talk about this being done promptly, so
18 I think we have to be faithful to that phrase.

19 CHAIRMAN BABCOCK: Uh-huh. Promptly. Yeah,
20 that's a good point. All right. Anything else on (e)?

21 MR. GILSTRAP: On (e)(4).

22 CHAIRMAN BABCOCK: Frank.

23 MR. GILSTRAP: On (e)(4) it has a good cause
24 exception to the time limits for submitting objection to
25 translations. Earlier I thought there was a reference

1 that there was a good cause exception for the notice
2 provisions, but I don't see it in here, if there's got to
3 be a good cause exception for the notice provision as well
4 then maybe (4) needs to come out and be its own separate
5 section and not be limited to translations.

6 CHAIRMAN BABCOCK: Okay. Anything else on
7 (e)? Yeah, Justice Gray.

8 HONORABLE TOM GRAY: Given the earlier
9 discussion I didn't know if the word "written" needed to
10 be inserted in front of each of the times we used
11 "translation" in (1), (2), and (3), just because it puts
12 the person that is uninformed that 1009 is about written
13 translations; but also in (e)(1) where the use of the word
14 -- we use "rely," and we may be far beyond that, the
15 revamping of what's being proposed, but "intends to rely"
16 is different than "intends to introduce into evidence,"
17 which is what 1009 is about, is the introduction into
18 evidence, where the "rely" could be the expert relying on
19 a document. And so if an expert is going to rely upon a
20 document, I don't know that you want to bring it under
21 this rule because that's the discovery aspect that we're
22 talking about earlier, but it is a word that troubles me
23 as opposed to what 1009 does, which is introduction into
24 evidence.

25 CHAIRMAN BABCOCK: All right. Anything on

1 (e)? All right. Let's go to (f), the hearing. Comments
2 about (f).

3 HONORABLE DAVID PEEPLES: Got a hand down
4 here.

5 CHAIRMAN BABCOCK: Oh.

6 HONORABLE DAVID PEEPLES: We've been
7 assuming that both sides hire lawyers and everything is
8 teed up and that things are translated, and if and when
9 that happens, judges know how to have those hearings.
10 What about default judgments, Richard, and what about
11 situations -- let me just hypothetically. They're from a
12 country where it's written in Arabic, and the man is there
13 wanting a judgment, and the woman may be there, but she's
14 in a very submissive state without a lawyer. And maybe
15 that's on my mind because when we get to pro ses this
16 afternoon. Or maybe she's not there and she didn't file
17 an answer.

18 So my question has to do with default and
19 waiver and my obligation as a judge to look after the best
20 interest of children and also just to do justice in a
21 situation that may be very unequal in which the
22 Legislature has expressed itself loudly and clearly, I
23 think. How much discretion do judges still have, Richard,
24 to maybe not grant that default judgment and be sure the
25 woman comes and shows up and you can ask some questions,

1 find out what the truth of the situation is? Section (g)
2 is almost verbatim from the statute, and I think the
3 Legislature in that provision was saying we want judges to
4 have the elbow room, the flexibility, to enforce public
5 policy when they need to. Where are we on that? By the
6 way, it will happen a lot.

7 MR. GILSTRAP: Doesn't the last sentence of
8 (g) cover that?

9 CHAIRMAN BABCOCK: Frank.

10 HONORABLE DAVID PEEPLES: Well, my question
11 is whether it does, and I think it's great if we get on
12 the record saying that it does, but when someone hasn't
13 answered or they're basically not fighting very hard, do
14 trial judges have as much discretion to take up for
15 children as they think they do right now?

16 MR. GILSTRAP: It says "may issue any
17 orders."

18 HONORABLE ANA ESTEVEZ: I do defaults, and I
19 do different from what they request. I mean, when there's
20 a default. So I listen to all of the evidence when they
21 try to prove up the marriage and divorce. And if they say
22 "no child support" I ask questions, and I still put it at
23 the statutory child support. So unless I'm unaware I
24 think that we as judges do have the discretion even on a
25 default to find whatever -- what is in the best interest

1 of the children.

2 HONORABLE DAVID PEEPLES: So, Frank, you're
3 under the opinion that under the (d) if the woman didn't
4 object to anything, didn't oppose anything about it, the
5 judge can still take a good look?

6 MR. GILSTRAP: Sure. Because it gets into
7 public policy, whatever that is.

8 HONORABLE DAVID PEEPLES: Public policy
9 can't be waived. Okay.

10 MR. GILSTRAP: And nobody knows what it
11 means.

12 CHAIRMAN BABCOCK: Roger.

13 MR. HUGHES: Subsection (g) does not exactly
14 track the statute, and I think it might be important to
15 make it track the statute. The second sentence just says,
16 "The order must include findings of fact and conclusions
17 of law." Well, the statute says we're to make a rule that
18 "to facilitate appellate review require that a court state
19 its findings of fact and conclusions of law in a written
20 order determining whether to enforce the foreign judgment
21 or an arbitration award based on foreign law that involves
22 the marital relationship."

23 My suggestion is that we at least ought to
24 state that the written order must include the findings of
25 fact and conclusions of law, because having researched

1 this, sometimes judges sign very cursory orders and
2 announce their reasoning on the record; and there are
3 questions arise about which control, what's applicable on
4 appeal, and so this would at least state that. And also,
5 my experience is, is that there's an awful tendency among
6 lawyers who draft orders for judges to sign is to say as
7 little as possible; and if all we do is say "include
8 findings of fact and conclusions of law" God only knows
9 what the lawyers who submit these orders are going to say
10 are the findings of fact and conclusions of law.

11 So I think we ought to track the statute at
12 least to say in determining why -- you know, at least
13 something that why it is they're not enforcing the
14 judgment or arbitration award. I mean, I'm not sure how
15 detailed we want to be because we don't have a lot of
16 guidance, but I think if the goal is to help out the
17 appellate courts for review, then the -- we ought to tell
18 them what the findings of fact and conclusions of law
19 ought to be about. And then I would also state there is a
20 public policy reason that if we have a Texas court that
21 says, "We're not going to enforce Nigerian law or Egyptian
22 law because" we would like I think -- simply for PR
23 purposes we don't want, you know, tomorrow's headline
24 around the world being "Texas court for no reason at all
25 won't enforce Nigerian law" or "Thai law" or "German law."

1 I mean, I think there is a public policy reason to state
2 what our reasons are for public relations and diplomatic
3 relations.

4 CHAIRMAN BABCOCK: Steve.

5 MR. BRESNEN: I think consistent with what
6 you're saying the subsection of the bill before the one
7 you were reading says that the purpose of the hearing is
8 to determine whether proposed enforcement of a judgment or
9 arbitration award that involves marriage relationship,
10 parent-child relationship, violates constitutional rights
11 or public policy. That's the purpose of the hearing, so
12 it would be consistent with what you're saying to have
13 those findings of fact and conclusions of law to reach
14 that determination.

15 CHAIRMAN BABCOCK: Karl, then Judge Estevez.

16 MR. HAYS: Judge Estevez was up first.

17 CHAIRMAN BABCOCK: Okay, Judge, you're
18 first.

19 HONORABLE ANA ESTEVEZ: This is a question
20 for Richard. Richard, what if it's one of those mediated
21 settlement agreements and someone wants to get out of it
22 later, the ones that are totally no discretion for the
23 judge, doesn't matter if it's in the best interest of the
24 child or not. It's a mediated settlement agreement under
25 the statute. How do we do that?

1 MR. ORSINGER: That sounds like a mandamus
2 to the Supreme Court to me.

3 HONORABLE ANA ESTEVEZ: Okay. Because that
4 is --

5 MR. ORSINGER: It's *In Re: Stephanie Lee*.

6 HONORABLE ANA ESTEVEZ: I feel -- yeah, I
7 feel like we still have discretion in a default, but it's
8 clear that we don't have discretion in *In Re: Stephanie*
9 *Lee*.

10 MR. ORSINGER: Yes. That was a five-one --
11 a four-one-four decision, so it's not the clearest thing
12 that the Supreme Court has ever done, and they did say
13 that you don't have to enforce a mediated settlement
14 agreement if the child is endangered, but the mere fact
15 that it may not be in the best interest in your opinion is
16 not grounds to refuse to enforce it. If I had to -- if I
17 was on the Supreme Court, and I never will be, I would say
18 that if this is violative of fundamental human rights or
19 due process are violated then you're not required to do
20 it, but I can see mandamus written all over that.

21 CHAIRMAN BABCOCK: Who is your concurring
22 justice in that case?

23 MR. ORSINGER: That was Justice Guzman was
24 the concurring justice, and so in order to figure out what
25 the majority is you have to see what she agreed with in

1 what Justice Lehrmann wrote and what she agreed with
2 Justice Green wrote and then you could figure out what the
3 majority opinion was.

4 MR. GILSTRAP: Richard, was that decision
5 based on statute or the Constitution?

6 MR. ORSINGER: Yes. The Family Code
7 makes -- says that if you have a mediated settlement
8 agreement, that means signed by the lawyers in mediation,
9 you're entitled to a judgment based on the agreement.

10 MR. GILSTRAP: Yeah, but the last sentence
11 that you used now changed that.

12 MR. ORSINGER: Well, this -- I don't think
13 this statute addresses the problem of what happens if
14 someone signs a mediated settlement agreement here in
15 Texas and somehow it involves foreign law, and the
16 enforcement of a judgment or arbitration award. Does that
17 include a mediated settlement agreement? And what if it
18 says you're entitled to all of the rights you're entitled
19 to under Pakistani law? Does that mean somebody can come
20 in after signing the MSA and say, "Wait a minute, my
21 rights are not fundamentally protected under Pakistani
22 law"? Is that what you're asking?

23 CHAIRMAN BABCOCK: Karl.

24 MR. HAYS: This just goes to what Judge
25 Peeples was asking about. The second part of the statute

1 is that in addition to drafting a rule the Supreme Court
2 is supposed to draft instructions for teaching the judges
3 all about the application of foreign law, and the hope
4 would be that whoever is doing that would be teaching
5 about the public policy so that the judges would
6 understand that in a default situation if what they're
7 being asked to do violates basically public policy or the
8 fundamental tenets of an individual's human rights that
9 they wouldn't have to do it, and so that would be the
10 hope.

11 CHAIRMAN BABCOCK: Nina. Yeah, I thought
12 you had your hand up.

13 MS. CORTELL: I had a different question.
14 Again, with the notion that this be done promptly, to
15 expeditiously decide all of this, why the 30 days before
16 trial, and then you have 10 days later an order, and now
17 you're 20 days out.

18 MR. ORSINGER: It's not a smart decision,
19 and I don't know who made it. We were probably overly
20 influenced by the Rules of Evidence, but clearly 30 days
21 before trial is late in the game if it's brought up months
22 before trial, which is one of the attractions, is that all
23 of the arbitrariness of Rule 203 deadlines, Rule 1009
24 deadlines, and the proposed deadlines, all of that
25 arbitrariness can go away if we just do what Judge

1 Christopher said, which is force a early hearing and have
2 the judge set up some rational rules for that case, and
3 that's so much better than trying to figure out how many
4 days it ought to be, I think.

5 MS. CORTELL: I agree, but we want to make
6 sure we look at that.

7 MR. ORSINGER: Yeah.

8 CHAIRMAN BABCOCK: Justice Gray.

9 HONORABLE TOM GRAY: From the appellate
10 standpoint I sure would like for the writers of this rule
11 to focus on what happens if there is no hearing, what
12 happens if the order does not have the findings of fact
13 and conclusions of law in it. Over in the criminal arena
14 there is a case called Maren that establishes three levels
15 of rights with what it takes to waive those rights,
16 categories one, two, and three, and so some hierarchy here
17 or reference to what happens because if you're this close
18 to trial and you wind up with one of these orders that
19 comes up for a review by mandamus for emergency review
20 because it doesn't have the findings of fact in it, what
21 are we supposed to do with it? You know, when can it be
22 waived? Just if you want to streamline it, make sure
23 there's a consequence for not abiding by it, and it's more
24 likely to be enforced then.

25 CHAIRMAN BABCOCK: Okay. Anything else on

1 (f) or (g), hearing or order? All right. Let's skip
2 right ahead to (h), hearings on temporary orders.
3 Comments about that? This silence is not because people
4 are hungry, is it?

5 MR. GILSTRAP: I guess this touches on --

6 CHAIRMAN BABCOCK: Frank.

7 MR. GILSTRAP: -- what was raised earlier.
8 It says "deadlines" -- last sentence, "Deadlines may not
9 be altered absent urgent circumstances." Can all of this
10 stuff be changed by agreement? For example, could the
11 parties waive findings of fact and conclusions of law?
12 How much -- you know, how much discretion do the parties
13 have, and do we have the problem of the compliant spouse
14 who really should have spoken up and not agreed?

15 CHAIRMAN BABCOCK: Justice Christopher.

16 HONORABLE TRACY CHRISTOPHER: My only
17 concern -- and I'm sorry I didn't pull up the case before
18 today, and maybe I can find it over the lunch break. I
19 know we had a mandamus where the father was divorced in
20 some country and given custody of the child, and the
21 mother tricked him into letting her take the child back to
22 the U.S. The child was a U.S. citizen, and then the
23 mother then sought protection, and the father sought
24 immediate return of the child, and the trial judge ordered
25 immediate return of the child to the foreign country, and

1 we stopped it at the mandamus level. So I'm -- I'm a
2 little -- and, you know, there was a whole lot of hurry up
3 on, you know, are we going to recognize this foreign
4 divorce or not, and what about the fact that this is a
5 U.S. citizen, the child was, and, you know, what are the
6 mother's rights. And, of course, if we had allowed that
7 temporary order to go, that child would never have
8 gotten back to the U.S.

9 So, you know, there's -- and to me now the
10 Legislature has said you really need to think about that,
11 you know, before -- before you issue a temporary order,
12 right? Whether there was due process for the mom there in
13 the foreign country. And so if something like that
14 happens, you know, the foreign law consideration needs to
15 be in the judge's mind before the child has irretrievably
16 gone back to the foreign country. I don't know how to
17 write that. I could find the case somewhere on the point
18 that -- you know, and so there were issues of child
19 abduction and but the country where the dad had gotten the
20 divorce didn't recognize the Hague Convention. So, I
21 mean, you know, there were a whole lot of moving parts in
22 the case.

23 HONORABLE TOM GRAY: We had a similar case,
24 except we sent them home, but then the Supreme Court
25 overruled us. So it happens. I mean, it's a real

1 problem.

2 HONORABLE TRACY CHRISTOPHER: So, I mean, so
3 I wouldn't say, "Notwithstanding other provisions of this
4 rule, the court may make temporary orders," because then
5 the court is making a temporary order without thinking of
6 the constitutional implications of their decision.

7 CHAIRMAN BABCOCK: Okay. Anything more
8 about (h)? Okay. Let's move on to (i), definitions. The
9 two definitions are "comity" and "foreign law." Anybody
10 want to add or subtract from these definitions? Justice
11 Gray.

12 HONORABLE TOM GRAY: The statute defines
13 three terms, "comity," "foreign law," but it also defines
14 "foreign judgment," and I found it interesting that it's
15 not in the rule, that definition.

16 CHAIRMAN BABCOCK: Interesting in the sense
17 that you noted it or you're curious about why?

18 HONORABLE TOM GRAY: Both. But I am not
19 going to formally ask the question why?

20 CHAIRMAN BABCOCK: Well, why don't we ask
21 the question.

22 HONORABLE TOM GRAY: Be my guest.

23 CHAIRMAN BABCOCK: Why is that third term
24 not in the rule?

25 MR. LEOPOLD: I think we did that because

1 the rule itself doesn't apply to foreign judgments. It
2 applies to judgments based on foreign law, and so having
3 the term "foreign judgment" defined didn't seem to make
4 sense why we would talk about that.

5 MR. HAYS: Well, and also the term "foreign
6 judgment" does not actually appear in any of the -- the
7 statute in terms of what -- the implementation part of the
8 statute as to what's supposed to -- beginning of section
9 22.0041, if you look through it, the term "foreign
10 judgment" is not actually in there other than in the
11 definition; and it simply says, "A judgment based on
12 foreign law" and doesn't refer to a "foreign judgment"
13 like Paul was saying.

14 CHAIRMAN BABCOCK: Okay. Yeah. Dee Dee,
15 the speaker before Karl was Paul.

16 THE REPORTER: Thank you.

17 CHAIRMAN BABCOCK: Just so you know, okay.
18 Sorry. Anything else on the definitions? All right.
19 What about the additions to Rule 203 and 1009? Obviously
20 some of our earlier comments would spill over to this, but
21 anything new on these additions to those two rules? You
22 guys must be hungry. Justice Christopher.

23 HONORABLE TRACY CHRISTOPHER: Well, we still
24 have the same problem with (h), you know, in terms of what
25 it's going to encompass, the foreign language document. I

1 mean, is it just the judgment that we're looking at or the
2 arbitration award, or is it everything else?

3 CHAIRMAN BABCOCK: All right. Anything
4 else? Okay. Well, then we are done for now with this
5 rule. I think, Richard and Jim, you probably need to take
6 another turn at drafting before our next meeting on
7 December 1, because this has got to be done by January 1.

8 MR. ORSINGER: Right.

9 CHAIRMAN BABCOCK: So if y'all could --

10 MR. PERDUE: I'm sure we will come back with
11 something that will prompt no discussion at all.

12 CHAIRMAN BABCOCK: Yeah. I'm guessing
13 that's right. Well, then let's break for lunch, and we
14 will be back at somewhere between 1:20 and 1:30.

15 MR. BRESNEN: Thank y'all for letting us
16 participate.

17 CHAIRMAN BABCOCK: Oh, thank you. Thanks
18 for being here.

19 (Recess from 12:16 p.m. to 1:17 p.m.)

20 CHAIRMAN BABCOCK: We are back on the
21 record, and we are now talking about the proposed
22 amendments to the Code of Judicial Conduct and policies on
23 assistance to court patrons by court and library staff,
24 and the chair of this subcommittee is Nina Cortell. So,
25 Nina, take it away.

1 MS. CORTELL: Thank you. This is a
2 follow-up on how can we assist self-represented litigants,
3 and at the last meeting, I believe it was, this committee
4 voted in favor of amending the Judicial Code of Conduct,
5 and we were charged with coming back with some proposed
6 language, and that's what we're here today on, a proposed
7 revision to the canon itself and also a proposed comment.
8 You will see it as item (F), as in Frank, on the agenda,
9 and it's a pretty short memorandum; and, basically, if you
10 would turn to the attachment A, we have some suggested
11 language which you have not seen before, which is
12 underscored under where it said "proposed amendments."
13 There's some additional language.

14 So it would be adding "and may make
15 reasonable accommodations to afford litigants, including
16 self-represented litigants, that right." The subcommittee
17 recommends that we add that language to Canon 3.B(8) as
18 you see it on attachment A. There are basically three
19 things for the committee to consider in this regard. The
20 first is whether you accept our recommendation on the
21 language. The second is its placement. We are
22 recommending that it be placed where you see it, but
23 another suggestion is -- see the enumerated subsections at
24 the top half of the page. It could be a new (a) in
25 essence. That would be another way to put it, because it

1 says, "This subsection does not prohibit" and we could say
2 -- basically put that language up there.

3 So and then the third issue is whether this
4 should apply in the criminal case context, and on that
5 Justice Newell will be providing some insights on that,
6 but if we take the issues in order -- and then let me say
7 after we finish with the canon we'll then address the
8 comment, and the comment we are proposing is under
9 attachment B. It is in a chart form. It is new language,
10 slightly revised from what you saw last time, and then we
11 have some comments to the side because -- showing some
12 concerns by some of the subcommittee members.

13 And let me say that our subcommittee has
14 grown beyond the appointed members, who you know the
15 members of that, but we have an enlarged subcommittee. So
16 we have now taken over the entire committee it feels like.
17 We were supplemented by Justice Busby, Lisa Hobbs, and
18 very happy to have Trish McAllister from the Commission on
19 Access to Justice, and all of our subcommittee members --
20 and let me just say we have a hundred percent attendance
21 by all of our members plus the additional three, so of the
22 people here we're about 50 percent of this committee. At
23 any rate, let me also say, as with any group, we have an
24 array of views. I've not attempted to try and provide all
25 of those to you. It's nuanced, but essentially what you

1 have before you is the recommendation of the subcommittee,
2 again, as maybe sort of the footnotes in the comments that
3 you see. So let me go first then, if I may, Chip, to the
4 first issue --

5 CHAIRMAN BABCOCK: Yeah.

6 MS. CORTELL: -- which is the proposed new
7 language, and so I would open it up for language whether
8 anyone has the proposed addition to Canon 3.B(8).

9 CHAIRMAN BABCOCK: Okay. Any comments about
10 it? Yeah, Judge.

11 HONORABLE BRETT BUSBY: I just wanted to
12 provide some background for folks on the issue that Nina
13 mentioned about where the language should be placed.
14 There was as suggestion that perhaps it could be moved
15 down as the new (a). I guess one reason I think why it
16 works better where it is, is that the exceptions (a)
17 through (e) are listed currently seem to relate more to
18 the statement further down in the rule about ex parte
19 communications because after that first sentence the rule
20 starts talking about ex parte communications, and it says
21 "This subsection does not prohibit" these various kinds of
22 things that might otherwise be considered ex parte
23 communications. So I guess my concern is if we move the
24 language down to (a) it might kind of get lost with some
25 things that relate to ex parte communications, and it will

1 be more easily explained and understood where you see it
2 in the text that's been recommended.

3 CHAIRMAN BABCOCK: Yeah, I personally think
4 you're right about that, but I think it's all going to
5 hinge on the comment. Because that language in and of
6 itself is fairly -- fairly -- not innocuous, but, you
7 know, it's not going to set off fireworks anywhere. It's
8 the comment, but anyway, still on that language, any --
9 any other thoughts about it? Comments? Yeah, Judge.

10 HONORABLE R. H. WALLACE: I have a question.
11 The added language is that "The judge may make reasonable
12 accommodations to afford litigants, including
13 self-represented litigants, that right." Who other than a
14 self-represented litigant would you want -- I mean, if
15 they have a lawyer normally I don't allow them to, you
16 know, argue if their lawyer is there. Could that be
17 construed to say, "Okay, I'm a litigant and even though I
18 have a lawyer I still have got a right to be heard"? Is
19 there anyone other than self-represented litigants that
20 we're talking about?

21 MS. CORTELL: Well, we hadn't meant the
22 litigants are --

23 HONORABLE R. H. WALLACE: I know you don't.

24 MS. CORTELL: The idea was to create parity,
25 if you will, between the rights that we're providing

1 litigants and self-represented litigants and not draw a
2 distinction. That's the basic notion here, but also let
3 me just say that there are others who are involved with
4 this language, Trish or anyone, if you want to offer your
5 thoughts, but that's the reason I think the language reads
6 the way it is.

7 CHAIRMAN BABCOCK: My sense of it, Nina, was
8 that you were trying to include all litigants, but you're
9 trying to draw attention to the --

10 MS. CORTELL: Correct. Correct.

11 CHAIRMAN BABCOCK: -- fact that it's
12 probably pro se litigants that are going to need it more
13 than represented litigants.

14 MS. CORTELL: Right.

15 CHAIRMAN BABCOCK: And I don't -- I would
16 wonder if you could single out pro se litigants for help
17 and deny that same help to a befuddled lawyer or
18 represented party. Yeah, Buddy.

19 MR. LOW: But for a litigant to be heard,
20 ordinarily he's heard through his lawyer.

21 CHAIRMAN BABCOCK: Right.

22 MR. LOW: So, I mean, I don't see that that
23 makes any difference. He's heard through his lawyer. The
24 other person is heard through himself, a nonlawyer.

25 CHAIRMAN BABCOCK: Right.

1 MR. LOW: So I think the language is
2 probably a problem.

3 CHAIRMAN BABCOCK: Richard.

4 MR. ORSINGER: You know, it hadn't occurred
5 to me until this discussion came up, but also I think
6 corporations and other entities are not allowed to
7 represent themselves pro se, are they?

8 MR. LEVY: Corporations are not.

9 CHAIRMAN BABCOCK: That's correct.

10 MR. ORSINGER: Corporations can't appear pro
11 se, so we wouldn't want -- a corporation is a litigant.
12 We wouldn't want this to be interpreted to somehow allow
13 the president or CEO of a corporation to conduct
14 examinations in the courtroom and stuff like that. I
15 mean, is this not relevant?

16 CHAIRMAN BABCOCK: I don't think this would
17 lead to that.

18 MR. ORSINGER: Why not? The right to be
19 heard according to law.

20 MR. YOUNG: What about changing "including"
21 to "particularly"? Because I'm thinking that your point
22 that there are those who may be represented by -- may be
23 poorly represented by counsel or whatever may still
24 justifiably benefit from some of the sorts of minor steps
25 that are listed, but really the focus is on making sure

1 that the judge is not allowing a pro se litigant to get
2 thrown under the bus through tricks, traps for the unwary,
3 et cetera.

4 CHAIRMAN BABCOCK: Yeah.

5 MR. LOW: But if the rule says a corporation
6 as known can't be represented other than through a lawyer,
7 then, I mean, why address it? I mean, you never get
8 there. You can't be there.

9 CHAIRMAN BABCOCK: Well, I think that -- I
10 don't want to speak for the subcommittee, but I would
11 guess that when you're saying "litigant," you would
12 include their representative.

13 MR. LOW: Yes.

14 CHAIRMAN BABCOCK: So if a attorney shows
15 up --

16 MR. LOW: But their representative of a
17 corporation has to be lawyer.

18 CHAIRMAN BABCOCK: Right. So a corporation
19 is a litigant, and his stumbling, bumbling, fumbling
20 lawyer shows up in court and doesn't know come here from
21 sic 'em, and some clerk, you know, takes pity on him and
22 helps him out a little bit.

23 MR. LOW: Rule says kick him out. He can't
24 do that. He can't represent -- a nonlawyer can't
25 represent a corporation as I understand it.

1 CHAIRMAN BABCOCK: No. It's lawyer in there
2 who's --

3 MR. LOW: Oh. Oh, well, I like those, if
4 they're on the other side.

5 CHAIRMAN BABCOCK: Yeah.

6 MS. CORTELL: I don't think this language in
7 any way expands upon what's already in here. It starts
8 with "Every person who has a legal interest in a
9 proceeding."

10 CHAIRMAN BABCOCK: Yeah.

11 MS. CORTELL: So we already have a pretty
12 expansive concept that's not run afoul of any of the
13 problems that are being raised, so I don't think the
14 additional language creates any issues.

15 CHAIRMAN BABCOCK: Yeah. I agree.

16 MS. CORTELL: Personally.

17 CHAIRMAN BABCOCK: I think that's right.
18 What else? Richard Munzinger.

19 MR. MUNZINGER: I just want to repeat what I
20 said the last time. Whatever you give to one party you
21 take away from another party. The genius of American law
22 and, frankly, the genius of true justice is the parties
23 are equal before the court. There's a reason we blindfold
24 our statuary representing justice. Justice is supposed to
25 be blind to the parties in front of it. Justice has equal

1 scales to the parties in front of it; and any time that
2 you start writing rules that encourage judges to bend
3 rules on behalf of a pro se litigant, you are adversely
4 affecting the right of a litigant who is not pro se; and
5 not all the non-pro se people are poor; and even if they
6 were, the genius of Western civilization and of Western
7 judgment is equal treatment before the law.

8 It's in Leviticus three times. Three times
9 it's in Leviticus. And I don't want to turn this into a
10 religious thing, but let's face it, Moses is part --

11 HONORABLE ANA ESTEVEZ: I was going to say
12 "amen" already.

13 MR. MUNZINGER: -- of what people call the
14 dow. It's the natural law. People are equal before the
15 court, and they should be.

16 HONORABLE ANA ESTEVEZ: Hallelujah. Praise
17 the Lord.

18 MR. MUNZINGER: So here if I say, "modify
19 the mode and order of evidence as permitted by the Rules
20 of Evidence, including allowance of narrative testimony,"
21 how many times have you been burned by a narrative
22 testimony? The words are out in front of the jury before
23 you can object. It's not right to bend justice because a
24 person doesn't have a lawyer. The -- one of the justices
25 of the Supreme Court, rules of procedure are the

1 handmaiden of justice. Rules of evidence are the
2 handmaidens of justice. Justice is justice. It's real.
3 It's giving to the person what is the person's, and when
4 you take away from one person to give to another you've
5 thwarted and perverted justice. "Refrain from using legal
6 jargon." I don't like the word "jargon."

7 MS. CORTELL: Chip, let me --

8 MR. MUNZINGER: Law is law.

9 MS. CORTELL: Richard, Richard. Point of
10 order. If we could get to the comment separately, because
11 what Richard is talking about is the --

12 MR. MUNZINGER: Well, I apologize. I don't
13 even like -- I don't like the underlined portion in the
14 proposed rule for the very reason --

15 MS. CORTELL: I understand, but let me just
16 say this. Unfortunately, I couldn't be at the last
17 meeting, but I did read the --

18 CHAIRMAN BABCOCK: Interrupting Richard's
19 rants are not --

20 MS. CORTELL: Well, I just want --

21 CHAIRMAN BABCOCK: Some of the best parts of
22 these meetings.

23 MS. CORTELL: I just want to keep us on
24 schedule here. So here's the thing. The subcommittee is
25 very sensitive to the concerns that Richard is raising.

1 That's the truth of it; and we came to you before on a
2 very split vote from the subcommittee; but the full
3 committee voted, as I recall, something like 17 to 4 in
4 favor of additional language such as that that you see
5 here. So the issue, for better or for worse, today is
6 does this language accomplish what this committee has
7 already approved conceptually, whether the language itself
8 is acceptable.

9 I appreciate that the comments -- that's
10 really another -- that we should take up line by line,
11 because that will get into some of the things Richard is
12 talking about, but for today and for right now part of the
13 discussion is whether this language is acceptable for the
14 purpose that this committee has already approved.

15 CHAIRMAN BABCOCK: Richard's point is -- and
16 I think he made it last meeting -- is that we ought not
17 to -- he's against this language at all, I think, and that
18 he's really against the comment, but --

19 MS. CORTELL: Well, I understand, but --

20 CHAIRMAN BABCOCK: We got that.

21 MS. CORTELL: Okay.

22 CHAIRMAN BABCOCK: So what else? Anything
23 else? We'll get to the comment in a minute, but on the
24 general language, recognizing that the general language is
25 going to lead to some comment. It's probably not going to

1 be there all by its lonesome. There will be a comment.
2 Anybody got any other thoughts about that? Judge Newell.

3 HONORABLE DAVID NEWELL: Hi. Yes, sir.
4 Well, yeah, okay. I can tell you what -- I can tell you
5 what we talked about in our Court, my Court. They don't
6 like the language at all. It's kind of eerily similar to
7 the arguments we've already heard, without the quotes from
8 Leviticus, was not in the discussion, but generally they
9 don't think it's a good idea. But I also understand that
10 that issue has been settled, so that's what I understand
11 the vote was overwhelmingly for something like this.

12 CHAIRMAN BABCOCK: Yeah.

13 HONORABLE DAVID NEWELL: So the language is
14 going in there. We don't think it's a good idea, or the
15 Court generally doesn't think it's a good idea. We
16 thought that -- we think that it might need to be limited
17 as to criminal cases. We don't want the canon changed to
18 apply to criminal cases. That's what the consensus was,
19 but again, I understand that this seems to be where the
20 train is going, so I'm not going to -- I'm not going to
21 try and stand in front of it. Okay.

22 CHAIRMAN BABCOCK: Yeah. Munzinger is there
23 on the tracks.

24 MS. CORTELL: But Justice Newell raised --

25 CHAIRMAN BABCOCK: The judge is not going to

1 join you. What?

2 MS. CORTELL: There is the issue raised by
3 Justice Newell, and that is whether in a comment we should
4 say this does not -- this additional language does not
5 apply in the criminal case context, and that is something
6 I think this committee has not yet spoken to.

7 CHAIRMAN BABCOCK: Yeah. Yeah. We'll bring
8 that up. We'll talk about that in a minute. All right.
9 Now, the -- any more comments about the general language?

10 HONORABLE STEPHEN YELENOSKY: Just that, a
11 comment on that comment.

12 CHAIRMAN BABCOCK: A comment on Nina's
13 comment?

14 HONORABLE STEPHEN YELENOSKY: Well, some of
15 these things seem to me -- I think I've said it before --
16 stuff that we can already do. So if you're going to say
17 it doesn't apply to criminal, do you really mean that? It
18 sort of says, you know, by negative implication, well,
19 you're not supposed to be -- I don't know, pick one,
20 construing pleadings to facilitate consideration of issues
21 raised. I guess that wouldn't apply. Not using legal
22 jargon. You want to exclude that from criminal?

23 MS. CORTELL: You should be looking at this.
24 It's a little different.

25 HONORABLE STEPHEN YELENOSKY: Oh, I have it

1 online, what's there.

2 MS. CORTELL: When we -- if we're going to
3 shift to the comment, let me just make clear. You should
4 be looking at the chart that we sent as attachment B to
5 the item -- the memo we submitted October 24th.

6 HONORABLE STEPHEN YELENOSKY: Oh, this is
7 May. I'm sorry.

8 MS. CORTELL: It's slightly different. It's
9 not hugely different. It's slightly different from the
10 comment you saw at the last meeting. I'm sorry, Judge.

11 HONORABLE STEPHEN YELENOSKY: Yeah. Well,
12 in general I see that dichotomy here. Some of these
13 things we can already do, and so I feel kind of
14 differently about saying the things we can already do and
15 the implication even in the civil context that we couldn't
16 already do those and we don't have as much latitude as I
17 think we already do have.

18 CHAIRMAN BABCOCK: Yeah. Okay. Judge
19 Estevez.

20 HONORABLE ANA ESTEVEZ: I don't think that
21 all of the judges know that they can do what you are
22 saying that we do do. So, I mean, I just think I need
23 this to cover what I do now, to make it clear that it's
24 not a violation, because I think that it gets very close.
25 When we have a pro se litigant that needs a lot of help,

1 especially when you send them away because they haven't
2 done something they need to do, you're providing some sort
3 of legal advice, and this would help us to make sure we
4 don't get a grievance from somewhere saying that we
5 violated our Code of Judicial Conduct because it actually
6 allows us to do what he believes we can do, but there's a
7 lot of lawyers you're going to have to agree might not
8 believe that. And so it clarifies it to the lawyers that,
9 oh, well, maybe they are allowed to do this, so they don't
10 get so upset about it.

11 CHAIRMAN BABCOCK: Okay. Nina.

12 MS. CORTELL: I'll be guided by you, Chip.
13 We can talk about the comment globally as proposed, or we
14 can go -- there's ten items, and there's about three total
15 sentences, so there's -- we could go through it sentence
16 by sentence or item by item, but I don't know.

17 CHAIRMAN BABCOCK: I would prefer going
18 through it item by item, you know, (1) through (10).

19 MS. CORTELL: Okay.

20 CHAIRMAN BABCOCK: Because otherwise it's
21 hard for Martha and for the Court to separate the --

22 MS. CORTELL: Okay. Then why don't we do
23 that, and we'll table maybe for a minute the global issue
24 on whether it applies in the criminal law context. Okay.
25 If you would turn to attachment B, which is this chart.

1 The first sentence is "A judge does not violate the duty
2 to remain impartial by making reasonable accommodations to
3 ensure litigants the right to be heard." Just an overall
4 threshold concept to start the ball rolling.

5 CHAIRMAN BABCOCK: Judge Peeples.

6 HONORABLE DAVID PEEPLES: As a member of the
7 subcommittee let me just make clear, there's a second part
8 of this whole proposal that's been put off until a future
9 meeting; and that is rules or policies for staff, clerks,
10 et cetera. This is for judges, and what -- I guess it
11 could -- you know, the judge could get involved, you know,
12 the day a case is filed, but really what judges are going
13 to do under this is in court. I don't envision judges,
14 you know, helping people file something or getting service
15 out, that kind of thing; but the main thing is waiting
16 until the later date, which is all of the pretrial stuff
17 that can be done hopefully by staff and so forth; and I
18 ask people to bear in mind -- I don't know what percentage
19 of cases get tried as opposed to the ones that are filed
20 and eventually are settled; but the percentage that get
21 tried is a small, small percentage; and we're dealing with
22 that right now. What we'll deal with next month I think
23 is the great bulk of cases pretrial and what staffs and
24 clerks can do. These are very, very different, and I
25 think it's helpful to remember those, that great divide.

1 MS. CORTELL: I think Judge Peeples makes
2 an important point, but let me kind of also show you the
3 architecture of how this works. You have the threshold
4 sentence and then you have a second sentence. "By way of
5 illustration a judge may" -- and then there's a question
6 whether to include this parenthetical "either directly or
7 through court personnel subject to the judge's direction
8 and control." I'm going to come back to that. That's
9 your second sentence, the 10 subparts; and then very
10 importantly, we've added -- this was not in your other
11 comment -- a third sentence that "in making reasonable
12 accommodations to afford a litigant the right to be heard
13 the judge may consider many factors, including the type of
14 case, the nature of the proceeding, the stage of the
15 proceeding, and the training, skill, knowledge, and
16 experience of the persons involved." But, again, to speak
17 to what Judge Peeples is saying, there are going to be
18 separate policies that will come to the committee later
19 for court personnel, other than the judge.

20 The other thing to take note of is that in
21 the first paragraph of Canon 3.B(8) there is a sentence
22 that says, "A judge shall require compliance with this
23 subsection by court personnel subject to the judge's
24 direction and control." So there already is a concept
25 embedded in the rule that not just the judge but those

1 under the direction and control of the judge. Okay.

2 Sorry. I just wanted to give a little bit of additional
3 background.

4 CHAIRMAN BABCOCK: Are these comments -- I
5 didn't think they were, but were these comments thought to
6 allow a judge to do these things ex parte?

7 MS. CORTELL: No.

8 CHAIRMAN BABCOCK: Okay. Yeah, I wouldn't
9 think so.

10 MS. CORTELL: That takes us to what we did
11 last year. We'll go back to that.

12 CHAIRMAN BABCOCK: Okay. Any comments about
13 the --

14 HONORABLE HARVEY BROWN: I have a comment.

15 CHAIRMAN BABCOCK: -- preamble language?
16 Yeah, Judge Estevez, and then Justice Brown.

17 HONORABLE ANA ESTEVEZ: Well, just you asked
18 about ex parte, whether it would allow it; and in our real
19 world of pro se litigants, a pro se litigant very often
20 shows up for their hearing, and they have not properly
21 served or it hasn't been on file long enough or something
22 has happened; and the way my -- you know, my court
23 coordinator just talks to them, sets the hearing, so no
24 one knows that until they're in front of me and I'm
25 actually having my hearing. So, yes, we have ex parte

1 communications at that point, because the other side
2 hasn't even been served. It's not a default issue. They
3 haven't even done it right, so I'm sending them off to do
4 something. So I don't want to suggest that this -- in
5 answer to your question, yes, sometimes it is ex parte.

6 CHAIRMAN BABCOCK: Okay.

7 HONORABLE ANA ESTEVEZ: In real life,
8 whether it's supposed to be or whether there's a way to
9 avoid that I don't know.

10 CHAIRMAN BABCOCK: Justice Brown.

11 HONORABLE HARVEY BROWN: Yeah, I want to
12 talk about the ex parte, too. If we include the phrase in
13 the second box, "either directly or through court
14 personnel" then it seems to me like you're going to
15 necessarily have some of this be ex parte. That being,
16 for example, "explain the basis of a ruling," that the
17 court staff is going to answer that when they're asked and
18 the judge isn't around. So if you're already preparing a
19 rule to deal with court personnel, I suggest you take that
20 out, and I also suggest that you think about adding in "in
21 the presence of all counsel" or "in the presence of all
22 parties" to the first part because while you think it may
23 be obvious that this is going to be done with all of the
24 people there, I could see a pro se hanging around and
25 approaching a judge afterwards and then a judge saying,

1 "Well, I'm allowed to explain to him why I did what I
2 did," and so the judge does, and they've violated the
3 rules. So I think it would be helpful to tell judges
4 "Make sure the other side is there when you do this."

5 MS. CORTELL: I think the point is
6 well-taken, but remember that in Canon 3.B(8), the second
7 sentence talks about not permitting ex parte
8 communications, so it is in.

9 HONORABLE HARVEY BROWN: Yeah, I understand.
10 I'm just saying I think it's going to be -- I don't think
11 that little phrase will bring clarity to that potential
12 question.

13 CHAIRMAN BABCOCK: Yeah, Judge Wallace.

14 HONORABLE R. H. WALLACE: I think leaving
15 that parenthetical phrase out would be my preference also
16 because in looking through the list of things by way of
17 illustration that the judge could do, I'm not sure I would
18 want to have the court coordinator or clerk or whatever
19 explaining the basis of my rulings or doing things like
20 that.

21 CHAIRMAN BABCOCK: Yeah.

22 HONORABLE R. H. WALLACE: It seems like to
23 me most of those things are the things -- or all of those
24 things are things that the judge would be doing.

25 MS. CORTELL: There was a split in the

1 subcommittee on this, and certainly, certain members agree
2 to that.

3 CHAIRMAN BABCOCK: What does everybody else
4 think about that? Take out the parenthetical? I agree
5 with you, Judge Wallace. I think it seems misplaced. And
6 I hadn't realized that we've shelved the separate rule for
7 the staff.

8 HONORABLE DAVID PEEPLES: I envisioned this
9 whole, you know, 10 items to be for the judge in court.

10 CHAIRMAN BABCOCK: Yeah.

11 HONORABLE DAVID PEEPLES: And, therefore,
12 that parenthetical is unnecessary it seems to me, and that
13 takes care of the ex parte situation. It might be a
14 default judgment in which it would be ex parte in effect,
15 but in court everybody is going to be there who is
16 supposed to be.

17 CHAIRMAN BABCOCK: And if they're not there,
18 it's their fault.

19 HONORABLE DAVID PEEPLES: Sure.

20 MR. ORSINGER: Well, except for Justice
21 Estevez says lots of times they don't get service out
22 properly, and they show up for the prove-up, and you've
23 got to tell them, you know, "You didn't get citation" or
24 citation hadn't been on file for 10 days, so it's not
25 default. There's just no due process of law, and so I've

1 seen judges that beat around the bush, say, you know, "You
2 haven't done this right, but I can't tell you why." I
3 mean, that's kind of stupid to me it seems to say that
4 there is a curable defect, but the judge can't tell them
5 what it is.

6 HONORABLE ANA ESTEVEZ: Just -- I better
7 just keep my mouth shut, because I don't want to get in
8 trouble here.

9 CHAIRMAN BABCOCK: Cristina.

10 MR. RODRIGUEZ: What I thought you were
11 going to say, Judge, was that people call chambers all the
12 time.

13 HONORABLE ANA ESTEVEZ: Oh, no, -- well,
14 they do, and she tells them what to do, but at some point
15 they claim they've done everything, and right at the time
16 they've filed she'll count out the 45 days and get a
17 hearing date, and so now they've shown up. We don't do a
18 lot of babysitting, you know, just like when a lawyer sets
19 it up. So they'll do their 60 days, 45, whatever it might
20 be, you know, and so now they're here for the hearing, but
21 they haven't done what they needed to do, so they're not
22 going to get a divorce that day.

23 MS. RODRIGUEZ: Right. But do we worry
24 about that later when the second rule for staff is done,
25 or do we need to think about the parameters when that call

1 is made?

2 HONORABLE ANA ESTEVEZ: Well, there's both.
3 Those are two different issues. I was just talking -- you
4 were saying this does apply to the judge, so since we're
5 talking about just the judge. Oh, there's no question. I
6 tell them to stop talking when they talk all the time,
7 but, you know, they're not going to listen.

8 CHAIRMAN BABCOCK: Justice Busby. And then
9 Trish.

10 HONORABLE BRETT BUSBY: I thought it was
11 helpful to have the parenthetical in there in order to,
12 you know, put the spotlight on the fact that this also
13 comes up for court personnel, but given that we're going
14 to have a separate policy on that and given the concerns
15 that are expressed I can see taking it out and don't have
16 a concern about that, although I don't think it's
17 necessary to reiterate ex parte in the comment given that
18 the rule itself deals with ex parte.

19 CHAIRMAN BABCOCK: Yeah. Yeah. But you --
20 I mean, just take the first one. Did you really want your
21 clerk "to construe pleadings to facilitate consideration
22 of the issues raised"?

23 HONORABLE BRETT BUSBY: No, but I could see
24 the clerk asking neutral questions to elicit or clarify
25 information or perhaps making referrals to legal services

1 under number (8).

2 CHAIRMAN BABCOCK: Oh, yeah. Sure.

3 HONORABLE ANA ESTEVEZ: Yeah. They tell
4 them to go to the Texas Law Help.

5 CHAIRMAN BABCOCK: But number (1) is
6 construing pleadings. I mean, the clerk construes them
7 one way, and, you know, maybe you, the judge, construe
8 them a different way; and then the litigant says, "Well,
9 wait a minute. I talked to your clerk, and the clerk told
10 me the pleading meant this." I wouldn't think you would
11 want clerks doing that.

12 HONORABLE BRETT BUSBY: I agree.

13 CHAIRMAN BABCOCK: Trish. Sorry.

14 MS. McALLISTER: I agree with all of the
15 comments that are being said in the sense that, you know,
16 the court personnel and clerk policies are very different
17 from this. I mean, they're not -- they don't go into
18 these -- I mean, some of the things are similar, but they
19 are not contemplating the level of communication that
20 you're going to have from a judge to a litigant than from
21 a clerk to a litigant, potential litigant.

22 The only thing that I have a question for
23 the folks who are in the courtroom is whether or not it
24 would be useful to a judge to have maybe their staff
25 attorney be able to do some of these things simply because

1 I do think litigants call --

2 HONORABLE ANA ESTEVEZ: We don't have staff
3 attorneys.

4 MS. McALLISTER: Oh, well, sorry. Some
5 places do.

6 HONORABLE ANA ESTEVEZ: Well, I don't know
7 who they are, but we don't.

8 MS. McALLISTER: Don't they in Travis
9 County?

10 CHAIRMAN BABCOCK: Somebody else had
11 their -- Justice Christopher.

12 HONORABLE TRACY CHRISTOPHER: This is just a
13 suggestion for you. It doesn't really have anything to do
14 with the rule, but I had a lot of people when I would deny
15 a default, even when lawyers were involved, people would
16 call up and say, "Why did you deny the default," and the
17 clerk would say, "Why did you deny the default?" And so I
18 just always started doing a checklist. Okay. "Your
19 divorce is denied today because you didn't get service,
20 you didn't do this, you didn't do that. Your default is
21 denied today because" and I would check it off, and it was
22 an order and signed, and it was part of the record, and
23 I'm obviously able to explain in an order why I didn't do
24 something, and that way it just kind of -- I felt a lot
25 better with respect to ex parte communications.

1 CHAIRMAN BABCOCK: Judge Yelenosky.

2 HONORABLE STEPHEN YELENOSKY: With regard to
3 the part -- the parenthetical "either directly or through
4 court personnel," I think it depends on -- and maybe it's
5 the wording. There's two ways to take that, because it
6 says "subject to the judge's direction and control." One
7 way to take that would be, well, the clerk is subject to
8 the judge's direction and control, and therefore, unless
9 the judge tells them not to they can do these things.
10 What I read it to mean is if I'm going to do one of these
11 things and I ask a staff attorney or somebody else to tell
12 the person, that's my responsibility; and it's up to the
13 judge if it's something the judge could do to tell
14 somebody else to do it. Most of the time that isn't going
15 to happen on these things because they happen in court.
16 And -- but the dichotomy between judge and staff attorney
17 or anybody else doesn't really exist with respect to what
18 the judge directs somebody to do; and so if you're talking
19 about that versus, well, this person is in the hierarchy
20 below a judge and can do these things, then, yeah, that is
21 a problem.

22 CHAIRMAN BABCOCK: Okay. Richard.

23 MR. ORSINGER: I'm -- I'm troubled by the
24 parenthetical, and I would prefer to delete it and wait
25 and debate that separately, but let me just say that in

1 Bexar County we have the advantage of having staff
2 attorneys for the civil district judges, or at least one,
3 and augmented by volunteer students from St. Mary's law
4 school, and they have a pretty robust program of helping
5 pro se litigants get through a lawsuit, get divorced, and
6 they, frankly, will sit down -- you have to make an
7 appointment. You have to go in for an interview. Your
8 file is completely examined from stem to stern. Every
9 deficiency that you have in order to get your divorce
10 granted is pointed out to you, and it's all done by a
11 lawyer, and it's all done in the context of this kind of
12 clinic environment that's supervised by the county, and
13 this parenthetical, in my opinion, opens the door to
14 delegating construing pleadings and providing information
15 to nonlawyer employees. So that would be a district clerk
16 or an assistant district clerk or a court reporter. I'm
17 very troubled by a pro se litigant being advised anything
18 material other than just procedural filing by someone
19 whose not -- doesn't have a law degree.

20 CHAIRMAN BABCOCK: Buddy Low.

21 MR. LOW: Yeah, I realize we've come a long
22 way from the old days, but used to the judge would just
23 tell you, "You better get a lawyer. You need a lawyer. I
24 can't be your lawyer," and that was basically it, and then
25 when the judge or the clerk starts explaining legal

1 concepts or things like that, they'll sue a lawyer
2 quickly. You don't think they would sue that you gave
3 them misinformation? I mean, it's opening Pandora's box.
4 I know that's the way we're going, but we're getting
5 further, and we ought to think about it closely.

6 CHAIRMAN BABCOCK: Uh-huh. Okay. Trish,
7 did you have your hand up, or are you just pointing?

8 MS. McALLISTER: Well, I might have it up.
9 I'm just conferring real quick.

10 CHAIRMAN BABCOCK: All right. Frank. Who
11 had their hand up? Pete, was that you? Richard.

12 MR. MUNZINGER: I just want to agree with
13 what I think Buddy said. I don't let my secretary give my
14 clients advice, nor do I let my paralegal -- who is the
15 best paralegal in the history of the United States -- give
16 my clients advice. Why should a judge let a clerk give
17 legal advice to a pro se litigant? It doesn't make sense.

18 HONORABLE STEPHEN YELENOSKY: And a judge
19 wouldn't.

20 HONORABLE ANA ESTEVEZ: You don't let them.

21 HONORABLE STEPHEN YELENOSKY: That's my
22 point. You don't tell the clerk to do that.

23 MR. MUNZINGER: But why would the -- if it's
24 under his direction, her direction, why doesn't the judge
25 give it herself or himself?

1 HONORABLE ANA ESTEVEZ: We don't.

2 MR. MUNZINGER: The problem is people are
3 going to come, and you're busy, you're on the bench, or
4 you're not there, and they ask a question, and it's not on
5 your checklist, and your person answers it. That person
6 has received legal advice from a judicial officer of the
7 State of Texas and is going to rely upon it, but the
8 person giving the advice is not a lawyer. It doesn't make
9 sense.

10 MS. NEWTON: Trish, and then Judge Peeples.

11 MR. MUNZINGER: To me anyway.

12 MS. McALLISTER: So I'm going to go back to
13 the staff attorney concept here because there are -- you
14 know, I knew about the Bexar County one and, of course,
15 there are other ones in Travis County, too. There are
16 attorneys who are facilitating especially the uncontested
17 divorces between pro se litigants and just reviewing
18 pleadings, stuff like that. So my question to you is --
19 and you guys would know better than I -- is would -- would
20 removing the parenthetical language, you know, have an
21 unintended consequence of not allowing those types of
22 things to happen because, you know, these are people that
23 are typically -- the staff attorneys are typically
24 reviewing the documents for completeness. They're not
25 typically -- or I'm not aware of anybody who's giving

1 people advice. I don't know of any county that's like
2 allowed the staff attorneys to give advice, but they do
3 allow them to pull pleadings, which some people believe is
4 a form of advice, based on, you know, what they come in to
5 do.

6 HONORABLE ANA ESTEVEZ: Do they work for the
7 judge? Because this is just a judicial. Do they?

8 MS. McALLISTER: Yeah.

9 HONORABLE STEPHEN YELENOSKY: The resource
10 attorneys? They work for the county.

11 MS. McALLISTER: But San Antonio, you have
12 to go through -- you have to -- there's like a six-month
13 wait. You have to have all your documents approved by a
14 staff attorney.

15 HONORABLE ANA ESTEVEZ: But this is a
16 judicial canon.

17 MS. McALLISTER: No, I understand, but --

18 HONORABLE DAVID PEEPLES: Can I --

19 CHAIRMAN BABCOCK: Judge Peeples.

20 HONORABLE DAVID PEEPLES: Okay. We're
21 spending a lot of time on something that I think is not an
22 issue.

23 MS. McALLISTER: Okay.

24 HONORABLE DAVID PEEPLES: We've got staff
25 attorneys and so forth in December. We'll talk about that

1 in December. This is for judges, and I need to hear -- I
2 mean, I'm for taking the parenthetical out. Is anybody
3 for it, in view of the fact that we'll deal with staff
4 attorneys and so forth next month?

5 CHAIRMAN BABCOCK: Yeah, that's a better way
6 to frame it. Is anybody in favor of leaving the
7 parenthetical in? If you are, reveal yourselves now. And
8 you'll be stoned. And no hands are up, the record should
9 reflect.

10 HONORABLE DAVID PEEPLES: Let's take that
11 out. Anybody want that? Do we need it?

12 MS. CORTELL: I'm just saying there may be a
13 vote or two that are not showing themselves at this
14 moment, but I am fine with taking it out, which is my own
15 vote, so we'll take it out.

16 MR. ORSINGER: That's the way a railroad is
17 run. You railroaded that right through, didn't you?

18 CHAIRMAN BABCOCK: Judge Peeples and I are
19 on the same track.

20 MS. CORTELL: Okay.

21 CHAIRMAN BABCOCK: And Munzinger is right in
22 front of the train.

23 MS. CORTELL: Okay. So the second sentence
24 then will start with, "By way of illustration a judge
25 may." Okay. Now we're down -- now we're going to go to

1 our list of ten, (1), "construe pleadings to facilitate
2 consideration of the issues."

3 CHAIRMAN BABCOCK: Richard Munzinger.

4 MR. MUNZINGER: Currently to submit a
5 special issue to the jury there must be a pleading of
6 sufficient specificity to support it. I assume number (1)
7 erases that rule for a pro se litigant, and if that's the
8 case, what has happened to the lawyer who has prepared his
9 case, conducted his trial, made his strategic decisions on
10 the basis that there is no pleading to support a defense
11 or a theory asserted, even though possibly raised by the
12 evidence? What happens there? And when the judge cures
13 the problem for the pro se litigant, is the judge a judge,
14 or is the judge a litigant's helper? And is that fair,
15 honest, equal justice before the law? My client has paid
16 me to get him or her justice in accordance with the law.
17 This becomes the law as a practical matter.

18 CHAIRMAN BABCOCK: So --

19 MR. MUNZINGER: I have previously said I
20 think this is -- the whole exercise I think is
21 unnecessary.

22 CHAIRMAN BABCOCK: Really, I didn't think we
23 were clear on that.

24 MR. MUNZINGER: No, I understand. I've lost
25 that point. My only point is she said, "Well, I don't

1 want to get in trouble with the judicial" -- I've not
2 heard anybody get in trouble with judicial authorities
3 because they've assisted a pro se litigant by being
4 reasonable and fair, but when you start articulating these
5 things you're inviting it, and you're encouraging it. I
6 just raised a practical question that I think has merit.
7 What's the answer to it?

8 CHAIRMAN BABCOCK: Okay. Your hypothetical
9 is you're in court. Everybody is there, but one is pro se
10 and one is represented, and the judge says, "I'm
11 construing this pleading in a way to facilitate so
12 everybody can understand it." And how would that -- how
13 is that a problem?

14 HONORABLE ANA ESTEVEZ: They used an
15 affirmative defense there that is not clearly stated or
16 something like that. So then now they're litigating
17 something, but I have a quick question for Richard. He
18 wants justice, and I understand he wants it under the law,
19 but sometimes even the pro se that can't articulate
20 everything until you have all of the facts you won't ever
21 get a pure justice. And so if justice is truly what
22 you're going for, I think that's what's trying to drive
23 this, is recognizing that pro se litigants are less likely
24 to get true justice if they are bound by the rules, not
25 the law, but the rules, which are manmade and are not

1 heavenly and perfect and everything else.

2 MR. MUNZINGER: Well, all I can say, there
3 are any number of cases that I have read and you have read
4 over the years saying that the law applies to a pro se
5 litigant with the same way that it applies to a regular
6 litigant. The Supreme Court of Texas has said it, maybe
7 twice in the last 15 or 20 years.

8 HONORABLE ANA ESTEVEZ: But we're talking
9 about rules, not law. They're not trying to change the
10 law. At the end the judge is going to be applying the
11 same law. I don't think there's anything that says we're
12 going to be applying a law differently.

13 MR. MUNZINGER: Well, but --

14 HONORABLE ANA ESTEVEZ: I'm not trying to go
15 one way or the other. I know it sounds like I am, but the
16 problem is it's a real problem.

17 MR. MUNZINGER: I am at present --

18 HONORABLE ANA ESTEVEZ: And if that side
19 wins then another side really loses, and if this side
20 truly wins then the other side loses, and there's not
21 going to be a pure answer, and so the question is, is this
22 something where we get the right result, the just result,
23 the majority of the time.

24 CHAIRMAN BABCOCK: Pete, if they get too
25 close to each other you'll --

1 HONORABLE ANA ESTEVEZ: If I was sitting
2 over there I would be really going because I would be
3 looking at him.

4 PROFESSOR HOFFMAN: At the risk of
5 interrupting --

6 CHAIRMAN BABCOCK: Professor Hoffman.

7 MR. MUNZINGER: Can I just respond briefly
8 and then I promise to be quiet? I am at present briefing
9 a motion for new trial in a case I just lost. I'm looking
10 at appellate court cases regarding the court's charge. I
11 don't know how many cases I have read in which an
12 appellate court has said, "In obedience to Texas law you
13 did not raise the issue in a pleading. There is no error
14 because there's no pleading supporting the requested
15 issue." That is gone given parenthetic number (1).

16 CHAIRMAN BABCOCK: Professor Hoffman.

17 PROFESSOR HOFFMAN: So at the risk of
18 interrupting what has been entertaining, I might remind
19 both Richard and the Court that under Texas Rule of Civil
20 Procedure 67, "When an issue is not raised by the pleading
21 or tried by the express or implied consent of the parties
22 they shall be treated in all respects as if they had been
23 raised in the pleadings and in such case an amendment may
24 be allowed by the court as a leave of court." The same
25 provision might also flag as Rule 66, which allows the

1 court when justice so requires to grant an amendment.

2 And then while I'm in the business of
3 quoting things perhaps it would be also useful, not being
4 a Bible scholar myself, the quote I think you're referring
5 to, Richard, is -- is that "We should not pervert justice.
6 Do not pervert justice. Do not show partiality to the
7 poor or favoritism to the great, but judge your neighbor
8 fairly." I think what God may have meant is that we were
9 supposed to be balanced and not fairer to one side or the
10 other.

11 MR. MUNZINGER: All I can say is what you
12 give to him, you take from my client.

13 CHAIRMAN BABCOCK: We have reached new
14 heights I think this session.

15 MR. LOW: That's a first.

16 CHAIRMAN BABCOCK: No, I think heights is
17 the right thing. Orsinger, and then Hayes.

18 MR. ORSINGER: Okay. So I generally think
19 that this list is a bad idea because it will cause a lot
20 of disruption of familiar practices among the lawyers
21 where both sides are represented and people are trying to
22 get around or ride roughshod over procedural constraints.

23 Item (1) concerns me about construing
24 pleadings to facilitate consideration of the issues
25 raised. I don't know, raised when? Not raised in the

1 pleadings obviously, so are they talking only about issues
2 that have been tried by consent and now we're talking
3 about amending pleadings, but, you know, we have pleading
4 requirements for affirmative defenses. We have a pleading
5 requirement for a sworn account. We have pleading
6 requirements for verified defenses. We have pleading
7 requirements for injunctive relief, and I have grown used
8 to them, and I follow them, and I expect other lawyers to
9 follow them, and I don't like a comment anywhere saying
10 that, yeah, I may have all of these rules of procedure and
11 all of this case law that we've had for the last 50 years,
12 but you can construe pleadings to facilitate consideration
13 of the issues raised, and I don't know raised when or
14 where. Raised in -- at the time that someone has had an
15 objection sustained offering evidence because it wasn't
16 pled? I think that this is really a problem. I think all
17 of these are a problem. I would rather just have the rule
18 change say "Do what you need to to get the pro ses out of
19 your court," and let's not list all of these examples that
20 I think probably are just smashing a hammer through the
21 Rules of Procedure.

22 CHAIRMAN BABCOCK: Hayes.

23 MR. FULLER: I want to kind of follow up on
24 what Richard just said. The two things that concern me
25 here are, number one, "by way of illustration" because

1 that would imply that this is not an all-inclusive list of
2 what we write down all of the sudden empowers this with a
3 list of powers that can be done. And I'm also bothered by
4 the word "may" because even though we may do it, have we
5 thought about the negative? There are going to be some
6 people complaining about the fact for those judges who
7 choose not to do it that they didn't do it. And that's --
8 that I think -- I'm kind of like Richard. I think we
9 ought to leave it with the judges have broad authority to
10 kind of do what they need to do within the canons and let
11 it go from there, because I just have trouble trying to
12 enumerate all of the things that a judge can do, knowing
13 that we can't do that, and then once we've done that
14 you've got to worry about the negative of people if the
15 judge chooses not to do it, getting in trouble for not
16 doing it.

17 CHAIRMAN BABCOCK: Buddy, can you defer to
18 Judge Newell for a second?

19 MR. LOW: Yeah, go ahead.

20 CHAIRMAN BABCOCK: Judge Newell.

21 HONORABLE DAVID NEWELL: I was just going to
22 say that if we're talking about the phrase "construing
23 pleadings to facilitate consideration of issues raised" I
24 wonder whether or not that's something that we can -- you
25 don't need to say given that you are going to have law out

1 there that already talks about construing pleadings
2 liberally, and I think that's what this is getting at. So
3 if that's what this is getting at and these are not meant
4 to sort of trump the existing law, then it's probably
5 better if we can find some sort of analog for these things
6 to existing law that might already be said that maybe it's
7 better to be silent here and let the other law speak to
8 that, and that's one of the initial ideas I had when I was
9 thinking about the canons early on or about this change
10 early on, was maybe it's a good idea to go through and
11 see, well, what are some of the things that courts have
12 already weighed in on, kinds of things, to see if -- and
13 see if that's something that would be included and then at
14 least you're not venturing out into seas of unknown
15 thought. But anyway, just with regard to this, I think
16 maybe you could defer to liberal construction of pleadings
17 law and not include this.

18 CHAIRMAN BABCOCK: Yeah. Buddy, and then
19 Judge Busby, but, Judge Newell, what you've just said
20 leads me to wonder has the Judicial Conduct Commission
21 come after a judge for doing any of these things? I mean,
22 has a judge been called up there because he's -- because
23 he or she has construed pleadings to facilitate
24 consideration of the issues raised?

25 HONORABLE DAVID NEWELL: That was one of my

1 thoughts, actually, was kind of changing the canons seems
2 to suggest that anyone who had been doing these things
3 before was violating the canon and that's why we're going
4 to have to change the canon to say -- to make it okay to
5 do that. And I wondered about whether that was the case,
6 because if you could already do these things, then why do
7 you even need to change the text of the canon? But --

8 CHAIRMAN BABCOCK: Yeah.

9 MR. LOW: Chip?

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

12 MR. LOW: These things, like number (2),
13 reminds me of something happened 30 years ago. This "To
14 advise about proceeding and procedural requirements."
15 When I'm trying a case for the death of about 50 cows; and
16 the guy didn't prove he owned the cows, so I made motion
17 for a directed verdict; and the judge said, "Well, under
18 our procedure, Fitch, you're required to prove you own
19 those cows before you rest, so you're going to have to ask
20 me to reopen." I didn't go to jail, but I headed that
21 way. I mean, I mean, and that opens the door. I mean,
22 you know, the judge can construe that as he's doing
23 procedural, which is true. At any rate, that's --

24 CHAIRMAN BABCOCK: That's stuck with you.

25 MR. LOW: Yeah, it has stuck with me.

1 CHAIRMAN BABCOCK: 30 years later.

2 MR. ORSINGER: It was probably more than 30
3 years ago.

4 CHAIRMAN BABCOCK: Yeah, right. Justice
5 Busby.

6 MR. LOW: It really was. I didn't want to
7 go back that far.

8 HONORABLE BRETT BUSBY: I don't want to
9 repeat everything I said in the last meeting on this
10 subject, but it does seem like we're taking a step
11 backward in our discussion in terms of -- because we did
12 talk last meeting about whether we should have a comment
13 or not, and many of these same issues were raised about do
14 we really need a list or not, and I think, you know, we've
15 made a decision to have one at this point, but I think for
16 very good reasons, which are that not all judges all
17 around the state feel comfortable doing these same things
18 and we've got a lot of anecdotal evidence that the
19 commission has compiled of, you know, judges in certain
20 parts of the state may not know whether they can do these
21 things and while some others are.

22 So we're trying to facilitate some sort of
23 uniform treatment, and this is -- again, it's permissive.
24 It's not mandatory, and we've discussed that as well, but
25 we want judges around the state to be on the same page

1 about what is permissible, and so that's the value of
2 having a list like this. And, yes, indeed there is law
3 out there on a lot of these points that says the judge can
4 do it, but the value is having all of this in one place.
5 It's not, you know, well, maybe if one of these things
6 comes up I'll go and hunt down the law in each one of
7 these individual issues. If you do that it's not going to
8 happen, so the value is having it here so that the judge
9 knows what he or she is permitted to do.

10 CHAIRMAN BABCOCK: Yeah. Justice
11 Christopher.

12 HONORABLE TRACY CHRISTOPHER: I mean, I
13 think judges will do this even without pro ses, and that
14 same thing might have happened in your case if there had
15 been a lawyer on the other side, especially when you
16 have --

17 MR. LOW: There was a lawyer.

18 HONORABLE TRACY CHRISTOPHER: There was?
19 And especially when you have, you know, a brand new lawyer
20 who doesn't know that he needs to ask to reopen.

21 CHAIRMAN BABCOCK: No, Buddy was the brand
22 new lawyer.

23 MR. LOW: I was the brand new lawyer, but I
24 aged pretty quick.

25 HONORABLE TRACY CHRISTOPHER: You know, I

1 mean, I think that, you know, the judges who want to do
2 this are doing it already.

3 MR. LOW: Yeah.

4 HONORABLE TRACY CHRISTOPHER: I'm not really
5 sure that having a comment is going to make the judges who
6 don't do it change their mind, because I don't think
7 judges are not doing it because they think they can't.
8 They are not doing it for other reasons. Maybe they don't
9 think it's fair. Maybe they think that this pro se needs
10 a lawyer, and if they're not particularly friendly with
11 the pro se and keep denying the divorce 25 times they'll
12 finally get a lawyer to, you know, figure out what they're
13 doing wrong. But if we're going to keep number (1) -- and
14 this will make some of my appellate friends mad, I want to
15 say "construe briefs and pleadings," because we throw out
16 a lot of pro se briefs on poor pleading, poor -- you know,
17 didn't meet the briefing requirements.

18 MR. MUNZINGER: Well, that's not justice.

19 HONORABLE TRACY CHRISTOPHER: It's not.

20 MR. MUNZINGER: That's not justice. Let
21 them say what they want, the way they want to say it, when
22 they want to say it, how they want to say it. Now, that's
23 justice. No, it's not justice. Of course it isn't. The
24 rules of procedure and evidence are the handmaidens of
25 justice, and the moment that you relax them for one side

1 you've affected the other side.

2 HONORABLE TRACY CHRISTOPHER: If I can read
3 a brief and know what they're complaining about it, I
4 think we ought to write an opinion on it regardless of
5 whether they have gone through the formal briefing
6 requirements, but I'm in the minority, I believe, on my
7 court on this point.

8 HONORABLE BRETT BUSBY: But not alone.

9 CHAIRMAN BABCOCK: Justice Brown's been very
10 patient waiting his turn, but I will note also for the
11 record that he's got Astros orange on, so go Astros, and
12 then Frank.

13 HONORABLE HARVEY BROWN: That's right. My
14 point was going to be similar to what Justice Busby said,
15 which is I think the value of this is for the judges who
16 aren't sure they can do it and therefore don't do it out
17 of fear, and Justice Christopher may be right that judges
18 don't do it for that reason. My sense is that a lot of
19 judges don't. I could be wrong, but I think some judges
20 worry about a conduct commission complaint being leveled
21 against them, and therefore, they decide safer is better.
22 So I view these rules as kind of a safe harbor for judges
23 that tell the judges "If you want to do this, you may.
24 You don't have to."

25 I do think when we talk about them we should

1 remember this is only a canon that talks about whether a
2 judge can get in trouble for doing it. It doesn't change
3 the substantive law. It doesn't change the fact that if a
4 judge construes the pleadings to facilitate consideration
5 of issues raised and it hasn't been pled and they haven't
6 asked for a trial amendment, they may still get reversed.
7 It just means that they're not going to get in trouble
8 with the conduct commission for doing it, but you still
9 have all your appellate points you can make, Richard, and
10 others if you think the judge goes too far.

11 CHAIRMAN BABCOCK: Okay. Any other
12 comments? Frank. Yeah.

13 MR. GILSTRAP: You know, I think we're
14 struggling with two things. One, should we have anything,
15 and, two, if we do, what should be in it. If we're
16 going to -- if we're going to have something that's in it,
17 some of this stuff is pretty vanilla, like "explain the
18 basis for the ruling." "Inform litigants what will be
19 happening next and what is expected of them." Well, I
20 always want to know that. You know, if a judge doesn't do
21 that, you know, he -- you know, I don't like it. Some of
22 this stuff is easy, so I think we can decide whether we
23 have a list and then if we're going to have a list and
24 some of this stuff is pretty controversial, like narrative
25 testimony. So let's either decide whether we have a list.

1 If so, let's mush through it and figure out what goes in
2 it.

3 CHAIRMAN BABCOCK: Every time we have a
4 scheduling order you tell the parties what's next.

5 MR. GILSTRAP: Yeah. Yeah.

6 CHAIRMAN BABCOCK: After you file your
7 summary judgment.

8 MR. GILSTRAP: Yeah.

9 CHAIRMAN BABCOCK: If it's not granted
10 there's a trial.

11 MR. ORSINGER: Not inside the trial, though.
12 They're talking about "Now is the time for you to call a
13 witness." Or "Now you can only cross-examine."

14 CHAIRMAN BABCOCK: That's not what this
15 says.

16 MR. ORSINGER: Provide information.

17 CHAIRMAN BABCOCK: "Inform litigants what
18 will be happening next in the case and what is expected of
19 them."

20 MR. ORSINGER: You're thinking of at a
21 pretrial hearing. I'm thinking of in the trial.

22 CHAIRMAN BABCOCK: I'm thinking of a case.

23 MR. GILSTRAP: Well, that's why we need to
24 scrutinize each one of these in turn. Some of them might
25 seem benign to somebody and to somebody else it's not

1 benign.

2 MR. ORSINGER: There aren't pretrial
3 hearings in pro se cases. The people show up for trial
4 without pleadings, without the right judgment, and
5 somebody testifies and then instead of cross-examining,
6 they launch off into their own direct examination, and you
7 have to tell them, "No, now is the time where you
8 cross-examine your husband. You get to testify later when
9 it's you're time in the case." I interpret this to mean
10 is how the trial is unfolding, not how you're going to
11 pursue the pretrial.

12 CHAIRMAN BABCOCK: Well, you know, that's
13 part of the problem, because I would -- I would say that,
14 you know, if I'm a judge and I send out a scheduling order
15 to the litigants, I'm informing them what's going to be
16 happening next in the case and what's expected of them.
17 "If you want to file summary judgment, you better do it by
18 September 10th, and we're going to have, you know, expert
19 Daubert motions on October 5th, and we're going to have a
20 trial on November 15th." I'm informing the litigants
21 what's going to happen next and what I expect of them. I
22 understand your point. You could easily interpret it the
23 way you're talking about it, but you could also interpret
24 it in a way that happens everyday in court.

25 MR. ORSINGER: I have no problem with your

1 way, but the problem I have is in the middle of a trial
2 when the judge is basically managing the nonrepresented
3 client's presentation of the case, which is what it boils
4 down to, because you don't have a bunch -- you don't have
5 a pretrial conference at all on a pro se case normally.

6 CHAIRMAN BABCOCK: But he's not doing it ex
7 parte. I mean, he's doing it in front of everybody. He's
8 saying, "Okay, now we're going to have defendant's side of
9 this."

10 MR. ORSINGER: Yes, well, that particular
11 subdivision bothers me less than many of the others, but I
12 just wanted to say that I think the point is that the
13 trial judges have to do something to explain the trial to
14 the nonrepresented litigant during the trial because they
15 don't understand voir dire. They don't understand opening
16 arguments. They don't understand direct and
17 cross-examination. They don't understand resting. So
18 you've got to tell them, "Now's the time. Do you have any
19 more witnesses? Do you rest?" So, I mean, that's the way
20 it goes down. I don't do these, but I sit in the court
21 and watch them all the time, and that's what I see.

22 CHAIRMAN BABCOCK: You're easily amused
23 obviously.

24 MR. ORSINGER: Well, you know, if I want to
25 get a divorce in Judge Estevez' court I'm going to have to

1 listen 10 pro se divorces before mine is called. Isn't
2 that right?

3 HONORABLE ANA ESTEVEZ: It's usually just
4 two or three a day.

5 CHAIRMAN BABCOCK: She might put you to the
6 head of the line.

7 HONORABLE ANA ESTEVEZ: But you won't have
8 to really hear much because I do most of it.

9 MR. ORSINGER: Well, see, she's already
10 doing it.

11 HONORABLE ANA ESTEVEZ: But I never did
12 before. Not until I came here and found out it was okay.
13 You know, I thought -- I mean, I was one of the mean ones.

14 MR. ORSINGER: You make a compelling
15 argument for having good judicial continuing education,
16 but I'm not sure that that's a good reason to have a
17 comment in the Code of Judicial Conduct.

18 HONORABLE ANA ESTEVEZ: You know, what if
19 there's a way -- can I just suggest if there's a way to
20 not make it a comment and just let the judges know without
21 letting the public know that this is okay, I think that
22 is -- no, you guys can laugh. I am not kidding. If there
23 is a way to like do that without letting the public know,
24 I think that would do -- pretty much get what everybody
25 wants without it having the backfiring effect of some pro

1 se litigant coming in and saying, "Well, you have to do
2 this. You have to do that" or something else.

3 CHAIRMAN BABCOCK: Make sure that among the
4 people you let know are the Commission on Judicial
5 Conduct.

6 HONORABLE ANA ESTEVEZ: Well, I thought
7 maybe they could send it out. Maybe we let them send it
8 out.

9 CHAIRMAN BABCOCK: Judge Peeples.

10 HONORABLE DAVID PEEPLES: One reason we're
11 having trouble is because we've got a one-size-fits-all
12 approach, and I argued against that in the subcommittee
13 and I lost, but I think we're going to carve out criminal
14 when we give Judge Newell the floor because the Court of
15 Criminal Appeals was consulted, and they don't want this
16 for criminal cases for very good reason. So we may carve
17 that out. If we could carve out jury trials, it would
18 take away almost every objection that's been made here.
19 Almost, not all. But we've got one size fits all. If we
20 could limit it to JP courts and probate and family law, we
21 would deal with the areas where there is a crying need for
22 this and where it happens in many, many, many courts but
23 not all, but we've got one size fits all, and I wouldn't
24 dare -- I wouldn't even think about doing any of these in
25 a jury case where there's a pro se.

1 How common is that? I asked Judge
2 Christopher. She said she had had a handful of jury
3 trials in her career with a pro se litigant. I can
4 remember one. I asked Judge Yelenosky. He can remember
5 two jury cases with a pro se litigant. Very rare.
6 They're hard as heck when you have them, but they're rare.
7 Nonjury and family law just is daily, and the need is just
8 crying, but I think judges who maybe are self-confident
9 and so forth, are already doing almost everything, but
10 there are places where they don't do it, and I've seen
11 judges -- and Richard Orsinger and I have talked about it
12 -- where just a cold, cold judge and an easy divorce case
13 just stood there or sat there with his arms folded and
14 because one litigant didn't know what to do he just said,
15 "Go on," you know, "Go on." He would not grant an agreed
16 divorce because this poor woman didn't know what to do. I
17 just wanted to --

18 CHAIRMAN BABCOCK: Is this comment going to
19 change that behavior?

20 HONORABLE DAVID PEEPLES: Well, it will take
21 away the asserted reasons why that judge wouldn't do it.
22 I talked to the bailiff. The bailiff said, "Judge can't
23 ask those questions," and I explained to him that the
24 judge could, he just didn't want to. No.

25 HONORABLE ANA ESTEVEZ: Or he doesn't know

1 that he can.

2 HONORABLE DAVID PEEPLES: Well, maybe.
3 Maybe. I don't know what his reasons were, but this
4 rule -- I just see it as a problem that it's a one size
5 fits all, but how do you write an ethical rule that says,
6 you know, in some cases can you do this and others you
7 can't.

8 CHAIRMAN BABCOCK: Yeah. Judge Busby, and
9 then Peter.

10 HONORABLE BRETT BUSBY: I think that's the
11 concern, because to think that it's okay to explain the
12 basis for a ruling in one type of case and not another I
13 think is problematic, but we did add the language in the
14 last sentence to address the very issue that Judge Peeples
15 brings up about the judge being able to consider the type
16 of case, the stage of the proceeding, so that if a judge
17 doesn't feel comfortable doing this in a jury trial or in
18 a particular type of case, then, you know, he or she can
19 make that judgment based on that language. But I would
20 say that, you know, to the point of can we just do
21 judicial education on this, we tried that with the clerks
22 and the court personnel, and it was not effective. I
23 think we've reported on that at a previous meeting that
24 you need the language in there in the rule to have
25 something to hang your hat on, not only for the judge or

1 the court personnel when we come to those policies, but
2 also for the Judicial Conduct Commission to look at. So
3 it's not just for the judge. It's also -- it's for
4 everybody that's involved.

5 CHAIRMAN BABCOCK: Yeah, Evan. Oh, no, wait
6 a minute. Peter had his hand up earlier. Sorry.

7 MR. KELLY: I think it might make sense to
8 limit it to JP and to family law cases. JP tends to be
9 much more informal. We've had -- we've had the policy
10 determination to issue pro se forms for family law cases
11 in noncomplex family law cases and limit it to -- limit
12 this comment or these instructions to those cases where
13 there's been that policy determination to encourage pro se
14 litigation and in other instances don't have this rule,
15 you know, regular jury trial cases and that sort of thing,
16 but where there's already been the determination that
17 we're going to encourage pro se litigation then we should
18 have the judges have the authority or at least not be
19 punished for trying to guide that pro se litigation.

20 CHAIRMAN BABCOCK: Evan.

21 MR. YOUNG: It seems like a lot of the
22 discussion has had as a subtext of the greatest threat
23 facing not just Texas courts but maybe even Western
24 civilization is the threat of pro se litigants having too
25 much power in our courts, which seems unlikely to actually

1 be the chief threat. I support this because I think that
2 it is consistent with the Supreme Court's admirable
3 efforts over the past decade perhaps to really make the
4 court system work better for the many Texans who really
5 don't have access to lawyers at all. I don't think this
6 is a pro se rule explicitly. I think it includes and may
7 be even primarily about that, but I think this is an
8 ethical rule that says, "Texas judges, you're not going to
9 be ethically censured for managing your courtroom
10 consistent with common sense to make sure that actual
11 justice is done, that you're not going to be reversed for
12 some crazy thing because you didn't at the outset of a
13 proceeding get some information, that people aren't going
14 to spend years and years of their lives unable to have
15 access to their children or to get the divorce or to
16 recover some small amount that they need from their
17 employer or whatever."

18 And if it turns out that we suddenly see an
19 outpouring of Texas judges really putting the thumb on the
20 scale and harming that, you know, very vulnerable
21 population of represented parties in our courts, perhaps
22 we could revisit it, but why not try something that
23 includes a list, most of which is -- does strike me as
24 just common sense stuff that judges ought to do, and to
25 say not that you can't be reversed -- this is Justice

1 Brown's point I think. Not that you can't be reversed if
2 you abuse your discretion, but that it's not an ethical
3 violation. That's really what this is about, right?

4 It's not saying that we're now saying that
5 if a judge oversteps any bound that because it's listed in
6 a comment to the canon of judicial conduct that that's the
7 way it goes, too bad, the appellate courts are powerless
8 to set precedent that explains to judges better how to
9 handle it. I am astounded, frankly, there is so much
10 opposition to this, and I think that the Court should
11 proceed with most of these comments at the very least and
12 then cut back if it turns out that it really undermines
13 our system. I don't think that it will, though.

14 CHAIRMAN BABCOCK: Well, get ready to be
15 astonished. Judge Newell.

16 HONORABLE DAVID NEWELL: I was just going to
17 say can we just make the comment say, "A judge doesn't
18 violate the ethics canon if he uses common sense," and
19 that's it?

20 CHAIRMAN BABCOCK: Yeah, we're done.
21 Justice Christopher.

22 HONORABLE TRACY CHRISTOPHER: Well, I'm --
23 even though I have heard -- not from Justice Newell yet,
24 but some reasons why the Court of Criminal Appeals doesn't
25 want this. I'm against exceptions, because then the

1 judges in those cases will think that they can't do those
2 things, and I think they can do them even in criminal
3 cases. So, you know, I just think that it's a mistake to
4 have exceptions or to limit a comment to a certain type of
5 case.

6 CHAIRMAN BABCOCK: Yeah, I've got to say,
7 Justice Christopher, everything on this list I think a
8 judge can do now.

9 HONORABLE TRACY CHRISTOPHER: Right.

10 CHAIRMAN BABCOCK: I mean, they can't do it
11 ex parte, but we've already gotten over that hurdle. I
12 mean, one of the other things is invite somebody to
13 present an amicus. Well, you know, I've had cases where
14 the Supreme Court has done that, presented an amicus, and
15 you start saying, "Oh, by the way, now you can do this,"
16 that suggests that before you couldn't. And then there
17 may be some other things -- I don't know. Anyway, we're
18 beating a dead horse here. Judge Peeples.

19 HONORABLE DAVID PEEPLES: Well, I was just
20 going to say in criminal cases, do we really think it's
21 all right for a judge to help the state in a case?

22 HONORABLE TRACY CHRISTOPHER: Then it's not
23 a neutral question. I mean, you know, if the judge asks
24 the question to supply a missing element, that would not
25 be a neutral question.

1 HONORABLE DAVID NEWELL: I could speak to
2 one example that strikes me about that very issue there,
3 was there was a case dealing with a jury instruction on
4 the right for the jury to consider the refusal to take a
5 breath test, and it was an otherwise neutral instruction,
6 and the court said it was a neutral instruction, and it
7 nevertheless carried with it the potential to somehow
8 obliquely convey the judge's view regarding that evidence,
9 and it was declared a comment. Now, I didn't agree with
10 the opinion, but I'm just saying that that's an example
11 where things that we think are neutral are not necessarily
12 seen as neutral or things we think are not neutral could
13 be.

14 MR. MUNZINGER: If you have to ask the
15 question, it's not neutral.

16 CHAIRMAN BABCOCK: Richard.

17 MR. ORSINGER: A lot of my opposition to
18 this entire list is because this is going to be an
19 opportunity for litigants who are represented by lawyers
20 to try to weaken the structure that exists in our Rules of
21 Procedure, and if there was a sentence on here that said
22 what Justice Brown said, which is that the Rules of
23 Procedure are the same and your chances of reversal are
24 the same no matter what this says, I would feel better,
25 but there are lots of rules and case law and tradition to

1 support a lot of the things that this says you can ignore.

2 And then since you mentioned ad litem I
3 just want to mention to those of us here who don't know,
4 the Legislature has taken great interest in the
5 appointment of lawyers to assist in adjudicating
6 parent-child issues, not only permanent termination of the
7 parent-child relationship, but even in ordinary custody
8 cases we have a chapter dedicated to it, and there's a
9 distinction between an attorney ad litem and an amicus
10 attorney. Those are distinctions that probably are
11 unknown outside of the family law, and here we're telling
12 them we've got an entire chapter about what the conditions
13 are for appointing these people and what their
14 qualifications are, and now I've got a thing here in the
15 judicial conduct that says that you're free to appoint an
16 amicus curiae to present a particular issue.

17 Where does that fit into the Family Code?
18 We have all of this structure, and we have all of these
19 standards, and now all of the sudden I've got something
20 else. So what bothers me is that this is great, this is a
21 great way to achieve justice, but I think that this set of
22 rules will be used by lawyers to erode the sharp lines
23 that we have established for -- on purpose through
24 procedures and even in the Family Code through statutes,
25 and that's really why I oppose this entire list, although

1 parts of it are less harmful.

2 Now, I'll say a neutral question to me is
3 not a question that doesn't affect the outcome of the
4 case, Justice Christopher. To me a neutral question means
5 a nonleading question. So in Buddy's case if I was the
6 trial judge and I wanted to do this I would just say,
7 "Sir, do you own those cows?" To me that's a neutral
8 question, but to Buddy it's not because it affected the
9 outcome of his case. So there's so much about these
10 standards here that are troubling to me. I just I am very
11 disturbed, and it's not because I'm afraid that Western
12 civilization is crumbling. It's because we've spent a lot
13 of time putting together rules of procedure that make the
14 presentation of evidence orderly, and I now see something
15 that I consider to be just smashing all of it into bits.

16 MR. LOW: See, that is the whole thing.
17 Then he requested "You have to ask me to reopen the
18 testimony," and that's what I'm bothered about.
19 Procedural requirements, what if you have to lay a certain
20 predicate procedurally before you can ask a question?
21 Defense objects. Judge says, "Well, you haven't laid a
22 proper predicate. You've got to lay the predicate, and
23 how to lay the predicate before you ask that question."
24 That's procedural. Are we talking about procedural rules
25 or internal procedures of a court?

1 CHAIRMAN BABCOCK: Judge Newell. Then Nina.

2 HONORABLE DAVID NEWELL: I'll try to keep it
3 short. I'm afraid for Western civilization for other
4 reasons, but I would say that -- and I've said at the
5 beginning I'm not for these changes or anything like that.
6 That said, everything I'm hearing really can be boiled
7 down to an objection to any change at all being made to
8 this canon, and I thought that everyone had moved past
9 that.

10 MS. McALLISTER: Yes.

11 HONORABLE DAVID NEWELL: I thought we had
12 moved past the discussion on whether to change it and past
13 the discussion on whether or not to have some sort of
14 list. So we're going to keep going round and round about
15 this because it's still coming down to the basic
16 philosophical difference of this shouldn't be changed or
17 not, it shouldn't be changed. That's all.

18 CHAIRMAN BABCOCK: Nina.

19 MS. CORTELL: At the appropriate time I
20 would invite the committee to go through it item by item
21 so we can get a sense if we were to use -- if we were
22 going to suggest these to the Texas Supreme Court the
23 edits, if any, from this committee on the language or if
24 there are some that are more acceptable than others, if we
25 can get a sense of the committee on that, that would be

1 helpful.

2 CHAIRMAN BABCOCK: Thanks for bringing us
3 back to that. That was what your idea half an hour ago,
4 wasn't it?

5 MS. CORTELL: I thought so, but --

6 HONORABLE TRACY CHRISTOPHER: Vote, vote,
7 vote.

8 CHAIRMAN BABCOCK: Judge Estevez.

9 HONORABLE ANA ESTEVEZ: I think we're under
10 a false assumption that what we're talking about most of
11 the time here is a pro se litigant against someone that's
12 represented. The reality is this is usually two pro se
13 litigants that we wouldn't get anywhere without the judge
14 asking questions, modifications, divorces. They are
15 usually a pro se, and the other side is pro se as well.
16 That's what we're really dealing with. So without this,
17 there is a -- we don't even get to the -- we don't get to
18 any type of litigation. Most of the time. There's a few
19 educated people that really aren't poor that can read and
20 know how to do the rules, but the reality is most of the
21 people --

22 CHAIRMAN BABCOCK: Why are you pointing at
23 Munzinger when you say that?

24 HONORABLE ANA ESTEVEZ: Because most of the
25 people we're dealing with, they haven't graduated from

1 high school. They may not be able to barely read or fill
2 out the paperwork, but they still are entitled to get a
3 divorce for whatever reason. They're still entitled to be
4 able to rely on the Constitution, rely on all of the
5 rights they have that another citizen has, and yet they
6 don't have finances, they don't have education, they don't
7 know how, and between -- when you have two of them, you
8 don't have any way -- I mean, maybe in Bexar County if
9 you're blessed enough to live in Bexar County or Travis
10 County, but, you know, Amarillo is a great place, too, but
11 we don't have the finances and we don't have the resources
12 to be able to provide everyone equal justice. Or maybe
13 it's not the priority. I don't know, but I don't make
14 those decisions, and I'm not saying that we need this or
15 we don't need this, but the judges need to know this. I
16 don't care if the public knows it. The judges need to
17 know this so those people can be represented -- not
18 represented. They can just have justice. There is no
19 justice for them without it, something that allows the
20 judges to know what they can do and what they can't, and
21 they need to be able to do these things for a lot of
22 people.

23 CHAIRMAN BABCOCK: Richard Munzinger.

24 MR. MUNZINGER: Her comment, most of this is
25 two pro ses.

1 HONORABLE ANA ESTEVEZ: In my --

2 MR. MUNZINGER: I'm not arguing with you at
3 all, ma'am.

4 HONORABLE ANA ESTEVEZ: Okay. Thank you.

5 MR. MUNZINGER: The rule doesn't say that.
6 The rule says that this is what a judge can do, and he can
7 do it where one party is represented and where one isn't,
8 and my whole point is they're both entitled to the same
9 justice, and when you fiddle with this rule you've changed
10 the rules, and the parties that are so vulnerable because
11 they can afford a lawyer, they're citizens too. The
12 Constitution says they've got rights, too, even though
13 they've got money enough to hire a lawyer, for God's
14 sakes. They're American citizens. They've got
15 constitutional rights, and the Legislature passed the law
16 for them, too. What an amazing thing.

17 CHAIRMAN BABCOCK: Judge Peeples, and then
18 we'll go back to, I promise, item by item.

19 HONORABLE DAVID PEEPLES: Yeah, I was just
20 going to ask, Richard Orsinger made his point. Would it
21 change the thinking if, you know, there's not a proposal
22 to put it into the law, but if the Court were to do
23 something that were just to tell judges this is okay? I
24 mean, if it's happening anyway, Richard, can I just ask
25 you? I mean, you know that this kind of thing is

1 happening in Bexar County and a lot of other places. Does
2 that bother you very much, or is it mainly the idea of
3 memorializing it and making it official that is of
4 concern?

5 HONORABLE ANA ESTEVEZ: Make it part of the
6 judges conference and let us get some ethics credit for
7 it.

8 MR. ORSINGER: I think most of the time that
9 this is done are cases where it really isn't going to harm
10 either side, and it's not going to get appealed. My
11 concern really is not two pro ses, and it's not even
12 really one pro se against one lawyer. It's one lawyer
13 against another lawyer who are using these rules to tell
14 this judge that it's ethical to disregard pleading
15 requirements, to shade all of these rules that we live by
16 because it says right here it's ethical for you to do it.
17 And then someone is going to say, "Well, you won't
18 necessarily get reversed." Well, yeah, unless you abuse
19 your discretion you can do just about anything you want.
20 This is in my opinion a green light for lawyers to erode
21 the contours of procedure.

22 CHAIRMAN BABCOCK: I said it was Judge
23 Peeples was going to shut it off, but Judge Busby has had
24 his hand up for quite sometime, so --

25 HONORABLE BRETT BUSBY: I guess I would just

1 say to both Richards and to Buddy that, again, I just come
2 back to Justice Brown's point that this does not say that
3 you won't get reversed. It just says that you won't be
4 disciplined by the Judicial Conduct Commission if you do
5 these things, and so, you know, I think again, having
6 these somewhere where judges -- you know, where you have a
7 hook to do judicial education on this and that you're
8 providing safe harbors so that we get uniform treatment
9 around the state is a worthy objective.

10 CHAIRMAN BABCOCK: Trish.

11 MS. McALLISTER: I'm just going to point out
12 the final comment, which is that judges are allowed to
13 take the training, skill, and knowledge and experience of
14 persons involved. I mean, if you're really suggesting
15 that a judge is going to have two lawyers in front of them
16 and not assume that they know something about evidence,
17 procedure, all of those other things, I just -- I just
18 don't think there's a huge worry that the whole structure
19 is going to come falling down. But I do see -- I mean,
20 you know what I do see is that there is no access for
21 these people. We have judges all the time who refuse to
22 let people into their courtrooms unless they're
23 represented by a lawyer. That is not okay. It's not.
24 You know, Rule 7 allows you to come and represent
25 yourself, so, I mean, it's so -- it's heart-wrenching to

1 me.

2 CHAIRMAN BABCOCK: Okay. Let's take up item
3 (1).

4 MR. ORSINGER: I think we already did item
5 (1).

6 CHAIRMAN BABCOCK: Well, let me finish.

7 MS. CORTELL: I just want to -- of course,
8 everybody can read what it says right now, but here's what
9 the discussion has suggested as additions or edits. We
10 could say, per Justice Christopher, "construe pleadings
11 and briefs." You would include "and briefs," and you
12 could say "liberally" to pick up Justice Newell's concept
13 that we already have law that says you can construe
14 everything liberally, or we could stay with the current
15 language or any subset of that.

16 CHAIRMAN BABCOCK: Okay. Let's take some
17 votes. Let's take the original language, and if you are
18 against the concept all together, you'll vote "no," but
19 everybody in favor of number (1) as written, raise your
20 hand.

21 HONORABLE R. H. WALLACE: Number what?

22 CHAIRMAN BABCOCK: Number (1).

23 MR. MUNZINGER: As written.

24 CHAIRMAN BABCOCK: As written. Put them
25 back up again. All right, everybody opposed?

1 Well, that's interesting.

2 MR. ORSINGER: What?

3 CHAIRMAN BABCOCK: The vote is 10 to 10.

4 HONORABLE ANA ESTEVEZ: You get to vote.

5 MR. ORSINGER: Mr. Vice-President, you get
6 to vote.

7 CHAIRMAN BABCOCK: The vice-president gets
8 to vote, and I will vote against, so it's 11 against, 10
9 in favor. How about -- how about with the modification
10 that Nina proposes, "construe pleadings and briefs
11 liberally to facilitate consideration of the issues
12 raised"? How many people are --

13 MS. CORTELL: Or you could just put a period
14 after "liberally"?

15 HONORABLE ANA ESTEVEZ: Can we vote again,
16 or are you only going to take out of your 11?

17 CHAIRMAN BABCOCK: What's that?

18 HONORABLE ANA ESTEVEZ: Once you do this new
19 vote --

20 MR. YOUNG: You can favor multiple versions,
21 right? You can vote "yes" on multiple versions.

22 HONORABLE ANA ESTEVEZ: Have we been cut out
23 on that first vote?

24 PROFESSOR CARLSON: If you voted "yes" the
25 first time can you vote again?

1 MR. ORSINGER: Everybody can vote.

2 CHAIRMAN BABCOCK: Yeah. Yeah. You can
3 vote "yes" on the second one. Sure.

4 MS. CORTELL: Chip, it would be "construe
5 pleadings liberally."

6 CHAIRMAN BABCOCK: So the -- yeah, if you
7 voted "yes" before you can vote "yes" again if you liked
8 the number (1) heavy. You voted on number (1) light
9 before. Now you're going to vote on number (1) heavy.
10 "Construe pleadings and briefs liberally," period. Is
11 that what you want to do?

12 MS. CORTELL: Yes.

13 CHAIRMAN BABCOCK: And then what do you want
14 to say about the rest?

15 MS. CORTELL: Just period.

16 CHAIRMAN BABCOCK: Just period. Okay. So
17 everybody in favor of "construe pleadings and briefs
18 liberally." Everybody in favor.

19 MR. GILSTRAP: You can already do that,
20 can't you?

21 CHAIRMAN BABCOCK: Hayes, is your arm up?

22 MR. FULLER: I had a question. Well, never
23 mind. Go ahead, count.

24 CHAIRMAN BABCOCK: All right. Everybody in
25 favor raise your hand again.

1 MR. MUNZINGER: I can vote in favor and
2 still not give up my vote that I don't want to do anything
3 at all?

4 CHAIRMAN BABCOCK: Yes, you can. Yes, you
5 can. All right. Everybody opposed? Is your hand up,
6 Jim? All right. That one passes 14 to 8, the Chair not
7 voting.

8 Somebody voted on this one that didn't vote
9 on the first one. Chicken.

10 All right. Let's go to number two. "To
11 provide information about the proceeding and procedural
12 requirements." Any discussion that we haven't already
13 had? Richard.

14 MR. ORSINGER: Yes. Under this would it be
15 ethical for a judge to in the middle of a trial when
16 someone is eliciting hearsay, which will be admissible if
17 it's not objected to, but it will be inadmissible if it is
18 objected to, could a judge stop the proceeding and tell a
19 pro se, "If you don't object to this testimony based on
20 hearsay, it will come into evidence. If you do object,
21 I'll reject it"?

22 CHAIRMAN BABCOCK: Is that a number (2)
23 thing?

24 MR. ORSINGER: Yeah. I think so, because
25 "provide information about the foundational requirements,"

1 "the evidentiary foundational requirements."

2 CHAIRMAN BABCOCK: That's not what that
3 says.

4 MR. ORSINGER: What?

5 CHAIRMAN BABCOCK: That's not what it says.
6 It says "provide information about the proceeding and
7 procedural requirements."

8 MR. ORSINGER: No, no. I'm reading the
9 comment. You're reading the synthesis of the comment.

10 HONORABLE BRETT BUSBY: We've changed it
11 since then, Richard. Look at this sheet.

12 MR. ORSINGER: Oh, you've replaced the
13 written comment sheet?

14 MS. CORTELL: You've got to be looking at
15 this chart. It is revised. This is not the comment you
16 had in the first meeting. It's close, but it's different.

17 CHAIRMAN BABCOCK: Nina has discussed it
18 with you, and it takes a lot for her to --

19 MR. ORSINGER: I thought that this was just
20 a simplified explanation of the real words. Sorry.

21 CHAIRMAN BABCOCK: No, you've got to look at
22 attachment B.

23 MR. ORSINGER: Okay.

24 CHAIRMAN BABCOCK: All right. Which says --
25 I'll read it. "Provide information about the proceeding

1 and procedural requirements." So any discussion before we
2 vote on that?

3 MR. GILSTRAP: Well, Richard's comment would
4 still be applicable here. It is a procedural requirement.

5 MR. ORSINGER: I mean, the problem is
6 exactly how interventionist can the judge be because, you
7 know, an injustice will be done if a bunch of evidence is
8 omitted because someone doesn't know the proper predicate
9 or admitted because someone doesn't know the proper
10 objection. How interventionist can the judge be to
11 monitor the quality of the evidence?

12 CHAIRMAN BABCOCK: So you would say
13 foundation is procedural?

14 MR. ORSINGER: Well, I don't know. I mean,
15 I wish I knew.

16 CHAIRMAN BABCOCK: Okay. Judge Estevez.

17 HONORABLE ANA ESTEVEZ: All right. This is
18 how it actually goes down.

19 CHAIRMAN BABCOCK: All right. In Potter
20 County maybe.

21 HONORABLE ANA ESTEVEZ: In Potter County
22 this is how it goes down. They come in. They're both
23 sitting there. I tell them, "This is how it's going to
24 be. Court etiquette is you stand when you address the
25 court. You sit when you're asking questions, and if you

1 don't object, they're going to get to say whatever they
2 want to say. If you have an objection, you need to tell
3 me what it is and why you're objecting." And so they'll
4 usually throw out hearsay just because they've heard it on
5 TV. It's not necessarily good or that, you know, you get
6 a couple of objections and if you can sort of figure out
7 why they're objecting, kind of the same way, then you
8 sustain it and then when they're going to go testify you
9 tell them "When it's your turn you can ask him questions
10 and whenever they have a witness and when it's your turn
11 you can just talk, and then they'll get a chance to talk
12 to you."

13 And that's pretty much what this means,
14 "provide information about the proceeding and procedural
15 requirements." And I don't think that means anything more
16 than that. You tell them they have a right to object
17 before you start. You don't give them -- you know, when
18 they make an objection you may help them along just to try
19 to understand why they're objecting to it, ask neutral
20 questions to try to figure out exactly what they're trying
21 to say. But I don't know that -- I know that if I gave an
22 objection or told them to make an objection, whether
23 there's two lawyers there or one lawyer there or no
24 lawyers there, that it would be improper. I don't think
25 any judge would think that that would be proper.

1 CHAIRMAN BABCOCK: Justice Busby.

2 HONORABLE BRETT BUSBY: I think, Richard,
3 that the one that addresses evidence is number (5).

4 MR. ORSINGER: Okay.

5 CHAIRMAN BABCOCK: So hold your "no" vote
6 for number (5).

7 MR. ORSINGER: I will. Okay.

8 CHAIRMAN BABCOCK: All right.

9 MR. ORSINGER: Thank you.

10 CHAIRMAN BABCOCK: All right. Everybody in
11 favor of number (2), raise your hand.

12 Everybody opposed, raise your hand. All
13 right. That passes by 17 to 7.

14 All right. Let's go to number (3).
15 Richard, for your edification, number (3), "attempt to
16 make legal concepts understandable."

17 MR. ORSINGER: Okay. So does that apply to
18 the jury charge? Because if it does, number one, it's
19 impossible, and number two -- number two, we don't want
20 the judges explaining what the jury charge means to the
21 jury. We want the jury charge to stand for itself.

22 Now, in federal court, federal judges can
23 tell the jurors anything they want, but in state court
24 we're pretty strict about that. The jury charge stands on
25 its own. You read it to the jury and you let them figure

1 it out. Does this allow the judge to start explaining
2 what the terms are inside the jury charge?

3 HONORABLE ANA ESTEVEZ: Inside the jury
4 charge?

5 MR. ORSINGER: Terms in the jury charge.

6 HONORABLE ANA ESTEVEZ: You mean besides
7 just reading the charge?

8 MR. ORSINGER: Yeah.

9 HONORABLE DAVID PEEPLES: The answer is no.

10 MR. ORSINGER: No? How do you know that?
11 Where does it indicate that "attempting to make legal
12 concepts understandable" would not --

13 MS. CORTELL: The whole context of this is
14 communications to the litigants, not to the jury.

15 MR. ORSINGER: Okay. I hope that somebody
16 prints this record out and uses it when this is going up
17 on appeal. Because that doesn't mean that --

18 CHAIRMAN BABCOCK: Don't be a curmudgeon.

19 MR. ORSINGER: There's nothing in there that
20 says that it doesn't apply to the jury charge.

21 CHAIRMAN BABCOCK: All right. Justice
22 Busby. No? Any other comment? All right. Everybody in
23 favor of number (3), "attempt to make legal concepts
24 understandable," raise your hand.

25 Everybody against?

1 HONORABLE DAVID NEWELL: I'm for confusion.

2 MR. ORSINGER: This is the same seven.

3 CHAIRMAN BABCOCK: And that one the yes's
4 were 11, the no's were 14.

5 MR. ORSINGER: Oh, okay.

6 CHAIRMAN BABCOCK: All right. Number (4),
7 which reads, Richard, "ask neutral questions to elicit or
8 clarify information." Any further discussion on number
9 (4)?

10 HONORABLE DAVID PEEPLES: Yeah, here's an
11 example. "Ma'am, sir, I'm having to decide about this
12 house. I need to know if it's separate property or
13 community property. What's the evidence on that?" Okay.
14 Is that all right?

15 CHAIRMAN BABCOCK: "Ma'am, sir."

16 HONORABLE DAVID PEEPLES: Have I jumped into
17 the arena and helped somebody?

18 CHAIRMAN BABCOCK: Well, first of all you've
19 got to decide whether it's a ma'am or a sir. So you're
20 asking about community or separate property, and you're
21 the judge.

22 HONORABLE DAVID PEEPLES: Pardon?

23 CHAIRMAN BABCOCK: And you're the judge.
24 That's a neutral question. You want to know if that's
25 okay.

1 HONORABLE DAVID PEEPLES: How long have you
2 had it and that kind of thing, or, you know, "You're
3 asking me to decide custody. I haven't heard anything
4 except the so-and-so. Is that all of the evidence?" You
5 know, if you can't ask questions like, you know, in these
6 areas here, the people stand mute, and while everybody out
7 there is waiting for their case to be heard, this case is
8 stalled down.

9 CHAIRMAN BABCOCK: Yeah. Richard Orsinger.

10 MR. ORSINGER: I feel much more comfortable
11 about this in a bench trial than I do in a jury trial. I
12 really -- I've had bad experiences, and I really, really
13 don't like judges asking questions in jury trials because
14 I think that the jury reads too much into the questions
15 that the judge asks. In a bench trial, there's nothing
16 more relevant than to find out what the judge thinks is
17 important. You might be wasting your time, his or her
18 time, everybody else's time proving up stuff that the
19 judge doesn't care about, so I feel better about this
20 question in a bench trial. I totally oppose it 100
21 percent with my full force if it's a jury trial.

22 CHAIRMAN BABCOCK: He's going to bring his
23 linebacker mentality right to this one. Justice Busby.

24 HONORABLE DAVID PEEPLES: There may need to
25 be a motion on that at some point, Richard.

1 MR. ORSINGER: I so move.

2 HONORABLE ANA ESTEVEZ: I agree with you,
3 Richard. I think that's right because I think that -- I
4 think it will be a comment upon the weight of the
5 evidence, and I think it's going to be a big problem on
6 appeal, and I don't think you want judges to do that.

7 CHAIRMAN BABCOCK: Justice Busby.

8 HONORABLE BRETT BUSBY: That's why we added
9 the last sentence that says that "Judges should consider
10 the stage of the proceeding and the type of case and the
11 nature of the proceeding." So I think that's all fair
12 game for the judge to consider in deciding whether and
13 when and in what type of case to ask those sorts of
14 questions.

15 CHAIRMAN BABCOCK: Hayes.

16 MR. FULLER: Is there a basis for compromise
17 here? I mean, I'm okay with the first two sentences in
18 your deal, and I'm okay with the last sentence in your
19 deal. It's all of the stuff in between that I think is
20 causing all of the problems and the debate.

21 CHAIRMAN BABCOCK: Okay. You've skipped
22 ahead to the very last thing?

23 MR. FULLER: Yeah. I mean --

24 CHAIRMAN BABCOCK: Well, we're just talking
25 about number (4).

1 MR. FULLER: Items (1) through (10) are
2 things that good judges are going to do properly and bad
3 judges are going to do improperly, and ignorant judges or
4 scared judges are not going to do at all or by accident.
5 And if you've got a thoughtful jurist, they're going to
6 look at what they can do up top, and they're going to look
7 at the bottom, and they're going to think about how to
8 apply it. It seems to me that when you're -- I mean, we
9 don't want our rules of procedure and evidence and et
10 cetera to be an obstacle to what in essence is an
11 administrative function.

12 Judge Peebles indicated he's got two folks
13 in there. They're pro se. They think they're agreed for
14 the most part. All they're trying to do is get divorced,
15 and there are judges who sit there and say, "You need a
16 lawyer. I'm not going to tell you how to fill out the
17 paperwork. I'm not going to do this," and yet that judge
18 has the power I believe already to sit there and say,
19 "Okay, you know, here's what, you know, needs to be done
20 to get from point A to point B," but again, you've got two
21 people that show up pro se, and they're mad at each other,
22 and they're fighting. You've got to take a different
23 tact, and so, I mean, does it help -- does it help advance
24 the ball and yet avoid what we're bogging down because we
25 get into (1) through (10) people are going to be deciding

1 -- next question is going to be what exactly does that
2 mean now that I may do it and when can I do it?

3 MS. CORTELL: I think you raised a very good
4 point and a point of order question, and that is whether
5 the committee does -- whether we have a better yes-no
6 ratio on sentences (1) and (3), because we're going to
7 have splits I understand on the ten. I still think we
8 should go through all the votes on the ten, but we
9 probably to your point should also get an independent read
10 of the first sentence and the third sentence.

11 MR. FULLER: Yeah.

12 CHAIRMAN BABCOCK: And you're proposing, I'm
13 sorry, that we --

14 MS. CORTELL: Well, in other words, maybe we
15 had full consensus on the first sentence, I don't recall,
16 for those that are willing to have a comment, but so
17 what's been suggested is one way to do this -- and we're
18 past that. I think we need to continue all our votes on
19 the ten items, but is there pretty much consensus on the
20 first and third sentences?

21 CHAIRMAN BABCOCK: What sentences are you
22 talking about?

23 MS. CORTELL: So the top block, "A judge
24 does not violate the duty to remain impartial," that
25 sentence and then the last sentence at the bottom.

1 CHAIRMAN BABCOCK: You want to vote on that?

2 MS. CORTELL: Well, I mean, to your point, I
3 mean, right?

4 MR. FULLER: Yeah.

5 MS. CORTELL: That's what you're saying,
6 Hayes?

7 MR. FULLER: I think if we've got -- if
8 we've got strong consensus on the first and third
9 sentences I guess we can wander around on (1) through (10)
10 for a while, but the point of the matter is I think the
11 important -- the substance of this is (1) and (3).

12 MS. CORTELL: And again, I'm not saying not
13 to get a vote on all of those subparts of (10) because if
14 the Court wants to pick and choose, I think the Court
15 should have a read of this committee on the ten enumerated
16 items.

17 CHAIRMAN BABCOCK: Okay. Well, my -- and
18 maybe I'm wrong on this, but on number (1), the first
19 block, that's largely duplicative of the language that is
20 in -- is going to be in 3.B(8) and --

21 MS. CORTELL: Correct. Correct. It was
22 just seen as a threshold --

23 CHAIRMAN BABCOCK: -- I thought we had
24 consensus on that. We can take a vote if you want. I
25 thought we had consensus on that. So you want to take a

1 vote now on the last --

2 MS. CORTELL: Well, I'm sorry, I didn't mean
3 to -- I was just addressing Hayes' point that we could do
4 that. I'm sorry. I don't want to take us out of order.
5 We were on neutral questions, which is number (4), so
6 let's stay with it. We have a pattern here, so let's go
7 with it.

8 CHAIRMAN BABCOCK: Judge Busby, do you have
9 something on number (4) or --

10 HONORABLE BRETT BUSBY: Well, I was just
11 going to respond to Hayes, and I think it gets back to
12 whether you think it's helpful to have safe harbors or
13 not, and because of, you know, the anecdotal information
14 that we've gathered about scared judges who don't know
15 whether they can do this, I think there's an enormous
16 value in having these safe harbors to let them know that
17 they can, and so --

18 MR. FULLER: But are they really safe
19 harbors?

20 HONORABLE BRETT BUSBY: I think so. Why?

21 MR. FULLER: Because, I mean, you're going
22 to have somebody who is going to look at that and think
23 "Well, ah, I can do that," but then they're going to
24 absolutely apply it wrong. They're not going to know what
25 a neutral question is, or they're going to ask a question

1 that they think is neutral as it can be, and it is going
2 to absolutely drive it the wrong direction. I mean, I
3 think you're -- we're throwing out safe harbors that are
4 themselves subject to multiple interpretations.

5 HONORABLE BRETT BUSBY: Well, it gets back
6 to the -- I think it gets back to Justice Brown's comment
7 about you could still be reversed for that. It's just
8 you're not going to be sanctioned for doing that, but
9 again, I think it is important to have them in there, but,
10 you know, we'll see what the Supreme Court decides to do
11 in light of the votes that we take and the discussion.

12 CHAIRMAN BABCOCK: Yeah, the question is
13 whether the harbor is safe or whether it's mined; and I've
14 done a fair amount of work in front of the conduct
15 commission; and I can see this creating some mischief, not
16 necessarily that the commission would vote one way or the
17 other, just people could complain about these things and
18 say, "Oh, you know that wasn't a neutral question. I'm
19 filing a complaint with the commission." But anyway,
20 that's not on (4) either, so let's continue on number (4).
21 Everybody in favor of number (4), raise your hand.

22 Everybody against, raise your hand.

23 HONORABLE ANA ESTEVEZ: If you wanted a
24 modified one, are you against? Right?

25 MR. ORSINGER: You vote against it if you

1 don't like this exact language.

2 CHAIRMAN BABCOCK: All right. That one is
3 10 in favor, 11 against. Now, Judge, what did you say?

4 HONORABLE ANA ESTEVEZ: I wanted to modify
5 it. I didn't want it to apply to jury trials. I didn't
6 think it's appropriate for a judge -- if they want a
7 neutral question, I think they should get the -- if it's a
8 jury trial they have the parties come forward and tell
9 them what question they want and let the parties decide
10 whether they're going to object to that or something else,
11 but I don't think it's proper.

12 CHAIRMAN BABCOCK: Yeah. We've talked about
13 like parties ask jury questions -- asking jurors'
14 questions, right?

15 HONORABLE ANA ESTEVEZ: I just don't think
16 it's appropriate for the judge to do it in a jury trial.

17 CHAIRMAN BABCOCK: Judge Busby.

18 HONORABLE BRETT BUSBY: I would be fine
19 taking a vote on that if it's in nonjury proceedings. I
20 mean, you also have the question of whether it's in a
21 pretrial proceeding, you know, because a judge may want to
22 ask questions in a hearing that's not -- you know, not a
23 jury trial or a nonjury trial.

24 HONORABLE ANA ESTEVEZ: I just meant in
25 front of the jury I don't believe they should be able to

1 ask the questions.

2 CHAIRMAN BABCOCK: Nina, do you want to
3 amend and take a vote on amended --

4 MS. CORTELL: Sure.

5 CHAIRMAN BABCOCK: -- number (4)?

6 MS. CORTELL: Sure. What I would say is we
7 would just exclude jury trials, would be the easiest way,
8 right. So "ask neutral questions to elicit or clarify
9 information, except in jury trials."

10 MR. YOUNG: What about "in the presence of
11 the jury"?

12 CHAIRMAN BABCOCK: Or put a different way,
13 "in a nonjury trial only."

14 MS. CORTELL: Because that doesn't pick up
15 the other proceedings.

16 CHAIRMAN BABCOCK: All right. Everybody in
17 favor of that, raise your hand.

18 MR. YOUNG: How is it expressly --

19 CHAIRMAN BABCOCK: Well, it's been expressed
20 two ways. What I wrote in my notes is --

21 MR. YOUNG: Yeah.

22 CHAIRMAN BABCOCK: -- "in a nonjury trial
23 only, ask neutral questions to elicit or clarify
24 information." I think Nina maybe put it at the end of the
25 sentence.

1 MS. CORTELL: Well, I'm trying to make it
2 broader because we're talking about proceedings other than
3 trials altogether, and so if we only limit it to nonjury
4 trials then we won't have picked up other proceedings.

5 CHAIRMAN BABCOCK: Okay.

6 MS. CORTELL: So I would just create an
7 exception for jury trials. I'm not doing it very artfully
8 here, but right now the concept would be "ask neutral
9 questions to elicit or clarify information," comma,
10 "except in jury trials" or something with the exception.

11 HONORABLE ANA ESTEVEZ: Just say "except in
12 front of a jury" because I think --

13 MR. YOUNG: "Outside the presence of the
14 jury."

15 HONORABLE ANA ESTEVEZ: "Outside the
16 presence of the jury."

17 MS. CORTELL: "Outside the presence of a
18 jury," right?

19 HONORABLE BRETT BUSBY: Yeah, because there
20 may not be a jury.

21 MR. SCHENKKAN: "Outside the presence of a
22 jury" --

23 THE REPORTER: Wait a minute.

24 HONORABLE ANA ESTEVEZ: You could have one
25 in the middle that has to do with, you know, somebody who

1 is just trying to proffer. And you've --

2 HONORABLE BRETT BUSBY: You've got a
3 pretrial hearing.

4 HONORABLE ANA ESTEVEZ: -- already excluded
5 it.

6 MS. CORTELL: Okay. "Ask neutral questions
7 to elicit or clarify information outside the presence of a
8 jury."

9 CHAIRMAN BABCOCK: Okay. As modified,
10 everybody in favor.

11 All of those opposed? The modified version
12 passes 15 to 7. 15 in favor, 7 against. Okay. Let's go
13 to number (5). "Modify the mode and order of evidence as
14 permitted by the Rules of Evidence, including allowance of
15 narrative testimony." Any discussion on number (5)?
16 Justice Busby.

17 HONORABLE BRETT BUSBY: I'll just put out
18 there for everybody that this is based on Texas Rule of
19 Evidence 611. So this is something that's already
20 expressly authorized by the Rules of Evidence, and it's
21 just listed here in order to emphasize that this is
22 something that's permissible.

23 CHAIRMAN BABCOCK: Okay. Richard.

24 MR. ORSINGER: I have a question, because
25 Rule 266 of the Rules of Civil Procedure says that the

1 plaintiff opens and closes unless the burden of proof on
2 the whole case under the pleadings rests on the defendant.
3 Would this articulation of this rule invoking only the
4 Rules of Evidence and not mentioning the Rules of
5 Procedure, would it permit a judge to violate 266 and
6 still be safe?

7 HONORABLE BRETT BUSBY: From discipline,
8 yes.

9 MR. ORSINGER: From discipline. Yes, okay.

10 HONORABLE BRETT BUSBY: Well, I don't know.
11 I mean, what would you propose, Richard, in terms of
12 mentioning the other rule? I'm not sure I understand.

13 MR. ORSINGER: Well, as you may have
14 detected, I'm in favor of the Rules of Procedure actually
15 applying, and so encouraging or suggesting to judges that
16 they don't have to apply the Rules of Procedure because
17 they can't get into trouble for it, maybe it's a subtle
18 distinction that they might get reversed, but at least
19 they won't have their bench taken away from them, but how
20 do you tell them that it's ethical for you to ignore Rule
21 266 even though the criteria are not met and you can't be
22 sanctioned for doing it?

23 HONORABLE BRETT BUSBY: I'm not suggesting
24 that they can ignore the rule. I'm suggesting they can
25 follow Rule 611, but when do you think that Rule 611

1 violates the rule that you mentioned?

2 MR. ORSINGER: Well, I don't know. I'll
3 have to consider that, because I always considered Rule
4 266 to govern the order of proof in a trial. Plaintiff
5 got to go, whoever the plaintiff was, and in family law
6 cases it could have been either party. It's just whoever
7 got to the courthouse first. I always thought 266
8 applied, and I didn't think the rule of evidence
9 supplanted that rule of procedure, so I'm going to have to
10 go back and read it now and evaluate that.

11 CHAIRMAN BABCOCK: Judge, does Rule 611
12 speak to "including allowing narrative testimony"?

13 HONORABLE BRETT BUSBY: No, not the
14 narrative testimony. That comes from case law.

15 CHAIRMAN BABCOCK: From case law. Okay.

16 MS. CORTELL: We could say "by the rules of
17 procedure and evidence."

18 HONORABLE BRETT BUSBY: Sure.

19 CHAIRMAN BABCOCK: Okay. "Modify the mode
20 and order of evidence as permitted by the rules of
21 procedure and evidence"?

22 MS. CORTELL: Yes.

23 CHAIRMAN BABCOCK: Okay. Any other
24 discussion? Yeah, Scott.

25 MR. STOLLEY: I would offer an amendment to

1 take out the allowance of narrative testimony.

2 CHAIRMAN BABCOCK: Okay.

3 MS. CORTELL: What did you say, Scott? You
4 would take it out?

5 CHAIRMAN BABCOCK: Nina, what do you think
6 about that?

7 MR. STOLLEY: I would suggest taking it out.
8 To me it's too broad.

9 CHAIRMAN BABCOCK: Justice Busby.

10 HONORABLE BRETT BUSBY: What else would you
11 do in a pro se case when somebody is -- when the party
12 wants to testify?

13 MR. STOLLEY: Yeah. I see what you're
14 getting at now.

15 CHAIRMAN BABCOCK: I've suggested puppets.

16 HONORABLE BRETT BUSBY: Puppets?

17 HONORABLE DAVID NEWELL: Who doesn't like
18 puppets?

19 CHAIRMAN BABCOCK: And that, by the way --
20 and that, by the way, is on the record.

21 HONORABLE DAVID NEWELL: It's allowed by --

22 CHAIRMAN BABCOCK: In a case in Chicago the
23 plaintiff was a very accomplished lawyer, but he was pro
24 se, and he wanted to do a narrative, and the judge didn't
25 want him to do it, and I said, you know, just give him a

1 puppet and let the puppet ask the question and he can
2 answer. I thought it was totally reasonable. Judge
3 glared at me. I didn't understand that. Nina.

4 MS. CORTELL: I just want to say that the
5 discussion and the concerns raised here were raised in
6 subcommittee, and that's why we have revised the comments
7 we did to track the rules, and we're happy to add the
8 Rules of Procedure as well.

9 CHAIRMAN BABCOCK: Okay. All right. So she
10 accepts the adding "procedure and" before "evidence" but
11 rejects deleting "including allowance of narrative
12 testimony."

13 MS. CORTELL: Correct.

14 CHAIRMAN BABCOCK: Richard.

15 MR. ORSINGER: I just wanted to share that
16 in family law cases at least when lawyers are proving up
17 their attorney's fees, which we do in almost every
18 proceeding we have, typically some judges make the lawyers
19 take an oath and take the witness stand. Others just have
20 you testify from the table, but in almost all instances
21 the judges ask the lawyers to put on their fees in
22 narrative. Now, it's safer to do with a lawyer because a
23 lawyer knows what's completely impermissible, safer than
24 it is to do with a layperson, but I just wanted people to
25 understand there's a lot of that narrative testimony that

1 goes on in family law cases when the lawyer is a witness.
2 When the witness is a lawyer.

3 CHAIRMAN BABCOCK: So as amended, number (5)
4 says, "Modify the mode and order of evidence as permitted
5 by the rules of procedure and evidence, including
6 allowance of narrative testimony." Everybody in favor of
7 that, raise your hand.

8 Everybody opposed, raise your hand. That
9 one has 14 in favor, 9 against. So let's go to number
10 (6). "Refrain from using legal jargon by explaining legal
11 concepts in everyday language." Any discussion on (6)?
12 Fairly straightforward. All right. Everybody in favor?

13 MR. GILSTRAP: Wait a second. Wait a
14 second. I mean, what about when lawyers are present?

15 CHAIRMAN BABCOCK: We're talking about
16 jargon.

17 MR. GILSTRAP: Well, I mean, you can't --

18 HONORABLE ANA ESTEVEZ: It just means you
19 can't be disciplined for doing it. It doesn't mean you
20 have to do it. It means if you did it you're okay, even
21 when lawyers are present.

22 MR. GILSTRAP: Okay. All right. That's
23 okay.

24 CHAIRMAN BABCOCK: All right. Everybody in
25 favor of number (6), raise your hand.

1 Everybody against, raise your hand. Nine in
2 favor, 11 against.

3 HONORABLE TRACY CHRISTOPHER: Could I do an
4 amendment?

5 CHAIRMAN BABCOCK: Certainly.

6 HONORABLE TRACY CHRISTOPHER: Just
7 "explaining legal concepts in everyday language," because
8 we're talking about what the judge may do, so to me
9 "refraining" is weird, "may refrain from," so --

10 CHAIRMAN BABCOCK: How would you propose
11 modifying it?

12 MS. CORTELL: Just start it with "explaining
13 legal concepts in everyday language."

14 CHAIRMAN BABCOCK: And strike the "legal
15 jargon" part?

16 HONORABLE HARVEY BROWN: How is that
17 different than (3), just out of curiosity?

18 HONORABLE TRACY CHRISTOPHER: I voted for
19 (3).

20 HONORABLE ANA ESTEVEZ: I didn't understand
21 what (3) was.

22 HONORABLE HARVEY BROWN: (3) sounds
23 redundant to (6).

24 HONORABLE TRACY CHRISTOPHER: Well, (3) was
25 rejected, but (6) was --

1 CHAIRMAN BABCOCK: Nina, do you want to
2 modify it in this way?

3 MS. CORTELL: Yes.

4 CHAIRMAN BABCOCK: Okay. So now it's just
5 going to read "may explain legal concepts in everyday
6 language."

7 MS. CORTELL: Correct.

8 CHAIRMAN BABCOCK: All right. Everybody in
9 favor of that, raise your hand.

10 Everybody against? That one passed 17 to 4.

11 All right. Number (7). "Explain the basis
12 for a ruling." Any discussion on number (7)? All right.
13 Everybody in favor.

14 MR. HUGHES: Is it possible we could make
15 that mandatory?

16 CHAIRMAN BABCOCK: So must explain the basis
17 for a ruling.

18 MR. ORSINGER: What happens if there is no
19 basis?

20 CHAIRMAN BABCOCK: All right. Number (7),
21 everybody in favor.

22 Lonny, is your hand up? Everybody against?
23 That one passed 16 to 4. 16 yes, four against.

24 Number (8). "Make referrals to any
25 resources, such as legal services or interpretation and

1 translation services available to assist the litigant in
2 the preparation of the case." Any discussion on (8)?

3 Everybody in favor of number (8), raise your
4 hand.

5 All right, everybody against? That one
6 passed 16 to 3.

7 HONORABLE HARVEY BROWN: May I ask a
8 question?

9 CHAIRMAN BABCOCK: Yes, you may.

10 HONORABLE HARVEY BROWN: What does
11 "interpretation services" mean? I know what "translation
12 services" mean. I don't know what "interpretation
13 services" means.

14 MS. McALLISTER: Interpretation is spoken.
15 Translation is translating handwritten documents.

16 CHAIRMAN BABCOCK: You've got to talk a
17 little bit louder because Dee Dee can't hear you.

18 MS. McALLISTER: Interpretation is
19 translating the spoken word. Translation is translating a
20 written word. Basically it's just interpretation is for
21 oral, translation is for written.

22 HONORABLE HARVEY BROWN: Okay.

23 CHAIRMAN BABCOCK: All right. Number (9).
24 "Invite or appoint an amicus curiae to present a
25 particular issue in accordance with Canon 3.B(8)(c)."

1 MS. CORTELL: So 3.B(8)(c) says that the
2 subsection shall not prohibit -- and, of course, it talks
3 about the ex partes, which said "obtaining the advice of a
4 disinterested expert on the law applicable to a proceeding
5 before the judge if the judge gives notice to the parties
6 of the person consulted and the substance of the advice
7 and affords the parties reasonable opportunity to
8 respond."

9 CHAIRMAN BABCOCK: Okay. Everybody in favor
10 of (9), raise your hand.

11 Everybody against, raise your hand. That
12 one passed by 12 to 6.

13 Okay. Number (10). "Inform litigants what
14 will be happening next in the case and what is expected of
15 them." Any further discussion on that?

16 All right. Everybody in favor of (10),
17 raise your hand.

18 Everybody opposed? That one passes 16 in
19 favor, 3 against.

20 And now the language at the bottom, have we
21 got consensus on that, or do we need discussion? Justice
22 Brown.

23 HONORABLE HARVEY BROWN: I'm not sure the
24 word should be "may." I mean, think if a judge is going
25 to do this, the judge "should." I don't know that it

1 needs to be "must," but I think it needs to be stronger
2 than "may."

3 CHAIRMAN BABCOCK: Okay.

4 HONORABLE HARVEY BROWN: For example, this
5 goes back to our idea of nonjury versus jury, the strength
6 of the litigants, et cetera. So I think the judge really
7 should think about those and not have that as an option.

8 CHAIRMAN BABCOCK: Judge Estevez.

9 HONORABLE ANA ESTEVEZ: I was just thinking
10 because of what he just said, maybe we should put an
11 additional sentence stating that these are just
12 disciplinary rules. I mean, make it clear that if a judge
13 does some of these things it may still lead to reversal.
14 It may just be -- that might just help.

15 HONORABLE DAVID NEWELL: That will encourage
16 them to do it.

17 HONORABLE ANA ESTEVEZ: No, I mean --

18 HONORABLE DAVID NEWELL: You can do these,
19 but you could get reversed.

20 HONORABLE ANA ESTEVEZ: You're not going to
21 get in trouble for it. No, but I mean, but I think that
22 would be helpful for some that aren't thinking that way.
23 They just look at it and think, "Oh, well, I guess I can
24 do it." I don't know. I don't know how everybody thinks.

25 CHAIRMAN BABCOCK: Pete.

1 HONORABLE ANA ESTEVEZ: It could be helpful
2 if you're going to actually give it to the judges.

3 CHAIRMAN BABCOCK: Pete Schenkkan.

4 MR. SCHENKKAN: I would be reluctant to do
5 that here since this is in a disciplinary context and then
6 you've set up a disciplinary complaint that says, "Well,
7 he didn't consider this relevant factor" and then the
8 judge has to prove that he or she did, which may often be
9 a challenge since no one may have called upon the judge to
10 say any more than the judge actually said at the time.

11 CHAIRMAN BABCOCK: Richard.

12 MR. ORSINGER: Yeah. I have a procedural
13 concern that in the record, which is all that anyone will
14 get if they see this on the internet, they won't know the
15 language we're discussing because they won't have this
16 exhibit. Can we read the proposed language into the
17 record?

18 CHAIRMAN BABCOCK: Okay. Do you want to do
19 it or you want me to?

20 MR. ORSINGER: I would prefer that you do.
21 I think when I look at these transcripts the exhibits are
22 not there. What you have is the transcript of the
23 discussion.

24 MS. NEWTON: We do post the materials also
25 on the website, right next to the transcripts.

1 MR. ORSINGER: Okay. I still would prefer
2 that the language we're debating be in the record. Now,
3 I'm not the Chair here. I'm just saying that I'm a
4 sometimes much later user of the product.

5 CHAIRMAN BABCOCK: Richard, you are the man
6 behind the throne. I'm going to read this. "In making
7 reasonable accommodations to afford a litigant the right
8 to be heard, the judge may consider many factors,
9 including the type of case, the nature of the proceeding,
10 the stage of the proceeding, and the training, skill,
11 knowledge, and experience of the persons involved." Nina.

12 MS. CORTELL: To pick up on Justice Brown's
13 edit, which I think would be good, we could say, "The
14 judge should consider" and then just go into the listing.

15 CHAIRMAN BABCOCK: Okay. Peter.

16 MR. KELLY: Following on that, either "must
17 consider" or "should consider the totality of the
18 circumstances, including," whatever. So this is not
19 interpreted as an exclusive list.

20 CHAIRMAN BABCOCK: Okay. Anybody else?
21 Judge Wallace.

22 HONORABLE R. H. WALLACE: Well, since I
23 voted no on everything, I would like to make a suggestion.
24 I don't know whether you want to vote on it or not, but
25 what I would be in favor of is the very first sentence, "A

1 judge does not violate the duty to remain impartial," et
2 cetera, and the last sentence, which we've just talked
3 about.

4 MS. McALLISTER: I agree.

5 HONORABLE R. H. WALLACE: And omit
6 everything else.

7 MS. McALLISTER: Oh, not that part. I think
8 it's good to put it second because then the judge is
9 thinking about, you know, and in context --

10 HONORABLE R. H. WALLACE: Because I have
11 concerns about --

12 MS. McALLISTER: -- of all this other stuff.

13 HONORABLE R. H. WALLACE: -- the laundry
14 list of stuff and that some people interpret that as
15 being, you know, you must do it this way and --

16 CHAIRMAN BABCOCK: Okay. Nina, do you
17 accept or reject that proposed amendment?

18 MS. CORTELL: I accept the two combined from
19 Justice Brown and Peter, so let me read it, what the
20 revised language would be.

21 CHAIRMAN BABCOCK: Okay.

22 MS. CORTELL: "In making reasonable
23 accommodations to afford a litigant the right to be heard,
24 the judge should consider the totality of the
25 circumstances, including the type of case, the nature of

1 the proceeding, the stage of the proceeding, and the
2 training, skill, knowledge, and experience of the persons
3 involved."

4 CHAIRMAN BABCOCK: What about -- well, let's
5 deal with that first. Okay.

6 HONORABLE DAVID PEEPLES: Chip, if it's
7 clear to us what those vague words mean, why not specify
8 them? The type of case, nature of the proceeding, the
9 stage. It's not evident to me exactly what that means,
10 except that I've been here for the last two hours. You
11 know, jury, nonjury, family law, et cetera, or everything.

12 HONORABLE TRACY CHRISTOPHER: I think it's a
13 good idea. "Such as jury."

14 HONORABLE DAVID PEEPLES: If it's clear to
15 us, why not say it, and if it's not clear to us, do we
16 need to go back to the drawing board?

17 CHAIRMAN BABCOCK: Nina.

18 MS. CORTELL: I think we can come up with
19 some additional language, but the idea would be to specify
20 jury versus nonjury and then family law, so on and so
21 forth, give examples. If we're going to have a break, I
22 can up with some language.

23 CHAIRMAN BABCOCK: We're not breaking.

24 HONORABLE DAVID PEEPLES: Both sides pro se
25 as opposed to one side.

1 HONORABLE TRACY CHRISTOPHER: Right. Yeah,
2 when both sides are.

3 MS. CORTELL: We were trying to get --

4 MR. YOUNG: I would like a comma after
5 "knowledge" because I would like to make it a violation of
6 the Code of Judicial Conduct not to use the Oxford comma.

7 CHAIRMAN BABCOCK: Harsh. Very harsh.
8 Okay. Well, should -- Nina, do you want to vote on the
9 modified language?

10 MS. CORTELL: Which -- now I'm a little
11 lost. Are we --

12 CHAIRMAN BABCOCK: Not considering yet Judge
13 Peeples --

14 MS. CORTELL: Oh, what I just read.

15 CHAIRMAN BABCOCK: What you just read.

16 MS. CORTELL: I'm happy to get a vote on
17 that, yes.

18 CHAIRMAN BABCOCK: Okay. Why don't you read
19 it again so everybody has it fresh?

20 MS. CORTELL: Let me apply one thing here.
21 Okay. "In making reasonable accommodations to afford a
22 litigant the right to be heard, the judge should consider
23 the totality of the circumstances including the type of
24 case, the nature and stage of the proceeding, and the
25 training, skill, knowledge, and experience of the persons

1 involved."

2 CHAIRMAN BABCOCK: Comma after "knowledge"?

3 MS. CORTELL: I'll let Evan tell me what to
4 do.

5 CHAIRMAN BABCOCK: All right. Everybody in
6 favor of the modified language, raise your hand.

7 All right. Everybody opposed? You only get
8 one, Judge Gray.

9 All right. 20 in favor, 2 opposed. And so
10 we can take our afternoon break, and Nina can work on
11 Judge Peeples' excellent suggestion.

12 MS. CORTELL: Great. Thank you. Thanks to
13 everybody.

14 CHAIRMAN BABCOCK: We'll be back at 20 up.

15 (Recess from 3:18 p.m. to 3:37 p.m.)

16 CHAIRMAN BABCOCK: All right. We're back on
17 the record. Nina.

18 MS. CORTELL: Okay. We have a couple of
19 different approaches to suggest to the committee regarding
20 the last sentence, which might move, but right now it's
21 the last sentence.

22 CHAIRMAN BABCOCK: Right.

23 MS. CORTELL: So two comments. One, during
24 the break it was brought to my attention that using the
25 word "should consider" would be problematic, so we would

1 suggest some form of "may" coming back in, but otherwise
2 keeping the concept there; and with that also adding at
3 the back end of that sentence something like, comma, "with
4 greater latitude allowed in pretrial proceedings and
5 nonjury trials," and that was to flag that's really the
6 big area we're talking about. But Justice Christopher has
7 an alternative approach, so --

8 HONORABLE TRACY CHRISTOPHER: Okay. My
9 alternative approach would be to use the first sentence,
10 then the bottom sentence on our little chart here, and
11 then say, "For example, a judge may find some or all of
12 the following accommodations useful in hearings or a
13 nonjury trial where one or more sides are
14 self-represented" and then do our lists of (1) through
15 (10). Or (1) through (5), whatever we approved.

16 CHAIRMAN BABCOCK: Okay. What do you want
17 to -- Justice Busby. Sorry.

18 HONORABLE BRETT BUSBY: Go ahead. I think
19 it's more important to get the procedure sorted out first
20 about how we're going to vote on those different ones and
21 then --

22 CHAIRMAN BABCOCK: Yeah. How do you want to
23 vote, or do you want a vote on that?

24 HONORABLE TRACY CHRISTOPHER: I don't need a
25 vote. I'm just suggesting that as an alternative for the

1 Supreme Court to consider given the closeness of the votes
2 on (1) through (10). Perhaps we could take a vote that if
3 it was limited in such a manner whether all of the people
4 who voted "no" on (1) through (10) would feel more
5 comfortable with listing (1) through (10).

6 PROFESSOR HOFFMAN: For instance, not to
7 speak on behalf of Richard, who certainly can and does
8 speak for himself, but I think that would address a lot of
9 his concerns.

10 MR. ORSINGER: I'm not going to reverse all
11 of my votes, but I will tell you that it might have
12 changed some of my votes.

13 HONORABLE DAVID NEWELL: So we do it over.

14 MR. ORSINGER: I don't like the laundry list
15 at all, but it's much less harmful if it's clear that it's
16 not between people who are represented by lawyers, and if
17 it doesn't happen in front of a jury I feel much better
18 about that.

19 CHAIRMAN BABCOCK: Professor Carlson.

20 PROFESSOR CARLSON: Hayes and someone else
21 made the suggestion early on that we get a vote on the
22 first sentence and the last sentence, so could we do that
23 first?

24 CHAIRMAN BABCOCK: Sure. Hayes has left.

25 HONORABLE BRETT BUSBY: We did have a vote

1 on the last sentence.

2 PROFESSOR CARLSON: No, without the second.

3 CHAIRMAN BABCOCK: What, Justice Busby?

4 Sorry.

5 HONORABLE BRETT BUSBY: I think we did have
6 a vote on the reasonable accommodation sentence before the
7 break, but -- and we can certainly take a vote on the
8 first sentence, although as you said, Chip, I think that
9 largely tracks what's in the --

10 CHAIRMAN BABCOCK: Right.

11 HONORABLE BRETT BUSBY: -- the canon
12 amendment that we approved, but I guess in addressing the
13 amendment that Nina suggested to add in nonjury and
14 pretrial as something to consider versus Justice
15 Christopher's suggestion that these (1) through (10) items
16 would really only apply in nonjury and pretrial or, you
17 know, nontrial proceedings. I prefer Nina's version
18 because I think it is appropriate to do some of the things
19 in the (1) through (10) list even in a jury trial.

20 Now, you know, we made some changes here,
21 "outside the presence of a jury." For example, for number
22 (4), "ask neutral questions to elicit or clarify
23 information," and I think the implication is that's okay
24 in a jury trial as long as it's not in front of the jury.
25 So I think perhaps saying you can only do (1) through (10)

1 in a nonjury trial or in a hearing is unduly narrow.
2 Also, for example, I think -- well, we defeated the idea
3 that judges should attempt to make legal concepts
4 understandable, which I'm still puzzling over, but
5 explaining the basis of a ruling I think is appropriate
6 even in front of a jury, for example, and also an amicus
7 could be -- could be -- I could envision a situation where
8 an amicus could appear in front of a jury.

9 Some of the things in this list it's true
10 are more appropriate for procedures -- like you wouldn't
11 make a referral to other legal resources available to
12 assist the litigant. That would just never happen in
13 front of a jury, but I do think that some of these are
14 appropriate and helpful even in a jury trial. So I think
15 Nina's -- the version that Nina has suggested puts out
16 there that the judges should consider front and center
17 whether it's in front of a jury or whether it's in front
18 of a nonjury and whether it's a pretrial proceeding, but
19 it doesn't limit the list exclusively to those, and so I
20 think that's more helpful and more appropriate.

21 CHAIRMAN BABCOCK: Yeah, Judge Peeples.

22 HONORABLE DAVID PEEPLES: I think we need to
23 remember -- this is true of almost everything we do --
24 that the rules that what the Court ultimately adopts will
25 be applied by good judges and also by judges we would all

1 agree are not so good, and the same rules need to be
2 written for everybody, and I think most of us or a lot of
3 us are thinking in terms of the good people need to be
4 empowered to do things like we are talking about today,
5 but it is also a danger that there are judges on the bench
6 and all over the state who with certain powers in their
7 hands might abuse those powers, and that's just something
8 that we need to remember. Therefore, I think to put some
9 limits on what we're doing today needs to be done, and
10 what Judge Christopher read puts two limits, and I will
11 state them again. She rearranges things but would limit
12 all of this, the laundry list, to nonjury matters in which
13 one or both parties are pro se. In other words, you've
14 got lawyer versus lawyer, it doesn't apply, even nonjury.

15 HONORABLE TRACY CHRISTOPHER: Right.

16 HONORABLE DAVID PEEPLES: If you've got pro
17 se versus pro se to a jury, it wouldn't apply. Those are
18 some real limits and some good ones, and so I just wanted
19 to make those points. And a second thing is at some point
20 I think we ought to vote up and down, just the whole group
21 after discussion, whether to limit everything to nonjury,
22 just period, because I think that a lot of the votes would
23 have been different. I'm not saying totally different,
24 but there would have been differences in the margins in
25 the lineup if it had been -- if these proposals had been

1 limited to nonjury matters, so I think the Court ought to
2 have our voice on that.

3 CHAIRMAN BABCOCK: Okay.

4 MS. CORTELL: We still have the issue of
5 whether we're going to recommend an exclusion in criminal
6 cases.

7 CHAIRMAN BABCOCK: I'm sorry. Could you
8 speak up a little bit? I didn't hear you.

9 MS. CORTELL: Me? Sorry. I've got a cold.
10 We also have to still consider whether we're going to
11 exclude applicability in the criminal case context.

12 CHAIRMAN BABCOCK: Yeah.

13 HONORABLE DAVID NEWELL: So let's start
14 over.

15 CHAIRMAN BABCOCK: Who invited him?

16 HONORABLE DAVID NEWELL: I got jokes.
17 That's it.

18 CHAIRMAN BABCOCK: Justice Christopher.

19 HONORABLE TRACY CHRISTOPHER: Well, we could
20 do that with my language by saying, for example, "The
21 judge may find some or all of the following accommodations
22 useful in civil hearings or a civil nonjury trial where
23 one or both sides are self-represented."

24 CHAIRMAN BABCOCK: Okay. What do you think
25 about that, Judge Peeples?

1 HONORABLE DAVID PEEPLES: I think it gets
2 the job done in a very --

3 CHAIRMAN BABCOCK: Elegant.

4 HONORABLE DAVID PEEPLES: -- concise,
5 elegant way.

6 CHAIRMAN BABCOCK: Okay. Richard.

7 MR. ORSINGER: While people are being
8 accommodating maybe they could accommodate our rules of --
9 Disciplinary Rules of Professional Conduct have a comment
10 that say that those standards in those ethical rules are
11 not the basis of procedural rulings, should not be. I'll
12 have the exact language in just a minute, but I think
13 y'all know what I'm talking about. The idea is that the
14 ethical standards are not supposed to be the foundation
15 for procedural rights, and I would prefer if that -- this
16 said that as well, because one of my great concerns is
17 that this will be used to maneuver around procedures.

18 Now, if the Supreme Court adopts our
19 discussion that it doesn't apply between lawyer and
20 lawyer, then that's probably okay, but they may reject
21 that, and so I wish to put before the floor for
22 consideration a statement that this is for purposes of
23 judicial ethics, and it doesn't alter the Rules of
24 Procedure or can't be used as a basis for a procedural
25 ruling. I'll have that exact language in a second. I'm

1 looking it up right now, but it's already in the Rules of
2 Professional Conduct.

3 CHAIRMAN BABCOCK: Okay. Yeah, Evan.

4 MR. YOUNG: If we're going to have the jury
5 carve out, unless there's a reason that I've missed, I
6 would still prefer it to be something like "outside the
7 presence of a jury" rather than "in a nonjury trial"
8 because there's a lot of things that happen in a trial
9 that the jury is not there for but that some of these
10 things may be appropriate for, if the concern is you don't
11 want a jury hearing this stuff. I think the way that
12 you've described it would persuade a lot of judges that
13 because it's a jury trial at no point from beginning to
14 end, regardless of whether the jury is there, could I do
15 any of these things. That's I don't think your intent or
16 maybe I'm misunderstanding.

17 HONORABLE TRACY CHRISTOPHER: Well, it's not
18 my intent to actually limit to those matters, but by
19 saying sentence one, sentence two, and then giving an
20 example, most people will think, oh, this is where I
21 really should consider it, but it doesn't foreclose you
22 from considering it in another matter. To me, the way
23 I've written it would not foreclose it.

24 MR. YOUNG: Okay. I thought that there was
25 like a limit.

1 HONORABLE TRACY CHRISTOPHER: No. I said,
2 "A judge may find some or all of the following useful."
3 But I didn't say only in these kind of cases.

4 MR. YOUNG: Okay.

5 MS. CORTELL: You started it with "for
6 example."

7 HONORABLE TRACY CHRISTOPHER: Yes. I
8 started it with "for example."

9 MR. YOUNG: Could it be phrased, though, as
10 whether a jury is seated or some way of expressing so that
11 -- because I can't think of any principled basis off the
12 top of my head in which the fact that it is a jury trial
13 rather than a nonjury trial itself other than aside from
14 when the jury is there listening would be relevant, but I
15 could also be missing -- can you think of any situation in
16 which it would be a relevant consideration, that is, a
17 jury trial when they're talking among counsel before the
18 jury has been seated or when they're in the room or
19 something like that?

20 HONORABLE TRACY CHRISTOPHER: Well, okay.
21 For example, I mean, I think you do run into a little bit
22 more trouble when you're in a jury trial. I've only done
23 it a few times, and as you go along you explain to the pro
24 se what he has to do next or she has to do next. Okay.
25 "Ask questions of the people to see if, you know, there's

1 anything you want to find out about them." They ask about
2 two questions, and they sit down. Okay. "Now, it's time
3 for you to make an opening statement. You're supposed to
4 tell them what you think the evidence will be." And so I
5 do make those kind of explanations in the few cases I've
6 ever had it. So, you know, but I just thought to make
7 everyone else happier we would just try to focus on the
8 nonjury matters. But I -- I can see how it would apply,
9 and you could do it easily.

10 CHAIRMAN BABCOCK: Justice Busby.

11 HONORABLE BRETT BUSBY: To me the way --
12 maybe you could read it again, Tracy, in terms of what it
13 would say, but to me by negative implication it suggested
14 that you should not do those things in a jury case, but it
15 sounded like what you were describing about telling them,
16 "Okay, here's what you do next" is item (10), informing
17 litigants what will be happening next in the case and what
18 is expected of them; and the way I interpreted your
19 proposal was by negative implication you should not feel
20 comfortable doing number (10) in front of a jury, whereas
21 I think the way that Nina has stated it leaves that more
22 open and available for the judge to do that even in front
23 of the jury.

24 MS. CORTELL: My suggestion is, per Justice
25 Christopher's thought, is that we could provide both

1 formats to the Court. I mean, really they're fairly
2 close, or if you want we could get a vote as to which
3 version is preferred, but still provide both to the Court
4 is where I'm coming up.

5 CHAIRMAN BABCOCK: Yeah.

6 HONORABLE TRACY CHRISTOPHER: I think we
7 could represent to the Court if we did limit it or put it
8 in the way that I've done it that some of these concerns
9 -- some, not all, of the concerns of the committee would
10 be less. So, I mean, based on what people have been
11 saying throughout the day.

12 CHAIRMAN BABCOCK: Yeah. Do we need to vote
13 on your language?

14 HONORABLE TRACY CHRISTOPHER: I don't care.

15 CHAIRMAN BABCOCK: Nina.

16 MS. CORTELL: I don't think so. I think we
17 can provide --

18 CHAIRMAN BABCOCK: Yeah.

19 MS. CORTELL: But there's many members of my
20 committee here.

21 HONORABLE DAVID PEEPLES: I do think and I
22 will move if I need to that there be a vote up and down on
23 jury versus nonjury.

24 CHAIRMAN BABCOCK: Okay.

25 HONORABLE DAVID PEEPLES: Just find out how

1 the group feels about that. In other words, limit the
2 whole thing to nonjury.

3 CHAIRMAN BABCOCK: How many people are in
4 favor of limiting the whole thing to nonjury? Raise your
5 hand.

6 How many people do not think it should be so
7 limited? The vote there is 12 in favor of limiting it to
8 nonjury and 10 against.

9 MS. CORTELL: I think it's an important
10 sub-issue that has to be addressed, and that is even in a
11 jury case I'd want to be clear that this -- these would
12 still apply in the pretrial proceedings, right? So, in
13 other words, you're only excepting out the jury trial
14 itself.

15 HONORABLE DAVID PEEPLES: Right.

16 HONORABLE TRACY CHRISTOPHER: Right. Right.

17 CHAIRMAN BABCOCK: Yeah. We talked about
18 that "outside the presence of the jury."

19 MS. CORTELL: That's a little different.

20 HONORABLE BRETT BUSBY: Is that what that
21 vote was or not? Was that a -- maybe I didn't
22 understand --

23 CHAIRMAN BABCOCK: Does that change
24 anybody's vote?

25 HONORABLE BRETT BUSBY: -- Judge Peeples'

1 proposal. Was the proposal, Judge --

2 HONORABLE DAVID PEEPLES: What I had in mind
3 was the jury trial itself as opposed to everything else
4 that's nonjury.

5 HONORABLE BRETT BUSBY: And what about
6 Evan's comment about on matters during the jury trial that
7 aren't in front of the jury?

8 HONORABLE DAVID PEEPLES: I'd rather not
9 make that distinction, and it is certainly true that the
10 legal effect of whatever you do nonjury is the same as
11 with the jury. I mean, the ultimate result is going to be
12 the same, and in theory they're the same, but a jury just
13 elevates the seriousness of it and the formality to a
14 different level and --

15 CHAIRMAN BABCOCK: Evan.

16 MR. YOUNG: I just -- I'm a little concerned
17 at the idea that maybe a pro se litigant who otherwise a
18 judge might be willing to provide these accommodations by
19 exercising the constitutional right to have a jury is now
20 forfeiting the ability of a judge to be able to make these
21 accommodations on the paint of the judge not being
22 reversed but theoretically being brought up on censure or
23 discipline, which the whole thing strikes me as insane,
24 which is why I'm perfectly fine with everything that's
25 been done all along, but that's a concern that I have.

1 HONORABLE DAVID PEEPLES: And I hear you,
2 but I go back to the point I made a minute ago, which is
3 whatever is done here is a tool for, you know, things that
4 can be used by the good and the bad, and I'm concerned
5 about the bad, too. And I'm more concerned in a jury case
6 than I am in a nonjury case.

7 CHAIRMAN BABCOCK: Justice Christopher.

8 HONORABLE TRACY CHRISTOPHER: I do think it
9 might be useful to see whether people think the rule
10 should be limited to where one or more litigants are
11 self-represented. I mean, I know the language of the --
12 the way that the actual wording in the canon is "make
13 reasonable accommodations to litigants, including
14 self-represented litigants that right," but when we start
15 talking about the details we're all -- it seems we're a
16 lot more comfortable if one or more litigants are
17 self-represented.

18 CHAIRMAN BABCOCK: Some are. Munzinger has
19 left, but --

20 HONORABLE TRACY CHRISTOPHER: Right. Right.
21 But I think that might be useful, should we limit the rule
22 in general to where one or more litigants are
23 self-represented.

24 CHAIRMAN BABCOCK: Okay. I think we --
25 there's another kind of a big issue that we haven't talked

1 about, which is whether to apply criminal cases. You
2 know, Judge Newell is standing now and --

3 HONORABLE DAVID NEWELL: I heard "criminal
4 cases." I was like what?

5 CHAIRMAN BABCOCK: Is your Court pretty
6 unanimous?

7 HONORABLE DAVID NEWELL: Yes. It was -- I
8 will say that the meeting we had two of the judges were
9 not there, but all seven that were there, there wasn't
10 really any disagreement whatsoever about it. I could
11 rehash the arguments that we had, and it is very much the
12 tiered thing. This is a bad idea to change the canon, and
13 for many of the same reasons, without the reference of
14 Leviticus or the decline of Western civilization. So that
15 was that, and then the question became, well, do we want
16 to maybe limit it to just civil cases or exclude or have a
17 carve out for criminal cases.

18 One of the points that had come up was
19 actually one of the judges had said, you know, well, part
20 of the idea is in the criminal system there is already
21 institutions made to resolve the problem by getting people
22 to attorneys.

23 CHAIRMAN BABCOCK: Yeah.

24 HONORABLE DAVID NEWELL: Presiding Judge
25 Keller said \$247 million already goes to making sure you

1 have representation, so the pro se litigant problem or
2 issue has already been sort of addressed as a matter of
3 structure institutionally, but on the one end with that,
4 there's -- is get them a lawyer, but on the other end
5 there's also this -- there's also a body of law if
6 somebody wants to represent themselves they have a
7 constitutional right to represent themselves, and one of the
8 arguments was that this might undermine the Faretta
9 warnings, which are designed to try and emphasize you
10 might want an attorney, and they might actually -- it
11 might have the actual inverse effect in criminal cases
12 than it would in civil cases because now they'll go, you
13 know, "I can't get my lawyer to do what I want, but if
14 you're going to help me out, Judge, I'll totally just work
15 with you and try my case."

16 So I think that was one of the concerns that
17 was raised about it, and most of the people -- or the
18 Court was pretty unanimous in that regard. Not to suggest
19 that we did not understand or think that this is not a
20 real problem in the civil context. We recognize it, and
21 we think the Supreme Court absolutely has to do something,
22 but that's just where we came down on it.

23 CHAIRMAN BABCOCK: Sure. Okay. Professor
24 Hoffman.

25 PROFESSOR HOFFMAN: Let me get some

1 clarification on that last point.

2 CHAIRMAN BABCOCK: Don't get all biblical on
3 us now.

4 PROFESSOR HOFFMAN: I'm not, I'm not.

5 HONORABLE DAVID NEWELL: He's god.

6 PROFESSOR HOFFMAN: So why -- I don't
7 understand the reasoning. Why would a change in the Code
8 of Judicial Conduct have any potential influence on
9 whether a litigant, a criminal defendant, might choose not
10 to get a lawyer? Is the thinking that the criminal
11 defendant is going to look at the Code of Judicial Conduct
12 and think to themselves, "Wow, maybe the judge will help
13 me more if I don't have a lawyer, and that's a better
14 strategy for me"?

15 HONORABLE DAVID NEWELL: There are plenty of
16 defendants that think that it is a better strategy for
17 them to represent themselves, and the concern would be is
18 something that actually mirrors an argument that Chief
19 Justice Gray has mentioned before, which is that this is
20 likely to create -- if we're trying to incentivize this
21 behavior then the criminal defendants will say, "You
22 helped so-and-so out. You need to help me out," but if
23 the idea is that this is designed to create a more
24 receptive environment where the judges do help them out,
25 they will try to take advantage of that and use that as a

1 viable strategy instead of dealing with the appointed
2 attorney that isn't listening to them and doesn't want to
3 file their 372 motions about how Texas is not really a
4 state.

5 CHAIRMAN BABCOCK: Judge Estevez.

6 HONORABLE ANA ESTEVEZ: I am not opposed to
7 excluding the criminal cases, and I feel my job is to make
8 sure that every criminal or a person that is charged with
9 a crime to have an attorney no matter how much I have to
10 beg them, scare them, whatever it takes, and I do see what
11 you are bringing up, and I think that that's actually
12 quite legitimate, and it also -- it would go to the very
13 reason why we started this, and we're seeking true
14 justice. True justice in the criminal realm does not
15 occur unless they have a lawyer, and I will tell you that
16 from personal experience. So, therefore, if you have a
17 pro se litigant you are 90 percent sure that you are not
18 going to get a -- they're not going to be able to object
19 when they need to object, bring up the issues they need to
20 bring up. It is going to go contrary to what our ultimate
21 reason to have this was, was for access to justice. Every
22 time they go pro se, they are removing themselves from the
23 most justice they could have gotten. I don't know how --
24 I don't know how to express it, but it is something that
25 is contrary to what we really want. Even if they have a

1 right to represent themselves, it is stupid, absolutely
2 stupid. There is no other word for it.

3 HONORABLE DAVID NEWELL: Right.

4 HONORABLE ANA ESTEVEZ: And we need to
5 protect them from themselves. It is the same, and it
6 never will be different than you needing an appendix
7 pulled out, and you just go grab yourself a knife, and you
8 start scraping inside of your own tummy. There is nothing
9 that is different from it, and once we have someone that
10 has it, we don't want anything to suggest that they could
11 possibly do better on their own.

12 HONORABLE DAVID NEWELL: What she said.

13 HONORABLE ANA ESTEVEZ: It's impossible. I
14 wish Richard was here. I think he might actually agree
15 with me. I mean, yeah.

16 CHAIRMAN BABCOCK: Evan.

17 MR. YOUNG: All of that conversation,
18 though, does theoretically at least link up with the
19 question that was asked about whether or not this should
20 be limited to a represented, because if we don't make that
21 limitation it's just a factor. Then that would limit the
22 idea that a criminal defendant would be studying the Code
23 of Judicial Conduct, the canons of ethics, and decide for
24 that reason if that militates against having a lawyer.
25 Because if that's something that a judge could in theory

1 participate in some of these activities even when both
2 sides are represented, of course, using a wise measure of
3 discretion and limiting the amount of time that that would
4 be done, and arguably at least one of the objections that
5 you raised would be greatly diminished. I personally
6 would much prefer to give the judges the opportunity to
7 consider whether or not there's a pro se party involved,
8 to let that be a factor in their decision-making rather
9 than it be an absolute exclusion.

10 CHAIRMAN BABCOCK: Okay. We're going to
11 turn to Rule 99 now.

12 MR. ORSINGER: Okay. I'm ready to go.

13 CHAIRMAN BABCOCK: So, Richard, let's talk
14 about Rule 99.

15 MR. ORSINGER: Justice Hecht on July 5th,
16 2017, sent a letter to the advisory committee about Rule
17 of Procedure 99, and he said that -- this is what Chief
18 Justice Hecht said: "Texas Rule of Civil Procedure 99
19 subsections (b) and (c) set the deadline for filing an
20 answer at 10:00 a.m. on Monday next after the expiration
21 of 20 days after the date of service." That's a quote.
22 And Chief Justice Hecht ordered -- "The Court asks the
23 committee to consider whether the deadline should be
24 simplified and to draft any recommended amendments."

25 The second part of Chief Justice Hecht's

1 letter said, "Subsection (d) says 'The party filing any
2 pleading upon which citation is to be issued and served
3 shall furnish the clerk with the sufficient number of
4 copies thereof for use in serving the parties to be
5 served, and when copies are so furnished the clerk shall
6 make no charge for the copies,'" close quote. Chief
7 Justice Hecht went on, saying "The advent of e-filing has
8 rendered the language outdated. Filers want to avoid
9 paying additional fees for service copies of petition by
10 printing out the copies themselves and having the clerk
11 return the citation by e-mail, but some trial court clerks
12 refuse to provide a citation by e-mail. The Court asks
13 the committee to consider what changes to Rule 99 are
14 needed to update the process for issuing citation on an
15 e-filed petition and to draft any recommended amendments.
16 The committee should consider whether the rule should
17 instruct the clerk to return a citation on an e-filed
18 petition by e-mail. The Court asks the committee to
19 consider whether any other changes are necessary to
20 conform the text of Rule 99 to modern practice," close
21 quote.

22 That's the end of that portion of the
23 letter. Now, existing Rule 99 on citations has paragraph
24 (b), form of the citation, paragraph (10), "contain the
25 time within which the rules require the defendant to file

1 a written answer with the clerk who issued the citation."
2 So of a list of 12 items that have to be in the citation,
3 one of them is the deadline for a response. The Rule
4 subdivision (b), Rule 99 subdivision (b) also says, "The
5 citation shall direct the defendant to file a written
6 answer to the plaintiff's petition on or before 10:00 a.m.
7 on the Monday next after the expiration of 20 days after
8 the date of service thereof." So what we've got is a
9 laundry list that includes a requirement that the citation
10 contain the deadline, and then the deadline is also
11 specified at 10:00 a.m. on the Monday next after the
12 expiration of 20 days after the date of service.

13 So we did kind of an ad hoc review of what
14 the federal rules and other rules say about answer day,
15 and what we found is that a lot of these jurisdictions, in
16 fact, do have a rule that tells their court clerk what is
17 to go into the citations or the summons, but we also
18 became convinced that this is not smart. In this day and
19 time we can actually provide the form citation and have
20 everybody follow the same citation throughout the state
21 rather than tell them what it's supposed to say and then
22 every clerk has the freedom to deviate to the extent it's
23 not specified.

24 We also found the answer day changed, but it
25 was generally around three weeks, 21 days, 20 days, and

1 some in 30 days. These are in your memo. We looked at
2 California. We looked at Indiana. We looked at the
3 federal rules. These are just picked by random. Michigan
4 They are highlighted in black. The deadline is there.
5 Michigan is 21 days. So we basically came to the
6 following thought: It's easier to say that answer day is
7 21 days after you get served, unless it's a weekend.

8 Now, you can serve somebody on a Saturday,
9 but you can't serve somebody on a Sunday in Texas unless
10 it's a suit for injunction, attachment, garnishment,
11 sequestration or distress proceeding or citation by
12 publication. So if we are going to use the 21 days, which
13 is easy for everyone to visualize and count, then we have
14 to make an exception if answer day would be a Saturday or
15 Sunday and roll it to the next -- or a legal holiday and
16 roll it to the next day. So the subcommittee's
17 recommendation is to change answer day to 21 days after
18 the date of service, and if it's a Saturday, Sunday, or
19 legal holiday, then it goes to the next day that is not a
20 Saturday, Sunday, or legal holiday.

21 The second recommendation is that we change
22 the approach about what goes into a citation from having a
23 rule that has 12 paragraphs of things that must be
24 included and nothing about what's being excluded, and we
25 suggested that we just promulgate a form citation. It

1 should say what the Supreme Court wants it to say. It
2 should be used in every case. There's no discretion with
3 the district judge -- district clerk, and then furthermore
4 we think the backside of that should say the same thing in
5 front is in English, the backside should be in Spanish.
6 So you can read either the English -- it's a form. It's
7 standardized. It's the same everywhere, and if you can't
8 read English you can flip it over and read the Spanish.

9 So to change that rule that way you would do
10 the following. You would modify the rule to say this is
11 Rule subdivisions 99(c), which requires a simply stated
12 notice that you've been sued, and it could say, for
13 example -- this is in the memo -- quote, "You have been
14 sued. You may employ an attorney. If you or your
15 attorney do not file a written answer with the clerk who
16 issued this citation by 10:00 a.m. on the 21st day after
17 you were served with this citation and petition, a default
18 judgment may be taken against you. If the 21st day is a
19 Saturday, Sunday, or legal holiday, your written answer is
20 due on the next day that is not a Saturday, Sunday, or
21 legal holiday." That's the proposed language on what you
22 would put in the citation to tell them about answer date.
23 Now, there needs to be other information in the citation.
24 I'm not suggesting that citation is one paragraph long,
25 but that's the way you would tell them what their answer

1 day is.

2 Then the last thing, second thing mentioned
3 in Justice Hecht's letter, which has to do with the
4 clerk's refusing to send citations back by e-mail when you
5 have an e-filer, our suggestion is that we change Rule 99,
6 subdivision (d), where it says that the plaintiff is to
7 provide a sufficient number of copies for the pleading,
8 that we should delete that for e-filers, and we should add
9 to the rule a provision that if the party e-files the
10 petition, that the clerk should return the citation by
11 e-mail. So that's our recommendation.

12 CHAIRMAN BABCOCK: Martha.

13 MS. NEWTON: Is there still a need for a
14 10:00 a.m. deadline?

15 MR. ORSINGER: No, there isn't.

16 CHAIRMAN BABCOCK: You're taking that out,
17 right?

18 MR. ORSINGER: No. We didn't say take it
19 out, and, you know, you can file all the way up till
20 midnight if you're e-filing, but you can't necessarily
21 file after hours if you're physically filing, although
22 some district clerks do have boxes for you to do that.

23 MS. NEWTON: Yeah, but why not just give
24 them the whole business day?

25 MR. ORSINGER: I think that's an excellent

1 question, why not do that, and I don't have a good answer
2 for that.

3 CHAIRMAN BABCOCK: You're taking the first
4 Monday -- the next Monday out?

5 MR. ORSINGER: Yes. We're saying that it's
6 due on the 21st day after you're served, not the Monday
7 following the 20th day after you're served, which is
8 especially confusing if answer day is Monday, the 20th day
9 after you were served. I struggle with that in every one
10 of my cases, and I always have my paralegal make a
11 separate calculation.

12 CHAIRMAN BABCOCK: That's okay. The Monday
13 thing gives you a little bit of extra time. It could be
14 as much as seven extra days.

15 MR. ORSINGER: Yes. If your answer day
16 would normally be -- if Monday --

17 CHAIRMAN BABCOCK: You get served on Monday.

18 MR. ORSINGER: -- the 20th day after your
19 service is a Monday, you get to the following Monday, but
20 who can figure that out.

21 CHAIRMAN BABCOCK: I agree, but I'm just
22 wondering if you ought to make it 30 days instead of 21.
23 Most jurisdictions I think have 30 days.

24 MR. ORSINGER: Maybe, you know, I don't know
25 that I agree that most do. You may know better than I.

1 The survey that I did, they were hitting around 20 or 21
2 days.

3 CHAIRMAN BABCOCK: Okay.

4 MR. ORSINGER: At the state level, and the
5 federal level is --

6 HONORABLE TRACY CHRISTOPHER: 21.

7 MR. ORSINGER: The federal is 21? So I
8 would say, Chip, that most of the litigation in America is
9 done on 21 days or some variation of it.

10 MR. GILSTRAP: So we're shortening it by one
11 week in some cases.

12 CHAIRMAN BABCOCK: Right.

13 MR. ORSINGER: In the rare case where answer
14 day is --

15 MR. GILSTRAP: One out of every seven.

16 MR. ORSINGER: Probably a little higher on
17 that, on account there's not many services on Sunday
18 because they're so few.

19 MR. GILSTRAP: One out of every five.

20 MR. ORSINGER: One out of every six
21 probably. So, I mean, it's archaic the way we're doing
22 it, and most of these states, the rules you could tell
23 they were written in the 1930's, the same time that our
24 rule was written. There's no reason to give somebody a
25 bunch of general instructions about what to put in a

1 citation. It's statewide document. We have the ability
2 to decide what it looks like. We can put the English on
3 the front and the Spanish on the back, and that will take
4 care of 95 percent of the people in Texas. So there's a
5 lot to say for promulgating a form, putting it real
6 simply, having it easy to calculate, and if you e-file it,
7 you get it back by e-mail. To me that was like the least
8 controversial thing we've discussed today.

9 CHAIRMAN BABCOCK: I agree. Well, what was
10 the reason for the first Monday after 21 days?

11 MR. ORSINGER: You know, that was before my
12 time, but I think in the old days they used to --

13 CHAIRMAN BABCOCK: You think?

14 MR. ORSINGER: It wasn't before Buddy's
15 time, but Buddy is gone, but we used to have courts --
16 when I first started practicing, Monday was really
17 important for court terms and for dockets that were always
18 heard on a Monday in the rural districts. There was a
19 docket every Monday, and you had to be there, by God, or
20 your case was going to be dismissed or whatever. I think
21 that in the old days I think we were very Monday-oriented
22 about when people had to appear in court and do things.
23 You know, that's the only explanation I have.

24 CHAIRMAN BABCOCK: Elaine probably knows.

25 PROFESSOR CARLSON: No, I think it's because

1 of the limited terms of court and the dockets were on
2 Monday.

3 MR. ORSINGER: Yes, they were. And in my
4 early days in all the rural counties I had to be in five
5 different counties at the same time on Monday morning.

6 CHAIRMAN BABCOCK: Easy for you, of course.

7 MR. ORSINGER: Yeah.

8 CHAIRMAN BABCOCK: So there's really no
9 reason to keep the first Monday thing.

10 MR. ORSINGER: I don't think so. No.
11 That's archaic.

12 MR. GILSTRAP: We're not even keeping
13 Monday.

14 MR. ORSINGER: No, we're not keeping Monday.

15 CHAIRMAN BABCOCK: No, we're not keeping
16 Monday.

17 PROFESSOR CARLSON: Although it does -- I
18 teach that as the full lawyer employment act, because any
19 citizen who gets served with that says, "I'm supposed to
20 file an answer on or before Monday next upon the
21 expiration of 20 days from the date of service. I need a
22 lawyer. I don't know what that means."

23 CHAIRMAN BABCOCK: Well, and it does sneak
24 up on out-of-state lawyers, too.

25 PROFESSOR CARLSON: True.

1 MR. ORSINGER: Well, the truth is it's a
2 vestige of the past that may have been understandable when
3 you had to ride your horse all day long to get to Medina
4 County and all that, but we don't need it anymore.
5 Everything is electronic, everything instant. Let's make
6 it simple.

7 CHAIRMAN BABCOCK: It was California that's
8 30 days. That's what I was thinking of.

9 MR. ORSINGER: Well, that's always a popular
10 suggestion, I'll just adopt the California approach.

11 CHAIRMAN BABCOCK: No, that's the reason not
12 to do it. Yeah, Roger.

13 MR. HUGHES: Well, I was just going to
14 comment on the clerk issue with delivering the citations.
15 I mean, you know, whether to send them by e-mail or not.

16 CHAIRMAN BABCOCK: Sure. Comment away.

17 MR. HUGHES: I guess I'm not sure I
18 understand entirely why this is a major issue at all,
19 because I don't know what everyone's experience is, but
20 mine is that almost nobody goes to the courthouse to pick
21 up citation. They are usually -- you usually have a
22 private process server who goes by, and they can be given
23 copies to attach. I think the only real concern here,
24 which is maybe what the clerks' concern is, basically that
25 people will phony up their own citations. That, you know,

1 the clerk sends it, doesn't have a raised seal. The party
2 who gets it, somebody who is not a court official.
3 They're not a constable or a sheriff's deputy, shows up on
4 their step with a bunch of pieces of paper, and you don't
5 know whether it's real or not unless it's got a raised
6 seal on it.

7 I -- and maybe people think that's a vestige
8 of the past, but I -- where I live, you know, I can see
9 people going, "I don't know if this is from anybody
10 official. I don't know this really comes from a court."
11 You know, it's one step up -- it's one step above scanning
12 it all to PDF and leaving it on their Facebook page.

13 MR. ORSINGER: Good idea, Roger. Good idea.

14 MR. HUGHES: I'm sorry. I was being
15 sarcastic there. Note for the record I was being
16 sarcastic. So I can see the value of having a raised seal
17 with an ink signature on it that you can actually tell was
18 by a court person, but maybe that's a vestige of the past.
19 Maybe a lot of people that doesn't mean anything to them
20 anymore anyway, but I guess I'm not sure what the big
21 impediment is to saying, "Look, you want a raised seal on
22 it, you know, send your paralegal down, send your runner
23 down to get it, or we'll mail it to you."

24 MS. NEWTON: I may be able to shed some
25 light on this because the clerks and the process servers

1 both call me, so I have heard from both of them.

2 MR. HUGHES: Okay.

3 MS. NEWTON: So one thing is actually the
4 rules already -- the e-filing rules say that a court seal
5 may be electronic. So that's permissible already under
6 the e-filing rules, but what this controversy is, is so
7 the process servers, you know, they e-file the petition,
8 and they want the -- they want the clerk to just e-mail
9 them back the citation, and they want to then print out
10 their own copies and attach it and serve it that way. The
11 clerks are saying, no, you have to basically -- like we
12 are going to charge you to make these copies, and when you
13 would file a petition by mail or bring it down there you
14 would, you know, send in copies or bring them with you,
15 and they say, well, that doesn't work anymore because we
16 get the -- you know, we get the e-filed petition. We
17 can't be matching this up with stuff that's sent in the
18 mail or somebody is standing at the counter. We need to
19 kind of do this, print this out right now, and do it that
20 way.

21 There are some clerks who do also take the
22 position that they have some duty to physically attach the
23 citation and the petition together, but there's nothing in
24 the rules that says that. They just -- some of them just
25 take that position, and so you have some clerks who are

1 accommodating process servers and will e-mail the citation
2 back and then other clerks who say, "No, I won't do that
3 and you have to pay me for the copies." So that's kind of
4 why we have this, you know, situation where the Court's
5 asked for the committee's advice.

6 CHAIRMAN BABCOCK: Okay.

7 MR. HUGHES: Well, I mean, I'm a big
8 believer that the clerks don't get paid enough to begin
9 with, but if they want to charge a dollar a page, but I
10 see the problem, and okay. I see the problem now.

11 CHAIRMAN BABCOCK: Okay. Any other
12 comments? Frank.

13 MR. GILSTRAP: Well, now that I've thought
14 about it, we're shortening the time in just about every
15 case. You know, 21 days instead of Monday next after the
16 expiration of 20 days, and so every lawyer in the state is
17 going to have to figure out, whoops, you don't have as
18 much time as you used to, and 21 days is a vestige of the
19 past. You know, why not go 30 like the feds? That way --
20 that way it will be longer than what it is now, and
21 lawyers won't mess up.

22 CHAIRMAN BABCOCK: Not sure that follows,
23 but --

24 MR. ORSINGER: Are the feds 30 days or 21
25 days?

1 MR. GILSTRAP: 30.

2 MR. ORSINGER: 30?

3 MR. GILSTRAP: Yeah. Because if you're
4 still going with the old rule you'll hit it within time,
5 within the 30 days. But under the new rule, you know,
6 there's going to be lawyers who miss it because they still
7 think it's the Monday next after 20 days.

8 CHAIRMAN BABCOCK: Well, it's not only that.
9 It's somebody gets sued and, you know, they don't have a
10 lawyer, so now they've got to go look for a lawyer, and
11 maybe they don't do it like that very day.

12 MR. GILSTRAP: Maybe 21 days is too short.

13 MR. ORSINGER: So Federal Rule of Civil
14 Procedure 12 is "The defendant must serve an answer within
15 21 days after being served with the summons and
16 complaint."

17 MR. GILSTRAP: I'm wrong.

18 PROFESSOR CARLSON: You're thinking
19 California.

20 MR. GILSTRAP: But still, still. Is 21 days
21 too short?

22 CHAIRMAN BABCOCK: Well, where did the next
23 Monday come in?

24 MR. ORSINGER: That's just under the
25 existing Texas rule. I don't know if anyone else ever

1 copied that.

2 CHAIRMAN BABCOCK: What did you just read?

3 MR. ORSINGER: It may have been adopted
4 before we joined the United States of America.

5 CHAIRMAN BABCOCK: No, I don't think so.

6 MR. ORSINGER: You don't?

7 CHAIRMAN BABCOCK: These rules came into
8 being in 1938.

9 MR. ORSINGER: But they were based on
10 statutes that existed before the rules.

11 CHAIRMAN BABCOCK: Well, that's true.
12 That's true. So, okay, any other comments about this?
13 Yes, Justice Christopher. Eager to comment.

14 HONORABLE TRACY CHRISTOPHER: I'm like I
15 must be like in your dead zone.

16 CHAIRMAN BABCOCK: No, I'll tell you what,
17 there is a glare right behind you.

18 HONORABLE TRACY CHRISTOPHER: Okay. All
19 right. I'll give you that.

20 CHAIRMAN BABCOCK: Maybe a halo, I don't
21 know.

22 HONORABLE TRACY CHRISTOPHER: Now, here's a
23 funny thing about the 10:00 a.m. requirement. We get a
24 lot of pro ses that show up at 10:00 a.m. on the Monday
25 after 20 days, wanting to know what's going on with their

1 lawsuit, and we tell them to file an answer. And the
2 clerk's office sometimes will even say, "Here's a little
3 form for you to use." So there is something useful about
4 that because they seem -- it seems to -- it seems to make
5 people come to the courthouse. Now, those of you who want
6 defaults would not like that, but that's what happens at
7 10:00 a.m. on Monday, a lot of people showing up at the
8 courthouse, "I got the papers, I'm here."

9 MR. ORSINGER: They're making an appearance.

10 HONORABLE TRACY CHRISTOPHER: They're making
11 an appearance. That's a good thing. I think that's a
12 good thing.

13 CHAIRMAN BABCOCK: Yeah. It's not driving
14 them to lawyers like Elaine thinks.

15 HONORABLE TRACY CHRISTOPHER: You know, I
16 mean, they're showing up.

17 CHAIRMAN BABCOCK: All right. Peter.

18 MR. KELLY: I was going to say I agree with
19 Frank's point about 30 days making more sense.

20 MR. GILSTRAP: And do we want to do it at 10
21 a.m. or 5:00 p.m.?

22 CHAIRMAN BABCOCK: If they show up at 5:00
23 p.m. --

24 MR. ORSINGER: Then they'll show up right
25 before closing time, and then clerks will have to work

1 late and not get overtime. That is not good.

2 MS. NEWTON: Well, I mean, with e-filing, if
3 you are e-filing your answer then you have until midnight.

4 MR. ORSINGER: Well, not if it's by 10:00
5 a.m.

6 MS. NEWTON: Oh, I thought he was -- okay.

7 CHAIRMAN BABCOCK: Okay. Any other comments
8 about Rule 99? Okay.

9 MR. ORSINGER: You ready to go on to --

10 CHAIRMAN BABCOCK: Yes.

11 MR. ORSINGER: Okay. So the next item is
12 this civil case information sheet. On July 5th, 2017,
13 Chief Justice Hecht wrote a letter saying that they wanted
14 the SCAC's -- advisory committee's recommendation. The
15 civil case information sheet, which is a requirement of
16 Rule of Procedure 78 requires that the civil case
17 information sheet be filed with a petition that initiates
18 a new civil lawsuit and requests modification or
19 enforcement in a family law case. Appendix A is the civil
20 information sheet. We designed that with the help of OCA.
21 It was very useful, but now OCA says that the information
22 they need to capture is captured by the e-filing system
23 when a petition is e-filed. So they see no need for the
24 civil case information sheet in cases that are e-filed,
25 and the question is, why should we require everyone to

1 continue to fill one out when they have to put the same
2 data into the computer to e-file.

3 Now, if it's not e-filed they're not
4 answering the e-file questionnaire in order to file their
5 pleading, so lawyers we know are required to e-file, but
6 pro ses do not e-file, but apparently pro ses don't file
7 their civil case information sheet either. So we're not
8 getting any compliance from the pro ses, and we don't need
9 the information from the only people who are compliant,
10 who is the lawyers. So the recommendation or the question
11 is should the requirement of 78a be eliminated or should
12 it be restricted to initial pleadings that are not
13 electronically filed, and the subcommittee is of the view
14 that the case information sheet should be required only
15 where the pleading is not electronically filed, and in the
16 memo that went out to the SCAC the recommendation is a
17 simple change to Rule 78a that presently says in
18 subdivision (f), "Requirement, a civil case information
19 sheet in the form promulgated by the Supreme Court of
20 Texas must accompany a non-electronically filed," number
21 (1), "original petition or application" or number (2),
22 "post-judgment petition for modification or motion to
23 enforce in a case arising under the Family Code."

24 Then we would change paragraph (j) of that
25 rule to add the sentence under applicability, "A civil

1 case information sheet is not to be filed if the petition,
2 application, or motion described in subsection (f) is
3 electronically filed." And then finally in the comment
4 when -- there's a comment from when 78a was added. We
5 would like to add to the end of that comment, "The 2017
6 amendment eliminates the requirement of a case information
7 sheet where the petition, application, or motion is filed
8 electronically."

9 CHAIRMAN BABCOCK: Peter.

10 MR. KELLY: I took the liberty of posting
11 this on the TTLA LISTSERV to see who was in favor of
12 getting rid of it because they file a lot of lawsuits, and
13 it was unanimous, get rid of it. My question, though, is
14 I guess I don't know what actually happens to the civil
15 information sheets, and would getting rid of that
16 requirement in any way restrict or limit public access to
17 court information? And I just don't know enough about
18 the -- how OCA uses it, where these things are stored, and
19 if it's something the public currently has access to, but
20 no longer has access to that information. I would have
21 some doubts about getting rid of the requirement or doing
22 something else to make -- perhaps we do something else to
23 make sure that that information remains publicly
24 accessible, but I just don't know enough about the
25 process.

1 MR. ORSINGER: I don't either. I have no
2 idea whether that information is public or not.

3 MR. GILSTRAP: I've got a question where the
4 information goes. It says, "The Office of Court
5 Administration has reported to the Court that the
6 information required by the civil case information sheet
7 is captured independently by the e-filing system." Well,
8 I look at the civil information sheet, and it has the
9 names of the parties. Then it has all of these arcane
10 categories like paternity suit, suit to quiet title. I
11 remember we tried to make them -- suggest that they put in
12 different categories, and OCA was pretty much wedded to
13 these categories, and I think they may come out of the
14 federal sheet. I don't know, but how does the computer
15 tell that my suit is a paternity suit or a suit to quiet
16 title?

17 MR. ORSINGER: When you e-file -- and I
18 don't, but I also interact with my paralegals who do --
19 you're required to categorize the type of case it is.
20 Now, there may be people in here who personally e-file and
21 could speak more authoritatively.

22 MR. GILSTRAP: There's a civil information
23 sheet on the e-filing that you're required to fill out
24 when you e-file then, right?

25 MR. ORSINGER: Yes. There is an

1 information -- civil information sheet, yes, of sorts.

2 CHAIRMAN BABCOCK: Judge Estevez.

3 HONORABLE ANA ESTEVEZ: And I'll just say
4 that when we -- the judges look on Odyssey or whatever our
5 e-filing system is for us to be signing and getting access
6 to that case, it has that classification in there, so it
7 is like listed in a spot that we can't touch or anything.
8 So the clerk has obviously inserted it in there, and it is
9 a special code that I'm assuming is statewide.

10 CHAIRMAN BABCOCK: You think it's public --
11 if I was interested in those statistics, could I --

12 HONORABLE ANA ESTEVEZ: You could call OCA.

13 CHAIRMAN BABCOCK: Could I get it?

14 HONORABLE ANA ESTEVEZ: From OCA, yeah.

15 CHAIRMAN BABCOCK: From OCA.

16 HONORABLE ANA ESTEVEZ: They publish it.
17 They still send us the reports, so they send the reports
18 to the courts.

19 MR. ORSINGER: Wait. The statistical
20 information is available from OCA, but can you get
21 individual case sheets for individual lawsuits?

22 HONORABLE ANA ESTEVEZ: I don't know. I
23 don't know that they ever -- I don't know that they kept
24 them whenever they had them. I guess you just need to
25 check the file and see if they had it at their first part

1 of their filing. I never really paid attention.

2 CHAIRMAN BABCOCK: Well, it's in the file,
3 isn't it?

4 HONORABLE ANA ESTEVEZ: I don't know. I
5 never really paid attention to it. I always went straight
6 to the -- whatever the live pleading was.

7 MR. ORSINGER: You know, in family law
8 matters we have statistical certificates that are required
9 for each divorce and each order involving a parent-child.

10 CHAIRMAN BABCOCK: Right.

11 MR. ORSINGER: And those certificates are
12 sent directly to the agency that keeps track of statistics
13 for the population, and they're not made -- they're not
14 designed to be public, and I think they're not even
15 lawful. I don't think it's lawful, so I believe they get
16 diverted away from the lawsuit and get sent directly to
17 the agency that is responsible. I don't know if that's
18 true for this or not.

19 CHAIRMAN BABCOCK: Okay.

20 MR. ORSINGER: Now, can I say one thing, is
21 that I got an e-mail from Judge Evans, who was not able to
22 be here today, and he was I think curious to compare the
23 information that was captured by the online filing system
24 and compare it to the case information sheet, and I made
25 the inquiries, and I don't think that that's possible. So

1 our recommendation today is not based on our confirming
2 what information is captured by the electronic system
3 compared to this form. We're taking it on the
4 recommendation from OCA that they're capturing all the
5 information they need, and they don't need these
6 additional forms.

7 CHAIRMAN BABCOCK: Okay. Peter.

8 MR. KELLY: Does anybody know where
9 reporters get an information when a case is being filed?
10 You know, because the *Chronicle* will write a story about,
11 you know, a suit being filed relating to an industrial
12 accident or something, and I don't know if they're
13 getting -- I doubt they're reading every single petition.
14 I don't know if they're ripping through recent case
15 information sheets or something like that, but it does
16 seem -- I'm still concerned about public access to this
17 information, and if it's, you know, maintained by ProDoc,
18 how does someone get access to that?

19 CHAIRMAN BABCOCK: Justice Gray.

20 HONORABLE TOM GRAY: This was the rule that
21 I made reference to earlier where applicability is at the
22 end of the rule. Especially since we are cutting down the
23 number of cases to which it is applicable or a
24 requirement, it would seem like to me that (a) and (e),
25 which appears on the printout as (f) and (j), could be

1 combined in the first subsection under the rule and put
2 requirement and/or applicability in subsection (a) and --
3 if we're even going to keep it. Richard made one comment
4 there that's not in the letter from Chief Justice Hecht,
5 that if they're not getting this sheet from an appreciable
6 number of pro se filers and all we're getting it from is
7 the electronic filers anyway, why do we even need 78a as a
8 rule anymore?

9 CHAIRMAN BABCOCK: Okay. Anything else on
10 this? Richard.

11 MR. ORSINGER: That's it. I have something
12 on the agenda next time, but I think that's it for me.
13 Whew.

14 CHAIRMAN BABCOCK: I told everybody we were
15 going to be here until 5:00, but I think I may have lied
16 about that.

17 MR. ORSINGER: All right.

18 CHAIRMAN BABCOCK: So we'll be back December
19 1, which is a Friday. It is possible that we're going to
20 have to work Saturday, too, given the agenda that we've
21 got stacked up, right, Marti? Okay. But we'll make a
22 decision in consultation with Martha and her underlings,
23 the Chief and Justice Boyd. So for now we're in recess.
24 Thank you very much for staying, those of you who did.

25 (Adjourned)

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REPORTER'S CERTIFICATION
MEETING OF THE
SUPREME COURT ADVISORY COMMITTEE

* * * * *

I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above meeting of the Supreme Court Advisory Committee on the 27th day of October, 2017, and the same was thereafter reduced to computer transcription by me.

I further certify that the costs for my services in the matter are \$ 1,866.00 .

Charged to: The State Bar of Texas.

Given under my hand and seal of office on this the 20th day of November, 2017.

/s/D'Lois L. Jones
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