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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

February 16, 2007

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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 16th day of February, 2006, between the hours of 8:59 a.m. and 3:35 p.m., at the Texas Association of Broadcasters, 502 East 11th Street, 2nd Floor, 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

07-1 Letter from Justice Hecht (9-22-06)

07-2 Memorandum from Professor Dorsaneo (1-8-07)

07-3 Proposed Amendment to TRAP 39.1

07-4 Letter from David Beck and proposed amendment to Rule 226a (1-22-07)

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CHAIRMAN BABCOCK: Thanks for getting up on this chilly morning and joining us. We are now in session, and Justice Hecht will give us a report on a number of interesting items.

HONORABLE NATHAN HECHT: Well, the Court is working on the electronic access rules. The -- if you followed that issue in the national press, Illinois just came out I guess a few weeks ago, they're taking a pretty conservative approach to access to court records over the internet; and about last fall, late last fall, Florida took a sort of wait-and-see approach. The Federal rules are out, and they apply to all the courts, all the Federal courts, and there's a separate rule for civil courts, criminal courts, bankruptcy courts, and the appellate courts, so that issue has kind of moved along a little bit.

The Court had been a little -- we've kind of taken a wait-and-see approach to see how this is going, because there are just a lot of very sensitive issues that we would like to get right, so the committee's work is not dated at all. In fact, it's kind of ended up in the mainstream of where it looks like things are moving, but you may have seen that there's some consternation in Tarrant County over their access, I think to criminal

court records. So the issue is going to take a while to resolve, but anyway, we should have something finished in a month or so.

There's a lot going on at the Legislature. I'm pleased to report that our cooperative spirit -- a cooperative spirit prevails, and the Legislature is still generally of a mind to vet court operation, procedural type issues through this group to ensure that the rules that are developed will be practical and will get the job done, so we -- the Court thinks that's a very good thing.

Senator Wentworth has several proposals regarding the conduct and treatment of juries that grew out of a conference that he and some of the rest of us attended in October in Houston, put on by the National Center of State Courts, and Steve Susman's firm I think helped with it and maybe some others, and those are not very controversial. They have to do with note taking and those more operational type issues, but Senator Wentworth is a very good friend of this process and is -- wants to make it better.

There is a -- there are a couple of bills that would require the Supreme Court to make rules regarding the electronic filing of all records -- of all civil records in the justice courts, and this would be a rather significant undertaking. I don't know how many

justice courts there are, Tom. 835, I think.

HONORABLE TOM LAWRENCE: Something like that.

HONORABLE NATHAN HECHT: 835 justice courts in 254 counties that file things every different way in the world and have different fee structures and all sorts of things. So if that goes ahead we'll have some work to do in the summer and fall to work on those rules. We're going to have to be heavily advised by the justice courts themselves and technical people that can tell us what can be done, but on the procedural side and the practical side, we want this committee's view of those things, so that continues.

The Texans for Lawsuit Reform have structural proposals mostly that they are advancing in the Legislature this session, and they have to do with evening out jurisdictional anomalies, either making all the county courts district courts or doing something to smooth out the jurisdictional differences. If you've ever looked at OCA's description of the jurisdiction of the county courts in this state, it's about 8 or 10 pages single-spaced, and it's all over the map. Every court -- a lot of courts are different, and the differences don't seem to make much sense. So there's that and a number of other proposals that Senator Duncan is working on.

There is a proposal for the special assignment of complex cases as opposed to multidistrict court cases, but it would follow the same procedure that the MDL panel basically uses, and that's in the very early stages, and we'll see what happens to it, but there is -- there seems to be considerable energy directed to trying to simplify and improve the court system this session and, of course, we're all for that, depending on how it comes out. I guess, if they do away with the Supreme Court we would be less for it, but it is a very comprehensive study that TLR has commissioned. Their foundation did the study, and if you just look at the paper, the paper is a wonderful paper to just give you an idea of what the system looks like in some detail. I think it would be surprising to almost every member of the Bar to know that we have a system of the wonderful complexity that we do. So those are the principle issues, I think. Am I leaving out anything? I think those are the issues in the Legislature so far.

CHAIRMAN BABCOCK: Where is that paper available again?

HONORABLE NATHAN HECHT: It may be on TLR's website. I don't know. It's a pretty big paper. No, it's not that one. That's one of them. They have one, Civil Jury in Texas, but then they have another one, the

Texas Judicial System Recommendations for Rationalization and Reform, which I think is being published, and it will be a great -- replete with maps and diagrams, and it gives you a very thorough understanding of how the Texas judiciary is organized, if that's a good use of that word in that context.

HONORABLE TOM GRAY: Chip?

HONORABLE NATHAN HECHT: So it's not clear how many of these things will go forward, but Chief Justice Phillips and I have begged the Legislature for years to look at some of these issues, to just try to kind of just make things more rational, and a lot of the same work has been done the last few years in California, and they -- it seems to have met with good reaction out there. So anyway, some of that may go forward, but the thing most affecting this group is that the people who are most influential in this process are aware of the committee and its work and anxious to use its resources, so we are pleased by that. Yes, Chief.

HONORABLE TOM GRAY: Chip, in answer to your question, I don't remember if it's the OCA website or the Supreme Court's website that has a link directly to the TLR draft that Justice Hecht is looking at there, so it's easily accessible through one of those two websites, and it's on the front page link in one of those boxes. Jody,

do you remember offhand?

MR. HUGHES: It's not on -- it must be on OCA's.

HONORABLE TOM GRAY: Actually, I thought they put it on your website.

MR. HUGHES: Recently?

HONORABLE TOM GRAY: About two weeks ago.

HONORABLE NATHAN HECHT: It's 135 pages with 945 footnotes, so it will take you a while to get through it, but it's well worth looking at. It's a great -- it's going to be a great resource.

That's all I have.

CHAIRMAN BABCOCK: Great. Anybody else? Any questions for Justice Hecht about anything?

All right. Moving into our first agenda item, this is a continuation of discussion about TRAP Rules 24 and 41 and a proposed new rule regarding sealing of records in the court of appeals, and Professor Dorsaneo is going to lead us through this.

PROFESSOR DORSANEO: Well, actually what it is, is revisiting a memorandum that's been revised several times since at least last October. If you would look at the memo from me to you dated January 8th, we can probably move through this relatively quickly. Some of the items in the memo have been finalized, and I won't -- as

finalized as they get before the Court does something with our recommendations. I won't be talking about them, but the ones that need discussion actually go beyond what Chip mentioned and probably should start with 20.1, which is located in rule -- in Rule 20 when -- how to proceed when a party is indigent.

Now, in Justice Hecht's letter of September 22nd, 2006, he directed us to take a look at a particular issue with respect to 20.1, and we dealt with -- dealt with that. The particular issue was whether something needed to be said about the prior filing of an affidavit of indigence in the trial court pursuant to Rule 145 not meeting the requirements of the appellate rule, 20.1. That's been voted on, discussed and voted on, and it's located in (d)(1) on page three of the memorandum if you want to look at it.

When we started working on 20.1, however, we noted that Rule 145, the companion trial court rule, had been amended in 2005 adding, among other things, a provision for an IOLTA certificate that didn't appear in the appellate rule. So we began working on that, and that's really what I'm going to talk about right now, and 20.1(a) and (c), we did further work after the October meeting on the drafting of the change required by conforming Rule 145, or actually conforming Rule 20,

appellate Rule 20 to Rule 145, and that's what we have before you today.

Initially I drafted a provision concerning an IOLTA certificate that Stephen Yelenosky said is too long in an e-mail to me dated December 7th, said "The draft of (c) has a very long sentence that perhaps could be collapsed by reference to," et cetera; and the choice between the two versions of (c) is before you with that last sentence on the top of page three being included, regardless of whether you want the short version or the longer version. The little adjustment in 20.1(a) was also pointed out to me by Judge Yelenosky, saying that it would be clearer and better to add the words "may not be contested" in order to avoid potential interpretive problems, and I agree with that.

So I guess the issue, Mr. Chairman, is what version of (c) and does anybody see a problem with adding that "may not be contested" language into (a)? I don't think it -- I don't care which version of (c). Stephen's language is fine as far as I'm concerned.

CHAIRMAN BABCOCK: Yeah. Any discussion on (c)? There's two versions in this memo on 20.1(c). Anybody have any thoughts about that?

Well, shorter is better to me. Judge Yelenosky, is the second version the one that you thought

of?

HONORABLE STEPHEN YELENOSKY: Yes. I think it suffices, and more importantly, Bill Dorsaneo thinks it does, so if shorter is better I can't see --

PROFESSOR DORSANEO: Well, you know more about this business than any of us, so that's why --

HONORABLE STEPHEN YELENOSKY: Well --

PROFESSOR DORSANEO: -- it makes sense to defer to you.

HONORABLE STEPHEN YELENOSKY: Well, I drafted the shorter version, and I believe it meets the same purpose and says the same thing as (c) and is easier to understand.

CHAIRMAN BABCOCK: Okay. Any other comments about that?

Judge Patterson.

HONORABLE JAN PATTERSON: I have a mild preference for the second one just because it looks as though the first one is so carefully delineated that it's trying to exclude something, so I think if the second one covers what the first one does that it makes more sense to me.

CHAIRMAN BABCOCK: Okay. Judge Gray.

HONORABLE TOM GRAY: In the -- after the comma in the short version it says, "The attorney who

filed the certificate may file an additional IOLTA certificate." I think that may build into a problem if you change attorneys, it would seem. It seems to require the same attorney to file the -- both certificates, and that's probably an unintended consequence or unintended effect.

HONORABLE STEPHEN YELENOSKY: I agree. I agree with that. It could say "an attorney who filed." It could just say, "An attorney may file an additional IOLTA certificate."

HONORABLE TOM GRAY: Or take out the first five words. "Another certificate may be filed" or may -- well, that won't work.

HONORABLE SARAH DUNCAN: Yeah.

HONORABLE TOM GRAY: Something of that nature.

HONORABLE SARAH DUNCAN: Pass it, because we don't care who filed it.

CHAIRMAN BABCOCK: Yeah. Good point. So how would you fix that, Judge?

HONORABLE TOM GRAY: Take everything out up until "an additional," so that you would take out from the comma to the word "filed," or you could even change the word "an additional" to "a supplemental IOLTA certificate confirming" so that it would read something like "If the

appellant proceeded to the trial court without payment of fees pursuant to an IOLTA certificate, a supplemental IOLTA certificate confirming that the IOLTA-funded program rescreened" --

CHAIRMAN BABCOCK: I assume that IOLTA has one form, right, Judge Yelenosky?

HONORABLE STEPHEN YELENOSKY: Well, there's only --

CHAIRMAN BABCOCK: I mean, do they have a supplemental form?

HONORABLE STEPHEN YELENOSKY: Well, there is a form. I don't know that -- I mean, there may be variations on the form. The screening is prescribed by law such that we don't need to restate what it is.

CHAIRMAN BABCOCK: I sort of like "additional" instead of "supplemental" frankly.

HONORABLE TOM GRAY: And I'm not wed to the "supplemental."

CHAIRMAN BABCOCK: Okay. Any other comments?

MR. LOW: Chip?

CHAIRMAN BABCOCK: Buddy.

MR. LOW: One thing, and I know nothing about this, but Bill's original version does have, you know, "without legal fees in the trial court, without

contingency." The other one, what if you got a contingency? You don't pay any fees in the trial court, in other words, but you have a contingency and maybe they get money, you know, if they win it on appeal or something like that. I don't know if that means anything or not, but the original version does have "without a contingency," and we don't refer and maybe it doesn't matter we don't.

CHAIRMAN BABCOCK: Would IOLTA certify if there is a contingent fee arrangement?

MR. LOW: I don't know. That's what I'm saying, I don't know.

HONORABLE JAN PATTERSON: Doesn't the form cover something about that?

HONORABLE STEPHEN YELENOSKY: Well, yeah, the shortened version, I don't think you can -- I don't have it in front of me, but one of the things that you're saying in the certificate is that you're providing free legal services without contingency.

MR. LOW: Okay. Well, then if it's taken care of there, there is no reason to do it again. I just noted that one had that provision and the other one did not, and if there's a reason, there's no problem.

CHAIRMAN BABCOCK: Justice Jennings.

HONORABLE TERRY JENNINGS: The version I'm

looking at it, it says, "if the appellant." Do we mean "if the party"?

MR. LOW: Yeah.

PROFESSOR DORSANEO: Well, it's going to be an appellant here.

HONORABLE TERRY JENNINGS: Oh, just in this circumstance?

HONORABLE STEPHEN YELENOSKY: Yeah. Yeah.

CHAIRMAN BABCOCK: Okay. Any other comments?

PROFESSOR DORSANEO: So, for the record, it would say, "If the appellant proceeded in the trial court without payment of fees pursuant to an IOLTA certificate, an additional IOLTA certificate may be filed confirming" -- "may confirm"?

CHAIRMAN BABCOCK: Yeah.

PROFESSOR DORSANEO: Just what do you like?

HONORABLE NATHAN HECHT: Why don't you say, "An appellant who proceeded in the trial court without payment of fees pursuant to" -- "may file an additional IOLTA certificate."

CHAIRMAN BABCOCK: Yeah.

HONORABLE STEPHEN YELENOSKY: Well, the only point I'd make about that is the certificate has to be an attorney's certificate under Rule 145, so, I mean, it is

essentially the appellant, it's on their behalf, but it is an attorney certificate.

CHAIRMAN BABCOCK: How about "his counsel," or "his or her counsel"? "Counsel may file an additional IOLTA certificate." Does that work?

PROFESSOR DORSANEO: I'd like to go back, "if the appellant proceeded," but all I'm worried about is "may be filed confirming" or "may confirm," do we make it clear that it's filed? I think so. Next subject?

CHAIRMAN BABCOCK: Yeah. The next subject is if anybody has got a car with a California license plate that is parked in the church parking lot, anybody guilty of that? Because if you have such a car --

HONORABLE STEPHEN YELENOSKY: Guilty of having a California plate or guilty of parking?

CHAIRMAN BABCOCK: California license plate on the car that's parked in the church parking lot. It's about to be parked somewhere else pursuant to a truck towing it somewhere.

HONORABLE TOM GRAY: Buddy, are you going to move your car?

MR. LOW: I'm just going to get you some coffee.

CHAIRMAN BABCOCK: Okay. So that's not us hopefully. Okay. Next subject, Bill, 20.1(a), "the

language may not be contested," is that something we should talk about?

PROFESSOR DORSANEO: Yeah. You want to explain that, Stephen?

HONORABLE STEPHEN YELENOSKY: Well, the way it reads without that is "the claim of indigence is not contested or if contested was not sustained." Well, if you did a Rule 145 in the trial court you can't contest it.

PROFESSOR DORSANEO: Right, because of the IOLTA certificate.

HONORABLE STEPHEN YELENOSKY: Right. So it needs to refer to that possibility.

CHAIRMAN BABCOCK: Okay. Is there a reason to have after 20.1(a)(1) an either "and" or an "or"? What's the intent of this rule with respect to subparts (1) and (2)?

HONORABLE STEPHEN YELENOSKY: "And."

PROFESSOR DORSANEO: Let's see. What's it say?

CHAIRMAN BABCOCK: You've got to file an affidavit and then it's either got to be not contested, can't be contested, or the judge has denied the contest.

HONORABLE SARAH DUNCAN: Actually, the rule has three parts.

PROFESSOR DORSANEO: Yeah.

HONORABLE SARAH DUNCAN: One, two, three.

PROFESSOR DORSANEO: Then there's another "and" after that.

HONORABLE SARAH DUNCAN: And the "and" is after the second part.

PROFESSOR DORSANEO: There is another -- it shouldn't be -- there shouldn't be a period after (2). That misled you. It says "and" after (2).

HONORABLE SARAH DUNCAN: It's semicolon after (1), a semicolon "and" after (2), and then (3), "the party is."

HONORABLE STEPHEN YELENOSKY: That does bring to mind, though, another potential incongruity. If, in fact, if you're using an IOLTA certificate that's all you're using. You don't have to combine that with an affidavit of indigence. Isn't that right? And if that's right then (1) needs to say, "The party files an affidavit of indigence or an IOLTA certificate." Does somebody have 145 in front of them? I don't think you file an affidavit of indigence if there's no certificate, but it may be that you file both.

CHAIRMAN BABCOCK: Any other comments about this?

PROFESSOR DORSANEO: I think that's right.

CHAIRMAN BABCOCK: Is that right, Bill? Steve.

MR. TIPPS: I think the term "may not be contested" is ambiguous. Frankly, when I first read it I thought we were trying to say there was a possibility that it may not be contested in the future.

HONORABLE SARAH DUNCAN: Right. Me, too.

MR. TIPPS: I would suggest -- now that I understand the goal, I would suggest we say "the claim of indigence is not contested," comma, "is not contestable," is that the word, comma, "or if contested, the contest --"

HONORABLE STEPHEN YELENOSKY: That makes sense.

CHAIRMAN BABCOCK: Okay. What else?

PROFESSOR DORSANEO: Maybe we ought to take a look at (d)(3). I don't remember now whether -- whether the committee voted on the (d)(3) language, an extension of time. I remember that we discussed it, but I don't know whether we voted on it.

HONORABLE STEPHEN YELENOSKY: If I could, just before you get to that, I confirmed that my thought was wrong. You do file an affidavit of indigency and an IOLTA certificate, so 20.1(1) is fine.

MR. HUGHES: The last sentence of paragraph (c), 145.

CHAIRMAN BABCOCK: It appears that we did vote on (d) last time, but it wouldn't hurt to look at it one more time. Anybody have any other comments about (d)? 20.1(d)? Stephen, you -- Judge Yelenosky, you were charged with making a call to Legal Aid the night of our vote to see if there's any problem.

HONORABLE STEPHEN YELENOSKY: Yeah, I was able to call them actually during that last meeting, and they couldn't see any problem with the rescreening.

CHAIRMAN BABCOCK: Okay. Very well. Any other comments on (d)(3)? Going once, going twice, sold. You all right, Bill? You want to go on to the next one?

PROFESSOR DORSANEO: Yes. We may need to add a sentence to (b), though.

CHAIRMAN BABCOCK: To (b)?

PROFESSOR DORSANEO: To (b). 145(b) ends with the words "if the party is represented by an attorney on a contingent fee basis due to the party's" -- no, it goes -- (b) in 145 seems to talk about -- what's troubling me is the IOLTA certificate is not mentioned in the contents of the affidavit in 20.1(b), and I'm trying to see whether that's the same in 145(b).

HONORABLE STEPHEN YELENOSKY: I don't see any reference to the IOLTA certificate until you get to (c) in 145.

PROFESSOR DORSANEO: Yeah. That may be a problem in 145 and in 20.1.

HONORABLE STEPHEN YELENOSKY: Why?

PROFESSOR DORSANEO: Well, you said you file both, and that's --

HONORABLE STEPHEN YELENOSKY: If you look at the --

PROFESSOR DORSANEO: That seems like it makes sense because the affidavit of indigence is referenced in the very first -- in (a) as the kind of getting off the starting path.

HONORABLE STEPHEN YELENOSKY: Right.

PROFESSOR DORSANEO: But if you changed it by the addition of the language "or an IOLTA certificate," I don't think that would be so.

HONORABLE STEPHEN YELENOSKY: In 20.1(1)?

PROFESSOR DORSANEO: Yes.

HONORABLE STEPHEN YELENOSKY: Yeah, and that's why I was suggesting you don't need to change 20.1. After I saw (c) in 145 that you file both, the same would be true in the appellate court, and 20.1 could refer to just affidavit of indigency because you're going to have to file it regardless.

PROFESSOR DORSANEO: What I'm getting at, do you think it's a good idea to be required to file both?

HONORABLE STEPHEN YELENOSKY: Oh. I hadn't thought about that. I guess that's really a policy question, but nobody's had a problem with --

PROFESSOR DORSANEO: All right.

HONORABLE STEPHEN YELENOSKY: -- filing both.

PROFESSOR DORSANEO: Okay. I'm just saying it could be drafted to only file, you know, one or the other; and the change, I think, would just be to add the words "or an IOLTA certificate" in (a); but if you're happy with it, if it works fine, why do it differently.

HONORABLE STEPHEN YELENOSKY: Well, I mean, the attorney is representing in the screening, and the screening is dependent upon the veracity of what the client says in part, at least. Now, if they're getting governmental entitlements then it's pretty much confirmed, or at least the Federal government has determined that they're true, but if perhaps you don't have governmental entitlement then the IOLTA screening is really dependent upon the veracity of what the client says, and so the opposing party might very well want them to swear to it, and you're not going to get that from the IOLTA certificate. You're only getting the attorney's representation.

PROFESSOR DORSANEO: We have this long

affidavit with lots of information, though, and what it says can't be contested. It makes me wonder why we're going through that drill, and you say, okay, the attorney who's doing the IOLTA certificate would want an affidavit to be done.

HONORABLE STEPHEN YELENOSKY: Well, the opposing party might, because otherwise the attorney certificate can be true, but yet the underlying facts aren't true. At least you have the party represented by the IOLTA attorney swearing that their income is as low as they've represented it.

PROFESSOR DORSANEO: Okay.

HONORABLE STEPHEN YELENOSKY: Otherwise you don't have anybody subject to perjury.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: Are we on (d)(3)?

PROFESSOR DORSANEO: Yes.

MR. HAMILTON: To me that's a very cumbersome sentence, "must allow the appellant a reasonable time to correct the appellant's failure to file." Does that just mean reasonable time to file? How do you correct the failure to file other than by filing?

And then the next sentence says, "or the appellant's failure to file a sufficient affidavit." Can't we just say that "must allow an appellant a

reasonable time to file a sufficient affidavit"?

PROFESSOR DORSANEO: The cumbersome character of the language is probably dictated by the *Higgins vs. Randall Sheriff's Office* opinion.

HONORABLE NATHAN HECHT: Of course.

CHAIRMAN BABCOCK: Who decided that?

HONORABLE NATHAN HECHT: That's between you and me, but --

PROFESSOR DORSANEO: I don't mean that -- but the facts of that case are --

CHAIRMAN BABCOCK: Will you guys take this outside, please? Just kidding.

PROFESSOR DORSANEO: The facts of the case were, if I remember, there was -- was there something filed that wasn't sufficient or --

HONORABLE NATHAN HECHT: I don't remember.

PROFESSOR DORSANEO: Yeah.

HONORABLE TOM GRAY: It was a case that was dismissed because the affidavit was not filed with the notice of appeal as the rules require; therefore, there wasn't -- you can't fix that if it wasn't actually done; and the Court extended the concept of letting them fix it to filing one that had never been filed.

PROFESSOR DORSANEO: All right. So that's why it says "must allow the appellant a reasonable time to

correct the appellant's failure to file or appellant's failure to file a sufficient affidavit." That's why it says both things. Now, maybe it doesn't need to.

HONORABLE STEPHEN YELENOSKY: Well, it could in a much shorter way, couldn't it? Couldn't it just say "must allow the appellant a reasonable time to correct the appellant's failure to file an affidavit or a sufficient affidavit of indigence," period? The remainder of the sentence is pretty much unnecessary, isn't it? If you must do that, you can't dismiss the appeal obviously.

PROFESSOR DORSANEO: I don't suppose it really needs to refer to Rule 44.3. That's the justification in the opinion for doing it, but if the rule says it here, why would it need to be said -- why would anything more need to be said?

HONORABLE STEPHEN YELENOSKY: Right.

PROFESSOR DORSANEO: You're on a roll here. What language do you think would be better?

HONORABLE STEPHEN YELENOSKY: "Must allow the appellant a reasonable time to correct the appellant's failure to file an affidavit or a sufficient affidavit of indigence," period.

HONORABLE JAN PATTERSON: If you said it "must allow a reasonable time to cure the appellant's failure to file a sufficient affidavit," wouldn't that

include failure to file an affidavit at all, or does that raise that question? Couldn't you just say one without including both? I think we have the rules that do that.

PROFESSOR DORSANEO: Uh-huh.

CHAIRMAN BABCOCK: Stephen, will you --

HONORABLE TRACY CHRISTOPHER: I think that raises an ambiguity.

CHAIRMAN BABCOCK: Would you keep the language about before dismissing the appeal or do you think that that's redundant?

HONORABLE STEPHEN YELENOSKY: Well, I don't think it's redundant, but it's unnecessary because if they must do that then they can't do bad things before they do it.

CHAIRMAN BABCOCK: Yeah. So you would just put a period after?

HONORABLE SARAH DUNCAN: Well, if I can argue the contrary --

CHAIRMAN BABCOCK: Sure.

HONORABLE STEPHEN YELENOSKY: This is your expertise, so --

HONORABLE SARAH DUNCAN: Well, it just seems to me that what is a reasonable time is informed by the last clause. A reasonable time means at the very least before you dismiss or take some action on the judgment,

because otherwise a reasonable time could be, you know, three days is a reasonable time.

CHAIRMAN BABCOCK: Right. Right.

HONORABLE SARAH DUNCAN: In the abstract, but this is saying a reasonable time in this context means at some time before you take action on the judgment on appeal.

HONORABLE STEPHEN YELENOSKY: But -- well, wouldn't it necessarily entail before that? It wouldn't tell you how long, but if you must allow it by taking any action on appeal without allowing it to happen, haven't you --

HONORABLE SARAH DUNCAN: But that's what I'm saying, is a reasonable time in the abstract could be 10 days, but we're not talking about in the abstract. We're talking about before you -- before you take any action on the judgment is what is a reasonable time in this context.

CHAIRMAN BABCOCK: Justice Gray, then Judge Christopher.

HONORABLE TOM GRAY: The difficulty we're having defining this comes from the first sentence of the existing rule, which if you're looking at the page is actually repeated up there. "An appellant must file the affidavit of indigence in the trial court with or before the notice of appeal," and we know from Higgins that

"must" there does not mean that it is a dismissable offense if it is not filed at that time.

The reason 44.3 is referenced is before you can dismiss the case for a procedural default you have to give them a notice and opportunity to cure that default, and it may be easier to rework the "must" language, inserting notice and opportunity to cure concept in subparagraph (1) than it is trying to deal with it as an extension of time. Because conceptually there is no such thing as an extension of time as the first sentence in the first part of that paragraph is actually worded, and so we may be working on the wrong paragraph is what I'm suggesting.

CHAIRMAN BABCOCK: Judge Christopher and then Justice Duncan.

HONORABLE TRACY CHRISTOPHER: Well, unfortunately I haven't read Higgins, so I could be speaking out of turn, but it seems to me it would be easier to put an actual time limit in the rule rather than saying "a reasonable time," and perhaps it ought to be triggered off the appellate court saying, "We're going to dismiss unless you file this affidavit within 30 days."

PROFESSOR DORSANEO: Well, Higgins refers to 44.3, which the Court relied on, which says "a court of appeals must not affirm or reverse a judgment or dismiss

an appeal for formal defects or irregularities in appellate procedure without allowing a reasonable time to correct or amend the defects or irregularities."

HONORABLE TRACY CHRISTOPHER: Well, it just seems to me if we -- you know, if the appellate court gives notice "We're going to dismiss in 30 days unless you file this affidavit," that's a reasonable time and gives a lot more guidance to practitioners as to when they have to get something done.

HONORABLE SARAH DUNCAN: In response to that, I've only been at one court, but I think a reasonable time might be different from court to court depending on how backed up that court is. In the San Antonio court a reasonable time would probably not be more than 10 days; whereas, in the First court or the Dallas court it might be that 30 days, it's not going to delay their docket any at all to give somebody 30 days to file an affidavit, but that's fine with me to put in a time limit if that's what we want to do.

HONORABLE STEPHEN YELENOSKY: Well, I mean, Judge Christopher's concern would apply to every principal time that is -- that comes as a result of 44.3, so what do the courts of appeals typically do when they do a 44.3 opportunity to cure? Do they state a time in the order?

HONORABLE SARAH DUNCAN: That's what the San

Antonio court does. I assume others do it.

HONORABLE STEPHEN YELENOSKY: So why --

HONORABLE SARAH DUNCAN: In response to Chief Justice Gray, this type of structure, this "you must do something," next paragraph, "but we'll give you more time to do it," that's throughout the rules. That's how these rules were written by the Court, not by us, but by the Court and their drafting advisor, so to start changing it in this particular rule doesn't make a lot of sense to me, because we would have to go through all the rules, the appellate rules.

CHAIRMAN BABCOCK: You have to recodify the TRAP rules.

HONORABLE SARAH DUNCAN: We would have to change all of them.

HONORABLE STEPHEN YELENOSKY: Bill, could you get on that?

PROFESSOR DORSANEO: We don't want to do that.

HONORABLE SARAH DUNCAN: I personally find it very confusing to end these things with periods, say "you must do this," period, new sentence, "but you can do this, this, this," but that was a choice that was made when the '97 amendments were passed, promulgated by the Court. So I'm not in favor of redoing them all now. I'd

like to go back to the old TRAP rules because those are the numbers I still remember, but --

CHAIRMAN BABCOCK: And you had identified all those traps. Justice Gray.

HONORABLE TOM GRAY: Chip, I would say that, given Higgins, I do like the insert in subparagraph (1) about the prior filing of the affidavit doesn't --

CHAIRMAN BABCOCK: Yeah.

HONORABLE TOM GRAY: -- fix this problem on appeal. Given the Higgins opinion, I don't know that we need the fix in (3). I don't know that it needs to be even added to the rules at all at this point. I mean 44.3 is there. It is a requirement. It was a procedural defect. It got dismissed without notice and opportunity to cure. I think our court was also doing that. That didn't happen to be one of our opinions, but it very well could have been. We just adopted our procedure or modified our procedure to deal with Higgins, and it's not a problem at the appellate level.

CHAIRMAN BABCOCK: Didn't Higgins say that they had given them a notice and opportunity to cure but that filing the affidavit wasn't sufficient to cure the problem?

HONORABLE SARAH DUNCAN: Because they were --

HONORABLE TOM GRAY: I do not remember. All I know is that the -- it was not filed and, therefore, that led to a dismissal. It would not have mattered to our court when we were doing this that the affidavit was, in fact, filed and filed late. If it wasn't filed at the time the notice of appeal --

CHAIRMAN BABCOCK: Right.

HONORABLE TOM GRAY: -- was filed, it was in effect incurable.

CHAIRMAN BABCOCK: And that's what got reversed.

HONORABLE TOM GRAY: And we got straightened out on that in Higgins.

CHAIRMAN BABCOCK: Okay. Sarah, anything else?

HONORABLE SARAH DUNCAN: I don't see a problem with putting it in there. People really don't think about 44.3.

HONORABLE TOM GRAY: People as in appellate judges or the rest of the world?

HONORABLE SARAH DUNCAN: Staff attorneys, law clerks, appellate judges, lawyers. Yeah, it's there and, yeah, it should operate across all of the TRAP rules, but what's the problem with telling people in this particular situation this rule, this other rule, applies?

CHAIRMAN BABCOCK: Judge Patterson.

HONORABLE JAN PATTERSON: I think it's also helpful to have a rule, and Higgins is not intuitive, and it's a little inscrutable, I must say, and so I think the rule is helpful.

CHAIRMAN BABCOCK: A lot of mischief for a five paragraph per curiam opinion, I'll tell you.

HONORABLE SARAH DUNCAN: I think it's a good one.

HONORABLE JAN PATTERSON: But I think also the reasonable time, it comes from Higgins but also the philosophy of dealing with indigency and also dealing with a variety of courts, so I would also think that that makes sense and that there is a reason why it speaks to reasonable time and not to a deadline because we're dealing with a deadline as it is. So the courts are used to dealing with some flexibility in these kinds of filings.

HONORABLE SARAH DUNCAN: Actually, I would, though switch the order of the clauses if it were mine to move, but that's kind of my --

PROFESSOR DORSANEO: Let me tell you where I am on this discussion, where I'm marking things. Stephen Yelenosky's language, except for stopping at the period, you know, makes sense to me. "Must allow the appellant a

reasonable time to correct the appellant's failure to file an affidavit or a sufficient affidavit of indigence," but I think it should say "before dismissing the appeal or affirming the trial court's judgment." I think the reversing would not be pertinent, right? Huh?

HONORABLE STEPHEN YELENOSKY: Well, I thought all of it wouldn't be, but I'll defer to you as to what is, so --

PROFESSOR DORSANEO: And I don't know whether the reference to 44.3 is necessary, "as provided in Rule 44.3."

CHAIRMAN BABCOCK: Well, that was Sarah's point, that 44.3 is going to give you some sense of what's reasonable.

PROFESSOR DORSANEO: All right. I mean, "as provided in Rule 44.3," I don't see how that creates a big problem with just a few little words.

CHAIRMAN BABCOCK: Yeah.

PROFESSOR DORSANEO: And it does -- and I agree that Higgins --

HONORABLE STEPHEN YELENOSKY: Well, I mean, all that could mean --

PROFESSOR DORSANEO: Higgins, when you read it you say, "Oh, isn't that surprising?"

HONORABLE STEPHEN YELENOSKY: But doesn't

all that collapse to just saying that Rule 44.3 applies? I mean, you could say that. Or you could say it in the comments, "Rule 44.3 applies."

PROFESSOR DORSANEO: That's what this says, I think.

CHAIRMAN BABCOCK: Is our debate getting down to whether or not we ought to have this language or not? Richard Munzinger.

MR. MUNZINGER: Well, I don't -- I'm not an appellate practitioner. I do appeals, but if I'm looking at a rule that -- 44.3, that seems to apply to all the rules, and now I see that the Supreme Court has amended a rule and made specific reference to it because it applies to indigent affidavits, I ask myself why didn't the Supreme Court make the same statement in connection with rule X? The failure to make the statement with rule X suggests that Rule 44.3 doesn't apply to rule X because the Supreme Court didn't emphasize the point.

PROFESSOR DORSANEO: Yeah.

MR. MUNZINGER: Higgins, it seems to me says, "Rule 44.3 applies across the board. You didn't apply it to an affidavit of indigency. You should have. Do that in the future."

PROFESSOR DORSANEO: The next case, though, if we take out "as provided by Rule 44.3" from this draft

and just don't -- will be governed by this, and that will be the application of 44.3. I mean, instead of -- if we say, okay, Higgins means you can't do this and it cites 44.3 and we say in here you can't do this and don't -- no longer talk about 44.3 we end up at the same place, don't we?

MR. MUNZINGER: Yeah, but I think the point is by not saying anything Higgins is the law. Higgins is the law, and you don't create a problem that the Supreme Court has identified Rule 44.3's applicability to a particular procedural rule, but didn't do it to other procedural rules. Does 44.3 apply to rule X? They didn't say so.

CHAIRMAN BABCOCK: Sarah.

PROFESSOR DORSANEO: I think I'm agreeing with you, to take that language -- take "as provided in Rule 44.3" out of there because it's unnecessary, and it doesn't matter whether 44.3 would call for the same result that this new language would require.

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: Well, the problem as I understood it in Higgins -- and maybe I'm just not remembering correctly -- 44.3 talks about a formal defect or irregularity in appellate procedure. Well, to be defective something has to exist. If you didn't file your

affidavit in your notice of appeal at the same time as the rule requires in subparagraph (1), it can be construed as not being a defect. It's omission, and that I think was the problem the court of appeals had in Higgins, is they look at 44.3 and it talks about a defect or irregularity. It doesn't talk about not doing something the rule requires in mandatory language that you do.

So, you know, I certainly agreed with Higgins when it came out, but it's not an opinion I would have written as an intermediate appellate court judge probably -- well, I'm not going to say that because I might have, but it takes an analytical step to get from 44.3 to the problem that was presented in Higgins, so I guess I don't really understand why -- why wouldn't we -- you know, we codify Supreme Court decisions in the procedural rules not infrequently. Why wouldn't we codify Higgins in the appellate rules so that this mistake doesn't get made again? I mean, it's a substantial mistake. We're talking about dismissing somebody's appeal because they didn't do what (1) says you have to do.

CHAIRMAN BABCOCK: So, Sarah, how would you phrase this? Would you leave the -- all of the suggested language in or would you put a period someplace?

HONORABLE SARAH DUNCAN: I would put -- I would say "before affirming or reversing a judgment or

dismissing an appeal, an appellate court must allow a reasonable time to file an affidavit or sufficient affidavit of indigence."

CHAIRMAN BABCOCK: Okay. What do you think about that?

PROFESSOR DORSANEO: Number one, I don't think -- that just changes the order around. Okay, but, to respond to everything, 44.3 is not just about defects. It's about irregularities, so -- and that's much broader to defend the Court's use of the rule to apply it to this problem area. What's surprising about it is 44.3 seems itself inconsistent with the specific requirement that we're taking out, that you need to file an affidavit within 15 days after the deadline. I mean, that's the surprising part to me, is that that requirement doesn't -- you know, doesn't count.

HONORABLE NATHAN HECHT: Well, it counts, but you don't get your head chopped off every time you stub your toe, and the point is that there are all sorts of requirements in the rules, and you have to follow them, but if you don't follow them it may not be that you lose on the merits.

PROFESSOR DORSANEO: Okay.

HONORABLE NATHAN HECHT: It may be that something else bad happens to you.

PROFESSOR DORSANEO: But it's not a requirement.

HONORABLE NATHAN HECHT: You can get sanctioned or you can get, you know, your hand slapped, but you have to do it, but it doesn't mean you lose your entire case on the merits because you didn't do it.

PROFESSOR DORSANEO: And the last thing that I would say is, again, we don't need to codify Higgins to say that this is a 44.3 problem when somebody doesn't file an affidavit of indigence or a sufficient affidavit of indigence within -- with the -- with or before the notice of appeal. We don't need to say it's a 44.3 problem. We just need to deal with the problem, and if we get the same result as Higgins because we just changed (3) then that seems fine without saying "go read 44.3, go read Higgins in order to see why we've just said what we said."

So I would -- I would say "a sufficient affidavit of indigence before dismissing the appeal or affirming the trial court's judgment." I wouldn't say "or reversing" because I don't think the appellant -- I don't think reversing is ever going to be an issue in this context.

CHAIRMAN BABCOCK: Justice Gray, Justice Jennings, Judge Yelenosky.

HONORABLE TOM GRAY: To follow up with a

reference to what Richard Munzinger was talking about, the reason that we got into this problem in the first place is because the rule as written that we're looking at -- and you can look through the strikeout portion there of subsection (3) -- referenced another rule. It was our belief that that was the only way to extend the timetable. That failed and, therefore, there wasn't any opportunity to cure, and so it does play into our thought process when you reference another rule, and it's the presence of existing subsection (3) that really creates the problem as presented in Higgins, and I would say you can do away with the entire subsection and you don't need to reference it at all.

CHAIRMAN BABCOCK: Justice Jennings.

HONORABLE TOM GRAY: But that seems to be the trend here.

HONORABLE TERRY JENNINGS: I was going to propose some specific language. "Must allow the appellant a reasonable time to correct the appellant's failure to file a sufficient affidavit of indigence before disposing of the appeal."

HONORABLE STEPHEN YELENOSKY: Well, what would be the point of allowing them to file an affidavit of indigence after you've disposed of the appeal? That's what I don't understand.

HONORABLE TERRY JENNINGS: "Before the court may dispose of the appeal." I mean the whole point is --

HONORABLE STEPHEN YELENOSKY: But allowing somebody to file something is meaningless if you've already disposed of the appeal, so why do you need to say it?

HONORABLE TERRY JENNINGS: No. The appellate court must allow the appellant a reasonable time before the appellant court can dispose of the appeal.

HONORABLE STEPHEN YELENOSKY: I guess all I'm saying is reasonable time has to be before the disposal, otherwise it's not reasonable --

HONORABLE TERRY JENNINGS: Right.

HONORABLE STEPHEN YELENOSKY: -- or doesn't make sense, so why do you have to say "dispose of the appeal"?

HONORABLE TERRY JENNINGS: Well, typically what's going to happen here is you'll have a situation that will come to the attention of the clerk's office or whatever where the affidavit is not on file and it needs to be on file, and the clerk's office will send a notice to the appellant, right? And usually I think on our court it's 30 days. Is that right? Something along the lines of 30 days. Sometimes you may never hear from these people again.

HONORABLE STEPHEN YELENOSKY: Right.

HONORABLE TERRY JENNINGS: I mean, it can't go on forever.

HONORABLE STEPHEN YELENOSKY: Right. But it doesn't. You state -- the court states a reasonable time and if something isn't done, you dispose of the appeal.

HONORABLE TERRY JENNINGS: Right.

HONORABLE STEPHEN YELENOSKY: But, I mean, you're suggesting that if you didn't say "before you dispose of the appeal" the court of appeals could say, "You have 30 days to file an affidavit" and then on the 20th day they dispose of the appeal. I mean, they can't.

HONORABLE TERRY JENNINGS: Well, the whole purpose of the rule, as I understand it, is to prevent the appellate court from cutting off an indigent's lawsuit because they haven't timely filed their affidavit, right? We don't want -- we don't want an indigent appellant to be deprived of their right to appeal because something has slipped through the cracks and they haven't got their affidavit on file; is that right?

HONORABLE STEPHEN YELENOSKY: Well, it's just like -- I mean, there are all kinds of rules that apply to the trial court that say "a reasonable time," and in every single one of them that entails allowing somebody to do something before I sign a judgment, and it doesn't

say every time "You must allow a reasonable time before you sign the judgment." I mean, it's entailed within the notion of reasonable time that you're not going to, as Justice Hecht just said, cut off their head before that time expires.

PROFESSOR DORSANEO: What we're arguing about is whether there should be any words after -- you know, after "a sufficient affidavit of indigence," so three choices. Period, say nothing, say "before dismissing the appeal or affirming the trial court's judgment," or "before disposing of the appeal." My question to Justice Jennings would be, well, how would you dispose of this appeal other than by dismissing it or affirming the trial court's judgment?

HONORABLE TERRY JENNINGS: I was just thinking that was a shorter way to say it, disposing of it.

HONORABLE STEPHEN YELENOSKY: Can I have one other thing in response to what you said and what --

PROFESSOR DORSANEO: It's pretty short already. Pretty short.

HONORABLE STEPHEN YELENOSKY: -- Justice Duncan said. It seems to me you were saying that it's a good idea to allow people to correct the failure to file an affidavit or a defective affidavit whether or not Rule

44.3 would apply, and so if we hadn't had Higgins would we be suggesting to the Supreme Court that it write a rule that says if you don't file your affidavit of indigence you need to get notice before it's dismissed, and so with or without Higgins you're suggesting there should be a rule that allows this correction.

I thought that's what you were saying, sort of as a policy matter because the failure to file an affidavit of indigency should not lead to your head being chopped off. So the reason to state it without referring to 44.3 would be some other court -- other Supreme Court in the future finds that Higgins was wrong, this rule will be right.

PROFESSOR DORSANEO: You raise the issue -- Higgins raises the issue of whether we need to change every one of the other motion for extension of times rules to take out the time period. It raises that issue. I mean --

HONORABLE STEPHEN YELENOSKY: And this, and this rule standing on its own would apply to an affidavit of indigence regardless of whether Higgins existed.

PROFESSOR DORSANEO: Yes.

CHAIRMAN BABCOCK: Carl, then Buddy.

MR. HAMILTON: Since we took out the previous (d)(3) and required a motion, I assume, maybe I'm

wrong, that what's going to happen now is that the court sends out a notice that says "either pay the costs or file an affidavit by a certain date" as just an automatic something that goes out.

CHAIRMAN BABCOCK: Right.

MR. HAMILTON: With no motion. So if that goes out, doesn't it say how much time a person has to pay the costs or to file the affidavit?

CHAIRMAN BABCOCK: I would think so. Buddy.

MR. LOW: Chip, I haven't read Higgins, but I know I see in here where you say give a reasonable time. What if the affidavit is not filed or it's defective, the court waits 30 days and then dismisses, said, "Well, you had a reasonable time to correct it"? Is there a notice provision?

HONORABLE STEPHEN YELENOSKY: That's what Judge Christopher raised.

MR. LOW: Pardon?

HONORABLE STEPHEN YELENOSKY: Judge Christopher asked that. I assume that Higgins or 44.3 entailed the court of appeals saying to somebody, "You have a particular time," and that's what Justice Duncan was saying her court does.

MR. LOW: But what I'm saying is that if you just wait and say nothing, if I read this rule, it looks

like -- you know, and I say, "Well, you had a reasonable time. You had 30 days."

HONORABLE STEPHEN YELENOSKY: Well --

MR. LOW: But does Higgins require that the court point out something? I don't see where the rule does.

HONORABLE STEPHEN YELENOSKY: Well, the prior cases interpreting 44.3 require that.

CHAIRMAN BABCOCK: Yeah. The facts of that were that the court did give a 10-day notice and said, "If you don't do it within 10 days you're going to be bounced," but the appellant responded with an affidavit and not the money, and the court said, "Affidavit's not good enough, see ya."

MR. LOW: I know, but I still don't see where it requires the court give them notice.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: After listening to all of this and listening to what Justice Hecht said, I think it needs to be drafted in a more complicated way. It needs to leave the language about the motion. Listen to me. It needs to leave the language about the motion, which Justice Hecht said is not cancelled by 44.3 or Higgins, and then it needs to say "regardless of whether there's a motion or language to that effect, the appellate

court, you know, must give notice and allow the appellant a reasonable time to correct the failure to act."

I mean, that seems to be what -- all that engineering seems to me to be required in order to capture the whole point of what Higgins is saying, which I guess I didn't really appreciate, is that you don't really need to comply with the motion for extension of time rule in order to get an extension of time, because they need to tell you, "Hey, you screwed up," and apparently continue to tell you that until you get it right. And that does raise the issue as to whether that's true all the time, okay, or just in this one specific situation, which raises a lot of drafting possibilities.

HONORABLE NATHAN HECHT: Well, just to comment on that, philosophically, jurisprudentially, the Court has been thinking for the last 15 years that not every mandatory provision results in the worst sanction that you can have. For example, in *Hines vs. Hash* we said if you don't send out a notice letter under the DTPA as the statute requires, you don't lose your claim. It's just other things happen to preserve the effectiveness of the letter, but a couple of courts of appeals have held if you send that letter out 73 days before you file suit, your claim is gone.

But to make matters more complicated, the

Legislature has come in behind all of that and said every time we make something mandatory we mean you lose it if you don't comply, which is -- you know, it's hard for me to believe they really mean that across the board, but there is an indication of what the statutes mean, but for these -- particularly for the Rules of Appellate Procedure, but even for the Rules of Civil Procedure, if you don't get this motion filed within the prescribed period then that's bad, and something bad should happen to you.

If you didn't do it because Higgins lived in Huntsville and, you know, the mail between here and Huntsville isn't always as good as it is other places, then, you know, you wonder is 15 days really enough and shouldn't we cut him a little slack here. On the other hand, if it's been six months and, you know, he's just not doing anything, then you dismiss his appeal like anybody else's, but it seems to me the same thing happens under TransAmerican if you file your answers to interrogatories three days late or two weeks late. It doesn't mean that your case goes away. It just means that you should speed up, and if you don't, if you keep delaying, then we may have to take more firmer action.

So I think -- or the Court thinks that 44.3 -- this is from our discussions years ago when we

talked about it -- was to further this idea that if you don't do what's -- if you don't do what's necessary to invoke the court of appeal jurisdiction then there's nothing we can do. But otherwise, if you file your brief late, if you file a motion for extension late, if you do all these other things late, we frown on that. Everybody should follow the same rules. We should stick with the timetable, but it's not going to be resulting in adjudication of the merits.

PROFESSOR DORSANEO: So Higgins would not apply to a notice of appeal?

HONORABLE NATHAN HECHT: I can't remember what the -- I think there's a notice of appeal rule that says you do get extra time.

PROFESSOR DORSANEO: Actually file a motion.

HONORABLE TOM GRAY: There's Verbugt that says that the filing of the notice of appeal late implies a motion.

PROFESSOR DORSANEO: But I'm saying file a notice of appeal after the time for filing the motion for extension of time.

HONORABLE NATHAN HECHT: If you wait -- if you don't file anything before the last deadline, it's just too bad.

PROFESSOR DORSANEO: You wouldn't regard

that as an irregularity, not filing a notice of appeal within the time for moving for an extension of time.

HONORABLE NATHAN HECHT: I think that's what the --

PROFESSOR DORSANEO: But everything else you would?

HONORABLE NATHAN HECHT: Probably.

PROFESSOR DORSANEO: Okay. Then I think you agree with me. It needs to all be written down or else Tom Gray is right. Don't talk about it here. Just leave it the way it is and say -- and let the people know that they need to go read 44.3, you know, everyday. Okay. Huh?

HONORABLE TOM GRAY: I actually have it written on my bedroom ceiling now.

CHAIRMAN BABCOCK: 44.3 with breakfast everyday.

PROFESSOR DORSANEO: It needs to be in the clerk's office of every court of appeals on the wall.

CHAIRMAN BABCOCK: Justice Jennings.

HONORABLE TERRY JENNINGS: I want to take one last shot. The whole point seems to be to bind the appellate court to keep it from doing something that it shouldn't be doing, which is dismissing an indigent appellant's appeal because, you know, they didn't get a

affidavit timely filed or sufficient affidavit timely filed. What if we flip the sentence around and say something like "The appellate court shall not or may not dismiss or decide the appeal without providing the appellant a reasonable time after notice to correct the appellant's failure to file a sufficient affidavit of indigence"?

PROFESSOR DORSANEO: I like that, but I also think it needs to say this motion for extension of time 15-day requirement, but say that's --

HONORABLE TERRY JENNINGS: Tack that on after that?

PROFESSOR DORSANEO: Make it at (4). You know, make it (4).

HONORABLE SARAH DUNCAN: This really is a lot like Verbugt in two respects. If I know my notice of appeal or my affidavit wasn't timely or is effective, I can file a motion. The problem comes when the appellate court, some part of the appellate court, knows that my affidavit was in some way untimely or is deficient; and what I think Higgins is trying to do, what Verbugt tried to do, is say to the appellate court, "If you think there is a problem with this perfection instrument, you need to tell the appellant that there is a problem, what the problem is, and give them a reasonable opportunity to

cure."

I do think that's going -- if it ever gets to it -- that is going to be pervasive, I hope, in the rules, because that's just kind of fundamental fairness. "I know something that you need to know and I'm not going to tell you." That's not exactly the way we want a justice system to operate.

But that's why I agree with Bill. We need both the motion -- that's if I know there's something wrong -- and we need to restrain the court from taking action if it knows something wrong without first telling the appellant and giving them opportunity to cure. So I think I agree with Bill. I think we need both, and I think the problem came because the rule as written only provides for the circumstance when the appellant knows that she didn't file, timely file, an affidavit.

CHAIRMAN BABCOCK: Okay. May I suggest one thing? Let's -- Justice Gray, do you still cling to the belief that we don't need to say anything?

HONORABLE TOM GRAY: We could strike (3) in the proposed language.

CHAIRMAN BABCOCK: Okay. How many people agree with that?

PROFESSOR DORSANEO: Why would you need to strike (3), Tom?

HONORABLE TOM GRAY: Well, if it doesn't serve any function, there is a whole other rule on extensions of time, when you can have them, that applies to a late affidavit. Just like Sarah says, if you know you've got the problem and you go to the rule book and you say, okay, I'm within the 15 days, I can file a motion under 10.5(b).

CHAIRMAN BABCOCK: The reason why I asked the question is if there's a substantial number of people that agree with that then we can tell the Court that's what we think, you don't need a rule and we can go onto other things. I don't think that the majority of people here believe that, but maybe they do.

HONORABLE STEPHEN YELENOSKY: Well, whether I do or not depends on the answer from somebody, because I don't know the answer to this. From what Justice Hecht said and what you all said, I'm a little unclear as whether 44.3 is always or generally or sometimes read to require the court to take the initiative and give notice. If it is read to always require the court to take the initiative and give notice then I would agree that (3) is unnecessary, but if it's sometimes this, sometimes that, then we need to say "Here you have to give notice." So which is it?

CHAIRMAN BABCOCK: I don't know that there

is a definitive answer to that, is there?

HONORABLE STEPHEN YELENOSKY: Well, if there isn't, then Higgins says you need to give notice, so we can't rely on 44.3 alone then.

CHAIRMAN BABCOCK: I'm not sure that Higgins said you had to give notice.

PROFESSOR DORSANEO: I think it's implicit.

CHAIRMAN BABCOCK: It said they did give notice.

PROFESSOR DORSANEO: Implicit you have to give notice, and 44.3 should probably say that. I think the practice is to give notice.

CHAIRMAN BABCOCK: Yeah.

PROFESSOR DORSANEO: But 44.3 would also apply to a situation where you file something and then the court would just say, "I don't like that. I'm dismissing your case."

CHAIRMAN BABCOCK: Okay.

PROFESSOR DORSANEO: So you're not supposed to do that --

CHAIRMAN BABCOCK: Right.

PROFESSOR DORSANEO: -- either.

CHAIRMAN BABCOCK: Justice Gray says that (d)(3) is unnecessary. How many people agree with that?

Three. And I assume -- three people agree

with Justice Gray on that, and I assume that --

HONORABLE TOM GRAY: You didn't have to put that on the record.

HONORABLE STEPHEN YELENOSKY: Strike that after close-quote, "Justice Gray."

CHAIRMAN BABCOCK: You got a majority of the panel. Unfortunately in this group of a hundred people you have -- Justice Pemberton.

HONORABLE BOB PEMBERTON: I agree with that.

CHAIRMAN BABCOCK: You just added a fourth vote.

HONORABLE BOB PEMBERTON: I agree with Tom. I thought about it.

CHAIRMAN BABCOCK: Okay. Fair enough.

HONORABLE TOM GRAY: Well, I will say if you're going to edit it and add a new provision, I would like to still be able to dispose of the appeal on another ground, notwithstanding that the affidavit has not been filed.

CHAIRMAN BABCOCK: Yeah.

HONORABLE TOM GRAY: The way it's written is before you do this, affirm, reverse, or dismiss, you have to have this affidavit, and I don't think that's -- that's certainly not the intent. We may determine we don't have jurisdiction.

HONORABLE SARAH DUNCAN: That's the problem. If you don't have the affidavit, you don't have jurisdiction. If you don't have jurisdiction --

HONORABLE TOM GRAY: Now, the affidavit is not jurisdictional. The notice of appeal is what gives us jurisdiction.

HONORABLE SARAH DUNCAN: That's true. That's true.

CHAIRMAN BABCOCK: What I'm going to suggest is that Bill and Justice Jennings and Sarah or anybody else who wants to work -- tweak the language, let's tweak the language. If we can do it today, great; if not, we can come back and talk about it in April, but we ought to move on to the next rule.

PROFESSOR DORSANEO: And I do have this serious question as to whether this Higgins concept, if we add language into this rule, doesn't apply in other places, except for the notice of appeal. I mean, if we applied Higgins to the notice of appeal, for those of you who don't do this, then that is -- that would be a big change, but saying that it applies in other circumstances where we have a motion for extension of time rule, you know, that needs to at least be investigated to see if we need to say something there if we're going to say something here. Don't you think, Justice Hecht?

HONORABLE NATHAN HECHT: Sure.

CHAIRMAN BABCOCK: Okay. What's the next rule?

PROFESSOR DORSANEO: The next one is Rule 24, and this also started out in the September 22nd, 2006, letter, and we've talked about this a pretty good bit. Professor Carlson did a lengthy memorandum that we went over, and this particular version of 24.2 is my attempt based on everything that went before to capture what we, you know, agreed on or almost voted on or perhaps what we voted on. I would ask Professor Carlson to help here. I'm perfectly willing to work through this or to defer to her.

PROFESSOR CARLSON: Your call.

PROFESSOR DORSANEO: Huh?

PROFESSOR CARLSON: You know, I'm not sure, Bill, if the -- I know the subcommittee voted on all of this. I don't recall this being voted on by the full committee.

CHAIRMAN BABCOCK: I don't think we did.

MR. HUGHES: I'm not showing it in my notes here.

PROFESSOR DORSANEO: Okay.

PROFESSOR CARLSON: So you want me to walk through it?

PROFESSOR DORSANEO: Yeah, go ahead. They're tired of hearing me anyway. Me, I am, in fact.

CHAIRMAN BABCOCK: We never tire of hearing Professor Dorsaneo, let the record reflect. Professor Carlson.

PROFESSOR CARLSON: As you recall, as part of House Bill 4 and the tort reform movement the Legislature in 2003 amended 52.006 of the Civil Practice & Remedies Code to reduce the amount of appellate security that's necessary to suspend a money -- enforcement of a money judgment on appeal. Where you used to have to bond an entire money judgment, you no longer need to. You don't have to bond punitive damages at all, but you need to bond compensatory damages and interests and costs.

Then the Legislature provided, however, that amount must be lessened to a cap. The amount of appellate security required can never exceed the lesser of $25 million or 50 percent of the judgment debtor's net worth and then it must be further lowered if the court finds that it would cause a judgment debtor substantial economic harm to post at the cap. So we were given marching orders, the Court was given marching orders, to amend our appellate rules to conform with the statute, and we have current appellate Rule 24 that was -- that does not address a couple of things that Justice Hecht in his

September 22nd letter asked us to look at.

Under the current TRAP 24, if a judgment debtor files a net worth affidavit and the judgment creditor contests it, the trial court must have a hearing and make a finding detailing the basis for the net worth determination. Justice Hecht raised the inquiry of whether it wouldn't be prudent or whether it would be prudent to amend our appellate Rule 24 to include some procedure to allow a judgment creditor to move to strike a net worth affidavit that is facially deficient because the judgment debtor, if they're going to proceed on a net worth affidavit, has to state in detail, the rules say, the basis for their claimed net worth; and so we had talked about this in subcommittee and said that Justice Hecht's suggestion is absolutely a good one because a trial court should not have to have a hearing and determine the net worth of a judgment debtor when the judgment debtor hasn't filed an affidavit that sufficiently gives the basis, the particularity for their net worth; and so when you look on page four -- I'm going to come back to page three in a minute.

On page four of Bill's memo of January 8th, under heading two, which now reads "Motion to Strike Insufficient Affidavit," our subcommittee thought it would be beneficial to give a judgment creditor the ability to

move to strike a net worth affidavit that doesn't comply with TRAP 24.2, that is with the sufficient particularity; but we did feel that if the trial court determines that the affidavit is deficient on that motion to strike that the judgment debtor has to be informed of why the affidavit is defective and have a reasonable opportunity to amend.

If a conforming affidavit is not filed in accordance with the court's order then the trial court may order -- and we need the order to give to the clerk -- enforcement of the judgment is no longer suspended as to that judgment debt. So that's the first main proposal we have, Chip, and I don't know how you want to take this.

PROFESSOR DORSANEO: And note here that there are two choices, or there is one choice, two options, about how to say to -- one is "does not state the debtor's net worth or does not" -- you know, going into detail about what the problem is; and the other is, "or does not comply with 24.2(c)(1)," which contains those requirements; and I don't know which way you prefer to have it stated, you know, the long way or the slightly shorter way by cross-reference, an internal choice.

CHAIRMAN BABCOCK: Well, one way to do it is to take it one, two, three, but that may not make sense to you.

PROFESSOR CARLSON: One, two, three of -- we have four issues we were asked to look at.

CHAIRMAN BABCOCK: But I'm talking about taking it by rule. 24.2(c)(1).

PROFESSOR CARLSON: Oh.

CHAIRMAN BABCOCK: And then (c)(2) and then (c)(3).

PROFESSOR CARLSON: Yeah, the reason I presented (c)(2) first is I thought there was a logical order of presenting this to bring us back to it. It was not simply skipping over the hard part.

CHAIRMAN BABCOCK: Well, then let's start with (c)(2).

PROFESSOR CARLSON: Okay. We're on (c)(2), so I guess it would be helpful to get a subcommittee vote if they -- I mean a full committee vote if they agree with our subcommittee that it would be beneficial to allow a procedural mechanism to allow a motion to strike an affidavit, giving the judgment debtor an opportunity to fix the problem in a reasonable time.

CHAIRMAN BABCOCK: Okay. Comments about (c)(2)? Yeah, Hugh.

MR. KELLY: I don't see that the motion to strike insufficient affidavit, if they filed any kind of affidavit at all, why it would not be an adequate remedy

to simply have a contest under sub (3). The mischief I see in this or potential mischief is where the court might decide that it is not sufficient to inform the court about what the debtor's net worth is. One can easily conflate that with the -- you know, whether the whole statement by the judgment debtor is correct or not. I mean, they may say, "You haven't given us all of the net worth of your affiliated companies or of your other wholly-owned companies by this individual, and therefore, it's not sufficient"; whereas, if you did it under (3) you're just going to get up and prove up that the true nature of the judgment debtor is this individual and all these particular corporations have involved in his wrongdoing or whatever it was.

So I just don't think that (2) is necessary, and it does create the problem that the whole reform was intended to remedy, and that is the sudden death risk that was always the problem with appellate bonds.

PROFESSOR CARLSON: If I could respond.

CHAIRMAN BABCOCK: Yes.

PROFESSOR CARLSON: Our problem was that subsection (3) currently directs the trial court after the hearing to, one, have the hearing on net worth and issue an order that states the debtor's net worth and states with particularity the factual basis. I understood

Justice Hecht's inquiry in the letter to say why does the trial court have to hear all that if all you file is a global, nonspecific affidavit of net worth?

PROFESSOR DORSANEO: And how can the trial -- and that's the problem. How can the trial judge do what the rule requires if there isn't sufficient information provided in the affidavit to begin with?

MR. KELLY: Well, the judgment debtor has the burden of proof, doesn't he?

PROFESSOR DORSANEO: Yes.

MR. KELLY: Well, if he hasn't made any showing, he probably defaulted the 25 million, don't you think?

PROFESSOR CARLSON: Well, you know, it's kind of like -- you talk about pleadings requirements in general. To me this is akin to a special exception. You know, you've got to plead with sufficient specificity to put the thing on the table.

PROFESSOR DORSANEO: And the rule says, "The trial court must issue an order that states the debtor's net worth and states with particularity the factual basis for that determination." It does not provide for you're out of here --

PROFESSOR CARLSON: Right.

PROFESSOR DORSANEO: -- because you didn't

do a sufficient affidavit.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: And along those lines, is the idea of the motion to strike then that the judgment debtor, after having been given an opportunity to amend the affidavit, would have to basically conform their proof to the -- in other words, to the affidavit. You're not going to be able to have a hearing then and produce more financial information because you've -- I'm trying to figure out what -- is it sort of going to be, you know, here you've now -- okay, you've got an opportunity to clean up your affidavit, you've filed your new affidavit, but now you're limited to that, you can't go beyond that?

PROFESSOR CARLSON: That was not the thought at all.

HONORABLE JANE BLAND: Okay.

PROFESSOR CARLSON: Because I think from my experience in these hearings there is a lot more detail at the hearing than would be required in an affidavit.

HONORABLE JANE BLAND: Yes. So but would anybody read this and think -- a trial judge think, "I'm not going to let you put on that evidence because you didn't include any of that in your affidavit"?

PROFESSOR CARLSON: I would hope not, and if it could be read that way, that's not good.

CHAIRMAN BABCOCK: Okay. Who else? Judge Christopher.

HONORABLE TRACY CHRISTOPHER: I just think it adds an unnecessary layer of complexity to the issue also by having this sort of special exception to the affidavit, because it seems to me if someone's going to move to say this affidavit is sufficient -- insufficient, they're also going to contest it even after it's been revised, and it seems to me that you can just skip to the contest stage.

But I do agree that -- and I did want to state, although it's not really on the table, that if the judgment debtor has the burden of proof and they do a bad job of it, it's almost impossible for the trial court to come up with a number as to what the debtor's net worth is.

PROFESSOR DORSANEO: Even if you do, that's not good enough.

HONORABLE TRACY CHRISTOPHER: Right.

PROFESSOR DORSANEO: Under *In Re: Lind* you will get an F in the court of appeals unless you spell it all out.

HONORABLE TRACY CHRISTOPHER: I know, but there has to be some -- I agree. I think there ought to be some default. Now, you know, it's not in the rule and

it's not in the rule of -- it's not in the Civil Practice and Remedies Code either that there is some default that the judgment debtor, you know, is hiding money, or you know, has totally arranged his financial affairs to make himself appear to be insolvent, but you think he isn't, you know, there's no way for you to come up with a number as the trial court.

CHAIRMAN BABCOCK: Hugh, then Sarah.

MR. KELLY: Well, it seems to me that because you have a judgment creditor who is putting on a case also, that party is going to make some contention as to what the net worth is; and if the court is of the view that the judgment debtor has not carried his burden, the default is what the creditor is saying. Wouldn't that be true?

HONORABLE TRACY CHRISTOPHER: Yeah, but the creditor often doesn't do that good of a job either. I mean, truthfully from the trial judge's point of view, that's the difficulty. I mean, the creditor might be able to point out that he's funneled money over here, so that money over here maybe ought to be included back over on this side of the balance sheet, but when you're really trying to sit down and figure out assets and liabilities and come up with a net worth it's a very difficult job.

CHAIRMAN BABCOCK: Sarah, then Frank.

HONORABLE SARAH DUNCAN: I'm in -- I'm the dissenting member of our subcommittee on this one. I'm in agreement with Hugh and with Tracy. I think it complicates things unnecessarily. I think the offending sentence is actually in subsection (3), "The trial court must issue an order that states the debtor's net worth and states with particularity the factual basis for that determination." I think we ought to treat this like any other issue we have. If the person who wants the relief from the trial court doesn't make a sufficient case for it, they lose, and I don't -- I don't see why it should be more complicated than that.

HONORABLE STEPHEN YELENOSKY: And if you don't do that, it's an argument about prima facie case is pretty much irrelevant because the trial court has still got a demand to figure something out.

CHAIRMAN BABCOCK: Okay. Frank.

MR. GILSTRAP: There was a further reason for going to this summary procedure and that is this, is the time factor. I mean, without this then a debtor can come in, file a patently false or deficient affidavit and delay it until he has an evidentiary hearing, and whereas the idea is, is that there is some affidavits that simply don't trigger an evidentiary hearing and we can go use this procedure to get rid of the case at that point. I

mean, I'm sure there is some blurring on the edges, but that was the idea, and it seems to me that makes sense.

CHAIRMAN BABCOCK: Yeah, Elaine.

PROFESSOR CARLSON: One of the problems in working with this new world is the Legislature did not define net worth.

MR. WATSON: Yeah.

PROFESSOR CARLSON: I did look at a couple of other states that passed appellate security tort reform and some of them were very specific, would say "as of the preceding December 31st year," some said, "in a financial statement under generally accepted accounting principles," some said one that has been audited. So the clerks are really struggling as a practical matter, at least my discussions with the clerks, on how do we know if the affidavit is sufficient or not. We're not accountants, we don't know. It looks like there's a lot of words and numbers there. Oh, okay.

So what Frank is saying is right. You file this affidavit of net worth, and the clerks who accept it, now you're not going to have any enforcement of your judgment. You kind of got a free ride as long as you can eventually prove up your net worth if it's contested, which brings us back, Chip, to (c)(1).

CHAIRMAN BABCOCK: But before we go there --

Hugh.

MR. KELLY: I'm just having a terrible time understanding how you would have these two litigants, one is the judgment debtor who is trying to evade his responsibilities. That, we all know about that. You can see it from divorce cases and on. Once you're stuck you're going to try to hide everything you have and use every rule to evade your duty, but you've also got the creditor. Now, surely a creditor can be counted upon to put something in the record that the court could say, "Mr. Debtor, you are nothing but a deadbeat. Mr. Creditor, he put up a pretty crummy proof, but it's got a number on it, that's the number."

PROFESSOR CARLSON: I think that's what happens.

MR. KELLY: Why would that be hard?

HONORABLE SARAH DUNCAN: It's their burden as a contestant.

MR. KELLY: Yeah. That tells me that (2) is not needed.

PROFESSOR ALBRIGHT: I have a question.

CHAIRMAN BABCOCK: Yeah.

PROFESSOR ALBRIGHT: Is the evidentiary hearing triggered just when the creditor says, "I don't believe your affidavit, I want discovery in a hearing" or

do you have to say "something's wrong with your affidavit"? It seems like, you know, in the case -- I can't remember the name of it. This guy says, "I have no asset, I have a zero."

PROFESSOR DORSANEO: Negative net worth.

PROFESSOR ALBRIGHT: Negative net worth, so, you know, I don't know what your net worth is. You know, I know you've got something, but it seems like the issue is not that I'm challenging your affidavit. I'm putting you to your proof at a hearing because I don't have a burden to come forward and say --

PROFESSOR CARLSON: But that's the -- sorry.

PROFESSOR ALBRIGHT: Say you have a different net worth, but, you know, I have to do some discovery to be able to cross-examine you and put on some different proof eventually, but I don't see how I can challenge your affidavit and say it's not true without having gone through some discovery.

PROFESSOR CARLSON: Not saying it's not true or saying it's not detailed.

PROFESSOR ALBRIGHT: Not detailed.

PROFESSOR CARLSON: You're not giving supporting data for your conclusion.

PROFESSOR ALBRIGHT: So but you don't have to do that to trigger a hearing? I can just say, "I'm

setting this for a hearing." Right?

PROFESSOR CARLSON: Sure.

PROFESSOR ALBRIGHT: Yeah.

PROFESSOR CARLSON: You can waive the defect.

PROFESSOR ALBRIGHT: So this is -- the intent then is like you said, like a special exception. I just want more detail as to -- you know, you send an affidavit that says, "I have a negative net worth." You say, "Wait. List your assets and liabilities."

PROFESSOR CARLSON: Uh-huh.

PROFESSOR ALBRIGHT: Is that --

PROFESSOR CARLSON: That's right.

CHAIRMAN BABCOCK: Skip.

MR. WATSON: The thing that we keep hitting goes back to something that was mentioned before about when do you start counting, when is the net worth compiled as of, and literally we've hit several times this situation, and it's so basic. You come in and there were, you know, the complete detailed statement of assets and liabilities. Assets are fifty million twenty dollars. The judgment comes in. There are liabilities of 25 million, the judgment is 25 million. Now, on every financial statement, once that judgment is signed they've got to list that as a liability, a 25 million-dollar

judgment; but the effect is they come in and say, "Okay, we've got a net worth of $20, 25 million in liabilities and now, as of January 2nd, we have a judgment of record of 25 million, so we've got 20 bucks. Here's my appeals bond or my supersedeas of 10," you see, to supersede it.

That keeps happening, and what we need from the get-go -- and I've not found anything that's dealt with it -- is you would have to put that on an FDIC audited financial statement to a bank, whatever. I mean, it's not necessarily bogus. What we need is something that says that the net worth is computed either as of the date before the judgment or the day after the judgment. It would be so simple to do, and it would help so much.

PROFESSOR DORSANEO: Yeah.

CHAIRMAN BABCOCK: Elaine.

PROFESSOR CARLSON: Skip, the 14th Court of Appeals in *Ramco vs. Anglo-Dutch* held last year that you apply generally accepted accounting principles in determining net worth, which makes sense.

MR. WATSON: Yeah.

PROFESSOR CARLSON: So and that would -- one would think, and if you talk to CPAs and auditors about what that means they would say that the judgment ordinarily is not included. In other words, you don't get to deduct out the potential liability on the judgment to

determine current net worth.

MR. WATSON: It would be nice if it said that.

PROFESSOR CARLSON: Well, you know, we talked about this back in 2003, and you know, the consensus of I think the Court and the committee was this is just going to have to be resolved through case law, going to develop through the case law. You know, it does say "current net worth" in 24.2(a)(1)(a), but that doesn't help you a whole lot.

CHAIRMAN BABCOCK: Lonny.

PROFESSOR HOFFMAN: Not speaking to that issue, just returning to this question of this whole reason to have another deficiency hearing in (c)(2), I share the view with Tracy and Hugh Rice Kelly now that this adds a layer.

Elaine, if you're right that these things are hard to figure out, it's going to be hard to figure out at a deficiency hearing, which means that's another layer and a complicated process, so I don't see that we save time. I see that we've added a layer here. It seems to me that everyone is incentivized at the contest hearing to do what they need to do. So my view would be that I haven't heard anything to -- it sounds, to justify that in those initial --

PROFESSOR CARLSON: Now you're going to allow reasonable discovery and we're going to go and have a hearing on --

PROFESSOR HOFFMAN: To the extent that the judgment creditor wants it, which they may or may not. If the burden is on the judgment debtor -- I don't know how these things work. I take it that if you have a scenario and the judgment debtor has done nothing and it's easy, the judgment creditor is going to say, "This is easy. I don't need any discovery. They haven't done anything. It's facially defective."

If it is more complicated than that and it requires some additional discovery, they may choose to do that, but again, that seems to me that the proper place to happen is at the contest hearing as opposed to adding a layer. Effectively what you have done is you've added a layer of hearing where they're going to fight those same battles, and whatever the outcome of that hearing you're then going to have a contest hearing.

CHAIRMAN BABCOCK: Bill, did you have something? And then Justice Bland.

PROFESSOR DORSANEO: Yeah. I was just going to say that I don't know if this got lost along the way, but Justice Duncan's point about the problem being in the sentence requiring the trial judge to state the

particularity of the factual basis for that determination, if we could fix that that would go a long way towards solving the problem that we were trying to work on in this motion to strike insufficient affidavit place.

PROFESSOR CARLSON: Bill, that would absolutely work. I mean, that's another procedural way to approach it, say, "Well, trial judge, you have to have a hearing."

CHAIRMAN BABCOCK: Yeah.

PROFESSOR CARLSON: But if you have a hearing, you don't think that the affidavit gives enough information, then what?

CHAIRMAN BABCOCK: Justice Bland.

PROFESSOR DORSANEO: You didn't meet your burden.

PROFESSOR CARLSON: I'm sorry, Chip.

CHAIRMAN BABCOCK: No, no, no, that's okay.

HONORABLE JANE BLAND: Well, it seems like then we're going to focus the fight on the advocacy of the affidavit instead of on the net worth, where it should be. And I'll also -- does anybody have their Civil Practice and Remedies Code with them? I didn't bring my copy, but the -- may I borrow it? Because that is a little bit different than our rule.

HONORABLE TRACY CHRISTOPHER: Here you go,

Jane.

HONORABLE JANE BLAND: And it's not just -- or arguably not just net worth that you look at, so --

PROFESSOR CARLSON: I'm sorry. I didn't follow that.

HONORABLE JANE BLAND: Well, I'm going to look at it and then I'll bring it up. It doesn't affect this issue about whether or not we have a contest to the affidavit, but I really do think that you're going to get an argument from the other side, "Judge, I specially excepted or I contested their affidavit and I asked them to replead. They have repled. Now they're bringing all this stuff in that wasn't in their original affidavit. I don't think you should hear it." Because I can't see any other reason for adding that contest procedure if not to inform the other side what your position is as to your net worth.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Just a question. Are these ever done or could they be done just like we do a summary judgment where the creditor just files a no evidence summary judgment and put them to file their affidavit and if it's not good enough then the judgment is not suspended? If it's good enough to raise an issue then you have a contest, and then you don't argue

about what we're arguing about. That gives you an out, gives you an out on a no evidence summary judgment. They can't come up with an affidavit that's good enough to create a fact issue as to net worth then you're going to get an early out.

CHAIRMAN BABCOCK: Justice Jennings.

HONORABLE TERRY JENNINGS: I think Elaine's about to answer that question.

PROFESSOR CARLSON: You think the law is illusive, accounting principles can be very illusive as well, and --

HONORABLE STEPHEN YELENOSKY: Which means that we're always going to go to a contest unless they just have a totally insufficient affidavit, which is what Frank's been suggesting, if they have a totally facially insufficient affidavit the out would be a no evidence -- well, it will draw that, the no evidence motion will draw a facially insufficient. Otherwise, because of what you just said, if they have something that's reasonable they're going to have a contest anyway, so why argue about the affidavit?

PROFESSOR CARLSON: Yeah.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: And that comment made me think of something else. A lot of these cases are not

cases that involve Anglo-Dutch or Ramco. You know, they're small cases against small businesses or proprietorships or individuals, and to require generally accepted accounting principles as a requirement is going to be much more difficult for a small business or a sole proprietorship or an individual to meet with, and in fact, there would be arguments that their generally accepted accounting principles aren't really even designed to deal with those kinds of things, so --

HONORABLE STEPHEN YELENOSKY: And I've never done one of these, so it would be nicer if when I get it it's what I know how to do, which is no evidence summary judgment.

CHAIRMAN BABCOCK: Richard Munzinger.

MR. MUNZINGER: My experience is that people in discovery are harder to deal with in terms of being forthcoming and that there are many discovery disputes that are taken to trial courts, some of which are resolved, some of which are not, depending upon the trial court's attitude. The affidavit procedure that's outlined in No. (2) may very well save trial courts time and the problem of dealing with the ~~il~~elusive judgment debtor who doesn't want to answer discovery any more than he wants to put it in an affidavit.

If the affidavit is in general "I ain't got

no money," I wouldn't be surprised to see that. So now what do we do? Well, we say "Go do discovery," and the fellow doesn't answer questions and he won't produce documents, and "Oh, my banker burned that, my dog ate it," whatever it might be. We've all heard the stories, whether it's in post-judgment discovery or in pretrial discovery, and allowing a judgment creditor to require specificity in a sworn affidavit has a prophylactic effect, or should, if you're dealing with trial judges who will enforce the law, which is a problem.

But there is something to be said for an affidavit procedure that lets me as a judgment creditor say, "Wait a minute, Judge, make this fellow tell you what his assets and his liabilities are, does he have interest in this company or that company and what have you" because now then the fellow has to come up and give a sworn affidavit that may save a lot of time in discovery and a lot of money. Clients spend lots and lots and lots of money pursuing facts in discovery that they don't get or they spend lots of money attempting to conceal facts that they don't want to give, and this procedure may offer something that would be helpful to trial courts and judgment creditors.

If I've got a judgment and a judge or a jury has honored the law and given me a judgment, I've got a

right; and if you're going to evade my right now, all of justice, everything, has been done to say you owe me 10 million, one million, whatever it is. The law has been honored. Okay. Well, why don't you tell me under oath why you can't appeal this in accordance with the law? Make the guy give the affidavit. The more I've sat here and listened about it I like the idea. I think you ought to do it because I think then it would give some trial courts some reason to say, "Well, straighten this out," obviate some hearings.

HONORABLE STEPHEN YELENOSKY: Aren't you going to get the same thing and maybe faster with the no evidence motion? If all that his affidavit says is "I don't have the money," well, you know how to attack an affidavit like that. It's conclusory.

CHAIRMAN BABCOCK: Judge Christopher. Judge Christopher.

HONORABLE TRACY CHRISTOPHER: Well, (c)(1) requires that the affidavit contain detailed information concerning the debtor's assets and liabilities from which net worth can be ascertained, so we already have that requirement in (1), and it's never that they're not putting down numbers, it's that the numbers are wrong or the numbers are -- you know, they're hiding things. They've put all their money in trusts as a matter of

course throughout their whole life as an adult and to hide money from potential creditors, but you know, that's what they've done throughout their entire career, so you need to find that out at a contest, not have this extra layer of no evidence summary judgment or special exceptions to the affidavit.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: The Civil Practice and Remedies Code says that even if the judgment debtor puts on evidence of their net worth and it shows that, you know, the judgment is not 50 percent of their net worth, they still can go in and ask for a reduction of the bond based on a showing of substantial economic harm. So they file this affidavit, you know, that's not the end of the ballgame, even if the affidavit is facially, you know, showing that it's, you know --

HONORABLE STEPHEN YELENOSKY: Net worth is high.

HONORABLE JANE BLAND: -- that the net worth is high and the judgment is not 50 percent of their net worth. So, you know, I'm not sure that we really save anything, because if that doesn't -- that doesn't resolve all the arguments. So they could file an affidavit, and somebody could move to strike it and say, "Well, the one you filed shows that you've got, you know, 50 percent --

you know, 50 percent of your net worth is going to cover this judgment," but they could nonetheless argue that they shouldn't have to post a bond for that because they can't get it bonded or they're going to suffer some kind of economic harm.

CHAIRMAN BABCOCK: Right. Let's take a break so our court reporter can re-energize her fingers.

(Recess from 10:47 a.m. to 11:05 a.m.)

CHAIRMAN BABCOCK: All right, we're back on the record. Elaine, have you figured our way out of this yet?

PROFESSOR CARLSON: Well, it would be helpful to have a vote of the committee --

CHAIRMAN BABCOCK: Right.

PROFESSOR CARLSON: -- on whether they endorse the notion of the motion to strike the insufficient affidavit as you see it in subsection (2), or do you want us to try and reengineer subsection (3) to give the trial court some other option than having to always give a detailed -- a detailed finding on net worth.

HONORABLE JAN PATTERSON: May I ask a question before we vote?

CHAIRMAN BABCOCK: Judge Patterson.

HONORABLE JAN PATTERSON: I'd like to know from the practitioners whether they've gone through this

process because I think that Hugh and Richard have defined the problem well, does it facilitate the goal or does it obfuscate and add a layer. I'm not sure that we've heard entirely from people who've gone through it whether it would be useful for not, and I think their perspectives are helpful, and I can't get a fix on that.

CHAIRMAN BABCOCK: Anybody gone through it? Judge Christopher, Judge Bland.

PROFESSOR CARLSON: I've been in many of these hearings.

CHAIRMAN BABCOCK: Professor Carlson.

HONORABLE JAN PATTERSON: But none of the practitioners.

PROFESSOR DORSANEO: I read all the cases and I've read several, but I haven't done it.

HONORABLE JAN PATTERSON: I've read the cases, too.

CHAIRMAN BABCOCK: Okay. Well, I think Elaine's idea is a good one. How many people are -- regardless of how it's precisely worded, how many people are in favor of the subcommittee's recommendation that we have a section that deals with the motion to strike an insufficient affidavit? Raise your hand.

How many opposed? There are 9 in favor and 15 opposed. So there is an answer for you, Elaine.

PROFESSOR CARLSON: Well, yeah, we'll go back and reengineer (3) then to address the Court's concern about a factually -- I mean a facially insufficient affidavit.

CHAIRMAN BABCOCK: Okay.

PROFESSOR DORSANEO: Why don't we just take Justice Duncan's idea that we take out the requirement that in (3) "Trial court must issue an order that states with particularity the factual basis for the determination." That's the thing that bothers me the most. I mean, the trial judge may not have difficulty signing an order that states the debtor's net worth, if there's not much proof on the point. You know, write down a low number or write down an unfavorable number for the person who has the burden.

HONORABLE SARAH DUNCAN: Or state simply, "I'm not able to find" -- I mean, if I were a trial judge I would be very concerned about finding a number when the evidence before me didn't support any number.

CHAIRMAN BABCOCK: Hugh Rice.

MR. KELLY: The purpose of this clause is to carry out the public policy that's behind the basic statute, and that was a prior practice in which litigants would be denied their right of appeal because they couldn't make the bond or because the bonds were being set

at unreasonable or oppressive levels. If you take this out you've just reinstated that practice, and we're not -- it's not going to happen in Judge Tracy Christopher's court, but there are courts in which it will happen, and so taking that out would defeat the basic policy of the statute.

Furthermore, I don't think that you -- that judge, I would hope, that where it said "the factual basis for the determination" would not be -- rise to the level of having -- you know, that you have factually sufficient evidence before you, you know, like you can make a finding of fact and you have evidence before you that would give you sufficient proof of that fact. I mean, if both parties -- if one party just doesn't have information, that's to say the creditor, and the debtor is hiding the ball, what does the judge do? Well, I would assume the judge could do the best -- the best she could with whatever the creditor would say. Say, look, the creditor can't say -- make a better showing because of the debtor's intransigentness and so state that. That would seem to me while that wouldn't support a judgment, it very well, it seems to me, would support a setting of a bond at a certain level.

PROFESSOR DORSANEO: Won't judgment creditors that get affidavits that don't say very much

then have to do just a lot of discovery before they go to any hearing in order to be surprised by lots of information they don't know about?

MR. KELLY: I don't know.

PROFESSOR DORSANEO: And isn't that a bad idea to have this case after the case?

MR. KELLY: Well, I mean, they've got to ask themselves -- they got a judgment in the first place. Why do they know so little about the assets of the defendant?

PROFESSOR DORSANEO: Well, how are you supposed to find that out?

MR. KELLY: You do discovery during the case.

PROFESSOR CARLSON: It's irrelevant.

MR. KELLY: You can certainly find out insurances.

PROFESSOR DORSANEO: A punitive damages case it might be relevant, but generally speaking it --

MR. KELLY: If you have a doubt, the same principle that stands for why can you discover insurance? Because you want to use it for the purpose of determining whether you should invest any more of your time in this case. Somebody had a real valid question about whether the judgment -- proposed judgment debtor prior to the trial could ever pay a judgment, I'm not sure that that

would necessarily be irrelevant.

CHAIRMAN BABCOCK: Justice Bland.

PROFESSOR DORSANEO: Maybe now.

HONORABLE JANE BLAND: Well, I think it's good to have -- I disagree with Tracy about this, but I think it's good to have a number, the trial judge to have to find a number of net worth. For one thing, if you do reduce the bond, you have to figure out the 50 percent calculation, so you know that in and of itself you have to start with a number and end up with a number for reducing the bond; and the way that it's written it doesn't seem to me like -- you know, there's no definition of net worth, so the judge then can look at the evidence presented and see if -- you know, state "This is how I got to net worth"; and to me that's very helpful information when you're talking about whether or not the bond should have been reduced. So -- and I don't see how you can evaluate whether or not the bond should be reduced without making some sort of determination of what the net worth number is.

HONORABLE STEPHEN YELENOSKY: Well, if you can't make a determination, you're not going to reduce the bond.

HONORABLE JANE BLAND: Well, I mean, I would say they have not proved that they have insufficient --

HONORABLE STEPHEN YELENOSKY: But that wouldn't comply with this because I've got to state a net worth.

HONORABLE JANE BLAND: Well, you've got to state a net worth to -- well --

HONORABLE STEPHEN YELENOSKY: No, I want to be able to say, "They're hiding it. I don't know what their net worth is. They don't meet their burden, I'm not lowering the bond."

HONORABLE JANE BLAND: But, see, they're hiding it is a different thing because they're hiding it says to me that you think there's some number out there that should get included. You can't just say, "They're hiding it." You have to actually know that there's some amount that should be included.

HONORABLE SARAH DUNCAN: But --

CHAIRMAN BABCOCK: Judge Christopher, and then Judge Duncan.

HONORABLE TRACY CHRISTOPHER: Well, respectfully, I disagree with Jane.

CHAIRMAN BABCOCK: I think this is the first time that I can remember.

HONORABLE JANE BLAND: You're just not around us enough.

HONORABLE STEPHEN YELENOSKY: Do you want to

take a different seat?

HONORABLE TRACY CHRISTOPHER: The problem is in an adversarial system if the debtor has the burden of proving net worth, normally if they fail to meet their burden, they lose. Okay. You don't have to find some alternative number when they have failed to meet their burden, and requiring the trial court to find some alternative number is difficult, and also, I just wanted to point out that the appellate court can send it back to the trial court for entry of findings of fact or for the taking of more evidence if they think we haven't done it right the first time. It's a very complicated, difficult, problem for trial courts.

CHAIRMAN BABCOCK: Judge Duncan, and then Justice Bland.

HONORABLE SARAH DUNCAN: I'm concerned about what Hugh was saying about taking this sentence out was going to defeat the intent of the statute, so I'd like to probe that a little bit. What if this sentence said what it says now and then said, "If a finding of the debtor's net worth is" -- or "alternatively, the trial court may find that a determination of net worth is not reasonably possible" or something on the state of the evidence, I mean, because to follow up on what Tracy was just saying, we've assigned a burden of proof in this rule.

To follow up on what Richard was saying, there is a judgment. There are rules about how you supersede a judgment. The judgment debtor wants relief from those rules; and we say, "If you want relief from those rules, here's what you have to do." If the debtor fails to do what we tell him he has to do to get relief from the supersedeas rules, why isn't the trial court able to just say, "Here's the debtor's net worth" or alternatively, "I can't find net worth based on the evidence the debtor has given me, so it can't be more than 50 percent of the debtor's net worth because I can't find net worth based on the evidence the debtor has given me." Does that fulfill the purpose of the statute if we give the trial judge that out?

MR. KELLY: Well, my assumption is that the judgment creditor is going to have an opinion, even if it's an estimate based on a drive-by of the person's property. If he can't get discovery, been frustrated by that, he's got a recalcitrant, evasive judgment debtor, it would seem to me that would be perfectly reasonable proof. If somebody says, "I know this man has got 500 acres out here." He claims its worthless because it's, I don't know, a swamp, whatever, something in which he's got some pretty thin proof; but you never convince anybody except for the fact that you're trying to set a number; and so

the creditor comes in and says, "This guy owns a house, he owns this ranch, he owns this business. In my opinion -- and I've got an affidavit here from the county that says 'given the fact that we have had no access from this guy we think it's worth 20 million.'"

HONORABLE SARAH DUNCAN: What I'm suggesting is the judgment creditor -- they have no burden at this hearing. The burden is on the judgment debtor. Why should the judgment creditor have to list the judgment debtor's assets if the judgment debtor hasn't?

MR. KELLY: Well, in the hypothetical I outlined for you, the judgment debtor is probably saying he doesn't have a nickel and the creditor is saying he's worth a lot. The court says, "I take the creditor's number."

HONORABLE SARAH DUNCAN: And that's fine. I'm just saying what if we have one of those judgment creditors that doesn't come forward with a list of assets and we have a judgment debtor who doesn't do diddly squat basically. Why shouldn't the court just be able to say -- the trial court -- "The judgment debtor had the burden to prove his net worth. The judgment debtor failed to meet that burden; therefore, I cannot find that the judgment is in excess of 50 percent of the judgment debtor's net worth." Would that comport with the intent of the

statute?

MR. KELLY: Hard question. The primary thing, you know, this thing originated, from what I can recall, from the small business guy; and these are people who are not pushing 50 million or 40 million in net worth, and these -- maybe it would come up with doctors who are trying to cover their tracks, put things into trusts, but there is even for a judgment debtor in the case where they just completely defaulted I have a hard time answering your question. If we have someone comes in, they give what they think is a reasonable estimate, nobody else thinks it is, and the -- what should the judge do? Throw the book at them and tell somebody with a true net worth of 15 million that he ought to post a 25 million-dollar bond because he doesn't like his proof?

Well, if you're dealing with good and fair judges who, you know, doing right, that would be -- I would like your argument a lot better. Many of these have come up in the case of -- and I won't refer to any current history, but a judge that I appeared before many times, Neal Caldwell in Matagorda County, believe me, all affidavits were going to be held insufficient, and when you sent proof he was going to default you to 25 million. Now, he's not a judge at the moment, he's retired; but I promise you that was what was going to happen in Neal

Caldwell's court; and he knew how to do it, a very capable man, but he was not very happy about defendants; and we have other courts in this state that have the same problem, and that is the source of the original rule, that plus just the sheer problem of a small businessman who cannot make a bond.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: So you have three things. You have you know the net worth number and the net worth number is such that you reduce the bond, you grant relief. You know the net worth number and the number is such that you don't reduce the bond, so you grant no relief because it's high, or you're not capable of determining the net worth number. So maybe -- and I'm going back to Tracy now -- we should require a net worth number if the trial court grants relief or denies relief based on the fact that the net worth is too high, and then the third one, not require a net worth number but require an explanation as to why the evidence presented doesn't render an ability to figure out net worth or something like that.

CHAIRMAN BABCOCK: Sarah, then Judge Yelenosky.

HONORABLE SARAH DUNCAN: That's what I was wondering, is could we take the second part of the motion

to strike, subparagraph (2), "The court must inform the judgment debtor how the affidavit is deficient" and move that down into (3) instead of the sentence -- I'm just going to call it the offending -- the sentence I read earlier, of why the proof of claimed net worth is insufficient to satisfy the burden established by earlier portions of the rule? Which I think is sort of what Jane is saying.

HONORABLE JANE BLAND: I don't think you should say -- yes. I think you should have to say the reason why you think the evidence presented is not adequate to make a net worth determination.

MR. GILSTRAP: Are you giving them another chance then?

HONORABLE JANE BLAND: Well, they will just file another motion. I mean, you know, these things, there is no finality to a --

HONORABLE TRACY CHRISTOPHER: Yeah, there is.

HONORABLE JANE BLAND: To this, because your financial position can change throughout the course of the post-judgment proceedings, and they can come back in and seek more relief.

CHAIRMAN BABCOCK: Judge Yelenosky, and then Tom Riney.

HONORABLE STEPHEN YELENOSKY: Well, I was trying to figure out if there is a parallel in anything else we do where we're ordered to make a factual finding even if we think there's no competent evidence upon which to make the factual finding. I can think of when there's a 306a motion you've got to set the date of the judgment. Well, I mean, you've got to have a date for the judgment for everything else to work, so that's one example, but to tie this into our discussion this morning, this seems to me like saying somebody filed -- without an IOLTA certificate somebody who is allegedly poor files an affidavit of inability. If the judge is going to deny that, he has to determine what, in fact, their income is. We don't do that. We just say, "You haven't met your burden of establishing indigency," so why here?

I mean, I guess if you want to make it parallel to an IOLTA certificate you could make an incontestable affidavit by a judgment debtor, and we're not going to do that, but I'm just having trouble seeing why we would have a special requirement of a factual determination without necessarily even competent evidence of it.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: Because it's like a bench trial, and you're actually trying to figure out

exactly what factual findings the judge made to come up with the -- the legal issue is, you know, should I lower the bond and here are the facts about why I didn't.

HONORABLE STEPHEN YELENOSKY: Well, but my factual determination would be --

HONORABLE TRACY CHRISTOPHER: That I don't know.

HONORABLE STEPHEN YELENOSKY: -- that they have not met their burden of establishing any net worth of any --

HONORABLE JANE BLAND: Well, that might be true, and then that would get reviewed and you'd say, okay, the -- you know, but the problem is they usually put in some affidavit that says something.

HONORABLE STEPHEN YELENOSKY: But this --

HONORABLE JANE BLAND: "I have a negative net worth and here's why," and the truth is the judge should have said, "I can't determine the net worth because I don't find the person credible. I discovered that, you know, there are other sources of income."

HONORABLE STEPHEN YELENOSKY: But this doesn't allow me to do that. It just says I have to give a number.

HONORABLE JANE BLAND: That's why we were proposing --

HONORABLE STEPHEN YELENOSKY: Oh, I agree. I agree.

HONORABLE JANE BLAND: -- give a number, give a number if you're using a number --

HONORABLE STEPHEN YELENOSKY: I agree. Yeah, if you take out giving a number, then, yeah, I mean, it's more parallel. I think you should give a number if a number is necessary for the judgment.

HONORABLE SARAH DUNCAN: For the relief.

HONORABLE STEPHEN YELENOSKY: For a decision, but a number isn't always necessary because the answer may be you haven't met your burden, and so if you're saying you want to modify the language, then, yeah, I agree.

CHAIRMAN BABCOCK: Okay. Elaine, do you feel like you've got enough feedback here to go back to the board and the subcommittee on this, or are you still --

PROFESSOR CARLSON: I think so.

CHAIRMAN BABCOCK: Okay.

PROFESSOR CARLSON: I think so.

CHAIRMAN BABCOCK: All right. Well, I think unless anybody has any more thoughts about this rule, we'll just go onto the next one, if that's all right. Bill, back to you.

PROFESSOR DORSANEO: Well, I don't guess anybody formally moved to change that sentence, but I think we ought to vote on that as to whether we change the sentence because it -- to what Justice Bland thinks, if that's an option. Does that make sense after all this discussion?

CHAIRMAN BABCOCK: Which -- okay. Which sentence?

PROFESSOR DORSANEO: The sentence I myself think the source of the problem is, the sentence in (3), "The trial court must issue an order that states the debtor's net worth and states with particularity the factual basis for that determination." I thought we just lop off the end part and that would be okay, but if the judges think that it needs to be reworded to explain that when the -- if the judgment debtor doesn't meet his burden of proving net worth, then the order could say that. Huh? And that would make sense.

The case that I remember is the judge wrote down a number, and the Supreme Court said that you didn't state with particularity the factual basis for that determination, so mistake, error, and that seemed very unfair to me. And I wasn't convinced by Mr. Kelly's argument that the world would come to an end if that happens.

MR. KELLY: Well, I'm not arguing it comes to an end, but I'm arguing the policy behind the statute --

CHAIRMAN BABCOCK: Life as we know it comes to an end.

MR. KELLY: -- is to stop the sudden death application of appellate bonds and the abuse of appellate bonds in some courts to deny defendants the right to appeal. Now, that is not the end of the world as we know it, but it is an abuse that was noted in certain parts of the state.

PROFESSOR DORSANEO: But the statute doesn't require us to have this language, does it?

MR. KELLY: Yeah. But in that case did the court -- did the court state no reasons whatsoever or did it state reasons -- and I haven't read the case -- that the Supreme Court deemed to be insufficient particularity?

CHAIRMAN BABCOCK: Did we not work on this rule back in 2003, Bill? I mean, didn't this -- didn't this sentence that we're thinking about taking out --

PROFESSOR DORSANEO: Yes.

CHAIRMAN BABCOCK: -- didn't we insert it in 2003?

PROFESSOR DORSANEO: I don't remember who put it in or where it came from. I do not think that it

came from the statute, but I'm not absolutely positive about that. Elaine is the one that knows the most about this.

CHAIRMAN BABCOCK: It came as a result of a discussion we had, didn't it?

PROFESSOR CARLSON: May I respond?

CHAIRMAN BABCOCK: Yes.

PROFESSOR CARLSON: It's not in the statute, in 52.006. The Court was charged with coming up with procedures to implement the statute, and this could be done in a number of ways. Ideally the best way -- ideally the best way to handle this is to require the trial court in every case in which there is -- I'm going forward on net worth to make a finding, but the consensus was that, gosh, that's going to take a lot of trial court time and that might not be necessary, and so how about if we require the detailed affidavit, discovery, that might do it.

I mean, I've seen instances where you produce in discovery financial statements that satisfy the other side and that's the end of it, but if it goes to a contest we need the trial court to make a finding because the statute does say that the appellate court must review it. So it was the particularity of the finding to facilitate the appellate review where that sentence came

from.

PROFESSOR DORSANEO: So we're helping out the appellate court, but not worrying about the trial judge so much?

PROFESSOR CARLSON: It appears so.

HONORABLE SARAH DUNCAN: But an appellate court can review a record of a hearing in light of a trial judge's finding that the judgment debtor failed to produce sufficient evidence to establish its net worth and determine whether that's -- whether that finding is supported by that record. So it doesn't -- appellate review doesn't require that there be a number. Appellate review requires that there be a finding that is supported by a record.

PROFESSOR CARLSON: I agree. And we could easily -- and that's why I said I'd reengineer this language. We could easily include in subsection (3) something like Sarah has suggested, after the trial court must --

HONORABLE STEPHEN YELENOSKY: That's every summary judgment appeal.

PROFESSOR CARLSON: After "The trial court must state with particularity the factual basis for that determination," something like "or why the proof of net worth is insufficient to allow such a finding" and then

you go up on an abuse of discretion, factual sufficiency, legal sufficiency review according to *In Re: Smith* at the Texas Supreme Court.

CHAIRMAN BABCOCK: Not that we are bound rigidly by what the Court asks us to do, but on the issue that Bill just requested a vote on, which is whether or not we should eliminate this sentence that says, "The trial court must issue an order that states the debtor's net worth and states with particularity the factual basis for that determination," the summary of the issues and the request that the Court made of us didn't suggest that we look at that, and in fact, the implication of the charge is that this would be integral to what the Court did ask us to look at. Is that a fair read, Elaine, or not?

PROFESSOR CARLSON: Yeah. The Court did not us ask us to deal with that issue. It asked us to deal with the issue of do we really have to have a full blown hearing on net worth when you've got a facially defective affidavit. That was the big issue.

CHAIRMAN BABCOCK: Yeah. Justice Bland.

HONORABLE JANE BLAND: But doesn't that -- I mean, doesn't what we're talking about kind of solve the problem of the facially defective net worth affidavit, because then the trial judge can simply find that the evidence does not support a finding of net worth?

PROFESSOR DORSANEO: I submit, Mr. Chairman, this is the same problem.

HONORABLE JANE BLAND: And here, if we added to that sentence that's currently in the rule about net worth, "if relief is granted," comma, "the trial court must issue an order that states the debtor's net worth and states with particularity the factual basis for that determination," period. "If the trial court denies relief," comma, "the trial court must state the debtor's net worth or alternatively state that the evidence does not support a finding of net worth."

PROFESSOR CARLSON: The affidavit is not evidence. It gets you the hearing.

HONORABLE TRACY CHRISTOPHER: Right.

PROFESSOR CARLSON: Then you put on your real evidence.

HONORABLE JANE BLAND: Right, but I mean, if all they show up to the hearing with is this affidavit, they're dead.

HONORABLE STEPHEN YELENOSKY: The evidence is put on at that point.

PROFESSOR CARLSON: Then it is a no evidence.

HONORABLE JANE BLAND: Yeah, and then you could drop down and say the evidence does not support.

CHAIRMAN BABCOCK: Frank.

HONORABLE JANE BLAND: And then there's something for the appellate court to look at to say, okay, trial court said evidence doesn't support a finding of net worth. You can look at it and say, well, does it, is there something that could support a finding? I don't know.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: This all makes sense. We're treating it just like a fact finding and the debtor didn't carry his burden, but I'm troubled by the example Mr. Kelly gave, and that's, you know, okay, judge sits there. The debtor comes in, puts on his evidence. It's all there. He says, "I don't believe any of it. Motion denied." I mean, that's a possible outcome, and what I hear him saying is that maybe, maybe we need to require a little bit more of the trial judge. I guess this all gets to the need to revise that sentence, but I don't think it's quite as simple as people are saying here.

CHAIRMAN BABCOCK: Well, in the circumstance that you posit, though, isn't what's going to happen is the judge says, "I don't believe any of it. The motion is denied. Please prepare fact findings for me and I'll look at them and enter them if I want to," to the prevailing party?

MR. GILSTRAP: Well, I think, no, no, because he doesn't have to make a finding. The evidence didn't support any findings. I mean, you know, we've all had that problem with findings of fact; but, in fact, the proper thing for a judge to do in some cases is just say, "The plaintiff didn't make his case, I'm not going to make any findings." I don't think that solves the problem, and I don't think we can solve it here. I just want to put that on the table, too, if we go back and deal with revising that sentence.

CHAIRMAN BABCOCK: Elaine.

PROFESSOR CARLSON: Frank, as a practical matter what happens is the judgment debtor is going to seek to appeal the ruling, and you rely upon the appellate court to grant you a stay, which is often granted.

CHAIRMAN BABCOCK: Uh-huh.

HONORABLE STEPHEN YELENOSKY: Why is an appeal inadequate there where it's adequate everywhere else, Frank?

MR. GILSTRAP: What's that?

HONORABLE STEPHEN YELENOSKY: Why is appeal inadequate where it's presumed to be adequate everywhere else?

MR. GILSTRAP: Well, at the end of the day, at the end of the day you're going to appeal it and the

appellate court's going to say, you know, "Trial judge, you know, that's a factual question, we're going to defer to him," period, and it may not be an answer to that.

CHAIRMAN BABCOCK: Sarah, and then Elaine.

HONORABLE SARAH DUNCAN: The reason I think it's different is that once the trial judge denies the motion, if the debtor has not put up the bond that's required by the rule, the creditor can execute, which is a fairly irreversible, uncompensible event in the life of a judgment debtor. I mean, once they've sold my house that I value as the place where I live and it's paid for --

MR. GILSTRAP: My boat.

HONORABLE SARAH DUNCAN: Your boat. They may could give me money, but I can't buy my house again.

PROFESSOR DORSANEO: You get to keep your house and your boat.

HONORABLE SARAH DUNCAN: I paid 1960 prices for it and this is 2006.

HONORABLE STEPHEN YELENOSKY: And it's not reviewable by mandamus?

PROFESSOR CARLSON: That is exactly what I was going to say, is that the downside is a judgment debtor is --

CHAIRMAN BABCOCK: You're just like Bland and Christopher, you two.

PROFESSOR CARLSON: She nuked my subsection (2).

HONORABLE SARAH DUNCAN: That's what I was going to say to Justice Hecht, is when he can get Elaine and me to disagree on a supersedeas question, that's a very provocative letter. But that's the downside.

HONORABLE TRACY CHRISTOPHER: I mean, the rule provides that the appellate court can issue a temporary order necessary to preserve the party's rights, so, I mean, if you get some crazy trial judge, you go immediately to your appellate court saying, you know, "Stop execution until you review this, please."

HONORABLE SARAH DUNCAN: And that may not be soon enough, but --

HONORABLE JANE BLAND: And that may not be what?

HONORABLE SARAH DUNCAN: Soon enough, but I mean, you know, we can only --

CHAIRMAN BABCOCK: We can only fix so much.

HONORABLE SARAH DUNCAN: -- provide for so much.

CHAIRMAN BABCOCK: You think you've got enough, Elaine?

PROFESSOR CARLSON: I do.

CHAIRMAN BABCOCK: Okay. That's enough of

that.

MR. HAMILTON: Chip?

CHAIRMAN BABCOCK: Yeah, Carl.

MR. HAMILTON: I have one little minor problem which may bear on that, too. It's this 20-day thing. That second underlined sentence, "when the trial court orders additional or other security," under the rules there can be additional or other security required, but here we're talking about the net worth only.

PROFESSOR DORSANEO: Uh-huh.

MR. HAMILTON: So I'm wondering if that sentence really needs to be somewhere else, or are we talking about if the trial court increases the amount of the bond contrary to the affidavit or the testimony that he gets another 20 days, or are we talking about additional or other security?

PROFESSOR CARLSON: We're talking about the trial court either -- well, increasing it. It could be from you don't have a negative net worth to you have this net worth or you said your net worth was X, but it's higher, it's Y. So we're really talking about --

MR. HAMILTON: So we're talking about an amount of money, an amount of bond, not additional or other security there.

HONORABLE SARAH DUNCAN: It could take

different forms. The additional security.

MR. HAMILTON: I know it could take different forms, and that's provided for in the rule, but here we're really just talking about net worth, the determination of net worth.

HONORABLE SARAH DUNCAN: Well, but the amount of the bond, the amount of the security that was filed, is based upon what the judgment debtor said its net worth was.

MR. HAMILTON: Right.

HONORABLE SARAH DUNCAN: If that number proves to not be what the trial court finds then there's going to have to be additional or other security to bring that additional security that was filed up to where it needs to be under the rule, and that's what that sentence does.

MR. HAMILTON: All I'm saying is do we want him to do that in this contest of net worth?

PROFESSOR CARLSON: Why not?

MR. HAMILTON: Because that's really all we're arguing about is net worth, or is the judge going to be able to say, "Well, I don't agree with your net worth, but I'm going to order you to put up this 500 acres over here as collateral" or your stocks and bonds as collateral, or what other security is he going to require?

You see, it provides for that on recovery of property.

PROFESSOR CARLSON: I see what you're saying. It would be additional monetary security.

MR. HAMILTON: Monetary is all we're talking about really.

PROFESSOR CARLSON: Right. That's all we're talking about.

CHAIRMAN BABCOCK: Justice Bland.

PROFESSOR CARLSON: Okay.

HONORABLE JANE BLAND: I just have one other comment on that provision that's not related to this topic. At the last sentence, "If the judgment debtor does not comply with the order within that period, the judgment may be enforced," and don't we want to add if the -- or should we add "if the judgment debtor does not comply with the order within that period," comma, "absent a stay by the appellate court, the judgment may be enforced against," because otherwise it sounds like if the appellate court hasn't acted in 20 days arguably they can go ahead and proceed.

HONORABLE SARAH DUNCAN: They can.

HONORABLE JANE BLAND: Unless this is intended to get the appellate court to rule in 20 days, which may not be a bad thing either. It just depends on what you're --

HONORABLE SARAH DUNCAN: But what the appellate court would be staying is this order, so I don't understand why it's necessary to --

HONORABLE JANE BLAND: My fear is that a judgment debtor would read this and say -- I mean, I'm sorry, a judgment creditor would read this and say, "I can execute, it's been 20 days."

HONORABLE SARAH DUNCAN: Well, that's right. They can.

HONORABLE STEPHEN YELENOSKY: Unless there is a stay of orders.

HONORABLE SARAH DUNCAN: Unless that order is vacated or stayed or reversed or transmogrified someway.

CHAIRMAN BABCOCK: Transmogrified. Hugh.

MR. KELLY: You know, when we talk -- it's an interesting point about talking about how does the deadbeat secure any bond. If he says, "Well, I don't actually own the property and it's in a trust," so he's going to have to put up cash or he's going to have to put up an appellate bond. Well, you can't get an appellate bond if the insurance company can't look at your net worth. If they say, "Well, you're busted," you can't -- you can't get an insurance company bond either. So there's an interesting dimension to that. If somebody

really is taking the position that they can't pay a thing, they're never going to make a bond.

CHAIRMAN BABCOCK: Tom.

MR. RINEY: There are situations where someone else will step in and with substantial net worth and guarantee. I've not been in that exact situation, but I have been in situations where daddy has stepped in to take care of someone, and I would imagine that could be done in those circumstances, but let me focus on something else. I don't think this net worth number needs to be perfect, because what we're really talking about, we're not talking about, you know, how much liability is being established. What we're talking about is modifying a procedure whereby enforcement of the judgment is suspended until an appellate court can determine a party's rights, so it's a lot different to me than a finding of fact on the amount of damages, for example.

Now, the risk, I suppose, is if it is abused by a judgment debtor is that a judgment debtor could dissipate assets during the time period of time that they appeal, but here we're starting out with an affidavit, then we're going to allow some discovery on top of that, then we're going to allow the trial court to have a hearing, and then either side is protected because you can pretty much go up to the appellate court right then and

get some immediate review. So I think we need to keep in mind what this procedure is intended to be and the safeguards already incorporated in it and perhaps not make it too complicated.

CHAIRMAN BABCOCK: Yeah. Okay. Rule 34.

PROFESSOR DORSANEO: We did that one.

CHAIRMAN BABCOCK: All right.

PROFESSOR DORSANEO: We're all the way up to 41.

CHAIRMAN BABCOCK: 41.

PROFESSOR DORSANEO: And all we were directed to do was to figure out who would be added --

CHAIRMAN BABCOCK: Hold it, Bill, for a second.

HONORABLE NATHAN HECHT: Have we done 24.4(d)?

CHAIRMAN BABCOCK: No. We didn't talk about that. Sorry.

HONORABLE NATHAN HECHT: Why did we skip it?

CHAIRMAN BABCOCK: Oversight.

PROFESSOR DORSANEO: I thought we were going back to the drawing board on the 24 altogether.

CHAIRMAN BABCOCK: Yeah, we are, but we never talked about 24.4(d). Elaine, did you have anything to say about 24.4(d)? The appellate court, "A motion

filed under paragraph (a) should be filed in the court of appeals having potential appellate jurisdiction over the underlying judgment. The court of appeals ruling is subject to review on motion to the Texas Supreme Court."

PROFESSOR CARLSON: Uh-huh. Yes, I do.

CHAIRMAN BABCOCK: What do you have to say about that?

PROFESSOR CARLSON: Justice Hecht actually raised four questions for our subcommittee to look at, and we've gone through one of them. The two questions on the appellate side that we were asked to look at is does the court of appeals or the Texas Supreme Court have jurisdiction over a Rule 24 supersedeas or appellate security ruling when there is no appeal of the underlying case yet pending before the court, and that's very common because of the need to get to the appellate court for a stay so you don't have judgment enforcement.

It is very common that your time to appeal is far away, but judgment enforcement can start immediately after the signing of the judgment in many different forms, in 30 days I think after the judgment is signed or your motion for new trial is overruled as far as execution, but there is still turnover and there's garnishment and there are other -- judgment liens. There is lots of mischief that can take place immediately, so

there is a need of immediate relief from the appellate court before you formally invoked the court's jurisdiction.

The second -- and the second question Justice Hecht asked us to look at is if the court of appeals and the Supreme Court does have jurisdiction to look at a Rule 24 determination by the trial court without its appellate jurisdiction being formally invoked, what procedure should the appellate courts use? Some courts of appeals treat a Rule 24 motion for review as a mandamus. Others say, no, you go forward on motion because the rule says you can do it on a motion.

The Texas Supreme Court in *In Re: Smith*, I believe said, "We're treating it like a mandamus," so getting to those two questions, our subcommittee felt -- and this is kind of consistent with what Hugh was saying -- that when you look at the history of Chapter 52 and House Bill 4 and the language of that statute allowing the appellate court to review the amount of security under Rule 24, that there was an intent by the Legislature that the appellate courts have jurisdiction to review these motions without formal invocation of their appellate jurisdiction, because otherwise you have 90 days to appeal and you can't get any ruling or stay in your appellate security. You just have a field day on enforcement. You

could. So that would definitely defeat, I think, the legislative purpose in modifying appellate security to facilitate eventual appellate review.

So we answered that first question, yes, that we thought that the legislative intent did provide that jurisdiction, and then we proceeded to the second inquiry of should this go before the appellate court in the form of mandamus or in the form of a motion, and the consensus of our subcommittee was that it should go forward as a motion. When you look at mandamus procedures, they're more complicated in some ways.

Arguably -- and I don't know the answer to this -- but arguably you could say the abuse of discretion standard is applied distinctively in the mandamus context as opposed to looking at an ordinary motion. You see language in some cases that I don't know the answer to that, but it causes me concern. And then procedurally it's just easier to go forward with a motion, and of course, again, that's what our rule reads.

So those are the two questions I think we answered in the amendments -- proposed amendments to 24.4. Now, subsection (a)(1), I'm on page four of Bill's memo, 24.4(a)(1) is out the door because we just decided we're not going to have a motion to strike. We're going to deal with that in some other way, but looking over on page five

under 24.4(d), a motion filed under paragraph (a) -- yeah, under paragraph (a), "should be filed in the court of appeals having potential appellate jurisdiction," so, you know, if you're in the Tyler court of appeals you need to go there and not Houston or somewhere else, and that the court of appeals ruling is subject to review on motion to the Texas Supreme Court, so we thought that was --

CHAIRMAN BABCOCK: Simple, elegant, and --

PROFESSOR DORSANEO: All the statute says is "An appellate court may review the amount of securities allowed under Rule 24."

CHAIRMAN BABCOCK: And the Supreme Court is an appellate court.

PROFESSOR DORSANEO: Well, yeah, but who knows what the statute means.

CHAIRMAN BABCOCK: The shadow knows. Sarah, and then Gene.

HONORABLE SARAH DUNCAN: I guess I was sort of a dissenting voice to this, too. Only because --

PROFESSOR CARLSON: Thanks a lot.

HONORABLE SARAH DUNCAN: Well, I'm sorry. It's rare that we disagree, but I was, and it's just because to me jurisdiction either is or it isn't; and if a court doesn't have appellate jurisdiction of a matter and it doesn't have original jurisdiction of a matter, it

doesn't have jurisdiction. So even though I'm in favor of a motion because it's simpler than an original proceeding, I don't understand any basis for it.

I mean, if they don't have jurisdiction over the appeal and we're not going to file an original proceeding, they don't have jurisdiction to do anything with the case, so I just have that tiny little philosophical --

PROFESSOR CARLSON: Purist principle.

HONORABLE SARAH DUNCAN: -- purist problem.

PROFESSOR DORSANEO: The argument was made that you could have, at least in the Supreme Court -- and I was talking to Buddy a little bit here, so I don't know if I heard everything that you were saying, but the argument was made you could file a motion for extension of time to file --

HONORABLE SARAH DUNCAN: I made that motion.

PROFESSOR DORSANEO: Okay.

HONORABLE SARAH DUNCAN: I mean, I made that point, and that's -- I have a little question about that, too, but a motion is simpler.

CHAIRMAN BABCOCK: Gene.

MR. STORY: Yeah, my question was just is this giving Supreme Court jurisdiction to look at factual sufficiency?

PROFESSOR CARLSON: No. The Texas Supreme Court in I think it is *In Re: Smith* --

MR. HUGHES: It's *In re: Main Place Custom Homes*, but it's been consolidated with Smith. It's the same case.

PROFESSOR CARLSON: "We understand that 52.006 confers jurisdiction upon us to review appellate security orders, but we have no authority to conduct a factual sufficiency review, limited to legal sufficiency review of the evidence to support the net worth finding."

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: I'm -- could you -- I'm a little unclear about the need for the "potential appellate jurisdiction" because, okay, so execution can't take place till 30 days after the judgment is final, and that's where I'm messed up. Okay.

HONORABLE SARAH DUNCAN: That's where you're messed up.

HONORABLE JANE BLAND: What is the problem --

HONORABLE SARAH DUNCAN: One of the means -- just as an easy example, one of the means of enforcing a judgment is abstract, and that can occur one second after the judgment is signed.

HONORABLE JANE BLAND: Okay. That's not --

okay, but that's not executing. You're just saying making people aware of the judgment.

HONORABLE SARAH DUNCAN: It's a means of enforcing a judgment. Garnishment can occur immediately after a judgment is signed.

PROFESSOR CARLSON: Turnover.

HONORABLE SARAH DUNCAN: Turnover order can occur immediately after --

HONORABLE JANE BLAND: But those are -- I mean, those are all theoretically -- they're a little different, and, I mean, a garnishment action is a little bit different than trying to reduce the bond; and so I guess what I'm trying to say is don't we want to have some indication that they actually are going to appeal; and it's going to be presented to the trial court, first, right, before 24.4 comes in? I mean, aren't we envisioning that?

PROFESSOR CARLSON: Well, sure.

HONORABLE SARAH DUNCAN: I think that's actually in the rule, isn't it? It has to be presented to the trial court first.

PROFESSOR CARLSON: Yeah.

CHAIRMAN BABCOCK: Yeah, Bill.

PROFESSOR DORSANEO: Because the statute is so unclear as to what it means, I mean, this provision is

actually kind of a compromise. I wanted to at least to make certain that you couldn't file in any appellate court, right, which the statute says "an appellate court has jurisdiction" or whatever, and I felt pretty happy getting that.

Quite frankly, I'd rather -- I would rather somebody get into the appellate court before they seek relief by filing a notice of appeal, and I wouldn't go to the Supreme Court -- I mean, I read the statute to say the appellate court that you're in can review -- follow me -- not just any old appellate court any time on motion, and I really wonder whether an appellate court means the Supreme Court or whether that even makes any sense for it to be the Supreme Court, but the committee ended up with where the committee ended up, and that's kind of a compromise internally I think. I hope that was for Justice Hecht's benefit.

CHAIRMAN BABCOCK: He wasn't listening. Justice Gray.

PROFESSOR DORSANEO: I didn't think so.

HONORABLE TOM GRAY: This may be further into the process of looking at some problems that it may raise than you-all want to get into at this point, but from a management aspect on the courts of appeals, I'm going to need to know what this is to know how to docket

it, number it, pay for it. Legislature has shown an extremely high degree of interest in our fee collection procedures and how much we're collecting.

I will comment that the phrase "potential jurisdiction" means that a way to interpret that anyway would be that the Tenth court in Waco has the ability to review virtually anything out of the 254 counties because I have potential jurisdiction of one filed anywhere through the transfer of cases; and so that presents a whole other level of ambiguity in this; and would it be simpler to simply say that the motion is filed -- or when it is filed invokes the jurisdiction of the court as would a notice of appeal and, in effect, it triggers the appellate court's jurisdiction, just like a notice of appeal does?

I recognize that that has some potential ramifications about bringing up the clerk's record and the timetable for that and the reporter's record; but then as far as the Supreme Court review, it would seem that theirs would best be dealt with through a mandamus procedure of whatever it is we did with that as a, heaven forbid, interlocutory order or appeal while we're, you know, putzing with the rest of the case.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: Just the problem with

mandamus is it's just so easy to deny it, and that's what happens to 99 percent of all mandamus applications.

HONORABLE TOM GRAY: Well, I would hope that one out of 99 would all -- that the courts of appeals would miss that would need to go to the Supreme Court and they'd take the one that needed to be fixed, but I understand the statistics.

HONORABLE SARAH DUNCAN: Well, the problem with your suggestion that it invoke the appellate jurisdiction I think is then you have, you know, ex parte bona face problems. You have -- once the court of appeals appellate jurisdiction is invoked the trial court loses all authority over that, pretty much, little exception now, but pretty much loses authority over that judgment; and you may have motion for new trial, you may have JNOV motions, you may have motion for discovery that's still pending in the trial court; and you need the trial court to be able to be active in all these other respects, so I don't think we can have the trial court and the court of appeals having concurrent -- both having -- I don't think we can supplant the trial court's jurisdiction with the court of appeals jurisdiction just to get this supersedeas problem addressed by the court of appeals.

CHAIRMAN BABCOCK: Justice Hecht.

HONORABLE NATHAN HECHT: The -- in our Court

we docket motions for extension of time to file the petition, which are common as the petitioner, and that's what -- that's where the number is assigned and it goes into our system, even though the petition has not been filed and may not be filed for a year or more; and then, of course, there are questions about what's pending in the court of appeals and there's all sorts of things; but I think in the court of appeals it's different, isn't it, that there's nothing to be done in the court of appeals even filing a motion extension of time until a notice of appeal is filed, that even if you want more time to file the notice of appeal you've got to file the notice with the motion and say, "I know it was due back on such and such date, but I want until now to do it."

So I'm wondering is there -- is the only reason to do it by a motion in the court of appeals to avoid the problem that you have to hurry up and file a notice of appeal?

PROFESSOR DORSANEO: Yes.

CHAIRMAN BABCOCK: Justice Pemberton.

HONORABLE BOB PEMBERTON: Well, I was just going to respond, I believe we docket METs for notices of appeal as appeals. I know they're assigned to a judge at that time. So, Jan, do you have a different understanding?

HONORABLE JAN PATTERSON: I think that's my understanding.

HONORABLE NATHAN HECHT: Rule 26.3 says, "The appellate court may extend the time to file a notice of appeal if within 15 days after the deadline for filing the notice of appeal the party files in the trial court the notice of appeal and files a motion." So you can -- you can get more time, but you've got to -- if you're late you've got to file the notice with the motion, so I don't think there's anything that happens, but I don't know if there are stay orders, or I suppose you could file a motion for injunction in the court of appeals before --

HONORABLE SARAH DUNCAN: But that's a case that's ready to be appealed. We're talking about a case that may or may not be ready to be appealed in the sense of trial court proceedings being concluded, and that was my concern, which is Justice Gray's suggestion, is this supersedeas thing can come up 30 seconds after the judgment is signed, and there may be a whole lot that needs to happen yet in the trial court, and to have -- I'm afraid what would happen is that trial courts wouldn't do those things that need to happen because their response to lawyers would be, "The court of appeals has jurisdiction of this now, I can't do anything."

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: In termination cases we get notice of appeal or we're supposed to get the notice of appeal within 20 days, but the motion for rehearing still gets heard in the same time frame and is overruled by operation of law by the same time frame, so I don't see the problem of keeping the trial court invested, and it must be the criminal cases -- I'm remembering somewhere in one of the provisions that the trial court maintains jurisdiction to deal with the case until the record is filed, but is that just in criminal cases? Anybody, appellate judges, remember off the top of your heads?

HONORABLE BOB PEMBERTON: No.

HONORABLE TOM GRAY: But I think that's just criminal cases that they can continue to deal with the defendant, rule on trial motions and stuff, and so the concurrent jurisdiction doesn't bother me.

CHAIRMAN BABCOCK: Aren't there premature notices of appeal that are filed in cases?

PROFESSOR CARLSON: Yeah.

HONORABLE SARAH DUNCAN: Notices are deemed premature.

CHAIRMAN BABCOCK: But when they are, stuff doesn't stop in the trial court. I mean, if I'm in the trial court and -- I mean, I've got this situation right now. I'm in the trial court and there are multiple

defendants and there have been summary judgments as to all but one, so there's no final judgment, even though there's final relief granted against I think eight defendants, and the plaintiff filed a notice of appeal.

HONORABLE STEPHEN YELENOSKY: You have to sever it.

CHAIRMAN BABCOCK: Huh?

HONORABLE STEPHEN YELENOSKY: You have to sever it out.

HONORABLE TOM GRAY: It's simply premature if the court of appeals wants to hold onto it.

CHAIRMAN BABCOCK: Well, but nobody's moved to sever. I mean, it's just sitting there and yet the trial court is continuing to act. Is the trial court without power to act?

HONORABLE SARAH DUNCAN: I think there's some question.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: Justice Hecht, I think that the appellate rules subcommittee believed -- and I don't know, Elaine can correct me if I'm wrong -- that the basis for going to the Supreme Court is 52.006(d), which simply says, "An appellate court may review the amount of security," and I personally don't think that's right, but that was the subcommittee's report, so I don't think

there's something else that would -- that's being talked about as a basis to go either to the court of appeals or to the Supreme Court. I mean, I just think it's just this little deal here, and that does seem to me to increase jurisdictional foundation for seeking relief just a bit.

HONORABLE NATHAN HECHT: Well, the rules set the time, but we can set -- you know, the rules set the time for when all of this has to happen and when plenary jurisdiction expires, so it seems to me the rules could adjust that.

PROFESSOR DORSANEO: Uh-huh.

HONORABLE NATHAN HECHT: But in answer to -- I was just making the point in answer to Sarah's comment that we already treat preliminary -- a motion for extension of time as invoking the court's jurisdiction, even though you could argue, well, it doesn't, but it has to, because otherwise how could you get it granted. But I don't think there is anything that -- any analog in the court of appeals, so this motion is kind of a new thing, but maybe it's the best thing -- maybe it's the best procedure.

HONORABLE SARAH DUNCAN: I agree with the comment about it's too easy to deny a petition for writ of mandamus.

PROFESSOR DORSANEO: Not so hard to file a

notice of appeal.

HONORABLE SARAH DUNCAN: With one word.

PROFESSOR DORSANEO: Not so hard to file a notice of appeal.

HONORABLE SARAH DUNCAN: Although, frankly, it's easy to deny a motion with one word, too.

PROFESSOR CARLSON: Denied?

HONORABLE SARAH DUNCAN: I was on a losing crusade to encourage more opinions on motions because I think it's a really underdeveloped aspect of procedural law, but it is easier for them to -- it's cheaper and easier for the lawyer and client to file a motion than it is a petition for writ of mandamus.

HONORABLE TOM GRAY: Well, Chip, whatever is done with it, a motion or whatever, wherever it goes needs to also be the place that the appeal goes. I don't know if Houston -- I don't know how they would treat these motions with the overlapping courts of appeals, but you don't want the situation where the motion goes to one court and then the notice of appeal, if it is considered a separate document, later goes somewhere else. In the overlaps in East Texas you could actually file the motion with one court of appeal and file your notice of appeal with another one.

CHAIRMAN BABCOCK: Yeah, did that not get

fixed?

HONORABLE TOM GRAY: That is not fixed.

HONORABLE SARAH DUNCAN: And with transfers how do you obviate that? Now, I could file the motion with the First and the notice of appeal ends up going to the First but then it gets transferred to Waco, so I don't know how we preclude a different court ruling on the motion than was on the merits of the appeal.

CHAIRMAN BABCOCK: Well, but that's always the case in transfer, isn't it?

HONORABLE SARAH DUNCAN: Yeah, that's what I'm saying.

CHAIRMAN BABCOCK: You could have preliminary motions ruled on by the court prior to transfer.

HONORABLE SARAH DUNCAN: That's what I'm saying. That's what I'm saying. I don't think we have a way of precluding that.

CHAIRMAN BABCOCK: No, I wouldn't think so. Well, how many -- are we ready to vote on this rule? I mean, I don't hear any language change. It's just a matter of philosophy whether people think that this is appropriate to permit a motion to either the court of appeals or the Supreme Court. Sarah.

HONORABLE SARAH DUNCAN: The only question I

have is Chief Justice Gray's comment about potential jurisdiction. I really hadn't construed that liberally until you said that.

CHAIRMAN BABCOCK: The way I would construe it would be at the court of appeals where an appeal could properly be filed, but as you point out, in Houston that could be one of two places and in East Texas that could be one of two places.

MR. GILSTRAP: Yeah, but that's the best we can do.

HONORABLE SARAH DUNCAN: Don't we have language in another rule that says "shall be filed in the court in which an appeal may properly" -- "an appeal on the merits may properly be filed"? Don't we have another rule that said that?

HONORABLE BOB PEMBERTON: We discussed that in connection with MDL.

HONORABLE SARAH DUNCAN: Was that the MDL rules?

HONORABLE BOB PEMBERTON: I think that was the MDL rules.

HONORABLE SARAH DUNCAN: Yeah. It might be a little more precise.

MR. TIPPS: I apologize for having been out of the room when we introduced this discussion, but what

is the reason that we're considering the addition of the new (d)? Is there some --

CHAIRMAN BABCOCK: Statute.

MR. TIPPS: I understand that's the reason for 24.4, but why do we need to specify which court it's filed in? That's what we're doing in (d), isn't it?

HONORABLE SARAH DUNCAN: Bill's not here, so I'll repeat what he said earlier. The concern was that this rule has never said where you file these motions, and we don't want somebody in Texarkana saying, "You know, I've got really good friends on the Corpus court, so I think I'll go file this in Corpus." We want it to be filed in the court to which you would normally take an appeal on the merits.

HONORABLE TOM GRAY: Actually, Sarah, when you said it that way, it reminded me that the way the appellate jurisdiction statute is written I wouldn't have jurisdiction of it.

HONORABLE SARAH DUNCAN: Until the transfer.

HONORABLE TOM GRAY: Under the statute -- the way the rule is written it would appear that it would be okay to go to any court and file it, but that court is going to look back and say, "Sorry, we don't have jurisdiction of that motion because you are not within our 18 counties."

HONORABLE SARAH DUNCAN: Right.

CHAIRMAN BABCOCK: Yeah. I think that's right.

HONORABLE TOM GRAY: And so it may be misleading to even put "potential" in there. Just put "having appellate jurisdiction."

CHAIRMAN BABCOCK: No, the "potential" is because the notice of appeal may not have been filed yet. Right?

PROFESSOR CARLSON: Yes.

HONORABLE SARAH DUNCAN: Uh-huh.

CHAIRMAN BABCOCK: Yeah, Carl.

MR. HAMILTON: I have a couple of questions. I wondered, first of all, if we should try to put in the rule what the standard of review is, is it abuse of discretion or what is it; and number two, whether there should be a time put in there. You know, in most situations where an appeal is filed the judgment creditor rarely attempts to levy execution on the judgment because he doesn't know if it's going to stand up or not. So this may be used as a device to avoid an appeal and just go through a lengthy process of appealing the supersedeas aspect of it for a year or two or three while other things get done during that two or three years to avoid the final execution on the judgment.

So if this is a long, drawn out process then one might use that rather than an appeal to avoid the execution. I don't know whether we ought to put any time limits on this or not.

CHAIRMAN BABCOCK: Pam.

MS. BARON: I'm still struggling with the jurisdictional aspect.

CHAIRMAN BABCOCK: Oh, another purist.

HONORABLE SARAH DUNCAN: You're a purist, too.

CHAIRMAN BABCOCK: Another purist.

MS. BARON: Well, generally appellate courts have two kinds of jurisdiction. You take a regular appeal and then they can decide things relevant plus the appeal to perfect or they have written power, which means you file a mandamus or writ of injunction. This isn't either of those because you're not requiring a notice of appeal, so it's not within the penumbra of an appellate proceeding, and it's not an original proceeding, so you don't have writ power. So it really kind of falls in the jurisdictional cracks that I don't quite understand, and then you're going to get into record problems, because if it's considered part of a regular appeal there's no record being brought forward until the appeal is perfected and the reporter's record and the clerk's record come up. So

how's the appellate court going to review these kinds of questions?

If you make it an original proceeding I think it works better because there you bring forward your own certified record, and they'll have the whole package they need to make the decision. What the problem appears to be in the room is that there is some objection to the standard, which says "These are extraordinary proceedings, therefore we rarely grant them," but maybe they should be extraordinary proceedings. So I'm having jurisdictional issues.

HONORABLE SARAH DUNCAN: I am, too, and I have throughout this whole thing; and it just occurred to me, what if we had a certified interlocutory appeal, but not under the Legislature's definition of a certified interlocutory appeal, because that would mean we would never have any? But that's kind of what it is, is we want the trial court to retain all of its jurisdiction that it otherwise would have in these circumstances, but we just want the appellate courts to decide this one discrete issue.

HONORABLE TOM GRAY: I think it ought to be then direct to the Texas Supreme Court and skip us entirely.

HONORABLE SARAH DUNCAN: I'm in full

agreement with that.

CHAIRMAN BABCOCK: Doesn't the statute grant jurisdiction for this purpose? I mean, isn't that where you get your jurisdictional basis?

HONORABLE SARAH DUNCAN: That's a very broad reading of the statute.

CHAIRMAN BABCOCK: Well, it's not so broad. The statute says the appellate courts can decide these motions.

HONORABLE SARAH DUNCAN: But it doesn't say when.

CHAIRMAN BABCOCK: Well --

HONORABLE SARAH DUNCAN: And it's the when that affects jurisdiction.

CHAIRMAN BABCOCK: Well, if it doesn't say when then it means any time.

MR. GILSTRAP: Doesn't say when you file an original proceeding.

CHAIRMAN BABCOCK: Huh?

MR. GILSTRAP: It doesn't say when you file an original proceeding. I mean, it creates jurisdiction.

CHAIRMAN BABCOCK: Yeah, it's a matter of creation of jurisdiction, not how procedurally you're going to administer that jurisdiction.

HONORABLE SARAH DUNCAN: Well, the other

argument is it recognizes that a mandamus is appropriate and available in these circumstances. So that one little sentence in the statute --

CHAIRMAN BABCOCK: Well, as a -- it seems to me without that one little sentence then you're absolutely right that there's a jurisdictional problem, but perhaps that one little sentence --

HONORABLE SARAH DUNCAN: We've had this rule for years, and we've never -- it's rarely invoked, and we never talk about jurisdiction. It is the elephant in the room that nobody wants to talk about.

HONORABLE BOB PEMBERTON: Well, I want to talk about it.

CHAIRMAN BABCOCK: Pemberton wants to talk about it. Then Justice Bland gets to talk about it.

HONORABLE BOB PEMBERTON: As I recall, the constitutional provisions granting the appellate court, the intermediate appellate courts, jurisdiction it says essentially we have such jurisdiction as the Legislature gives us. I think it's pretty clear here we've been given some kind of jurisdiction. Whether it fits into the conceptual categories of original or appellate as traditionally understood, I don't know. It is what it is. So I think it's probably more closely analogous to something like an original proceeding, just sort of a one

shot may or may not have an appeal for it.

CHAIRMAN BABCOCK: Justice Hecht.

HONORABLE NATHAN HECHT: Well, that's true, and, you know, the jurisdiction is subject matter with the constitution of statute. This is just as to timing, and the rules already say this is when you do it, and the rules could say the court of appeals jurisdiction attaches from the moment the judgment is signed for purposes of ruling on the supersedeas, because we already say when it attaches, so I don't think there's any problem. I don't see any problem with that. Just a question of what's the best way to do it.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: I don't think we can do it by mandamus, because mandamus seems to me to be, you know, discretionary, and I think this requires us to review the ruling. We don't get to say, you know, we don't want to review it. We have to review it; and I think, you know, we always have been able to issue orders necessary to protect our jurisdiction, a stay or -- and if this motion is incident to protecting our jurisdiction over the eventual appeal because, you know, there's going to be a meaningful right of appeal lost if execution takes place before it comes to our court, then isn't it just ancillary to our jurisdiction; and then if the notice of

appeal isn't really ever filed then we dismiss it as moot, but, you know, it would just be sort of an ancillary order issued to protect our jurisdiction.

CHAIRMAN BABCOCK: Okay. Justice Gray.

HONORABLE TOM GRAY: I would propose the following language to address the potential issue. "A motion filed under paragraph (a) should be filed in the court of appeals having appellate jurisdiction over the county in which the judgment was rendered."

HONORABLE SARAH DUNCAN: We don't have appellate jurisdiction over counties.

HONORABLE TOM GRAY: Or "in which appellate jurisdiction" --

HONORABLE SARAH DUNCAN: It would have jurisdiction over cases appealed from that county.

MR. LOW: Cases appealed from that county.

HONORABLE SARAH DUNCAN: Over judgments rendered.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, I just have a question based on what Justice Bland said. Does that mean that the routine would be that you get a supersedeas by routine stay?

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE STEPHEN YELENOSKY: Which seems to

me to be an evil the other way.

HONORABLE JANE BLAND: I mean, usually when you get these you get a request for a stay and an emergency motion to reduce the supersedeas bond, so why don't we take out "potential" because, as Justice Hecht said, this is really just an issue about timing; and I don't think just because a notice of appeal hasn't been filed yet, if it's something that's going to affect our ability to hear the appeal because there's the risk that the judgment would be executed upon before the -- you know, the notice of appeal ripened, then, you know, I think we have that jurisdiction; and so instead of putting "potential" in there, which is I think what's troubling everybody, just be quiet as to the time.

Honestly, I think most of these things really, you know, are going to happen sort of contemporaneously. They're going to file a notice of appeal and they're going to also contest, you know, the trial court's refusal to reduce the supersedeas bond.

HONORABLE STEPHEN YELENOSKY: And I guess my question goes beyond "potential" or whether the word "potential" is used or not. If we're saying it's not mandamus, so it's less than extraordinary, is it then becoming not only available as something other than an extraordinary writ, but accompanied with that, routinely

the court of appeals to preserve its jurisdiction would grant a stay, and thereby, everybody gets a supersedeas for some period of time?

HONORABLE JANE BLAND: Yeah, that's right.

HONORABLE STEPHEN YELENOSKY: Is that not potentially an evil the other way, Mr. Kelly?

CHAIRMAN BABCOCK: Justice Duncan.

MR. KELLY: I think that's what was intended.

HONORABLE SARAH DUNCAN: Well, protection of subject matters jurisdiction, at least my understanding is that's traditionally been asserted in the context of an original proceeding; and, you know, to answer Steve's question -- or not to answer it, but just to -- if you're the one that gets this motion and if there is any possibility that somebody is going to be denied the right to supersede a judgment because of a trial court order, the only prudent thing is to grant the stay for some period of time until you can resolve that question because, as Justice Bland says, otherwise they're going to moot the appeal.

CHAIRMAN BABCOCK: Justice Jennings.

HONORABLE STEPHEN YELENOSKY: Well, but they might also dispose of the assets during that period.

HONORABLE SARAH DUNCAN: That's right.

That's right. That's the problem with this whole area.

HONORABLE STEPHEN YELENOSKY: So the default becomes a stay when the real emergency might be the disposition of assets.

CHAIRMAN BABCOCK: Justice Jennings.

HONORABLE TERRY JENNINGS: I agree with Judge Bland about just striking the word "potential," and just out of curiosity, I was looking at mandamuses, about, you know, where do you file a mandamus. "An original proceeding seeking extraordinary relief," yadda, yadda, yadda, "is commenced by filing a petition with the clerk of the appropriate appellate court."

MS. BARON: "Appropriate."

HONORABLE SARAH DUNCAN: Specificity.

HONORABLE TERRY JENNINGS: So if that's good enough for an original proceeding, it ought to be good enough for one of these motions.

CHAIRMAN BABCOCK: So you want to leave "appropriate" in.

HONORABLE TERRY JENNINGS: Yeah.

CHAIRMAN BABCOCK: Okay. That sounds good. Anything more? All right. Let's vote on this thing. How many people think subsection (d) should be recommended to the Court?

MR. TIPPS: Which version?

CHAIRMAN BABCOCK: Oh, I think probably taking "potential" out and putting "appropriate" in. So with that friendly amendment, how many people are in favor of this change? Raise your hands.

HONORABLE TRACY CHRISTOPHER: I'm with Jane on this one.

CHAIRMAN BABCOCK: And how many opposed?

That passes by a vote of 22 to 2, and, Elaine, you said that there were four questions and we had only answered one of them prior to this discussion, but I think you said these encompassed two questions, so that would get us up to three, and what's the fourth one? I stumped you, didn't I?

PROFESSOR CARLSON: No.

HONORABLE SARAH DUNCAN: You wish.

PROFESSOR CARLSON: I want to be exacting here. The question reads exactly "Should appellate Rule 24 be amended to state 'a judgment is not superseded when the judgment debtor fails to obtain a net worth finding in line with his net worth affidavit.'"

HONORABLE TOM GRAY: Maybe you could read that again.

PROFESSOR CARLSON: I'm sorry. This is out of Justice Hecht's memo.

CHAIRMAN BABCOCK: Yeah, there it is. Okay.

PROFESSOR CARLSON: "Should appellate Rule 24 be amended to state that 'a judgment is not superseded when the judgment debtor fails to obtain a net finding in line with his net worth affidavit'?"

CHAIRMAN BABCOCK: A net worth finding. Okay. And what's the recommendation of the subcommittee?

PROFESSOR CARLSON: It was kind of tied into our motion to strike, and I'm going to suggest that we carry that question to the next meeting and allow me to finesse the language a little bit in both of them.

CHAIRMAN BABCOCK: Okay.

PROFESSOR CARLSON: So I'm done.

CHAIRMAN BABCOCK: All right. So we're done with this. Sorry, I didn't mean to move on prematurely, but with that, I move that we have lunch. Granted.

(Recess from 12:22 p.m. to 1:23 p.m.)

CHAIRMAN BABCOCK: Okay, everybody. Back on the record, having had a wonderful lunch, right, Stephen?

All right, guys. Come on, let's go.

HONORABLE NATHAN HECHT: The Texas Lawsuit Reform Foundation paper on the judicial system, Hugh Rice tells me is going to be out in the next day or two, and they're going to send everybody on the committee a copy.

PROFESSOR DORSANEO: Good. Thank you.

HONORABLE SARAH DUNCAN: Thank you.

MR. KELLY: You're welcome.

CHAIRMAN BABCOCK: Okay. Bill, you said we're pretty much done with 34, 35, and 38. David Jackson, did you want to say anything about 34?

MR. JACKSON: Sure. I'm sorry I couldn't get here for that December meeting. I was in California, but I just had a couple of questions. I first read the transcript from the meeting, and I didn't have any real big concerns over it. I thought, you know, that would be fine in the way language had came down, you know, I thought, well, these court recorders are going to be required to make transcripts, good luck; but the thing that starts -- that concerns me a little bit here is I couldn't find anywhere in the discussion or in the wording where they put the accountability on those transcripts, whether the accountability lies with the court recorder to sign those transcripts as being accurate and verbatim or whether the accountability lies with the person they hire to transcribe the court recorder's tape, so I couldn't get that cleared up, and I'd like to get, you know, some sort of a response on where everybody feels that's going to rest.

CHAIRMAN BABCOCK: Well, my own personal view, David, is I think with respect to all transcripts you personally should be responsible for them. Any

problem?

MR. JACKSON: All right. Bring it on.

CHAIRMAN BABCOCK: Bill, I know this is off agenda, but any thoughts about that?

PROFESSOR DORSANEO: Well, I'd like you to talk a little more. Who should be responsible and why?

MR. JACKSON: Well, let me get into the whole philosophy of what we're doing here and why I think the tape system hasn't been as successful as everyone had hoped it would be, is because with a certified court reporter you have one person who is responsible for all aspects of the process. If their equipment doesn't work, it's their problem. If they can't keep up or they can't make a record or somebody is talking 300 words a minute and they're only talking -- or writing 225, it's their problem, they've got to solve it. If they can't make a record, it's their problem; and if one of the litigants doesn't like what they've done, they file a grievance against that court reporter, and they appear before the Court Reporters Certification Board, and that court reporter likely won't be reporting any longer.

With a tape system you have too many people with too many facets of that whole process that are blamable. You've got a court recorder that's going to blame it on the equipment; you've got a transcriber that's

going to blame it on the equipment and the court recorder; and you have no -- I have transcribed those tapes. I've transcribed tapes that were actually very good tapes and I felt like I made a very good record.

I have also transcribed tapes, one in particular, where a key witness, a whole cross-examination wasn't there; and I wound up having to transcribe the whole thing again because the court recorder swore it was there. They brought me all the tapes again, and I retranscribed them, and what happened, it's a dual system. You put a tape in and a tape here. It goes through the first system and goes onto the second tape and gives you a whole hour to put a new tape in the front deck; and if the court recorder forgets to put a tape in the front deck and it goes over into that, there's nothing going on the record until they remember to put a tape in there.

So a cross-examination of a key witness was not on tape, and it's not part of the appeal; but, the blame, you can't blame me because it wasn't there. You can't blame the court recorder. You could, you should, because it wasn't there, but they blame the equipment. So the litigants don't really have any recourse in a court-recorded system because there are too many people to blame for the fault.

So that's the problem when you're now going

to turn over the requirement that a court recorder now is required to make a record, you're going to go one of two ways. If you make them responsible for the record and then you don't provide for any certification process, you're decertifying the whole process of court reporting.

PROFESSOR DORSANEO: Where is the -- this rule doesn't talk about certification, what the certification is. It doesn't talk about anything you've been talking about. Where does it provide --

MR. JACKSON: Government Code 52. Government Code 52 talks about certification of the court reporter.

PROFESSOR DORSANEO: Is there anything in the certification that you're required to sign that would bother you in the context of a transcription of a tape-recorded record?

MR. JACKSON: No. It would be my own comfort level. You know, I would get a comfort level from what I heard on the tape, what I thought might be missing, or, you know, a lot of times lawyers are all talking at the same time and it's impossible to figure out what they said. A live court reporter would stop the proceeding and make them talk one at a time; or, you know, if there was something that you couldn't understand you can make them repeat it, but you don't have that luxury when you're

transcribing a tape. You just basically have to keep playing it over and over and over until you figure out as close as you can what you've got; and my certificates say that, that "to the best of my ability to decipher, this is the verbatim record."

CHAIRMAN BABCOCK: Okay. Anything else, David?

MR. JACKSON: Well, Judge Yelenosky said I may want explain what I mean by the decertification. If you -- this is sort of in conjunction with some of the legislation that's pending now about maybe disincentivizing a court reporter to be making the record in the first place. To use Dee as an example here, if we were to say to Dee that "We want you to just sit here and make a record. We're now going to take everything you do and we're going to turn it over to this transcribing service that we've got to deal with to actually put it on paper, and we're going to make money off of that because we've figured out a way to do this," it's going to disincentivize her to be part of this whole one unit process where she does it all, gets the record out, everybody gets their transcript and everything is fine, and we create that dual accountability situation again.

We now have some legislation that Wentworth has got that the counties want to try to take over some of

that transcription business and just pay the court reporter to make a record and have them have it transcribed somewhere else, and who's going to be responsible for the final record if that happens? And it kind of -- when I read this and I'm thinking about that, I thought we could very easily decertify the process of court reporting by doing that because there's no incentive for her to be a machine shorthand writer when she could call herself a court recorder and not have to go to any seminars, not have to do any training, not have to do anything but turn everything over to somebody who is going to transcribe it.

CHAIRMAN BABCOCK: Okay. I think you're raising -- what sounds to me like anyway, you're raising issues that are much deeper than just what we have here on this rule.

MR. JACKSON: Right. I think the rule probably needs to somehow, somewhere clarify where the accountability lies.

CHAIRMAN BABCOCK: Yeah, okay. Well, we will -- I don't think we can do that today, but I'll make a note to work on that.

So that takes us to --

MR. TIPPS: Chip?

CHAIRMAN BABCOCK: -- 41, does it, Bill?

PROFESSOR DORSANEO: Yes, try to keep up with this blistering pace here. 41. Now, this goes back to October of last year, and what we were asked to look at in the September 22, 2006, letter is an issue about adding another person, an active district court judge, to the list of persons who could be appointed by the Chief Justice of the Supreme Court to an appellate panel under 41.1 and in the en banc context under 41.2.

When I looked at the proposal and the subcommittee looked at the proposal, which was -- or suggested proposal was to add the word "qualified" before the former words in (b), "retired or former," such that it would say, "The assignment of a qualified," you know, "justice or judge," and I looked at that and I thought "qualified," what's that mean? We don't want to appoint people who aren't capable of doing this job, even if they might fit into the category and was troubled by that; and at our October meeting it also became relatively clear to me at least, and probably to all of us, that we weren't sure what the statutes said; and Jody and I worked on that and, if you'll look at (b) first, came up with language to just try to make it plain who could be added.

Now, (b) is about a -- (b) is about a more than three judge court. This rule has other problems in trying to figure out what in the world it's talking about,

but this is about a more than three judge court and if you just work -- maybe it makes sense to work through the whole thing. "After argument, if for any reason, a member of the panel cannot participate in deciding a case, a case may be decided by the two remaining justices. If they cannot agree on a judgment, the chief justice of the court of appeals must designate another justice of the court to sit on the panel to consider the case." That's how you know that it's more than a three judge court. "Request the" -- under our draft -- "temporary assignment by the Chief Justice of the Supreme Court," it doesn't say who does it now, "of an active court of appeals justice from another court of appeals"; and when you go through the draft here, the word "qualified," the shorthand way of saying it is one alternative.

Another way of saying it is to leave out the world "qualified" in brackets and to just proceed. That's my preference. "A retired or former appellate justice or appellate judge who is qualified for appointment by Chapter 74 and 75 of the Government Code or an active district court judge to sit on the panel to consider the case." I think we have everybody in there, and it's reasonably clear where you would look to see who is qualified for appointment.

Same change in -- essentially the same

wording. I guess it doesn't say an active appellate justice or appellate judge is in (c), okay, is in (c), and (c) is about a three judge -- a three justice court, okay. Then we get down to decision by en banc court, and a comparable change is made with respect to the persons eligible for temporary assignment by the chief justice. And we think that completes what we were told to go fix, and after a lot of people looking at it and us checking it out, we think we've got it right, but I think that on more occasions than that turns out to be so.

CHAIRMAN BABCOCK: Yeah. I don't think a nanosecond passed before Sarah had her hand up.

HONORABLE SARAH DUNCAN: Well, something just occurred to me that didn't occur to me during that meeting, and this is not what we were asked to consider. I don't think you'll have a problem with it. Where it says "may order the case argued," it probably actually should say "argued or re-argued," because there's at least a possibility that the case will have been submitted on briefs.

PROFESSOR DORSANEO: Where are you?

HONORABLE SARAH DUNCAN: In all three.

PROFESSOR DORSANEO: Well, there are many problems with this rule. I was going to talk about some of those after we got finished --

HONORABLE SARAH DUNCAN: Oh, okay.

PROFESSOR DORSANEO: -- with what we were supposed to do.

CHAIRMAN BABCOCK: Okay. Any -- yes, Stephen and then Pam.

MR. TIPPS: Just two small things. First, since we refer to appellate judges as justices, is there a reason to say "appellate justice or appellate judge" in both (d) and (c) rather than just appellate justice?

HONORABLE SARAH DUNCAN: Yes. It could be a member, a former member, of the Court of Criminal Appeals and they're judges.

PROFESSOR DORSANEO: Yes.

MR. TIPPS: Okay. And then I notice in (b) we talk about an active court of appeals justice from another court of appeals and in (c) we just say a justice of another court of appeals. Was that intentional or --

PROFESSOR DORSANEO: I don't remember if it was intentional. The idea was -- I don't think we need the word "active."

MR. TIPPS: In either place?

PROFESSOR DORSANEO: Uh-huh.

MR. TIPPS: Okay.

CHAIRMAN BABCOCK: Okay. Pam.

MS. BARON: Steve made the points that I

would have made.

CHAIRMAN BABCOCK: Thank you. Justice Gray and then Justice Pemberton.

HONORABLE TOM GRAY: I know that as drafted originally and as proposed it's not contemplated that there would be a fourth judge available on a three judge court of appeals, but the practice in Texas is that the Chief Justice routinely in either -- Jody, is it quarterly or -- it's either quarterly, three times a year, or twice a year that Justice Jefferson makes the appointments for essentially a permanently assigned alternate judge.

MR. HUGHES: I think it's quarterly.

HONORABLE TOM GRAY: Quarterly. But it's a standing assignment, and so on some of the courts of appeals -- Waco is not one of them, but on some of the courts of appeals, I know that, for example, Eastland and Amarillo and I believe Tyler all use this where they have multiple additional judges already assigned, not to a case, but to the court; and there would be no reason that the three judge court could not fall under subsection (b); and that chief justice of that court would be able to make the same appointment of that already assigned judge to a particular appeal. Does that -- do you follow me of what the practice is, what's happening?

But when we do it in Waco the way we've --

we're doing it now is it is on a case-by-case basis, and the chief appoints a retired or, excuse me, a district judge. As a matter of fact, Judge Yelenosky has been appointed to sit on a case in our court, and that is the practice that we use in Waco, fits very nicely within subsection (c). In Eastland, for example, that is not what's done. They never go back to the chief for an assignment. They don't have to because they've already got a judge sitting there that they can bring in and become part of the panel.

PROFESSOR DORSANEO: So this rule doesn't say -- doesn't match what happens in Eastland.

HONORABLE TOM GRAY: Right. As I understand the text of the rule. Now, I see the word "temporary assignment" up there, and maybe that covers it in the -- because the same practice also goes on at the courts of appeals with more than three judges where they have, in effect, assigned judges on those -- or for those courts to sub into a panel. They do not have to go back to the Supreme Court to get the assignment of one of those former court of appeals justices to sit on a panel in the court.

PROFESSOR DORSANEO: And that's because they already have the assignment from a list that came from the chief justice?

HONORABLE TOM GRAY: Yes.

HONORABLE SARAH DUNCAN: But in that --

CHAIRMAN BABCOCK: Justice Pemberton had his hand up first.

HONORABLE BOB PEMBERTON: Well, just a quick question. Also in the reference to active district judges, is the assignment of active district judges to these panels not authorized under Chapter 74 or 75?

PROFESSOR DORSANEO: It is.

HONORABLE BOB PEMBERTON: It is.

PROFESSOR DORSANEO: Maybe we should --

HONORABLE BOB PEMBERTON: I was thinking it should reference to 74 and 75 because it almost suggests either that they don't have a different statutory authorization or not at all, so all this is independent of that. So I would just say bring it under Chapter 74 and 75 to make that connection clear. Because you refer to all these appellate types of appellate judges, current and former and active and all that, "whose appointment is authorized under Chapter 74 and 75." Then there's the reference to district judges. That's all.

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: In the Eastland court of appeals, was your example, would that court with its fourth judge, would it even come -- would it be a subsection (c) court anymore? It doesn't consist of only

three judges if there's a fourth justice that's been temporarily assigned to that court. Wouldn't it be a (b) court?

HONORABLE TOM GRAY: I had never thought about it that way. I mean --

HONORABLE SARAH DUNCAN: I can't imagine why not.

HONORABLE TOM GRAY: -- my assumption was it was three duly elected justices.

HONORABLE SARAH DUNCAN: Well, I think you're reading that into the rule.

HONORABLE TOM GRAY: That's a fair statement of what I was doing, yes.

PROFESSOR DORSANEO: It sounds like it would be hard to fit this situation into the language of this rule, which doesn't contemplate that procedure, and I think if this rule is meant to indicate what can be done, it ought to say so.

CHAIRMAN BABCOCK: Yeah.

PROFESSOR DORSANEO: So I would suggest we add another provision to deal with that or redraft something to deal with it. But going on, this rule is not a well-crafted piece of work. It is a terrible thing from top to bottom.

MR. DAWSON: Would you tell us how you feel,

Bill? Come on.

PROFESSOR DORSANEO: I don't know where a good bit of it came from.

MR. HAMILTON: It's recodification, wasn't it?

PROFESSOR DORSANEO: No. I think Lee Parsley did it, so but I have no idea. Like, look in (a). Now, (a), it's kind of hard to know what (a) is about, right, whether it's about three judge courts or all courts. It begins by talking about "Unless a court of appeals with more than three justices votes to decide a case en banc," which suggests the definition of an en banc court, a court with more than three justices in and of itself, okay, "the case must be assigned for decision to a panel of the court consisting of three justices, although not every member of the panel must be present for argument."

Now, it has the argument thing in there, okay, might not be argument, but then it goes on. These other sentences I'm not sure if they have general application or if they only have application to courts with more than three justices, so several problems. The next sentence, "If a case is decided without argument, three justices must participate in the decision." Why only if the case is decided without argument? Why? Okay,

why does it say that? So I have trouble knowing what it's about and why it's saying what it's saying and implying, you know, other things.

CHAIRMAN BABCOCK: Sarah has got an answer to that.

PROFESSOR DORSANEO: Huh?

CHAIRMAN BABCOCK: Sarah knows the answer to that.

HONORABLE SARAH DUNCAN: If a case has been submitted -- for instance, a case that I was in was submitted on briefs, but an opinion did not issue before I left the court. All you have to do is withdraw that case from submission, resubmit it, give the lawyers and parties another 21 days notice, and you just submit it with a different three judges, but you can't do that if a case has been argued. That's the reason for the distinction between the two situations.

PROFESSOR DORSANEO: Why can't you do it if a case has been argued?

HONORABLE SARAH DUNCAN: Because under this rule you --

PROFESSOR DORSANEO: Well, that's what I'm saying. This sentence implies if a case is decided with argument three justices don't need to participate in the decision.

HONORABLE SARAH DUNCAN: That's right. Two can decide it.

PROFESSOR DORSANEO: Well --

HONORABLE SARAH DUNCAN: And if the two agree on a judgment they can render a judgment in that case.

MR. GILSTRAP: That's what (b) and (c) both say, that "the two remaining justice can render a judgment if, for any reason, a member of the panel can't participate."

HONORABLE SARAH DUNCAN: And the reason we do that is because you don't -- if the two judges agree on a judgment in that case, we don't want to re-argue that case just to get a third, but if a case hasn't been argued, why not resubmit it and have three justices participate?

PROFESSOR DORSANEO: Three?

HONORABLE SARAH DUNCAN: Yeah. If it hasn't been argued.

HONORABLE TOM GRAY: What if it's an unargued case and two judges have decided what they want to do?

HONORABLE NATHAN HECHT: It has to be three.

HONORABLE SARAH DUNCAN: If it's -- it has to be three.

HONORABLE NATHAN HECHT: I think part of the rule was addressed to a practice that had grown up in some of the courts of appeals where if the case was not to be argued it would only be assigned two justices, and if they agreed, a third justice would not participate.

PROFESSOR DORSANEO: Was that the way things should be done?

HONORABLE NATHAN HECHT: No, that's why the second sentence is there.

HONORABLE TOM GRAY: Well, I know you-all won't find this surprising, but there are two judges on our court that will issue an opinion without waiting for a third justice to vote on it.

HONORABLE SARAH DUNCAN: We've heard that. I did read that somewhere, too.

HONORABLE NATHAN HECHT: So to follow up on -- to restate it, back when this rule was written, there was a practice in some of the courts, and I've forgotten which ones, where to economize on the workload, and a case was going to be argued, it would always be assigned to a panel of three judges, and those three judges would participate in the decision; but if a case was not going to be argued, it would initially be assigned two judges; and if the two agreed then the third judge would never be involved. The decision would issue with

two judges.

That way you reduced people's workload by a considerable portion by only having two judges assigned in the first instance, and the second sentence is meant to deal with that situation and to say no matter what, you've got to assign it to three judges to start with, and then if they can't all participate we have fallback positions.

CHAIRMAN BABCOCK: Tracy.

HONORABLE TRACY CHRISTOPHER: Can I just ask why this is in the Rules of Appellate Procedure rather than the Rules of Judicial Administration? I mean, I don't see anything in these rules about how many people you need to make a Supreme Court opinion or how we get visiting judges appointed to the Supreme Court.

CHAIRMAN BABCOCK: Yeah.

HONORABLE STEPHEN YELENOSKY: Take that.

HONORABLE TRACY CHRISTOPHER: I mean, I just -- you know, because we normally try to only put rules in here that the litigants need to know about versus the judges need to know about.

HONORABLE NATHAN HECHT: Well, part of it, I only have -- I have three answers. First, I think there was a predecessor to this rule that dealt with how panels are constructed. Secondly, there was this practice that needed to be addressed because the Bar was wondering about

it. People would get opinions back, joined in by -- or, yeah, opinions back joined in joined by Smith and Jones but no third judge; and they were saying, "Wait a minute, I thought they had to have three judges"; but, you know, the Bar can read the Rules of Judicial Administration as well as they can read these rules. And then, you know, but otherwise I don't -- I suppose it could go in the Rules of Judicial Administration, but something like this has been --

HONORABLE TRACY CHRISTOPHER: If we were going to do a total redo I'd move it there rather than leave it here. I mean, if you-all -- because it doesn't matter to me, but if you think the rules are really badly written and we would need to do a whole redo of 41, then I'd put it in the Rules of Judicial Administration.

HONORABLE NATHAN HECHT: Well, but it maybe should be clarified, but the reason it's written the way it is is that the first sentence assumes that the three judges to whom the case is originally going to be assigned are going to participate in the decision unless, as you go down in the rules, somebody gets sick or goes away or something else happens; but the second sentence is to address the situation where you file an appeal, the court says "we're going to decide without argument," the next thing you get is an opinion with two judges' names on it.

PROFESSOR DORSANEO: Well, I can see what the second sentence is about now, but it does have this suggestion --

HONORABLE NATHAN HECHT: Right.

PROFESSOR DORSANEO: -- that three justices don't need to participate in the decision in the normal course of events; and the answer is, well, yeah, that's right. Well, you go by reference to the other rules, and I wonder if those other rules could conceivably mean -- and I don't think so -- that a member of the panel can't participate in deciding the case because the other two don't think it's necessary for him to do so. Okay. As opposed to, you know, being sick or disqualified or recused, and just the language just is not tight enough to make it plain how these courts are meant to operate, it seems to me.

HONORABLE TERRY JENNINGS: But Sarah's point is well-taken in that, I mean, you can have a situation where a case is argued and one of the judges either has become ill and cannot participate because of their illness or they've been voted off the court or they've retired or whatever, and do you really want to put the litigants in that situation where they now have to go back and reargue the case just because you've got a new judge assigned to it? That seems a waste of the court's time and the

litigants' time.

HONORABLE BOB PEMBERTON: I don't want to cut in front of anybody.

CHAIRMAN BABCOCK: Justice Pemberton.

HONORABLE BOB PEMBERTON: We've had this situation come up in a variety of contexts. We've had deaths on the court and opinions were issued with two judges, not having to go back and reargue. We had one instance where a judge got sick from green chile cheeseburgers at lunchtime and was not able to sit on the panel that afternoon.

PROFESSOR DORSANEO: Well, we're going to get to this question about argument anyway coming up a little later, and I wonder if this rule kind of presupposes that the normal way to do things is with argument. I wonder whether it should even draw any distinctions

HONORABLE SARAH DUNCAN: How does it do that?

PROFESSOR DORSANEO: Huh?

HONORABLE SARAH DUNCAN: How does it do that?

PROFESSOR DORSANEO: Well --

HONORABLE SARAH DUNCAN: We have a whole separate rule when argument is appropriate.

PROFESSOR DORSANEO: I know, but this rule was drafted at a time when argument was the conventional way to do it. It looks like it's assuming that after argument is the normal -- is the normal drill.

MR. GILSTRAP: Before we get off the two judge issue, can I offer kind of a contrary view? I mean, you know, when litigants lose a lawsuit, they tend to be disgruntled and suspicious, and the first thing they look for is, well, was the deal rigged. A lot of them do it. We all know it, we've all had it. I can tell you when you go up to the court of appeals and you argue before three judges and then six months or a year passes and the opinion comes back with only two names on it, they're very suspicious. I mean, you know, I think -- I think you're supposed to have three judges, and I think if a judge is not available, they need to get a third judge to sit in on the decision.

CHAIRMAN BABCOCK: Sarah doesn't think so. Anybody else? Well, Bill, in terms of solving all the problems in the rule, maybe we could put that aside for a second and then just --

PROFESSOR DORSANEO: Yeah.

CHAIRMAN BABCOCK: -- see if anybody else wants to talk any more about the changes you have proposed, which seemed to me to be sensible and nobody has

a problem with them. Anybody have a problem with the redline that Bill has got on this rule? I don't see anybody that does, so we'll assume that that passes unanimously.

Justice Hecht, what do you want to do about addressing the other things that Professor Dorsaneo has raised about Rule 41?

HONORABLE NATHAN HECHT: Well, I wish Bill would take a look at it and -- or his subcommittee and propose what they think is a better state of the rule, because I don't think -- I know the rule was intended to express the Court's policy -- our Court's policy when it was written that every case start out with three assigned judges in the court of appeals; and then if something happens, I'm sensitive to what Frank said and I think there is a lot of sentiment about that in the Bar, but there are rare situations where you get down to a week before the opinion goes out and everybody has done all this work and it's all set to go and, you know, it's a week before an election or somebody dies, unfortunately, or something happens.

CHAIRMAN BABCOCK: I hope they're not tied together, are they?

HONORABLE NATHAN HECHT: No. And it holds up the opinion because it will hold it up in many

instances for months while another judge gets up to speed, go reads 500 pages of briefs, looks at the argument transcript, and then says, "Oh, well, yes, I agree with the other two." So really, do we want to do that, but those are relatively rare events, and it seems to me that the Court's policy at the time was, well, for those rare situations there's not going to be -- it's not going to happen often enough that it's going to matter, but the default ought to be always three, because just like the jury argument about whether you should have six jurors or twelve, I mean, at some point if you have fewer than a certain number of judges you're not getting the collaborative view of the case that you think makes a better decision. One judge on the court of appeals could decide it, but you want three because you want three minds thinking about it and maybe seeing differences in the way the case is presented. So if that's not well-expressed, then, you know, I wish we could do it better.

CHAIRMAN BABCOCK: Okay.

HONORABLE NATHAN HECHT: And I think the Court would agree with that.

CHAIRMAN BABCOCK: Okay. Do you accept that challenge?

PROFESSOR DORSANEO: Yes, with the idea being that the rule does not seem to say clearly that you

need to start out with three.

CHAIRMAN BABCOCK: Okay.

HONORABLE TERRY JENNINGS: May I make one last comment? In regard to, you know, what the rule says and doesn't say, I think the courts of appeals understand what it means and we've been following it fairly well. I don't think anybody on a court of appeals has had a problem utilizing the rule.

CHAIRMAN BABCOCK: Okay.

HONORABLE TOM GRAY: With one noted exception.

HONORABLE TERRY JENNINGS: Well --

HONORABLE STEPHEN YELENOSKY: But Bill's right. The way it literally reads, I mean, you can assign three judges, two go to argument, and then those two write the decision.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: Well, and there's also the issue that came up when I was a practitioner of a judge that's going to be leaving a court who is in the majority and the dissenting judge, you know, for whatever reason, holding up the decision knowing that judge is leaving December 31st. So in that case the two judges in the majority just issued the opinion December 31st and said "dissent to follow," but you want to be sure that you

don't have that issue either, that, oh, okay, the dissenting judge thinks there's a shot at another panel deciding it later that might flip it, so it can go both ways.

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: But it can always be flipped on a motion for rehearing anyway. I guess my overall point here is, again, that of a purist or an extremist, whichever one you want to call me. Nobody, and I do mean nobody, regulates how any given court of appeals operates. We don't tell courts of appeals how to select their panels, whether they're supposed to be random or not. This seems an odd place to me to start. I mean, we don't -- courts can have internal operating procedures that deal with precisely the problem that Justice Bland raised.

We have -- you know, the San Antonio court has a 10-day rule. When the opinion would hit my desk I had 10 days to decide what I was going to do. We have -- they have a rule that if a member of a panel hasn't gotten around to an opinion for 30 days, the remaining two members of the panel can issue without the third judge. This just seems -- you know, I mean, either let's regulate all the courts of appeals on all of these possibilities, because they're numerous, or if it's not broken, don't fix

it, don't try to fix it, and I don't personally think this is broken, but --

PROFESSOR DORSANEO: What you said sounded broken to me. The internal operating rule sounded like one that I wouldn't find to be a good rule, but that's just me.

HONORABLE SARAH DUNCAN: Well, and that's I think why no Chief Justice in Texas's history has tried to regulate how the courts of appeals do their business, is because there are probably as many different opinions of that as there are people sitting around this table.

CHAIRMAN BABCOCK: There you have it. What about 41.2? It looks to me that goes right along with what we just discussed in 41.1.

PROFESSOR DORSANEO: Yes. Yes.

CHAIRMAN BABCOCK: And 49.7, have we done that?

PROFESSOR DORSANEO: We've done -- we've voted on that already, haven't we, Jody?

MR. HUGHES: We did, but that was on October 20th.

PROFESSOR DORSANEO: Yeah. We've done all the 49 things.

CHAIRMAN BABCOCK: Okay.

PROFESSOR DORSANEO: And we've actually done

everything that's here, but there's something more to be said about 52.3.

CHAIRMAN BABCOCK: Okay.

PROFESSOR DORSANEO: 52.3 was dealt with in October, and this language was approved by the committee, affirmative vote, I don't remember the number, but at the end of the meeting some people who voted for the language on page eight for 52.3 changed their minds and suggested on the record at the meeting that this, change subsection -- is that right?

I'll just read what it says, "Change subsection (j) to subsection (k) and add a new (j) entitled 'Verification,' saying this: 'The person filing the petition must verify that he or she has reviewed the petition and concluded that every factual statement in the petition is supported by competent evidence including'" -- "'included in the appendix or record,'" and I gather the difference is that this certification says that it's supported by sworn testimony, affidavit, or other competent evidence, rather than saying that things that are not otherwise supported by sworn testimony, affidavit or competent evidence, factual statements not supported must be verified by an affidavit. The affidavit is more of an affidavit in the context of the -- of the proposed changed language. I wasn't here when that was done, so --

but I'm sure the record speaks the truth, because there's a court reporter's certification. Okay. And that would be added in in 52.3, 52.3(j).

MR. HUGHES: I think it just bumps the other one down one.

PROFESSOR DORSANEO: Yeah, and that probably should be -- that engineering should have been indicated on this page to begin with.

CHAIRMAN BABCOCK: Okay. Justice Bland.

HONORABLE JANE BLAND: This was the Sarah Duncan solution to the issue that was discussed at the last meeting about lawyers having to say they had personal knowledge about facts in a record versus -- you know, when they weren't a witness to them versus lawyers representing that the statements in the mandamus position are supported by the record, and I think it was the solution suggested by concerns raised by Judge Christopher and Pam Baron, and it's a good one. It's a really good one, so we should adopt it.

PROFESSOR DORSANEO: I'm not speaking against it.

CHAIRMAN BABCOCK: Okay. What else? All right. So you two carry the day on this, aye?

PROFESSOR DORSANEO: Well, if they want to have a little more of a certification than the one that we

voted on, I'm fine.

CHAIRMAN BABCOCK: Okay.

HONORABLE TOM GRAY: Well, for clarification, does that mean that the Bland alternative carries the day or the one that's on the paper on page eight carries the day?

HONORABLE JANE BLAND: It's actually the Duncan alternative.

HONORABLE SARAH DUNCAN: I think it's the Justices Bland, Judge Christopher, Judge Baron, Judge Duncan proposal. It took all four of us.

CHAIRMAN BABCOCK: And but that's what's on page eight or not?

HONORABLE SARAH DUNCAN: That's not what's on page eight.

CHAIRMAN BABCOCK: That's not what's on page eight. I'm sorry, I misunderstood.

HONORABLE JANE BLAND: No.

HONORABLE SARAH DUNCAN: That's what I read into the record. I changed my vote. It took me -- I mean, I'm a little slow, and it took me quite a while to understand what Judge Christopher and Judge Bland and Judge Baron were saying were the problems from the practitioner's standpoint, the problems from the trial judges' standpoint, and the problems from the appellate

court judges' standpoint. Once I finally got it, that was my proposed fix. I went down to the other end of the table, ran it by the three judges down there, and the four of us agreed that this resolved all of their problems.

CHAIRMAN BABCOCK: And how does that resolve it where the language on page eight does not?

HONORABLE TRACY CHRISTOPHER: I don't think this is what we voted on on page eight.

HONORABLE SARAH DUNCAN: It's not.

HONORABLE TRACY CHRISTOPHER: I don't think this is an accurate -- because what we originally voted on was to get rid of that "verified by affidavit," and then I was like, no, you can't do that, and that's why we put it back in as a (k).

HONORABLE SARAH DUNCAN: Yeah. It was an evolving evolution of this.

HONORABLE TRACY CHRISTOPHER: I don't think what's written here on page eight is what we voted on.

PROFESSOR DORSANEO: I think it is. Because I think that's what I had in my original memo, that --

HONORABLE TRACY CHRISTOPHER: It is what was in your original memo, but that was not supported.

CHAIRMAN BABCOCK: I'm sorry, what did you say?

MR. GILSTRAP: Regardless, as opposed to,

you know, deciding how it evolved and who had the idea, somebody say it and let's talk about it. What is it, Bill?

PROFESSOR DORSANEO: Well, I just read it, and we just talked about it. I'm not going to read it again, no. The difference -- the draft that I had says you only have to verify things that aren't otherwise verified by evidence in the record, okay, which seems to me to be a sensible rule.

Now, what the naysayers want that I'm so agreeable I'm willing to adopt is that you need to say, quote, "The person filing the petition must verify that he or she has reviewed the petition," okay, and this is the person -- you know, I think that's good that they would review it before they verify it, "and concluded that every factual statement in the petition is supported by competent evidence included in the appendix or record."

So, you know, that's a special rule for mandamus that I don't need to put in. I mean, everything is supposed to be supported by something, right, that I file with an appellate court since I'm certifying it?

CHAIRMAN BABCOCK: So you're okay with that?

PROFESSOR DORSANEO: I'm fine with it, because it doesn't make that much difference to me what the certification said.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: Bill, we were defending your need for a verification. It got shot down.

PROFESSOR DORSANEO: Oh, I left before that happened.

HONORABLE JANE BLAND: Mostly because of Justice Duncan's eloquent arguments about why it was unnecessary, and so then this was the --

PROFESSOR DORSANEO: When I left, this language was voted up. You voted to change it.

HONORABLE TRACY CHRISTOPHER: It failed.

HONORABLE JANE BLAND: It failed, and there was going to be no verification, and then --

HONORABLE TRACY CHRISTOPHER: Right.

HONORABLE JANE BLAND: We were defending you.

PROFESSOR DORSANEO: Well --

MR. DAWSON: So you're no longer a naysayer.

HONORABLE JANE BLAND: We're not naysayers.

CHAIRMAN BABCOCK: Is everybody in agreement with the language that Bill just read?

HONORABLE STEPHEN YELENOSKY: Well, is that to replace this or in addition to it?

CHAIRMAN BABCOCK: To replace it.

PROFESSOR DORSANEO: To replace it.

CHAIRMAN BABCOCK: To replace it.

HONORABLE STEPHEN YELENOSKY: Well, in an original proceeding couldn't you have things outside the record that you need to put in affidavit form?

PROFESSOR DORSANEO: Well, what this is saying is that everything, every factual statement is -- I have looked at everything that I'm filing.

HONORABLE STEPHEN YELENOSKY: Yes.

PROFESSOR DORSANEO: And every factual statement in the petition has evidentiary support.

HONORABLE STEPHEN YELENOSKY: Oh, which could include evidentiary support that was added after the proceeding.

CHAIRMAN BABCOCK: Yeah.

HONORABLE STEPHEN YELENOSKY: Well, because there could be an affidavit --

PROFESSOR DORSANEO: Yeah.

HONORABLE STEPHEN YELENOSKY: -- in an original proceeding that wasn't --

PROFESSOR DORSANEO: That would be the affidavit.

CHAIRMAN BABCOCK: So now the naysayers are in the unanimous majority.

PROFESSOR DORSANEO: No, they're different naysayers. The nay sayers are people I didn't even know

about.

CHAIRMAN BABCOCK: Well, now nobody is a naysayer. We all agree, and we're going to have the language -- we're going to recommend the language that was just read into the record a minute ago.

What's the next rule? Do we have to talk about 53.7, Bill?

PROFESSOR DORSANEO: No.

HONORABLE TRACY CHRISTOPHER: No, no, no. I'm sorry, Chip. What is on page eight does not need the addition.

CHAIRMAN BABCOCK: It needs to be replaced with the addition, right?

HONORABLE TRACY CHRISTOPHER: No. It could stay as what's here on page eight, but that's not what we voted on last time. This is okay and doesn't need the extra verification.

CHAIRMAN BABCOCK: Say that again, I'm sorry.

HONORABLE TRACY CHRISTOPHER: Okay. What's written on the January 6th -- January 8th, 2007, memo on page eight meets the concerns that we had the last time, in my opinion.

CHAIRMAN BABCOCK: Okay.

HONORABLE TRACY CHRISTOPHER: And is

sufficient as it is. It is not what we voted on at the last meeting.

CHAIRMAN BABCOCK: Okay. Well --

HONORABLE TRACY CHRISTOPHER: Because people didn't want to sign based on personal knowledge.

CHAIRMAN BABCOCK: I understand, but which language do we all want? Do we want what Bill read, which was something you guys wrote up on the side, or do we want what's on page eight? Sarah, which do you choose?

HONORABLE SARAH DUNCAN: Well, at the end of the meeting I came up with what Bill read.

CHAIRMAN BABCOCK: So do you prefer that or what's on page eight?

HONORABLE SARAH DUNCAN: I would have to go back and read all of the words in that meeting to understand and remember precisely why I came up with that because it was not just that people didn't want --

CHAIRMAN BABCOCK: Let me put it a different way. Do you like what's on page eight?

HONORABLE SARAH DUNCAN: I don't know.

CHAIRMAN BABCOCK: Okay. Justice Bland, do you like what's on page eight?

HONORABLE JANE BLAND: The problem with page eight I think Pam Baron and others spoke about was that they did not like the fact that a lawyer would be

verifying statements based on their personal knowledge.

MR. TIPPS: Why?

HONORABLE SARAH DUNCAN: It was a long, complicated discussion.

CHAIRMAN BABCOCK: Yeah, and what Bill read strikes me as way different than what's on page eight.

HONORABLE JANE BLAND: The trial lawyer has personal knowledge but not the appellate lawyer. I don't have a dog in the hunt, I'm just -- that was the argument, and that's why we came up with this other solution.

CHAIRMAN BABCOCK: Yeah. The other solution, which Bill read a minute ago but refuses to read again, sounds to me different from what is on page eight here.

MS. BARON: Can we have it read again?

PROFESSOR DORSANEO: All right. I'll read it again, and I'll tell you the difference.

CHAIRMAN BABCOCK: But listen up.

PROFESSOR DORSANEO: "The person filing the petition," okay, "must verify that he or she has reviewed the petition and concluded that every factual statement in the petition is supported by competent evidence included in the appendix or record." Whoa. So I need to --

HONORABLE SARAH DUNCAN: That was to address Judge Christopher's concern, if I'm remembering correctly,

Tracy, that people come in and file these petitions -- help me here.

HONORABLE JANE BLAND: That's right. And they weren't there, and they represent that things happened in the trial court that didn't happen, and this way they would have to get an affidavit from the trial lawyer who was there saying this is what happened instead of the appellate lawyer saying what was happening even though the appellate lawyer wasn't there.

CHAIRMAN BABCOCK: Kent Sullivan.

HONORABLE KENT SULLIVAN: My recollection was, is you were substituting a verification when someone had to swear to something that we were concerned about -- that is, that they didn't actually have personal knowledge of -- with a different process that was called sort of a certification process that I as the lawyer had confirmed that, in fact, the representations made in this are supported by evidence, which is different, I think, than what's on page eight --

CHAIRMAN BABCOCK: Yeah.

HONORABLE KENT SULLIVAN: -- because as I read page eight, it contemplates individual and perhaps multiple affidavits from people --

CHAIRMAN BABCOCK: Right.

HONORABLE KENT SULLIVAN: -- with personal

knowledge. So it seems to me that is the array of choices that I see being offered.

PROFESSOR DORSANEO: All -- I'm sorry. All page eight contemplates, one difference that I see, is that you don't need any affidavits if you have sworn testimony or you don't need any additional affidavits from trial lawyers, appellate lawyers, or whatever, if you have in the record already sworn testimony, an affidavit, or other competent evidence, but if you're going to add any factual statements --

HONORABLE STEPHEN YELENOSKY: Yeah.

PROFESSOR DORSANEO: -- then you need more affidavits. Maybe that's not worded all that well either. It's hard to not make it turn in on itself.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: What would be wrong with just saying that "All factual statements of the petition must be supported by sworn testimony, affidavit, or other competent evidence," period?

PROFESSOR DORSANEO: Nothing.

HONORABLE SARAH DUNCAN: Because what -- Judge Christopher, help me out here, because I believe this was your concern, that somebody needs to be on the line when signing and filing this petition; and the way it's written now, the way it is in 52.3, there's no actor

in any of this. There's nobody that is certifying to the court, "I've read all this evidence, this testimony, these affidavits, this petition, they all mesh, everything is supported" and there ought to be.

MR. GILSTRAP: Well, you don't don't need that for a summary judgment proceeding.

HONORABLE SARAH DUNCAN: This is an extraordinary proceeding.

MR. GILSTRAP: Oh, so what.

HONORABLE SARAH DUNCAN: Well, some of us take that word seriously.

CHAIRMAN BABCOCK: Kent.

HONORABLE KENT SULLIVAN: I think you kind of do for a summary judgment proceeding in that a judge is in a posture of confirming independently that everything is proven up by competent evidence. I think that what Justice Duncan is talking about is there's a choice here, sort of administratively. Do you want the lawyer to say "I certified that is, in fact, the case" to allow this to go forward as a threshold matter, or do you want to require the record to be such that the judge or the justices independently by looking at this can verify and you must verify for them that, in fact, it is all supported by competent evidence?

To me that's the choice that's being made

here, and it's an administrative policy choice. Is that fair, do you think, Justice Duncan?

HONORABLE SARAH DUNCAN: Well, I thought Judge Christopher made a very good point that somebody ought to have to say this is true, "I've looked at it, and this to the best of my knowledge is true," before we go forward with looking at an extraordinary writ against a trial judge.

HONORABLE KENT SULLIVAN: And the question is do you want that to be the lawyer or do you want it to be more or less witness by witness --

MR. GILSTRAP: The evidence.

HONORABLE KENT SULLIVAN: -- so to speak.

MR. GILSTRAP: The evidence.

HONORABLE KENT SULLIVAN: Yeah.

CHAIRMAN BABCOCK: Pam.

MS. BARON: Well, let me just give a little history here because the way this debate started is we took a sentence out of current Rule 52 that says, "All factual statements have to be verified." Period, okay. So we went from the person who is signing that affidavit was saying everything in there is true, without the fudge of saying, "or supported by the record," now, what we're doing under what's on page eight is going to the opposite extreme where you may not have any affidavit at all

supporting this extraordinary proceeding, and you have to remember that the court of appeals when they get this have to take a lot on faith from the party that's filing it.

They don't have a chain of record, a chain of custody on the record. The only facts they have are the facts that relator puts in their mandamus petition, so this is a compromised position. What we offered at the end of the last meeting was that you don't have to verify that everything is true because you don't know that, you don't know if the witness is really telling the truth, but you do have to say, "I've looked at this and I feel comfortable filing it."

HONORABLE SARAH DUNCAN: And there's evidence.

MS. BARON: Yes.

HONORABLE SARAH DUNCAN: Whether it's true or not true, there's evidence.

MS. BARON: Right. And ordinarily, you know, sometimes there are extra pieces of information in there about the proceedings that aren't exactly supported by the record, and those do need to be supported by somebody, so it's a compromise. I don't think it's onerous, but I do think it gives a little more security to the appellate court that's being asked to give extraordinary relief to a party.

HONORABLE SARAH DUNCAN: And frequently to do it --

MS. BARON: Yeah.

HONORABLE SARAH DUNCAN: To do something quickly.

MS. BARON: In a matter of hours, right.

CHAIRMAN BABCOCK: Yeah, Jody.

MR. HUGHES: I just -- I wanted to bring something up to clarify, and I guess maybe Bill wasn't here at the time. This was actually back in the October 21 meeting, but I think the original version of what appears on page eight was voted on and was approved 15 to 7, which is not at all to say don't reconsider it. The additional language that was suggested by Justice Duncan that was just added at the end of the meeting and sort of left hanging there, I think it's a great idea to reconsider it, but I think somebody suggested early on that Professor Dorsaneo's original version, what appears at page eight, did not pass, and it did. It passed 15 to 7.

HONORABLE SARAH DUNCAN: It did.

MR. HUGHES: And I'm only saying that out there to clarify the record on this.

HONORABLE SARAH DUNCAN: That was why -- and I changed my vote.

MR. HUGHES: And that is included in the 15 to 7.

HONORABLE SARAH DUNCAN: Right. Because Chip allowed me to change it --

MR. HUGHES: Right. Right.

HONORABLE SARAH DUNCAN: -- for some odd reason that I didn't understand then and don't understand now.

CHAIRMAN BABCOCK: Maybe because you hadn't dipped your finger in purple ink yet.

HONORABLE JANE BLAND: I misled everybody, and I'm sorry about that, but Judge Duncan led the charge on this, and it was an issue about whether or not there would have to be any sort of verification, so I'm -- and this one has verification.

HONORABLE SARAH DUNCAN: Well, and that's why I say if I can't go back and read the record I can't explain all this, but I know --

CHAIRMAN BABCOCK: Okay. And that's the problem we're having. Frank.

HONORABLE SARAH DUNCAN: -- that solved all of our concerns.

MR. GILSTRAP: I think we have accurately reconstructed what happened. I really do. I think that's what I recall, and I think the judges' proposal is better

than what we adopted, and I think we ought to vote on it.

PROFESSOR CARLSON: I do, too.

CHAIRMAN BABCOCK: Okay. What do you think, Bill?

PROFESSOR DORSANEO: I think Frank's proposal was better than either one. I don't like -- I don't see why I need to -- I see why things need to be -- that are in papers filed with the court need to be -- need to have factual support, not just be made up, okay. I can see that. I don't see why a verification is some sort of special verification of a brief filed in appellate court needs to be verified. I don't see the reason for that.

MR. GILSTRAP: Why isn't the attorney's signature enough?

PROFESSOR DORSANEO: I think if the rule had said that everything needs to be supported by competent evidence, that would be adequate, but I don't feel strongly enough about it one way or the other as to exactly what the procedure ought to be, but I --

CHAIRMAN BABCOCK: Okay. Well, why don't we have a vote, page eight versus Justice Duncan's proposal or language?

HONORABLE SARAH DUNCAN: Gang of four's proposal. It's not just me.

CHAIRMAN BABCOCK: Okay. Gang of four's

versus page eight.

HONORABLE SARAH DUNCAN: I was responding to other points made by more competent people.

CHAIRMAN BABCOCK: Justice Jennings.

HONORABLE TERRY JENNINGS: Well, what about the idea of keeping the rule as it is right now?

CHAIRMAN BABCOCK: That would always be an option, but the Court asked us to look at it, so if we're going to change it then we've got two alternatives, and which one does everybody prefer? Carl.

MR. HAMILTON: On Justice Duncan's it says "the person filing the petition." "Person" means the lawyer or the party?

HONORABLE TRACY CHRISTOPHER: Party.

HONORABLE SARAH DUNCAN: Whichever one is filing the petition.

MR. HAMILTON: Well, the lawyer is signing it. Are you talking about whoever signs the petition, or are you talking about the party for whom the petition is being signed?

HONORABLE SARAH DUNCAN: Or "person signing it" is fine with me.

MR. HAMILTON: Which would be the lawyer.

HONORABLE SARAH DUNCAN: Well, in some cases it would be the lawyer. In other cases it would be the

party.

MR. HAMILTON: Well, if there's no lawyer, okay.

CHAIRMAN BABCOCK: Okay. Yeah, Bill.

PROFESSOR DORSANEO: In answer to the last point about leaving it the way it is, I think the problem is the personal knowledge requirement, okay, but we don't need to have a personal knowledge requirement. We could have probably accomplished the same thing -- I guess Texas lawyers don't believe if somebody verifies it on information and belief that that's -- that they aren't lying.

HONORABLE SARAH DUNCAN: But that's not an affidavit under the terms of the statute.

PROFESSOR DORSANEO: We do have some of those affidavits recognized in our procedure. That's not our normal rule. That's the New York rule.

HONORABLE TERRY JENNINGS: Most of these are going to be addressed on like a mandamus situation where basically the facts being verified are basically that on such-and-such a date the trial court did X or whatever and so forth and so on, to basically tell the appellate court what happened below, right?

PROFESSOR DORSANEO: Uh-huh.

HONORABLE TERRY JENNINGS: And that

doesn't -- the way the rule reads now, that doesn't have to be the actual appellate lawyer filing the petition. They could have the trial counsel testify to what the trial court did below or how the proceedings -- you know, on such-and-such date there was a hearing and yadda, yadda, yadda. So I'm having a hard time understanding what all the fuss is about. The rule as it reads seems to take care of that. It doesn't require that any particular person sign the affidavit, but you do need someone with personal knowledge to tell the appellate court what happened below, don't you?

HONORABLE TRACY CHRISTOPHER: That's my point. I mean, that -- the change seemed to take away the requirement of personal knowledge. I liked the rule as it was and then we have the alternative verification as a fix.

CHAIRMAN BABCOCK: Okay. We're going to vote. The choices are page eight versus gang of four. Everybody who's in favor of page eight raise your hand.

Everybody in favor of the gang of four proposal?

PROFESSOR DORSANEO: What one?

MR. HAMILTON: Which one?

CHAIRMAN BABCOCK: All right. Interestingly enough, the page eight proposal garnered four votes and

the gang of four proposal garnered 18 votes, so gang of four wins, and let's go onto the next one.

HONORABLE DAVID PEEPLES: Chip, we weren't given a choice to keep it the way it is.

CHAIRMAN BABCOCK: Well, this is a recommendation to the Court --

HONORABLE DAVID PEEPLES: Okay.

CHAIRMAN BABCOCK: -- and they can always keep it as it is.

HONORABLE DAVID PEEPLES: Are they interested in knowing how this body feels about that?

CHAIRMAN BABCOCK: About keeping it as it is?

HONORABLE SARAH DUNCAN: Why not just have a vote on that?

CHAIRMAN BABCOCK: Well, if you're interested in telling them, why not. How many are in favor of keeping it as it is?

HONORABLE NATHAN HECHT: Both sides voting one.

HONORABLE STEPHEN YELENOSKY: Now the gang of two and a half.

CHAIRMAN BABCOCK: Eleven people want to keep it as it is, and how many people want some form of change?

MR. DAWSON: The other half of the gang of four.

HONORABLE STEPHEN YELENOSKY: Or the gang that couldn't shoot straight.

CHAIRMAN BABCOCK: Okay. Eleven want to keep it as it is, eight want to change it.

HONORABLE SARAH DUNCAN: That would be the two members of the gang of four who actually have to sign these petitions and know that they do not have personal knowledge of everything in the petition.

CHAIRMAN BABCOCK: So noted. All right. Rule 53.7, is that something we have to talk about or not?

PROFESSOR DORSANEO: We're done.

CHAIRMAN BABCOCK: We're done with that? Okay, good.

All right. Now, we are onto the letter from Justice Bland behind Tab 5.

PROFESSOR DORSANEO: With my name on it, but I respectfully defer.

CHAIRMAN BABCOCK: Justice Bland, do you want to --

HONORABLE JANE BLAND: That's because I mailed it to you.

CHAIRMAN BABCOCK: You want to tell us what you're thinking?

HONORABLE JANE BLAND: Well, you know, I guess it used to be that oral argument was of right in the intermediate courts of appeals, and now the intermediate courts of appeals can determine whether or not argument would be helpful, and this would be an addition to the rule governing the right to oral argument that would allow parties like they do on the Federal side of the circuit to file a statement regarding oral argument, because although the courts of appeals handle their oral argument calendar differently all across the state, everybody has to make the decision about whether or not to grant argument, and many of them make the decision at the time of docketing, which is well before the case is submitted.

So if you had a statement regarding oral argument, I think it would help appellate courts match cases that are suited to argument with argument and would help practitioners who are really interested in getting oral argument to have a place where they could explain why it would be helpful, because although it used to be that if you asked for oral argument on the front cover of your brief, you had a right to it; and I think even for a while after there if you asked for oral argument on the cover of your brief, you would automatically get it; and some courts of appeals still, you know, routinely grant it if you ask for it. Others grant it much less frequently, and

the trend in terms of overall numbers of arguments among all the courts of appeals has declined in the last five years, so this is an effort to allow counsel a place to educate the intermediate appellate court about the reason argument would or would not be helpful in the decision of this case, and the language is just similar to what the Federal rule states.

HONORABLE BOB PEMBERTON: May I ask a quick question?

CHAIRMAN BABCOCK: Justice Pemberton.

HONORABLE BOB PEMBERTON: Do you envision it being a separate document? I guess do you-all set argument based on just a docketing statement? We usually do it -- judges make a call based on briefs, which we've already been encouraging counsel just to include some kind of statement if they want to within the brief. When would that be done?

HONORABLE JANE BLAND: Well, I think every court does it differently, and you know, some courts, one judge decides whether the case --

HONORABLE BOB PEMBERTON: Yeah.

HONORABLE JANE BLAND: -- goes onto the oral argument calendar. Some courts decide it together. Some decide it -- you know, you have to be at least 21 days in advance.

HONORABLE BOB PEMBERTON: Yeah, I know, but --

HONORABLE JANE BLAND: So chances are before you've had an in-depth review of the briefing. I know one court sort of automatically in their clerks offices say if it's a summary judgment that's a nonargued case, so -- and it's a court that grants a lot of arguments. It's just for whatever reason summary judgment cases are over here.

HONORABLE BOB PEMBERTON: Will not be a separate document and depends on local needs.

HONORABLE JANE BLAND: Yeah. I don't think it would be a separate document. It would be in the brief just before the statement of the case.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: I'm not sure if I'm reading the statistics right, but what is the landscape? I mean, obviously if oral arguments are not routinely granted, I'm probably going to want to say something more than "oral argument requested," because I'm not going to get it in your court. Unless I explain my myself a little bit better, I wouldn't want to say that.

Now, you don't want me saying it in -- I want to know am I going to say it in numbered pages or not numbered pages; and if I'm going to say it in not numbered pages I'd want -- you probably want to say how much I

could say or might set some limits on it; but those kinds of both what's really going on questions and the practical issues are involved with it. What happens? How many times do -- these statistics look like oral argument doesn't happen very often.

HONORABLE JANE BLAND: It varies a lot from court to court, but I think -- and these numbers that I attached, you know, there is a lot of issues, like criminal cases are in there and the way that OCA keeps track of them, you know, arguments for a particular year may not be recorded here; but overall the number of arguments over the last five years have gone down, even if you take all the courts of appeals together, so --

PROFESSOR DORSANEO: A lot?

HONORABLE STEPHEN YELENOSKY: Yeah.

HONORABLE JANE BLAND: Well, I think it's been steadily downward, and if we want to, you know -- and I know there's been some interest among the appellate practitioners in sort of why, and there have been -- I think I have been on a couple of different panels over the last couple years and that's been a hot topic, and it just looked to me like one thing that could help is if you think your case really needs argument to tell the court why.

CHAIRMAN BABCOCK: Frank.

HONORABLE JANE BLAND: And as far as placement, in the Federal rule it's not dictated and people generally put it in the Roman numeral section of the brief so it's not counted against their page limit, and it's, you know, I don't think been a big problem, unless -- I mean, I haven't filed one in Federal court in a few years, but I don't think it's been a big problem.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: If -- you know, Justice Bland's logic seems to me to be very clear and makes a lot of sense. If the courts aren't going to grant oral argument in all the cases, there's got to be some way they decide, and as an advocate I'd like to know and I'd like to have some input and tell them why I want oral argument or why I don't want oral argument.

CHAIRMAN BABCOCK: Does anything preclude you from doing that now?

HONORABLE SARAH DUNCAN: No.

MR. GILSTRAP: Well, where do I do it? Do I do it -- I mean, that's the problem. Where do they look, because they're not going to read the whole -- my impression is they don't read the whole brief. In the Fifth Circuit you get one page, usually one page, it's the first page of the brief and it's kind of a mini-petition for review and you take your best shot. I have no idea

whether they look at that in deciding it, but they don't grant oral argument in all cases, and that's your chance to tell them why. I mean, if you're not going to get oral argument in all cases, there ought to be some reason why and you ought to have some control over it.

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: I don't think you should have control over it. If you want to have input, I think that's great; and we, like the Austin court, the San Antonio court, any time we spoke we said, you know, "Tell us why you think oral argument is appropriate in this case. If we deny oral argument, please know that if you file a motion for reconsideration, we will reconsider. We're not guaranteeing you'll get argument, but we will reconsider."

In response to the statistics, I need to make the point that when I got to the court 12 years ago we were not permitted to deny oral argument in criminal cases, only in civil cases, and the rules were -- when the amended rules came out, not the last set of amended rules but the set before that, would have been '94, I think, the rule permitted courts of appeals to deny oral argument in criminal cases. A lot of the statistics, I'm not saying -- I'm not denying that argument is denied in civil cases. I'm saying that a lot of the denials are in

criminal cases.

PROFESSOR DORSANEO: Which used to be argued orally all the time because they didn't really write briefs once upon a time, the criminal cases.

HONORABLE SARAH DUNCAN: When I got there they did write briefs, but we were not permitted to deny argument in a criminal case. I'm not quite sure how a court would decide whether a case should be argued based on a docketing statement. I mean, some of the toughest cases I have had have been summary judgment cases for one reason or another, but if that's true then putting it in the brief isn't going to help. It needs to be put with the docketing statement, if there are courts who are deciding whether to grant oral argument based on the docketing statement.

CHAIRMAN BABCOCK: Justice Bland, then Judge Yelenosky.

HONORABLE JANE BLAND: I'm not talking about the docketing statement. I'm talking about docketing the oral argument. Calendaring I guess would be a better word, and I don't think there are courts that use the docketing statement for that, but I do think that there are courts that submit the case on the nonargument calendar, get to submission, get to the submission conference and say, "Oh, you know, it's too bad; we

probably should have argued this case," because it at first blush didn't appear to be a case that warranted argument and then you get to it and you really get into the merits of it and you realize it should have been argued; and this would just give you an opportunity in the brief for the lawyers to explain; and, you know, it's true that, yes, if you deny argument somebody can file a motion and request that argument be heard; and I think those are often granted; but if we could avoid all that and just go ahead and set cases for argument --

CHAIRMAN BABCOCK: Justice Hecht wants to make a comment.

HONORABLE NATHAN HECHT: While we're commenting, I would just be interested in knowing what the practitioners think they would say in the statement. "We don't think the court's going to read the brief, so we need to tell them something, some point," or "We haven't done a very good job explaining it, so maybe oral argument will help," or I mean --

HONORABLE JAN PATTERSON: "This is a case of first impression."

PROFESSOR DORSANEO: "Complicated record, long trial."

HONORABLE SARAH DUNCAN: It's like summary of argument. It just gives a lawyer a place to highlight

and a judge or attorney at the court to focus on just the considerations of oral argument without regards to the merits.

MR. GILSTRAP: Kind of a one-page petition for review is really what it is. This is why the case is sexy, this is why you ought to be interested, and this is why it ought to be argued, and, you know, it's one page, but the idea is the court hasn't read the briefs when they decide whether or not to grant oral argument. If they've read the briefs, you don't need it.

CHAIRMAN BABCOCK: Well, on a deeper level, too, this is in response to your question because you wouldn't say this probably in your statement, but, you know, we're living in a society where we're not talking to each other anymore. I mean, we've got Blackberries and we e-mail and we just don't talk, and we could do this Supreme Court advisory stuff on the papers if we wanted to, but there's a terrific dynamic --

HONORABLE STEPHEN YELENOSKY: But then there would be no free lunch.

CHAIRMAN BABCOCK: Then there would be no free lunch. Is there ever really a free lunch? And there's something good that comes out of the dynamic of talking to people, and especially when you're talking to the people who are charged with deciding the case. I

mean, we all know that judges read their briefs, but they also have law clerks that do a lot of the real heavy lifting on reading and researching and writing, and these statistics to me are shocking. I think maybe a lot of my cases get set for oral argument.

HONORABLE SARAH DUNCAN: Yeah. I think most people around this table's cases probably get set for argument.

CHAIRMAN BABCOCK: But I'm just stunned by some of these.

HONORABLE SARAH DUNCAN: Well, you need to come look at the docket of any court of appeals represented at this table, because there is an awful lot of unargument-worthy stuff.

HONORABLE TOM GRAY: Actually, he needs to read the briefs that are submitted to the courts of appeals for, you know, a couple of hundred cases. You don't have to read them all.

CHAIRMAN BABCOCK: Yeah, but one court only had eleven arguments out of a thousand in a year. That seems low to me, but maybe I don't know. Professor Hoffman had his hand up first, then Justice Jennings.

HONORABLE STEPHEN YELENOSKY: You skipped over me.

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

HONORABLE STEPHEN YELENOSKY: It's just a small drafting point, but based on what I've heard, the right to oral argument used to mean two rights. It was assumed we're going to have an oral argument because it says "when the case is called for argument" and what that first sentence really says is "At the oral argument each party who has requested it may argue"; and then it goes to the other right issue, which apparently no longer is a right, which is whether you're going to have an oral argument. So just in drafting it at least one thing it shouldn't say, "right to oral argument" because that implies that you're going to have one, so are we talking about whether you're going to have an oral argument or whether you get to argue, two different rights, and now the difference is apparent.

CHAIRMAN BABCOCK: Have I got the order right? Is it Professor Hoffman, Justice Jennings? Somebody over here had their hand up. Pam did, and then Judge Bland.

PROFESSOR HOFFMAN: My thoughts are that I think, with Justice Hecht, it is not likely that requesting the oral argument will often make a difference; and I think that it's also probably not likely that putting in the short statement will, in fact, persuade courts to have oral arguments where they are not having

it. I think there is a lot of dynamic that goes on that has nothing to do with what the lawyers say or would say in addition beyond what they've already said in their papers.

That all said, it's sort of hard to be against it. To me this is sort of like the placard, you know, "For better schools." You know, we're a group of people who our job is to, most of us or many of us, even judges and academics, we convince; and we do that through writing most of the time; and so it seems like it's sort of a -- I'm not going to say it's a no-brainer, but I think I support it. It's hard to see what the substantive argument is against giving people a place in a paragraph or two to say why oral argument -- the court is free to ignore it, and there may be other things going on.

By the way, relating to that last point, look at these statistics comparing the First Court of Appeals with the Fourteenth.

HONORABLE JANE BLAND: Thanks. Thanks for bringing that up.

MR. TIPPS: We do that all the time.

PROFESSOR HOFFMAN: So that has nothing to do with criminal law changing or any others. Right here we have a nice control desk, and it looks like the First Court of Appeals is playing a lot more golf than the

Fourteenth.

CHAIRMAN BABCOCK: Justice Hecht again.

HONORABLE NATHAN HECHT: I'm not against oral argument. I think it's a very useful part of the process, but I just wonder -- and maybe it serves a purpose to have counsel focus on why they want it, but my own experience is that a lot of time when counsel might not have a very good idea of why they wanted it and we might not have a very good idea of why we want granted it, it still is useful enough in enough instances that I would never want the default to be the other way. I mean, I wouldn't want to think you should be thinking of reasons not to argue it rather than reasons to argue it because -- now, I know on the court of appeals, because I was there for a while, a lot of the criminal cases just -- in fact, when I was on the Dallas court, we set nine cases for argument every week, and rarely would more than one show up, but frequently none of the nine would show up, and so even if we set them, the lawyers just didn't come in, but that was not true of the civil side.

CHAIRMAN BABCOCK: Justice Jennings was next, I think.

HONORABLE TERRY JENNINGS: Two points. I'm fully in favor of amending the rule, but just to give you a little background on it, I don't think you can just read

the rule and the amendment without considering 39.8; and 39.8 says, "Under the circumstances where a court of appeals may decide the case without oral argument"; and that is a circumstance where argument would not significantly aid the court in determining the legal and factual issues presented in the appeal; and on some of these panels that Judge Bland and I have appeared on where the Bar is -- many members of the Bar are very much upset about this decline in the oral argument at the intermediate courts of appeals, and I think rightly so given these statistics.

The point is, is to give the entire panel an opportunity to kind of consider maybe, well, we should have argument in this case and tell us, "You, as a lawyer. Don't just rely on the rule as it's written now by, you know, writing this little statement on the front of your brief saying 'oral argument requested.'" That doesn't tell us anything, but if you can tell each member of the panel as they're reading the brief when they open it up, "Here's why oral argument in this case would significantly aid you in making your decision," that would be valuable to us, and some of this may be a problem unique to certain courts.

Obviously if you look at some courts here, like Dallas, in 2001 they had 61 oral arguments. Well,

they've actually dramatically increased. In 2006 they had 277 arguments. Fort Worth has remained steady. From 2001 they had 157 arguments to 2006, 146 arguments, and last time I looked at their statistics, they are both very productive courts and yet, they're still having a lot more arguments than some other courts are having. Then if you look at Corpus Christi, you know, they went from 172 arguments down to 11, and our court went from 135 to 52 arguments. So there's something wrong here, and to me it's probably more than just amending the rule.

I would probably go further than Judge Bland. The Federal rule says basically that if any member of a panel wants to hear argument, the panel will hear argument. I think the way our court now works is we kind of defer to the assigned judge. When a notice of appeal is filed it's assigned to a judge, and I was talking to Bob. Different courts operate differently in this regard. We kind of -- we defer to basically the assigned judge. They review the case first, set it on the docket, and they say up or down on oral argument.

Well, the other members of our panel don't really see that case until a week before it's submitted when we get the briefs and a proposed pre-sub opinion. By that time the 21-day notice letter has been issued, a decision has made -- been made to decline oral argument,

so accordingly, sometimes when we come into argument the decision has already been made and then we get to a point where, you know, maybe one or two -- one or the other two panel members think "Well, you know, maybe this is a case that merits argument," and sometimes we do go ahead and the judge will defer and say, "Okay, well, if you think we ought to have argument, we ought to have argument," but there is a serious problem here. I think maybe one way to address it would even be to go further and copy the Federal rule and say, well, if one judge on the panel wants to hear argument, they ought to hear argument.

CHAIRMAN BABCOCK: Okay.

HONORABLE JANE BLAND: That's an IOP.

CHAIRMAN BABCOCK: Wait a minute. It was Pam.

HONORABLE JANE BLAND: I was just telling him it's not in the rule. It's not in the Federal rule.

HONORABLE TERRY JENNINGS: Well --

CHAIRMAN BABCOCK: Internal operating procedure?

HONORABLE TERRY JENNINGS: Well, Rule 34(a), and I think I'm looking at the rule, not the Fifth Circuit rule, "Oral argument must be allowed in every case unless a panel of three judges who have examined the brief and record unanimously agrees that oral argument is

unnecessary for any of the following reasons."

HONORABLE JANE BLAND: I think that's Fifth Circuit.

CHAIRMAN BABCOCK: Pam, waiting patiently.

MS. BARON: That's me.

HONORABLE TERRY JENNINGS: No, because I have --

HONORABLE JANE BLAND: Okay. Well, good. I'm happy for that.

MS. BARON: I think it's a great idea. I think as a practitioner I think it's useful to try and give your input to the court before a decision is made instead of trying to get them to change their mind after the fact. I guess in terms of placement, though, I agree with Professor Dorsaneo. I think it would need to be mentioned in the briefing rule. There would need to be a place for it.

I've already done this before in some cases where I am concerned that the court won't hear argument or will issue -- I've even explained why they shouldn't issue a memorandum opinion in my case, why it should be a published opinion, before they even write it; and I think it's useful and it also maybe helps with the Bar's expectation. If what you're going to write in that statement is "This is a routine property division case

that involves, you know, the application of existing law to really boring schedules of property," you know that you're probably not going to get argument; and you can kind of tell your client that it's very unlikely; but there are situations where the parties have engaged at trial with a fairly significant dispute over what the law is; and it's nice if you can tell the court of appeals that before they make the decision whether to hear argument, because in those particular cases it is very useful to allow the court to ask questions to know what the impact of making that decision is going to be, because it's always not just the parties before them that will be affected by that decision.

But I would, you know, say it could be an optional statement, but it should be in the brief. A party may explain to the court the reasons that argument would be beneficial to the court in making its decision in a case, and I would include it in a preliminary Roman numeral part of the brief.

CHAIRMAN BABCOCK: I think it was Justice Bland that had her hand up and then Sarah and then Bill.

HONORABLE JANE BLAND: I was just going to -- the reason that I didn't -- I thought it would be in the briefing rules, too, but on the Federal side it's in this little oral argument section, and we have this same

thing on the state side, and so that's why I put it in there. And as far as it being in 39.1, well, you know, it might be that 39.1 entitled "Right to Oral Argument" is not exactly correct because it's got the "except as provided in 39.8," but, you know, to me if somebody was looking about oral argument, that's where they would look, but, you know, wherever you want to put it is fine.

As far as Justice Jennings' comment, if this committee is interested in tracking that, I would be interested in hearing it, but I mean, I think we would need input from all the appellate courts about whether or not they would want a rule like that.

CHAIRMAN BABCOCK: Okay. Sarah.

HONORABLE SARAH DUNCAN: Just two quick points. One is, at least at the San Antonio court, the staff attorney would go through all of the -- her judge's cases that were set for a particular day or that came at issue, and there would be a stack like this, and that staff attorney is responsible for flipping through all those briefs and making a recommendation to her judge about whether oral argument should be granted. If any member of the panel wants oral argument I don't think our IOPs -- the court's IOPs said that it had to be granted, but that was certainly the custom at the Fourth Court of Appeals.

I support this proposal, don't get me wrong. As far as the actual proposal, I think we need a little bit of work on the language because it says, "Any party who has filed a brief and who has timely requested oral argument may argue the case to the court," and we specifically say in 39.7, "Even if a party has waived oral argument by not requesting it on the cover of their brief, the court may direct the party to appear and argue," and there could be -- you know, just because you forget to put it on the cover of your brief, if you've got a section in your brief entitled "Reasons for Granting Oral Argument" that ought to take precedence to me.

HONORABLE JANE BLAND: That's the current language. The only thing new is the bold.

HONORABLE SARAH DUNCAN: Right, but then further down in the rule --

CHAIRMAN BABCOCK: Bill, then Pam. Bill, Frank, Pam.

PROFESSOR DORSANEO: Does anybody know where it says in our appellate rules that you put "oral argument requested" on the front cover of the brief?

HONRABLE SARAH DUNCAN: Uh-huh.

PROFESSOR DORSANEO: Where?

HONRABLE SARAH DUNCAN: It's in 39.7.

PROFESSOR DORSANEO: 39.7.

MR. GILSTRAP: It doesn't belong there.

PROFESSOR DORSANEO: Uh-huh.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: Okay. It needs to go in 38.1 in the appellant's brief.

PROFESSOR DORSANEO: Yeah.

MR. GILSTRAP: It needs to be right after identity of parties and counsel. I think that's how the Fifth Circuit does it. The first thing that the briefing attorney opens up and looks and says, "identity of parties and counsel," anybody have a conflict. Well, I don't know whether the briefing attorney looks at that, but the judge does; second page, reasons for granting oral argument. That way it's there. It doesn't belong in 39 because --

PROFESSOR DORSANEO: Right.

MR. GILSTRAP: -- you know, that doesn't tell you how -- that's not where you look when you see how to write the brief.

PROFESSOR DORSANEO: I'm not sure where it goes, but I think it does go -- I think it should be put in 38.1. I'm not sure whether it's first page, second page, fifth page. The templates that I have seen for, you know, briefs written in other places, it is in the beginning pages, not necessarily right there at the front, and I don't think it should count in the number of --

MR. GILSTRAP: Right.

PROFESSOR DORSANEO: -- number of -- in the 50 pages.

CHAIRMAN BABCOCK: Pam.

MS. BARON: Just a little bit off subject, but as part of the certification to become board certified in civil appellate law you have to have made a certain number of oral arguments, and as a former chair of the appellate section, our members were having trouble meeting that requirement in order to get certified, and I guess this would give them an opportunity to explain, you know, maybe why.

HONORABLE TRACY CHRISTOPHER: "I've done five and I need one more."

MS. BARON: And one thing our section is doing is we're working on some pro bono pilot projects, one with the Third Court of Appeals in Austin, that would at least try and encourage the court to grant argument in those cases in which our members are willing to take on a case and represent a party pro bono, and that would help them with certification so we could tie that together, but it is very difficult for our younger lawyers to meet the requirements for board certification right now.

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: A number of comments.

First of all, kind of to address one of Frank's comments, and now Frank's gone, but I never recommend advancement without argument without a draft opinion and that draft opinion being provided to the two other judges on the court, so we're well into my cases before that decision is made. I recommended something very similar to this for our local rules when we were reviewing them. It got shot down, but I actually decided ultimately that we didn't need local rules anyway, but the local procedure differs so much from court to court, I think the local rules, if you're going to do something like this, is the place to do it rather than -- so it's applicable to your court and not other courts.

Basically Pam Baron's position, as I understand it, is she takes the role of an advocate, and this is why you do it, and so this is why it's important to me and why this case should be important to you, and make that pitch to us in the form of a motion or other argument.

We see on the courts of appeals something very close to this in the criminal cases in -- when they file a petition for discretionary review, we have the opportunity to see those before they're actually filed with the Court of Criminal Appeals, so it's a very different procedure than with the Supreme Court, and

there's almost always one of three reasons given. It -- we decided a significant issue of state law that had not been previously decided, it was -- we decided it contrary to the existing precedent of the high court or that there is contrary precedent in another court of appeals; and that really doesn't help us decide, or if that was provided to us on the front end, it's just very repetitious, it gets very rote.

I think that's what you'll see here. I think when Pam files a special motion that says, "This is why this case is important," then you've identified a case that's more likely to need oral argument; and I think there's a significant difference between having this in the court of appeals requirements versus the Supreme Court because -- and the need for oral argument because at the Supreme Court they have the opportunity to not review it at all and they're making a decision -- they've already decided they want to review it, before, you know, they get there; and so the oral argument in the Supreme Court is much more important, is what I'm saying, in each case, because they've already had that discretionary review and have decided they're going to hear it; and in the court of appeals we don't have that option of saying -- there are a lot of cases you can look at on the briefs and say, we -- you know, question whether or not it should have been

filed as an appeal in the first place, whether or not there was merit to it, and certainly didn't justify oral argument that had been requested. So because this is just adding another feel good provision to a rule that already would accommodate it, I don't think it's a necessary change.

CHAIRMAN BABCOCK: Justice Patterson.

HONORABLE JAN PATTERSON: I think I agree with most of that, and I could go either way on this rule. I don't feel strongly about it one way or the other, but I think that we should not assume that there is any relationship between the presence or absence of this kind of statement and the number of oral arguments. I think that is a false assumption that there is any relationship between them. The reason arguments have dropped off are for other reasons.

I do think that we get a lot of information -- we do it as a practice tip and commonly give it out as a practice tip, and the practitioners in the district, more often than not if they want oral argument they include it or they know that if they file a motion for reconsideration that it's almost automatic, although they don't have to do that, I think, anymore; but we get a lot of information in the table of contents; and I think the practice is -- one reason not to have it is

because the practices do vary among the courts so much as to whether it's done by a staff attorney, a single staff attorney, the judge's staff attorney, the judge.

I look at all of these briefs and make a determination on oral argument, and what's really helpful is the table of contents. The good practitioners commonly and automatically include a statement of oral argument because they know that perhaps the statement on the brief is no longer sufficient, so I think it's become rather automatic. I do think it is an advocacy piece, so I'm not sure how informative it really is. I do think there are a few items they could include in that. It's usually about a half a page, but to add another requirement for the lawyers when those who want to do it know that they can include it, I think is -- makes it -- makes it mandatory for those who may not know about it or may not want to do it or it might add more work for them.

The courts uniformly have different points at time in which they make these decisions, so whether it's done when the appellant's brief comes in or when both briefs come in or the notice of appeal, they're all done at different times and by different methods; and I have one other reason why I think perhaps now is not the time to change it, and that is that I think we ought to be cognizant of the fact that every time we change a rule

practitioners have to figure out what the changes are and another change is down the way and another rule book, and I think that if we can do these -- save them up and do them at a time when we want to do much more of a wholesale change, that that's the time to make changes like this. If a rule ain't broke, dot, dot, dot.

CHAIRMAN BABCOCK: Yeah.

HONORABLE JAN PATTERSON: Or as Judge Jennings says "yadda, yadda, yadda."

CHAIRMAN BABCOCK: Yeah, but before you yadda, yadda, Judge Jennings, Buddy.

MR. LOW: All right. I totally agree. I was just sitting here thinking about how long it's going to be before there's an article in the Bar Journal or something, "How to Get Your Oral Argument Granted." It's going to be "First, this will have great impact on the jurisprudence in the state. Secondly, judges have many questions, and I want to be sure you're well-informed," so I need -- and you're going to see and West will have a form book on it. So as a practical matter I think the way to do it is if you don't grant it, get something yourself and put it together on a motion to reconsider whether you get oral argument, but that's all.

CHAIRMAN BABCOCK: Yeah. Justice Jennings.

HONORABLE TERRY JENNINGS: I respectfully

couldn't disagree more. I think the rule is broken because I think in a way it's deceptive, because what this is telling you is basically, look, you put your little request on the cover and basically that's the end of the story, and if you don't get argument, there's nothing you can do about it. I think it's important for the practitioners to know and give them some guidance on this part, saying you can include at least a paragraph or a page, certainly no more than a paragraph or page, telling us why in this particular case. This isn't your normal summary judgment; there are recent cases out of the Supreme Court have made this issue influx or whatever. I think that's critical for every single person.

Part of the problem is that we're all fighting a huge volume; and, you know, I'm not only handling my cases and making a decision on my cases, but also my fellow panel members. You know, on our court typically a judge authors anywhere from 65 to 75 opinions a year, and then on top of that you're participating in twice as many more cases as that, and if you can give me a summary that would help me make a decision to intelligently grant or deny oral argument, you know, tell us, you know, what is it about this case that doesn't, you know -- tell us what it is about this case where oral argument would significantly aid the court in determining

legal and factual issues presented in this appeal.

I have been in more situations where I have regretted not having argument than having argument. I like to use argument to test. You know, you read the briefs, you read the pre-sub, you go in with kind of an idea of how the case should come out, you give the counsel a chance to refute that, and then sometimes I have had my mind changed in oral argument; and to me I would rather err on the side of having more arguments than fewer arguments.

I don't think anybody can deny there is a huge problem here. The UT Appellate Conference, the State Bar Appellate Conference has noted this in the last two sessions. They're going to talk about it again this summer, I'm sure, in one respect or another. The State Bar is working on something like this. It's a problem that we can't just say, "Oh, it's not there."

HONORABLE JAN PATTERSON: But do you think --

HONORABLE TERRY JENNINGS: But the bottom line is I do think this deceptive. Well, you just request oral argument; and if you don't get it, there's not a darn thing you can do about it; whereas, you know, all you have to do, if you could tell us in a paragraph why this is a little bit different than your normal summary judgment or

something like that, I mean, how can you be opposed to that?

MR. LOW: But, no, no, I'm not opposed to oral argument, but in your court, nobody -- if you don't grant it, you won't allow them to file a motion to reconsider? Are you just going to throw it in the wastebasket and do nothing?

HONORABLE TERRY JENNINGS: But certainly, but the problem is, is the way the rule is written now. I think a lot of practitioners are reading the rule and saying, "Look, all we can do is put this statement on there, and if the court doesn't agree that this case -- oral argument should be granted in this case, we're stuck."

MR. LOW: Then you need to educate the lawyers rather than change the rules, if they can file a motion.

CHAIRMAN BABCOCK: Judge Patterson.

HONORABLE JAN PATTERSON: Well, I think I'm probably --

MR. GILSTRAP: You need a *Bar Journal* article.

HONORABLE JAN PATTERSON: -- the biggest proponent of oral argument, but are you telling me that you would be more likely to grant more oral arguments with

that statement? I mean, if that's -- if you say "yes" and other judges say "yes" then I'm for it, because I think we ought to have a lot more oral argument, but I don't think there is any relationship between that, and our lawyers routinely include these, and I'm surprised that there are some that think you can't.

HONORABLE TERRY JENNINGS: What's more helpful a statement on the cover of the brief saying, "oral argument requested" or a paragraph when you open the brief up saying, "Here's why oral argument would help you decide this case"?

HONORABLE TRACY CHRISTOPHER: So --

HONORABLE TERRY JENNINGS: Presuming you get an intelligent paragraph telling you why it would be helpful.

CHAIRMAN BABCOCK: Judge Christopher.

HONORABLE TRACY CHRISTOPHER: Well, what strikes me is that in some jurisdictions, apparently, people routinely are adding these paragraphs, even though it's not provided for in the rules and people are routinely asking for a rehearing on the denial of oral argument, which is not included in the rules. I mean, that seems like you've got to be kind of part of the club to know that you can do either of those two things. It ought to be in the rule.

HONORABLE BOB PEMBERTON: Yeah.

CHAIRMAN BABCOCK: Justice Pemberton.

HONORABLE BOB PEMBERTON: I agree with that. I mean, what we've got now is sort of if you happen to go to CLE conference and hear the judge say you can do this, you're in the club and you know to file these things and we won't sanction you for doing so; but if our philosophy of the rules is as I thought it was to be user-friendly and folks who perhaps maybe don't do appeals all the time, we want them to be able to pick it up and kind of know what the rules are, it might be helpful to have a specific provision there saying, "Yes, in this day and time the courts aren't granting as many arguments. You get your shot to say some reasons why they ought to and why it would aid the court" and it wouldn't count against your 50-page limit.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: I think the only basis for comparison we have is the Federal side, so I would be interested for people to share their experiences on the Federal side; but I know when I requested oral argument and I had crummy reasons for it, I didn't get it; and if I requested oral argument and I had good reasons, I did; and maybe that just had to do with the -- you know, that they had read the briefs and they would have granted

them anyway; but I have to think that it didn't hurt that, you know, that if I had good reasons, I had them in there for them to look at, and if I had crummy reasons, they realized that I shouldn't waste their time.

HONORABLE JAN PATTERSON: So you think we'll restore oral argument with that statement?

HONORABLE JANE BLAND: No, I'm not promising that. I'm just saying it would give every litigant a chance to educate the judge, the panel, the reviewing attorney, whoever, in a quick way without having to review the entire brief why it should be calendared or should not be calendared on the oral argument docket.

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: I think I'm one of the people who has been advocating for more constraints on when to grant oral argument. I have done so despite my belief that oral argument is a good thing; but I came to believe after looking at the volume at the court of appeals that while it may be a good thing, it is a luxury; and as long as the Legislature is tying the courts of appeals funding to the number of cases, the clearance rate of that court of appeals, this is just reality; and that's our practice tip to the lawyers in our district, is "The reality is we've got to have 100 percent clearance rate to get the funding we need from the Legislature. So, given

that, tell us why your case deserves oral argument, why it will help us decide your case more quickly," because that's our goal, is to decide cases quickly and correctly; but I completely agree that you shouldn't have to be a member of the club or a member of a group that's heard Judge Pemberton talk about it or Judge Bland talk about or Judge Patterson talk about you can include this in your brief, nothing prohibits it. You can file a motion for reconsideration, nothing prohibits it. You shouldn't have to be a member of a club. So if this is better since it levels the playing field for all lawyers who read the rule books, and that's not by any stretch of the imagination all lawyers, and from my perspective it enables the court to work more efficiently in weeding out the cases that do merit oral argument, how can you, Tom Gray, be against it? And I'm saying that with a smile on my face, but really and truly, I mean, are you concerned that people -- that courts are going to strike briefs because the statement isn't included?

HONORABLE TOM GRAY: God, I would hope not after the 44.3 discussion we had before the --

HONORABLE SARAH DUNCAN: There have been years that I was an appellate lawyer that that would have happened in some places in the eastern part of Texas, but if it helps the court more efficiently identify those

cases that need to be argued and it helps the lawyer feel that they have had input into the decision-making process, how can it really be a bad thing?

HONORABLE TOM GRAY: Well, I'm fully confident that when the recodification is done this provision will be in there.

CHAIRMAN BABCOCK: Well, before the turn of that century, why don't we get a sense of whether it's the sense of this group that Justice Bland's proposal is one with merit? It may not be in the right rule, it may not be the right language, but generally, we're in favor of it. Stephen.

MR. TIPPS: I was going to offer a friendly amendment, which I think would be accepted, that the proposal be relocated from 39.1 to 38.1.

CHAIRMAN BABCOCK: Okay. Yeah, Bill.

PROFESSOR DORSANEO: Well, we may not want to make it mandatory.

MS. BARON: Right.

MR. TIPPS: That is true.

PROFESSOR DORSANEO: So I think it ought to be in 38, something ought to be said in 38 about this, but maybe just in the page limits and then you can leave the thing in 39, although just a minute ago I didn't know what it said in 39.7 because it's not 38.

HONORABLE SARAH DUNCAN: Because they changed all the rule numbers.

CHAIRMAN BABCOCK: Okay. How many people think that this is a good idea? Raise your hand.

MR. GILSTRAP: Better schools.

CHAIRMAN BABCOCK: How many people think it's a bad idea?

MR. LOW: Some people don't think either way.

CHAIRMAN BABCOCK: By a vote of 25 to 1, Gray, J., in dissent, the motion passed. So, Justice Bland, could you get with Bill and maybe try to figure out the right place and tweak any language based on our discussions?

HONORABLE JANE BLAND: Yes.

CHAIRMAN BABCOCK: That would be great.

There was a letter that was sent to me, which we forwarded on to Bill Dorsaneo this week regarding several TRAP rules and, Bill, I'm assuming that you have not had a chance to get your subcommittee together on those yet.

PROFESSOR DORSANEO: I think that came last week, right?

CHAIRMAN BABCOCK: Yeah, it came on the 5th. So is that a fair assessment?

PROFESSOR DORSANEO: That's a fair assumption.

CHAIRMAN BABCOCK: Okay. Good. So we'll do that next time. We have one other thing to talk about today; and that is, David Beck, as you may recall, sometime ago, almost a year ago maybe, sent us a proposed -- a proposed amendment to Rule 226a. We have reviewed it and voted on it and each time -- two times it has met with the disapproval of this committee.

The Court is now asking us to look at the revised language, the language that you'll find behind Tab 6, which Mr. Beck has sent us; and if we were to have such a rule or a statement, would we be comfortable with this language, recognizing the Court knows that our committee has now twice voted with not insubstantial majority that no such change should be made. Yes, Elaine.

PROFESSOR CARLSON: Chip, I believe the initial vote was to endorse the concept that David Beck was advancing, that Rule 226a should have some statement about the role of counsel in light of public criticism of lawyers or misunderstanding of our faith, so there was -- I thought that we voted --

CHAIRMAN BABCOCK: You may be right.

PROFESSOR CARLSON: But we did not ever get a positive vote on the language that we brought.

CHAIRMAN BABCOCK: Yeah, I remember two votes being taken and being negative.

PROFESSOR CARLSON: They were. I just wanted to clarify that.

CHAIRMAN BABCOCK: Okay. Well, good. So, Elaine, do you have jurisdiction over this?

PROFESSOR CARLSON: I think I've got a Rule 21 violation because I just got this on the 13th, but --

MR. DAWSON: Do you want me to speak to it, Elaine?

PROFESSOR CARLSON: Yeah, would you?

MR. DAWSON: Sure. I was not at the last meeting, and I apologize. I forget what my conflict was, but I'm sure it was really, really good, but I got a report from Elaine and others on the comments, criticisms of the then existing draft of Rule 226a that David had proposed or the committee had proposed, and so I attempted to rerevise the language of the proposed rule to address the two principal issues. One, as I recall, was an endorsement. The committee was concerned about a judicial endorsement of the conduct of any particular attorney and then there was another comment about making sure that we zealously represented clients within the confines of the rules.

So I made those changes, circulated it

through our subcommittee, and as I recall, it was sort of generally the thought that -- from the subcommittee that the language changes addressed the issues raised by this group. I then sent it to David, who then changed the language that I had proposed and kept the concepts there, but this is slightly different than what our subcommittee I want to say informally agreed -- and correct me if I'm wrong, Elaine, that they may or may not have liked the language, but I think they agreed it addressed the issues raised by this committee.

CHAIRMAN BABCOCK: And I'll just say that this draft remedies a substantial problem that I had with the prior drafts, and that is where the court is telling the jury that "Even though the attorney is ethically obligated to represent zealously his or her client, you should not take what I have said as an endorsement by me of any particular conduct," because I was worried about this rule talking about how the lawyers have got to be zealous and advocates and, you know, act like, you know, braying hyenas in the trial court would be sanctioning that kind of conduct, and there is in the trial of cases conduct that is beyond the pail and often does get chastised by the trial judge for not being appropriate, so I really like that change. Having said that, what kind of comments do we have? Hugh.

MR. KELLY: I'm in favor of the letter. Having just watched Will Ferrell in a movie about race drivers, we might detune some of the language. The average juror may not even know what zealous really means, for example. That minor comment aside, I think this is an appropriate thing to tell people on the jury.

CHAIRMAN BABCOCK: Okay.

MR. KELLY: And we ought to support Dave. You know, he's our standard bearer right now.

HONORABLE SARAH DUNCAN: Just this morning -- I imagine all of you-all have read about the license plate frame case. Just this morning John Kelso wrote in his column, maybe he was trying to be funny, about how "the court sided with this law." I'm like, "That's the Legislature's law. That's not the Court of Criminal Appeals law." We have fundamental misunderstandings of our system of justice at fairly high educated levels, and people need to understand this. They need to understand that we have an adversary system and that there are ethical obligations to do what we do.

CHAIRMAN BABCOCK: Yeah. Having said that, of course, you always talk about the last rodeo you've been to, but I found yesterday that these jurors in this case were asked by my opponent, who was really kind of doing a lot of stuff in the courtroom that was close to

the line, and he asked them, "Hey, did you hold any of what I did against me"; and they all said, "Nah, you know, we know you've got to advocate for your client and you're just doing what lawyers have to do in the courtroom."

HONORABLE SARAH DUNCAN: Very educated jury.

CHAIRMAN BABCOCK: Yeah. Well, actually it was, yeah. I'm sorry. Professor Hoffman, I'm sorry.

PROFESSOR HOFFMAN: The first thing I think is I voted against including this before, and I'm not persuaded it ought to come in. I think it is a lot like our conversations we were just having about lawyers in one paragraph or so convincing people to have oral argument. I think we may be fooling ourselves into thinking it's going to make a difference, even if I agree, you know, that perceptions are no good.

That said, and let me sort of address the particular question it sounds like the Court asked. The language that seems to be troubling, the only thing that really jumps out at me, is right in the middle there, the ending phrase where it says "which the attorney believes there is a basis for so doing that is not frivolous." And it's especially that latter language, "frivolous," that troubles me. First of all, the term itself feeds into a misperception of the system. If you're going to use that idea, the word should be "nonmeritorious," which I'm happy

-- normally I don't care, but "frivolous" actually feeds the misperception.

That said, I would recommend just taking out all that, everything I just said. You've already said here, Alistair, above "within the confines of the rules governing attorneys in the trials of this case," so that seems to me to get what you want without engaging that debate.

CHAIRMAN BABCOCK: Fair enough. Frank.

MR. GILSTRAP: Well, this is kind of like coming out against good schools, but I think as we've watched this evolve, it's -- the thing has happened to it that we predicted. It's become politicized and watered down and where it doesn't have any kick at all. It's just some kind of bland platitude that you're going to read to the jury, and the jury is going to nod off.

Now, having said that, if you want to keep it, I'm fine with the first paragraph. I'm fine with this last sentence in the second paragraph. I think the first part of the second paragraph, those first two sentences, one of which is a sentence that contains 66 words, will convince the jurors that lawyers are wordy, and that's got to be rewritten. It just -- I defy you to read that sentence and understand it.

CHAIRMAN BABCOCK: Okay. Yeah, Gene.

MR. STORY: This may be a question and something I hadn't thought of before, but are there any pro ses doing jury trials; and if so, is this prejudicial to them?

HONORABLE SARAH DUNCAN: I hadn't thought of that either.

CHAIRMAN BABCOCK: Yeah, that's a good point. See, that's why we have this big group of people, so we can think of stuff we don't think of. Bill. That's a great point, Gene. Thank you.

PROFESSOR DORSANEO: Carl has pointed out to me and is apparently too bashful to say that that language that Lonny doesn't like that's not all that felicitous comes right from the Rules of Professional Conduct Rule 3.01, "Unless the lawyer reasonably believes that there is a basis for doing so that is not frivolous."

PROFESSOR HOFFMAN: Right. Right.

HONORABLE SARAH DUNCAN: Well, but that doesn't mean it should be read to a jury.

PROFESSOR HOFFMAN: It's just a loaded --

PROFESSOR DORSANEO: I just wanted to point out where it came from. I don't know what that indicates.

HONORABLE SARAH DUNCAN: Yeah. Just for the record.

CHAIRMAN BABCOCK: So certainly this thing

was not frivolous, concerning the language it's not frivolous. There was a basis for it is your point.

Anybody else? Yeah.

MR. MUNZINGER: I think it would take most judges 60 seconds, 90 seconds to read this. If anybody truly believes that you're going to educate jurors in reading something like this in 60 to 90 seconds, I have a bridge to sell you. There isn't anybody that is going to be persuaded by anything in this or educated by anything in this, in my humble opinion. It's a license for a lawyer to take liberties in front of juries that he wouldn't otherwise take because the judge has blessed his conduct in advance. In my opinion, and with all due respect to Mr. Beck, I don't think it has any place in the jury instructions. I've said that before, I say it again. I'll vote vigorously against it.

CHAIRMAN BABCOCK: Okay. Yeah, I think the sense, Elaine, am I right that -- did we vote on concept in favor or not?

PROFESSOR CARLSON: We did.

CHAIRMAN BABCOCK: We did. Okay.

PROFESSOR CARLSON: Maybe last August or --

MR. DAWSON: My recollection is it was kind of a narrow victory.

CHAIRMAN BABCOCK: Yeah, Jody's got it.

MR. HUGHES: In October there was a narrow 12 to 10 vote, I think in favor of the concept; and then at the December meeting it was voted against, I guess not in concept, but the particular language, 12 to 7.

HONORABLE STEPHEN YELENOSKY: Well, how do we know? I mean, some of us might have voted against the language because we didn't want any language.

CHAIRMAN BABCOCK: Yeah, that could be. Buddy.

MR. LOW: One of the dangers I find in it, for instance, the first sentence or the first part of the first sentence, second paragraph, that "each attorney is devoted to the interests of his client." Well, he's devoted to the interest of justice and, you know, our system and so forth. And then it goes on and explains, but if people don't listen to that closely they're going to get little bits and pieces and things out of it that's going to make it look like, well, lawyers can do whatever they want to for their client.

Now, that's not the way it reads, but if they don't listen closely they could come out with that feeling. I think it's dangerous in that sense. In concept, if they would listen to it and they knew what it said, it's good.

HONORABLE SARAH DUNCAN: I think Buddy's

made a good point.

CHAIRMAN BABCOCK: Excuse me?

HONORABLE SARAH DUNCAN: I think Buddy's make a good point.

CHAIRMAN BABCOCK: Yeah. I think in light of my faulty memory and the closeness of the vote last time, I think it might be good for the Court to hear a revote on concept and then we can get back to the language, so how many people are in -- yes. Judge Christopher.

HONORABLE TRACY CHRISTOPHER: What is the purpose of this?

CHAIRMAN BABCOCK: Excuse me?

HONORABLE TRACY CHRISTOPHER: What is the purpose of this? To encourage zealous advocacy at the trial or to prevent the jury from thinking zealous advocacy is bad?

HONORABLE TERRY JENNINGS: Lawyers aren't evil. They're doing their job.

HONORABLE TRACY CHRISTOPHER: And I don't mean that in a flip manner. I really want to know what we're ultimately trying to achieve from the language.

CHAIRMAN BABCOCK: Alistair.

MR. DAWSON: Yeah, I think I can address that. I mean, David's point is that there's a lot of

lawyer bashing, a poor perception of lawyers by the public at large, and he sort of says that we're not doing anything about it, and he wants to do something about it, and this is one of the ways he wants to start, and I think it's been communicated to you-all before, is his hope that whatever language, if approved by the Supreme Court, would then go to all the other states and be sort of a model to be used in all the other states, so that's what it's designed to do.

HONORABLE TRACY CHRISTOPHER: To make people like lawyers?

MR. DAWSON: No, to combat --

HONORABLE TRACY CHRISTOPHER: You think reading these three paragraphs is going to do that?

MR. DAWSON: To combat the poor perception of lawyers by a lot of people in the public.

HONORABLE TRACY CHRISTOPHER: But is the poor -- and I don't mean to be argumentative with you, but is --

MR. DAWSON: Yes, you do.

HONORABLE TRACY CHRISTOPHER: -- the poor perception of lawyers in the public because they think lawyers are zealous advocates and that that's somehow wrong?

MR. DAWSON: Probably not.

HONORABLE TRACY CHRISTOPHER: I mean, what is the poor perception --

CHAIRMAN BABCOCK: Hayes.

HONORABLE TRACY CHRISTOPHER: -- that we're combating?

MR. FULLER: Couple points. I think David's response to that would be that zealous advocacy basically colors the public -- the public does not understand that and that contributes to a poor perception of lawyers and the jury system, et cetera; but what I would think, the argument that was persuasive to me in terms of concept last time is that what I think David is trying to achieve and what this statement tries to achieve is already handled by some courts across the state. It's also hashed out between the lawyers in voir dire, if some judges will allow it; and someone argued last time that if perhaps we're going to allow that to go on in voir dire where some judges are going to do it and some judges are not going to do it, perhaps it would be better to let the judges do it and have a uniform script from which to proceed as opposed to kind of making it up, you know, from court to court.

I don't think this particular language gets us there. I agree. I think it confirms everything that the public would think about lawyers in terms of wordiness and maybe sitting there wondering "What the heck are they

talking about," but I think that's where we were on concept.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: I think some people think that certain persons, causes, shouldn't be represented at all; and they don't understand what our professional responsibilities are, so they think it's some sort of character flaw that is involved in representing people, zealously or not.

CHAIRMAN BABCOCK: Yeah. Justice Jennings and then Judge Yelenosky.

HONORABLE TERRY JENNINGS: I just think it's important to keep in mind the context of this. This is in 226a. This is before voir dire begins; and maybe it can be shortened considerably to, you know, fit into one of the numbered paragraphs here; but to the extent that it could help set a tone with the jury before the lawyers actually get up and start talking to them that, you know, lawyers have a job to do and this is part of the adversary process, I think it could be shortened considerably, but to the extent it could help set the tone I think it could be helpful.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, it could be and, you know, suggesting this language to judges is

certainly a fine idea. The problem I have is making it mandatory. I guess you could say, well, how can it hurt? Well, one example is you've got a pro se. Am I supposed to read this at the beginning of a legal malpractice case? Doesn't that make a statement? And so the goal of educating the public is a nice goal; but it's one that has to take a backseat to the particular trial and justice in that particular trial; and so I don't want to be compelled to read something that I can't foresee right now would cause a problem; and moreover, I think what will educate the jurors or the voir dire is their experience in voir dire and those that get on the panel, their experience as jurors, and my responsibility there is much greater than this 60 seconds that I'm reading.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: Now, I don't propose to write this, and I totally agree with David's objective, but I would start out by writing that "Your duty and your job is to determine the truth and what happened. We have found that the best way to arrive at the truth is to have each side" -- you know, some way in simple terms. "The lawyer who under the rules ethical to present the testimony on this side, the testimony on that side, and we find that the truth comes out, and it's called an adversary system because he's for this one" or something like that, but

when you talk about zealously doing these things that bothers me.

CHAIRMAN BABCOCK: Yep. Okay. Yeah, Stephen.

MR. TIPPS: I think there's a real risk of unintended consequences from something like this. I think it does -- I think lawyers would use it to try to cloak their misbehavior with some kind of judicial imprimatur. And to the extent that the goal is to address just lawyer bashing in general, well, I certainly share that goal, but I think a jury in a particular case is really the wrong audience, because in my experience at the end of almost every trial the jurors like the lawyers. Now, maybe there are a few lawyers that who don't measure up and they don't get that kind of accolade, but I think juries watching cases understand what lawyers are doing and understand that they're advancing the cause of their client, and I don't think they hold that against the individual lawyers. I really think this is the wrong forum.

CHAIRMAN BABCOCK: Okay. Jeff, do you have your hand up or you're just stretching? If it's all right with you-all, let's take a revote on concept just to let the Court know what the committee thinks about concept, and then we'll have to do a little more work on the language it sounds like, but -- Judge Christopher.

HONORABLE TRACY CHRISTOPHER: Is the concept a statement that explains the lawyer's role in the adversary system? Is that the concept we're voting on?

CHAIRMAN BABCOCK: I think the concept -- Alistair can correct me if I'm wrong -- but I think the concept is to explain the lawyer's role in the adversary system in a way that illuminates the fact that lawyers must be advocates, must be zealous, must be, you know, really advancing their clients' interest with the hope that people who hear the speech will think better of lawyers.

HONORABLE TERRY JENNINGS: Or not ill of them.

CHAIRMAN BABCOCK: Or maybe bring them back to neutral.

MR. DAWSON: And, Chip, my proposal, depending on what the vote is on the concept, is that rather than look at this language we go back to the subcommittee if it's necessary and kind of rewrite it.

CHAIRMAN BABCOCK: The Court wants us to give them language, so we're going to do that, but I think the Court would also like to hear where we are on concept. So everybody that's in favor of the concept raise your hand.

HONORABLE TERRY JENNINGS: How about not

opposed to the concept?

HONORABLE SARAH DUNCAN: Yeah, not opposed.

CHAIRMAN BABCOCK: Seven people are either in favor or not opposed. How many opposed?

15 opposed. Okay. Alistair, if you could get with interested parties -- Buddy I know has volunteered and probably Judge Christopher -- and try to come back with some language next time. Judge Christopher always volunteers for things and -- yeah, Buddy.

MR. LOW: One of the things that we need to in doing that think about is in jury trials when you talk to the jury, what is their main gripe, and it usually isn't the lawyers. It's wasting time and those kind of things.

CHAIRMAN BABCOCK: That's the first, second, and third gripe, wasted time.

MR. DAWSON: Repetitive questions.

MR. LOW: Okay.

CHAIRMAN BABCOCK: Okay. I think we're through our agenda. The next meeting is April 27th, and, Jeff, your subcommittee on rocket docket is going to be back on that, and we've got some spillovers from here, and there may be -- Buddy's 904 will be on the agenda, and there may be some other goodies that get passed down to us between now and then, but thanks so much for showing up

and participating so well. We had terrific attendance today. I think we only maybe had five members who didn't show up for this meeting, which is great. We get a lot more done and a lot better work done, work product done.

MR. HAMILTON: Richard wasn't here, we got a lot more done.

(Meeting adjourned at 03:35 p.m.)

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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 16th day of February, 2007, and the same was thereafter reduced to computer transcription by me.

I further certify that the costs for my services in the matter are $1,690.25.

Charged to: The Supreme Court of Texas.

Given under my hand and seal of office on this the 5th day of March, 2007.

D'Lois L. Jones

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