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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

APRIL 22, 2016

(FRIDAY SESSION)

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Taken before *D'Lois L. Jones*, Certified Shorthand Reporter in and for the State of Texas, reported by machine shorthand method, on the 22nd day of April, 2016, between the hours of 8:58 a.m. and 12:25 p.m., at the Texas Association of Broadcasters, 502 East 11th Street, Suite 200, Austin, Texas 78701.

INDEX OF VOTES

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

Documents referenced in this session

16-01 TRE 203

16-02 Proposed Appellate Rule 57

16-03 Proposed Appellate Rule 34

16-04 Section 3 Garnishment

16-05 2013-10-29 Order *Strickland v. Greene & Cooper*

16-06 2014-11-20 Appeal

16-07 2015-09-08 Order *Strickland v. Alexander*

16-08 2015-09-08 Judgment *Strickland v. Alexander*

16-09 Texas Finance Code 59.008

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CHAIRMAN BABCOCK: Welcome, everybody, and thank you for attending. We'll start, as always, with the report from the Chief Justice. Justice Hecht.

CHIEF JUSTICE HECHT: We have put out the judicial bypass rules and forms. They were effective -- the statutory changes were effective January 1, and so we put them out to make that deadline and without comments so that we could -- so that we could have the rules in place when the statutory changes took effect. The comment period ends April 1st, ended April 1st, but we're still awaiting a few more comments. Then the Court will review those, finalize those rules, and they'll be done.

On March 22nd we also put out the new Rule of Judicial Administration 14, governing procedures in the new three-judge court, created by Chapter 22a of the Government Code. Those were effective immediately as well. They'll be published in the May *Bar Journal*. Again, we have a comment period to follow because we wanted the rules to be in place in case any cases that they would apply to come along.

With the Disciplinary Rules of Professional Conduct, we did something a little different that we've not done before. The Professional Ethics Committee issued an opinion in August of 19 -- I mean of 2014, saying that

if a law firm representing a party in a case hires a lawyer who when he was in law school was a summer clerk for a firm representing an opposing party, the firm, the hiring firm, is disqualified in the case, and so it treats basically -- basically treats summer clerks as a lawyer.

Of course, this met with some consternation in the academy, and the deans of the 10 law schools wrote a motion for rehearing to the Ethics Committee, which denied it. The opinion is contrary to the ABA model rules and also comments to the restatement, and so the Court adopted comments to those two rules, 106 and 109, that basically followed the ABA model rules and the restatement, in effect overturning the Ethics Committee opinion. A time or two we've written rules that overturned prior cases, but I don't remember doing this in a comment to the professional rules, but if -- it seems to have been a very effective way of reviewing an opinion of the Ethics Committee. The Ethics Committee has been around since the Seventies, actually by statute. It was created by the bar back in the Forties right after the first rules of ethics were adopted. So it's been around a long time. Sometimes it's had more sway than other times and but there's essentially the decisions of the committee are not binding, but I think a lot of lawyers and law

firms think that it's dangerous not to follow them. So this was a method that the Court used to review that opinion, and it seems to have been effective.

We also added a comment to the Professional Rule 13.03 to reference Chapter 456 of the Estates Code, which also -- both the rule and the statute have to do with lining up a deceased lawyer's practice, and we just added a cross-reference so that people could see in reading the rule that there was a statute as well and call it to the attention of a probate court. This committee considered whether any rules changes were necessary and decided no, and the Court agreed with that, but we just thought a cross-reference was important.

We amended the standards for specializations, for specialization certification in civil trial law, at the recommendation of the Board of Legal Specialization. The number of trials requirement in the standards is increasingly difficult for young lawyers to meet, so that was relaxed somewhat by counting Federal court trials, sometimes arbitrations and administrative hearings as trials to meet the 20-trial requirement. And the board studied that for over a year and decided that's what needed to be done, and we agreed.

The Court of Criminal Appeals amended Rules 73 and 79 of the appellate rules and Rule 615 of the

evidence rules, and the practice of the two courts has been for each to adopt the other's changes so that when they're published in the rules pamphlet you don't get the West saying, "This rule was adopted by the Supreme Court and this rule was adopted by the Court of Criminal Appeals," and you can't tell the difference and you don't know exactly which one is which, and we try to keep them uniform, and so they made changes only affecting their practice, and we made the same changes.

You know that on November 23rd the Court created the Commission to Expand Civil Legal Services, and former Chief Justice Jefferson is chairing that. The goal of that commission is to try to find ways that lawyers can represent people of more modest means, middle income people, small businesses, and this is an effort across the country to do this, but this is Texas' own version of it, and they've met twice. I think there's 17 people altogether on that commission, and they're vigorously exploring with the law schools, with the firms, with the practice, every way that seems viable to make it possible for people who need representation but can't afford -- don't think they can afford legal fees to get legal services.

Just as a side note, the market itself has not done much to close that gap between lawyers who don't

have jobs and are looking for work and clients who need lawyers but don't think they can afford their fees, so the market now is responding more, and I think you'll see in the next -- well, this year, a number of internet programs that allow people access to some kinds of legal services through technology. So there may be more of that, but anyway, the commission is looking for ways to close that gap.

And then finally, we're about to finish the rule changes to Rule 145 and TRAP Rule 20 regarding indigency and consistent with the study that this committee did and then following up on it in talking with the association of counties and others, the clerks groups, that have an interest in this, the changes will basically make it harder to contest an affidavit of indigency at the beginning when the only thing at stake is the filing fee and easier to challenge it at the end when what's at stake is the reporter's record or along the way if masters or other people have been appointed in family law cases. So I think it's a very practical approach to indigency and consistent with the work that this committee did, so it should be in the June *Bar Journal*.

On that score, you've read in the media some that the -- there is a problem throughout the country with the fees and fines imposed in Class C misdemeanor, traffic

offense cases, parking cases. Part of the problem is that people who are indigent and can't pay anything have trouble having that recognized by those courts because these rules do not apply to them; and then beyond that, people who have limited means find that they get a speeding ticket that's several hundred dollars and then they get court costs that are several hundred dollars on top of that, then they can't afford any of that so they sign up for a payment plan that costs so much a month, and then they fail to make payments, so they have to go back to court, which there's another fee for that, and then they have to redo the plan. There's another fee for that. So the story of one lady ended up owing $2,300 on a speeding ticket, and this is not just in Texas. It's throughout the United States.

So the Conference of Chief Justices has appointed a task force to try to correct this problem, but it's an enormous problem. Just in Texas there are 1,272 municipal courts and 807 justices of the peace, so there's 2,079 courts that are handling these cases. They handle eight million cases a year, and the fees and fines and costs that they take in are -- we don't know exactly how much they are, but they're well over a billion dollars. The state gets part of that money, and the state only gets about 300 million of it, which is only about 50 million

more than they spend on the entire judiciary. So the judiciary is funded -- could be funded out of the fees and fines that are collected by these low level courts. Actually, a lot of that money is spent on other things, some of which don't have anything to do with the judiciary. Somebody was saying the other day, for example, a piece of it goes to roads, transportation, but I pointed out --

CHAIRMAN BABCOCK: So you can go faster.

CHIEF JUSTICE HECHT: Well, you've got to use a road to get to the court, so it seems to me it's rather directly related, but so that's a national problem.

The City of Austin was sued for civil rights violations, and Judge Sparks dismissed the suit on a 12(b)(6) motion I think it was in December. The City of Amarillo has been sued, and the City of El Paso was sued I think this week, and these lawsuits are springing up all over the country. This was an outgrowth of Ferguson, and when the DOJ came in to investigate the problems in Ferguson, this is one of the things that they found and that Ferguson and the State of Missouri are trying to correct because it's -- there's some liability, possible liability, for not being more careful in the way that indigent cases are handled.

So we'll have Rule 145 out in June and TRAP

Rule 20 and then we'll continue to address this problem in the justice and municipal courts.

CHAIRMAN BABCOCK: Thank you, Chief Justice. We will now turn to our vice-liaison. Is that what you are?

PROFESSOR DORSANEO: In charge of vice.

CHIEF JUSTICE HECHT: Deputy liaison.

CHAIRMAN BABCOCK: Deputy liaison, Justice Boyd.

HONORABLE JEFF BOYD: Thank you. I was asked to give you a brief update on e-filing and some of the accomplishments and projects currently underway on the e-filing realm. As you know, all of the counties have been required to go mandatory for civil e-filing except for the smallest population counties, so specifically in terms of numbers the last information we have is from about two months ago, and as of that time all counties throughout the state are offering e-filing on a permissive basis, and 118 of -- or all of them are offering e-filing and 118 were still permissive rather than mandatory, but all of those become mandatory in July. In the first two years of e-filing, from the time it was first implemented as a permissive system until late January of this year over 63 million individual pages have been filed through the system electronically as opposed to pieces of paper,

so we're seeing that impact.

One of the difficulties that -- and there have been a number of obstacles to overcome as we roll it out, and one of those has dealt with what do you do with filings that are made that for some reason or another don't comply either with the state rules or the statewide standards or what some counties have tried to implement as their own rules, and that results in returning them for correction. In the summer of 2013 the return for correction rate was 43 percent of all filings, dropped to 15 percent by the end of that year, and then around 10 percent by the end of 2014, and then in 2015 was less than 6 percent; and when you consider that the number of users increased by over 25 percent in that time it's a pretty remarkable showing of progress.

About 60 percent of all of the Texas court clerk's offices at the trial court level are using a case management system that's fully two-way integrated with the state system, and so what that provides us is the opportunity to now start providing access to all of these records, not just getting them filed electronically, but electronically allowing access to those records, and so that has -- you may have seen the article recently in the *Texas Lawyer* that covered this. The JCIT recently approved some preliminary steps to start developing with

Tyler Technologies that access those. We were calling it RACER, registered access, because it's not public access. It will be registered access. Registered users who will be able to register and get onto the system and through that system then access filings from all courts throughout the state of trial and appellate level.

Step one in that process, which we're working on and hope to have implemented by the end of this year, is access for judges and for lawyers in the given case. So in a case in which you are an attorney of record you would have access to all of the records electronically, and then step two, which we hope to get to next year, is the implementation of the full registered access, so not just lawyers in that given case; but you've got opposing parties in the case in Nueces County and you hear that they have a similar case in Potter County, you can get on from your office in Houston and look up the records in their similar case in Potter County, similar to the PACER system; and, you know, there will be a lot of obstacles to overcome on that, including redactions and sealed records, which shouldn't be e-filed anyway, but redactions within records that are e-filed.

The cost of access is going to be an issue, only because counties are used to charging people too much money per page to give you a copy, and so it looks now as

if the ability to get online and pull up the document will be free and then the question is when you want to download the document so that you can print it then will there be a charge, and if so, how much will that be, and so we're working through all of those details, but that's the next big step in the process.

The other big step in the process is criminal e-filing. As of a couple of months ago, 52 counties had implemented permissive criminal e-filing at the end of last year in December and then in January of this year, but that did not include the more populated urban counties, and even in the 52 permissive counties in more rural areas the volumes were low. They're increasing slightly since then. You may know that the Court of Criminal Appeals, we asked them to look into that issue and do some work with us on looking at the possibility of mandating criminal e-filing, at least certain aspects of the case. There are unique obstacles in the criminal context because some of the documents that have to be filed in ways that we don't have to deal with in the civil context, but the CCA had a public meeting earlier this month and has begun that process of looking at criminal e-filing.

One other issue that we're keeping an eye on is the number of self-represented litigants who are filing

through the e-filing system, and that number hovered around 3 to 400 per month for the first two years of the roll out, and in January of this year went from 400 to 4,400 in one month, and so we're trying to anticipate what issues that can raise. On the one hand, access to justice concerns would suggest that we ought to be making it easier for people who are representing themselves. On the other hand, should the judicial system be encouraging self-representation on such a broad scale, and so we're looking at that and how that will affect what we're doing with e-filing.

And so the things to watch for are the registered access developments and the developments on the criminal e-filing front, but the civil e-filing, with some minor blocks along the way, and current obstacles in that area deal primarily with how the -- where the rubber meets the road at the district court judges' level; and in some counties you've got district court judges that want 100 percent e-filing; and you've got other district court judges who threaten to hold the clerk in contempt if they don't give them paper. So dealing with elected judges in their own unique court is just an educational process and one that we're staying focused on as well.

CHAIRMAN BABCOCK: Thank you, Justice Boyd. Either on the back table or maybe in your package that we

submitted there are some new referrals of rules issues. I want to go through those briefly. The first is Texas Rule of Appellate Procedure 49. Justice Hecht tells us the Court of Criminal Appeals Rules Advisory Committee has approved the amendments to Rule 49. We have a memo on that, and the Court is asking us to draft amendments to clarify when a motion for rehearing en banc may be filed. Rule 49.7 states that a motion for en banc reconsideration may be filed within 15 days or when permitted within 15 days after the court of appeals denial of the party's last timely filed motion for rehearing or en banc consideration. The "when permitted" language has caused confusion among practitioners and the courts, so that will be referred to the appellate subcommittee, chaired by Professor Dorsaneo.

PROFESSOR DORSANEO: We're ready to report now. We've been ready to report for more than a year.

CHAIRMAN BABCOCK: All right. Well, if we have time today we'll add that to the agenda and knock that one out.

MS. BARON: Actually, Bill, since like 2008.

PROFESSOR DORSANEO: Oh, okay. Well, time goes by faster the older you get.

CHAIRMAN BABCOCK: The next item is Texas Rule of Civil Procedure 183 regarding court-appointed

interpreters' fees; and normally this would be referred to a subcommittee chaired by Bobby Meadows that covers Rule 183; but for reasons that will be apparent in a minute, I'd like to refer it to Carl Hamilton's subcommittee, which consists of Hayes Fuller and Eduardo Rodriguez; and so, Carl, if you wouldn't mind taking that on; and anybody else that wants to jump into that project, you're welcome to.

The next item is the time for jury demand in a de novo appeal in county court, and we don't really currently have a subcommittee for this issue, so I'm going to ask Justice Christopher and Professor Carlson and Chris Rodriguez -- who is somewhere here I think, yeah -- to serve on that subcommittee to study that. And last but not least, Chief Justice Hecht snuck this into the back of the referral letter, the discovery rules. As you may recall, this committee -- or some of you may recall, this committee made a Herculean effort to overhaul our discovery rules, and at the time introduced many, many, many reforms that I think have worked really well in practice. I think it's fair to say we led the nation in a lot of reform of discovery, but time marches on, and now it's time to look at them again, especially in light of the amendments to the Federal rules on discovery. So that's the reason I didn't give the other project to Bobby

Meadows' subcommittee dealing with the discovery rules.

For those of you who may have forgotten, that committee consists of Justice Christopher as the vice-chair, Albright, Bland, Brown, Jackson, and C. Rodriguez, and I would like Judge Estevez to join that committee, if you wouldn't mind. I think it would be helpful to have a trial court judge on that subcommittee, and that's -- that's a big project, important project. They're all important, but this one is especially -- especially important.

So if there are no questions about that, moving right along to the agenda, the first item is ex parte communications, and Nina Cortell is the chair, and she has -- is not here today and has been ill and asked that we pass this to the next meeting, and I told her that we would be agreeable to doing that, so we'll take that up at the next meeting unless anybody has something to say about it now. Justice Christopher, do you want to say anything about it now?

HONORABLE TRACY CHRISTOPHER: Well, do you want me to pass out this letter? I can talk about it if you want to.

CHAIRMAN BABCOCK: I think it would be better to talk about it all at one time.

HONORABLE TRACY CHRISTOPHER: All right.

Then we'll wait.

CHAIRMAN BABCOCK: Okay. Justice Christopher had a handout, but we'll wait until the next meeting on that. So, Buddy, that brings us to Texas Rule of Evidence 203.

MR. LOW: Yeah. First, I'd like to point out that the copies that were sent out were made before the rules were restyled. There were no substantive changes, but you'll notice there's a lot of difference in forms, but when I made the copies I didn't have the book that I have now. Basically this came from the State Bar committee, and they were concerned about a difference in time when you have to furnish certain foreign documents or foreign law to the opposing parties. The foreign document had to be -- under 1009 had to be 45 days. What you're relying on to prove foreign law had to be 30 days before trial. It was felt that certainly if 45 days is needed for foreign documents, at least 45 days would be needed there.

Now, the Federal courts, I copied the Federal rules. They don't have anything at all about foreign documents. They have a rule on translator, and I guess you would have to call a translator to translate the document, so we got no real help from there, and it's fairly simple. I could find -- we could find no cases

where this had been a problem one way or another, but it was felt that we should amend the rule by the recommendation of the State Bar to 45 days in both things, and that's all I've got to say.

CHAIRMAN BABCOCK: Okay. Any comments on Buddy's comment? Yeah, Justice Brown.

HONORABLE HARVEY BROWN: Well, so the reason for the rule then is to make Rule 203 more consistent with 1009(a), but 1009(a), of course, covers translation of foreign language documents, and sometimes foreign law is not in a foreign language. Sometimes it might be England or materials from other countries that have already been translated into English in their respective jurisdictions, so at least in those jurisdictions we would be extending the time for how long it has to be on file before the hearing is conducted, just so everybody is aware of that.

CHAIRMAN BABCOCK: Okay. Yeah, Justice Bland.

HONORABLE JANE BLAND: Buddy, did the committee consider the interplay between this and the notice of the trial setting under the rules, the 45-day notice for the first trial setting, and the fact, you know, it may be that people are going to be focusing on their foreign law materials upon receipt of a notice, but at that point it's too late?

MR. LOW: No, there was no -- there was no -- no study made of that. The State Bar did not make such a study. We did not make such a study. It was just felt that in many cases foreign law involves much more than just a foreign document, and we felt like that another 15 days should be added. We did not relate it to trial settings and things like that. I mean, and does trial setting mean the first time it's set or what? We didn't go into that. So --

CHAIRMAN BABCOCK: Okay. Anybody else have any -- any comments about that? Yeah, Professor Hoffman.

PROFESSOR HOFFMAN: I'm on the evidence subcommittee here, but so I think that this has not been studied. It's not clear to me this has been studied sufficiently, that we are in a position yet to make a good recommendation to the Court, so I could say more about that, but I'll just flag that we -- this came to us back in August. We had a very short exchange about it, and part of our exchange was several of us, primarily Roger, raised some very good questions about the change in timing and whether, for instance, 45 days was even enough. Maybe actually a longer period of time would make more sense, and we would want to change both rules, and so we had asked the State Bar evidence subcommittee to take a look at it, and we asked for them to give us more of their

thinking or look further at it, and we never heard back. So this is a rule that comes from a recommendation from the State Bar evidence subcommittee, but at least from where I'm sitting, it's not clear that it has been looked at enough to feel confident that the -- that to make this change is a change that would make sense. So I can say much more about it, but I'll just throw that out there.

CHAIRMAN BABCOCK: Well, that's never been your style to limit your comments.

PROFESSOR HOFFMAN: Thanks.

CHAIRMAN BABCOCK: But if you're going to look, what are you going to look for? What are you going to look at?

PROFESSOR HOFFMAN: Well, we may want to know, for instance -- maybe I should defer to Roger on this since he raised it, but I didn't tell him in advance I was going to do this.

CHAIRMAN BABCOCK: That's part of the theater of all of this.

PROFESSOR HOFFMAN: One of the points Roger raised was maybe 45 days isn't enough because it may be that the other side disputes the translation, and so you want to get a counter-translator or counter-expert to speak about the content of the law, and it may be that the time frame that we're going to change it to will not be

sufficient to permit that. So, anyway, Roger raised some other issues, but that would be an example of one.

CHAIRMAN BABCOCK: Yeah, Roger, and then Buddy.

MR. HUGHES: Well, my concern is that now we have various pretrial deadlines about when to finish discovery, et cetera, et cetera, and so it had to be fit in that, and then usually if you're going to try to get this in you need an expert. For example, we're in a construction case now in another country, and so we're having to prove up state laws and -- I mean, building standards and statutes from another nation; and since this nation is in Europe, the European union stuff also affects it; and so trying to get experts who are knowledgeable and can write sufficient affidavits for the court and get the translations, those deadlines -- fortunately, counsel are working together; but if they weren't, it just proves unworkable, and then when you plug this into the deadlines for designating experts, I mean, if you need an expert to explain the law and fill in some things that may not jump out from the text or explain the building standards, all of the sudden you're accelerating when you're going to have to put in these experts. So it seems to me to make sense that some consideration needed to be put in that it has to be -- these deadlines have to be set within

considering expert deadlines and discovery deadlines, that you just can't change the evidence rule and hope it will all sort itself out.

CHAIRMAN BABCOCK: Yeah. Buddy, and then Carl.

MR. LOW: Chip, two things. These rules don't prevent the judge from doing certain things in pretrial procedure. These rules don't say you can't give more than that. These rules say "at least," "at least," so I don't think there's a prohibition in giving more time if the judge thinks it's needed; and secondly, they're right. I asked the -- the State Bar, you remember last time I asked to withdraw it?

CHAIRMAN BABCOCK: Yeah.

MR. LOW: And that was -- they had asked me to do that, and I've called them, talked to them. They've given me nothing else. I have looked at every case under both rules, and I've not found a problem, and I don't know where else to look.

CHAIRMAN BABCOCK: Yeah. Carl, and then Professor Albright.

MR. HAMILTON: I was going to say much the same thing. It ought to just be left up to the judge to set the timing on when the expert's reports need to be filed.

CHAIRMAN BABCOCK: Professor Albright.

PROFESSOR ALBRIGHT: It looks to me like this would fit well in the discovery rules. If you're going to use foreign law then you have to make certain disclosures at a certain time, so maybe we could put this on the list for Bobby Meadows' committee that I'm on to study in that context.

CHAIRMAN BABCOCK: Uh-huh. That's a good thought. I notice that Meadows almost never misses, and on the day when he gets a major assignment he's not here. Eduardo, and then Professor Hoffman.

MR. RODRIGUEZ: I agree with Roger. I mean, we come across this a lot, and we really -- there really needs to be more time because it's just very difficult sometimes to find somebody that -- that's an expert in foreign law, especially in Mexico, and there's multiple -- there may be multiple laws that apply, such as individual states versus the federal system, so I think -- I think it should be studied more and consideration should be given to more time, and I -- it's been my experience in South Texas that if the rules give you more time, it's good. If you leave it up to the judge, it may or may not be good for you.

CHAIRMAN BABCOCK: Yeah. To follow up on Roger and Professor Albright's point, though, the written

materials you're going to furnish the court would most always come in through an expert, I would think, and that -- and the deadlines for that are much farther back than 30 days, so it shouldn't be a problem; but, but as Professor Albright says, maybe that's something that ought to be considered in the discovery rules and then harmonize this rule with it. Maybe. I don't know. Buddy, and then Professor Hoffman. I'm sorry.

MR. LOW: Yeah, the feds deal with that not under an evidence rule.

CHAIRMAN BABCOCK: Right.

MR. LOW: They deal with it in 44.01, and I copied that, and they have -- it requires notice, but does not require furnishing copies even.

CHAIRMAN BABCOCK: Right.

MR. LOW: That's what the feds have. So we are so much better, but anyhow, maybe we can get better, but I just don't know how.

CHAIRMAN BABCOCK: Yeah. It's 44.1, right, not 44.01? Yeah. Professor Hoffman.

PROFESSOR HOFFMAN: Let me just flag another issue that Roger also had raised in our committee discussions. If you'll look at the current version of 203, there's an (a) and a (b), so the proposal from the State Bar would amend only (a), so -- so a party who

intends to raise an issue about foreign law has to -- you've got to give reasonable notice in some way; and then step two, at least they would change 30 to 45 days before trial, give everyone a copy of the materials; but then you get to the point that relates to what Harvey was saying, which is there's a (b); and it says if the materials were written in a language other than English then you have 30 days before trial you're supposed to provide a copy of the foreign law and the translation. But they don't amend -- they don't even propose to amend part (b).

Why would you leave 30 days on the translation but change the other to 45? So we asked, we never got an answer, just sort of goes to underline my point that I feel like we need to study this more.

CHAIRMAN BABCOCK: Okay. Yeah, Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: On Buddy's point about the trial judge and Lonny's point about 45 being too short, of course, it's a minimum, and that's important that it be low. I don't think it should try to approximate what the average is. I mean, right now nobody sets trial for 45 days except one experience I had. It was great that it was 45 days and not 46 because I had an election challenge on whether a petition was sufficient. They set it to happen two weeks before the election, and

an intervenor said, "Wait a minute, 45 days notice," and I counted it out, and it was the day before the election. Now, of course, I could have set it shorter, but, you know, when you start shortening it from 45 then you start getting questions of due process and that. So you need to set it short with the understanding that in the normal course of things nobody is going to give just 45 days notice, but the judge needs to be in a position to say presumptively, you know, it can be this low.

CHAIRMAN BABCOCK: Okay. Anybody -- yeah, Professor Carlson.

PROFESSOR CARLSON: Yeah, if you change the discovery rules to incorporate a deadline, you might think about also including that in Rule 166, the pretrial conference rule.

CHAIRMAN BABCOCK: Yeah, that's a good idea. Richard.

MR. MUNZINGER: This rule, the rule currently seems to me is designed to address the situation where a judge must consider what the foreign law is. It is possible that a jury has to be told what the foreign law is. A Sabine Pilot case, I had a Sabine Pilot case where a fellow was supposedly fired because he violated El Salvador's environmental records regarding a certain kind of wood that was taken from El Salvador's forests; and so

it became necessary to translate that law definitively and prove what the law was definitively in order for the jury to understand whether that was the purpose behind the firing; and I mean, I've got to tell you, to prove and get that done is not done in 45 days; and it has to be done through experts; and so it brings the discovery and the expert thing into play as well. So I just point that out, that to me at least it's a very serious practical problem and very expensive to translate all of these regulations and all of these laws and what have you from some foreign jurisdiction to reach a point where you can say what the law is definitively. It's a real problem.

CHAIRMAN BABCOCK: Okay. Any other comments? Okay. Well, the Court's got the benefit of this discussion, but I think probably the dialogue should go on in the discovery subcommittee as they look at that and Elaine's comment about maybe thinking about the pretrial conference Rule 1 --

PROFESSOR CARLSON: 66.

CHAIRMAN BABCOCK: 60?

PROFESSOR CARLSON: 166.

CHAIRMAN BABCOCK: 166, right. Would be helpful. So if there's nothing else, we will move on to the next item on the agenda, which is Judge Peeples, who has previewed this with me. The time standards for the

disposition of criminal cases in district and statutory county courts, and he's foreshadowed that this discussion will be brief. We'll see.

HONORABLE DAVID PEEPLES: Yeah. We do not have a draft ready today. I need just a few minutes to tell you what we have been doing, and I think we'll be ready for the next meeting. The committee met once by conference call several months ago, and we reported after that to this committee, I guess the last meeting -- last meeting? And the main take away from that was even though a lot of us were not enthusiastic about the idea of time standards in criminal cases, the committee and the Court want to see a draft, so you can make a better decision whether you want something or not if you can see what it is that's been proposed, and so we're working on that, and then I checked with the Chief and with Chip.

I thought that -- I mean, this committee, first of all, there are only two people, Rusty Hardin and Judge Estevez, who really have hands-on experience very much with criminal law, and I thought we ought to strengthen our committee with somebody who knows that, so we got Judge Alcala appointed to the subcommittee, and then that led to getting some input from the Court of Criminal Appeals, and four members of the Court of Criminal Appeals were willing to meet with me and talk

about it, and Jeff Boyd wasn't able to make that meeting, but we met in Austin and talked about the project and came up with a draft, and then after that I sent a draft to the -- those people, the four members of the Court of Criminal Appeals, plus their staff attorney, plus Justice Boyd; and then once everybody saw it in writing, they had more questions and problems with it; and not to get into the weeds about all of that discussion, but the result was that the Court -- the members of the Court wanted the other members of the Court to take a look at it; and that's where it is right now.

I don't know whether they've put it on their agenda yet or not, but they either have or they will, and then they'll come up with some suggestion about that, and then we'll come up with a draft I'm confident by the next meeting of this committee and have something to look at and have a recommendation and some pros and cons, that kind of thing.

CHAIRMAN BABCOCK: Okay. And we ought -- Marti, we ought to make a note to invite certainly Judge Alcala to our meeting, but should we invite the other judges who are from the Court of Criminal Appeals?

HONORABLE DAVID PEEPLES: I see no harm in inviting them. If they want to come, I think they should be able to. This is not a complicated project. The draft

was, you know, basically two sentences, but, you know, the problem is what event will trigger the clock to run and the creation and filing of the charging instrument, well, what if the person is at large and things like that.

CHAIRMAN BABCOCK: Right.

HONORABLE DAVID PEEPLES: Time standards generally already have provisions that say these don't apply to exceptionally complicated cases, that kind of thing, so that's some comfort.

CHAIRMAN BABCOCK: Okay.

HONORABLE DAVID PEEPLES: But it's not a hard, lengthy project, it seems to me. There's some things that need to be decided before we have this draft.

CHAIRMAN BABCOCK: Okay. Perfect. Marti can get with you about who we should invite and who we shouldn't invite.

HONORABLE DAVID PEEPLES: Okay.

CHAIRMAN BABCOCK: All right. Any comments about this? Pete? No? All right. Anybody else? All right. Thank you, Judge Peeples.

Moving on to the proposed appellate Rule 57, that will be Professor Dorsaneo.

PROFESSOR DORSANEO: We got here a lot more quickly than I anticipated.

CHAIRMAN BABCOCK: Yeah, well, see, you said

you wanted to be done by 3:30.

PROFESSOR DORSANEO: Yeah, of course, I'm leaving in the middle of the evening tonight, but that's fine. Okay. Well, we talked about Rule 57 sometime ago. It's a rule with which I have had very little familiarity over many years of working on appellate rules, and I think that's probably fair to say for most people. I'm going to start by directing you to look at, if you want to, a little memo from me to the members of the appellate rules subcommittee that has been copied and made available to you. It talks about why we're talking about Rule 57, and it says, "A new version of appellate Rule 57 is required because of the recent expansion of direct appeal jurisdiction by statute." We've talked about that statute, a three-judge district court to handle certain really significant matters brought to that court's attention by a statutory process involving the attorney general, right? Okay. And perhaps as importantly, the current rule, I think, does a very poor job and is misleading in explaining how direct appeal jurisdiction operates.

Rule 57, as currently worded and as it has been worded from the time of its promulgation in 1943, talks about the procedure for direct appeal jurisdiction from a trial court to the Supreme Court being governed by

the rules of procedure for appeals from trial courts to the court of appeals; and whether that ever made good sense, it has probably been the case that the -- the rules for appeals from trial courts to the courts of appeals have changed so much over time that it's not a good -- not really a good fit to say that you should use the rules that are applicable in appeals from trial courts to the courts of appeals in dealing with cases that are appealed directly to the Supreme Court from trial courts. So I think that the committee -- and we talked about this a little bit last time, but to refresh your recollection, basically decided that that approach should be replaced with a revision of Rule 57 that actually says how you do these appeals through the Supreme Court, and that requires a pretty substantial rewrite to explain the procedure from top to bottom.

So that's the -- that's the first objective, that's to put the procedure for direct appeals from trial courts to the Supreme Court in the rule. It's not so clear how you handle it otherwise, and it hasn't been clear to me, and, in fact, I was not aware of how the Supreme Court clerk had been handling these matters until starting to work on this project.

So the first step in the process involves filing the appeal, and the idea would be to continue the

process that operates under the current rule, but to say in the amended rule that "A direct appeal to the Supreme Court permitted by law is perfected by giving notice of appeal." All right. So that's the first thing that the rule says. Now, the question comes up as to, well, when and how do you do that; and one approach is to just take a look at the current procedure for giving notice of appeal in cases generally; and Rule 26 is -- is the rule that talks about when, you know, when notice of appeal is given.

Now, as Richard and I commented at the last meeting and will probably comment whenever the opportunity arises, Rule 26 is probably more complicated than it needs to be because it has two tracks. It has a 30-day after judgment is signed track unless certain post-trial -- post-judgment motions are filed or a request for findings of fact and conclusions, if required or if not required when the findings could properly be considered by an appellate court extends the time, okay, to 90 days. So if you just say in here, "The time provided by Rule 26.1," you buy into that 30 days, but maybe 90 days if these post-judgment procedures are followed, and maybe that works. It must apparently be working with the direct appeals to the Supreme Court because that's the timetable that we're on now by reference to the rules that are for

perfecting appeals to the -- through the courts of appeals being transported over to the Supreme Court, and that that's the first option in (a), is to just say, "Within the time provided by Rule 26.1 or as extended by Rule 26.3."

Now, part of the difficulty I have with that is that I'm not exactly sure what I'm talking about, okay, in terms of when there's a direct appeal and what kind of proceedings are these and what is the -- you know, who is the patient here that is going to be subject to this direct appeal, and I think it might be better, but it's something for consideration if people have comments about it, it might be better to drop down below "Contents of notice" to a provision that talks about "when filed," okay, and just pick a time for filing these direct appeals. "The notice of appeal must be filed within blank days," okay, "after the date on which the interlocutory order or judgment to be appealed is signed, unless the Supreme Court extends the time for filing under Rule 10.5(b)."

Now, that, I at least know what that means. Okay. I don't know what it means if I just say, "Use Rule 26." Huh? In the context of whatever it is that the statutes are going to require or permit to be appealed directly to the Supreme Court, and to simplify it further,

you could say and we're not going to complicate this. "Filing a motion for new trial, any other post-trial motions or a request for finding will not extend the time to perfect a direct appeal to the Supreme Court." Okay. And we didn't really talk about that at any length in our committee discussions. We had a lot of other things to worry about, but those I think are the two obvious choices. So you want to discuss that, Chip, or you want to --

CHAIRMAN BABCOCK: Yeah, let's discuss that. I think we should. Lisa, you've got some thoughts? You have a rye look on your face.

MS. HOBBS: Why do you think the 30-, 90-day world that we operate under generally is insufficient? Are you just worried that you won't know what a final judgment is or --

PROFESSOR DORSANEO: No. I just think that nobody would have created such a system to begin with.

CHAIRMAN BABCOCK: Well, you were part of it.

PROFESSOR DORSANEO: Huh?

CHAIRMAN BABCOCK: You were part of this.

PROFESSOR DORSANEO: Yes, but since I teach this every year I realize it has serious flaws.

MS. BARON: I think we tried to get a one

number.

PROFESSOR DORSANEO: I'm still trying.

MS. BARON: Yeah. May I comment?

CHAIRMAN BABCOCK: Yes, certainly. If Lisa is done.

MS. HOBBS: I am done.

MS. BARON: I tend to go with incorporating Rule 26. We all know how that works, and I don't know why you shouldn't be able to have post-order motions for reconsideration or for new trial just because there's a direct appeal. We still want to get the trial court to flesh out issues or have opportunity to make findings before the Supreme Court is asked to weigh in; and so 26 builds in the time for all of that to happen; and if the parties are in a hurry, if there's a temporary injunction that's affecting somebody's business, they're going to move faster; and there's nothing that prohibits them from filing a notice of appeal early in those situations, so I think we do -- don't want to cut off that important step of allowing the trial court to reconsider or to hear new arguments.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: Yeah, I'm just -- I'm confused as usual, but as I see what you're talking about, you're talking about 26.1 versus being specific here because 26.1

is ambiguous.

PROFESSOR DORSANEO: No, it's not ambiguous, just too complicated.

MR. LOW: Well, it creates some questions. If that -- if it creates questions in your mind, god, what it would do to mine.

PROFESSOR DORSANEO: And I guess my main concern is what I started out to say, and that is that I haven't examined each one of these statutes.

MR. LOW: Yeah, okay.

PROFESSOR DORSANEO: And I don't know what kind of a case -- or what cases are involved from statute to statute. I just looked at one, and one of them provides for interlocutory appeals of certain orders. I don't even know what those orders are. They're identified by number, and that appeal from a final judgment, and it's a just -- I don't know really what that's about, and I anticipate discovering something if I studied it for some period of time that would make me want to -- make me want to choose a different approach.

MR. LOW: Can I ask one more question?

CHAIRMAN BABCOCK: Yeah, Buddy.

MR. LOW: What is the downside of specific, like you're talking about? What is the downside of that rather than following 26.1?

PROFESSOR DORSANEO: Well, I think it's what Pam says, that everybody knows about 26.1, and they're happy.

CHAIRMAN BABCOCK: David Jackson.

MR. JACKSON: I think an issue that concerns court reporters in this is there's some wording in there about no court reporter's record shall be transcribed unless the Supreme Court tells us to do that. That would kick in a different timetable for us, and we need to kind of get some guidance on how many days after the Supreme Court tells us they want a reporter's record based on that direct appeal.

PROFESSOR DORSANEO: Well, that comes up later.

MR. JACKSON: Well --

PROFESSOR DORSANEO: The current rule says that you file a statement of jurisdiction, presumably after you gave notice of appeal, and that the record goes -- is filed with the statement of jurisdiction. Now, the court clerk, Supreme Court clerk, Blake Hawthorne, says that they don't want the record until they ask for the record, so --

MR. JACKSON: So how much time do we have once they ask for it?

PROFESSOR DORSANEO: Well, that comes up

later in this draft, and I'm not sure it's altogether clear how much time.

MR. JACKSON: Okay.

PROFESSOR DORSANEO: Other than when the Supreme Court wants the record.

CHAIRMAN BABCOCK: So hold that thought, David.

MR. JACKSON: I'm holding it.

CHAIRMAN BABCOCK: Yeah, Marcy.

MS. GREER: I'm very much in favor of amending this rule, having done a couple of direct appeals. It's very confusing currently, so I would like the specificity. I agree with Pam, though, that having the flexibility because the constitutional questions come up in all kinds of bizarre formats, and you kind of have to follow the procedural posture of where you are, is it a final judgment where the injunction is being issued, is it a temporary appeal, and there may need to be an opportunity, depending on how it came about -- especially because a lot of times these issues raise government intervention that may require additional reconsideration options, and so I think having the flexibility of deferring back to 26.1 is very helpful, but I love that it will actually say that because I remember looking at the rule and saying, "When do you file?"

CHAIRMAN BABCOCK: Yeah. Okay. Good. Anybody else on this part? Bill, it sounds like from the comments we've had that -- that the consensus is we ought to include Rule 26 in here.

PROFESSOR DORSANEO: Fine, I'll cross out that one below, and we'll just go with what it says up above, unless somebody has some corrections or suggestions about changing the balance of 57.1(a).

CHAIRMAN BABCOCK: Yeah. Any other -- speak now or forever hold your peace.

MR. MUNZINGER: Could you restate what you said you believe the consensus to be?

CHAIRMAN BABCOCK: The consensus was that there would be language in 57.1(a) that references back to Rule 26.

PROFESSOR DORSANEO: And that's the language right there in brackets at the end of the first sentence.

CHAIRMAN BABCOCK: In the draft it's the bracketed language about Rule 26?

MS. BARON: Yes.

CHAIRMAN BABCOCK: Okay. Next.

PROFESSOR DORSANEO: Okay. So then the next thing is we have to decide what contents -- what the notice should say and where the rule book should say that.

MS. GREER: Can I just clarify, the second

set of brackets, or is the proposal to have that now --

PROFESSOR DORSANEO: Oh, the second set of brackets, I should talk about that. I doubt that that's very controversial. Okay.

MS. GREER: Yeah.

PROFESSOR DORSANEO: It came from -- it's a variation on the notice of appeal language that we have in appellate Rule 25, but let me check. It's been a while.

CHAIRMAN BABCOCK: Marcy, what language are you talking about?

MS. GREER: It's the second set of brackets under (a) that "The notice of appeal is mistakenly filed," and I would be in favor of including that here just because it is a very unusual procedure.

CHAIRMAN BABCOCK: Yeah.

PROFESSOR DORSANEO: Okay. The first -- 25.1(a) says now, "If the notice of appeal is mistakenly filed with the appellate court, the notice is deemed to have been filed the same day with the trial court clerk, and the appellate clerk must immediately send the trial court clerk a copy of the notice," and it's a little bit different because "If the notice of appeal is mistakenly filed with the clerk of the Supreme Court or the clerk of a court of appeals, rather than the trial court, then the notice is deemed filed the same day with the trial court

clerk and the Supreme Court clerk or the court of appeals clerk must immediately send the trial court clerk a copy of the notice." So it's a little more complicated because you have more people, okay, but it's the same thing. It's the same -- it's meant to be the same thing as the second part of 25.1(a) is now. I should have said that. I apologize.

CHAIRMAN BABCOCK: Yeah. Okay, good. Going to the contents.

PROFESSOR DORSANEO: All right. And so right now the contents of notice of -- of notices of appeal are in 25, and, you know, it could go there. You know, we could expand Rule 25 and have the contents of the notice there, including -- including things that are added into this standalone rule like amending the notice. In 25 there's -- 25.1 there's a (g) about amending the notice, but in drafting it I at least liked the idea of it being all in -- or mostly in one place rather than going from here and there and everywhere for something that you probably haven't really done more than a couple of times, if ever, in your life. Okay.

So I put it in (b), "Contents of Notice of Appeal," and it's similar, okay, similar to the standard discussion of -- of the contents of notices of appeal in 25. For example, it states, "If applicable that the

appellant is presumed indigent and may proceed without advance payments of cost as provided in Rule 20.1(a)(3)," which is, you know, in 25. And it just seemed to me that this contents of notice works better in the direct appeal rule rather than -- rather than going over to the -- going over to the court of appeals rules and kind of doing what we're doing now. I want to put it in one place, make it a Supreme Court rule, and just proceed on that basis.

I realize, you know, Pam might say that, you know, we already know about that, okay, so and we know where to look, so why are you -- why are you saying it here? Well, I think it -- I would like it better if I said it here. So one of my rules is how can I teach my students to do this. Okay?

CHAIRMAN BABCOCK: Right.

PROFESSOR DORSANEO: And when it's hard for them to follow, it probably means that it's hard to follow.

CHAIRMAN BABCOCK: Okay. Does that say something about the students or the teacher or the rule?

PROFESSOR DORSANEO: All of the above.

CHAIRMAN BABCOCK: Pam.

MS. BARON: I think it should be included.

CHAIRMAN BABCOCK: Wait a minute. Hang on. I couldn't hear that.

MS. BARON: I think it should be included here. Rule 26 was a little too hard to pick up and move here because it's longer and more complicated. This is pretty simple. It's nice to have it in the rule. I think it will help the clerk's office in particular that people know exactly what they're supposed to put in this document that they're going to file, and I agree with what has been extracted from 25 in terms of what's necessary at this point.

PROFESSOR DORSANEO: Okay.

MS. BARON: So I like it.

CHAIRMAN BABCOCK: I was wondering why you left out the requirement of giving notice that it was an accelerated appeal if it was?

PROFESSOR DORSANEO: Well, that's a good point.

CHAIRMAN BABCOCK: Okay.

PROFESSOR DORSANEO: I think it's still going to be in 26.

CHAIRMAN BABCOCK: Right.

PROFESSOR DORSANEO: But it doesn't say -- that could be -- what do you think, Pam? Should we put that in?

CHAIRMAN BABCOCK: I don't know, maybe there is no instance where there would be --

PROFESSOR DORSANEO: No, there is.
PROFESSOR CARLSON: There is.
MS. BARON: I mean, if it's from an interlocutory appeal, it would be accelerated. I guess do you need to tell the Court that?
CHAIRMAN BABCOCK: Well, you need to tell the court of appeals that, which maybe you don't, but --
MR. ORSINGER: It's in the docketing statement in the court of appeals.
MS. BARON: Right, but it's also in your notice of appeal in a traditional appeal, but this is a direct appeal to the Supreme Court.
MS. HOBBS: I think we probably put it in there to tell the clerk and the court reporter when their record is due, is probably one of the reasons why we state it in the notice of appeal, too.
CHAIRMAN BABCOCK: In 25.1(d)(6) it says, "In an accelerated appeal state that the appeal is accelerated and state whether it is a parental termination or child protection case as defined in Rule 28.4." If you're going to tell the court of appeals that, why wouldn't you tell the Supreme Court?
MS. HOBBS: Well, because I think the reason why, on the parental notification or termination cases that's different. That's to tell the court of appeals

they are going to move faster. I really think the reason why we put it in our notice of appeal is it tells the trial court personnel how quickly they need to start preparing the record, but under this rule they won't start preparing the record anyway. So if that is the reason, and I'm not sure it is, but if that is the reason, it may not be needed here because it's a record issue and not a -- but it doesn't hurt.

CHAIRMAN BABCOCK: Justice Busby.

HONORABLE BRETT BUSBY: I think we should include it. Obviously we wouldn't need to include the language about parental termination or child protection cases, but we will have some interlocutory appeals coming up through this procedure; and it may, as we're going to talk about later, affect the time line for preparing the record once the record is requested, because there are shorter deadlines if it's an accelerated appeal, so and I also just think it would be useful information for the clerk to have as they're docketing the case.

CHAIRMAN BABCOCK: Right.

PROFESSOR DORSANEO: I'll put it in.

CHAIRMAN BABCOCK: Okay. Evan.

MR. YOUNG: One of the things we talked about in discussing this was the rule of the Supreme Court of the United States, which is Rule 18 of their rules that

govern direct appeals, and the one thing that we might consider adding to 57.1(b) is the requirement that the U.S. Supreme Court has in its notice of appeal, which is that it has to specify the statute or statutes under which the appeal is taken, and it might serve some of the same sorts of points. You know, an appeal to the court of appeals, that's no extraordinary thing. That's the normal course, but when we're going to the Supreme Court directly, it may well be helpful to have that fleshed out immediately right as a simple point, and I don't know that that -- that may not be something that somebody looking at just these five things would automatically do.

PROFESSOR DORSANEO: Yeah, that would be -- in this rule it would be in the statement of jurisdiction.

MR. YOUNG: So the jurisdictional statement, which is described later in Rule 18, also, of course, because it follows the cert petition process, requires you to explain your jurisdiction, but rather than let the thing go all the way until when effectively the brief is filed, put it right there in the notice of appeal. Surely somebody when they're going to try to go straight to the Supreme Court is going to have some statutory basis to do it. So I'm just wondering if just one extra sentence maybe, and if they can't figure out what that is, that's a pretty good clue that maybe you shouldn't be doing it.

Save everybody some time.

MS. HOBBS: But in our rule you're going to file a statement of jurisdiction as your petition essentially, right, immediately with your notice of appeal or within a certain amount of time. It's supposed to happen quick, right?

HONORABLE BRETT BUSBY: Within a certain amount of time.

PROFESSOR DORSANEO: Yes.

MS. HOBBS: Yeah.

MR. YOUNG: 60 days at the U.S. Supreme Court. Is that comparable?

HONORABLE BRETT BUSBY: 45 here, it says.

CHAIRMAN BABCOCK: Carl, then Justice Gray.

MR. HAMILTON: They already covered what I was --

CHAIRMAN BABCOCK: They covered your point?

MR. HAMILTON: Yeah.

CHAIRMAN BABCOCK: I hate it when they do that. Justice Gray.

HONORABLE TOM GRAY: I want to encourage the adoption as Evan proposed because we as lawyers know what the next step is or as judges, but I've gotten a number of documents from pro se litigants that they were trying to get to the Texas Supreme Court or the United States

Supreme Court, and they had something that looked like a notice of appeal. They've clearly opened a rule book somewhere. You might stop an errant effort by a pro se litigant to take a direct appeal to the Texas Supreme Court if they had to have some reference to authority in the notice of appeal.

HONORABLE STEPHEN YELENOSKY: Hope springs eternal.

CHAIRMAN BABCOCK: Okay. Pam.

MS. BARON: I just agree with what Judge Gray and Evan both said. I think it's not a bad idea to put it in the notice of appeal, which may, you know, avoid a few -- probably not a lot, but a few unnecessary notices of appeal might get dumped at that stage if a party has to figure out why they're asking for a direct appeal and cite a statute or constitutional provision.

CHAIRMAN BABCOCK: Okay.

PROFESSOR DORSANEO: Well, you know, our notice of appeal law is such that if you didn't put that in there it wouldn't matter.

MS. BARON: Right.

PROFESSOR DORSANEO: Okay.

MS. BARON: Right.

PROFESSOR DORSANEO: So you're just making somebody do busy work.

MS. BARON: It's not busy work, I don't think. I think you have to at least have a reasonable thought that you have a basis for a direct appeal at the time you're filing your notice, so it does make you think about it; and you're right, if you don't have it in there, you're not going to lose your right to appeal or your right to a direct appeal probably if you have one.

CHAIRMAN BABCOCK: Okay.

PROFESSOR DORSANEO: Should I put it in?

CHAIRMAN BABCOCK: Richard Orsinger.

MR. ORSINGER: Bill, this may be off the wall, but the rule on docketing statements, which I haven't gotten on my phone yet, does it apply to direct appeal to the Supreme Court, or does it only apply to courts of appeals?

PROFESSOR DORSANEO: No, it's a -- we have a -- we changed it. Other requirements, 57.1(d), "The appellant or petitioner," that's a big issue as to what we're going to call this person, "must file" -- "must also file with the clerk of the Supreme Court a docketing statement as provided in Rule 32.1 and pay all required fees authorized to be collected by the clerk of the Supreme Court. We put it in there. Blake Hawthorne tells people that they need to do a docketing statement now.

MR. ORSINGER: Okay.

PROFESSOR DORSANEO: So that's the practice, but it doesn't -- you know, it doesn't say that anywhere until (d).

MR. ORSINGER: Okay.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: Chip, are the contents of the notice, if they don't comply, is that jurisdictional if they don't put all the contents of what the notice required? Is that jurisdictional if they don't do it?

PROFESSOR DORSANEO: Well, the notice, it's -- in our user-friendly law, is that the notice of appeal is jurisdictional, but if you file something with the intention of giving notice of appeal, intention of appealing, it doesn't matter if it's even the wrong thing.

MR. LOW: Okay. I just wanted to be sure we're not creating something that would just destroy jurisdiction.

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: I saw that it was covered, never mind.

HONORABLE JEFF BOYD: Chip, I have a question.

CHAIRMAN BABCOCK: Yeah, Justice Boyd.

HONORABLE JEFF BOYD: Going back to the

second set of brackets in subparagraph (a) that Lisa asked about, in light of the contents of the notice requirements and the statement of jurisdiction requirement, I'm trying to imagine why someone would ever file it accidentally in the court of appeals. I can understand why they would file it accidentally in the Supreme Court, but they know that they're seeking -- they've done all of this effort to seek a direct appeal to the Supreme Court. Why would the language in the bracket need to address -- would we really expect someone to accidentally file it in the court of appeals?

PROFESSOR DORSANEO: Well, I wouldn't expect it to happen, but as soon as we don't put it in there it will happen.

CHAIRMAN BABCOCK: But the language I have here says, "If a notice of appeal is mistakenly filed with the clerk of the Supreme Court."

HONORABLE JEFF BOYD: "Or the clerk of a court of appeals."

CHAIRMAN BABCOCK: That's not the version I have.

HONORABLE JEFF BOYD: I may have a different version.

PROFESSOR DORSANEO: No, it's --

CHAIRMAN BABCOCK: It's in there. How come

I don't have it?

PROFESSOR DORSANEO: Take another look. Move your glasses down your nose.

HONORABLE TOM GRAY: To confirm what Professor Dorsaneo said, just as soon as we don't put it in there, I have received notices of appeal to our court, but they are filed with the First or the Fourteenth Court of Appeals. So go figure. I would suggest that there's going to be a lot of these that get forwarded to the court of appeals. I don't know if there's a way to fix that. That's what I was looking at to make sure that the notice actually designated the court to which it was going, which is included in subpart (b)(3). It might be nice if these were titled something besides "Notice of appeal," as in "Notice of direct Supreme Court appeal" or something because even by the most capable appellate lawyer they're going to file them in the trial court, and we're going to get them at the court of appeals, and then we're going to have to deal with them.

CHAIRMAN BABCOCK: Okay. Lisa.

MS. HOBBS: Since we went back up to (a), I was just going to say this off-line, but this language of filing something with the clerk of the Supreme Court, that's not the language that we use in the current rules. We file things with the Court, the Supreme Court, or the

appellate court. We don't file them with the clerk. I mean, I know technically that's probably what we're doing, but that word "clerk" isn't in the current rules.

PROFESSOR DORSANEO: Why shouldn't people know who you're talking about? Should they just go over to Justice Hecht's office and knock on the door? "Here, Chief, please stamp this."

HONORABLE TRACY CHRISTOPHER: They can.

MS. HOBBS: They can.

PROFESSOR DORSANEO: Well, I know, but that's not desirable --

MS. HOBBS: And I know where he lives if I ever need him.

PROFESSOR DORSANEO: -- behavior in church.

CHAIRMAN BABCOCK: Skip.

MR. WATSON: To Justice Boyd's question, the procedures are in place for appeals, and lots of times this isn't necessarily the lawyer doing it. It's the staff just understands that when they're kicking out the notice of appeal that they need to look up what county it came out of and it goes to that court of appeals, notwithstanding what's been typed on the piece of paper. It can just procedurally in office procedure go to the court of appeals, and you -- you know, you find it and go, "Oh, you big dummy, why didn't you say not to do that?

This is -- when it says 'Supreme Court,' it means Supreme Court," but it happens.

CHAIRMAN BABCOCK: Okay. Anything else? Okay. What about this bracketed language down here about "when filed"? Are we --

PROFESSOR DORSANEO: That's gone.

CHAIRMAN BABCOCK: That's gone. Okay. All right. Next is (c), amending the notice?

PROFESSOR DORSANEO: Yeah. That just comes right out of 25, but it's -- the only difference is -- I mean, there is an amending the notice in 25.1(g) for the -- you know, notice of appeal in the courts of appeals, but (g) talks about the person who is taking the appeal being an appellant, okay; and, you know, we could call the person an appellant if you like; but I would rather call them a petitioner since it's going to the Supreme Court. The only reason that they're called appellants now is because you're supposed to follow the rules for the court of appeals, and somebody interpreted that to mean it has to be called -- the person who is appealing needs to be called an appellant, even though it would make better sense to call them a petitioner because that's what everybody who is appealing to the Supreme Court is. Now, I actually like the idea of amending the definition section, but that's probably getting carried

away.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: I think -- I think Bill's touched on a deeper point. They're not a petitioner because this isn't a petition for review, it's an appeal, and they're an appellant, and there is -- there is a distinction between those two that I think the rule is glossing over. We can talk about that in a second, but I didn't want that to pass without noting it.

CHAIRMAN BABCOCK: Yeah. Judge Busby.

HONORABLE BRETT BUSBY: I agree with Frank. I think because it's a notice of appeal that's being filed it makes more sense to call them an appellant. It's up to the Supreme Court if they have a preference on that, but it does seem to highlight the distinction between a petition for review and a direct appeal.

CHAIRMAN BABCOCK: Okay. Anybody else have views on the petitioner or appellant debate? Chris.

MS. RODRIGUEZ: Agree with the judge, yeah.

CHAIRMAN BABCOCK: So we're running three to one in favor of appellant. Elaine.

PROFESSOR CARLSON: I just have a question for Bill. So if there is direct appeal jurisdiction, is it obligatory?

PROFESSOR DORSANEO: Is it a what?

PROFESSOR CARLSON: Obligatory or does the Supreme Court still have discretion?

MR. GILSTRAP: That gets to the problem.

PROFESSOR DORSANEO: Well, that kind of gets to the more complicated. I can't answer that without talking more than I want to.

PROFESSOR CARLSON: All right.

MR. GILSTRAP: But I think we need to touch on it before we -- because it's at the heart of this rule, and the problem is this: In most cases you don't appeal to the Texas Supreme Court. You used to you do it by writ of error. Now you do it by petition for review, and it's discretionary. That's inherent in the process. Here we have a direct appeal, and historically we've given the Supreme Court discretion in Rule 57. It says, "The Court may decline to exercise jurisdiction." Now, think about use of "jurisdiction," that word "jurisdiction" in the current debate over what really is jurisdiction in a plea to the jurisdiction issue, but passing over that, this new rule says, "The Court may decline to exercise jurisdiction," and that's discretionary. It says that, but the statutes that create -- that allow various appeals of various kinds of cases don't say nothing about discretion. They say -- they have a wide variety of language. "You may take a direct appeal." "The judgment

to the district court may be reviewed only by direct appeal." Another one says, "A final order is subject to appeal." Most of them say "subject to appeal."

Are we just implicitly saying that the Legislature means discretionary review when they say appeal? The Legislature has the call on this, I think, and it seems to me maybe that's fine. Maybe we just say until somebody raises it, when they say appeal, we mean discretionary appeal, but I'm not sure that's what -- I'm not sure that's what the Legislature means, and I could see a situation as has happened in the statute involving interlocutory appeals. You know, there was only one or two cases in which you could take an interlocutory appeal on to the Supreme Court. Then the Legislature started piling on, and now we've got a whole, whole list because "This is an important bill. I'm going to let it go to the Supreme Court." I could see that happening here, creating a right to direct appeal. Are all of those going to be discretionary? That's as far as I can see in the problem.

CHAIRMAN BABCOCK: Yep. Justice Busby.

HONORABLE BRETT BUSBY: I'll defer to the Chair whether we want to talk about this now. It's addressed in the current draft under 57.2(d), so we'll come to it later, but, Mr. Chairman, do you want to -- should we take this up now, or should we wait until we get

to that section?

CHAIRMAN BABCOCK: Well, I'm going to follow the lead of Professor Dorsaneo.

PROFESSOR DORSANEO: Wait.

CHAIRMAN BABCOCK: And he says wait, so we'll do that. Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Frank, does the language you just read answer your question? It says "may be appealed only," so if the Supreme Court says "no," you've got no appeal.

MR. GILSTRAP: All right. And the other cases, can you go to the court of appeals?

HONORABLE STEPHEN YELENOSKY: Well, I don't know. I'm just saying if it says "only," it seems to me you have to have an appeal somewhere.

MR. GILSTRAP: Right. Right.

HONORABLE STEPHEN YELENOSKY: So it would be nondiscretionary.

MR. GILSTRAP: Rules of statutory construction, right.

HONORABLE BRETT BUSBY: Are we waiting on this or not?

CHAIRMAN BABCOCK: This committee has never followed my direction. I don't know about Dorsaneo, but --

PROFESSOR DORSANEO: Wait. Let's wait.

HONORABLE JANE BLAND: You're referring to him as "Mr. Chairman."

CHAIRMAN BABCOCK: Judge Estevez.

HONORABLE ANA ESTEVEZ: Well, whenever we decide to resolve that issue, I believe we were taking a vote at the time about whether it should be petitioner and appellant; and if it's discretionary then they are acting as a petitioner; and I think once we determine that, it should determine the terminology, because if they are always going to be an appellant and they have this absolute right to appeal in every case, then they're an appellant. Maybe sometimes they're an appellant and sometimes they're petitioner. I don't know, but that's my vote.

CHAIRMAN BABCOCK: Yeah, that's a sensible position.

HONORABLE ANA ESTEVEZ: Depending on your other --

CHAIRMAN BABCOCK: Yeah, Pam.

MS. BARON: Well, I think they would still be an appellant because even if the Supreme Court had some discretionary jurisdiction, and when we talk about it I'm going to say on many of these statutes they don't, but if they have an appeal and the Supreme Court declines

jurisdiction in theory, it would, except with the "only" language, go to a court of appeals, so they would still be appealing. They would still be an appellant. They wouldn't be a petitioner.

CHAIRMAN BABCOCK: Yeah. What's the practice in the U.S. Supreme Court when you appeal from the final decision of a state court on a rule or a constitutional question?

MR. YOUNG: You're a petitioner in that case. Ever since 1988 they've not had direct appeal jurisdiction in that context, but before that it was an appellant because there was an appeal.

CHAIRMAN BABCOCK: Appellant.

MR. YOUNG: Until they got rid of that.

PROFESSOR DORSANEO: Good for them.

MR. YOUNG: Our Legislature has not seen fit to go the way that Congress has in all those respects, though.

CHAIRMAN BABCOCK: Judge Estevez.

HONORABLE ANA ESTEVEZ: Well, and I could be wrong, but my understanding is if they decline jurisdiction it doesn't just go to the court of appeals. They then have to file another appeal in the court of appeals, which would make them the appellant there. So I don't know that --

CHAIRMAN BABCOCK: Who knew? Bill.

PROFESSOR DORSANEO: If you read the end of the story, you would see that. It's right at the end. Justice Hecht put it in there 1990.

CHAIRMAN BABCOCK: Okay. Any more comments about this? We'll defer whether we call them a petitioner or appellant until we have our full discussion. How about (d), other requirements? Any discussion on that?

PROFESSOR DORSANEO: Well, that just speaks for itself, just to satisfy what Blake Hawthorne says needs to happen.

CHAIRMAN BABCOCK: Okay. What do you want to talk about next?

PROFESSOR DORSANEO: Huh?

CHAIRMAN BABCOCK: What should we talk about next?

PROFESSOR DORSANEO: Well, there is a -- the statement of jurisdiction has been the process. I don't know how far to go back, but the current rule says -- calls the person an appellant, but leaving that aside, appellant, petitioner "must file with the record a statement fully but plainly setting out the basis asserted for the exercise of Supreme Court jurisdiction. A statement of jurisdiction" -- okay.

"Contents of statement of jurisdiction" kind

of goes together with that. "The statement of jurisdiction must plainly state the basis for the exercise of the Supreme Court's direct appeal jurisdiction. Otherwise follow the form," and then it turns left and says and it should look like a petition for review prescribed by 53. Okay.

CHAIRMAN BABCOCK: Okay.

PROFESSOR DORSANEO: There's a statement of jurisdiction filed, and I don't know what they look like all the time, but they ought -- it seems to me they ought to look like a petition for review. Huh? And the -- and because that will work. Maybe it could be simpler or different, okay. I just picked the petition for review as the form of the -- of the statement of jurisdiction and say it covers like 53 and it's -- at the length prescribed by Rule 9.4.

CHAIRMAN BABCOCK: Okay.

PROFESSOR DORSANEO: Now, I just made that up. Okay. So if you like it, fine. If you don't, what would you like?

CHAIRMAN BABCOCK: So you are the father of 57.2(b) or the parent? Okay. Comments about this? Everybody like it? Nobody dislike it? Professor Albright.

PROFESSOR ALBRIGHT: Is 45 days too long?

Are these -- I don't know anything.

PROFESSOR DORSANEO: That's just -- I just picked that number.

MS. HOBBS: No, that's not too long.

PROFESSOR DORSANEO: We made it up.

PROFESSOR ALBRIGHT: These are pretty complicated issues?

MS. HOBBS: They can be. I don't know what they are now with these statutes, but in other contexts.

PROFESSOR DORSANEO: 45 days is petition for review.

MS. HOBBS: Yeah. I wouldn't make it shorter.

CHAIRMAN BABCOCK: You would or would not?

MS. GREER: Especially to make it fit within the word count.

MS. HOBBS: The impossible word count.

MS. GREER: The impossible word count. It's less than 15 pages.

HONORABLE JANE BLAND: Oh, don't.

CHAIRMAN BABCOCK: Okay. Any more comments about this? All right. What's next, Bill?

PROFESSOR DORSANEO: Then I said, you know, if you're going to have a contents, you're going to make a response, whatever it's called, "Appellee or respondent

may file a response to the statement of jurisdiction challenging the exercise of direct appeal jurisdiction," and I added in there in brackets "waiver of response," okay, and I put the time. "30 days after the jurisdictional statement is filed with the clerk of the Supreme Court," and I want that to look like the response to a petition for review, and I want to just buy into that method of presenting the issue of jurisdiction to the Court.

CHAIRMAN BABCOCK: Okay. Richard.

MR. MUNZINGER: Why do you have a delay in filing a content -- a statement of jurisdiction? The Court has jurisdiction or it doesn't. Why would you need to wait 45 days to file that instead of requiring it to be done immediately?

CHAIRMAN BABCOCK: Lisa's got the answer.

PROFESSOR DORSANEO: It's just called a statement of jurisdiction. It's really a brief, okay, following the procedure for petitions for review that are followed when those briefs are filed. Even though people apparently like to think of them as somehow different from a brief, it's the petition.

MS. HOBBS: So there may be cases where the statement of jurisdiction is fairly plainly granted under the statute, but there may not be. It could actually be

an interesting legal issue about whether or not this particular case fits in to this particular statute or not and the parties have differing views on that, in which case you would want it briefed, and you need time to research and brief the issue. It also will be important if it is a discretionary appeal and not an appeal of right. This is also when you would sell the Court on why they should hear the case if they have discretion to turn down the case, and that is an art form as well and takes time, and so I don't see how you do a statement of jurisdiction without giving the party a sufficient time to brief the issue and write the statement as you would in a petition.

CHAIRMAN BABCOCK: Okay. Frank.

MR. GILSTRAP: Well, I know that's how it's done, and people argue whether -- whether the Court has jurisdiction in their statement of jurisdiction, but the rule says, "The petition must state without argument the basis of the Court's jurisdiction," and I don't know what -- what we gain by referring back to Rule 53. Why don't we just say use the same language, because we're again feeding into this tendency to say, well, this is discretionary, and maybe it is, but referring to the rule doesn't help.

CHAIRMAN BABCOCK: Pam, did you catch that?

MS. BARON: I'm sorry. We were discussing discretionary versus mandatory.

CHAIRMAN BABCOCK: I know, but you might have a view on this. Frank, you want to repeat it?

MS. BARON: I'm sorry.

MR. GILSTRAP: Well, I mean, just that, again, the statement of jurisdiction in Rule 53 says, "The petition must state without argument the basis of the Court's jurisdiction." Widely violated, I know, in the petition for review --

MS. BARON: Absolutely.

MR. GILSTRAP: -- because people argue, but how are we helping ourselves by simply referring to Rule 53 in this direct appeal statute?

PROFESSOR DORSANEO: Well, the reference to Rule 53 is like the contents of the statement of jurisdiction. In addition to saying the basis for the jurisdiction, then we're going to say, okay, what else you going to say?

MR. GILSTRAP: Well, maybe we ought to say it, because the proposal doesn't help me. It just says, "It shall follow the form and content of a petition for review described by Rule 53 in stating the jurisdiction." I mean, I think this is all about the statement of jurisdiction.

MS. HOBBS: I don't think that's what the intent of the draft is. I think the intent is for you to have a table of authorities, a table of contents, a --

PROFESSOR DORSANEO: Right.

MS. HOBBS: -- prayer, certain appendix items. That's what you mean when you're referencing 53, right?

PROFESSOR DORSANEO: And right now 57 doesn't say anything.

MS. HOBBS: Right.

PROFESSOR DORSANEO: Okay. So I wonder what people do? Huh?

MS. HOBBS: I've seen it done as a motion, and I've seen it done as a brief.

MR. GILSTRAP: Okay. When we say in 57.2(b), "The statement of jurisdiction must plainly state the basis for the exercise of the Supreme Court's direct appeal jurisdiction; otherwise, follow the form and content of a petition for review prescribed by Rule 53," are we telling the writer to include all of Rule 53 in writing his direct appeal brief, or are we talking about just jurisdiction? It's not clear to me.

CHAIRMAN BABCOCK: Yeah, Justice --

PROFESSOR DORSANEO: All of 53 for the petition for review.

MR. GILSTRAP: Okay. I understand that. Then we ought to say so.

CHAIRMAN BABCOCK: Justice --

PROFESSOR DORSANEO: Maybe we ought to break it down in more sentences if anybody else finds it confusing. Since I know what it meant I just don't find it confusing.

MR. GILSTRAP: It says "Contents of statement of jurisdiction." Sorry.

CHAIRMAN BABCOCK: Justice Busby.

HONORABLE BRETT BUSBY: Just to pick up on a point that Evan mentioned earlier, one of the things that he suggested in our subcommittee meeting and that we have tried to do in the draft is to track U.S. Supreme Court Rule 18, and this is the way that they approach their jurisdictional statement where they say it should address jurisdiction and otherwise follow the form of a cert petition, so it seems to work fairly well in that context.

CHAIRMAN BABCOCK: Okay.

MS. BARON: Plus this is so much more guidance than currently exists.

CHAIRMAN BABCOCK: But I'm -- maybe I'm --

MR. GILSTRAP: Stated ironically.

MS. BARON: No, no, no. But I think with Frank's issue I think probably what I would put, you know,

if you included a statement of jurisdiction it would just say, "Court has jurisdiction under this statute," but the argument section would be purely the basis of jurisdiction and why the Court has jurisdiction or if it's discretionary why it should exercise jurisdiction.

MS. HOBBS: Yes.

MS. BARON: So I don't think it's -- it's -- you know, it's a little ambiguous, but it's so much clearer, and if we start trying to sort through each element of a petition for review that necessarily applies and doesn't apply then it gets a little bogged down. I mean, we could say you could skip the statement of jurisdiction, but that would probably be about the only big difference. Right, Lisa?

MS. HOBBS: I think so. I think you could say, "Follow the form and contents of a petition for review prescribed by Rule 53" and then maybe an em dash, "excluding the statement of interest," so that may make it more clear that what we're talking about is not just the statement. So excluding it.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: I don't have any quarrel with having a requirement for a jurisdictional statement, but 45 days to be the default in these cases that are extraordinary and oftentimes sensitive seems to

me to be too long. 45 days is longer than most brief length, and under I think Rule 42.3 we allow for the involuntarily dismissal for lack of jurisdiction on 10 days' notice. Ten days seems to be about the right amount of time to file a statement of jurisdiction with the Court, to get that argument in front of the Court; and by building in 45 days for this and then perhaps a 30-day response, we're delaying the consideration of this appeal significantly; and I would argue that the default should be a much shorter length of time for filing a statement of jurisdiction and then if the Court determines that the jurisdictional question needs extensive briefing, if a party wants to move for an extension of time, they can; but I think we should keep it consistent with 42.3, which allows for the involuntary dismissal of a civil appeal based on lack of jurisdiction on 10 days' notice to the parties.

CHAIRMAN BABCOCK: Marcy.

MS. GREER: I think the timing issue is tied into whether this is discretionary or mandatory jurisdiction. As I read the Government Code, it says "An appeal may be taken directly," which sounds discretionary, and I think there's a benefit to that. You want to require the Court to take it up just -- in every case when this is a discretionary form. They're still going to get

an appeal through the normal routine of going to the court of appeals. It's just not a direct appeal without the Court's discretion. If it's discretionary, then I think 45 days, for the reason Lisa just articulated, is really important because it's a lot of work to be done in that one document; and to me -- I agree with referring to Rule 53. To me the answer to statement of jurisdiction is to cite the Government Code, Chapter 22, which gives you the right to take a direct appeal, and that just satisfies that blank there; and then your argument is about why there is a constitutional question that gives rise to cases for this, and that's in the argument point. So I think that can be reconciled pretty nicely.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: Let me see if I can state the source of the confusion here. When you go to the Supreme Court, you file at least two briefs. If you've -- first of all, you file a brief called a petition for review. It includes a statement of jurisdiction. I think what we're envisioning here is to go to the Supreme Court on a direct appeal you file an initial brief. This is entitled a "Statement of jurisdiction," but it's essentially a petition for review, so I guess the confusion lies in that -- and it also includes a statement of jurisdiction. Maybe the problem is the nomenclature.

CHAIRMAN BABCOCK: Okay. Yeah, Evan.

MR. YOUNG: I agree that that probably is a big part of the confusion. Right now the way we have it is that 7.2 sub (a) and (b) refer to statement of jurisdiction, jurisdictional statement; and the statement of jurisdiction I think is confusing because that is specifically, as you say, the term that's used in Rule 53 for this component of a petition for review; and this is probably being borrowed all from the U.S. Supreme Court practice again, which calls it jurisdictional statement, which will have a statement of jurisdiction in it; and the practice there and the reason why they allow 60 days instead of 45 days, 60 days, which can, in fact, be extended is maybe something that doesn't apply as much to the current practice in the Texas Supreme Court, and that is that a lot of these direct appeals in the U.S. Supreme Court will be resolved on the merits after the jurisdictional statement is filed, so that's why the facts are given. That's where all the legal argument is previewed. That's where the issues are clarified. It's not just saying you have jurisdiction under this statute. It's really explaining how the Court could resolve the case, and a lot of them are resolved that way.

If the Court notes probable jurisdiction then it sets it for argument as if it were any other sort

of case, and full briefing will follow. In the Texas Supreme Court it doesn't seem to ever really happen that a per curiam on the merits, you know, be issued after just the petition for review is filed, so it may never really happen. The merits decision would be rendered solely based on the jurisdictional statement; and so it may -- you know, it may well be as Justice Bland suggested, we don't need as much time, but I think is where all of that came from. It's the chance for the first time because the notice of appeal is not going to provide anything like the texture of the case, where it came from, what the dispute really is about, what the resolution ought to be and all of that kind of stuff, and so if it is mandatory -- and that's again, I think it may well turn on that as an appeal, then there may be less need to have that complete and thorough jurisdictional statement that would be quite as long as a petition for review and take 45 days with potential extensions on the rest of it.

On the other hand, there's great value in having the Court seeing something for the first time since the trial court having that additional stage in which the parties have the chance to really flesh out what the issue is before the Court determines, one, whether it actually has jurisdiction and, two, decides whether to set it for argument.

CHAIRMAN BABCOCK: Yeah. Yeah. Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: From what I've heard, and maybe I misunderstand it, some of these could be mandatory and some of them could be discretionary if the language is statutory. Like I don't know, but I think the three-court judge school finance cases can only be directly appealed to the Supreme Court. If that's right, then it seems to me that has to be mandatory, but others, interlocutories surely, and maybe some others would be as it's drafted here. If the Supreme Court doesn't take it, you can take it to the court of appeals, so we would have to contemplate both if that's possible.

CHAIRMAN BABCOCK: Mike Hatchell.

MR. HATCHELL: I think a lot of the confusion is the inability to determine whether or not these are discretionary or appeals as a matter of right. If it's discretionary I think you can eliminate a lot of the confusion by just some text changes by calling it a petition to exercise jurisdiction or something like that, but I particularly wanted to agree with Marcy's comments about the time. I watched those guys struggle to do their, quote, statement of jurisdiction in the school finance litigation, and they barely crashed across the finish line in the time that they had. So 45 days is just

to me is accurate. If it's an appeal as a matter of right, it would just be, you know, a few sentences, but that's the problem that you've got to get over is to determine what sort of animal you have.

CHAIRMAN BABCOCK: Okay. Well, Bill, do you think we've reached any sort of consensus on how this subpart (b) ought to go?

PROFESSOR DORSANEO: I think I ought to take out the "e.g. 45" and just leave the blank and let the Court fill it in.

CHAIRMAN BABCOCK: Judge Estevez.

HONORABLE ANA ESTEVEZ: Since we're having that discussion, maybe we should have a subpart, one is for mandatory direct appeals and one are for discretionary, but I think that would make it clear as long as someone knew which one they were with or they may want to file under both and not lose it if they were a little insecure.

PROFESSOR DORSANEO: I think this mandatory/discretionary issue is an important issue, but I think when the Supreme Court put in their statement -- in their jurisdictional paragraph, 57.2, that there's -- you know, that review is discretionary in 1990, you know, I don't know if they changed their mind about it, but it seems to me that discretionary review is always, always,

the method for Supreme Court review. Okay. And 56.1, which is talking about petitions for review says that it's discretionary review, and in this rule that got added in, "If the case is not of such importance to the jurisprudence of the state that a direct appeal should be allowed," okay, when that got added in, it got added in on purpose; and this is meant to be a discretionary review. Jurisdiction is meant to be discretionary, and I drafted it on that assumption, okay, ultimately. Huh?

HONORABLE STEPHEN YELENOSKY: In every case discretionary?

PROFESSOR DORSANEO: Yeah. I think that's the law, in every case discretionary.

MR. GILSTRAP: The Legislature changed it. They can change it.

CHAIRMAN BABCOCK: And have they changed it with, for example, the state's public school system?

HONORABLE STEPHEN YELENOSKY: That's what we're looking for.

PROFESSOR DORSANEO: No.

CHAIRMAN BABCOCK: You don't think so? Justice Busby.

HONORABLE BRETT BUSBY: I think now we're coming to the part of the discussion that involves 57.2(d), and I agree with what's been said. That's sort

of what resolved what the timelines need to be in the earlier parts of the rule, and I'll just mention something. We talked about this briefly at the last meeting, but I think it's helpful to read Chief Justice Phillips' dissent *Dow Chemical Company vs. Alfaro* from 1990 where he on behalf of four justices takes on this issue and says that he doesn't think it's -- does not think it's discretionary, that because when the -- when it's that the rules are couched in terms of what a party may do, a party may take an appeal, it doesn't say that the Supreme Court may decline to hear it. It just says that the "may" is directed at the party, not the Court, and so I think that's one thing that we need to consider.

Now, the way the rule is written doesn't take a -- doesn't take the position that -- the current rule is not written to allow discretion to appeals from final judgments. The way I read it is it's only written to allow discretion for interlocutory appeals if the record is not sufficiently developed or something like that, so that it might come back on direct appeal later at the end of the case, but the Supreme Court doesn't want to hear it now if the record's not adequately developed. I don't necessarily have a concern with that, if that's the way the Court wants to go on interlocutory orders, but I do think we need to be careful not to alter the rule in a

way that would allow the Supreme Court to decline jurisdiction over appeals from final judgments where the Legislature has said that those sorts of appeals may be taken to the Supreme Court.

CHAIRMAN BABCOCK: Okay. Justice Boyce.

PROFESSOR DORSANEO: So you read that language that talks about interlocutory orders that's several commas back as being pertinent to everything before the end of the sentence?

HONORABLE BRETT BUSBY: I think that's the way it's written now in this draft. "May decline to exercise jurisdiction of a direct appeal of an interlocutory order if the record is not adequately developed, or if its decision would be advisory, or if the case is not of such importance to the jurisprudence that a direct appeal should be allowed"; and we could have a discussion about whether "importance to the jurisprudence" should be in there or not, but I do think all of that pertains to an interlocutory order the way that the current draft is, and I think appropriately so.

CHAIRMAN BABCOCK: Justice Boyce.

HONORABLE BILL BOYCE: The specific language pertaining to three-judge district courts is "An appeal from an appealable interlocutory order or final judgment of a special three-judge district court is to the Supreme

Court." And perhaps there's room for discussion, does that mean is only to the Supreme Court and so forth, but --

HONORABLE STEPHEN YELENOSKY: Depends on what "is" means.

HONORABLE BILL BOYCE: So the discussion about discretionary versus mandatory and in what cases may indicate that it would be advisable to leave enough room in the rule for the Supreme Court to address some of that line drawing at the appropriate time rather than try to accomplish it all by now -- now by rule and declare everything unequivocally discretionary or not discretionary.

CHAIRMAN BABCOCK: Yeah. Okay. Yeah, Bill, Carl, and then we're going to take our break.

PROFESSOR DORSANEO: Look at 57.2 and see if I inadvertently changed that language in adding this exercise of jurisdiction paragraph. Maybe my -- you know, my eighth grade English education is not adequate for this job here at the moment, but it says in 57.2, "The Supreme Court may decline to exercise jurisdiction over a direct appeal of an interlocutory order if the record is not adequately developed," comma, "or," okay -- "or if a decision would be advisory, or" -- you know, aren't those -- aren't those three separate things, three

separate situations?

HONORABLE BRETT BUSBY: Well, I think -- I think you pick up with the "if," so the way it currently reads is even more -- I mean, we have it in brackets here, "granting or denying a temporary injunction," which would be even more limited than just any interlocutory order, and we haven't gotten to talk about that yet.

PROFESSOR DORSANEO: Yeah. I think that's a mistake from one of the 50 earlier drafts.

HONORABLE BRETT BUSBY: But I do think the way it's written now that it's only limited to interlocutory orders. I think what it says now is "of an interlocutory order if the record is not adequately developed or if," and so you pick up and insert that where the last "if" would be so that the second one is "an interlocutory order if the case is not of such importance to the jurisprudence or" -- I'm sorry, that's the third one. "Or a direct appeal of an interlocutory order if the decision would be advisory." I think all of those conditions are only for interlocutory orders the way it's written now, and again, I think appropriately so.

CHAIRMAN BABCOCK: Okay. Carl.

MR. HAMILTON: Many of these statutes -- to the question of discretionary or mandatory, many of the statutes say "subject to appeal to the Supreme Court," but

there are two that say the judge for the district court may review -- be reviewed only by direct appeal to the Supreme Court, which suggests to me that if there's going to be any review at all, it's got to be to the Supreme Court.

HONORABLE STEPHEN YELENOSKY: Right. That's --

PROFESSOR CARLSON: They have to take jurisdiction.

PROFESSOR DORSANEO: Well, maybe they don't have to take jurisdiction.

MR. GILSTRAP: The Legislature could --

MR. HAMILTON: Then there's no review.

MR. GILSTRAP: The Legislature could read that into it.

CHAIRMAN BABCOCK: Chris.

MS. RODRIGUEZ: Just in response to Justice Busby's point, I don't disagree with you on the merits at all. I do think --

CHAIRMAN BABCOCK: Could you speak up?

MS. RODRIGUEZ: I don't believe it's as clear as it should be, you know, what's the antecedent and what does the comma separate. When I read it quickly I read it more broadly, so just I think something for consideration, perhaps a colon and Roman numerals for the

sake of clarity.

CHAIRMAN BABCOCK: Okay. Roger.

MR. HUGHES: Well, first I'd like to echo what Mike Hatchell said about it. I think first we need to decide what kind of beast we're dealing with, whether this is a case where not only is jurisdictional mandated, but you can't file -- you can't go to the court of appeals, it's only to the Supreme Court and when it's discretionary, and I have a modest suggestion that as far as subsection (d) goes, I'd offer a predicate is that where by law the decision is discretionary, therefore, we do not have to solve by rule whether the Court may decline or it must accept; and, second, in light of the new comma decision from that last week with over the SLAPP statutes attorney's fees, you know, I think some more thought where we put the commas in that sentence should be given so that it's clear whether or not we're -- if (d) applies only to interlocutory appeals or might apply to final decisions as well. Otherwise, there is some precedent that could cause confusion.

CHAIRMAN BABCOCK: Evan.

MR. YOUNG: I'm of the view that if it's an appeal, it is mandatory. It's perhaps at the option of the appellant where to take the appeal, but that's what an appeal is. That may be not what people think, but on that

assumption, you look at one of the three, you know, exceptions here for exercise of discretion of jurisdiction. You know, if the record is not adequately developed, it would seem to me that it wouldn't mean that they wouldn't have an appeal, but as in any appeal that they could be remanded back for proper development of the record. If it's advisory, well, they can't take jurisdiction anyway because it would be unconstitutional to render an advisory opinion; and if it's not of such importance to the jurisprudence of the state, I would argue that the Legislature has made that judgment itself by saying we're going to have a direct appeal to the Supreme Court; and so it would be inappropriate to offer the parties a chance to ask the Supreme Court not to exercise jurisdiction where the Legislature has said this to us is something that's of sufficient importance that the Supreme Court should exercise jurisdiction; and for those reasons I think it may be adding more heat than light to have subsection (d) at all.

CHAIRMAN BABCOCK: Judge Yelenosky, then Richard.

HONORABLE STEPHEN YELENOSKY: Well, we're talking about resolving whether some are discretionary, all are discretionary or not. I don't think we're going to be able to do that here. I just think I heard Bill

Dorsaneo say in the school finance, which can only be appealed to the Supreme Court, the Supreme Court doesn't have to take it, and is that right? That's what I thought that was -- so there's an argument about this that I guess needs to be presented to the Supreme Court.

CHAIRMAN BABCOCK: Okay. Richard, and then we are going to take our break.

MR. MUNZINGER: We're focusing on courts instead of citizens and litigants. Well, it's a fact. I file a lawsuit, and I want to have the three-judge court resolve something, and the three-judge court tells me to go fly a kite. I've got no relief. I'm a citizen. Why? Well, because the Supreme Court can say, "We're not going to listen to your argument. We're not going to decide this question of Texas law. We're not going to do this." The Legislature has foreclosed the question, in my opinion, in these direct appeals as to whether the Court has jurisdiction or it doesn't.

Do citizens have a right to have a final answer to their question from the highest court in the state, or are they bound by a trial court justice? As good as the trial court justice or judge, rather, may be, look at it from the standpoint of a citizen. Look at it from the standpoint of justice. The highest court of the state has been told by the Legislature to take these cases

and decide them, and you can't say you don't have that authority.

CHAIRMAN BABCOCK: So what you would say is if the Legislature has clearly spoken that they've got to take it then that's the end of the question.

MR. MUNZINGER: Well, I can file an appeal to Waco court of appeals. He's going to tell me, "I don't have jurisdiction. Who am I to take this case? This is from a three-judge court."

CHAIRMAN BABCOCK: Yeah, but Bill is saying that he thinks the Legislature does not require the Supreme Court to take it.

MR. MUNZINGER: I understand, except that what Bill's view is and what his interpretation is is that a citizen has no right to have an appeal.

CHAIRMAN BABCOCK: Okay. Well, on that happy note let's ponder that while we take our break. We'll be back at ten after 11:00.

(Recess from 10:55 a.m. to 11:17 a.m.)

CHAIRMAN BABCOCK: Now we're back on the record talking about the proposed Rule 57.2, jurisdiction of the Supreme Court, and, Bill, what should we discuss next, if anything?

PROFESSOR DORSANEO: Well, I think we were in (d), right, exercise of jurisdiction.

CHAIRMAN BABCOCK: Yeah.

PROFESSOR DORSANEO: And talking about, you know, when is there discretionary review; and Justice Busby said, well, he reads it to be a direct appeal of an interlocutory order; and at some point or another in this process I added "granting or denying a temporary injunction" because the statute at the time this Rule 57 was drafted provided for direct appeals only -- only in the circumstance of an interlocutory order, granting or denying a temporary injunction. It also talked about a permanent injunction, but there wasn't any direct appeal jurisdiction other than that. Okay. I'm making my point.

CHAIRMAN BABCOCK: Right.

PROFESSOR DORSANEO: When 57 was modified in 1990. Okay. So that's what it had to mean. I had not interpreted it the way Brett did, and I think the issue ought to be whether it -- whether the limitation on interlocutory orders leaving in or taking out, granting or denying a temporary injunction, you know, ought to be in there. You know, to me, I didn't read it that way, and part of the reason I didn't read it that way is it doesn't make sense for it to be so limited, huh?

CHAIRMAN BABCOCK: Yeah.

PROFESSOR DORSANEO: And I think the issue ought to be whether there's discretionary review under

this direct appeal statute, and at the end of the statute, just to comment for concerns that people have, at the end of the rule, not statute, at the end of the rule, "If the direct appeal is dismissed, any party may pursue any other appeal available at the time that the direct appeal was filed. The other appeal may be perfected within 10 days after dismissal of the direct appeal." So you're going to go -- you're going to go to the court of appeals. You're not going to go home. Okay.

CHAIRMAN BABCOCK: Uh-huh.

PROFESSOR DORSANEO: And be able to get appellate review. Under the way --

HONORABLE STEPHEN YELENOSKY: According to the rule.

PROFESSOR DORSANEO: -- that the thing was revised in 1990.

HONORABLE STEPHEN YELENOSKY: But the rule is --

CHAIRMAN BABCOCK: Right. Justice Bland.

HONORABLE JANE BLAND: Why don't we eliminate subsection (b) entirely? In the rules we don't usually elaborate on the parameters of the court's jurisdiction, and that's usually governed by Constitution or statute, and then there's potentially case law that might inform that, but we don't typically in our rules

elaborate on it, and because there's strong differences of opinion in this group about the nature of the jurisdiction, why do we need it in the rule? We could go right into 57.2 -- I mean 57.3 without -- without remarking on the nature of the Court's jurisdiction and when it's mandatory and when it's discretionary.

PROFESSOR DORSANEO: You know, I have had over the past several months and before then all of these same thoughts, okay, about this --

HONORABLE JANE BLAND: Well, that was a good one.

PROFESSOR DORSANEO: -- jurisdictional conundrum, and after the last meeting I kind of decided that it got in there in 1990 because the people who put it in there wanted it in there. Okay.

HONORABLE JANE BLAND: It seems an outlier, though.

PROFESSOR DORSANEO: So I'm reluctant to cross it out. Huh? But I agree it's not necessary to the structure of this rule.

CHAIRMAN BABCOCK: Justice Hecht. Chief Justice Hecht.

CHIEF JUSTICE HECHT: As I recall, one of the reasons that we put it in there was a warning. We certainly didn't want to decide jurisdiction in the rule,

but we wanted people to know that just because you could file a direct appeal might not mean that you had a right to, might not -- the question about whether we could, for example, review the factual sufficiency of the evidence if there was a direct appeal. That might be an issue. There might be lots of issues, and you really ought to think before you file the direct appeal whether you want to go to the court of appeals first.

The first public school finance case was appealed to the court of appeals, even though they could have come directly to the Supreme Court, and they have every time since. I don't know why -- I have no idea why they did that, but we got so few of them, I think that was the reason that it was in there, and it may have outlived its usefulness. I don't know. But the purpose was not to try to have a definitive statement of when the Court could or could not take jurisdiction as much as it was to say to lawyers, "You better think about this before you do this."

CHAIRMAN BABCOCK: And, Bill, you were there at the time.

PROFESSOR DORSANEO: That's a long time ago. I really wasn't. I was there, but I wasn't a part of this discussion.

CHAIRMAN BABCOCK: I thought you were one of the original drafters in 1938, no? All right. Moving

right along, any other comments about (d)?

HONORABLE TRACY CHRISTOPHER: We should take a vote on getting rid of it.

CHAIRMAN BABCOCK: You want to vote to get rid of it? All right. You want to get a second to your motion to vote to get rid of it?

HONORABLE JANE BLAND: I second.

CHAIRMAN BABCOCK: All right. Any discussion on this motion to get rid of it? No? All right. Everybody in favor of getting rid of (d), raise your hand.

PROFESSOR DORSANEO: It sure would make my life easier.

MS. BARON: All in favor of making Bill's life easier.

MR. ORSINGER: Vote the public interest, not your self-interest, Bill.

CHAIRMAN BABCOCK: Okay. All opposed to getting rid of (d)?

CHIEF JUSTICE HECHT: Gracious. So -- oh, Judge Estevez.

CHAIRMAN BABCOCK: Yeah, I got it. By a vote of 26 to 2 the ayes have it, get rid of (d).

CHIEF JUSTICE HECHT: So it will stay. No, I'm just joking.

MR. GILSTRAP: Only one vote counts.

CHAIRMAN BABCOCK: Well, maybe nine.

PROFESSOR DORSANEO: So I'm going to put it in brackets.

HONORABLE BOB PEMBERTON: By the way, can I throw one more thing in there?

CHAIRMAN BABCOCK: What should we talk about next, Bill?

PROFESSOR DORSANEO: Well, then you go down to -- you know, it's always had a ruling on this idea of probable jurisdiction, preliminary ruling on jurisdiction. The way this is designed and currently drafted in the current rule, "If the Supreme Court notes probable jurisdiction over a direct appeal the parties must file briefs under Rule 38 as in any other case. If the" -- which is the court of appeals brief rule. "If the Supreme Court does not note probable jurisdiction, the appeal will be dismissed." Okay. And that really is -- the second sentence is the most important sentence. Okay. Game over, all right, if the Court doesn't want to take the case.

CHAIRMAN BABCOCK: That's the current rule.

PROFESSOR DORSANEO: Yes. And 57.3 in effect says the same thing and with more words. Okay. "The Supreme Court may determine whether the Court has

probable jurisdiction based on the statement of jurisdiction and any response," and then it adds this new idea, "and without first ordering the parties to obtain the appellate record." But right now, right now, when you file the statement of jurisdiction, "Appellant must file with the record a statement fully and plainly setting out the basis asserted for jurisdiction." So they don't want the record, okay, automatically. So it says with respect to the jurisdictional determination that you don't -- that you don't first order the parties to obtain the appellate record.

Whether the court has probable jurisdiction, "The Court may determine whether the court has probable jurisdiction without first ordering the parties to obtain the appellate record." That's an independent thought that comes from Blake Hawthorne. Okay.

"If the Supreme Court determines that it does have probable jurisdiction," jurisdiction, or now, cross that out, or leave it in brackets, "or if the direct appeal should not be allowed as a matter of judicial discretion, it will dismiss the appeal." Same thing. That's what it says now, okay, and then this last sentence could be taken -- 57.3 is the last sentence of 57.5 now; and it could go in 57.7, which is 57.5 now; and it's in brackets there, too. The same sentence in effect is in

57.7 and as the last sentence of 57.3, and that's just a matter of taste, where do you want to put it.

CHAIRMAN BABCOCK: Okay. Okay. Comments about this proposed 57.3? Skip.

MR. WATSON: Just the -- this may be obvious, but the last business of let's say it is dismissed and you can pursue the other appeal available. Does that mean filing a new notice of appeal?

PROFESSOR DORSANEO: Yes.

MR. WATSON: I see this being a point where rights are going to be lost. If it means that a new notice of appeal must be filed with the trial court, now going to the appellate court, a lot of people are going to think, "Well, I've already done that, it was just the wrong court," and the provisions for not doing it. But do we deal with that?

PROFESSOR DORSANEO: Well, you could add, "The other appeal may be perfected by giving notice of appeal within 10 days." You could say to somebody that that's how you perfect an appeal.

MR. WATSON: That was my point. You might want to be a little more specific.

PROFESSOR DORSANEO: If I was grading a paper I wouldn't look favorably on that mistake. Okay. If they didn't think they needed to file a notice of

appeal.

MR. WATSON: Well, except that we've gone to great lengths to say if you file in the wrong place it's really in the right place, and somebody could be lulled by that.

CHAIRMAN BABCOCK: Judge Yelenosky, then Roger, and then --

PROFESSOR DORSANEO: I don't mind adding that extra language.

HONORABLE STEPHEN YELENOSKY: Since we've been talking about this issue of discretionary versus mandatory, is the language "If the direct appeal is dismissed, any party may pursue any other appeal available" a little too strong, because it all hangs on "available," and it seems -- it might be taken as, yeah, you can go to the court of appeals when we haven't decided that. I know it linguistically says otherwise, but and did you mean to have "If the Supreme Court determines it does not have probable jurisdiction it will dismiss" or "does not have jurisdiction"?

PROFESSOR DORSANEO: I'm agnostic about whether that's in there or that isn't in there, in the title and in the text.

HONORABLE STEPHEN YELENOSKY: Well, you certainly could say -- the Court could say there's

probable jurisdiction and later change its mind and say, no, we don't, but how could the Court say, "We probably don't have jurisdiction, and therefore go away" as opposed to "We don't have jurisdiction"? I mean, you don't use "probably" with "jurisdiction," right? I mean, the court -- there's no attempt -- if there's no possibility later, why would you say "probably"? I mean, you say "probably" with a TRO or a TI when you grant it, but if probable means probable --

PROFESSOR DORSANEO: How about if I take it out?

HONORABLE STEPHEN YELENOSKY: Yeah.

CHAIRMAN BABCOCK: Roger.

MR. HUGHES: I think it's an interesting point about whether you need to file a -- yet another notice of appeal once the Supreme Court grants jurisdiction. I would favor not having to do that because we started with 57.1 saying you file the notice of appeal with the trial clerk. It will follow the notice of appeal you would -- that is the format for a notice of appeal as if this were a regular appeal either from a final interlocutory judgment. Now we're going to require them to file a new notice of appeal saying essentially the same thing with the same person. I favor not littering the clerk's file with unnecessary duplicative paperwork and

simply perhaps a provision that says that when the Supreme Court declines jurisdiction or whatever phrase we want, that the district or county clerk be instructed to send the notice of appeal to the appropriate court of appeals, rather than have -- force the litigants to do it all over again, because that's really what -- from the court of appeals point, you know, they want to be notified. Well, it seems to me the most expeditious way is simply that the district clerk or county clerk be under instructions when you get the letter from the Supreme Court, send it to the appropriate court of appeals.

CHAIRMAN BABCOCK: Justice Busby.

PROFESSOR DORSANEO: Well, it would be the trial court.

HONORABLE BRETT BUSBY: That's an interesting idea. I wonder, though, whether they would necessarily want to pursue the appeal in the court of appeals in all cases, whether we should assume that or whether we should require the party to at least file something and let the court of appeals know that they want to pursue it there instead because if the reason the Supreme Court has dismissed it for lack of jurisdiction might also apply to the court of appeals, then it seems like a waste of paper to send it to the court of appeals and then have them dismiss it again. So it might -- I can

see it either way, either require them to file a new notice of appeal or require them to file something with the court of appeals saying we want to go forward with this appeal in the court of appeals, but I don't think I would just assume that it just goes on to the court of appeals if the Supreme Court says "no."

CHAIRMAN BABCOCK: Judge Estevez.

HONORABLE ANA ESTEVEZ: I'm going to go back to the suggestion of having two rules again, and the reason being that the court reporter part doesn't make sense because if it's mandatory, there's going to be a record that's going to be required, so how can there be a dismissal if they have to take the appeal? I mean, none of it makes sense, or I guess it's confusing when you have two different types of direct appeals and you're lumping them in, and you think taking something out saying that it's not discretionary means that it is mandatory when there really is some discretion.

CHAIRMAN BABCOCK: Yeah.

HONORABLE ANA ESTEVEZ: And so I just think we're making it worse by taking out the discretionary part, and now 57.3 doesn't make sense because why did you dismiss the appeal, except for I guess you had some that were discretionary when you also have others that are mandatory.

CHAIRMAN BABCOCK: Judge Yelenosky, then Pam.

HONORABLE STEPHEN YELENOSKY: Not only might they not want to proceed in the court of appeals, I think we're trying to remain agnostic as to whether everything can go back to the court of appeals or whether your only hope was the Supreme Court. So if you say in there it's automatically filed with the court of appeals, that at least implies that you can go there, and I thought we were remaining agnostic on that at least with respect to some statutory right to appeal.

CHAIRMAN BABCOCK: Pam, then Marcy.

MS. BARON: I just want to make a point that the Court gets a number of filings that have no business being called direct appeals, and obviously they can't exercise jurisdiction over those appeals, and those would fall within this provision because they don't have jurisdiction. There's no statute that would permit the pro se litigant to appeal something from probate court, for example. It's just -- you'll see anything come up under a heading of direct appeal, and clearly this rule would address those.

CHAIRMAN BABCOCK: Yeah. Marcy.

MS. GREER: Well, I agree with Justice Busby's point on the prudential aspect, but I think there

is a jurisdictional and technical aspect to having to refile the notice of appeal. One, once the appeal is dismissed, there is no appeal, and so technically to take jurisdiction from the trial court to the court of appeals, you have to file a notice of appeal. Two, the notice of appeal is required to say which court that it's going to be taken to, and the original one was a direct appeal to the Supreme Court, so there needs to be some sort of instrument that says, "I'm taking an appeal to the intermediate court of appeals" and which one and then that is necessary to divest the district court from its jurisdiction and put it up in the court of appeals. So I think it is required, and we ought to state it in the rule.

CHAIRMAN BABCOCK: Okay. Yeah, Justice Gray.

HONORABLE TOM GRAY: I don't care what we call it or what has to be filed or how I get it, but it does matter in what it triggers off of what is the dismissal of the direct appeal, is there an option for a motion for rehearing, does it fall within 10 days after the motion for rehearing in the Supreme Court is denied. If the Supreme Court is denying it because it was not timely, does that revive my jurisdiction to consider the appeal that was untimely filed originally? I wouldn't

think so, but that doesn't read like that here, and there is some real nuances buried in that last phrase "10 days after dismissal of the direct appeal."

CHAIRMAN BABCOCK: Okay. Anybody else? Any other comments? Yeah, Frank.

MR. GILSTRAP: Do you really think 10 days is long enough? I mean, you know, you've been up to the Supreme Court. You've now failed. And you've got to get back with your client. Your client may be a corporation or a school board, and you've got to make the call within 10 days. What's the hurry?

HONORABLE TOM GRAY: Thank you, Frank. I actually meant to address that as well, because it can be that long before the person in prison actually gets the order.

MR. GILSTRAP: Or the person in prison.

CHAIRMAN BABCOCK: Okay. Anything else? All right. Want to take 57.4?

PROFESSOR DORSANEO: Yeah. And that 10 days thing, it's also in 57.7. That's in the current rule. I mean, that got in there in 1990. So that's why it's in there.

CHAIRMAN BABCOCK: A simpler time.

PROFESSOR DORSANEO: Huh?

CHAIRMAN BABCOCK: A simpler time, 1990.

PROFESSOR DORSANEO: Yes, maybe. It was a pretty good time period, if I recall.

CHAIRMAN BABCOCK: Loved the Nineties.

PROFESSOR DORSANEO: The appellate record, okay, since they don't want the record until they want it, this is to provide a mechanism for getting somebody to get it, and the idea here in the draft is -- is to, you know, recapitulate "The parties should not request preparation and filing of the clerk's record or the reporter's record until the Supreme Court directs them to do so." That's what I understand the way they want to do it. Okay. "If the Supreme Court determines that it has" -- strike "probable" -- "jurisdiction or that the Court needs the record to determine whether it has jurisdiction, the Supreme Court clerk will send written notice." You say, okay, to whom? "(a), of the Supreme Court's decision to all the parties," okay, "directing the parties to obtain the preparation of the clerk's record and if necessary to the appeal to request" and -- myself in my own page I crossed out "and obtain preparation of the reporter's record" because that's probably unnecessary to say that and requesting it ought to be adequate.

"Under Rules 34 and 35," and those are the -- those are the court of appeals rules, and I don't know any other way to do it other than the way it happens

in the court of appeals, okay, to get the record, because you're telling the people they -- the court clerk and the reporter to do it, and those rules are pretty complicated, so it makes better sense just to go by those rules. Now, I did make an adjustment to 34 to make it work together with this, because now you're supposed to request, you know, at the time that the appeal is -- request the reporter's record at the time the appeal is -- at or before the time the appeal is perfected, and that has to change if we're not doing it that way.

And I don't know whether 10 days is the right number of days. I just put it down there, and I wish I hadn't put these days here. They are causing more trouble. People want to talk about these days more than the important stuff. The "after the written notice of the court's decision was sent to the parties" and then "to the trial court clerk and the court reporter or court reporters responsible for preparing the reporter's record of the date on which the record must be filed by them in the Supreme Court." I don't know about -- I don't know about that, but it would seem to me that -- that that might be desirable to say when you're supposed to get this done, huh?

CHAIRMAN BABCOCK: Okay.

PROFESSOR DORSANEO: And that's four.

CHAIRMAN BABCOCK: Justice Bland.

PROFESSOR DORSANEO: 57.4.

HONORABLE JANE BLAND: I understand the idea that the parties do not present a record to the Supreme Court at the time that the Supreme Court is considering jurisdiction; but the way that the rule is written now, it tells the parties don't -- don't request the -- or you should not request the reporter's record or the clerk's record; but if an appeal of some kind is going to be filed, can't the parties in their own informed judgment request the -- go ahead and start that process? Again, trying to not build in unnecessary delay. In other words, if they know they're going to have an appeal and they're going to try to appeal to the Texas Supreme Court, but if they can't get there they're going to try to go to the court of appeals, why would we delay the preparation of the record by mandatory rule and sort of -- and instead why don't we do something like "you need not" or "you don't have to file the record with the Supreme Court unless the Court directs it," but to just tell them "Don't get the record yet," I mean, gosh, then we're like months down the road potentially before we even get the record put together, and some appeal eventually may be filed.

PROFESSOR DORSANEO: Well, this costs money to get these things, you know.

HONORABLE JANE BLAND: Right, but if the parties in their judgment want to pay that money, should we be directing them not to pay that money; or should we be giving them an option not to pay that money until the jurisdictional question is resolved?

PROFESSOR DORSANEO: Well, I mean, I would tell everybody you don't need to do this, so do it later.

PROFESSOR HOFFMAN: You care only about it not being filed.

PROFESSOR CARLSON: Right. You don't care if they request it.

PROFESSOR HOFFMAN: So all you want to do is the rule should just direct them not to file it with the Supreme Court until directed to do so.

PROFESSOR DORSANEO: I mean, you're going to -- if you don't tell them they don't need to request it, they're going to request it, okay, and they're probably going to file it. Just better -- you don't need to do this. Okay. Most people are not going to want to spend the money to do it if they didn't need to do it, and they're going to be irritated with you to tell them that they -- if you didn't tell them that they didn't need to do it.

CHAIRMAN BABCOCK: Personally, you. Lisa.

MS. HOBBS: When we're at the petition

stage, although the Court doesn't have the record, the parties have the record.

PROFESSOR DORSANEO: Right.

MS. HOBBS: And they actually cite to the record in their petition, and it keeps people honest arguably.

PROFESSOR DORSANEO: Huh.

MS. HOBBS: And so I think I agree with Judge Bland that maybe there's a need to prepare the record so that the parties can use it still, even though it's not submitted, filed, with the Supreme Court. That's one comment.

PROFESSOR DORSANEO: Okay. So it's --

MS. HOBBS: Two, I didn't really understand Justice Yelenosky's comment to be remove all references to probable jurisdiction, but only in that context where he was discussing it didn't make any sense to say you were dismissing it for lack of probable jurisdiction.

HONORABLE STEPHEN YELENOSKY: Yeah, that's what I meant.

MS. HOBBS: Because sometimes the Court is noting its probable jurisdiction. In other words, it may not have internally got five votes to say, "Yes, in fact, we do have jurisdiction and here are the reasons why," but there's enough consensus there that we probably have

jurisdiction, and so we can move the parties forward to the merits to see whether we think their appeal is fair.

HONORABLE STEPHEN YELENOSKY: Right, exactly, you can temporarily say you have probable jurisdiction --

MS. HOBBS: Yes.

HONORABLE STEPHEN YELENOSKY: -- but if you're going to dismiss and say, "Go away," you need to say you don't have jurisdiction.

MS. HOBBS: Yes. Right. So here I would still leave the probable jurisdiction in this context, "If the Supreme Court determines that it has probable jurisdiction or that it needs the record to determine whether it has probable jurisdiction, the Court will send the notice."

PROFESSOR HOFFMAN: Which tracks the current rule.

PROFESSOR DORSANEO: Okay, it's back.

MS. HOBBS: Okay. Then I feel like I had another comment besides just -- this thing is a little bit awkwardly worded, but I might not put a time period with which to file the record. I mean to request the record, assuming this is the way we go. I might should say -- use a word like "promptly" or something, just don't put a time limit on it, because if someone doesn't ask for the record

then they might get their appeal dismissed for lack of prosecution, but I don't think it needs a time period like that. I would just say "promptly request" or something.

CHAIRMAN BABCOCK: Justice Busby.

HONORABLE BRETT BUSBY: I also agree with Justice Bland's point. I think we could address it just by changing the first sentence to say, "The clerk's record and the reporter's record should not be filed until the Supreme Court directs the parties to do so," and then they have the option of requesting it or not as they see fit, but from what we understand from Blake, the Court doesn't want it until they want it, so that was the intent.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: I agree with Justice Busby's friendly amendment, and I think we should stop there. We don't need all of this other separate rule about the record, and we've already got pretty specific rules that govern the preparation and filing of the record, and I think to overlay another set of rules about that in Rule 57 is not going to be helpful to either the court reporters and the trial court clerks but also to the lawyers that are trying to get the record put together.

PROFESSOR DORSANEO: So tell me how to change it. I'm happy to change it whatever way you like. All of that made sense to me.

HONORABLE BRETT BUSBY: "The clerk's record and reporter's record should not be filed until the Court requests them."

MS. GREER: Unless.

CHAIRMAN BABCOCK: David.

MR. JACKSON: Well, the problem is the time. If you have got a final judgment and there are no motions for new trial or motions for rehearing or anything like that, you've got 60 days to get the record out. If there are motions, the court reporter has 120 days; and if this kicks in and the Supreme Court says, "We want the record," and this says "10 days," you've pretty well -- I mean, we're sitting here waiting for somebody to tell us what to do and when to do it. We go from 60 days to 120 days to 10 days, and the 10 days is pretty critical if you've got a 2,400-page record.

HONORABLE BRETT BUSBY: I don't think the intent was to require you to get it done within 10 days. It was just for the parties to talk to the clerk and reporter and get the process started within 10 days and then the time limits under Rules 34 and 35 would kick in, but we could make that clearer, although I understood Judge Bland's proposal to be that we take that out entirely.

HONORABLE JANE BLAND: Yes.

HONORABLE BRETT BUSBY: But from what I'm hearing you say, we need something in there so that the clerks and reporters are comfortable knowing what their deadlines are.

MR. JACKSON: Right.

CHAIRMAN BABCOCK: Richard Munzinger.

MR. MUNZINGER: I like Bill's language as it is because I wouldn't order the record unless I was required to do so by the Court. That's a lot of money. That's a lot of money, and not everybody has got a lot of money.

CHAIRMAN BABCOCK: Justice Christopher, who has a lot of money.

HONORABLE TRACY CHRISTOPHER: I mean, if it's a final judgment, you're asking the Supreme Court to take it; and if they refuse, presumably you're going to the court of appeals. I mean, it seems to me you need to be starting that process and not waiting to hear from the Supreme Court.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: And typically no appellate relief can be granted without a record of some kind, and so whether it ends up being a special record on jurisdiction in this case or a special record on indigency in some cases we have, I mean, we're not going to send out

an opinion on based on the say-so of the briefing. We've got to have a record eventually in any appellate relief, and the idea that we're going to, you know, not require that for these incredibly extraordinary cases doesn't seem right.

CHAIRMAN BABCOCK: Mike.

MR. HATCHELL: To the extent it may inform this discussion, look at Rule 57.2(b), which requires the statement of jurisdiction to conform to the contents of a petition for review, which requires you to cite to the record.

HONORABLE TRACY CHRISTOPHER: Right. Got to have the record.

MR. GILSTRAP: It does. Yeah, you just don't send the record up, but you still have to cite to it.

CHAIRMAN BABCOCK: Still have to have it, yeah. Richard Orsinger.

MR. ORSINGER: I think we need something explained here about how to handle this in the Supreme Court rather than just truncate it all and rely on the court of appeals rules, because I think the court of appeals rules, first of all, there's two timetables, depending on whether it's accelerated or not; and this articulation, Bill, lets the Supreme Court decide when

they want the record rather than referring to court of appeals rules that maybe don't even apply. So I feel like we need to leave enough of this rule in here that the Supreme Court can say, "We want the record, and we're going to need so many days to request it."

I have a couple of drafting suggestions. The idea of requesting and filing are mentioned separately, and I think we can omit requesting from the prohibition. I think that's -- I'm in favor of that, but when you get down to (1)(B), "directing the parties to obtain the preparation," we now have introduced a new term that doesn't mean anything to me. So I would suggest "directing the parties to request the preparation and filing." Those are the two things the parties have to request. They have to request that it be prepared, then they have to request that it be filed. They don't have to obtain it; and if you put "request" that they have -- "directing the parties to request the preparation and filing" you can delete in the next sentence "to request and obtain preparation." That's just surplusage, and I may have understood you to say you struck it anyway.

PROFESSOR DORSANEO: I did.

MR. ORSINGER: And then in the last two lines of (B) where it says "within 10 days after," it says, "date written notice of the Court's decision was

sent," we've already talked about written notice in the words leading right up to (A). Why can't we just say "within 10 days after the notice was sent to the parties"?

My last comment, Bill, is in subdivision (C). Normally in this structure you put the subject matter of the notice first and the persons to whom the Supreme Court is going to send the notice second. That's reversed here. My suggestion would be that (C) say that "The clerk will send written notice," colon (C), "of the date of which the record must be filed in the Supreme Court to the trial court clerk and court reporter." You see what I'm saying? In other words, the first sentence you give written notice of the Court's decision to the parties. It's the subject matter followed by the people who get it. I think the structure looks better if we do that with the third sentence. The subject matter is the date on which the record is due and then you list the parties to who it's going to. Do you see what I'm saying?

PROFESSOR DORSANEO: I'm not getting what you're saying.

MR. ORSINGER: I'll show you my edits. I did that to get it in the record, and I'm sorry, I shouldn't burden the record with those kind of details, but that's where we are.

PROFESSOR DORSANEO: I'm happy for the help.

MR. ORSINGER: I'll hand this to you.

CHAIRMAN BABCOCK: All right. Anything more on 57.4? Mike.

MR. HATCHELL: Oh, yes, (B) says, "The notice from the Supreme Court should direct the parties to obtain preparation of the record." Normally the nonappealing party doesn't have an obligation to request the record. Does this, number one, put an obligation on a nonappealing party, and, two, does it obligate it financially to pay for the record?

CHAIRMAN BABCOCK: Rhetorical question?

MR. HATCHELL: Yeah.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: This phrase "10 days after the notice was sent to the parties," we don't usually use when it's sent to the parties. We tie it to some date. The date of the notice or something, because -- or "received by the parties" or something, because sent by the parties is a little nebulous.

CHAIRMAN BABCOCK: Yeah.

PROFESSOR DORSANEO: This is the hardest thing to figure out how to say it without going and making a huge project out of it.

CHAIRMAN BABCOCK: Yeah.

PROFESSOR DORSANEO: So any help that

anybody wants to provide drafting-wise I would be very happy to get it, but we've already spent -- I've done my best.

CHAIRMAN BABCOCK: Of course you have. And it's been a great job, just for the record. Justice Gray.

HONORABLE TOM GRAY: Following up on Mike's comment about "obtain" and who has the burden, under the old rules it was only on the parties, but under one of the more recent iterations, the duty to make sure that we get the record is on the court and the reporter -- excuse me, the appellate court and the trial court judge, but if you make the changes that Richard suggested where that is the duty is to request and file as opposed to obtain then that sort of fixes that problem.

CHAIRMAN BABCOCK: Pam.

MS. BARON: We could just punt and leave it to the Court's order to tell the parties what they need to do, so say "direct the parties as to the preparation and filing of the record."

CHAIRMAN BABCOCK: Yeah. Okay. Yeah, Justice Christopher.

HONORABLE TRACY CHRISTOPHER: All I can say is I'm really looking forward to the Supreme Court issuing show cause orders to court reporters to get their records done.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: A lot of time and thought went into Rule 35, which is the rule about preparing the record, and it's not "obtain the record." It's "request and make an arrangement to pay," unless you're indigent, and the lawyers in the state are familiar with this process. The court reporters in the state are familiar with this process. It's working, and to the extent there are problems, they are not problems that are going to be specific to an appeal in the Texas Supreme Court. They're going to be in all appeals, and I don't think we should create a special rule for preparing the record for the Texas Supreme Court appeals. We can -- the Court itself can deviate from the rules by order if it's necessary, but otherwise, let's keep the status quo that's working and that everybody is relying on in place.

CHAIRMAN BABCOCK: Justice Busby.

HONORABLE BRETT BUSBY: Well, I agree with that to an extent, and I think Pam's suggestion about having this in the order rather than in the rule may clear some of this up, but I do -- the only thing that I think may not map directly onto this process from Rule 34 and 35 is when the request has to happen, and so I think what we were trying to do here was to show -- to give some clarity to the reporter and the clerk about when they need to --

you know, when the parties need to do something after hearing from the Court and then when, you know -- and then 34 and 35 kick in and tell the clerk and the reporter when they need to do what they're supposed to do. So we can leave that to the Court by rule, or that's why the 10 days was in here, to sort of say within 10 days the time periods and the obligations of 34 and 35 are going to kick in, because I agree, everybody knows how to use those, and I'm agnostic between those two approaches, whether we spell it out or leave it for the Court's order.

CHAIRMAN BABCOCK: Okay. Any other comments? Okay. Let's go to 57.6 of the proposed rule, and I assume that the omission of 57.5 was intentional.

PROFESSOR DORSANEO: Pardon me?

CHAIRMAN BABCOCK: I assume the omission of 57.5 was intentional?

PROFESSOR DORSANEO: Well, it was inadvertent.

CHAIRMAN BABCOCK: Okay.

MR. ORSINGER: But he did his best.

CHAIRMAN BABCOCK: Of course he did. The draft has "Determination of direct appeal," which is labeled here as 57.6, and, Bill, what do you have to say about this?

PROFESSOR DORSANEO: Well, I think it just

kind of speaks for itself. It's just like, okay, how do you finish, okay, and it's all the steps to get to the end.

CHAIRMAN BABCOCK: Sounds good. Anybody got any comments? Any missteps in the steps getting to the end?

MS. GREER: Are you talking about 57.5?

CHAIRMAN BABCOCK: Marcy.

MS. GREER: Okay. It strikes me that full briefs on the merit should be required at this point because if we are finding -- if we're believing that this is a case of -- where the Court has found jurisdiction, then the parties have only had 15 pages to brief whether the Court had jurisdiction or not, not the merits of the appeal; and so it strikes me that if the Court is going the next step in saying, "Yes, I have jurisdiction," the parties get the right to brief the issues on appeal, and they get the full Rule 55 brief.

CHAIRMAN BABCOCK: Okay.

PROFESSOR DORSANEO: So what are you saying, change "may" to "must"?

MS. GREER: Please. That's my suggestion.

CHAIRMAN BABCOCK: Justice Busby, and then Justice Christopher.

HONORABLE BRETT BUSBY: Rule 55.1 says the

Court may request merits briefs, but does it say later that they have to before they decide the case?

MS. HOBBS: No. I think the reason why it's permissive is because in certain circumstances the Court may want to decide a case without full briefing because there's an emergency reason to do it, you know, and I think they've always had discretion, and I'm not sure it's just in the word "may" there, but they have at times decided cases on the petition stage, like election cases or something where you really had time is of the essence, and I think they should have that discretion to do it if they feel like they've gotten enough briefing to decide the merits without more briefing.

MS. GREER: Well, could they err on the side of asking for briefs on the merits --

MS. HOBBS: Which they do.

MS. GREER: -- in all cases except where there's a reason not to?

PROFESSOR DORSANEO: Well, there goes "must."

MS. GREER: I would be afraid a lot of these cases would be decided on a 15-page brief that was designed to educate the Court on why it should go to the next step as opposed to being able to brief the merits.

MS. HOBBS: I think it would be rare, but I

think they do need discretion to do it in some circumstances.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, I was just wondering why they must request a response to the statement of jurisdiction. I mean, somebody said they filed a statement saying you've got jurisdiction. The court says, "Yep, we've got jurisdiction, file your brief." I mean, why after they've made the determination we have jurisdiction must they get a response?

PROFESSOR DORSANEO: Yeah. Makes sense.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: Number (4) says the court "may render judgment under Rule 60." Rule 60 says, "The Court will announce a judgment," so maybe that ought to say "will render judgment" instead of "may."

CHAIRMAN BABCOCK: May they do it under some other rule?

MR. HAMILTON: Well, it seems like maybe they don't have to render a decision if they don't want to.

PROFESSOR DORSANEO: To be or not to be, that is the question.

CHAIRMAN BABCOCK: Justice Christopher.

MS. HOBBS: Well, I got hung up on the word

"render" there. I mean, I had to look up what Rule 60 was, too, because when I think of render judgment I think of that as, you know, you reversed and rendered judgment.

HONORABLE BRETT BUSBY: Not remand.

MS. HOBBS: Yes. So I didn't like the word "render" in that context. They "may issue an appropriate order under Rule 60" or something. Even though --

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Just I was wondering how the technicality of actually doing the court reporter's record in the Supreme Court would work, and maybe this is something that Justice Boyd will have to work through, but right now court reporters file through -- with us through a portal run by the OCA. We then have to -- this is from my clerk. We have to accept, rename, and put into the correct case. If we send a record to the Supreme Court, we use a different portal that doesn't open in TAMES. They have to save to a computer and then upload it, similar but not quite the same. Some records are too big for that portal because the Supreme Court wants them all combined into one record, so we send on CD by FedEx. So just to let you know that there's a lot of stuff behind the scenes that will have to be worked out with these records.

CHAIRMAN BABCOCK: Okay. Any other

comments? Yeah. Richard Orsinger.

MR. ORSINGER: Bill, I just wanted to be sure that we're taking note of the per curiam process, which I think comes up in a different rule, not Rule 60. Setting the case for submission and argument, argument is not -- sometimes not requested for a per curiam disposition, and I can't tell if this list is exclusive or whether subdivision (4) would preclude per curiam. I just want to call it to your attention.

MS. HOBBS: It does, because it's referencing 59, and 59 is submission with argument or submission without argument. So I think by reference to 59 you're encompassing the per curiam process.

MR. ORSINGER: Well, I don't know that it is if you say "set the case for submission and argument." Why don't you just set the case for submission under Rule 59?

MS. HOBBS: Yes.

MR. ORSINGER: And take out the "and argument." That would be my concern.

MS. HOBBS: Yes. That's good. That's good.

PROFESSOR DORSANEO: That's good.

CHAIRMAN BABCOCK: Okay. Justice Gray.

HONORABLE TOM GRAY: Question, are 57.7 open for discussion?

CHAIRMAN BABCOCK: I think, unless somebody else has comments about 57.6. I think we're open for business on 57.7.

HONORABLE TOM GRAY: And I didn't know if this is my ignorance. Are all the appeals that would be pursued under this, do they stay all proceedings in the trial court? If they do not, you could run into a problem of losing the right to appeal while there was one pending in the Supreme Court on the other issues, it seems like, the way that 57.7 is currently worded.

CHAIRMAN BABCOCK: Justice Busby.

HONORABLE BRETT BUSBY: I think often that's determined by statute rather than rule as to whether there's a scope -- a stay in place based on a particular kind of appeal, and there is a procedure in the rules for asking for a stay, so I'm not sure we need to address it separately in this rule.

HONORABLE TOM GRAY: My problem is if you -- if I can't pursue my appeal on the final judgment while I'm appealing an interlocutory order because the trial court went ahead and granted the injunction or denied the injunction or whatever, you know, proceeded on at the trial court level; and I can't pursue an appeal of that final judgment while I've got an appeal pending in the Supreme Court. I realize that it may be a simple timing

thing, but it can create problems for you.

CHAIRMAN BABCOCK: Roger.

MR. HUGHES: Well, perhaps this is dealt elsewhere in the Rules of Appellate Procedure, but if you're pursuing a direct appeal from an otherwise final judgment and some of these ones are fairly important, there would be a question of superseding the judgment or not enforcing it during appeal, and right now in this -- in this as it stands now, we have a two-step process for other than money appeals in which the trial court makes a decision about whether to -- what kind of supersedeas to set up, et cetera, et cetera, which is then reviewed by the court of appeals, usually by motion. So has any thought been given to the coordination between the trial court and the Supreme Court on stay relief of -- or shall we say supersedeas relief? That is, are we just simply going to apply the -- what's the TRAP? TRAP 24 about appellate review of the trial court's supersedeas decision, or will that be a different rule?

PROFESSOR DORSANEO: Answering the question has any thought been given to that, no.

CHAIRMAN BABCOCK: Putting him on the spot there, Roger.

MR. HUGHES: Uh-oh. Okay.

CHAIRMAN BABCOCK: All right. Any other

comments about this? Frank.

MR. GILSTRAP: I would like to fire a Parthian shot on the question of jurisdiction before we eat lunch, and I promise not to delay lunch, but you may not be ready for that or you may not want to hear it.

CHAIRMAN BABCOCK: Well, fire away.

MR. GILSTRAP: Okay. I think by using the term "jurisdiction" here and talking about the Court exercising or not exercising jurisdiction we're perpetuating the anachronistic use of the word "jurisdiction," which is a problem. Ever since at least the Kazi against Dubai in 2000 the courts have struggled to say that subject matter jurisdiction is determined by the statutes and the Constitution and the Court can decide whether it has subject matter jurisdiction by interpreting the statutes and Constitution, but it doesn't mean that the Court decides as a matter of discretion whether it has jurisdiction over a case, and if we were going to -- starting from scratch we would not use the term "jurisdiction" in fashioning this rule, and, you know, there's still a lot of confusion on that, and I think by continuing to call it -- discuss it in terms of jurisdiction in the long term we're making a mistake.

MR. ORSINGER: I ditto those comments.

MR. HATCHELL: Yes.

CHAIRMAN BABCOCK: You ditto them?

MR. ORSINGER: Yes. That's a Rush Limbaugh term, "I ditto." Ditto, Chip, ditto.

CHAIRMAN BABCOCK: Okay. Not being a Rush Limbaugh aficionado as apparently you are.

MR. ORSINGER: I'm not either. I just heard it.

CHAIRMAN BABCOCK: Michael.

MR. HATCHELL: No, same thing. I think it's a real problem.

CHAIRMAN BABCOCK: Yeah. Okay. Yeah, Frank, it seems like the Court has the power or it doesn't to decide and then there may be, may be, cases where it must review it because the Legislature says so, but the vast majority of cases it has discretion whether to review or not. That doesn't mean it doesn't have the power to do it if it wants to.

MR. GILSTRAP: That's right. That's right. It goes back to when you go before the trial judge and he rules against you and says, "Son, I don't have jurisdiction over this case," and it means that he's ruling against you on the merits. It's a misuse.

CHAIRMAN BABCOCK: Yeah. Well, plea to the jurisdiction.

MR. GILSTRAP: Yeah, well, that's where

we're -- that's where it comes up all the time.

CHAIRMAN BABCOCK: That's right. You lack standing; therefore, there is a plea to the jurisdiction that should be granted.

MR. ORSINGER: I know you don't want to pollute the record too much but --

CHAIRMAN BABCOCK: Oh, I'm all for polluting the record.

MR. ORSINGER: In the forms of practice under English common law you did or didn't have jurisdiction depending on whether your case was meritorious or not within the scope of the cause of action that you pled or the form of action that you pled. So I think it's been with us for hundreds of years. We ought to get rid of it. Let's talk about whether they grant review and not whether they have jurisdiction.

CHAIRMAN BABCOCK: Great. All right. Anything more on this proposed Rule 57? Okay. Carl, how long do you think -- I know it's always hazardous to guess. How long do you think we'll be discussing constitutional adequacy of Texas garnishment procedure?

MR. HAMILTON: I won't be more than 30 minutes, but I don't know about everybody else.

CHAIRMAN BABCOCK: Okay.

PROFESSOR DORSANEO: Can you speed that up a

little?

CHAIRMAN BABCOCK: Yeah. Well, why don't we dip our toe in that right now?

MR. HAMILTON: Okay.

CHAIRMAN BABCOCK: Carl, we're ready.

MR. HAMILTON: Ready, okay. Our task was to look at the garnishment in the rules to see if they were in line with the Constitution in view of the Georgia cases. The Georgia cases are attached. There was apparently a decision in 2013, which we don't have, which went up to the court of appeals, and it got sent back on a standing question. The court held that the plaintiff did have standing. So then in 2014 there was a decision that discussed the merits of the case, but the injunction that they issued was too broad, so then there was another decision in 2015 which narrowed the scope of the injunction.

HONORABLE STEPHEN YELENOSKY: Carl, could you speak up? Somebody back here can't hear.

MR. ORSINGER: Some of the old people.

MR. HAMILTON: The issues in the Georgia case were whether the statute -- that it failed to require the judgment debtors to be notified that there were certain exemptions under Federal law which the debtor may be entitled to claim with respect to the garnished

property. In that case it was garnishment to a bank.

Secondly, it failed to require the judgment debtors to be notified of the procedure to claim the exemption; and, third, it failed to provide a timely procedure for adjudicating the exemption claims. Those were the issues in the Georgia case. Now, we looked at our rules and decided that they probably passed constitutional muster, but they could be tweaked a little bit, and we did some tweaking for the last hearing, but then there was some comments made at the last hearing about some suggestions, so we have added those to the rules.

If you look on page four of the suggested rules, the rule on garnishment, 5 -- 620, contents of writ of garnishment, we had previously suggested that there should be no difference between whether the writ issues out of the JP court or out of the district court. Why have 10 days on one and 20 days on the other? So we originally made it 10 days, but at the last hearing people thought that was too short, so I've changed that now to 20 days. That's page four.

Page six, the redlined version is the language that we've added. It was suggested that perhaps these people don't really know what a garnishment proceeding is and they ought to be told. So this notice

to respondent advises the respondent that "A garnishment is a court proceeding whereby an alleged creditor of yours is seeking to acquire from the garnishee funds or property allegedly owned by you, and if you claim any right to the property" -- we've added "or funds" -- then your funds or -- "you're advised your funds may be exempt under Federal law." And somebody suggested last time we shouldn't tell them to go get a lawyer, that it ought to say, "It may be in your best interest to consult a lawyer to determine if your property is exempt," so we put that in there.

Then there was some discussion about they don't know what a replevy bond is, so we put in there, "Pending a decision in the garnishment proceeding, you cannot regain possession of your property unless you file a bond, which is cash or other security in an amount set by the court." That's one thing they can do. "However, if you believe your property is exempt from garnishment under state or Federal law or has been wrongfully garnished, you have a right to seek to regain possession by filing a motion to dissolve or modify the writ." So these are the instructions to the respondent.

On page seven, delivery and service of the writ, the existing rules require that the writ be delivered to the sheriff or constable; and we didn't think

that was necessary, that it ought to be delivered to the applicant to deliver to the sheriff or constable because the clerk may or may not get it timely to the constable. Of course, he may not get it timely to the applicant either, but at least the applicant can stay on the clerk to get it so that it can be timely delivered to the sheriff.

And that the return of the writ, that the sheriff ought to make the return delivered to the applicant who files it rather than the clerk because when the applicant gets the return back from the sheriff, then the applicant is required to serve that on the respondent.

The (d) part says immediately -- we struggled with that word, whether it should be "as soon as practical," "immediately," or maybe it ought to just say "within three days" or something, a time period, to get the notice to the respondent that something has been garnished, his bank account or something else. We don't -- well, we do have a catch-all provision in here that the garnishment proceeding can't go forward unless that evidence of that service has been on file for at least 10 days with the court. So if the applicant fails to deliver it to the respondent, he can't go forward with the garnishment proceeding.

Those are basically the twerks that we made

to it to try to comply more with the notice proceedings and to give the respondent plenty of notice of what's happening to his property so he can do something about it.

CHAIRMAN BABCOCK: Great. Thank you. Any comments about any of these tweaks or --

MR. HAMILTON: Tweaks or twerks.

CHAIRMAN BABCOCK: Twerks? Whatever, the changes.

MR. HAMILTON: That's a combination of perks and tweaks.

CHAIRMAN BABCOCK: Yeah. Richard.

MR. ORSINGER: It's not exactly on what you mentioned, and I hope this is allowable, but what did we decide to do about the content of the notice to the debtor of the nature of the exemptions? Do we just say it may be subject to -- or may be exempt from seizure without mentioning any exemptions?

MR. HAMILTON: Yeah, because there's too many possibilities, and we decided that it was better not to try to list them all or try to tell the debtor what his rights were, just tell him he ought to consult a lawyer.

CHAIRMAN BABCOCK: Didn't we talk about that last time?

MR. ORSINGER: I think we did, but the opinion that I read in the Federal court, I thought, had a

component to it that they failed to disclose or give any information about the nature of the exemption. In that case it was workers's comp, but there are some categories, and I know that maybe there may be a hundred different Federal statutes that make things exempt, but I would just like to raise the question unless it's ruled out of order. In light of the fact that we have so many pro ses, in light of the fact that so many of these defendants are going to be pro ses, in light of the fact that we have this access to justice problem, should we put down maybe some of the major issues, like you can't garnish wages, you can't garnish child support, you can't garnish VA disability, you can't garnish -- I mean, there are some that probably we could list a half dozen that would capture 90 percent of the useful exemptions, and I just -- if we voted against that, well, then we'll forget it, but it seems to me like this is the perfect place for us to help somebody help themselves.

MR. HAMILTON: Elaine also mentioned she thought there was a statute, a Federal statute, that required some kind of notice, but I couldn't find that.

PROFESSOR CARLSON: That was brought up by -- in the task force by -- I cannot remember the gentleman's name, but it's in the proposed garnishment rules from the task force that went through this

committee. I just don't recall the statute. Someone on the committee brought it to our attention.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: I didn't work on this, but on prior work on the garnishment I think that's when -- I guess this was put in the rules a while back that the respondent or the person who had the money garnished had the note for 10 days before you could go into court and get it because in the past you could sort of get it and the person who owned the money or previously owned the money didn't even really get a chance to come in and stop it. So it's really moved along there, and I think this is good it moves along further, just along the lines of what Richard was saying, there may be some more tweaks here. I think I probably was a judge for three or four years before I could keep clear who was the garnishor and who was the garnishee and what that was, so when you say "garnishee," it might help to say -- because you define a "bond," and that's really helpful. "Garnishee, the bank or other who has your money that you're holding," something like that. So just some of the words, but I think it's a great improvement.

MR. HAMILTON: Well, the writ of garnishment is directed to the garnishee and then by name, and that's the writ that's served on respondent.

HONORABLE STEPHEN YELENOSKY: Yeah, but if I'm the person getting the notice and it's my workers comp benefits, it would help if they explained to me a little better, but it's not a major point.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: I have a question about some of the language. Proposed Rule 5(d), notice to respondent, you have three boldface paragraphs. The third paragraph on my draft starts at the bottom of one page and goes to the next page. It says, "The old rule" -- "the old notice said you have a right to regain possession of the property by filing a replevy bond. You have a right to seek to regain possession of the property by filing with the court a motion to dissolve or modify this writ." That includes, of course, the one basis for dissolving it would be if it's exempt. You've now inserted language that modifies that last provision. You say, "However, if you believe that your property is exempt from garnishment under state or Federal law or otherwise has been wrongfully garnished, then" -- it's what's applied there -- "you have a right to seek to regain possession."

Are there circumstances under which you could seek dissolution of the writ that don't qualify as wrongful garnishment? I mean, maybe the clerk dropped a -- you know, forgot to sign something or some

clerical error that would allow you to dissolve the writ that wouldn't be wrongful? It's probably not communicating anything to the garnishee, but it does bother me as a lawyer that we're limiting the circumstances under which you can dissolve -- move to dissolve the writ.

CHAIRMAN BABCOCK: Anybody else? Yeah, Justice Gray.

HONORABLE TOM GRAY: We use four different phrases that I don't think really are different. Page six we use "property," "funds or property," "property or funds" and then "funds or other property." It would seem to me that every place that we have the word "property" the full phrase should be used, "funds or other property." And that appears several times in each of the paragraphs, but that one change would fix -- so that there's no distinction that we appellate people try to make if you use different words or phrases, you mean something different, so just use the same phrase every time.

CHAIRMAN BABCOCK: Thank you. Any other comments? Professor Carlson.

PROFESSOR CARLSON: Yeah. I just want to echo what Frank said. I think those -- there needs to be some separation in that last warning under (d) that Frank was referring to, because you -- the defendant has a right

to seek to regain possession of the property and put the burden of proof on the party who obtained the garnishment. It might have been ex parte, so there is a -- I think any situation, the party who is a wrongfully affected by the garnishment has a right to move to dissolve, not just based on exemptions.

CHAIRMAN BABCOCK: Elaine, when you just said ex parte did you mean ex parte?

PROFESSOR CARLSON: Ex parte, yes.

MR. HAMILTON: What are you saying we need to do, Elaine?

PROFESSOR CARLSON: I think you need to separate that -- or somehow reword this so that fourth paragraph doesn't imply that you can move to dissolve only if you have an exemption. You can move to dissolve on other grounds.

MR. HAMILTON: Well, okay, that was the reason for the "however," but we can -- we can fix that. We can fix that.

CHAIRMAN BABCOCK: Okay. Judge Wallace.

HONORABLE R. H. WALLACE: If we're trying to draft something that would comply with that Georgia court's ruling, in the footnote this goes back to the exemptions, the Court said -- the Court agrees that a potentially confusing laundry list of all available

exemptions is not required; however, the notice should include at least a partial list of those essential Federal or state exemptions that provide the basic necessities of life for someone like in that case. I read their opinion as to -- in order to meet the constitutional muster under their decision you have to at least list those that we've been talking about.

CHAIRMAN BABCOCK: All righty. Anybody else? Okay. Well, then I think we're done for today, and there's lunch to be served if anybody wants to have it, and our next meeting is June 10th, and depending on how far we get along with the discovery subcommittee we might want to plan for a day and a half like spill into Saturday, but we'll give you -- we'll try to give you plenty of notice on that. So if there's nothing else, we're adjourned, and thank you very much.

(Adjourned)

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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 22nd day of April, 2016, and the same was thereafter reduced to computer transcription by me.

I further certify that the costs for my services in the matter are $ 927.50 .

Charged to: The State Bar of Texas.

Given under my hand and seal of office on this the 16th day of May, 2016.

/s/D'Lois L. Jones
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