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6 **MEETING OF THE SUPREME COURT ADVISORY COMMITTEE**

7 May 27, 2020

8 (via Zoom videoconference)

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18 Taken before *D'Lois L. Jones*, Certified19 Shorthand Reporter in and for the State of Texas, reported
20 by machine shorthand method, on the 27th day of May, 2019,
21 between the hours of 12:00 p.m. and 1:40 p.m., via Zoom
22 videoconference and YouTube livestream in accordance with
23 the Supreme Court of Texas' First Emergency Order
24 regarding the COVID-19 State of Disaster.

25

INDEX OF VOTES

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

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Documents referenced in this session

- 20-19 Report from 15-165a Subcommittee re: Service of Citation
- 20-20 E-mail re: Service of Citation
- 20-21 Berkley vs. Williams
- 20-22 Rogers vs. Moore
- 20-23 Summersett vs. Jaiyeola
- 20-24 Texas Industries Inc vs. Sanchez
- 20-25 Texas Industries Inc vs. Sanchez Sup. ct.(1)

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2 CHAIRMAN BABCOCK: Well, welcome, everybody,
3 to our first ever Zoom Supreme Court Advisory Committee
4 meeting. If Justice Hecht, Justice Bland, Justice Boyd,
5 or any other justices of the Supreme Court are present and
6 wish to say something, speak now. I didn't see any of
7 them listed as participants, so I am assuming that --

8 HONORABLE JANE BLAND: I'm here, Chip.

9 CHAIRMAN BABCOCK: Ah, okay. Justice Bland,
10 anything you wish to go ahead and tell us about?

11 HONORABLE JANE BLAND: No. It's good to see
12 everybody. That's all.

13 CHAIRMAN BABCOCK: Yeah, absolutely. All
14 right. I believe it was Orsinger that was tasked with
15 leading a subcommittee on this, if I'm not wrong. Is
16 Richard on yet?

17 MR. ORSINGER: I am here.

18 CHAIRMAN BABCOCK: All right. Take it away.

19 MR. ORSINGER: Okay. So we received an
20 e-mail late last week from Marti Walker saying that the
21 Supreme Court was interested in the committee's comments
22 relating to a proposal on service of process, personal
23 service of process, particularly Rule 106, but then also
24 the subpoena rule, which is Rule 176, so the subcommittee
25 on Rules 15 to 165b had a Zoom conference on Friday, and

1 we discussed the proposal, and we sent out a
2 recommendation, and we're now ready to talk about it.

3 The proposal was submitted by Austin
4 practitioner Manny Newburger, a lawyer in Austin, who has
5 taught at UT for 22 years and who is involved in the
6 credit business and represents apparently at least one
7 agency that's wide ranging in terms of service of process;
8 and he raised a concern in his e-mail of Thursday, May 21,
9 that I'll quote, "As I said, my concern is that service of
10 process," parenthesis, "until there is a COVID-19 cure or
11 vaccine," close parenthesis, "presents certain risks.
12 Process servers cannot maintain proper social distancing,
13 and there is a risk that process servers could infect
14 litigants.

15 "I represent a national process service
16 company that has spent considerable time and effort
17 developing safety protocol. Nevertheless, there is an
18 unavoidable risk that serving an infected person can
19 result in transmission of the virus to others who are
20 served." Quote, "'Personal,'" close quote, "service
21 violates social distancing recommendations. Contact by a
22 process server with one infected person risks spreading
23 the infection to everyone whom that process server
24 subsequently serves."

25 So that's the end of the part that I'll

1 quote. He -- Manny forwarded a provision out of the New
2 York procedural standards, Section 308, New York state,
3 personal service upon a natural person, and he highlighted
4 subdivision (4). Subdivision (1) is delivering the
5 summons to the person. No. (2) is delivering the summons
6 within the state to a person of suitable age. No. (3) is
7 delivering the summons to an agent for service, and
8 No. (4), "Where service under paragraphs (1) and (2)
9 cannot be made with due diligence, by affixing the summons
10 to the door of either the actual place of business,
11 dwelling place, or usual place of abode within the state
12 of the person to be served, and by either mailing the
13 summons to such person at his last known address or by
14 first class mail to the business address," et cetera, et
15 cetera.

16 I won't quote any further. So Manny's
17 concern was that personal safety of the process servers
18 and other people that they may see in the sequence of a
19 day, if they get close enough to someone to pick up the
20 virus, they might transmit it to others as well as to
21 them, the people they work with, and the people they live
22 with. So the question arises whether the Supreme Court
23 should temporarily modify Rule 106 of the Rules of Civil
24 Procedure regarding service of citation, and the
25 subcommittee has also added Rule 76 on the service of

1 subpoenas during the period when we have social distancing
2 required by gubernatorial act or local county judge or
3 mayor and when the safety considerations are foremost.

4 So in approaching this problem, first I
5 think we should look at the language of Rule 106, which is
6 the general rule for service of citation in Texas. I'll
7 quote Rule 106(a). "Unless the citation or an order of
8 the court otherwise directs, the citation shall be served
9 by any person authorized by Rule 103, by" -- and there are
10 two choices. Number (1), "delivering to the defendant, in
11 person, a true copy of the citation with the date of
12 delivery endorsed thereon, with a copy of the petition
13 attached thereto," or choice number (2), "mailing to the
14 defendant by registered mail, return receipt requested, a
15 true copy of the citation with a copy of the petition
16 attached." I should say "registered or certified mail."

17 That's subdivision (a) of Rule 106 on
18 serving citation. Subdivision (b) says, "Upon motion
19 supported by affidavit, stating the location of the
20 defendant's usual place of business or usual place of
21 abode or other place where the defendant can probably be
22 found and stating specifically the facts showing that
23 service has been attempted under either (a)(1) or (a)(2)." Remember,
24 (a)(1) is delivering to the defendant in person,
25 and (a)(2) is mailing by registered or certified mail.

1 So back to (b), "Upon motion supported by
2 affidavit, stating the location of the defendant's usual
3 place of abode or usual place of business or other place
4 where the defendant can probably be found and stating
5 specifically the facts showing that service has been
6 attempted under either (a) (1) or (a) (2) at the location
7 named in the affidavit that has not been successful, the
8 court may authorize service," and there are two choices.
9 Number (1), "by leaving a true copy of the citation, with
10 a copy of the petition attached, with anyone over 16 years
11 of age at the location specified in such affidavit," or
12 number (2), "in any other manner that the affidavit or
13 evidence before the court shows will be reasonably
14 effective to give the defendant notice of the suit." That
15 is our rule in Texas for service of citation.

16 Let's look briefly at Rule 176 on service of
17 subpoenas, because the issues are the same or even perhaps
18 more acute with subpoenas. Rule 176.5 of the Texas Rules
19 of Civil Procedure talks about service of a subpoena.
20 Subdivision (a) says, quote, "Manner of service. A
21 subpoena may be served at any place within the State of
22 Texas by any sheriff or constable of the State of Texas or
23 any person who is not a party and is 18 years of age or
24 older. A subpoena must be served by delivering a copy to
25 the witness and tendering to that person any fees required

1 by law. If the witness is a party and is represented by
2 an attorney of record in the proceeding, the subpoena may
3 be served on the witness' attorney of record."

4 Paragraph two, "Proof of service. Proof of
5 service must be made by filing either," number (1), "the
6 witness's signed, written memorandum attached to the
7 subpoena showing that the witness accepted the subpoena,
8 or," number (2), "a certified statement by the person who
9 made the service stating the date, time, and manner of
10 service and the name of the person served."

11 So in Texas, personal service is prescribed
12 if you don't have mail service, at least for citations,
13 and for subpoena's personal service is prescribed; and in
14 Texas if you want to do something besides personal service
15 of citation by mail you have to go to the court, prove
16 that personal service or citation by mail is not effective
17 and get the court's permission on ultimate service by
18 delivering it to anyone 16 or older or leaving it on the
19 door and stepping away. So our committee -- subcommittee,
20 I should say, felt -- we all agreed, immediately, that
21 rather than change any of these service rules permanently,
22 anything that is done should be just temporary, like other
23 orders of the Court have been relating to the virus.

24 Secondly, after discussing many different
25 alternatives and the fact that New York went and allowed

1 the process server to make the decision for ultimate
2 service rather than the court upon affidavit, our
3 conclusion was that we would prefer for the Court not to
4 change Rule 106 or Rule 176 in its own terms, but instead,
5 the Court should express a comment interpreting how the
6 rules should be applied. We felt like the definition of
7 personal service or delivery was global enough that the
8 Court could grant clarification that would cure the
9 security problem, and we would not have to abandon our
10 existing requirement that the court decide on substitute
11 service based on an affidavit.

12 So here was the subcommittee's
13 recommendation. The subcommittee recommends that TRCP 106
14 and TRCP 176 not be amended. The subcommittee recommends
15 that the Supreme Court issue a COVID-19 order of limited
16 duration saying two things. Number (1), under Rule 106
17 and Rule 176, delivery does not require personal touching
18 of the person being served; number (2), under Rule 106 and
19 Rule 176, delivery includes leaving the document being
20 served in the presence of the person being served, while
21 verbally identifying the document being served.

22 That's the totality of the recommendation.
23 And the idea is, number one, you don't have to touch the
24 piece of paper while it's touching the hands of the person
25 that's being served; and secondly, delivery, personal

1 delivery, would include laying it on the ground, ringing
2 the doorbell, stepping back to the edge of the porch. The
3 person comes to the door. The process server said, "I'm a
4 process server. I've laid there at the floor right in
5 front of your door process in such-and-such a lawsuit,"
6 keeping social distancing, not requiring touching. As far
7 as the witness fee is concerned, it could be put in an
8 envelope and laid on the package. You're going to serve
9 the subpoena. So that's all I have by way of introduction
10 and recommendation, and so, Chip, I think it's back to the
11 committee for discussion.

12 CHAIRMAN BABCOCK: Great. One question I
13 had with respect to the documents that are placed at the
14 door or in somewhere near the -- either the witness or the
15 defendant, is there any concern, or could a prospective
16 defendant or witness raise an issue about have you wiped
17 this down, you know, if I touch this myself within the
18 next 24 or 72 hours, whatever the time is, three hours,
19 three minutes, I'm going to get the -- I could get the
20 disease? Any thinking about -- any thoughts about that?

21 MR. ORSINGER: You know, members of the
22 subcommittee are on the committee -- in the committee
23 meeting here today, and I think everyone has some views
24 that they would share. The news seems to change the --
25 the governing standards frequently, and the last I heard

1 there was a reduced risk -- the scientists are saying
2 there is a reduced risk of transmission by paper. I know
3 some people leave their Amazon boxes outside for 24 hours
4 or 48 hours so the virus could dry up or whatever. I just
5 don't know that any of us are knowledgeable enough to say.
6 I think it's a legitimate concern based on the fact that
7 before people didn't know how long the virus lasted on
8 plastic or metal or paper. Now they're saying it doesn't
9 last very long and it's not likely to be transmitted by
10 any surface, so I don't have the answer to that question.
11 However, we need to remember that the standards seem to be
12 changing frequently as we learn more about the virus, and
13 there are thousands or hundreds of thousands or millions
14 of people that are being delivered packages everyday and
15 groceries and everything around our society, and it
16 doesn't seem to be that that behavior is prohibited.

17 CHAIRMAN BABCOCK: Yeah. That's a --

18 (inaudible)

19 MR. ORSINGER: Uh-oh.

20 THE REPORTER: I can't hear you.

21 CHAIRMAN BABCOCK: Great point, Richard,
22 because a lot of people when they deliver groceries --
23 pretty bad? Better now? No? You can't hear me? Okay.

24 MR. ORSINGER: It's like a bad Japanese
25 movie where your lips are out of sync with your voice. I

1 should say bad foreign movie. Pardon me, I withdraw that
2 comment and substitute.

3 CHAIRMAN BABCOCK: Hang on for a minute.

4 Well, what I had to say wasn't that important, so who else
5 wants to talk?

6 MS. EASLEY: It looks like Judge Yelenosky
7 has his hand raised that he wants to comment and then also
8 Judge Estevez.

9 CHAIRMAN BABCOCK: Okay. Judge Yelenosky.

10 MR. ORSINGER: Uh-oh, he's muted. Your
11 mute. There we go. Your mute.

12 HONORABLE STEPHEN YELENOSKY: Yeah, I don't
13 think you can unmute without somebody allowing you to.
14 But anyway, Richard, you read off something I think from
15 Manny. Did you get my e-mail?

16 MR. ORSINGER: No, I didn't.

17 HONORABLE STEPHEN YELENOSKY: I don't know
18 why, but I'm going to read it to you. Okay. I'll try to
19 -- I'll try to shorten it, but probably reading it to you
20 is shorter than me extemporaneously talking because I'll
21 go on and on. So is it okay if I read it?

22 MR. ORSINGER: Yeah. Yeah. Go ahead.

23 HONORABLE STEPHEN YELENOSKY: All right.
24 "Perhaps I'm reading the first recommendation too
25 literally, but to me 'personal touching,'" in quotes,

1 "means putting one's hand on another, another person. Has
2 the law ever required a process server to do that?
3 Doesn't recommendation number one imply a change in law is
4 necessary to excuse process servers from what is surely an
5 unwanted touching? Moreover, if there is any concern that
6 somehow process servers might mistakenly believe they have
7 to touch the person being served, doesn't recommendation
8 number two encompass recommendation number one? Where I
9 do think process servers need guidance is what," quote,
10 "'in the presence of,'" unquote, "means in a pandemic. I
11 don't think there is any case law defining it during a
12 pandemic, and regardless, process servers generally don't
13 read case law.

14 "The guidance should be specific about what
15 should and should not be done to both protect the process
16 server and to protect the person being served. Nothing in
17 the proposed recommendation precludes an irresponsible
18 process server who is not wearing a mask from handing the
19 citation to the person being served. Would running away
20 from that process server be avoiding service? Perhaps
21 what would be most useful is one rule that said 'in the
22 presence of,'" and that's in quote, "during a pandemic
23 means leaving the document and identifying it while within
24 the sight and hearing of the person being served but no
25 closer than six feet and while wearing a mask."

1 MR. ORSINGER: Great.

2 HONORABLE STEPHEN YELENOSKY: I think -- I
3 mean, since you didn't respond immediately, I mean, we
4 don't need to reinvent the wheel. Somebody alluded to
5 what's happening with delivery, and an important part of
6 it if it's left out of the proposed rule is protecting the
7 person served, and so that's -- that's why -- or a big
8 part of what I wrote. And secondly, it's not clear at all
9 to a process server what it means, which is why I propose
10 what is recommended by the CDC and ought to be clear. And
11 the third thing is that the proposal, as I said, number
12 (1) is encompassed within number (2); but number (2) says,
13 well, this includes doing blah, blah, blah. Well,
14 anything that includes means that there are other things
15 you can do, and other things are not okay because they put
16 the process server at risk and the person served at risk,
17 and if I'm going to be served by process, I need to know
18 that that person is going to be at least as safe as the
19 person who brings me groceries. And I don't know why you
20 didn't get the e-mail. Did anybody else get it?

21 HONORABLE ANA ESTEVEZ: Chip, is it okay if
22 I go? I think he might be having problems.

23 HONORABLE STEPHEN YELENOSKY: Well, I'm
24 going to send the e-mail around. I just read it, but if
25 you want it. I don't know why -- I responded to Marti's

1 e-mail, and so I don't know why it didn't get there.

2 Somebody got it because --

3 MS. WALKER: Judge Yelenosky? It went out
4 Sunday, and it went to the full committee. I do remember
5 receiving it on Sunday, and your e-mail went to the full
6 committee.

7 HONORABLE STEPHEN YELENOSKY: All right.

8 MR. ORSINGER: Ana, why don't you go ahead
9 and comment?

10 HONORABLE ANA ESTEVEZ: I just wanted to
11 respond to Mr. Babcock's concern about the contamination
12 of the documents. I don't think we would have the same
13 issue, so I don't think it becomes an issue because even
14 if we did the nail -- nailing on the wall, they don't know
15 who's touched it and how long it's been there, so I don't
16 think it's an issue we need to spend any time on, because
17 unless we're electronically serving people there's no way
18 to avoid the fact that no one is going to know how long
19 since it's been -- well, we'll know how long it's been
20 touched, but they'll still have to follow whatever
21 procedures they feel comfortable with regarding any type
22 of package, whether it's the one -- you know, you're
23 someone that doesn't believe there's any probability of
24 you getting sick from touching a package or whether you
25 feel like you need to keep it in your garage or outside

1 for 24 hours.

2 So I don't think that's going to make any
3 difference, so I just wanted to bring up that it would be
4 the same issue on any way you served the papers, so I
5 don't -- it's not -- it's not something we need to spend
6 the time on. Unless we're going to find -- you know, ask
7 them to put it in plastic so they could spray it down.
8 That would be the only thing, but then they would have to
9 assure that that plastic inside the document that's inside
10 had been inside for 24 hours or 48 hours, so hopefully
11 there's an answer to that. That's all.

12 HONORABLE STEPHEN YELENOSKY: Can't hear
13 you.

14 HONORABLE DAVID EVANS: I couldn't figure
15 out how to raise my hand, so I'll just do it this way. I
16 think that the committee's solution is probably practical,
17 given lack of data we have about what's happening with
18 service right now, and I want to point out that the
19 subcommittee's solution relies on the assumption that the
20 door will be opened, yet the groceries, the Chinese
21 takeout, and the Amazon packages are being left on the
22 porch, and I'm not sure that the door is being opened.

23 The second part, by the defendant, and the
24 reason I'm not sure of that is I had the district clerk in
25 Tarrant County compare six weeks from March 13th in 2020

1 with the same six-week period using a Friday and six weeks
2 forward in 2019, and I looked for two things: Number of
3 citations issued, number of citations returned. The
4 number of citations issued remained the same, really
5 close, like 50 cases off. However, the citations returned
6 is right at 65 to 70 percent less during that six-week
7 period. So I didn't have it updated.

8 Now, there's two responses to that. Those
9 will eventually become motions for substitute service, and
10 there won't be due diligence on it, or somebody will open
11 a door and will be served. The other fact that's not
12 being accounted for is, is that postal regulations require
13 personal contact at the post office now to sign for the
14 certified letter, and that's not addressed and couldn't be
15 addressed by the Supreme Court.

16 I have not asked what the service is, what
17 percentage of service is personal versus what percentage
18 of service is by mail. We do know that certified mail
19 without a signature is constitutionally sound and is
20 likely to give notice and is safe and effective and
21 probably meets the model that is going on in business
22 right now on delivering everything we have going on in the
23 pandemic.

24 The problem I have is I don't know if
25 Tarrant County is a one off and the same problem is out

1 there in all the counties or whether the fact that they're
2 not being served or that the process server is unable to
3 get somebody to open the door or the post office is unable
4 to get somebody to come up and pick up the green card,
5 which I think is more likely, because I don't think we
6 would open the door at our house at both of us at 70. I
7 know it's hard to believe, youthful looks, but I don't
8 think we would both open the door. I think we would let
9 the guy stand out there in a uniform. We let the Chinese
10 takeout guy bring it every Friday and leave it on the
11 doorstep, so I don't know why we would open it for anybody
12 else, and we like him.

13 So I would just suggest to the Court that
14 once OCA might have some time maybe they should look and
15 see what kind of returns we are actually getting in by
16 sampling somewhere and finding out what's happening. I
17 don't have to point out to everybody here that if we don't
18 have this -- since we don't have these returns coming in,
19 we're going to have a series of defenses, notwithstanding
20 the extension of statute of limitations in normal civil
21 lawsuits that due diligence was not used in obtaining
22 service. Because everybody will wake up once the day
23 limitations is not told and start pressing to get diligent
24 service, and defendants will have to raise that. So I
25 think this may be a nice interim solution, but I don't

1 think it's a -- I don't think it reaches the real core of
2 the problem, and that is are we getting service or not.
3 It's because the process servers are driving this argument
4 from the standpoint of safety versus whether or not we've
5 got effective service going on in cases. That's my --
6 that's my pitch.

7 CHAIRMAN BABCOCK: Yeah, but what do you
8 think the answer is, Judge?

9 HONORABLE DAVID EVANS: Well, I'm not sure
10 that -- I don't know if I'm one off, that this county is
11 one off or if the same thing is going on in every urban
12 county. I think those are the ones that are easiest to
13 compare. Now, if you think of citation issuance, what
14 you're really looking for is the six weeks preceding March
15 13th or eight weeks preceding March 13th and the eight
16 weeks following March 13th. Because you've got an
17 inventory built up. Anecdotally most of these constables
18 will tell you it takes six weeks to eight weeks to serve
19 paper. They all prefer mail if they can get it done, but
20 they understand that nobody will sign a green card.

21 So there's a tremendous amount of gas being
22 driven around knocking on doors, waiting for somebody to
23 open the door and get a signature. And I think you're
24 right, you could drop it in their presence. The cases
25 that Elaine presented are fine, but I don't know that

1 you're going to get them to open the door, and I don't
2 know why we don't have this return of service in Tarrant
3 County.

4 By the way, it works both for the county
5 clerk, the same percentages are present for the county
6 clerk and the district clerk in Tarrant County. I don't
7 know if anybody else checked any other counties on return
8 of service or not, so if we're -- if we're one off then
9 that should be ignored. If that's a -- I think it's
10 probably, based on the constables who contacted me, a --
11 and that's the only people I got contacted by. I raised
12 this with the presiding judges, is that this is a problem
13 statewide for the constables. They have a safety issue,
14 but they're also not getting the service here, so --

15 CHAIRMAN BABCOCK: Robert Levy has got his
16 hand up. Robert.

17 MR. LEVY: So I wanted to obviously point
18 out that the concern is to avoid a situation where a
19 defendant could receive citation and not be aware of it,
20 and the proposal that was submitted I think runs that
21 risk. If somebody puts a notice on the front door of an
22 office building and the defendant is working from home
23 like they are required to do, they will not see that, and
24 it might not even last on the front door; and if it's
25 mailed to that office address, they still might not see it

1 and be in a risk of default.

2 I would note that, as I understand, the
3 current Supreme Court's rulings kind of take the question
4 of default off the table anyway while we're in this --
5 this period, so that I don't know that anyone could
6 actually submit a request for default at this point or
7 that it would be void because of the orders.

8 But the other point that I think really
9 supports the subcommittee's suggestion about not creating
10 a rule is that I think that we would be in a difficult
11 spot if we had a rule that would suggest the best
12 practices about staying six feet away or wearing a mask or
13 something like that because the CDC guidance and other
14 guidance might change, and it might be eight feet, or it
15 might be four feet. The medical issues are evolving as,
16 Chip, you pointed out. It's -- this is a very difficult
17 situation, and we should avoid a rule that describes what
18 is today the right practice when next week or next month
19 it might be different.

20 So I think that the subcommittee's approach
21 makes the most sense and maybe an interpretive explanation
22 of what constitutes service. I would ask Judge Evans,
23 though, or at least in response to his question, would it
24 be acceptable if you served -- if you were served through
25 your door, i.e., somebody knocked on your door, you don't

1 answer it, or you don't open it, but you answer it, and
2 process server says, "I've got service of process for you.
3 I'm leaving it on your front porch." Would that
4 constitute service if your voice was heard on the --
5 through the door?

6 HONORABLE DAVID EVANS: Well, the key is, is
7 on the return; and defaults, as I understand it, are only
8 prevented right now in the current orders on certain
9 Financial Code cases, consumer credit cases, just so --
10 and I'd have to go back and review the 17th order today
11 and the litany of it, but the process of the return
12 actually says they identified the person, and I don't
13 think you can say you identified the person. On
14 substituted service, you -- of course, it's a terrible
15 term, but nail or mail, but my personal experience is I
16 don't have as many -- there's two things that lead to
17 defaults in my mind. One is that you've just got the
18 wrong address on somebody. If you mail to the right
19 address on substitute service, you're probably going to
20 get an answer.

21 The second thing that's the hardest on
22 individuals is the riddle of 20 -- the first Monday
23 following 20 days. 20 days in this environment is very
24 hard for somebody to get a lawyer. Now, that's a totally
25 different topic, but I just throw it into as to where you

1 get the problems with people getting behind on defaults,
2 is that it's not stated 30 days after you're served or 45
3 days after you're served. It's this riddle for wage
4 earners and people like that to get a service, so in a
5 better environment and a longer term, I would think the
6 whole rule kind of needs to be looked at from the
7 standpoint of the people being served otherwise. But my
8 experience has been if you mail it to them or you leave it
9 on your door, you're as likely to get an answer as if you
10 had it handed to them, but I haven't drilled down through
11 the numbers to see where the defaults are coming from.
12 That's just a personal anecdotal impression.

13 CHAIRMAN BABCOCK: Judge Estevez.

14 HONORABLE ANA ESTEVEZ: Yeah, I wanted to
15 address the issue of Judge Evans not going to the door
16 except to pick up his -- his takeout meal for the
17 delivery. We didn't talk about it in the subcommittee,
18 but I think that this is a good forum and we need to
19 discuss it as well and include the fact that if somebody
20 comes to my door I don't go to the door. I go to my
21 phone. I have a Ring device, and I have a conversation
22 with whoever is on my -- at my door before I ever open the
23 door, and I think that we should also clarify, because
24 this is going to be something in the future that
25 delivery -- if you adopt the -- the suggestions from the

1 subcommittee that delivery also includes if they don't
2 open the door that they identify themselves on that smart
3 doorbell that showed, you know, where they could see you
4 and that you've communicated to them what you've left, and
5 I think that takes care of a lot of this -- the door --
6 people opening the door or not opening the door in where
7 we are as far as technology goes. So I do think we should
8 have addressed that, and I don't think we thought about
9 that, but that is something else that, you know, as time
10 goes by and those prices are cheaper, people are doing
11 more and more of that.

12 CHAIRMAN BABCOCK: Stephen Yelenosky.

13 HONORABLE STEPHEN YELENOSKY: Yeah, I don't
14 have a Ring, and I'm not going to get one, and I
15 understand people who do. It seems to me Judge Evans laid
16 out the problem of how do we get it to people who are even
17 willing to respond, and that's a problem, so that could be
18 tried by mail, but if you don't get a certified receipt in
19 this circumstance, can you operate on the case law that
20 it's likely to have been served, and I don't know the case
21 law. And then you have the issue of -- excuse me, the
22 variability I think Robert said as to what the guidance
23 is.

24 What I suggested is current guidance, and it
25 is just a temporary rule, but if you really want to avoid

1 having to amend the temporary rule because CDC guidance
2 changes, then put instead "consistent with the CDC
3 guidance." I can tell you my wife has underlying
4 conditions, and if you send me a service by mail I'll
5 respond to it. I'm not going to the post office. I'm not
6 doing anything that's near a person. If you knock on my
7 door, I'm not going to answer it. I don't have a Ring,
8 and so if that person is knocking on my door, the guy or
9 woman who brings food doesn't do that. I don't want
10 anybody knocking on my door. They call or they text.
11 They leave it there. We know they're there, and they walk
12 away. And if you do anything that's inconsistent with CDC
13 guidance, I think you have a perfect excuse for not
14 responding at all. I'm not going to do that. And if
15 somebody said, well, you were served, they knocked on the
16 door, you know, and you didn't open it, fine, I'm not
17 going to open it.

18 So, I mean, there's two -- it seems like
19 there's more concern about the process server, when there
20 should be equal concern about the person being served, and
21 the person being served is entitled to require that
22 somebody comply with CDC guidance on this, and what I
23 proposed is current, six feet, wear a mask, but if that
24 changes then just say "CDC guidance."

25 CHAIRMAN BABCOCK: Professor Albright.

1 PROFESSOR ALBRIGHT: So what -- what I think
2 we tend to do in these discussions both with our smaller
3 group and with this group is start trying to solve
4 problems that are not COVID-19 problems. I think we -- if
5 we want to rethink what is valid personal service and that
6 should be regular mail now, I think that is not a COVID-19
7 issue. It may be brought up because of that, but to solve
8 the direct problem that we're talking about now, I think
9 the issue is what is personal service other than actually
10 handing it to the person with the door open or seeing them
11 on the street or in the reception room or whatever.

12 We -- you know, not answering the door or
13 not picking up certified mail is not unique to COVID.
14 People haven't been picking up certified mail forever.
15 People have not been answering the door forever. People
16 have been avoiding service of process forever. If I
17 know -- if I was trying to serve process and I knock on
18 your door and I hear you rustling around and I see the
19 Chinese food sitting on your front door, I know you're
20 probably there. So if -- you know, if I can't hand it to
21 you, I go get an order for substituted service and say, "I
22 know they're in this house and if I leave it at the door I
23 think that it's reasonable notice."

24 But I think what we were trying to solve is
25 just the issue of somebody who does answer the door, but

1 they don't want to put their hand out and get it, and do
2 you have to put your hand out and get it? It could be
3 left on the -- on the porch in front of you. You can
4 leave it there for as many days as you want to. I let my
5 mail come in everyday. I have friends who make the mail
6 sit outside for four days. So I think that's a personal
7 choice that's not really our problem. So I think we
8 really need to focus on what -- what is personal service
9 for purpose of the rule, so what does comply with the rule
10 without having to get substituted service. Yeah, you
11 may -- people may refuse to take it and you have to get
12 substituted service, and that's the breaks.

13 We could get larger than that and say, you
14 know, our personal service is much too restrictive, and
15 this is the time to add regular mail to the list in part
16 (a) of the rule, but I think we need to focus on whether
17 that's what we're doing or if we're just trying to solve
18 this more narrow COVID problem.

19 CHAIRMAN BABCOCK: Thank you, Professor
20 Albright. I don't see any other hands up, but maybe I'm
21 not looking, looks like --

22 HONORABLE DAVID EVANS: I just want to point
23 out --

24 CHAIRMAN BABCOCK: -- Justice Christopher is
25 ready to go, and then Judge Evans. Justice Christopher.

1 Yeah, you.

2 HONORABLE TRACY CHRISTOPHER: Okay. Good, I
3 had to unmute. I like the subcommittee's proposal,
4 although I agree with Judge Yelenosky that we should
5 eliminate number (1). I don't think it's necessary.
6 Number (2) is all you need, and I would say -- I would
7 define what the presence of someone means, so presence
8 could include talking to them, you know, by phone or
9 through your Ring doorbell. I don't know how we word
10 that, but, you know, I think that should be "presence of."
11 It shouldn't just be sight, and I can't remember what you
12 said exactly, Stephen, sight and something. But I think
13 that would cover it, and I agree that it should just be in
14 a limited duration at this point.

15 CHAIRMAN BABCOCK: Judge Evans. Judge
16 Evans.

17 HONORABLE DAVID EVANS: Well, I would never
18 suggest regular mail. The problem is the signature on the
19 certified, return receipt requested with a signature.
20 Certified mail is different. Certified or registered mail
21 or even most recent things would be reasonable. The --
22 I'm fine with the subcommittee and especially with Judge
23 Christopher's suggestion, but I just want to point out to
24 you, you may not know the extent of the problem right now,
25 and you may not find it out until you start looking at all

1 of these motions for substituted service when the judges
2 will be authorizing certified mail.

3 Given my age, I always think about orders
4 that order people to do things that they think are
5 frivolous and contrary to the guidance. You know the
6 problems we're having with face masks right now and
7 courtroom spacing compared to what is doing in private
8 business. If you tell a process server you have a
9 choice -- you have an easy way to serve people by mail,
10 but we want you to drive around, make contact with folks,
11 and we want you to go up and knock on doors, or we want
12 everybody else will telework from home, you can talk to
13 people about duty all day long, but they won't expose
14 themselves if they think they're being exposed.

15 What I think, if you interview the
16 constables, is that what's not happening is our paper is
17 not moving because they're concerned about this issue
18 about going around being exposed in these times, but I
19 don't have -- that's a -- that's based on a few
20 conversations I've had that I wouldn't want to extrapolate
21 out past it, but I do think we should look into and see
22 whether or not there -- or the Court might want to
23 consider looking into whether or not we have a fall off in
24 the service. We shouldn't have it. There's nothing in
25 this proposal that shows us what the local constables are

1 telling me, is that the paper is not getting served.

2 CHAIRMAN BABCOCK: Yep. Yep.

3 HONORABLE DAVID EVANS: And if those
4 attempts aren't being made, you can't even get to
5 substituted service. So I'm okay with the proposal for
6 the Court, but I don't think we've gone into -- I don't
7 think the Court has all the data it needs, and if this
8 county is one off, then it's one off, but I talked to the
9 head of the constables association from Granbury, and
10 basically, he told me that, you know, their whole problem
11 is, is they -- their people tell them "Why should I go out
12 and serve this when it's a nonessential hearing?" And you
13 say, "Well, you're confusing your duty," and they say,
14 "Well, why should I go serve something that's not even
15 going to get into court or going to be done remotely? I
16 have to go touch somebody," or Steve has a great point,
17 not touching, but get close to them, but you're going to
18 do all of your hearings remotely. Look at the 17th order,
19 today. Everything is remote unless you can show that you
20 can't do it remote, and that's what's bothering those
21 constables, and I think that if -- if I'm right then we're
22 way off on service, and that's in the record, and that's
23 fine, and I'm comfortable with that.

24 CHAIRMAN BABCOCK: Great, thank you. Thank
25 you, Judge.

1 HONORABLE DAVID EVANS: And we do order
2 other foods other than Chinese. Just wanted everybody to
3 know.

4 CHAIRMAN BABCOCK: Not to make it be a
5 political issue here. Anybody else have any comments?

6 MR. GILSTRAP: Yes, I do, Chip.

7 CHAIRMAN BABCOCK: Okay, hands raised.
8 Frank.

9 MR. GILSTRAP: Yes, please. I'll try to be
10 brief. First of all, this is obviously a fluid situation.
11 We don't know what's happening, and we really won't know
12 the effect for a while now. We've simply got to come up
13 with some type of stopgap order here, and that's an
14 attempt. It's based on something that process servers
15 understand called drop service. They do that. They do
16 that in -- and they don't like it, because it's a case
17 where the defendant will not reach his hand out and take
18 the process from the constable or from the private process
19 server, and so they put it on the ground and then in the
20 person's presence, and they say, "You've been served."
21 They all know how to do that.

22 Insofar as the private process servers, they
23 have a bit more incentive because if they're not serving,
24 they don't get paid, unlike the constables; and the
25 private process servers I've talked to, which have been

1 three, they all wear -- you know, they are concerned.
2 They wear gloves. They wear masks. They step back from
3 the door. They try to do that in some way to protect
4 themselves.

5 I am -- I'm concerned about the suggestion
6 that we might at this point think about how to redo the
7 rule all together. To my mind this is the worst time to
8 think about some type of reform. That's why I think the
9 subcommittee wanted it to be merely temporary. I don't
10 have an answer to not opening the door, but this is just a
11 way to get some process served. Insofar as mail is
12 concerned, I was horrified by the suggestion that began
13 all of this, and I can't recall the guy's name, and it's
14 what he called "nail and mail," which was to mail it and
15 attach it to the door. If we're talking about just
16 mailing it, that's even worse. If we go to some type mail
17 service, then we ought to at least require the nailing
18 portion, that it be attached to the door. I think that's
19 all I have.

20 CHAIRMAN BABCOCK: Thanks, Frank. Anybody
21 else have any thoughts, concerns, or questions they want
22 to raise? Yes, Professor Carlson.

23 PROFESSOR CARLSON: I just want to remind
24 the committee that the constitutional standard for the
25 validity of the service under *Mullane vs. Central Hanover*

1 Bank is that under the circumstances that give the
2 defendant notice, but we are under some very dire
3 circumstances, and you could make a good argument that
4 perhaps service by certified mail without a signature is
5 sufficient under the circumstances. And as we all know,
6 there are countries that allow service by social media, so
7 that's all I have.

8 CHAIRMAN BABCOCK: Thanks, Professor
9 Carlson. Yeah, Justice Christopher.

10 HONORABLE TRACY CHRISTOPHER: Yes, so back
11 when I was on the trial court, what we would usually do is
12 require three in-person attempts before we allowed taping
13 to the door, and some people not only required taping to
14 the door but also sending by regular and certified mail.
15 So, you know, taping to the door is still an option if the
16 service -- if the process server, you know, cannot verify
17 either by, you know, actually seeing and talking to the
18 person or by talking to them via phone or Ring that the
19 person is there and is aware they're being served.

20 I think most judges, at least in Harris
21 County, are handling their submission dockets and are up
22 to date on that. Almost all requests for, you know,
23 alternative service of process is done on a submission
24 docket, so that's all done remotely, but that's basically
25 how it worked then, and I think it's similar now.

1 CHAIRMAN BABCOCK: Great. Thank you.

2 Professor Albright.

3 PROFESSOR ALBRIGHT: I just want to comment
4 on Professor Carlson's comment real quickly. She is
5 exactly right. The constitutional requirement is rather
6 low. It's, you know, anything that -- she had the
7 language off the top of her head. I don't. But
8 reasonable service, reasonably calculated to -- to give
9 actual notice, and so we have a lot of leeway for the
10 rules for service of process in Texas, but what we're
11 talking about is whether what the process server is doing
12 complies with the Texas rules or statutes. So there is
13 really two inquiries, does it comply with the Texas rules
14 and statutes and did it -- was that attempt
15 constitutional.

16 So depending on where you are in fighting
17 the default judgment, one or the other might be an issue,
18 but -- but I think we need to -- we need to think about --
19 we can't just say, well, anything is okay. We have to
20 establish what we want to require in our rules, and I
21 think that's what we're talking about. I just wanted to
22 clarify that.

23 CHAIRMAN BABCOCK: Thanks, Professor
24 Albright. Somebody's got their hand up who is identified
25 only as "number two." And so whoever number two is, it

1 might be Rusty Hardin, I don't know, but if number two
2 wants to be recognized, I'm recognizing them. Nina, is
3 that you?

4 MS. CORTELL: I don't know, but I'll take
5 it.

6 CHAIRMAN BABCOCK: Then Judge Yelenosky.

7 MS. CORTELL: I did want to respond to Judge
8 Yelenosky's comment. The subcommittee absolutely was
9 trying to consider the interests of the person being
10 served as well. That is the reason the subcommittee did
11 not come back to the full committee with the proposal that
12 you just nail it to the door or whatever, which is really
13 what the process servers were requesting, and we felt that
14 was not sufficient. If one wants to go further and
15 provide medical -- medically, what can I say, safe
16 service, then one could, it seems to me -- I'm very
17 comfortable with the subcommittee proposal, either (1) or
18 (1) and (2). You could reference CDC guidance. I don't
19 know if this Court wants to go that direction, or per the
20 conversation we've heard today, you could amend or say
21 temporary suspension on the provision for a return receipt
22 requested and just have the registered or certified mail.
23 That's been bouncing around a little bit in these
24 suggestions, and I don't know if the committee wants to
25 vote on that or not, but that would be another way to do

1 it, to suspend just for this time period the requirement
2 for a return receipt requested.

3 CHAIRMAN BABCOCK: Thanks, Nina. Stephen
4 Yelenosky.

5 MR. ORSINGER: You're muted. You're muted.

6 HONORABLE STEPHEN YELENOSKY: Not on my
7 screen.

8 MR. ORSINGER: Okay. Can hear you now.

9 HONORABLE STEPHEN YELENOSKY: Okay. Didn't
10 the Legislature pass a law that allows service by social
11 media as substitute service? That's my understanding, and
12 in fact, I've been trying to look it up, but it is
13 substitute service, but look at Civil Practice and
14 Remedies Code 17.033. And I'm just looking at -- I'm not
15 looking at anything official, so maybe this is wrong.

16 MR. ORSINGER: You know, I think we've
17 actually had two committee meetings on that subject, and
18 David Slayton came to one of them and keep the memo on the
19 statute.

20 HONORABLE STEPHEN YELENOSKY: So it is
21 available as substitute? Because obviously right now
22 especially that would seem to be more likely than
23 anything, if you're on social media. But once again, you
24 can't get me because I'm not on social media, but other
25 people are.

1 CHAIRMAN BABCOCK: Somebody had their hand
2 up.

3 MR. ORSINGER: It was Lisa.

4 CHAIRMAN BABCOCK: I could see the hand, but
5 I couldn't see the face.

6 MR. ORSINGER: Lisa has her hand up.

7 CHAIRMAN BABCOCK: Lisa.

8 MS. HOBBS: Hey, I think that 17.033,
9 Richard is right that we talked about it, but I think it
10 only is in accordance with rules adopted by the Supreme
11 Court, so currently the Supreme Court has not adopted any
12 rules that would allow for social media service, so I
13 think that means you could not do it today until there's
14 actually rules promulgated.

15 HONORABLE STEPHEN YELENOSKY: But that's
16 what could be in the emergency rule.

17 MS. HOBBS: Yes.

18 HONORABLE STEPHEN YELENOSKY: It could be
19 that it's not even required on a motion, but is just
20 allowed right now.

21 MR. ORSINGER: So, Chip, I may be number
22 two. This is Richard. I don't know why my name is not
23 appearing, but can I speak?

24 CHAIRMAN BABCOCK: You can, although I
25 should note that I withdraw and retract my slander of

1 Rusty Hardin who texted me and said that he is not number
2 two, and of course, in Rusty's mind he would always be
3 number one.

4 MR. ORSINGER: Right.

5 CHAIRMAN BABCOCK: So I'm amending my
6 comment about that, but, Richard, yeah, go ahead. You may
7 be number two.

8 MR. ORSINGER: Okay. So right now the
9 person whose -- wants the process served can elect either
10 to have delivery to the defendant in person or by
11 registered or certified mail, return receipt requested.
12 If you're not going to do one of those two things, you
13 have to -- you have to make the attempt and then you have
14 to go to the court with an affidavit and talk to the judge
15 about what the substitute service is. Someone who won't
16 answer the door and that you're not communicating with and
17 you're just laying the process on the floor or Scotch
18 taping it to the door is substitute service. You have to
19 have a judge's permission. It has to be based on an
20 effort to have delivery to the defendant in person or by
21 mail.

22 To me the immediate problem is what does
23 delivery to the defendant in person mean, and the reason
24 we're talking about it is because we don't want people to
25 have to touch each other or touch things that other people

1 touched or be so close that they're exposed to a virus,
2 and so to me, really the focus of what we should be
3 talking about is how do we interpret the term "delivery to
4 the defendant in person" or on Rule 176.5, "delivering a
5 copy to the witness." To me we need to solve that
6 problem. Anything else, whether talking to somebody over
7 a Ring Central, with no image or with an image, whether
8 all of that constitutes personal service, to me that's
9 something we should decide separately. Right now we've
10 got to figure out conventionally you hand a piece of paper
11 to somebody, and so you're within an arm's length or at
12 least within two arm's lengths, so can we cure that, can
13 we eliminate the requirement that I be touching something
14 that someone else touches. To me that's the real problem.

15 CHAIRMAN BABCOCK: Right. Yeah. Anybody --
16 anybody else have comments about this?

17 MR. HUGHES: This is Roger Hughes.

18 CHAIRMAN BABCOCK: Hey, Roger.

19 MR. HUGHES: Hi. I want to echo what
20 Richard has said and why it is that we just address the
21 one problem before us. In virtually every seminar,
22 national and local, that I have attended in the past
23 couple of weeks and had to do this Zoom thing, the
24 question that invariably comes up to federal judges and
25 state judges is once this is over is this Zoom stuff for

1 court hearings still going to be the wave of the future,
2 and what has happened and I'm beginning to hear people --
3 judges all say is, well, you know, we're used to it and we
4 can do it, so maybe we're just going to keep it as an
5 option.

6 So I think it's real important that, number
7 one, we address only this problem, that it be a short-term
8 order, and that we wait until we have some at least
9 anecdotal evidence, if not statistical, about what has
10 happened. Because we might suddenly realize it has caused
11 problems we didn't anticipate, but we're going to be
12 setting a kind of precedent for any permanent changes to
13 the rules in general, and I think before we start
14 listening to this, well, it worked during the COVID
15 crisis, why can't it work now kind of arguments, we at
16 least wait until we get some hard data.

17 Now, otherwise for practical suggestions, I
18 think once -- all we should do, and this is where I echo
19 Richard, just address what will be personal service when
20 we have problems with a contagious virus and social
21 distancing, and the only practical addition I would give
22 to the proposal from the subcommittee is to make it clear
23 or shall I say express that it be within -- within the
24 range of sight and hearing, so we don't have the process
25 server saying, "Well, I left it in their mail -- attached

1 to their mailbox 30 feet from the door of the house, and I
2 kind of raised my voice and told them what it was." I
3 think that has to be baked into the rule. Other than
4 that, that's my only comment. And thank you.

5 CHAIRMAN BABCOCK: Yeah, thanks, Roger.
6 Justice Christopher.

7 HONORABLE TRACY CHRISTOPHER: Yes, well, I
8 wanted to echo what Roger says, because one of the things
9 that our subcommittee is already being asked to look at is
10 whether to continue depositions by Zoom, and one of the
11 things that we're looking about there is in terms of a
12 subpoena. If you had to subpoena a witness to show up for
13 a Zoom deposition how that would work, and if we have more
14 time at the end of this meeting, Chip, I'd ask that
15 anybody who wanted to talk about it could stay on if that
16 would be all right.

17 CHAIRMAN BABCOCK: Sure. Yeah. Of course.
18 Anybody else have any comments about 106 or serving
19 subpoenas? Anybody else have any thoughts?

20 Well, Richard, do you want to move for the
21 committee to vote on the subcommittee's recommendation?

22 MR. ORSINGER: I would so move. I noticed
23 that Lamont Jefferson before he left out said he would
24 support the second paragraph of the proposal and not the
25 first one. I don't know if you want to vote on (1)

1 separately from (2) or just vote on both together at one
2 time.

3 CHAIRMAN BABCOCK: Has Lamont left the
4 meeting? Because if he hasn't, maybe he could articulate
5 why he doesn't like one.

6 MR. ORSINGER: I think he left, but I'm
7 assuming that he picked up on Stephen Yelenosky's comment
8 that this might suggest to someone that they should be
9 personally touching someone.

10 CHAIRMAN BABCOCK: Yeah.

11 MR. ORSINGER: We don't need -- you know, I
12 don't think the subcommittee intended for physical contact
13 between the two bodies. I think it was assumed the
14 closest you would get is you would hold a piece of paper
15 that the other person took from your grasp, but there
16 could be an accidental touching, but we certainly don't
17 want to encourage touching. This whole point is to avoid
18 touching.

19 CHAIRMAN BABCOCK: Well, that's
20 post-pandemic. I mean, I was in favor of a rule where the
21 process servers would give a little hug after they served
22 the defendant, but didn't go anywhere. Judge Yelenosky I
23 think has got his hand up. He does.

24 HONORABLE STEPHEN YELENOSKY: Yeah. Yeah, I
25 read my point on that. I think somebody else echoed it,

1 which is just for purposes of drafting, (1) is encompassed
2 within (2), and personal touching to me means touching
3 somebody. So if you want to use something about, well,
4 you don't have to do this, then it should be you don't
5 have to hand the paper to somebody hand-to-hand. Anyway,
6 if we're voting on anything that talks about what a
7 process server can do, not what they must do, when I vote
8 against it, I'm voting against it because it's not a
9 requirement that would protect the person being served.

10 CHAIRMAN BABCOCK: Frank.

11 MR. GILSTRAP: With regard to number (1), I
12 think what we were trying to get at was the fact that even
13 though the rule doesn't strictly literally require it,
14 delivery in person has always meant handing the paper to
15 the other person and having that person take it in his
16 hand. I think we might could say -- we could modify (1)
17 to say it doesn't require hand-delivery, and I think that
18 would address the problem.

19 CHAIRMAN BABCOCK: Okay. Any other
20 comments?

21 MR. MUNZINGER: Chip?

22 CHAIRMAN BABCOCK: Yeah.

23 MR. MUNZINGER: This is Richard Munzinger.
24 I'm not on video, just on audio. Whatever we end up
25 saying, using words like "hand-delivery" suggests that you

1 hand it to somebody. I've always -- I don't want to say
2 I've always, but I do believe that if a person refused to
3 accept something that had been identified to him or her as
4 a summons or citation or subpoena, dropping it in the
5 person's presence or laying it on his desk or dropping it
6 on the floor, having identified what it is, is sufficient
7 service. Otherwise, there's no -- the person being served
8 can stop justice in its tracks, and that's certainly not
9 what's required.

10 But in any event, the only other comment I
11 would make is if we were to vote on (1) and (2) as
12 proposed, I would have to vote "no" because of the
13 touching words that are in there because I don't believe
14 there is any requirement for touching. I think if it is
15 done within a reasonable distance to that a reasonable
16 person would believe that you could both see and hear with
17 emphasis on the nature of the transaction is what's
18 required because I can see and hear you from -- I can't
19 hear, but I can see you from 50 or 75 feet, and if I'm
20 talking to you over traffic, well, I could see him and
21 hear him, but it has to be -- it seems to me that if it's
22 going to be seeing and hearing it has to be with some
23 reference to the nature of the transaction. I'm finished
24 speaking.

25 CHAIRMAN BABCOCK: Thanks, Richard. On the

1 subcommittee's proposal on (1), the objection is you don't
2 want it to say "delivery does not require personal
3 touching of the person being served" because it implies
4 that but for this you do have to touch them? That's the
5 problem? Frank.

6 MR. GILSTRAP: Yes, I think that's the
7 problem. With regard to what Richard Munzinger says, he
8 is correct, but all of -- as the cases that Professor
9 Carlson sent out, which were right on point, drop service
10 is only allowed if the person refuses hand-delivery, and
11 what we're doing with this rule is we're getting rid of
12 that requirement that they refused hand-delivery. In
13 those circumstances you can do drop service if the other
14 requirements are met, and those are, as the cases say,
15 it's got to be deposited in an appropriate place in the
16 presence or near the defendant or a place where he's
17 likely to find it. He's also got to be informed of the
18 nature of the process and that service is being attempted.

19 CHAIRMAN BABCOCK: So would the objection be
20 cure and --

21 (Extraneous background conversation)

22 THE REPORTER: Hold on.

23 CHAIRMAN BABCOCK: Yeah, I don't think that
24 was me, but maybe it was. Would the problem be solved if
25 we said, "Delivery does not require hand service" or

1 "service by hand"? Is that what you're trying to get at?

2 MR. GILSTRAP: "Delivery of person doesn't
3 require hand-delivery." I think that would do it.
4 Because the rule talks about "in-person delivery." We're
5 just interpreting that to say it doesn't require
6 hand-delivery.

7 CHAIRMAN BABCOCK: Judge Yelenosky, would
8 that solve your problem? And then Nina.

9 HONORABLE STEPHEN YELENOSKY: Well,
10 assuming, I guess, you're saying that it doesn't require
11 it and, therefore, the process server being faced or
12 rather not faced with somebody because they won't answer
13 the door or whatever, they know they can do something
14 different, but I would like it to require something
15 different from the get-go rather than, "Well, you can do
16 this, process server, if you want," but they shouldn't be
17 doing it without a mask. If we're going to have personal
18 service, they shouldn't be doing it without a mask. They
19 should not be, you know, trying to hand it to somebody.
20 Like I said, I'd run the other direction, and somebody
21 might call that avoiding service, but my point is just
22 nothing is required of the process server any differently
23 from what they do now. It's just an option.

24 CHAIRMAN BABCOCK: Yeah. Nina.

25 MS. CORTELL: The reason the first proposal

1 is worded the way it is because of the wording of the
2 rule itself, which says that you can serve by delivering
3 to the defendant in person. There's nothing in the rule
4 that really says you have to physically touch the person
5 or not, but that seemed to be the concern of the servers,
6 which led to the whole question being posed to the
7 subcommittee. So that's all that (1) was intended to do
8 is to release them of that perceived burden, whether it's
9 real or not, to provide comfort in that area.

10 I'm comfortable -- I think I suggested the
11 wording for the first one for that reason. I hear what
12 the committee is saying. I think you can -- I think it is
13 subsumed in the second if people want to just go with that
14 one. I'm okay either way. I'm sensitive to also Steve's
15 point about what we should be requiring, but that's not
16 what I perceived to be within the scope of what we're
17 about here, but, again, if you want to, then you can make
18 a reference to CDC guidance, that any service should be
19 compliant with CDC guidance.

20 CHAIRMAN BABCOCK: Yeah. I think I'm a
21 little sympathetic to the notion that not only the CDC,
22 but the states and the counties and the cities are
23 changing requirements all the time. I think that -- you
24 know, for example, on temperatures when you take people's
25 temperature, if they're elevated above 100.4 degrees, I

1 think that's the CDC standard. Well, last Friday San
2 Diego County in California lowered that by almost half a
3 degree. Now in San Diego if you take a temperature and
4 it's over 100 degrees then you've got to, you know, ship
5 them off to a clinic or something. So for us by rule to
6 get into guidelines might be -- might be tricky because
7 not everybody is following the CDC guidelines. And
8 somebody has their hand up, which is Stephen again. Go
9 ahead, Stephen.

10 HONORABLE STEPHEN YELENOSKY: Well, I seem
11 to be the lone voice on this, so I apologize, but, sure,
12 the rule doesn't say that we can require anything of
13 process servers. I don't know whether the rule requires
14 anything that the Supreme Court has required us to do in
15 the last 17 emergency orders. They've said you can't
16 evict somebody, so I'm not particularly concerned about
17 the propriety of saying something that we couldn't say
18 otherwise; and as far as what process servers can do, I
19 mean, aren't they subject to the same requirements that
20 I'm subject to under Travis County rules, City of Austin
21 rules, as well as any state rules? So us not saying
22 anything about it doesn't seem to me to solve the problem,
23 and it's exactly the failure to be clear about what we
24 want from process servers and what we don't want from
25 process servers that I think is -- would be a failing of

1 this rule.

2 And, again, if there's a concern about
3 things changing, make it more generic. Say, you know, "in
4 compliance with all legal requirements and CDC guidance."
5 I don't know, but it seems to me to say, well, we'll throw
6 up our hands because things might change is not the
7 approach.

8 CHAIRMAN BABCOCK: Judge Estevez, and then
9 Richard, who appears to be "number two."

10 HONORABLE ANA ESTEVEZ: Well, my only
11 concern about telling the process servers what they need
12 to do is that they go all over, like especially here, all
13 over the country, all over -- you know, all over the
14 states. One county is -- the requirements for one county
15 and one city is different from the other one. I don't
16 know that it's even easy to find what those requirements
17 are for people if they haven't been watching all of the
18 news. So I think that it wouldn't be appropriate to state
19 whatever the CDC guidelines are because there's counties
20 that aren't -- I mean, I've got -- I think I still have
21 three counties now, out of the top 45 at least two that
22 don't have one COVID case, so they've had no one, and the
23 courthouse has never closed, and people -- service of
24 process continued, and they're not concerned about masks,
25 and, you know, to put that standard on them when they

1 won't even be aware of what it may be if they're leaving
2 the county to serve someone, you know, their home county,
3 depending on who they're serving, I think is just a high
4 burden. I'm not opposed to something very broad that just
5 says appropriate -- "appropriate safeguards due to the
6 circumstances," which might mean social distancing, might
7 mean a mask, might mean -- I mean, they're even saying the
8 masks are now hurting people's health, so, you know, I
9 don't feel comfortable imposing those type of regulations
10 on a -- on someone that's serving process.

11 CHAIRMAN BABCOCK: Thanks. Richard, and
12 then Roger.

13 MR. ORSINGER: Well, actually, I didn't
14 raise my hand, Chip, but it does seem to me that we
15 shouldn't pick the Center for Disease Control as the
16 governing standard if we're going to refer to a standard.
17 The legally binding standards are the ones by your mayors,
18 your county judges, and your governors, and so I would
19 never want the Supreme Court to say that you should follow
20 the CDC guidelines if they were to ever vary from the
21 proclamations from the Governor or the county judge or the
22 mayor.

23 CHAIRMAN BABCOCK: Yeah, that was the point
24 of my San Diego story, but you're right about that, I
25 think, Richard. Roger.

1 HONORABLE STEPHEN YELENOSKY: He's muted.

2 CHAIRMAN BABCOCK: Roger, you're muted.

3 MR. HUGHES: I favor the committee's
4 proposal number (2) because it solves the exact problem we
5 need to address right now and doesn't go too far afield,
6 but more important, it tells process servers if they want
7 to serve process, this will be sufficient to count as
8 personal service. You don't need to go in and file an
9 affidavit and a motion for substitute service. You comply
10 with this, it's personal, it counts as personal service in
11 these particular times. And it also, I think, is helpful
12 for the judge so the judge will know that if it fits
13 within these parameters it was personal service. It
14 wasn't some goofy form of substitute service that required
15 an affidavit. So that's what I favor. Thank you.

16 CHAIRMAN BABCOCK: Great. Anybody else?

17 Are we ready to vote? Okay. Let's do it this way.

18 Everybody who is in favor of subparagraph (1) as written,
19 okay, subparagraph (1) as written, raise your hand so I
20 can see it. I can't see anybody's hand other than Nina's,
21 which may mean nobody is raising their hand.

22 MR. ORSINGER: Why don't we do --

23 CHAIRMAN BABCOCK: I see Nina's got a hand
24 up. Let's see who else does.

25 MR. ORSINGER: Chip?

1 CHAIRMAN BABCOCK: And Scott does, Orsinger
2 does. This is not a good way to do it.

3 MR. ORSINGER: What about participants
4 voting? Raise it electronically.

5 HONORABLE STEPHEN YELENOSKY: You can do
6 reaction, thumbs up or thumbs down. Vote reactions.

7 CHAIRMAN BABCOCK: Okay. Can we do that?
8 Participant voting?

9 HONORABLE STEPHEN YELENOSKY: We can do
10 that.

11 MR. ORSINGER: If you click "participants."

12 CHAIRMAN BABCOCK: Right.

13 MR. ORSINGER: Open up a window, in the
14 lower righthand corner it says "raise hand" and the
15 moderator can see all of the raised hands.

16 CHAIRMAN BABCOCK: Okay. I'm not the
17 moderator. Pauline is, I think. Right, Pauline?

18 MS. EASLEY: Correct. But you'll also see
19 because I've made you co-host, Chip, so you'll see the
20 hands go up as well, and Marti and Jackie should be able
21 to see them, so we can get an accurate count.

22 CHAIRMAN BABCOCK: All right.

23 MR. ORSINGER: Does everybody know how to
24 raise your hand electronically? Does anyone not know?
25 Lisa, did you say you did not know?

1 MS. HOBBS: Why do I not -- is it by
2 reactions?

3 PROFESSOR CARLSON: No.

4 MS. EASLEY: If you'll click on
5 "participants" down at the bottom and it should come up
6 with a list of participants, and it will say "raise your
7 hand."

8 PROFESSOR CARLSON: On the righthand side.

9 MS. HOBBS: Got it, got it, got it. Sorry.

10 MR. ORSINGER: Anybody else need help on
11 raising hand electronically?

12 CHAIRMAN BABCOCK: Well, the Chair doesn't
13 vote, so I don't need help, but I don't see it on mine.

14 MR. ORSINGER: If you double click on
15 "participants," which has 39 participants, it has two
16 little people there with "39." If you double click on
17 that, it opens a window.

18 CHAIRMAN BABCOCK: I've got that, but I
19 don't --

20 MR. ORSINGER: Right there in the corner,
21 "raise hand."

22 MS. DAUMERIE: Chip, this is Jackie. As a
23 host you cannot raise your own hand.

24 CHAIRMAN BABCOCK: Okay.

25 MR. ORSINGER: Uh-oh. I hope we don't have

1 a tie.

2 CHAIRMAN BABCOCK: I see that Bobby has got
3 his hand raised, but I don't see anybody else.

4 MR. ORSINGER: Judge Wallace.

5 MS. EASLEY: So are we currently voting, or
6 are people just testing out to make sure they can raise
7 their hand?

8 MR. ORSINGER: I think we're voting on
9 paragraph (1).

10 CHAIRMAN BABCOCK: We're voting on paragraph
11 (1) as written. Now I can see some hands. So everybody
12 who's in favor of paragraph (1) as written, vote now.
13 Orsinger, Phillips, Stolley, Levy, okay. I only count
14 four. Pauline, how many do you count in favor?

15 MS. EASLEY: I count five currently.

16 CHAIRMAN BABCOCK: Yeah. Somebody just --
17 okay. I count five, too.

18 MS. EASLEY: Okay. So I'll go ahead and
19 lower the hands and then you can take the next vote.

20 MR. ORSINGER: No, we have a negative vote.
21 We have a negative vote, don't we?

22 CHAIRMAN BABCOCK: Yeah, so it's five in
23 favor and everybody else against. As written. Now, what
24 if we --

25 MR. ORSINGER: Wait, wait, wait. That's not

1 necessarily true. Normally you have people vote "no."
2 There may be some people that are not voting "yes" or
3 "no."

4 HONORABLE STEPHEN YELENOSKY: How are people
5 voting who are only on by phone?

6 MR. ORSINGER: So now we call for the nay
7 vote. We have the yay vote. Call for the nay vote.
8 Everyone that's against it, raise your hand. That's the
9 way you would do it.

10 CHAIRMAN BABCOCK: Okay. Yeah. That's a
11 good point. All right. Everybody against it, raise your
12 hand.

13 I've got 18 against.

14 MS. EASLEY: All right. I have 19.

15 CHAIRMAN BABCOCK: All right. What's one
16 vote among friends. So you have 6 in favor and 19
17 against?

18 MS. EASLEY: I have 5 in favor and 19
19 against.

20 CHAIRMAN BABCOCK: Okay. Five in favor and
21 19 against. Okay. So that's as written.

22 What if we changed it to delete "personal
23 touching" to "hand-delivery." In other words, it would
24 say, "Under Rule 106 and Rule 176 delivery does not
25 require hand-delivery of the person being served." How

1 many people would be in favor if we did that? Raise your
2 hand.

3 Okay. I got 14, Pauline.

4 MS. EASLEY: Yeah, me too.

5 CHAIRMAN BABCOCK: Everybody who is against
6 subpart (1) as modified, raise your hand. Everybody
7 opposed.

8 HONORABLE STEPHEN YELENOSKY: Pauline, you
9 didn't clear.

10 CHAIRMAN BABCOCK: You didn't clear it,
11 Pauline.

12 MS. DAUMERIE: It takes just a minute to
13 clear them, so --

14 CHAIRMAN BABCOCK: Okay.

15 MS. DAUMERIE: She has to do it
16 individually.

17 CHAIRMAN BABCOCK: No problem.

18 MS. EASLEY: Okay. So if everyone can vote
19 again.

20 CHAIRMAN BABCOCK: All right. Everybody
21 opposed, raise your hand.

22 I've got six opposed. Is that what you've
23 got, Pauline?

24 MS. EASLEY: Two more came in. It's eight.

25 CHAIRMAN BABCOCK: So 14 in favor, 8

1 opposed. Okay. Lower the hands.

2 Now we're going to take a vote on subpart
3 (2). Everybody in favor of subpart (2), raise your
4 hand.

5 I got 26. Pauline, what did you have?

6 MS. EASLEY: 26.

7 CHAIRMAN BABCOCK: All right. Now we're
8 getting the hang of it. So clear that and then everybody
9 opposed, raise your hand. After the prior vote is
10 cleared. It will take a while to clear 26.

11 MS. EASLEY: Okay.

12 CHAIRMAN BABCOCK: Okay. Everybody opposed,
13 raise your hand.

14 I've got one. Pauline, what about you?

15 MS. EASLEY: One.

16 CHAIRMAN BABCOCK: Okay. 26 to 1. That one
17 is a little lopsided. So there we are in that. We have
18 voted. We have discussed. I'm not sure we have
19 conquered, but we are here. So any other comments about
20 these? And thanks for the quick work, Richard and
21 subcommittee, great and timely.

22 MR. ORSINGER: Actually, it was easier for
23 us to put this Zoom meeting together than it was any
24 conference call I've ever tried in 25 years.

25 CHAIRMAN BABCOCK: So you're a Zoomer, are

1 you?

2 MR. ORSINGER: We all are.

3 CHAIRMAN BABCOCK: We're all Zoomers. Okay.

4 Justice Christopher wondered if anybody was interested in
5 talking about post-pandemic Zoom depositions. Is that a
6 fair description of what you were thinking about talking
7 about, Judge?

8 HONORABLE TRACY CHRISTOPHER: Yes. I think
9 Bobby's on the phone, but I think our subcommittee, the
10 discovery subcommittee, was asked to look into that, and
11 we haven't had an opportunity for our subcommittee to meet
12 yet, so I thought maybe the members of our subcommittee
13 that are still on the call can stay on, and if anybody
14 else wants to stay on, they could stay on and we could
15 chat about it.

16 CHAIRMAN BABCOCK: Okay. We can release Dee
17 Dee.

18 HONORABLE TRACY CHRISTOPHER: Right.

19 CHAIRMAN BABCOCK: And we can release Marti.
20 Pauline, you may have to stay on in case of trouble.

21 MS. EASLEY: Correct. So as soon as the
22 meeting is over, I'll stop recording and livestream so
23 that way you-all can have a discussion.

24 CHAIRMAN BABCOCK: Okay. That will be good,
25 and, Pauline, if I leave this, that won't shut them down

1 as long as you stay?

2 MS. EASLEY: Correct.

3 CHAIRMAN BABCOCK: Okay. Good. Anybody
4 else got anything to say while we're still in the SCAC
5 meeting and live?

6 HONORABLE ANA ESTEVEZ: I did. I wanted to
7 know -- I know that Stephen had good suggestions regarding
8 the guidelines, and even though I didn't necessarily agree
9 with them, I thought it would be fair to take a vote to
10 include some of that in the draft, too, so --

11 CHAIRMAN BABCOCK: Fine with me. And how
12 would you structure the vote, Judge?

13 HONORABLE ANA ESTEVEZ: Well, whatever his
14 wording was at the beginning. I mean, he stated if he
15 voted against it, it was because he wanted to have either
16 the social distancing or the masks or the requirements,
17 and it may be the Court feels the same way. I don't know.
18 I was just -- I talked against it, but that doesn't mean
19 other people feel differently about it.

20 CHAIRMAN BABCOCK: Well, that's an
21 enthusiastic second to Stephen's proposal.

22 HONORABLE STEPHEN YELENOSKY: That doesn't
23 sound like a second.

24 CHAIRMAN BABCOCK: I'm going to vote against
25 it, but --

1 HONORABLE ANA ESTEVEZ: Well, I mean, I'm
2 very sympathetic. I just have reasons that I don't think
3 it's necessarily workable, but, you know, people disagree
4 with me everyday.

5 CHAIRMAN BABCOCK: Stephen, what do you
6 think? Would you like to frame an issue that we could
7 vote on?

8 HONORABLE STEPHEN YELENOSKY: Oh, I don't
9 know if a vote is appropriate. We have a record of it.
10 If you want something specific that's available for the
11 Supreme Court to consider if they want to go that way,
12 having heard things, it certainly makes sense that it be
13 more generalized than what I suggested, which was, you
14 know, current guidance, and it's going to change. I
15 understand why you don't want CDC. Whether we say it or
16 not, state, local laws are going to apply; and, you know,
17 tough luck for the process servers if they don't know what
18 they are, but they exist. We can't do anything about
19 that.

20 So I guess I'd just say something like
21 process servers -- whatever (2) says, and "while taking
22 appropriate precautions" or some language like that, that
23 makes it a requirement rather than, hey, you can do this;
24 and if it has to be generic, then it would just say this
25 is okay if you do it while taking appropriate --

1 appropriate cautions. I don't know.

2 CHAIRMAN BABCOCK: That's a good thought,
3 and Jackie is on the line, I think, right? Am I right,
4 Jackie? You're somewhere.

5 MS. DAUMERIE: Yes. I'm here, Chip.

6 CHAIRMAN BABCOCK: Okay. If the Court
7 has -- you know, has interest in that, you know, Stephen
8 is sort of our point person on that, and we can even, you
9 know, get back together if you want to do that, too. But
10 you've heard the discussion and so you know the pros and
11 cons, so thank you. Thank you for that.

12 And any other business? Well, if not then
13 thank you everybody for doing this. It's a pretty good --
14 pretty good test run for June 19th. Maybe we'll be a
15 little bit better -- better at manipulating votes and
16 everything else on the 19th when we have our full day
17 committee meeting. But thanks again, and we are now in
18 recess, except for Tracy's group that are going to hang
19 around and talk about that issue. So thanks, everybody.

20 (Adjourned)

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2 **REPORTER'S CERTIFICATION**
MEETING OF THE
3 SUPREME COURT ADVISORY COMMITTEE
(via Zoom videoconference)

4 *

5 *

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7 I, D'LOIS L. JONES, Certified Shorthand
8 Reporter, State of Texas, hereby certify that I reported
9 the above meeting of the Supreme Court Advisory Committee
10 on the 27th day of May, 2020, which occurred via Zoom
11 videoconference and YouTube livestream in accordance with
12 the Supreme Court of Texas' First Emergency Order
13 regarding the COVID-19 State of Disaster, and the same was
14 thereafter reduced to computer transcription by me.

15 I further certify that the costs for my
16 services in the matter are \$ 470.00.

17 Charged to: The State Bar of Texas.

18 Given under my hand and seal of office on
19 this the 31st day of May, 2020.

20
21 /s/D'Lois L. Jones
D'Lois L. Jones, Texas CSR #4546
22 Certificate Expires 04/30/21
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24 #DJ-554

25