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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

September 28, 2018

(FRIDAY SESSION)

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Taken before *D'Lois L. Jones*, Certified Shorthand Reporter in and for the State of Texas, reported by machine shorthand method, on the 28th day of September, 2018, between the hours of 9:00 a.m. and 5:07 p.m., at the Texas Association of Broadcasters, 502 East 11th Street, Suite 200, Austin, Texas 78701.

INDEX OF VOTES

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

Documents referenced in this session

18-07 Jury Charge in Termination Cases Subcommittee Report (9-25-18)

18-08 Appendix C - Jury Charge in Parental Termination, Jury Charge in E.B.

18-09 HB 7 Task Force Report to Texas Supreme Court

18-10 Majority Grounds Separate Question From Best Interest (Exhibit F to report)

18-11 Minority Grounds Best Interest in Same Question (Exhibit E to report)

18-12 Proposed Amendments to Texas Rules of Civil Procedure 8 and 10 (9-26-18 redline)

18-13 Social Media Subcommittee Report (9-22-18)

18-14 Final Proposed Changes to Disciplinary Rules (9-21-18)

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CHAIRMAN BABCOCK: Welcome to the Supreme Court Advisory. We've got a lot of scheduling problems today, so we're going to start with the agenda through items one, two, and three, and then we're going to move item seven to item four. So item seven, local rules, will come after jury questions and parental termination cases, unless somebody violently disagrees with that.

MS. CORTELL: Chip, can I --

CHAIRMAN BABCOCK: Huh? Nina. Nina violently disagrees. The chair of that subcommittee.

MS. CORTELL: So Kennon Wooten is presenting, and she's not able to be here today. She had been told we would reach that tomorrow morning.

CHAIRMAN BABCOCK: We can do that, although she told Marti that she would be here this morning.

MS. CORTELL: Well, I got an e-mail from her this morning. She cannot be here.

CHAIRMAN BABCOCK: Okay.

HONORABLE TOM GRAY: Nina, I could present my side of it.

MS. CORTELL: I know that. I mean, we can go forward, but it would be preferable if we could --

CHAIRMAN BABCOCK: Okay. Well, we've got a lot of things to talk about. What about -- Justice Bland

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

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

CHAIRMAN BABCOCK: Okay.

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

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

MS. CORTELL: Yes, thank you.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

HONORABLE JEFF BOYD: Thank you very much.

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

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

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

I'm hoping that Professor Dorsaneo and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

And then they have a fourth question, which

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

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

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

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

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

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

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

CHAIRMAN BABCOCK: Yep.

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

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, my first

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

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

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

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

CHAIRMAN BABCOCK: Okay.

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

CHAIRMAN BABCOCK: Right.

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

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

HONORABLE DAVID PEEPLES: Yeah.

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

CHAIRMAN BABCOCK: Yeah. Professor Carlson.

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

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

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

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

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

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

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

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

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

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

PROFESSOR ELAINE CARLSON: Okay.

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

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

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

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

CHAIRMAN BABCOCK: Judge Yelenosky.

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

coupled with anything else.

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

HONORABLE STEPHEN YELENOSKY: Yeah.

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

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

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

CHAIRMAN BABCOCK: Yeah, Justice Pemberton.

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

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

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

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

HONORABLE DAVID PEEPLES: He might disagree with the jury.

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

CHAIRMAN BABCOCK: Justice Christopher.

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

"no," by way of example.

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

CHAIRMAN BABCOCK: Skip Watson.

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

trouble here.

HONORABLE TRACY CHRISTOPHER: Yes.

HONORABLE STEPHEN YELENOSKY: Yes.

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

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

MR. WATSON: It always does mean the jury?

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

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

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

HONORABLE STEPHEN YELENOSKY: It's the jury.

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

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

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

HONORABLE STEPHEN YELENOSKY: Sure.

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

CHAIRMAN BABCOCK: Judge Yelenosky.

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

HONORABLE TOM GRAY: Yeah.

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

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

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

HONORABLE STEPHEN YELENOSKY: I don't think

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

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

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

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

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

MR. WATSON: Got it. Thanks.

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

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

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

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

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

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

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

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

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

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

CHAIRMAN BABCOCK: Roger, then Justice Christopher.

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

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

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

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

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

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

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

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

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

CHAIRMAN BABCOCK: Justice Christopher.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CHAIRMAN BABCOCK: Professor Hoffman.

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

CHAIRMAN BABCOCK: Judge Yelenosky, and then Professor Carlson.

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

HONORABLE ANA ESTEVEZ: That's okay.

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

HONORABLE ANA ESTEVEZ: That's fine.

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

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

MR. MUNZINGER: May I respond?

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

CHAIRMAN BABCOCK: Richard, go ahead and --

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

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

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

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

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

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

CHAIRMAN BABCOCK: Fair enough. Justice Bland.

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

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

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

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

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

MR. WATSON: I understand.

HONORABLE BRETT BUSBY: Oh, okay.

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

CHAIRMAN BABCOCK: Richard.

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

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

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

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

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

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

almost like a philosopher would.

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

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

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

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

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

CHAIRMAN BABCOCK: While we're young.

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

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

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

So then I guess that brings me to my last

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

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

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

CHAIRMAN BABCOCK: Thanks, Richard. Judge Estevez.

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

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

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

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

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

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

MR. ORSINGER: You might never be on the

Supreme Court.

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

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

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

CHAIRMAN BABCOCK: Thank you, Judge. Judge Yelenosky.

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

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

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

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

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

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

HONORABLE TRACY CHRISTOPHER: It says "may."

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

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

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

just forget the fact that --

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

MR. ORSINGER: Right.

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

MR. ORSINGER: Right.

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

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

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

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

HONORABLE STEPHEN YELENOSKY: I'm sorry, what?

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

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

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

MR. ORSINGER: Pardon me?

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

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

The only contrary that I know is in the

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

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

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

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

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

MR. LOW: Yeah.

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

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

CHAIRMAN BABCOCK: Fire away.

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

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

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

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

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

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

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

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

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

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

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

CHAIRMAN BABCOCK: That's what I was thinking.

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

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

CHAIRMAN BABCOCK: Skip.

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

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

HONORABLE TRACY CHRISTOPHER: There's

actually three.

CHAIRMAN BABCOCK: Huh?

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

CHAIRMAN BABCOCK: And is not predicated.

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

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

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

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

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

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

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

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

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

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

CHAIRMAN BABCOCK: Yeah, Exhibit C is the

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

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

HONORABLE DAVID PEEPLES: Yeah, we did.

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

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

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

CHAIRMAN BABCOCK: Okay. Justice Gray.

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

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

CHAIRMAN BABCOCK: Yeah.

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

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

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

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

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

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

HONORABLE STEPHEN YELENOSKY: On the "should"?

MR. PERDUE: The "should" word.

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

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

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

Everybody against the task force, raise your hand.

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

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

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

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

HONORABLE JANE BLAND: Three.

CHAIRMAN BABCOCK: Three, who snuck in there.

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

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

MR. HUGHES: No, no.

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

MR. WATSON: What am I against?

MR. PERDUE: The Constitution.

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

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

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

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

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

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

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

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

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

CHAIRMAN BABCOCK: Richard Orsinger.

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

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

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

CHAIRMAN BABCOCK: Buddy, then Lisa.

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

CHAIRMAN BABCOCK: Lisa.

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

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

MR. RINEY: Just resting.

MR. MUNZINGER: I agree with Richard Orsinger.

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

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

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

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

CHAIRMAN BABCOCK: Okay. Frame that.

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

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

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

CHAIRMAN BABCOCK: Frame the question for the vote.

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

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

HONORABLE DAVID PEEPLES: Of which?

CHAIRMAN BABCOCK: Of what you just said.

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

CHAIRMAN BABCOCK: I told you to frame the question.

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

HONORABLE BRETT BUSBY: We already voted on that.

HONORABLE TRACY CHRISTOPHER: We already voted for that.

HONORABLE ANA ESTEVEZ: What concerns me

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

MR. HARDIN: Yes.

HONORABLE TOM GRAY: Not nearly enough.

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

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

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

HONORABLE ANA ESTEVEZ: That was the policy limits.

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

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

CHAIRMAN BABCOCK: Eduardo.

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

CHAIRMAN BABCOCK: Yeah, who knew.

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

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

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

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

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

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

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

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

HONORABLE STEPHEN YELENOSKY: Is it in here?

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

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

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

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

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

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

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

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

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

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

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

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

CHAIRMAN BABCOCK: Okay. Any other

comments?

HONORABLE TOM GRAY: I had one more.

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

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

CHAIRMAN BABCOCK: Thank you. Judge Wallace.

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

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

CHAIRMAN BABCOCK: Roger.

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

So meanwhile the insurance personal counsel

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

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

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

CHAIRMAN BABCOCK: Professor Hoffman.

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

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

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

and opposing counsel.

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

CHAIRMAN BABCOCK: Frank. And then Richard Munzinger.

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

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

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

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

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

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

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

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

CHAIRMAN BABCOCK: Richard.

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

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

HONORABLE JANE BLAND: That's right.

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

HONORABLE JANE BLAND: That's right.

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

HONORABLE JANE BLAND: That's right.

MR. MUNZINGER: Okay.

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

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

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

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

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

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

MR. MUNZINGER: I agree with you.

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

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

HONORABLE JANE BLAND: Yes.

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

HONORABLE JANE BLAND: It used to be either

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

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

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

MR. MUNZINGER: Well --

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

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

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

CHAIRMAN BABCOCK: Frank.

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

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

HONORABLE JANE BLAND: That's the idea.

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

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

MR. GILSTRAP: Okay. Okay.

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

CHAIRMAN BABCOCK: Judge Wallace.

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

HONORABLE JANE BLAND: Correct.

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

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

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

MR. GILSTRAP: Once you get to two attorneys.

HONORABLE JANE BLAND: Once you get to two attorneys.

HONORABLE TOM GRAY: At the same time.

HONORABLE JANE BLAND: At the same time.

CHAIRMAN BABCOCK: Roger.

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

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

MR. MUNZINGER: Chip.

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

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

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

CHAIRMAN BABCOCK: Richard Orsinger.

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

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

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

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

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

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

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

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

MR. MUNZINGER: Sir?

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

MR. MUNZINGER: Okay.

CHAIRMAN BABCOCK: Judge Yelenosky.

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

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

CHAIRMAN BABCOCK: Okay. Any other comments?

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

CHAIRMAN BABCOCK: Richard.

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

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

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

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

CHAIRMAN BABCOCK: The Bland-Munzinger detente.

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

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

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

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

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

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

CHAIRMAN BABCOCK: Justice Christopher.

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

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

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

CHAIRMAN BABCOCK: Judge Yelenosky.

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

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

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

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

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

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

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

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

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

HONORABLE STEPHEN YELENOSKY: I yield to Justice Christopher.

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

was, I'm only handling pretrial.

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

CHAIRMAN BABCOCK: Judge Wallace.

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

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

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

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

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

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

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

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

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

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

HONORABLE JANE BLAND: Okay.

HONORABLE TOM GRAY: Second general comment,

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

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

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

HONORABLE JANE BLAND: Okay.

CHAIRMAN BABCOCK: Justice Christopher.

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

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

HONORABLE JANE BLAND: Yes. Okay. Yes.

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

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

HONORABLE STEPHEN YELENOSKY: (H).

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

HONORABLE STEPHEN YELENOSKY: Is that his

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

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

HONORABLE STEPHEN YELENOSKY: Or voting it down.

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

HONORABLE STEPHEN YELENOSKY: It's the whole turkey.

HONORABLE JANE BLAND: As Judge Yelenosky

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

CHAIRMAN BABCOCK: Let me just --

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

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

(Off the record)

CHAIRMAN BABCOCK: All right. Richard.

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

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

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

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

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

HONORABLE JANE BLAND: -- except family law

and --

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

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

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

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

CHAIRMAN BABCOCK: Judge Yelenosky.

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

CHAIRMAN BABCOCK: Richard.

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

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

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

CHAIRMAN BABCOCK: Parental termination.

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

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

CHAIRMAN BABCOCK: So you're against his proposal?

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

CHAIRMAN BABCOCK: Judge Yelenosky.

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

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

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

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

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

HONORABLE JANE BLAND: Okay.

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

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

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

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

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

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

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

CHAIRMAN BABCOCK: Roger.

HONORABLE STEPHEN YELENOSKY: Yes, under his proposal.

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

MR. ORSINGER: Go ahead.

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

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

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

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

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

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

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

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

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

CHAIRMAN BABCOCK: All right. Justice Christopher.

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

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

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

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

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

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

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

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

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

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

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

PROFESSOR CARLSON: This is in Texas, right?

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

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

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

CHAIRMAN BABCOCK: Could I just interrupt for one moment?

HONORABLE TRACY CHRISTOPHER: Yes.

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

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

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

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

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

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

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

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

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

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

MR. ORSINGER: Bypassing the Texas Supreme Court?

CHAIRMAN BABCOCK: Yes.

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

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

MR. ORSINGER: That's amazing.

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

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

changing --

CHAIRMAN BABCOCK: Well --

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

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

HONORABLE TRACY CHRISTOPHER: Okay.

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

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

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

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

CHAIRMAN BABCOCK: That's what some people think.

MR. HARDIN: Are they working as chair of

this committee?

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

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

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

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

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

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

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

CHAIRMAN BABCOCK: Although you might not know.

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

CHAIRMAN BABCOCK: Yeah.

HONORABLE TRACY CHRISTOPHER: If they don't

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

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

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

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

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

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

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

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

HONORABLE STEPHEN YELENOSKY: Still have AOL addresses.

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

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

his position on various issues.

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

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

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

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

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

HONORABLE TRACY CHRISTOPHER: Yes.

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

HONORABLE STEPHEN YELENOSKY: Right.

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

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

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

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

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

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

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

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

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

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

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

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

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

HONORABLE DAVID PEEPLES: Kind of like the picture.

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

HONORABLE JANE BLAND: He wasn't independent.

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

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

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

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

CHAIRMAN BABCOCK: And give fair notice.

Yeah, Judge Yelenosky.

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

CHAIRMAN BABCOCK: I wouldn't think so.

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

CHAIRMAN BABCOCK: So what?

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

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

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

MR. HARDIN: I like that much better.

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

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

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

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

HONORABLE STEPHEN YELENOSKY: Yeah.

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

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

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

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

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

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

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

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

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

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

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

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

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

give them money.

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

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

CHAIRMAN BABCOCK: Frank.

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

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

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

MR. GILSTRAP: I know, I know.

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

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

that anymore?

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

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

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

CHAIRMAN BABCOCK: Right.

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

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

CHAIRMAN BABCOCK: Justice Boyce.

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

MR. GILSTRAP: Was the judge disciplined for those?

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

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

HONORABLE TRACY CHRISTOPHER: But they were initially --

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

MR. GILSTRAP: I understand. I understand. Okay.

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

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

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

CHAIRMAN BABCOCK: Sure.

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

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

HONORABLE STEPHEN YELENOSKY: There you go.

Yeah.

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

HONORABLE BILL BOYCE: Correct.

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

HONORABLE BILL BOYCE: And an 18-month process.

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

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

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

HONORABLE DAVID PEEPLES: I'm just saying

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

CHAIRMAN BABCOCK: Yeah.

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

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

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

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

CHAIRMAN BABCOCK: Judge Estevez.

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

CHAIRMAN BABCOCK: That is one of my concerns.

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

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

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

MR. HARDIN: And I've got two.

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

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

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

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

CHAIRMAN BABCOCK: Justice Kennedy made exactly that argument.

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

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

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

HONORABLE JANE BLAND: They absolutely do.

CHAIRMAN BABCOCK: Yeah. They take that position.

MS. TAYLOR: Yes, they do.

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

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

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

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

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

HONORABLE STEPHEN YELENOSKY: Yes.

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

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

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

MR. HARDIN: Right.

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

MR. HARDIN: Right.

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

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

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

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

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

CHAIRMAN BABCOCK: Professor Hoffman.

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

HONORABLE TRACY CHRISTOPHER: Right.

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

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

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

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

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

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

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

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

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

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

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

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

CHAIRMAN BABCOCK: Another couple hundred thousands at least.

HONORABLE TRACY CHRISTOPHER: Exactly.

CHAIRMAN BABCOCK: Judge. Judge Wallace.

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

MR. ORSINGER: And shoot everyone.

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

CHAIRMAN BABCOCK: Rusty.

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

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

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

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

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

CHAIRMAN BABCOCK: What's that?

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

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

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

CHAIRMAN BABCOCK: Yeah, so remember that.

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

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

CHAIRMAN BABCOCK: Frank.

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

CHAIRMAN BABCOCK: Yeah.

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

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

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

CHAIRMAN BABCOCK: Yeah. Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, it was

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

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

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

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

HONORABLE TRACY CHRISTOPHER: Okay.

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

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

My larger comments are really that I think

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

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

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

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

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

HONORABLE TRACY CHRISTOPHER: Where's my editor?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CHAIRMAN BABCOCK: I would think so.

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

CHAIRMAN BABCOCK: Uh-huh, please.

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

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

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

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

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

CHAIRMAN BABCOCK: John, what do you think?

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

pertain to the party.

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

was done at the instigation of the attorney.

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

CHAIRMAN BABCOCK: Right.

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

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

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

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

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

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

MR. MUNZINGER: Something similar to that.

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

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

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

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

PROFESSOR CARLSON: Okay.

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

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

MR. BROWNING: No. No.

CHAIRMAN BABCOCK: Justice Christopher.

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

CHAIRMAN BABCOCK: DR's, yeah. Jim.

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

CHAIRMAN BABCOCK: Yeah.

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

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

HONORABLE TRACY CHRISTOPHER: Some of us do.

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

CHAIRMAN BABCOCK: Yeah.

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

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

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

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

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

MR. BROWNING: Yeah.

MR. PERDUE: You're incompetent.

CHAIRMAN BABCOCK: -- you're incompetent?

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

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

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

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

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

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

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

MR. FULLER: Right. Right.

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

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

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

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

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

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

MR. FULLER: Okay.

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

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

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

CHAIRMAN BABCOCK: Okay.

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

CHAIRMAN BABCOCK: All right.

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

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

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

PROFESSOR CARLSON: Yes.

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

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

CHAIRMAN BABCOCK: Is that --

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

CHAIRMAN BABCOCK: Okay.

MR. PERDUE: I'm joking.

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

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

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

CHAIRMAN BABCOCK: That's coming.

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

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

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

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

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

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

HONORABLE ANA ESTEVEZ: Sustained.

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

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

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

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

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

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

MS. HOBBS: Okay.

CHAIRMAN BABCOCK: Justice Busby.

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

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

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

CHAIRMAN BABCOCK: Roger.

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

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

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

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

CHAIRMAN BABCOCK: Nina.

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

CHAIRMAN BABCOCK: Justice Christopher, and then Richard.

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

CHAIRMAN BABCOCK: Elaine.

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

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

CHAIRMAN BABCOCK: Yeah.

MR. BROWNING: And that's actually the majority view of not just the ABA but the majority of ethics opinions other than New York that looked at it.

PROFESSOR CARLSON: That it's okay.

MR. BROWNING: Yeah, that it's okay.

MR. MUNZINGER: Is the object here to forbid the attorney from accessing the ESM if the juror can learn it was the attorney doing it?

PROFESSOR CARLSON: Yes.

MR. MUNZINGER: It doesn't say that in stern enough language. All it says is "knew or should have known" and then the next sentence in brackets seems to say go out and check out the available technology as opposed to saying the anonymity of the inquiring lawyer must be maintained or may not -- if the object is to forbid someone from having the prospective or actual juror know that you've communicated with their site, if that's the object, I think we ought to say it point-blank. Don't.

And then the guy who doesn't want to spend the 500 or a thousand dollars, doesn't or takes the -- runs the risk of whatever sanction may take place or new trial perhaps or bar punitive sanction or something like that for his having violated the rule.

If you're saying don't communicate with these people, I think you ought to say don't communicate with them, and if you don't know whether you're communicating with them or they can find you out, that's their problem. This is law, this is ethics. Don't do it.

CHAIRMAN BABCOCK: Jim, did you have your hand up?

MR. PERDUE: I did.

CHAIRMAN BABCOCK: Well, you can put it down and talk.

MR. PERDUE: So to second Mr. Browning's point, the ABA rule is that this second sentence reads "is not improper" and so -- and that is the majority rule across the country, so while Professor Carlson keeps saying "we," my recollection is it was pretty narrow; and we do like to be contrarians in this committee but realize that that current version is a split from the ABA and a split from the majority rule; and now we have all of this conversation about, you know, how to either narrow it or broaden it; but you're not -- so, Mr. Munzinger, you're

not talking about communication I think in the way you're phrasing it, because the last section, which again, is a reflection of the ABA rule and the majority rule is I can't proactively ask you to give me access to what you have out there on the internet.

The first sentence very clearly says if you're out there on the internet I can passively look at that; and the second sentence, which is now where we are splitting, is I can look at that if I don't know that you can know I've looked at it. That's -- I mean, right?

PROFESSOR CARLSON: Yeah.

MR. PERDUE: And the majority rule is I can look at it even if you know that I've looked at it; and to Judge Christopher's point, why is that a vexatious investigation, much less it's not a communication whatsoever, why is that a vexatious investigation of a venireperson when all me or someone on my behalf is doing is I would like to see if they have postings that express something relevant to the case at hand. And that's -- and that's the -- I think the -- this whole conversation that is very much focused on what, frankly, was I recall a pretty close vote on the split with the majority rule is because the majority rule, from my perspective, at least makes sense. It is not a vexatious investigation, and there is no communication. Proactive communication

through social media with a prospective juror is absolutely forbidden, should remain forbidden, and I think is very clearly captured. So that would be the only --

MR. MUNZINGER: Thank you very much. That was very informative.

MR. PERDUE: I don't know if it was, but that was my position.

MR. MUNZINGER: It was, and I agree with your point of view. It's analogous to the rights in the media. A newspaper reporter is free to look through an open window. He's not free to climb a tree to look through an open window, and so if your website is an open window, what the hell, why can't I look at it?

CHAIRMAN BABCOCK: Is the tree on public property?

HONORABLE ANA ESTEVEZ: Yeah, it depends where the tree is.

CHAIRMAN BABCOCK: Elaine.

PROFESSOR CARLSON: That was the unanimous recommendation.

MR. PERDUE: That's pitiful. I do not remember that, but I wasn't here.

PROFESSOR CARLSON: No, of the subcommittee, was to adopt the ABA approach, that it's okay; and the vote was, you're right, close, 14 to 11 not to adopt

the ABA subcommittee recommendation.

CHAIRMAN BABCOCK: Okay. So the -- yeah, Alistair.

MR. DAWSON: So I would respectfully disagree with my friend Mr. Perdue because I think that if you do a LinkedIn request -- and this came up in a trial where one of my co-counsel did a LinkedIn request or looked on LinkedIn at a juror's LinkedIn page, and the juror was notified about it. I think that is a communication with a juror. I mean, that's communication that the lawyer has looked at your page. There may be no substance in the communication, but it is a communication, and, you know, you never know how the juror is going to react to that. They could react favorably to it or unfavorably to it, but we don't want communications with jurors, so we should prohibit that kind of communications, and since the technology exists to do it anonymously we should, you know, say if you want to do this, if you want to look at LinkedIn there's technology that allows you to do it anonymously. That's what you should do so that there is no communication -- the juror doesn't know that the lawyer has looked at his or her page.

MR. PERDUE: But they know somebody -- I need the business card of that vendor, by the way.

MR. BROWNING: Yeah.

MR. PERDUE: But they knew somebody -- they know somebody is looking.

MR. DAWSON: Yeah, but they weren't associated with the -- I mean, with the lawyer or anyone in the courtroom.

MR. BROWNING: The language, the distinguishing language for the ABA and the majority of ethics bodies that looked at this and said that auto notification is not a communication hinged on the fact that it's not coming from the lawyer. It's coming from the platform itself in the form of an auto notification that has nothing to do with the, you know, lawyer or anyone on the lawyer's staff; and so it would not be considered -- I mean, it was also debatable whether or not a notification would be considered a communication, but in any event it's not something being generated by the attorney, and that's kind of been the view of the ABA and the majority of the ethics cases.

CHAIRMAN BABCOCK: Lamont.

MR. JEFFERSON: So we tried a case a few years ago in Houston where our side got in trouble because someone on our team went down to the central jury room and was investigating jurors without anybody's knowledge and that came to the attention of the trial judge and --

CHAIRMAN BABCOCK: Investigating how?

MR. JEFFERSON: Just observing, just observing.

CHAIRMAN BABCOCK: Just went down to the central jury room and looking?

MR. JEFFERSON: Then this whole idea of if it's available you might even have a duty to investigate potential jurors is troubling to me, and I could see a trial judge getting upset because a trial lawyer -- someone on the trial lawyer's team is following jurors around or is doing something, even if it's publicly available, you can do it; but is that something that we really want to encourage is the total -- is the investigation by an advocate of, you know, anything that you can learn about. You know, and I don't know where to -- I don't know where you draw the line there; but I'm -- I think it -- number one, I think it's definitely a communication if a juror knows you're doing it; and that's something we do want to, I would think, discourage; but secondly, I think we need to think about how far can you take this. Because now when things are so automated and there's so much on the internet you have an ability to do a whole lot of investigating of jurors and potential jurors, and I mean, you know, how much do we want to really encourage that.

CHAIRMAN BABCOCK: Lamont, I don't know if

you remember, but, I don't know, probably several years ago now, but we talked about the jury shuffle; and I remember Judge, at the time, Benton was very much against it because he said lawyers were going down to the central jury room and looking at the big group of people that were going to be walking upstairs in a few hours to his courtroom and then they were shuffling, and the only thing they could have seen was the racial composition of the people front and back, and so they asked for a shuffle.

PROFESSOR CARLSON: Or gender.

CHAIRMAN BABCOCK: But the point is to yours I thought it was fairly common to go down and look at the panel.

MR. JEFFERSON: Well, in our case there was a consultant involved, and I don't really -- I disagreed with the fact that we got in trouble for it, and I'm not really even sure why, although there was a lot of history, as there usually is, but I'm just concerned about the ability to check so easily and deeply into, you know, the backgrounds of jurors.

CHAIRMAN BABCOCK: Sure.

MR. JEFFERSON: Even with or without their knowledge, especially --

CHAIRMAN BABCOCK: Can we vote on these brackets or, Roger, you want to talk first?

MR. HUGHES: Well, there's another thing here, which I personally cannot evaluate, and that's the public perception of being investigated by a lawyer just because you're a prospective juror. I mean, we've all learned about the CSI effect that everybody believes that there's some sort of criminal lab that can come up with all sort of technical evidence and all of that. Well, now we have a prominent TV show in which their jury consultant does extensive background research on people, which some people if they knew about it might consider intrusive, and I am a little worried about the public perception that when you get that little LinkedIn thing or the Facebook thing that says, "Lawyer Schmedlap that's going to be voir diring you tomorrow just looked at your page," people may get -- start going, "Well, what else is lawyer Schmedlap looking at? Is he getting my finances? Are my phones being tapped?" I mean, this is not something I do, and I'm not deeply involved in it.

CHAIRMAN BABCOCK: Yeah, you get Schmedlap to do it.

MR. HUGHES: Yeah. But the point of it is I don't know how the average person who is going to come and sit on our jury, the average Texan, is going to feel when they suddenly get that thing. They may not be bothered at all, but there may be a substantial number of -- probably

it's like this is just the tip of the iceberg. They just finally poked their nose up; and they -- who knows what else they've been looking at; and I can see jurors in the jury box going, you know, "Lawyer, I find out you just looked at my Facebook page. What else have you been looking at? Your Honor, I want you to tell him what else has he been looking at?" I can see the dialogue starting, but again, I'm not in a position to evaluate that because I don't use social media much. I don't know if ordinary people find it offensive or what they're going to think.

CHAIRMAN BABCOCK: Yeah. What about these brackets? The language is counsel should not -- "counsel should use available technology to remain anonymous when viewing or causing another to view a prospective juror or juror's social media." How many people think that's a good idea, raise your hand?

How many people think that's a bad idea?

MR. DAWSON: Jim, you're wrong.

MR. PERDUE: I know, but I'll come -- I'll bring you around eventually, Alistair.

CHAIRMAN BABCOCK: All right. There was 6 in favor and 19 against. So --

HONORABLE STEPHEN YELENOSKY: Another close vote.

CHAIRMAN BABCOCK: Yeah, so squeeze those

brackets right on out of there.

PROFESSOR CARLSON: They're gone.

CHAIRMAN BABCOCK: What other vote do you want to take before our break?

PROFESSOR CARLSON: We didn't expressly vote on the "knew or should have known" last time.

CHAIRMAN BABCOCK: Okay. So we should do that.

PROFESSOR CARLSON: Yes. So page six, (5), the second sentence, "However, review by a lawyer or someone acting for the lawyer of a prospective juror or juror ESM is improper" -- we agreed on that in our vote last time. Here's the new part: "When the lawyer knew or should have known the prospective juror or juror could become aware." We didn't do "knew or should have known."

CHAIRMAN BABCOCK: Okay. Who's in favor of that?

MS. HOBBS: Can I have a point of clarification?

CHAIRMAN BABCOCK: Sure. Before we vote, point of clarification.

MS. HOBBS: Sorry. Okay. I think what you want us to do is take a vote on if we're going to have some kind of mental standard in this does "should or should have known" do the trick as opposed to revisiting

what some of us in this room might want to do, which is do we want this at all. So I guess I want the record to be clear that if I voted for the "should or should have known" as a fine standard based on our votes at the last meeting that even include this in there, I am not changing my being part of the 11 who thought this was a bad idea to begin with.

CHAIRMAN BABCOCK: Okay. All right.

MR. PERDUE: And I would say that a vote against can also reflect "or should have known" because I think if you -- if you're going to have this and you absolutely know that they're gonna know, that's one thing; but, you know, this lower standard, there's a whole lot of -- you know, there's just dangers in this.

CHAIRMAN BABCOCK: I'm hoping we can make this vote so that Jackie and Martha can't figure it out possibly, and they can do whatever they want to.

MR. PERDUE: Sometimes you win when you muddle the record so bad.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: So the way I look at this, and this will influence my vote depending on how you phrase it, if the standard is "knew" you have to -- in order to sanction someone you have to prove their subjective thinking, what they knew, what was in their

mind at the time, which we know is very difficult when you're trying to put a lawyer on the witness stand and have them admit that they knew they were doing wrong. The other standard is, well, even if we can't prove that you knew it, you should have known it, because some reasonableness standard, some objective standard of what we all can agree you should have done, you didn't do it, so you were negligent. It's not a negligence standard, but it's like negligence rather than intent.

So in my view what we're doing is we are setting up two standards here, is that you can't do it knowingly and you also can't do it negligently. And they are different, and the proof of them is different, and knowing is a lot harder to prove, but it's a lot wronger. You're much worse if you do it knowingly than if you don't know it but you're just out of touch; and one of the things that concerns me is that I was in the front end of the computer revolution in 1968. I studied computer programming and --

CHAIRMAN BABCOCK: You big bragger.

MR. ORSINGER: -- I was right on the front edge. I am so far behind --

PROFESSOR HOFFMAN: He actually invented the internet.

MR. ORSINGER: I learned computer

programming in 1968; but, you know, I can't do hardly any of the stuff you're talking about today; and so not that I'm going to try to do this; but if I went out and thought I was safely checking to see if someone was a member or something like that, and then all of the sudden I should have known, because everybody that -- everybody is on Facebook, except for me.

CHAIRMAN BABCOCK: The millennial knew. How come you didn't?

MR. ORSINGER: Yeah. So I'm a little worried about the "should have known" standard because that invokes this whole thing about what are we expecting lawyers to know and how much do they have to keep up, and if it's a brand new service that they've just been on, to me the "should have known" is a real problem.

CHAIRMAN BABCOCK: You've got to spend 500 bucks with Lisa there for your little --

MR. ORSINGER: All right. I'll be happy to spend $500 on Lisa.

CHAIRMAN BABCOCK: Not on Lisa, with Lisa.

MR. ORSINGER: With Lisa. Dinner. For Lisa.

HONORABLE BRETT BUSBY: Are we taking a vote on whether or not the standard should just be "knew" or whether it should also include "should have known," or are

we taking a vote on whether the sentence should end with "improper" or include the "where the lawyer knew or should have known," some standard? I don't understand what we're being asked to vote on.

CHAIRMAN BABCOCK: Well, my sense, my confused sense of Elaine's proposal was that we're voting -- we put a period after "improper," unless we vote in favor of this other language, but -- but I probably didn't get it right either.

MR. WATSON: Can we vote on the period after "improper" first?

CHAIRMAN BABCOCK: We can do whatever we want. But Alistair is itching to say something. Alistair.

MR. DAWSON: So in response to the comments about not including "should have known," and in my case where the other co-counsel or co-defense counsel did the LinkedIn request and the juror found out about it, then the lawyer got chastised a little bit by the judge; and he said, "Well, I didn't know that you could do that in LinkedIn." Well, you know, most people know that, and the judge said, "Well, if you didn't know, you shouldn't have used it." You know, if you don't know how it works, you shouldn't use it, which I think is appropriate. So I think it's important to include that so that you can't

have a lawyer claim ignorance as a defense, and if you don't know whether it's going to notify the juror or not then you shouldn't use that form of technology or do it anonymously.

CHAIRMAN BABCOCK: Good point. Elaine.

PROFESSOR CARLSON: So put a bracket around "the lawyer knew or should have known."

CHAIRMAN BABCOCK: Okay.

PROFESSOR CARLSON: Do you like the sentence with that or without it?

HONORABLE BRETT BUSBY: Thank you.

CHAIRMAN BABCOCK: Everybody in favor of the sentence?

HONORABLE DAVID PEEPLES: Can we look at that just a minute?

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: I just want to point out that we're talking about review by a lawyer or somebody acting by the lawyer, so I mean, to me that's even making it even more difficult to have this "should have known" standard in there.

PROFESSOR CARLSON: It was not my idea. That came up at the last meeting.

CHAIRMAN BABCOCK: Elaine is trying to bail on you now.

MR. ORSINGER: Yeah, fleeing a sinking ship.

PROFESSOR HOFFMAN: So my comment from last time that I don't fully remember, but my comment was that I didn't like the notion that there was going to be a penalty -- so, again, to Alistair's pointed story, if the lawyer doesn't do a sort of minimum due diligence before, you know, thinking about it, they just go in and do it, then, yeah, there probably should be a penalty; but it's linked to do we think that the lawyer thought about it in the right way and was careful. If you end with "improper," review of a lawyer acting is improper, period, then you're just simply barring the practice entirely. You can't do it.

PROFESSOR CARLSON: No, I'm not doing that. I'm bracketing that language "where the prospective juror or juror could have become aware of through a website or ESM feature of the identity" --

PROFESSOR HOFFMAN: So there the change is simply on the question of whether we're going to focus on what the lawyer knew or should have known versus on what sort of the standard is as to the juror.

CHAIRMAN BABCOCK: Yeah.

PROFESSOR HOFFMAN: And maybe those aren't all that different, I don't know.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE DAVID PEEPLES: Elaine, does that make --

HONORABLE STEPHEN YELENOSKY: What about focusing on --

THE REPORTER: Wait a minute, wait a minute.

HONORABLE DAVID PEEPLES: What's the culpable mental state here if we take that out? There is none?

PROFESSOR CARLSON: We don't have a culpable statement.

HONORABLE DAVID PEEPLES: Huh?

PROFESSOR CARLSON: We wouldn't have one.

HONORABLE DAVID PEEPLES: So it's strict liability.

PROFESSOR CARLSON: Yeah, if the prospective juror becomes aware or could become aware.

HONORABLE DAVID PEEPLES: It's more stringent than "should have known".

MR. ORSINGER: Clearly.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Why not just focus on something that doesn't go to intent that just says -- and it requires them then to do their due diligence, failed to use -- or I'm not sure if it's positive or negative, but failed to use technology that

was available, and you have to use the technology, and your only defense was it wasn't available.

MR. DAWSON: We already voted against that.

HONORABLE STEPHEN YELENOSKY: Did we?

HONORABLE BRETT BUSBY: I voted for it, but --

MR. DAWSON: Jim Perdue voted against it.

HONORABLE STEPHEN YELENOSKY: Well, in the Perdue view of things, motion for rehearing.

CHAIRMAN BABCOCK: Story of his life.

MR. PERDUE: But I -- I think that the vote you're asking for, if I could frame it, would be those in favor of where the lawyer knew, or alternative, those in favor of the lawyer knew or should have known. That -- that -- with where you are right now and assuming 14-11 still rules the day, despite many of us in the room thinking it should be revisited, Mr. Dawson, you know, I think that at least is a vote that gives some guidance to the committee.

CHAIRMAN BABCOCK: Yeah, that makes some sense. What do you think, Elaine?

PROFESSOR CARLSON: That will work.

CHAIRMAN BABCOCK: All right. Lamont.

MR. JEFFERSON: I thought Elaine's suggestion was an elegant one to just get rid of the "knew

or should have known" language and just say you can't do it under circumstances where the juror knows. You take the risk that if the juror knows.

CHAIRMAN BABCOCK: Yeah.

HONORABLE STEPHEN YELENOSKY: That's what I just said.

CHAIRMAN BABCOCK: But that's so-called strict liability, I think.

MR. JEFFERSON: I don't think it's strict liability.

HONORABLE TRACY CHRISTOPHER: Yeah, that's even worse.

MR. PERDUE: That scares me.

MR. JEFFERSON: You don't do it unless you're sure that the juror is not going to know.

MR. WATSON: Thus you're not going to do it.

MR. JEFFERSON: Well, no, I don't think that's the case. I think those who are inclined to do it will do it, understanding that they can manage this risk by using whatever the technology is out there to know that the juror isn't going to become aware.

CHAIRMAN BABCOCK: Justice Busby.

HONORABLE BRETT BUSBY: I think it's a good point, and perhaps there could be a couple of different votes. One would be should we have the bracketed language

at all, "knew or should have known," and then if the majority says that we should, should the standard be "knew" or should it be "knew or should have known." In response to Jim, I will incorporate by reference the good points from the December meeting in favor of having this standard that led to the 14 to 11 vote rather than repeating them here.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, there are apparently services that you can hire to go do this kind of search for -- on your prospective jurors, you know. They just get the list immediately and go do it for you and get results back in an hour, so in time for you to make strikes. So where do they fall in this? You know, in terms of --

CHAIRMAN BABCOCK: Well, they would be the lawyer's agent.

MR. BROWNING: Yeah, they would be an agent of the attorney.

PROFESSOR CARLSON: That's why you hire these other people.

MR. BROWNING: Yeah.

MR. RODRIGUEZ: Can I be in her court, to give me an hour to pick a jury?

MR. BROWNING: Well, and there's another

reason for a third party --

HONORABLE TRACY CHRISTOPHER: That's on strikes.

MR. BROWNING: You know, they're acting at the lawyer's behest, but obviously if I were to do something myself, you know, I can't be both the lawyer and testifying about it. So if something is found I have to have someone who is going to be available to testify about the content of what was found if there's, you know, something that warrants bringing it to, you know, the court's attention.

CHAIRMAN BABCOCK: Professor Hoffman.

PROFESSOR HOFFMAN: What if we change the language as follows: "Review is only proper if you take reasonable precautions to ensure that the juror does not become aware." So, in other words, let's take the focus away from the "knew or should have known," and let's put it where it sounds like most of us are landing, which is you ought to do your best at reasonable efforts to make sure that your attempt to access their thing is not -- it doesn't violate the requirement that -- you know, that they know you're looking, and so what if that's the focus?

CHAIRMAN BABCOCK: Richard, sorry.

MR. ORSINGER: I think that what Lonny suggested is an improvement, but it doesn't change the

fact that what we're doing, as I see it, we're deciding three things, either mental state is irrelevant, strict liability; or we have to prove the conscious awareness of the lawyer, which is a subjective standard; or we have to prove a reasonableness, which is an objective standard. I think those are the three choices, either mental state is irrelevant, strict liability, you do it and you're punished; or you are only punished if you do it knowing that you were doing it; or you're punished if you knew and you were careless about it or negligent about it. Those are the choices we're talking about.

CHAIRMAN BABCOCK: Okay. Hayes.

MR. FULLER: I would like to have included in any vote ultimately along the lines of what Lonny is suggesting because it is dawning on me there are these services. These services purport to be able to do this anonymously, which would allow me to be in compliance with the rule. I hire that service, and lo and behold they didn't tell me the truth. Should I be punished for that when in good faith I relied upon their professional expertise to keep me in compliance?

HONORABLE BOB PEMBERTON: It has the benefit of building in a safe harbor.

MR. FULLER: Yeah.

MR. JEFFERSON: I think one thing that's

concerning me is this idea of jurors being snooped on, and I know that's what we do, right? We've got to figure out what they're like -- how they're likely to decide a case, but it might help soften the blow if we know that they know where the limits are. So and that's not to address it here, but I mean, if jurors are warned that, you know, any public information that you have is fair game for investigation, and we are deciding whether you're going to be a juror on our case.

CHAIRMAN BABCOCK: Okay. We're going to try a vote here. The bracketed language is "The lawyer knew or should have known." That's the bracketed language. So how many people want strict liability, which means we ditch the bracketed language? Raise your hand.

How many against that? Three in favor, 26 against. All right. Now, how many people want solely the subjective standard; that is, lawyer knew? Raise your hand.

And how many people against that? 11 in favor, 16 against. How many want the subjective and the objective, "knew or should have known"?

How many people against that? 15 in favor, 10 against. We're on a break.

(Recess from 3:45 p.m. to 4:03 p.m.)

CHAIRMAN BABCOCK: All right. We are at

item six on the agenda, protective order kit, protective order form, re: respondent's access to firearms, and the chair of our subcommittee is Jim Perdue, and he will take us through this I hope. Oh, no, no. Wait a minute. Before we start that Elaine has got language that she wants voted on over the last item, inspired by Professor Hoffman, seconded by Judge Peeples, and I'm sure will be adopted by acclimation, but read the language, Elaine, in a loud voice and then no discussion, but we'll vote up or down.

MR. ORSINGER: So a Senator Grassley.

CHAIRMAN BABCOCK: I mean that in the fairest possible way.

PROFESSOR CARLSON: So back on comment (5), the second sentence, "however," would be modified as follows. "However, review by a lawyer or someone acting for the lawyer of a prospective juror or a juror's electronic social media is proper so long as reasonable precautions are taken to ensure" -- strike "improper where the lawyer knew or should have known."

So let me go back over that. "Review by a lawyer or someone acting for the lawyer of a prospective juror's or a juror's ESM is proper so long as reasonable precautions are taken to ensure" -- now striking the part I just said, "the prospective juror or juror would not

become aware through a website or ESM feature of the identity of the viewer."

CHAIRMAN BABCOCK: The only person who gets to make a comment is Justice Boyd. Do you have a comment?

HONORABLE JEFF BOYD: I have actually a question, and that is -- and I understand completely the proposal, but how is it not inconsistent with the first sentence? What is the relationship with that and the first sentence that says it's not improper, however, it is proper?

PROFESSOR CARLSON: Well, you're right. The "however" is now kind of confusing. Just take out the "however." "Review by a lawyer" --

HONORABLE JEFF BOYD: Well, it just seems to me that first sentence says it's all okay and then you say, however, it is okay if you do A and B.

PROFESSOR HOFFMAN: In some ways the solution might be to simply say it's not improper provided that reasonable precautions are taken. So, in other words, that you take the what now are two sentences --

HONORABLE JEFF BOYD: You just put a comma after the word "juror" and then add what you're providing.

PROFESSOR HOFFMAN: Provided that --

PROFESSOR CARLSON: That would work, too.

MR. PERDUE: Wait, wait. The first sentence

is the ABA's general rule regarding looking at something that's publicly available. The second sentence is looking at something that is social media that require -- that would allow a jury to know you're looking at it, so the -- there -- this is -- in the conversations at the break, this is really LinkedIn, kind of Twitter subscriptions where there's an electronic social media presence where you know that your access of it pings the person that you're looking at; whereas a publicly available profile on Facebook is just available. You just see it. So the distinction --

HONORABLE JEFF BOYD: So and that's just because you know that when you look at somebody's publicly available profile they're not going to know that you're looking, so you have taken the reasonable precaution to make sure that they don't know that you looked.

PROFESSOR HOFFMAN: I agree with that.

HONORABLE JEFF BOYD: So you're just -- it's just all -- we're saying the same thing, I think. It just seemed to me to be -- to leave them in as two sentences created a conflict.

PROFESSOR CARLSON: Let me take this back. I don't want to take any more of the committee's time, and I'll read the transcript and come back with something That --

CHAIRMAN BABCOCK: Yeah, and come back to Jackie and Martha.

PROFESSOR CARLSON: Yeah.

CHAIRMAN BABCOCK: Good. All right. All right, Jim, now you get to talk about guns.

HONORABLE JEFF BOYD: We had acclimation on that?

CHAIRMAN BABCOCK: Yeah. Everybody is in favor of that, aren't you, everybody?

MR. PERDUE: Well, I'll just begin by saying that if y'all enjoyed the discussion regarding termination of parental rights you're going to love this topic. This is a referral to our particular subcommittee regarding what are generically known as red flag laws and a specific protective order relating to an individual's access to firearms. This is not in my bailiwick, and I was blessed to hand it over to Justice Jane Bland, who took the laboring oar with some resources. We have a couple of resource witnesses here as well as we get into the conversation, and I think that they can add to it later for everybody that's here, but I'm going to let Justice Bland give you the summary of the memo to the committee.

HONORABLE JANE BLAND: All right. Well, Governor Abbott in May issued a school and firearm safety action plan, and one of -- one of the recommendations in

that plan was legislative consideration of a red flag law that would allow a family member or law enforcement to petition the court to seek removal of firearms from a person that was -- you know, was at an extreme risk to himself, extreme risk of injuries to himself or others; and I think in connection with that the Texas Supreme Court, via Justice Hecht's referral letter, has referred to our SCAC committee a request to draft forms which could be included in a protective order kit that would advise a judge about a respondent's access to firearms.

So at this point we don't have any legislation that would enable that sort of protective order in that way, but because it may be coming down the pike and because the Texas Supreme Court has asked us to look at it and draft forms, we thought it would be beneficial to give this committee an overview on where we are and what -- what exists under Texas law now, and then we're fortunate to have David Slayton here from the Office of Court Administration, and he has done some significant work on this issue along with Chief Justice Hecht through the National Center of State Courts, and he's going to supplement the information in your memo and could probably briefly let us know what other states are doing in connection with red flag protection laws. They're called different things in different states. They're sometimes

called gun violence restraining orders, sometimes called extreme risk protective orders.

So and one of the states that's got a law and has forms available on the internet is the state that should not be named, but we've attached some of their work for this committee to look at. In Texas right now, there are three places that authorize protective orders, and then the question becomes, you know, does a trial court right now have the authority to prohibit access to firearms, and in looking at the legislation that authorizes these protective orders, it's -- it's not completely coherent, but there are two provisions in the Family Code that talk about protective orders. There's one in the Code of Criminal Procedure. Interestingly enough -- and I confirmed this with Dave. John, who is a magistrate judge in Denton County who does all of their mental health commitment proceedings in that county, and he confirmed that the Mental Health Code does not have its own stand-alone protective order, so we're really looking at the Family Code and the Code of Criminal Procedure.

Right now Family Code section 5.04 allows any party to a suit to move for a protective order, any party to a suit for a divorce to move for a protective order. So if there's a filing for a divorce, a court -- a protective order court or any trial court can issue a

protective order. That provision of the Family Code, section 6.504, says that you can -- that the trial court can render a protective order as provided by Family Code, section 81. Family Code section 81 is another place where the Legislature has authorized protective orders. Family Code section 85.001(b) allows a trial judge to issue a protective order if the court finds that family violence has occurred and is likely to occur in the future. So the difference between 6.504 and section 81.001 is the necessary finding that must be made to issue the protective order. 6.504 allows any party to a divorce without any showing to seek a protective order, "any further showing."

Section 81.001 requires that the court find family violence has occurred and is likely to occur in the future. So -- and for section 81, members of the same household, those in a dating relationship, or persons seeking to protect a child from abuse may request the order. So it's not simply an order between a husband and a wife. It can be in any family situation where family violence has occurred. Then -- and this is where it gets tricky. In section 85, section 85.002, it -- it says -- it lists the things that a trial court can do in connection with issuing a protective order, and it says that a trial court may prohibit the respondent or the

person subject to the protective order from possessing a firearm, and there's an exception if the respondent is a peace officer who is actively engaged in full-time employment as a peace officer, but overall for non-peace officer respondents a trial court may currently under the Family Code prohibit a person found to have committed family violence from possessing a firearm.

So the question then becomes do you have to find that the respondent has committed family violence before you include in your protective order a prohibition on possessing a firearm. I've talked to the trial judges that do this kind of work and including there is a trial judge in Harris County that her entire docket is nothing but protective orders, so she gets the criminal protective orders, the civil protective orders, and that's all that she does; and the answer to that question in the minds of trial judges is, no, that they can issue an order prohibiting the possession of a firearm in connection with any protective order that they issue under the Family Code; and you say, "Well, where do they get the authorization for that?" It looks like that section 85.002 only applies when the court's found that the respondent has committed family violence.

Well, they get it from section 85.026 in the Family Code and Chapter 46 in the Texas Penal Code.

Chapter -- I mean section 85.026 in the Family Code requires that every protective order issued under the chapter contain a warning, and it's -- there are several different warnings that it requires, but one of the warnings that it requires is a warning to the respondent subject to the protective order that it is, quote, "unlawful for any person other than a peace officer," yada, yada, yada, "who is subject to a protective order to possess a firearm or ammunition." So that's the warning that has to be put at the bottom of every protective order issued under section 85.026.

Where does the warning come from? The warning comes from Texas Penal Code, Chapter -- section 46.04(c). Texas -- Texas Penal Code, section 46.04(c) makes it a misdemeanor offense for a person who is subject to a protective order issued under 6.504, which is the protective orders that govern just general divorces or Chapter 85 to possess a firearm after receiving notice of the order and before expiration of the order. So currently under Texas law a trial judge may issue a prohibition on the possession of firearms for respondents who are subject to protective orders and, in fact, do issue it frequently because of the fact that they want to advise the respondent of their potential criminal jeopardy if they should possess a firearm while subject to a

protective order. So --

CHAIRMAN BABCOCK: He's lurking in wait.

HONORABLE JANE BLAND: So there is nothing in any of these provisions that require the trial judge to issue the prohibition on possessing a firearm, and then there is also the interesting thing that the warning in section 85.026 says it's a -- it's unlawful to possess a firearm or ammunition, but the Penal Code does not mention ammunition, so I'm not sure where ammunition comes from. And although these protective orders may not potentially be enforceable by contempt if the trial judge has not ordered or prohibited the possession of a firearm, they might be prosecutable under the Texas Penal Code, and that's the reason that many trial judges include this prohibition against the possession of guns, of firearms.

So then just in talking with judges that do this kind of work, two things, one is in the mental health context, which is in a different part of the statutory scheme. It's in the Health & Safety Code, sections 571 to sections 574, there is no provision for a protective order, although presumably if family violence is involved a party may seek protection in connection with a mental health crisis by seeking it under section 85 of the Family Code. It also does not have a provision regarding the possession of firearms other than there is one specific

provision. Section 571.001(h), which allows a peace officer to seize a fire -- firearm in connection with a civil mental health commitment and then make the adequate provision for its return.

That, interestingly enough, is only when a peace officer intervenes and in connection with -- without a warrant for -- in a mental health crisis. So if there is a warrant, that provision doesn't apply. So the bottom line is right now we have some provisions that tangentially address the possession of firearms in connection with family violence and other sorts of protective orders, and it looks like that what the governor's office is looking at and potentially our Legislature will be looking at is a way of putting this together in some sort of comprehensive -- or maybe just tweak the individual statutes to better set out the process for, you know, what grounds must be shown before you can prohibit somebody from possessing, receiving, or purchasing a firearm, what sort of due process a person would be entitled to, how -- how can a person who has -- has by court order been prohibited from possessing guns, what happens to the guns, who holds -- who holds onto the firearms and the ammunition, and then how does that person get those firearms back. And those are all questions that are beyond the scope of our committee because they're

legislative questions that will have to be addressed by the Legislature, and we can't really start to draft forms until we know what the Legislature would like -- like us to do.

I'm going to turn it over to David in a second. There -- other states have gun violence restraining orders, is what they're called in a lot of other states. We usually use the word "protective order" in Texas, and some states have forms that they've used. So should the Legislature pass a law that would address this sort of process, we have some good reference -- source materials from other states to look at; but at this point, I think other than to give our committee the heads-up that this could be coming down the road and to get maybe this committee's feedback on, you know, on important points to think about in drafting forms associated with this topic, I don't think that -- you know, I think that we need some more guidance from the Legislature before we proceed.

One final thing, in talking with judges who do these sorts of protective orders, you know, the question then becomes -- even now, even under the Texas -- the current Texas statutory scheme, what do we do when somebody is under a protective order and they possess a firearm and the protective order now says, you know, you

may not possess a firearm and it also says, you know, it's unlawful to do so under the Texas Penal Code.

Well, different counties have different approaches; and many counties ask the respondent to certify that, you know, they've handed over or, you know, become dispossessed of firearms for any firearms they own and they basically, you know, file a certificate of compliance that they don't -- they're not in current possession of any firearms. Some counties -- and Denton County being one of them, and this is one of the things that we would probably bring in the judges and lawyers that do this kind of work to educate us further when the Legislature tells us what they would like us to -- like us to look at, but some counties have a working relationship with law enforcement where law enforcement keeps the firearms until the person has either applied in the court to receive them -- return them, get them returned, or the protective order has expired. So that's sort of -- it's pretty convoluted right now in Texas, but that's kind of where we are.

CHAIRMAN BABCOCK: Okay. Richard, you had a question?

MR. MUNZINGER: I just had a question. In looking at the papers it appeared to me that the Family Code says that under the Family Code there has to have

been a past act of violence before the judge can enter this order, and you seem to say that yourself and then suggested to me -- and I may have misinterpreted -- that judges were ignoring that provision and entering it anyway, and it raised my question in my mind was there some case or something that does that, that allows them to do that.

HONORABLE JANE BLAND: Right. They're -- they're including it sometimes in their order because of the Texas Penal Code provision, which does not qualify the prohibition on possession of firearms based on a family -- a family violence finding. In other words, if you look -- it's in the -- I quoted it in the memo.

HONORABLE STEPHEN YELENOSKY: But isn't it also required regardless? It says "shall be included."

HONORABLE JANE BLAND: No, it's "may."

HONORABLE STEPHEN YELENOSKY: The notice.

HONORABLE JANE BLAND: Oh, the notice, okay, so --

HONORABLE STEPHEN YELENOSKY: The notice.

HONORABLE JANE BLAND: Okay. There's two things, but the notice stems from the Penal Code. The Penal Code says that whether you're subject to a protective order under 6.504, which is the case of divorce, which is the one case that you can get a

protective order without the showing of family violence, or under Chapter 85, which is the family violence case, under either one of those protective orders it's a -- a person who possesses a firearm commits an offense if they possess the firearm after receiving notice of the order.

MR. MUNZINGER: And my question is, is there a case so interpreting them? Is that a practice? Is there attorney general's opinion? If there are none of those things, it would seem to me that the ambiguity in the law -- there is an ambiguity in the law that the Legislature ought to be alerted to to cure --

HONORABLE JANE BLAND: Right.

MR. MUNZINGER: -- in the upcoming session.

HONORABLE JANE BLAND: Well, I'm hoping that we're alerting them by having this discussion this afternoon, and I'll also note that the Legislature not only passed the Penal Code provision that makes it an offense and I think the judges are basically trying to notify the respondent of their potential criminal liability in connection with possessing a firearm while being subject to a protective order, but the other place that the Legislature appears to say that it's unlawful and thus appears to authorize trial judges to forbid possession of firearms is in section 85.026, which tells a -- tells the court that in every single protective order

you have to list this warning.

HONORABLE STEPHEN YELENOSKY: Yeah.

HONORABLE JANE BLAND: So and the warning says that it's unlawful to possess a firearm or ammunition, and I'm not sure exactly, like I said, where "ammunition" comes from.

CHAIRMAN BABCOCK: Anybody else have any other comments? Richard.

MR. ORSINGER: Since I'm a judge I can say what I think, and --

CHAIRMAN BABCOCK: But you're not.

MR. ORSINGER: -- I don't think there's any question that Penal Code section 46.042 is unconstitutional. Basically the Family Code says that a protective order may prohibit the possession of a firearm. It is not automatic. It is not required. A judge can say nothing or a judge can permit the possession of a firearm for hunting purposes, in your home. Those are all options, but the Penal Code says no matter what the protective order says, if there's just a protective order, it's a crime for you to possess a gun. Now, how do they answer the protective order that specifically permits the use of a gun, like for hunting purposes or to keep in your home but not carry around in your car is not answered, but in the Heller -- in *D.C. vs. Heller* the majority of the

Supreme Court told us that this is an individual right to keep and bear arms.

So we've got a problem with the Penal Code that the Legislature needs to do something or some court is going to have to declare it unconstitutional, but there isn't anything we can do about that, but we need to remember in the forms that we're doing that the Family Code makes the prohibition of firearms optional. The existing forms show that. It's a check-off on the temporary -- the ex parte temporary order as well as the permanent protective order. There's a check mark, and the judge is supposed to either check it to prohibit firearms or not check it if firearms are not prohibited.

MR. GILSTRAP: Well, it's already checked. Isn't it automatically checked?

MR. ORSINGER: I don't think it's -- I don't think so. I don't think the law requires it. I think that the form suggests it.

HONORABLE STEPHEN YELENOSKY: If it doesn't check --

MR. GILSTRAP: The form requires --

THE REPORTER: Wait a minute.

HONORABLE STEPHEN YELENOSKY: -- then you have the form --

MR. ORSINGER: Then you have what?

HONORABLE STEPHEN YELENOSKY: Well, it's facially in conflict if it's not checked because you have to have the warning.

MR. ORSINGER: Okay. Okay. Well, look, the fact that something says a warning, if it's not supported by law it's not an accurate warning, so I mean, we've got a mess here on our hands I'm afraid.

HONORABLE STEPHEN YELENOSKY: Well, that's true.

MR. ORSINGER: Trish disagrees with me, but before -- before we leave today there is one thing we can do today.

CHAIRMAN BABCOCK: What can we do?

MR. ORSINGER: There is a proposal, we have a Rule 78a, which is the case information rule, which I've been told that the Office of Court Administration doesn't need anymore now that we have electronic filing, and some family lawyers were working on this problem independently from what Jane's subcommittee was doing, and Trish McAllister has come up with a judicial disclosure sheet, which is in the materials for the committee together with the proposed amendment to Rule 78a, which eliminates the case information sheet but requires the filing of a judicial disclosure sheet for protective orders. And so we would eliminate the rule we don't want and replace it

with the rule we do want, which is to require someone that's applying for a protective order to fill out this form and indicate whether the target of the protective order possesses firearms, possesses ammunition, or used the weapon in connection with family violence or a crime. So I feel like I would -- I mean, it would be very helpful if we could address that rather than just the Second Amendment issue.

CHAIRMAN BABCOCK: You're sure you want to call them a target?

MR. ORSINGER: No, that's a poor choice of words.

CHAIRMAN BABCOCK: Trish.

MS. McALLISTER: I think we're -- one of the things that's become clear to me today is that we were -- we were actually asked to -- Richard -- actually, I guess it was Martha and Richard both contacted me to get in touch with the protective order task force, which is the forms task force that's the Court's task force to create this form and then subsequently allow us to, you know, look at making a rule change, but this basically all arose -- this part, the form that y'all are going to be looking at as well as the rule change all arose from a conversation that Judge Warne in Houston, family law judge in Houston, had had with Justice Guzman, and then Justice

Guzman subsequently talked to the Chief, and her goal was that they're trying to increase the information that is available to judges on the access of a respondent in a protective order to weapons basically to give more information to the judges in these cases because there are lots of problems that come up with these cases.

So the Chief then asked us to do this, and this is what we're -- what -- part of what we're here to talk about, but Jeana Lungwitz is here from the UT Domestic Violence Clinic, and she deals with these cases all day, so she may be able to answer some of the questions that were arising just a few minutes ago as well.

MS. LUNGWITZ: On the firearms prohibition, that's automatically checked -- I do believe -- I don't have it in front of me, but I'm pretty sure we decided in those forms to automatically check it because it's a federal law.

MS. McALLISTER: Right.

MS. LUNGWITZ: 18 U.S.C. 922(g)(8) that would make it -- that prohibits someone who is subject to the protective order, the language kind of defines what a protective order is, to ship, transport, possess, or receive firearms or ammunition while protective order is in effect. So I think what happened after that passed is

when I think Texas put that provision in the code about putting the warning in the order.

HONORABLE STEPHEN YELENOSKY: Does the definition of a protective order in federal law comport with the 65.04 protective order? Because your protective order under 65.04 I think might not have anything to do with violence.

MR. ORSINGER: I can answer that. That was litigated in *U.S. vs. Emerson* which was a Fifth Circuit case of some notoriety. It was a forerunner to Heller, and in that case there was a standard temporary order in a -- out of the form book in a divorce, and after it was signed -- and it didn't mention guns. After it was signed the husband went out and bought a Beretta pistol, and he was indicted and prosecuted and convicted by the U.S. attorney and the U.S. government, and he appealed to the Fifth Circuit. Unfortunately their case wandered off into the Second Amendment and whether individuals have a right under the Second Amendment, but part of that Emerson case was this was a standard temporary injunction that's issued in every divorce case against both spouses. Didn't mention guns or ammunition at all, but because the federal statute said that it's improper to take a gun through interstate commerce if you have an order against you for the use of physical violence, even though there was no

finding of violence, it wasn't a protective order. It was just a temporary order. They indicted him. So we still have a problem that that federal law is out there.

The Fifth Circuit has upheld it, but Heller was decided later on, which makes the Fifth Circuit decision in Emerson questionable, and so now I guess what we've got is a form in which we're following the federal statute, which doesn't require any finding of violence as the justification for how we're handling our state forms when the Family Code says barring weapons is elective with the court. It's not mandatory in every case. So we have a mess.

HONORABLE STEPHEN YELENOSKY: But doesn't the federal law define protective order such that it's narrower --

MR. ORSINGER: No.

HONORABLE STEPHEN YELENOSKY: -- than the standard?

MR. ORSINGER: I can give you the language here.

HONORABLE JANE BLAND: So the federal law and to the extent it covers, you know, not interstate commerce, is from the Violence Against Women Act.

MS. LUNGWITZ: Right.

HONORABLE JANE BLAND: Right? And so -- and

that may be where "ammunition" comes from when I heard you read it. But we have a -- we have a parallel state law, and the state law is the one that subjects you to criminal prosecution if you possess a firearm while subject to a protective order. So it's not just the federal law. It's also our state law.

MR. ORSINGER: So the Violence Against Women's Act justification was interstate commerce, and that's why the issue was -- there's your federal authority to legislate, but everything in -- everything that we're all talking about right now is pre-Heller, and it needs to be re-evaluated in light of the U.S. Supreme Court decision in Heller, but the problem is we've got a Penal Code that says if you have a protective order, no matter what it says, even if it specifically permits the possession of weapons, you're committing a crime if you possess a weapon. And then we have a federal law that says if you have an order against you that has to do with the use of force against a woman or child then it's a federal crime to possess a weapon, and then we have a Heller decision saying you have a constitutional right to possess you're weapon, and those different strands of our history have not been pulled together, and we don't have to pull them together today.

What I would suggest that we do, at least

try to do, is talk about the idea of whether we want to have an application form that requests the affiant to declare whether or not there is a weapon or ammunition in the home or that has been used for a crime or used by this violent person and then let's decide whether we want to get rid of the case information sheet if it's not needed anymore, and let's just borrow Rule 78a, which is now empty, and let's require a disclosure sheet for protective orders, and these were submitted and are part of the agenda today, and although it's not necessary it would be helpful if we found out whether this was okay, whether we want to go forward with this, whether we want to rewrite it or give it up.

CHAIRMAN BABCOCK: Roger, then Frank.

MR. HUGHES: I think we are getting ahead of ourselves. I would like to see what the Legislature would do, and if I may take a contrary view, the problem that brings us here today is not some abstract question over how far Heller goes. It has to do with people being killed, shot to death, or murdered because somebody wouldn't say "boo." People who knew they had guns and people who knew they were dangerous didn't have a method to bring it to the attention of authorities so something could be done.

Now, if I have any suggestion today, I'd say

whatever form we have needs to be bilingual, and it needs to be in ordinary English or whatever language the applicants speak. I'd also like to hear a history of how the forms we've got are working, because when I looked at the forms in this package, my initial reaction is the poor people that have to fill these out are going to struggle figuring out what all those terms mean. Now, as if I have any advice to the Legislature, if you're going to take away people's guns because they are flagged as perhaps violent, we need to -- my recommendation is that we have -- that the Legislature determine who is going to take possession of these weapons, and I say that because 18 years ago we had my town was sued in one of the first state created danger cases because a weapon was turned into the police department for destruction, and it didn't get destroyed because the police department had -- my hometown police department had one of the laxist gun security, I don't know, in the state but it was certainly somewhat surprising to me to find out that they had no gun security. They didn't even keep track of the weapons issued to the officers, so I suggest the Legislature determine who is going to take possession of these weapons when they're seized, and I also suggest that if it's left to us we're going to have to work out a method for how they get their weapons back. I mean, if -- it bothered me

a little, and I say strictly from a procedural point of view, if we're going to say the person gets their gun back when the -- when the -- when the PO terminates or expires of its own terms we're going to have to have a method, because I can assure you as soon as the clock strikes midnight on that day, that guy or gal is going to be at the local police station saying, "It's expired, I want my gun back," and then what's the poor custodian supposed to do? How are they supposed to know that the order has expired? How do they know that now that the gun can give back? These are things that are going to be practically very important and going to cause a lot of things.

Once again, I think the security of these weapons, because I'm sure the courts don't want to take possession of them, and we need to have -- I would just say we're going to have to have that nailed down, and also the method of return of the weapons because I was quite surprised. A lot of these weapons are extraordinarily expensive. It's not a -- a lot of these assault rifles that we're screaming about being used, they're 600, 700, thousand-dollar piece of equipment. People are going to want them back, and there's going to be fights over that, and we need to nail down a procedure for it. So having taken the contrary view, all I can say is we're getting ahead of ourselves, but I would like to hear a report

about how the forms we have have either worked or not worked in actual practice. Not today, not necessarily today.

MS. LUNGWITZ: I can -- I can speak a little bit to that.

MR. HUGHES: Sure.

MS. LUNGWITZ: So but I don't have any statistical information because I wasn't prepared for that today. We know that they do get used. Texas is unique in that prosecutors offices are given the authority to obtain protective orders on behalf of --

CHAIRMAN BABCOCK: Jeana, could you speak up just a little bit, please?

MS. LUNGWITZ: Yes, sorry about that.

CHAIRMAN BABCOCK: That's all right.

MS. LUNGWITZ: Prosecutors offices in Texas are given the authority under the Family Code to obtain protective orders; and so a lot of offices, especially larger city offices, but also some more rural offices obtain protective orders; but there are a lot of them that don't; and a lot of people can't afford private lawyers for that purpose, so that's why the kit kind of began years and years ago when we first started working on that. But we know more protective orders are granted not using the kit than are, and I think it's because prosecutors

have their own forms. I know in my office I have -- because I was on this task force, I use a lot of the language, but it may not look exactly like these forms.

But that is why there was that legislative change that Richard referred to, 78a, so that that weapons -- you know, identifying what kinds of weapons the applicant knows about and where they're located can be put on that form so that law enforcement -- I think kind of the main goal of that was for law enforcement, but also judges wanted to have that information, was my understanding of what we were tasked with doing.

MS. McALLISTER: And just one other thing, I do know -- the last time that I looked at the statistics on how frequently the protective order kit was downloaded -- we have no way of really tracking how often it's used. There was over 40,000 times per year it is downloaded from Texas Law Help. I don't know how often it's used, but there are -- there is Texas -- the Women's Advocacy or Texas Advocacy Project now has a specific outreach program that they do around the kit; and they do walk people through, you know, filling out the form, doing all sorts of different kinds of things, safety planning around, filing a protective order, stuff like that.

So we do know that it's used. We know that it's successfully used. It's obviously, you know, a

complex packet, too, but it's better than not -- it was designed originally because there were so many counties in which people were not allowed to get a -- didn't have a way to get a protective order other than doing it themselves, which as advocates we would never really ideally want, but it's just the way the reality is.

But today I just do want to clarify originally we were asked to promulgate a form for the applicant to complete when they file the protective order in the kit, but then when we all got together and after talking to Judge Warne and, of course, even myself, the majority of the protective orders are not protective order kit protective orders. They're filed -- you know, many more are filed just without that form, so we asked the Chief if -- you know, if the goal was to provide judges with information about the weapons that the respondent has that the applicant is aware of, it would be best to just have a form that's not just in the protective order kit but that's available to every protective order file, which is why they -- we then made changes to Rule 78a. So those are the two things that are in the packet.

CHAIRMAN BABCOCK: Okay. David.

MR. SLAYTON: Good afternoon, everyone. David Slayton with the Office of Court Administration. Just a few things. First of all, to Justice Bland's

points about the statute, the Legislature is fully aware they have a mess. They had a hearing in July about this issue, and it was pointed out to them that the laws are all not clear and conflicting, and so I think that we will likely see something in this next legislative session to try to address that. The outcome of that hearing in July at the Senate was such that I don't expect that there will actually be a consolidated statute to create a red flag law. The Lieutenant Governor's description was it was dead on arrival, so but I know there are -- there is some discussion on both sides of the aisle in both houses of trying to take existing statutes and modify them to make it where it's permissive for judges to consider applications for extreme risk protection orders, which is what they're likely to be called in Texas, that are not associated with family violence or a divorce case, so it would be another mental health issue that's arisen where someone is at risk and has guns.

A couple of things that I think the Legislature will consider, some have been raised here today, and things that you-all will have to consider as part of this is who can file them. Several states have these now, and they differ as to whether law enforcement is the only one who can file it or if family members or friends or social workers or others can file them. So

that's something the Legislature will have to consider as to who has the authority and then what the burden of proof is for the judges to consider them. Most states have made that clear and convincing evidence and given the actual things judges are to consider.

Also, the states have looked at what is the length of the orders, so most of them provide for a temporary ex parte extreme risk protective order that is in place for 14 days, similar to our domestic violence protective orders with then a hearing for a permanent protective order which lasts for a year, but Maryland actually has created an interim order which lasts for one to two days, and I will tell you in discussions with legislators about this issue in Texas that was actually an appealing idea because they didn't want to even take someone's gun away for 14 days without giving them proper opportunity to be heard, so that's something we may see.

With regard to getting the guns back, in every state that has a protective order -- or, sorry, extreme risk protection order statute there is a requirement that the respondent file an application to have their gun returned, at which point the court would have to consider that, do a criminal background check to ensure that they actually do not have some other disqualifier to possessing a firearm, at which time it can

be responded. It's not an automatic return. It's really there has to be some order that the court can say that the order has expired, there's no disqualifiers that they've been made aware of, and then the order is done. Obviously lots of other things with regard to court-appointed counsel for the respondent, psychiatric evaluations being a requirement, and then other types of procedural protections for respondents with regards to their rights.

And then the last thing I would say is that every state that has allowed non-law enforcement petitioners in these types of cases have also added penalties for people filing fraudulent or harassing petitions that -- in case someone is just doing this to harass someone else, so that's something that will have to be considered as well, so and then to Justice Bland's point about surrender, one of the discussions the Legislature is having with regard to this and other states have is to -- what does a surrender look like? Is it just what we have in many of our statutes now where the judges tell them "You can't have a gun," but that's pretty much as far as it goes. Other states have given judges explicit authority to say, "You must surrender by this date and time at this location." Justice Bland mentioned the certificate that some are using as an option, and then some states have even authorized law enforcement to see --

go in and seize the weapon, which I will tell you in discussions about this here law enforcement was not too excited about, having to go seize a firearm from someone who might have a mental health issue, so that's that.

And the last thing I would add is that we looked at the data from the other states. These are rarely being used in any other state, so, for instance, Connecticut has had them since 1999. They were the first state. In 1999 they had 10 filed. In 2013, which is the last date they had, there were 184. Indiana had somewhere between 50 and 70 per year. Washington, who just enacted theirs recently, had 121, and Oregon, 34. So we don't expect there to be a significant number, but in every law that's been put in place the Legislature has required the courts to come up with forms, so we can expect if that occurs here in Texas that this will become an issue. Florida, it was really problematic because they made the law effective very quickly, and so, of course, the forms were not ready, which made it quite an issue whenever they were trying to start this process.

CHAIRMAN BABCOCK: Thanks, David.

MR. ORSINGER: Can I ask David a question? In the states that provided to turn the guns in, were they turned in to the sheriff or to the court clerk or the court reporter or --

MR. SLAYTON: So the most common and maybe the single way it's done is that it's either to be turned in to law enforcement or to a federal firearms -- a licensed federal firearms dealer.

MR. ORSINGER: Really?

MR. SLAYTON: And so those have been the two ways it's been done in the other states.

CHAIRMAN BABCOCK: Okay. Any other comments, questions? Frank.

MR. GILSTRAP: Well, I'm glad to hear what you're doing because it does embody due process, and we've got to have due process, because it is a federally -- it's a constitutional right now. It seems to me that the idea that we've got in the initial form that the order has a mandatory provision saying that you not possess a firearm obviously is unconstitutional. It's got to be -- it can't apply to every case where a family violence order is issued. There are some cases which you may not want to do that, but our form has a mandatory check in it.

Beyond that, with regard to the surrender and return of firearms, suppose you give them to the sheriff, suppose you give them to the local police department, and you come back in a year, they're gone. We don't know what happened. We have no remedy. It's negligence. They're immune from that. If they're

expensive guns there has got -- there might want to be some way where maybe the respondent could pay for a bonded warehouse or something like that. If the guns are worth a half million dollars, it seems to me that that at least should be feasible. That's all I have.

MR. SLAYTON: Can I just add one thing, too? To complicate matters even worse the discussion earlier that the reason why we had this notice language in there was because of the fact that the federal law prohibits the possession. It's worth noting that the federal law only prohibits possession of the firearm if it is actually a domestic violence against a member of the household, but Texas' protective order is allowed to be issued in dating relationships, stalking, other types of protective orders, too. So it does complicate matters a little bit with regard to when they're prohibited from possessing it.

CHAIRMAN BABCOCK: Jim.

MR. PERDUE: So for the committee, what happened is our legislative mandates subcommittee got a referral on something that has not been legislatively mandated, and so we undertook to kind of understand the issue and give the committee resources to have the discussion. It's five till 5:00, and I just want to say I desperately miss Richard Munzinger because I wish he could be here for this because it would be an important

addition.

What is conflated -- what is conflated with the issue is this 78a issue and just kind of was running unknown to us concurrently and got put in together, so the -- what this committee loves to do is talk about the Constitution when it's not necessarily at issue. It hasn't really taken effect today, but we do have something somewhat concrete to deal with that kind of may want to get on a vote before the end, which is if you're taking away the filing sheet but you have this protective order kit -- and with all due respect, I can't imagine an issue where there is a finding of family violence where you wouldn't want a judicial finding that then that person who is found to be committing family violence should not have access or possession of firearms. But be that as it may, the law says what it says on that. You ought to at least have a system where the court has notice that somebody subject to that protective order has firearms.

So as I understand what a separate subcommittee was working on with Trish and Richard was to bring the committee of the whole the idea of taking this notice form for the protective order kit and putting it in where we're removing the civil -- the civil filing form in 78a. That is completely separate from red flag laws, so the record reflects everybody who votes in favor of that

is not on record saying we're taking anybody's guns. It's a completely separate and more distinct issue for the committee.

MR. GILSTRAP: I agree.

MR. ORSINGER: And if I could put a point on that, the proposal that we brought here today goes a little beyond the kit, the form kit. If we amend Rule 76a to require a judicial disclosure form for --

CHAIRMAN BABCOCK: 76 or 78?

MR. ORSINGER: 78a. Then we're not limiting the effect of this reporting form to the kit. Every single application that's filed by an attorney or by a district attorney or a county attorney or a pro se would be required to fill out the information sheet about the weapons and the ammunition, so there's been a lot of talk about the kit, and the kit is -- the TRO is in the kit, and the order is in the kit, and there's a whole big constitutional mess there, but I don't know that there's a constitutional problem with saying that if you file a protective order you've got to disclose if you have knowledge of weapons and ammunition. So to me that is something that is within our grasp, it's within our jurisdiction, and we don't have to decide on it in the next 60 seconds, but it's something that we need to look at, because the proposal that has been brought here, which

has no official authority behind it other than just interest from members of the Supreme Court of Texas, which is worth something, is that we ought to have an application here --

CHAIRMAN BABCOCK: Yeah, what do you think about that? Not much? Something.

MR. ORSINGER: And the thought is a perfect place to put it is Rule 78a is going away as a case information sheet, which you don't need anymore, do you?

MR. SLAYTON: We do not.

MR. ORSINGER: Okay. That's not just a rumor. It's the truth. We don't need this rule anymore for civil litigation. Why don't we just use it for the information sheet on weapons, and then we'll let the Legislature figure out, you know, what the procedures are.

CHAIRMAN BABCOCK: Justice Christopher -- Justice Bland, what would be wrong with what Richard's proposing?

HONORABLE JANE BLAND: Why would I say there would be anything wrong with it?

CHAIRMAN BABCOCK: I don't know. You were frowning, so --

HONORABLE JANE BLAND: I'm frowning because it's late in the day.

CHAIRMAN BABCOCK: Does anybody have any --

HONORABLE JANE BLAND: No, no, I don't think that -- I think there are two separate issues. One was the Court asked us to draft these red flag forms, and we're going to -- we're going to monitor that, and then the second is do we want to go ahead and have a required disclosure form where anyone seeking a protective order should fill out the form and say, "To my knowledge, these are the weapons that the respondent has."

MS. NEWTON: Can I clarify something?

CHAIRMAN BABCOCK: Yeah.

MS. NEWTON: I think there's been a lack of communication, which probably is our fault, but we did not intend to ask you to draft forms for red flag laws. It was actually this disclosure form that we were referring over.

HONORABLE JANE BLAND: No, well, Justice Hecht, to quote verbatim, "Draft forms which could be included in a protective order kit that would advise a judge about a respondent's access to firearms and impose necessary limits," and then attached Governor Abbott's firearm action safety plan.

MS. NEWTON: Yeah, so I think he wanted to add that to give us some cover for doing it because the Governor had just said -- made this statement and then, of course, later on it was then the -- the other guy said,

no, we're not doing it, the Lieutenant Governor, but this all began because the judge in Houston contacted us and said, "We're already doing this, and we're already working with Trish and these other people, and will you do this," and so then we said "yes," and, I'm sorry, it gets confusing. Sometimes there are just so many e-mail chains that it gets confusing of who we're talking to.

CHAIRMAN BABCOCK: Yeah, don't apologize for that. So has everybody had an opportunity to look at this piece of paper that Richard's trying to slide in here?

MR. ORSINGER: What concerns me, Chip, is that we really haven't had a debate here today about the public policy of requesting this private information be filed --

CHAIRMAN BABCOCK: Right.

MR. ORSINGER: -- in every application form even if the person applying for it is not concerned about weapons or whatever. I wish we had had a discussion. I mean, I'm happy to get this project on the way, and I'm sure Justice Hecht will be pleased, but there's really been no discussion about the public policy issues about requiring this in the filing of every application and is the information necessary and what happens if the information is false and should it be under oath and should there be a sanction if it's a frivolous filing or

you can prove that it's motivated --

MR. SLAYTON: Should it be under seal.

MR. ORSINGER: Should it be under seal. I mean, I'm afraid that -- I'm afraid that we probably have --

CHAIRMAN BABCOCK: Is it even in our package?

MR. ORSINGER: Yes, it is, but it's not part -- since it wasn't part of the official subcommittee structure it's just kind of a rogue effort to do what the Chief Justice wants.

CHAIRMAN BABCOCK: Well, I wouldn't say rogue, but, okay, well, is there any reason why we can't talk about it in the morning? Lisa.

MS. HOBBS: I don't think there's any reason why we can't talk about it in the morning, and I for one would like a drink, but can I ask, if it came through -- like did this come through like the new Mental Health Commission?

MS. NEWTON: No. It was Judge --

MS. McALLISTER: Judge Warne.

MR. ORSINGER: Judge Warne in Houston has been working on this for a couple of years.

MS. McALLISTER: It was literally -- it literally was a conversation that Judge Warne had with

Justice Guzman, Justice Guzman had with the Chief.

MR. ORSINGER: Judge Warne, who is a family law district judge in Houston, has been working on this problem for several years with local lawyers and local people.

MS. McALLISTER: Right. But she's been working on the passport part. She's been working on the part actually that you guys were kind of looking into, which is the legislative piece on gun surrender laws. So she's been trying to work with the Harris County folks on gun surrender laws or how they're going to handle gun surrender once it's been ordered that a respondent has, you know, got to surrender their stuff, but this was separate. This was just like she's -- you know, the problem -- part of the problem that judges have is that they don't -- they don't know, you know, what's potentially out there; and so it's -- you know, there's just it's a dangerous, dangerous situation. Anyway, that's the history as I know it.

CHAIRMAN BABCOCK: Yeah, Justice Bland.

HONORABLE JANE BLAND: Chip, since this particular draft hasn't been vetted by a subcommittee of this committee, and it would seem since the proposal is to be Rule 78, which is not one of my rules --

MR. PERDUE: I'm going to say again there's

no legislative mandate behind this.

HONORABLE JANE BLAND: Maybe we need to refer it to the appropriate -- I mean, or we can do it because we've already done some work similar to this, but what we were looking at was the Governor's proposal and how that might look. We weren't looking at this particular form.

CHAIRMAN BABCOCK: Well, Richard --

HONORABLE JANE BLAND: And we can go back and take a look at it, but we haven't really had a subcommittee meeting and looked at it.

CHAIRMAN BABCOCK: Yeah. Richard is the chair of the committee that has Rule 78a in the middle of it, and you've just been named vice-chair, so --

HONORABLE JANE BLAND: No, I'm not.

CHAIRMAN BABCOCK: I'm just kidding.

MR. ORSINGER: Basically Justice Bland would like to not have this problem, and my subcommittee is hard-working people, and we're willing to take it on.

CHAIRMAN BABCOCK: And Frank is vice-chair of this. So, I'm sorry, what did you say?

MR. ORSINGER: I said Justice Bland --

HONORABLE JANE BLAND: He made it that his committee is hard working.

MR. ORSINGER: -- doesn't want to be

involved, and my subcommittee is hard working, and we're willing to take it on.

HONORABLE ANA ESTEVEZ: And we like guns.

CHAIRMAN BABCOCK: Okay. So --

MR. ORSINGER: But we have already taken it on, but I think we haven't examined it in sufficient detail.

CHAIRMAN BABCOCK: Okay. So we'll bring it back not next meeting, but the --

MR. ORSINGER: And I'd like to get a better understanding from David about what the other states have done because they have some protections against frivolous filing and whatnot that we didn't consider.

CHAIRMAN BABCOCK: Yeah.

MR. ORSINGER: We just considered capturing the information and not the motive or the sanction for false filing or anything like that.

CHAIRMAN BABCOCK: All right. So the last order of business today, we will refer the evolution of Rule 78a and the replacement of it with this proposal that you're talking about. It will be referred back to subcommittee to be reported on in the first meeting in 2019.

MR. ORSINGER: 2019. Okay. That's next year.

CHAIRMAN BABCOCK: I tell you what, they don't put anything by you, do they? All right?

MR. ORSINGER: Thank you.

CHAIRMAN BABCOCK: All right. Good. Thank you, everybody. We'll see you tomorrow morning at 9:00 a.m. Or we'll see you tonight, right now, and the picture is at 6:00.

(Recessed at 5:07 p.m. until the following day.)

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REPORTER'S CERTIFICATION
MEETING OF THE
SUPREME COURT ADVISORY COMMITTEE

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I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above meeting of the Supreme Court Advisory Committee on the 28th day of September, 2018, and the same was thereafter reduced to computer transcription by me.

I further certify that the costs for my services in the matter are $ 1,871.00 .

Charged to: The State Bar of Texas.

Given under my hand and seal of office on this the 29th day of October, 2018.

/s/D'Lois L. Jones
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